Norwegian authorities’ advice on Western Sahara and Norwegian vessels’ complicity in human rights violations: fish oil and phosphates from Western Sahara

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Abstract. Based on Western Sahara’s status as a non-self-governing territory and the rights of peoples in such territories over their natural resources, the article analyzes the Norwegian policy on Norwegian business enterprises relating to Western Sahara. In addition to relevant treaties and resolutions, the article will assess the scope of the revised OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, both adopted in 2011. In both the OECD and UN non-binding standards, enterprises are asked undertake a human rights due diligence and to prevent adverse human rights impacts that are directly linked to their operations, products or services by their business relationships. While the fact that Norway has listed Western Sahara as an exceptional case in its 2009 White Paper on CSR, and made available an explicit ‘dissuasion’, the text of this dissuasion is far from perfect. First, the text does not refer to international law, but rather refers to the ‘situation’ in Western Sahara. Second, the central feature of the text is whether or not the economic activities promotes the ‘interests of the local population’, rather than the rights and wishes of the peoples of the non-self-governing territory of Western Sahara. The statement, policies, rejections and secrecy of specific Norwegian companies are also analyzed, showing that some of these companies simply chose to ignore the impact of their conduct for the original peoples (the Saharawis) – even if there will be some Saharawis who have substantial financial benefits. This is in clear contradiction to the duty to undertake human rights due diligence and to prevent negative human rights impact resulting from their operations, as specified in the OECD and UN standards.

The Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises (‘Special Representative’) formulated a ‘respect, protect and access to remedies’ framework at the end of his first mandate period. This framework was endorsed unanimously by the Human Rights Council in June 2008, which also:

Recognizes the need to operationalize this framework with a view to providing more effective protection to individuals and communities against human rights abuses by, or involving, transnational corporations and other business enterprises, and to contribute to the consolidation of existing relevant norms and standards and any future initiatives, such as a relevant, comprehensive international framework.1

We see that the Human Rights Council understood that the corporations can be involved in human rights abuses, that there are applicable ‘existing standards’ and that there is a need for a ‘relevant, comprehensive international framework’ in order to consolidate these standards.

1 Human Rights Council 2008, A/HRC/RES/8/7, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, paragraph 2.
The operationalization of the respect, protect and remedies framework was done through the Guiding Principles outlined in the Special Representative’s final report,\(^2\) which was endorsed by the Human Rights Council in June 2011.\(^3\) While a Human Rights Impact Assessment (HRIA),\(^4\) will be the most comprehensive approach in order to address the total impacts of a project or operation, this article starts from the premise that it would be to expect too much of the companies covered in this article to apply a full HRIA.

Moreover, the non-binding OECD Guidelines for Multinational Enterprises which apply also to the international operations of these enterprises, will also be applied in the analysis. The most substantive amendment in the OECD Guidelines, which were updated in May 2011, is a new section on human rights, which is basically in conformity with the principles of the UN Special Representative. The section has six paragraphs which says that multinational enterprises should respect human rights; avoid causing or contributing to adverse human rights; prevent or mitigate adverse human rights impacts that are directly linked to their business operations, even if they do not contribute to those impacts; have a policy commitment to respect human rights; carry out human rights due diligence; and provide for remediation of adverse human rights impacts.\(^5\)

The decisions in the Human Rights Council and the OECD indicate a stronger awareness of corporations’ accountability to international human rights standards, not merely corporate social responsibility. Acknowledging that international standards are preferable to particular national standards, this article nevertheless will analyze how Norway has adopted a specific recommendation business activities taking place in Western Sahara. The aim of the article is to identify the effectiveness of national standards and procedures on business operations.

On this background, the article proceeds as follows: First, there will be a clarification of the legal status of Western Sahara, with a particular emphasis on rights over natural resources. Second, the wording of the Norwegian recommendation to Norwegian corporations, and the policy debate in Norway concerning Norwegian business involvement in Western Sahara will be reviewed. Third, the actual business practice will be mapped, including how the Norwegian recommendation is understood by the companies. Fourth, the UN Guiding Principles and the OECD Principles, as well as other relevant frameworks to understand the responsibilities of companies, will be analysed. Fifth, there will be an analysis of the companies’ natural resource extraction from a non-self-governing territory, in light of the relevant legal sources and soft-law documents.

While this article addresses the issue of natural resources in non-self-governing territories from a human rights perspective, it is obvious that both fish harvesting and phosphates extraction directly address environmental issues. Much of the waters both to the north and the south of Western Sahara are characterized by overfishing. The higher fish stocks off the coast of Western Sahara can be explained by Western Sahara’s relatively less developed fishing sector, a situation that is now rapidly changing. Moreover, phosphates mining is area intensive and an expansion in the phosphates extraction will have environmental impacts.

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\(^4\) Special Representative 2008, A/HRC/4/74, Human rights impact assessments [HRIA] - resolving key methodological questions, saying that a HRIA should include a catalogue of national laws and regulations (paragraph 12) and human rights standards, indigenous customary laws and traditions, and international humanitarian law (paragraph 23).

The legal status of Western Sahara, with a particular emphasis on rights over natural resources

Western Sahara is considered by the United Nations to be a non-self-governing territory, which is regulated by Chapter XI of the UN Charter. It is less known that the right to self-determination for non-self-governing territories is also recognized in joint Article 1, paragraph 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR). In addition, Article 1, paragraph 2 of the ICESCR and the ICCPR recognizes the rights of all peoples, including peoples of non-self-governing territories, over their natural resources.

The rights of peoples of non-self-governing territories over their natural resources are recognized in even more explicit term in resolutions adopted annually by the UN General Assembly titled ‘Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories’. The most recent resolution reads:

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…

[…] Urges the administering Powers concerned to take effective measures to safeguard and guarantee the inalienable right of the peoples of the Non-Self-Governing Territories to their natural resources and to establish and maintain control over the future development of those resources, and requests the administering Powers to take all steps necessary to protect the property rights of the peoples of those Territories…

It is reasonable to state that the resolution contains strong wording (permanent sovereignty, inalienable rights, property rights). Moreover, the limited number of States voting against (USA and Israel) or abstaining (France and United Kingdom) indicates that the principles expressed in the resolution have broad, but not universal support. Western Sahara is the largest non-self-governing territory, but the State which is acknowledged as the ‘administering power’, namely Spain, does currently not exercise any such functions in relation to Western Sahara, as specified in Article 73 and 74 of the Charter of the United Nations. Morocco is exercising jurisdiction in approximately 75 per cent of the territory, referring to these as ‘Sahara’ or ‘Southern province’.

In a letter by the President of the Security Council to the UN Legal Counsel of 13 November 2001, a legal opinion was requested on “the legality … of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara.” While phosphates and fish trade has been taking place from the territories of Western Sahara for decades, the increased interest in oil and gas by foreign companies triggered this request.

The resulting opinion concluded by distinguishing between ‘contracts’ on the one hand and ‘further exploration and exploitation activities’ on the other hand. The latter, to the extent that they “were to proceed in disregard of the interests and wishes of the people of

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6 Article 1, paragraph 3 reads: “The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

7 Article 1, paragraph 2 reads: “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.”

Western Sahara, they would be in violation of the principles of international law…’ The term ‘people of Western Sahara’ must be understood to refer to the Saharawis, whose legitimate representative body, as recognized by the United Nations,9 is Polisario (Popular Front for the Liberation of Saguia el Hamra and Rio del Oro).

While the opinion of the UN Legal Counsel started from the premise that Western Sahara is a non-self-governing territory, it must be observed that Western Sahara by the UN General Assembly has also been recognized as being a question of occupation10 and decolonization.11 Also First Additional Protocol to the Geneva Convention recognizes the right to self-determination for peoples who “are fighting against colonial domination and alien occupation.”12 While a peace agreement has been in force for more than 20 years, Morocco continues to act as an occupying power.13

Two provisions which apply for the duration of the occupation are Article 33.2, which says: “Pillage is prohibited” and Article 49.6, which says: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”14 Geneva Convention is, however, rarely referred to in the context of Western Sahara. The equivalent of the prohibition against pillage is, however, found in the resolution on economic activities referred to above, specifying the inalienable right of the peoples of the Non-Self-Governing Territories to their natural resources and to establish and maintain control over the future development of those resources, and requests the administering Powers to take all steps necessary to protect the property rights.

The problem for Western Sahara is that the State which de jure is administering authority, namely Spain,15 does not exercise any functions in relation to Western Sahara. This makes Western Sahara particularly vulnerable, as the State which maintains control, namely Morocco, is actively involved in economic activities taking place in clear disregard of the rights of the Saharawis, and the expressed wishes of their representative body.16

Ministry of Foreign Affairs recommendation to Norwegian corporations

The Norwegian Ministry of Foreign Affairs has on its home page a text on Western Sahara which says (extract): “To prevent trade, investments, resource exploitation and other forms of

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9 The UN has recognized Polisario as the representative of the Saharawis since 1990, and in the ‘Peace plan for self-determination of the people of Western Sahara’, contained in UN Doc, S/2003/565, Annex 1, Polisario is listed as one of the signatories to the Plan.
10 A/RES/34/37 1979, paragraphs 5 and 6.
11 A/RES/45/21 1990, paragraph 2. Note also that Western Sahara is regularly reviewed by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (‘Committee of 24’).
12 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), reads in paragraph 1.4: “The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”
13 This allows for the application of those provisions of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), where Article 6 specifies which Articles the occupying power shall be bound to comply with, “…for the duration of the occupation…”
business activities that are not in accordance with the interests of the local population, and hence can be contrary to international law, Norwegian authorities dissuade such activities.16

By using the term ‘local population’, this text makes no distinction between the original people and the Moroccan settlers. Moreover, by emphasizing only the ‘interests’ and not the ‘wishes’, the recommendation ignores one crucial element of the letter by the UN Legal Counsel and the annual resolution on economic and other activities which affect the interests of the peoples of the non-self-governing territories.17 While we see that the term ‘interests’ is highlighted in the title of the annual resolution, and is also repeated in three operative paragraphs,18 it is always applied in conjunction with the term ‘peoples’.

In effect, the Norwegian recommendation can be understood to be complied with by promoting the interests of the local population. This could be done by providing jobs, training, new equipment and other investments – for Moroccan settlers living in Western Sahara.

Moreover, while the recommendation talks about ‘activities that can be contrary to international law’, and explicitly applies the phrase ‘self-determination for the peoples of Western Sahara’,19 the recommendation has one additional substantial weakness. By applying the term ‘situation’ twice, Norwegian authorities do not specify what characterizes the Moroccan presence in Western Sahara.

A study finds that from 2002, when Norwegian authorities had to respond publicly to the fact that Norwegian companies were entering into agreements with Morocco, until the autumn of 2007, Norwegian authorities referred to the situation both by applying the term ‘occupation’ and ‘annexation’ – in 23 instances.20 In 2007, both the title and the content of the recommendation were changed, the former becoming somewhat more explicit – now having the title ‘dissuasion’ – but the latter becoming less explicit – by applying the term ‘situation’. From December 2007, the study found that there is only one instance where the terms occupation and annexation are actually applied in communication from the Ministry of Foreign Affairs, in a presentation and letter to the Parliament in June 2010, but then ending with a conclusion that these terms were not appropriate – for political reasons.21 Responding to a parliamentary question – posed after the study was completed – the Minister applies the term annexation, and reiterates that the Norwegian government’s attitude is both clear and

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17 The term ‘wishes’ is applied in A/RES/65/109, paragraph 2; see also 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, paragraphs 12, 22 and 25.


19 See note 16; while the Norwegian phrase is “selvbestemmelsesrett for folket i Vest-Sahara...”, it is common in English to apply the plural form ‘peoples’, in accordance with common Article 1 of the ICCPR and ICESCR.

20 Future in Our Hands 2011, Feilslått fraråding og glemte ord. Om UDs fraråding mot norsk næringsliv i Vest-Sahara og hvordan norsk Vest-Sahara-terminologi ble endret under FN’s fredssamtaler, 12, and note 32-40.

21 Minister of Foreign Affairs 2010, Vest-Sahara; http://www.regjeringen.no/upload/UD/Vedlegg/brev/100615_Brev_Stortinget_VestSahara.pdf. While the Minister of Foreign Affairs only said that Norway wanted to ‘support’ the peace process, the [then] State Secretary said in May 2007 that Norway were ready to “explore the possibilities”, and there is credible information that a formal request was made to Norwegian authorities in 2007 to play a facilitating role.
well known. Moreover, he states that “the Government will continue to inform actively about the disuasion in the same way as before”, hence emphasizing the continuation, while the study found a discontinuation – despite the more explicit term in the title, by applying ‘dissuasion’, rather than ‘recommendation’.

Two responses by the Norwegian Minister for Foreign Affairs to two questions by Norwegian parliamentarians – given in November 2007 and January 2008 – illustrate the change that happened in late 2007. In the former response, the Minister stated:

The situation is complex and will not be resolved by referring to or interpreting legal concepts like occupation or annexation. But there can be no doubt that the Security Council has not accepted any annexation, and presupposes a self-determination process in accordance with the UN Charter.

In the latter response, the latter sentence did not appear, only the former sentence. It must also be emphasized that the Minister of Foreign Affairs – in a written response – states that Norway does not want to “unilaterally influence or advance the outcome of the peace efforts and the self-determination process initiated by the UN.” In this process, however, Morocco does not want to have independence of Western Sahara as an option. Contrary to the Moroccan position, the UN has specified that outcomes of a self-determination process must either be independence, association with another state; or full integration with another state.

Hence, while the UN Charter does not specify the details of a self-determination process, this is done in subsequent resolutions, whose essence has been confirmed by the

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26 For an analysis of Morocco’s rejection of a referendum with independence as an option; see Assessment of the [former] Personal Envoy of the Secretary-General for Western Sahara before the Security Council 21 April 2008, paragraph 5; http://www.moroccanamericanpolicy.org/upload/documents/vawalsum.pdf
27 Principle VI of A/RES/1541(XV) 1960, reads: ‘A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State.’
28 While Article 1.2 of the UN Charter says that one of UN’s purposes is to work for the self-determination of peoples, the most specific provision of the UN Charter applying to non-self-governing territories does not apply the term ‘self-determination’, but rather ‘self-government’; see UN Charter Article 73(b).
29 A/RES/1514(XV)1960, Declaration on the Granting of Independence to Colonial Countries and Peoples reads in paragraph 2: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The content of a process of self-determination is further outlined in A/RES/1541(XV), 1960, Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73(c) of the Charter, where principle VII(a) requires “…free and voluntary choice by the peoples of the territory concerned...
International Court of Justice as being applicable to Western Sahara. Self-determination for peoples of non-self-governing territories constitutes international customary law. Hence, the Norwegian Minister of Foreign Affairs only refers to the relatively vague wording of the UN Charter, and not the more specific subsequent resolutions, which specifies self-determination in much greater detail – but also the Security Council applies vague and somewhat inconsistent terms.

On the other hand, it must be observed that in the 2009 Report to the Parliament on corporate social responsibility (CSR), Western Sahara was identified as a special case, in addition to Burma, as “exceptions from the main rule” saying that there is no particular Norwegian approach to trade and investments in certain states. While this is noteworthy – and while there are statements dissuading “all commercial activity in Western Sahara” – it cannot be expected that Norwegian companies do read Reports to the Parliament. Moreover, these clear positions are not reflected in the 2007 recommendation available on the Ministry’s home page and one report concludes that Norwegian companies finds the “double speech by the Ministry of Foreign Affairs frustrating.”

expressed through informed and democratic processes,” and principle IX(b) requires “…peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.”

The requirements for being considered international customary law is opino juris (legal declaration widely endorsed; subjective criteria) and usus (various state actions; objective criteria). Free and fair referendum is the operationalisation of the right to self-determination for peoples of non-self-governing territories, and self-determination is confirmed by the ICJ in Case concerning East Timor (Portugal v. Australia), paragraph 29, ICJ Report 1995, 102 as “one of the essential principles of contemporary international law.” Referendums are also considered as the only legitimate form for approving state secession, as in the case of the 2006 referendum in Montenegro.

S/RES/1979, adopted by the Security Council in April 2011, says in paragraph 6: “Calls upon the parties to continue negotiations under the auspices of the Secretary-General without preconditions and in good faith, taking into account the efforts made since 2006 and subsequent developments, with a view to achieving a just, lasting, and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations, and noting the role and responsibilities of the parties in this respect.”

The inconsistencies of this paragraph are primarily two. First, the emphasis that the solution shall both be ‘mutually acceptable’ and ‘provide for the self-determination’, when self-determination for peoples of non-self-governing territories is operationalized as a referendum where independence is an option. Second, as the ‘responsibilities’ are not distinguished between the two parties, this implies that too little pressure is exercised on Morocco, acknowledging that Morocco is the stronger party, that Morocco has rejected the 2003 Plan which the Security Council unanimously approved (S/RES/1495 2003, paragraph 1), and that Western Sahara does not even have a state which serves as an ‘administering authority’ in order to serve the inhabitants’ interests and well-being, in accordance with Article 73 of the UN Charter.


In a 2010 letter from the Minister of Trade and Industry to the Norwegian Support Committee for Western Sahara, the phrase “understanding of the dissuasion” is applied, implying that there might be a need for more clarity; see Henvendelse om Ewos AS og import av fiskeolje fra Vest-Sahara; http://www.vest-sahara.no/files/dated/2010-08-09/brev_giske-skvs_06.04.2010.pdf.

Future in Our Hands 2011, note 19 above, 23. The CEO of GC Rieber Oils, Paul Christian Rieber, says that there is a considerable margin of discretion “[betydelig rom for skjønn]” in the recommendation of the Ministry of Foreign Affairs; Bergens Tidende 2010, ‘Riktig av oss å bli i Vest-Sahara’ (5 May).
In summary, the argument by the Minister of Foreign Affairs is that Norway chooses to apply the same terms as those applied in UN resolutions, and wants to support any peace effort, hence emphasizing a “political solution to the situation…”37 The approach by the Security Council, however, is determined by the position of those states which are least willing to exert pressure on Morocco. Hence, the prospects for any substantial change are limited.

It is reasonable to state that the recommendation does not explain adequately the reasons for why the companies must avoid being involved in Morocco’s exploitation of natural resources from Western Sahara. These reasons are outlined in the annual resolutions on ‘Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories’. 38 A company that visits the homepage of the Ministry of Foreign Affairs to find out how to relate to resource exploitation or exploration in Western Sahara will only have information that there is a ‘situation’ that is somehow relating to international law, and that they are dissuaded from not promoting the interests of the local population.

Norwegian business involvement in Western Sahara

The emphasis in this section is on Norwegian-based and –owned companies involved in processing and trade with fish and fish oil from Western Sahara. There will not be an analysis of how Norway, through the Norwegian Pension Fund’s investments in seven companies that are shipping phosphates out from Western Sahara,39 are acting in contradiction to the Saharawis’ rights, interests and wishes. Moreover, while Norwegian companies have traded phosphates from Western Sahara,40 and previously contributed to oil exploration activities,41 the companies with the most comprehensive and most enduring involvement, are in the fishing sector.

Three themes will be analyzed below. First, how the relationship to the local population is viewed. Second, how the content of the Ministry of Foreign Affairs’ recommendation is understood. Third, how international law is understood, particularly the right of peoples of non-self-governing territories in relation to their natural resources.

Among the Norwegian companies that have emphasized their close cooperation with the ‘local population’ in order to justify their activities are GC Rieber Oils42 and Sjøvik Group.43 As they contribute to the development of the fishing sector, and provide jobs, they consider that they are serving the interests of the local population.

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37 Ministry of Foreign Affairs 2007, note 16 above.
38 UN 2010, note 8 above.
41 Norwegian support Committee for Western Sahara 2010: ‘Surpriseparty for Fugro på UiO’; www.vest-sahara.no/index.php?cat=111&art=1552&searchString=studenter&shw=3&sy=&sm=&stnm=&page=1&ntm=0. Also TGS Nopec has been involved in oil exploration activities, but has now promised not to be involved in Moroccan activities outside the coast of Western Sahara.
43 Dagens Næringsliv 2010, ‘Dropper ikke Vest-Sahara’ (13 August); http://www.vest-sahara.no/index.php?parse_news=single&cat=39&art=1540&searchString=sj%F8vik&shw=3&sy=&sm=&stnm=&page=1&ntm=0; Bergens Tidende 2007, ‘Refser norsk reder i Vest-Sahara’ (10 March). Sjøvik is involved in fishing and processing of fish, including through the vessel Midøy Dahkla1 (previously Midøy Viking), Fiskaren 2009, ‘Aksjoner mot “Midøy Viking”’ (30 May). While there are reports that Sjøvik might have problems to continue their presence, due to new regulations; see Fiskaren 2010, ‘Sjøvik kan bli presset ut av Vest-Sahara’ (26 April); http://www.vest-sahara.no/index.php?cat=111&art=1619, the company seems to continue to fish and process fish. The large capacity for freezing onboard the ship is given as a reason for the problems faced when renewing the license. One of the owners of Sjøvik is also a majority share-holder and Chairman in two other carrier companies, one of which is reported to be involved in fishing in and fish trade from Western Sahara,
On the understanding of the Ministry of Foreign Affairs’ recommendation, GC Rieber Oils publicly stated that it did not end its trade due to the recommendation, but due to commercial reasons only, and the CEO has said that it was correct to remain in Western Sahara. One of the investors in Sjøvik, moreover says that “there is no trade ban. If such a ban were to be adopted, the business community would surely comply loyal to it.”

Finally, there will be an analysis of how international law is understood, particularly the right of peoples of non-self-governing territories in relation to their natural resources. Initially, it is relevant to note that GC Rieber Oils has challenged the understanding that Western Sahara is excluded from the Morocco-EFTA Free Trade Agreement (FTA), which is contrary to the position by Norway, as expressed by the Norwegian Minister of Foreign Affairs. There are two sentences which are relevant. GC Rieber Oils simply says that import from Western Sahara is part of the FTA with Morocco. This understanding does only make sense if one accepts that Western Sahara is a part of Morocco.

Also other aspects of understanding of international law are weak, and there seems not to be an understanding of Western Sahara’s widely recognized status as non-self-governing territory, and the annual resolution on ‘Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories’, which emphasizes the non-self-governing peoples’ permanent sovereignty and inalienable right in relation to their natural resources.

It cannot be expected that company representatives shall be fully informed on all UN resolutions. Hence, the responsibility for the weak understanding is as much with the Ministry of Foreign Affairs, which can make references to this resolution in the context of informing about Western Sahara in general and in the recommendation on the homepage in particular.

A most interesting aspect relating to international law is the information from the companies on shipping and travel routes. Two examples will be provided; one where a fish oil producing company has allegedly undertaken a seemingly conscious change – which proved not to be sustained; and another where a ship owning company were renting out the boats certeparti (with crew) and presents itself as uninvolved – and uninformed.

The first example is from GC Rieber Oils, whose fish oil processing industry is in Kristiansund. Its Director admits in an interview that they have purchased fish from Moroccan-owned KB Fish, which operates from al-Ayoun. The Director then says that the company:

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Dagens Næringsliv (above), reporting that Kristian Eidesvik is through Caiano AS majority owner and Director in Green Reefers and Wilson, but these companies have not been pressured to comment on their activities in public.


45 Bergens Tidende 2010, note 35 above.

46 Dagens Næringsliv 2010, note 42 above.


49 UN 2010, note 8 above.
is trying to “shift the production northward” and that most of the import today comes from Morocco. Alnæs explains that the shift has occurred after discussions with Norway’s Ministry of Foreign Affairs.

“We have informed our producers in the region that we prefer production at plants in Tan Tan and Agadir [in Morocco, ed.]. It does happen that it is shipped from the northernmost harbour in what you call Western Sahara, but that is for practical purposes only… On those occasions when the Norwegian importer has shipped fish oil from a harbour in Western Sahara it has been, according to Alnæs, because the harbour conditions in South Morocco have been bad, usually because of a combination of bad weather and ebb tide.”

Hence, it was important to signal that there had been a shift, but that the shift was not meant to be ‘absolute’. As has been seen above, however, CG Rieber Oils has been strongly involved in Western Sahara in the subsequent years, having cooperated with five companies in Western Sahara, of which four were “owned by the local population.” GC Rieber Oils has not informed exactly which these companies are, making it impossible to identify the origin of the owners.

The other example is Th. Brovig Shipowners, which is now part of Gezina AS. In the Swedish documentary ‘Det gränslösa fisket’ (‘The borderless fish catch’) from 2010, it is documented that three Brovig ships, Wind, Viento and Vindur, in 2009 had been visiting both Tan-tan (Southern Morocco; se quote above) and al-Ayoun before delivering fish oil – to GC Rieber Oils in Kristiansund.

While the port authorities have been shown documentation that the shipping took place in Tan-tan, a telephone conversation with a representative of KB Fish in a-Ayoun confirmed that the shipping took place in al-Ayoun, but that the documentation nevertheless was stating Tan-tan as the port of origin for the shipment. A contact to Gezina resulted in the company inquiring the cargo owner, but not the captains, and the former rejected that the shipment had taken place in al-Ayoun.

Immediately after the documentary was screened, in March 2010, the then CEO of Brovig neither confirmed nor rejected that their vessels had been in Western Sahara.

In summary, we see that the fishing companies are more directly involved and have considerably more information as compared to the ship owning companies. As the latter might be renting out the boats certeparti, they are not necessarily very informed about the

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50 Norwatch 2007, Continued Omega-3 Import from Western Sahara
http://www.norwatch.no/20070119652/english/westernsahara/continued-omega-3-import-from-western-sahara.html

51 Bergens Tidende, note 35 above.

52 For three letters sent to GC Rieber Oils, to which there has been no answer, see The Norwegian Support Committee for Western Sahara 2010, note 43 above. A letter from GC Rieber Oils sent to The Norwegian Support Committee for Western Sahara 22 December 2010 is available at http://www.vest-sahara.no/index.php?parse_news=single&cat=1&art=1623, saying that the company now only comes from Tantan, and that GC Rieber Oils are co-owners in a processing industry in Tan-tan.


54 Tracing done by Anders Krantz, Gothenburg Branch of Lloyd's Register – Fairplay, now IHS Fairplay.

55 Swedish Television 2010, note 52 above, from 31 minutes; the KB Fish representative confirms that the shipping to Brovig Vind took place 7 October 2009, that the total shipping was 2388 tons and that the shipment was to GC Reiber.

56 Ibid, from 41:20 minutes; information provided by Kenneth Haugerøy, Port Inspector at Kristiansund Port, confirming that at the end of October 2010 Brovig Vind arrived at Kristiansund with approximately 2400 tons of fish oil.

57 Information provided from Director of Board in Gezina AS, Geir Bredo Larsen, 9 May 2011.

58 Farsund Avis 2010, ‘Brøvig-skip involvert i ulovlig frakt’ (17 March). The Director was quoted as having stated (in Norwegian): “Dersom vi har vært der, har vi vært der.”
vessels’ routes and bulk. To which extent the role of renting out ships certeparti relieves a company from human rights responsibility, will be analyzed below.

**UN Guiding Principles, the OECD Principles and other sources to determine boundaries for companies’ human rights responsibilities and corresponding state duties**

After a review of the most relevant principles applying to companies, there will be an assessment of how the state shall act in order to ensure an adequate framework for the effective protection of human rights in the context of its companies’ activities in other states.

In the Guiding Principles, the section on the corporate responsibility to respect human rights is introduced by this principle:

> Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.\(^{59}\)

As this is merely a restatement of what is already included in the two first principles of the Global Compact,\(^{60}\) this is by no means a new approach towards business responsibility. When specifying this responsibility, the Guiding Principles extends the responsibility also to those with whom the company has a business relationship:

> Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.\(^{61}\)

An almost identical formulation is found in the revised OECD Guidelines on Multinational Enterprises.\(^{62}\) Hence, it is clear that the responsibility extends beyond the activities of only the company in question. The crucial question is what is implied in the term ‘business relationship’? To take the GC Rieber Oils case, the CEO stated that they had cooperation with five companies; hence these constitute a business relationship. Sjøvik Group is also directly involved in Moroccan fishing industry taking place beyond Moroccan territory. What about Gezina, which rents out its vessels certeparti and has no direct relationship to the fishing companies operating in the waters outside the coast of Western Sahara in disrespect of the rights, interests and wishes of the Saharawi and their representative body, Polisario? Gezina does not instruct the vessels where they are to make their shipments. Irrespective of what actually happened during the time the vessels were in the ports of Tan-tan (which provided the documents) and al-Ayoun (which provided the fish oil), it is reasonable to state that the captains have sought to hide information regarding the actual shipping port. A shipping company does have an independent responsibility when natural resources are being taken out from a non-self-governing territory in disregard of the rights, interests and wishes of the peoples belonging to the non-self-governing territory.\(^{63}\)

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59 Special Representative, note 2 above, principle 11.

60 Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; Principle 2: Businesses should make sure that they are not complicit in human rights abuses.

61 Special Representative, note 2 above, principle 13(a).

62 OECD 2011, note 5 above, 16 (IV.3): “Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.”

63 A (Norwegian) company that has been involved in shipping phosphates from Western Sahara, Gearbulk, has on several occasions been criticized for its operations; see *Western Sahara Resource Watch* 2008, ‘Press release: 29 parliamentarians protest unethical phosphate’, http://groups.yahoo.com/group/Sahara-Update/message/2067.
Moreover, another element of business responsibility that is specified in both the Guiding Principles and the Revised OECD Guidelines is the requirement to carry out human rights due diligence, in particular where there is a risk of severe human rights impacts. Together with one other Norwegian transporting vessel, the three Brovig vessels have been transporting an estimated amount of 22,000 tons of fish oil in 2009. This is an economic activity that is in contradiction to the rights of peoples of non-self-governing territories to freely dispose of their natural wealth and resources, in accordance with common Article 1.2 of the ICESCR and the ICCPR, as specified in the annual resolutions on ‘Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories’. The company’s size, and the operation’s nature and context shall be considered when determining the appropriateness of a human rights due diligence, and it is reasonable to state that a total shipping of 22,000 tons implies that a human rights due diligence is required.

Moreover, while a HRIA is not explicitly listed neither in the Guiding Principles nor in the OECD revised Guidelines, the requirement that the enterprises should ‘mitigate human rights impact’ implies that there is a basic understanding of the relevant and applicable human rights on which the business operations can have a negative impact.

Turning to the responsibility of the state, these are more specified under the Guiding Principles. Unlike the revised OECD Guidelines, which indicate its title (‘global context’) that it applies extraterritorially, the Guiding Principles are formulated in a more cautious manner. The commentary to the second principle reads (extracts):

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction. There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses.

In other words, there is a more convincing policy basis than international human rights law basis for regulating the extraterritorial activities of companies. Acknowledging the limitations that the Guiding Principles set down regarding its applicability to the extraterritorial dimensions, the OECD Guidelines are explicitly recognized as having such dimensions. Hence, without entering into an in-depth analysis of states’ international or extraterritorial

Moreover, Norwegian pension company KLP has divested from Wesfarmers, due to its import of phosphates from Western Sahara; see Dagens Næringsliv 2007, ‘To nye selskaper på svarteliste’ (3 December). In the Guiding Principles, Special Representative 2011, note 2 above, it is specified that a human rights due diligence should be carried out appropriate to a company’s size and circumstances (principle 15) and that the due diligence process will vary according to its size and the nature and context of its operations (principle 17(b); see also the OECD Guidelines OECD 2011, note 5 above, 16 (IV.5); see also 14 (II.10; incorporate due diligence into ‘enterprise risk management systems’; II.11; ‘avoid causing or contributing to adverse impacts’; and II.12; ‘prevent or mitigate an adverse impact where they have not contributed’).

Ibid

Swedish Television 2010, note 52 above, at 36:15. The last vessel involved is Onartank, owned by Norwegian company Onarjell. The term applied is ‘the area’, which cannot exclude that some of the shipping actually took place in Tan-tan (Morocco).

See notes 6, 7 and 8 above.


Special Representative, note 4 above.

OECD 2011, see note 60 above.

Special Representative 2011, note 2 above, 7 (commentary to principle 2).

Ibid.
human rights obligations, it is reasonable to state that the latter part of the quoted commentary ('strong policy reasons that businesses respect human rights abroad') implies that states should give "[g]uidance to business enterprises on respecting human rights…" including "advise on appropriate methods, including human rights due diligence…"\(^{73}\)

More specifically, it is reasonable to state that even with a formal peace agreement between Morocco and Polisario, Western Sahara can be characterized as being a conflict area, where senior military officials are personally very involved in resource exploitation, \(^{74}\) and where the lack of an administering authority fulfilling its responsibilities in accordance with Article 73 of the UN Charter makes the original Western Saharan population most vulnerable. Principle 7 (‘Supporting business respect for human rights in conflict-affected areas’) applies to states. Among positive measures, the states are asked to help business enterprises to “identify, prevent and mitigate the human rights-related risks”\(^{75}\) and “[e]nsuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.”\(^{76}\) Hence, there is an expectation on the states to be pro-active. There are two terms that warrant some clarification, namely ‘effective’ and ‘gross human rights abuses’.

What is understood by the term ‘effective’ is not elaborated in the commentary, but it is reasonable to state that it must result in a change in the conduct of business enterprises, so that they no longer are “involved with human rights abuse…”\(^{77}\) Also Principle 3(c) applies the term ‘effective’ in a similar context.\(^{78}\)

Moreover, the term ‘gross human rights abuses’ is also applied in one of the Principles that apply to business enterprises.\(^{79}\) The Guiding Principles do, however, not give any assistance in determining what is required to constitute ‘gross human rights abuses’. ‘Gross’ connotes something that is of a high degree. The term ‘abuse’ is often reserved to acts by non-state actors, such as business enterprises. While the status of the right to self-determination as “an essential principles of contemporary international law” is not disputed, \(^{80}\) it is another issue whether activities which are contrary to the right to self-determination can be considered gross human rights abuses. On the one hand, self-determination is recognized among \textit{jus cogens} norms, \(^{81}\) implying that treaties that conflict with \textit{jus cogens} norms are void and terminates. \(^{82}\) On the other hand, it is not evident which elements of the right to self-determination which has \textit{jus cogens} status. In brief, the narrow understanding is that only violations of the right to self-determination that is related to use of military force is included, but as made clear in the East Timor case, \(^{83}\) self-determination is intrinsically linked also to

\(^{73}\) Ibid, 8 (commentary to principle 3).
\(^{75}\) Special Representative 2011, note 2 above, Principle 7(a).
\(^{76}\) Ibid, Principle 7(d).
\(^{77}\) Ibid, 11 (commentary to principle 7).
\(^{78}\) Ibid, Principle 3(c), reading: “Provide effective guidance to business enterprises on how to respect human rights throughout their operations.”
\(^{79}\) Ibid, Principle 23(c), reading: “In all contexts, business enterprises should treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate. In the commentaries, ibid, 21, it is specified that “corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.”
\(^{80}\) ICJ 1995, note 30 above.
\(^{81}\) A. Cassese 2005, \textit{International Law} (2nd ed), 198-212, listing non-use of force; the right of self-determination; and the prohibitions of slavery, genocide, \textit{apartheid}, crimes against humanity, and torture.
\(^{82}\) Vienna Convention on the Law of Treaties, Articles 53 and 64.
\(^{83}\) ICJ 1995, note 30 above.
peoples’ permanent sovereignty over natural resources. Hence, it cannot be excluded that activities that are undertaken in total disregard of non-self-governing peoples’ permanent and inherent rights over their natural resources can at least be considered a ‘gross human rights abuses’, irrespective of whether this element of self-determination is recognized as being a part of the *jus cogens* norms or not.

Principle 7 also refers to sanctions to be applied for a business enterprise that is “involved with gross human rights abuses and refuses to cooperate in addressing the situation.” The emphasis on cooperation is crucial. If there might be situations where there is *bona fide* negligence that one’s activities has contributed to human rights abuses, this situation does not exist if business enterprises have been informed by the relevant public authorities that their activities will contribute to human rights abuses.

This brief review of the principles indicates clearly that even if there is some uncertainty as to the states’ international law obligations applying to regulating business enterprises’ extraterritorial activities, the states are nevertheless required to take pro-active measures in order to engage with the business enterprises operating in other countries.

**Natural resource extraction from Western Sahara: Are the Norwegian dissuasion policy adequate in order to avoid conflict with international law obligations and the non-binding Guidelines and Guiding Principles?**

This article is written in the context of Western Sahara being a non-self-governing territory. As this article has shown, both the ICESCR and ICCPR, as well as General Assembly resolutions have clear wording on the rights over natural resources that is to be enjoyed by the peoples of these non-self-governing territories, and there can be no doubt that Norwegian companies have been undertaken their activities in clear contradiction to these human rights. Finally, the article has shown that the text available on the home page of the Ministry is in itself inadequate in order to guide the companies. This last and concluding section will analyze the *overall* Norwegian dissuasion policy, including whether Norwegian authorities have done enough to ensure that their current policies “are effective in addressing the risk of business involvement in gross human rights abuses” and to assist business enterprises to “identify, prevent and mitigate the human rights-related risks.”

Three issues will be reviewed. All three issues are premised on the fact that Norwegian companies are strongly involved in primarily the exploitation of the fish resources from the waters outside the coast of Western Sahara, and that these activities are not “carried out for the benefit of the people of such Territory, and in accordance to their wishes.” First, how...
Western Sahara is described by Norwegian authorities, in order to specify the uniqueness of Western Sahara. Second, how Norway seeks to make its position on business involvement in Western Sahara generally known internationally. Third, whether Norwegian authorities has a practice in engaging with business enterprises that is in accordance with the Guiding Principles.

On the first issue, the Norwegian Minister of Foreign Affairs addressed the situation in Western Sahara substantively on two occasions before the Norwegian Parliament in 2010. On the first occasion, the Minister stated that it “could not be excluded that such activities could constitute violations of international law, or aiding and abetting such violations.” This, however, “requires a conduct by the business enterprise in contradiction to international humanitarian law.” As international humanitarian law applies to an international or non-international armed conflict, it is relevant to know if the Minister of Foreign Affairs finds that international humanitarian law is applicable to the Western Sahara conflict in its current phase.

The second occasion that the Minister was meeting in the Norwegian Parliament to discuss Western Sahara happened one and a half month after the first, and as a direct response to issues raised at the first occasion, namely the unclear way of referring to Western Sahara. The Minister addressed the factual situation concerning whether the term ‘occupation’ was appropriate to use, concluding that “there can hardly be any doubt that the part of Western Sahara that is to the west of the defense wall is controlled in civilian and military terms by Morocco”, hence fulfilling the requirement of Article 42 of the 1907 Convention respecting the laws and customs of war on land (IV Hague Convention). In conclusion, however, the Minister says that the situation on the ground, and the ongoing negotiations between the parties, “would a change in Norwegian terminology hardly be understood as a signal that is intended to put pressure on both parties.”

Hence, there is a basis to state that even if Norway in principle considers that Western Sahara is occupied and that international humanitarian law could be applicable, Norway does not want to stress this in its public communication. This omission of referring to the realm of international humanitarian law has as a consequence that the gravity of the Western Sahara situation is downplayed and that the relevant provisions are not given adequate attention.

By

90 As specified in note 13 above, the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), has certain provisions that the occupying power shall be bound to comply with, “…for the duration of the occupation…”, in accordance with Article 6.
91 Minister of Foreign Affairs 2010, note 21 above.
92 Ibid, 1.
94 See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), article 33 and 49; note 13 and accompanying text. On the term ‘pillage’, see International Criminal Court 2011, Elements
emphasizing Western Sahara’s status as non-self-governing territory, this status provides in itself clear guidance concerning how natural resources exploitation is to be undertaken. However, as the General Assembly resolution is mostly unknown, and as the Norwegian Ministry of Foreign Affairs has not sought to make neither this resolution nor the relevant provisions of the ICESCR and ICCPR visible in the context of Western Sahara, the impression given to Norwegian enterprises is that there is a dissuasion of commercial involvement in Western Sahara, but as long as the operations are serving the interests of the local population, this dissuasion does not apply.

On Norway’s attempts to make its position on business involvement in Western Sahara generally known internationally, this is specified as an option by the Minister of Foreign Affairs.95 While there are strong reasons to argue against Norway seeking to influence other states based on the text of the home page,96 the position as expressed in the report to the Parliament is clearer,97 but the relevant passage does not specify the circumstances when economic activity in Western Sahara can actually take place in accordance with the rights, interests and wishes of the Saharawis – and for their benefit.

There are, however, no recorded examples of Norway seeking neither to actively make its position on business involvement in Western Sahara generally known internationally nor influencing the policies of other states concerning the natural resource exploitation. Hence, the promise be the Minister does not seem to be adequately implemented.

Finally, are Norwegian authorities actually engaging with business enterprises, in accordance with the Guiding Principles? While there general information is that “everyone contacting the Ministry of Foreign Affairs for advice is informed about the position of Norwegian authorities”,98 there seems to be a perception that the media coverage and existence of the recommendation on the home page is in itself sufficient. This is neither adequate nor in line with the state duty to protect human rights, as specified in the Guiding Principles.

As one example, Norwegian authorities has demonstrated unwillingness to go public to challenge perceptions saying that Western Sahara is a part of the Morocco-EFTA FTA,99 even if Norway’s position is made clear to the Norwegian Parliament.100 It is also reasonable to say that there are no sanctions against Norwegian companies.101

These factors imply that Norwegian authorities have not acted proactively when faced with a situation where Norwegian corporations have conducted and facilitated natural resources extraction from Western Sahara. While there are certain recommendations to Norwegian enterprises given in the report to the Norwegian Parliament that are most relevant, including adequate control with the supply chain,102 the history and current involvement of

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96 Ministry of Foreign Affairs 2007, note 16 above.
97 Ministry of Foreign Affairs 2009, note 32 above.
98 Future in Our Hands 2011, note 19 above, 43.
99 GC Rieber Oils 2010, note 46 above.
100 Norwegian Parliament 2010, note 47 above.
101 As an example, GC Rieber Oils was required to pay to Norwegian customs authorities due to wrongful reporting, but still insists that is shall not pay for imports from Western Sahara, as imports from Western Sahara is a part of the Morocco-EFTA FTA; see GC Rieber Oils 2010, note 46 above.
102 Ministry of Foreign Affairs, note 32 above.
Norwegian companies in Western Sahara shows that merely requesting business enterprises to exercise corporate social responsibility is not adequate.103

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103 Norwegian Parliament 2010, note 88 above.