



**UNREPRESENTED
NATIONS & PEOPLES
ORGANIZATION**

unpo.org

Amicus Curiae Submission

African Court on Human and Peoples' Rights

Application No 028/2018

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About the UNPO

The Unrepresented Nations and Peoples Organization (UNPO) is an international membership-based organization established to empower the voices of unrepresented and marginalised peoples worldwide and to protect their fundamental human rights.

The peoples represented within the UNPO membership are all united by one shared condition: they are denied equal representation in the institutions of national or international governance. As a consequence, their opportunity to participate on the national or international stage is limited, and they struggle to fully realise their rights to civil and political participation and to control their economic, social and cultural development. In many cases, they are subject to the worst forms of violence and repression.

UNPO is a unique presence in the international arena in that it is built and primarily funded by its members. This gives it a strong connection to those suffering the consequences of the exclusion that the organization seeks to address. It also means that UNPO is able to address cases that often remain hidden because the organisation has the freedom to raise issues that others cannot due to political or funding constraints.

The organization consists of a General Assembly of members, which serves as a deliberative body for decision-making, solidarity and standard setting among unrepresented nations and peoples, and a number of Foundations established to provide secretariat services for the General Assembly and to improve the respect for the rights of unrepresented peoples everywhere through research, education and public campaigns.

Website: www.unpo.org

Twitter: @UNPOIntl

Tel: +32 (0)2 513 1459

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Introduction

The right to self-determination is a fundamental human right. Those who are denied the right find themselves excluded from the institutions of national or international governance and, as a result, are deprived of enjoying their rights to civil and political participation and to control their economic, social and cultural development. Even worse, they are often subject to violence and persecution.

Because the right to self-determination is commonly associated with the idea of secession, states and other international actors often see it as a threat to territorial integrity and to the prevailing international order. Against this backdrop, UNPO campaigns to address the misunderstanding around the concept of self-determination, highlighting how its realisation is, in fact, at the heart of true implementation of all other human rights. Through its international advocacy work, UNPO encourages practical solutions to ensure that disagreements over the implementation of self-determination do not create a negative human impact - for example, by encouraging the recognition of official documents issued by unrepresented states to guarantee freedom of movement and access to educational opportunities for its citizens.

As the global platform for non-violent self-determination movements, UNPO also serve as a safe space where indigenous peoples, minorities and states with limited recognition come together to learn from each other and to exchange best practices based on their experiences. Because UNPO members are denied equal representation in the mechanisms of governance, their ability to survive in an international system that is designed to reject them is remarkable. Particularly with regards to **Application No 028/2018**, some developments concerning some UNPO members may offer a valuable insight to the case of the Sahrawi Republic.

This document hopes to contribute to the Court discussion by offering an overview on four cases in which unrepresented states have had their right to self-determination promoted by member states of the UN without necessarily having their statehood claim recognised. **Somaliland**, with a democratically elected government, a military and its own currency, enjoys no official recognition. Yet, it has engaged with different countries – included some of the Africa Union – in the same fashion as if they were a fully recognised entity.

Taiwan, also with a democratically elected government, a military and their own currency¹, has engaged with different international actors and is recognised as a state by 20 countries.¹² Moreover, its government has engaged in trade and diplomacy with the EU delegation³ and, in Asia, trades billions of dollars with other states⁴. Moreover, the Taipei Economic and Cultural Offices and Taipei Economic and Cultural Representative Offices both serve as “quasi-embassies” and are stationed throughout the world.⁵

¹ Taiwan, *Unrepresented Nations & Peoples Organization*, July 19, 2018, available at: <https://unpo.org/members/7908>

² Countries That recognise Taiwan 2020, *World Population Review*, 2020, available at: <https://worldpopulationreview.com/countries/countries-that-recognize-taiwan/>

³ President Tsai meets delegation led by European Parliament-Taiwan Friendship Group Chair Michael Gahler, *Office of the President*, October 29, 2019 <https://english.president.gov.tw/News/5906>

⁴ Hunter Marston and Richard C. Bush, Taiwan's engagement with Southeast Asia is making progress under the New Southbound Policy, *Brookings Institution*, July 30, 2018, <https://www.brookings.edu/opinions/taiwans-engagement-with-southeast-asia-is-making-progress-under-the-new-southbound-policy/>

⁵ Charlie Smith, Taipei Economic and Cultural Office shows how diplomatic soft power works on the ground in Vancouver, *Straight*, August 2, 2016, available at: <https://www.straight.com/news/746786/taipei-economic-and-cultural-office-shows-how-diplomatic-soft-power-works-ground> & Adam Taylor, Taiwan's de facto ambassador to the U.S. is optimistic in the age of coronavirus, *Washington Post*, May 6, 2020, <https://www.washingtonpost.com/world/2020/05/07/taiwans-de-facto-ambassador-us-is-optimistic-age-coronavirus/>

Kosovo, in turn, is currently recognised by 108 states.⁶ The EU has supported broader recognition of the country and has pushed for talks for Serbia to recognise its right to self-determination.⁷ The International Court of Justice even supported Kosovo's right to declare independence, even though it did not formally rule Kosovo was a state.⁸ Kosovo has also successfully engaged in trade with countries throughout the world.⁹

The **Turkish Republic of Northern Cyprus** (TRNC) has not achieved the same success as Taiwan and Kosovo yet, but it has been able to exercise many of the powers that states have and has even established consulates in dozens of countries throughout the world.¹⁰ The UN has advocated for other states to quit levying punishments against the TRNC for exercising its right to exist.¹¹

These examples show that despite the challenges of navigating on the fringes of the international system, states with limited recognition have successfully engaged with some UN member states through bilateral political, military, trade, travel and educational agreements. By drawing these parallels with the case of Western Sahara, UNPO hopes to encourage member states of the African Union to engage with the Sahrawi Arab Democratic Republic in order to ensure that the Sahrawi people have their fundamental rights protected and promoted.

In its legal analysis, this document reiterates that the continuing occupation of Western Sahara constitutes a violation of the right of the Sahrawi people to sovereignty, territorial integrity and independence. These rights are inextricably linked to the Sahrawi people's right to self-determination and, by virtue of the specific nature of this right, particular obligations arise for the Defendants.

Finally, this document reminds that international law does provide an obligation to act to "*refrain Morocco from further occupying parts of the territory of Western Sahara in any manner whatsoever and howsoever*". Additionally, it specifies measures that may be taken by member states of the African Union to comply with their obligation to act.

According to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States:

*"[e]very State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination" and "peoples [resisting against forcible actions] are entitled to seek and to receive support in accordance with the purposes and principles of the Charter."*¹²

⁶ Integrating Kosovo into the United Nations System, *Legal Political Studies*, May 2018, <http://www.legalpoliticalstudies.org/wp-content/uploads/2018/05/GLPS-Policy-Report-INtegrating-Kosovo-into-the-UN-System.pdf>

⁷ Robin Emmott, Serbia, Kosovo Leaders Abruptly Cancel EU-brokered Meeting on Land Swap, *Reuters*, September 7, 2018, available at: <https://www.reuters.com/article/us-serbia-kosovo-eu/serbia-kosovo-leaders-abruptly-cancel-eu-brokered-meeting-on-land-swap-idUSKCN1LN1SD>

⁸ Integrating Kosovo into the United Nations System, *Legal Political Studies*, May 2018, <http://www.legalpoliticalstudies.org/wp-content/uploads/2018/05/GLPS-Policy-Report-INtegrating-Kosovo-into-the-UN-System.pdf>

⁹ Kosovo - Market Overview, *Export.gov*, February 22, 2019, https://www.export.gov/article?series=a0pt0000000PAuCAAW&type=Country_Commercial__kav

¹⁰ Relations with Gulf States, *Deputy Prime Ministry and Ministry of Foreign Affairs*, available at:

¹¹ S/RES/541 (1983), point 7.

¹² Resolution of the General Assembly 2625, October 24th, 1970, "The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among State", [A/RES/2625 (XXV)], pp. 123-234.

Furthermore, the ICJ affirmed the right to political self-determination of the peoples of the occupied territories, adding that UN member states had an obligation to recognise the illegality of the occupation. Therefore, under international law, a situation of violation of the right to self-determination imposes obligations on third states.¹³

¹³ ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia, §117-119, 21/06/71.

Experience of Other States with Limited Recognition

I. The Case of the Republic of Somaliland

Somaliland is a *de facto* state lacking international recognition. With a population of around 4.5 million, it has its own democratically elected government, as well as its own military and currency. The Government of Somaliland has been a member of the Unrepresented Nations and Peoples Organization since 2004. It achieved its full independence from the United Kingdom on 26 June 1960. Shortly after, it voluntarily entered a union with Somalia, but following a civil war and the collapse of Somalia, Somaliland unilaterally withdrew from the union and reclaimed its independence on 18 May 1991.

Somaliland wishes for the international community to recognise its decision to end the voluntary union with Somalia, in line with other African precedents and accordingly with the African Union (AU)'s principle of '*respect[ing] the borders existing on (...) achievement of independence*'¹⁴ for it considers that '*the borders of African States, on the day of their independence, constitute a tangible reality*'.¹⁵ Somaliland applied for membership of the AU in December 2005, but its request is still pending.

Somaliland is by no means the first African state to have entered into a voluntary union with another state and subsequently withdrawn from that union intact. Egypt and Syria, Cape Verde and Guinea Bissau, Senegal and Mali, and Senegal and Gambia have all taken similar steps in their histories, with no effect on the status of their independence'.¹⁶

In 2005, an African Union fact-finding mission stated that '*the lack of recognition ties the hands of the authorities and people of Somaliland as they cannot effectively and sustainably transact with the outside to pursue the reconstruction and development goals*'.¹⁷ Moreover, the 2008 mission recommended that '*as a peace dividend, the international community should provide institutional capacity building support to Somaliland infrastructure and facilitate its access to the international and regional financial institutions and banking systems*'.¹⁸

Even without official recognition of Somaliland, some states of the international community and of the African Union have taken positive steps, engaging into diplomatic relations with Somaliland and ensuring stability and prosperity in the region. These examples show that Somaliland has the capacity to maintain foreign relations.

Positive steps taken by the United Nations

Somaliland was recognised by the United Nations (UN) right after its independence in June 1960. However, after its voluntary union with Somalia, the UN generally showed no intention of

¹⁴ Charter of the Organization of African Unity (OAU), Resolution AHG/Res.16(I), July 1964 'Border Disputes Among African States', available at: https://www.usc.es/export9/sites/webinstitucional/gl/institutos/ceso/descargas/OAU_AHG_Res-16-I-1964_en.pdf.

¹⁵ *Ibid.*

¹⁶ Alison K. EGGERS, 'When is a State a State? The Case for Recognition of Somaliland', *30 Boston College International and Comparative Law Review*, Issue 1, Article 12 (2007), p. 220.

¹⁷ African Union, *Resume, AU Fact-Finding Mission to Somaliland*, 2005, para. 9.

¹⁸ African Union, *Resumé, AU Fact-Finding Mission to Somaliland*, 2008.

recognising Somaliland,¹⁹ 'leav[ing] the issue of [its] recognition in the hands of the African Union'.²⁰ Nevertheless, in 2009, Ahmedou Ould-Abdallah, the Secretary-General's Special Representative for Somalia 'congratulated officials in the self-declared autonomous region of Somaliland (...) for striking an agreement to end a stalemate on delayed presidential elections, (...) [an] agreement [which] is a testament to the Somalilanders' tradition of resolving internal conflict peacefully',²¹ and which 'should result in a free and fair plebiscite'.²²

In January 2020, the UN Special Representative of the Secretary-General for Somalia and Head of the UN Assistance Mission in Somalia (UNSOM), James Swan stated that 'while the two countries remain divided politically, there are areas [in which] they can work together to benefit their people'.²³ The UN thus pushes for 'renewed talks between Somalia and Somaliland to improve security and promote economic growth'.²⁴ Moreover, Swan said that 'the United Nations remains a key partner to Somaliland'²⁵. In this regard, the UN has a full-time office in Hargeisa, among 22 other UN agencies physically established in Somaliland, 'cover[ing] a wide range of governance, security, development, and humanitarian programmes'.²⁶ Another example is the education access programme launched by UNICEF and other partners in view of addressing the lack of access to education of children in Somaliland.²⁷ On the other hand, due to the lack of international recognition, Somaliland is not able to receive financial aid from international financial bodies, such as the World Bank and the International Monetary Fund.

These examples show that the UN is aware and concerned about the economic, social and cultural rights of the people of Somaliland in the region, while to some extent acknowledging that Somalia and Somaliland do not constitute one single entity.

Positive steps taken by the European Union

In 2007, the European Union sent a delegation for foreign affairs to Somaliland to discuss future cooperation.²⁸ The same year, MEP Annemie Neyts-Uyttebroeck, President of the European Liberal Democrat and Reform Party, called on all European Union member states to recognise Somaliland diplomatically.²⁹

¹⁹ See for example: Communiqué on Secretary-General's Mini-Summit on Somalia, SG/2187-AFR/2450, 26th September 2012, available at: <https://www.un.org/press/en/2012/sg2187.doc.htm>.

²⁰ Rebekah BRAGG, 'International Recognition of Somaliland', ODUMUNC 2015, Issue Brief for the GA Fourth Committee: SPECPOL, available at: <https://www.odu.edu/content/dam/odu/offices/mun/2015/specpol-international-recognition-of-somaliland.pdf>

²¹ 'Top UN envoy welcomes agreement on presidential polls in Somaliland', *UN News*, October 2nd, 2009, available on: <https://news.un.org/en/story/2009/10/315852-top-un-envoy-welcomes-agreement-presidential-polls-somaliland>

²² *Ibid.*

²³ 'The United Nations Pushing For Renewed Talks Between Somalia and Somaliland', Radio Dalsan, January 11th, 2020, available on: <https://www.radiodalsan.com/en/2020/01/11/the-united-nations-pushing-for-renewed-talks-between-somalia-and-somaliland/#>. See also: EABW Editor, 'UN Expresses Support For Dialogue Between Somaliland and Somalia', *East African Business Week*, January 10th, 2020, available at: <https://www.busiweek.com/un-expresses-support-for-dialogue-between-somaliland-and-somalia/>.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ 'With half of Somaliland children not in school, UNICEF and partners launch education access programme', *UN News*, July 13th, 2019, available at: <https://news.un.org/en/story/2019/07/1042401>.

²⁸ 'The Recognition of Somaliland: Growing International Engagement and Backing', p.4, available at: <https://recognition.somalilandgov.com/wp-content/uploads/2013/01/The-recognition-of-Somaliland-Growing-international-engagement-and-backing.pdf>.

²⁹ See for example: 'Somaliland: ELDR Calls for Recognition', December 5th, 2007, available at: <https://unpo.org/article/7389>.

In 2011, during a visit to Somaliland, EU Commissioner for Development Andris Piebalgs announced 'more support for stability and regional cooperation'³⁰ and that as an 'example of peace, democracy and stability',³¹ the EU would 'invest additional development funds as security and the socio-political conditions favour sustainable development'.³² An Urban Development Project in Somaliland has been launched between 2019 and 2020 by the EU.³³ Lastly, the EU is pushing for negotiations between Somalia and Somaliland.³⁴

African Union Member States

Ethiopia has been the 'first country which officially referred to Somaliland as a sovereign state and her President as a Head of State during the 9th African Union summit in Accra, Ghana held between 25 and 29 June 2007'.³⁵ Ethiopia 'has gone the furthest of all States in its unofficial recognition of Somaliland by entering into bilateral agreements for cooperation in various arenas'.³⁶ Moreover, Ethiopia has signed a strategic trade and infrastructure agreement with Somaliland, which is believed to 'enhance the economy'³⁷, according to Ethiopia's Minister for Finance and Economic Development, Sufian Ahmed. Moreover, a London-based organisation behind the initiative launched a project in 2019 aimed at helping Somaliland further develop its trade relationship with Ethiopia.³⁸

Ethiopia and Djibouti have also permitted the opening of Somaliland liaison offices in their territories to engage in bilateral ties.³⁹ During a visit in Djibouti in 2010, President Silanyo 'was awarded red carpet status as if he were a recognised head of state'.⁴⁰

South African President Zuma first visited Somaliland in 2002 and has since then maintained a close relationship with the latter⁴¹, having also observed the four elections in Somaliland.⁴² Yemen has also engaged in relations with Somaliland, 'largely for inter-regional political reasons'.⁴³

³⁰ 'Somaliland: EU Commissioner Andris Piebalgs announces more support for stability and regional cooperation', European Commission, Press release, July 6th, 2011, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_11_837.

³¹ *Ibid.*

³² *Ibid.*

³³ See for example: <https://www.busiweek.com/somaliland-eu-launch-berbera-urban-development-project/>;

³⁴ See for example: <https://www.busiweek.com/eu-in-fresh-push-for-somaliland-somalia-talks/>.

³⁵ Katerina RUDINCOVÁ, 'Ethiopian Foreign Policy in the Horn of Africa: Informal Relations with Somaliland and their Possible Future Development', *Politeja*, No. 42, *African Studies* (2016), Księgarnia Akademicka, p. 217, available at: <https://www.jstor.org/stable/10.2307/24920255>.

³⁶ Alison K. EGGERS, 'When is a State a State? The Case for Recognition of Somaliland', *30 Boston College International and Comparative Law Review*, Issue 1, Article 12 (2007), p. 213.

³⁷ Ethiopia: Somaliland signed strategic trade and infrastructure agreement', *Geeska Afrika Online*, November 19th, 2014, available at: <http://www.geeskaafrika.com/6468/ethiopia-somaliland-signed-strategic-trade-and-infrastructure-agreement/>.

³⁸ Salem SOLOMON, 'Trade Project Builds Somaliland's Economy; Leaders Seek More', *VOA News*, February 14th, 2019, available at: <https://www.voanews.com/africa/trade-project-builds-somalilands-economy-leaders-seek-more>.

³⁹ Somaliland: Time for African Union Leadership Crisis Group Africa Report N°110, 23 May 2006, p. 14.

⁴⁰ 'The Recognition of Somaliland: Growing International Engagement and Backing', p.5, available at:

<https://recognition.somalilandgov.com/wp-content/uploads/2013/01/The-recognition-of-Somaliland-Growing-international-engagement-and-backing.pdf>.

⁴¹ Somaliland: Time for African Union Leadership Crisis Group Africa Report N°110, 23 May 2006, p. 14.

⁴² 'The Recognition of Somaliland: Growing International Engagement and Backing', *op. cit.*, p.7.

⁴³ Alison K. EGGERS, 'When is a State a State? The Case for Recognition of Somaliland', *30 Boston College International and Comparative Law Review*, Issue 1, Article 12 (2007), p. 220.

States of the wider international community

The United Kingdom and the United States leave recognition in the hands of the African Union.⁴⁴ However, ministers and state representatives from both states have already received Somaliland government representatives.⁴⁵

In 2011, the former UK Minister for Africa Henry Bellingham visited Somaliland, where he met the President of the Republic of Somaliland Ahmed Silanyo.⁴⁶

In 2018, an All Party Parliamentary Group, led by MP Stephen Doughty (Labour Party) visited Somaliland's Vice President, Parliament and civil society among others.⁴⁷ On 17 July 2019, an Early Day Motion (EDM) entitled 'Recognition of Somaliland Independence' was filed by MP Stephen Doughty. The EDM states that the House of Commons:

'recognises the 1991 declaration of independence from Somalia; applauds the cities and boroughs across the UK including Cardiff, Sheffield, Tower Hamlets and Birmingham that recognise Somaliland as independent; believes that the common interests of the UK and Somaliland in the region will be advanced by continued close cooperation; welcomes the strong cooperation between the UK Government and Somaliland through development aid, help in sustaining democratic institutions and promoting trade and business relationships in Somaliland (...) and calls on the UK Government to formally recognise Somaliland as an independent state (...) to help bring about a peaceful and lasting settlement in the region based on the self-determination of the people of Somaliland'.⁴⁸

The United States declared their will to strengthen their relationship with Somaliland and Puntland in 2010, albeit not recognising Somaliland's independence. *'The assistant secretary of state for Africa said the US would send more aid workers and diplomats to Puntland and Somaliland and support the governments of both regions'.⁴⁹*

Russia also shows interest in Somaliland and seeks to *'send more military advisors (...) to assist the emerging Somaliland military as well as push forth a resolution to recognise the state of Somaliland as sovereign'.⁵⁰*

Somaliland has opened liaison offices in Paris (France), Stockholm (Sweden), Addis Ababa (Ethiopia), Dubai (UAE), Pretoria (South Africa), Turin (Italy), Washington, D.C. (USA), and Nairobi (Kenya). Ethiopia, Djibouti and Turkey have consulate offices in Hargeisa, and Denmark has opened a liaison office.

⁴⁴ *Ibid.*, p. 214.

⁴⁵ *Ibid.* p. 219.

⁴⁶ 'UK Minister for Africa Henry Bellingham Somaliland Visit', *Somaliland* 247, July 25th, 2011, available at: <https://somaliland247.wordpress.com/tag/former-british-protectorate/>.

⁴⁷ Mohamed DUJALE, 'Somaliland: UK All Party Parliamentary Group in Somaliland (Full Report)', *Horn Diplomat*, April 7th, 2018, available at: <https://www.horndiplomat.com/2018/04/07/somalilanduk-all-party-parliamentary-group-in-somaliland-full-report/>.

⁴⁸ EDM #2618 'Recognition of Somaliland Independence', Tabled 17 July 2019, House of Commons 2017-19 Session, available at: <https://edm.parliament.uk/early-day-motion/53162/recognition-of-somaliland-independence#collapse-signatures>.

⁴⁹ 'US to seek stronger ties with Somaliland and Puntland', *BBC News*, September 25th, 2010, available at: <https://www.bbc.com/news/world-africa-11410852>; See also: <https://www.africom.mil/media-room/Article/7747/united-states-to-strengthen-engagement-with-puntla>.

⁵⁰ 'Russia offers to build military base in Zeila in exchange for Somaliland recognition', *Somtribune*, April 3rd, 2018, available at: <http://www.somtribune.com/2018/04/03/russia-offers-to-build-military-base-in-zeila-in-exchange-for-somaliland-recognition/>.

II. The Case of Taiwan

Taiwan is a *de facto* state with limited international recognition. It has its own democratically elected government, as well as its own military and currency. Taiwan has been independent of China since 1950, shortly after the communist revolution in China. Following 38 years of military rule, Taiwan became a democratic state, beginning in 1987.

Taiwan was a member of the UN and even held China's UN Security Council seat until 1971 under the official name of the Republic of China (ROC).⁵¹ However, when Beijing became recognised as the seat of the Chinese government, Taiwan was forced out of the UN and now only 15 states recognise Taiwan as a state.

In the 1980s, China and Taiwan began to reconcile and China hoped the two states would merge. Beijing offered Taiwan a "one country, two systems" set up, but Taiwan rejected it.⁵² However, in the 1990s, Taiwan relaxed restrictions over travel and financial dealings with China and in 1991, declared its war with the People's Republic of China over.⁵³

During the 1990s, China and Taiwan also had some informal talks, but their governments could not formally communicate because China did not recognise Taiwan's government.⁵⁴ In the 2000s, the relationship between the two countries became strained as Taiwan elected pro-independence governments, to which China took offence.⁵⁵ Over the last decade, Taiwan has refrained from electing pro-unification parties and pro-independence parties.⁵⁶

While China and Taiwan relations have remained at a standstill, Taiwan has been seeking to expand its relations with other countries through economic deals and has called on international companies to stop listing Taiwan as part of China.⁵⁷ Taiwan has also found the United States to be a helpful ally in terms of security and economic aid.⁵⁸

Positive steps taken by the United Nations

Taiwan was recognised by the United Nations as the 'Republic of China' in 1950 and held China's seat on the Security Council. However, once the UN started recognising the PRC as the official government of China, Taiwan was forced out. Since then, Taiwan has had limited engagement with the UN.⁵⁹

Within the UN, there are 17 member states that have official diplomatic ties with Taiwan.⁶⁰ However, China has used its power at the UN to prevent Taiwan from participating in many organisations, such as the World Health Organization (WHO).⁶¹ Moreover, China has the

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Alexander Kozlov, Taiwan's Tough History with the United Nations, *Taiwan Insight*, February 18, 2018, available at: <https://taiwaninsight.org/2018/02/16/taiwans-tough-history-with-the-united-nations/>

⁶⁰ Chris Horton, As U.N. Gathers, Taiwan, Frozen Out, struggles to Get Noticed, *New York Times*, September 21, 2018, available at: <https://www.nytimes.com/2018/09/21/world/asia/taiwan-united-nations-joseph-wu.html>

⁶¹ *Ibid.*

power to restrict Taiwan's air travel, which can make diplomatic trips difficult. Taiwanese passports are not even recognised by the UN for tourists to visit the artwork at the UN.⁶²

Despite these setbacks, Taiwan has had some success in terms of informal communications with the UN, such as in 2018, when Taiwan sent two government ministers to a UN General Assembly meeting to show that Taiwan had lived up to the UN's "Sustainable Development Goals."⁶³ In 2009, Taiwan also enacted the crucial UN conventions known as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁶⁴ Additionally, even countries with which Taiwan does not have official ties have advocated for Taiwan to be included in UN meetings, including the US, Australia, Japan, Canada and several European countries.⁶⁵

Taiwan and the UN-affiliated WHO has been particularly controversial.⁶⁶ In 2017, Taiwan went to a WHO meeting despite not being invited.⁶⁷ During the COVID-19 outbreak and Taiwan's successful fight against COVID-19, many have called for the WHO to change its policy on Taiwan.⁶⁸

While the UN may not officially recognise Taiwan as a member, Taipei has successfully engaged with the UN on a myriad of issues. Moreover, many prominent members of the UN have advocated for Taiwan to play a larger role in the organisation.

Positive steps taken by the European Union

Though the EU does not officially recognise Taiwan as an independent state, Brussels has entered in relations with Taipei in several ways. Firstly, Taiwan's government has met with an EU delegation as recently as 2019.⁶⁹ Remarkably, Taiwan has strong trade ties with the EU⁷⁰, being EU's 15th largest overall trade partner and the EU's seventh largest trading partner in Asia.⁷¹ The EU has a trade deficit with Taiwan and the two have traded billions.⁷² The EU has described its view of Taiwan's participation on the global stage as "*the EU supports Taiwan's meaningful participation in multilateral fora, especially where Taiwan's participation is important to the EU and global interests.*"⁷³ Additionally, the EU has said it has "structured dialogue" on economic issues.⁷⁴ Moreover, the EU has opened up its trade to Taiwan further as a result of the "Economic Cooperation Framework Agreement" signed between China and Taiwan in June 2010.⁷⁵ The EU also has an office in Taiwan known as the European Economic and Trade Office in Taiwan⁷⁶.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ J.R. Wu, Uninvited Taiwan says going to U.N. health meeting, warns China on ties, *Reuters*, May 8, 2017, available at: <https://www.reuters.com/article/us-taiwan-china-idUSKBN1841CM>

⁶⁷ *Ibid.*

⁶⁸ Annabelle Timsit & Mary Hui, Taiwan's status could disrupt the most important global health meeting of this pandemic, *Quartz*, May 16, 2020, available at: <https://qz.com/1857449/taiwan-china-relations-take-center-stage-at-who-meeting/>

⁶⁹ President Tsai meets delegation led by European Parliament-Taiwan Friendship Group Chair Michael Gahler, *Office of the President*, October 29, 2019 <https://english.president.gov.tw/News/5906>

⁷⁰ Taiwan, *European Commission*, available at: <https://ec.europa.eu/trade/policy/countries-and-regions/countries/taiwan/>

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ European Economic and Trade Office in Taiwan, *European Union*, available at:

In light of the coronavirus pandemic, Taiwan's exemplary public health policies have drawn the attention of individual EU member states.⁷⁷ Members of the Czech, French, German and British Parliaments have signed a petition to demand that the WHO allow Taiwanese participation,⁷⁸ as well as 67 members of the European Parliament.⁷⁹ Furthermore, the Taiwanese government has successfully made a diplomatic push to help countries fighting COVID-19 by donating masks and other materials.⁸⁰ The Prague City Council has officially cut ties with China and is announcing that it is supporting ties with Taiwan.⁸¹ France and Great Britain have supported Taiwan in a similar manner that the US has.⁸²

These practices show that although the EU officially does not recognise Taiwan, some of its member states have taken an active approach in terms of establishing a relationship with Taipei and have largely treated it like an official state.

Relations with Asian states

Several Asian states have provided support to Taiwan, particularly countries that are wary of China. Japan in particular has stood with Taiwan.⁸³ In 2019, Japan joined the Global Cooperation Training Framework, an agreement set up by the US to coordinate with Taiwan on a host of global issues.⁸⁴ Japan has increased its partnership with Taiwan on many defence agreements and has also worked with Taiwan in regards to increasing tourism and other economic matters.⁸⁵

Singapore has shown support for Taiwan and has continued a 40-year military relationship, despite pressure from China to end it.⁸⁶ Singapore has remained committed to being neutral and, as a result, has provided some support and recognition to Taiwan.⁸⁷

Taiwan and Vietnam have worked together to foster stronger ties. Tourism between the two countries has flourished.⁸⁸ They have also worked to establish educational exchanges between their universities.⁸⁹

https://eeas.europa.eu/delegations/taiwan/index_en.htm

⁷⁷ Ralph Jennings, *Isolated Diplomatically by China, Taiwan Is Finding Friends in Europe*, *VOICE OF AMERICA*, OCTOBER 18, 2019, available at: <https://www.voanews.com/east-asia-pacific/isolated-diplomatically-china-taiwan-finding-friends-europe>

⁷⁸ *Ibid.*

⁷⁹ Matthew Strong, *127 European politicians back Taiwan's inclusion in WHO*, *Taiwan News*, April 11, 2020, available at: <https://www.taiwannews.com.tw/en/news/3914545>

⁸⁰ David Hutt, *Taiwan sees doors open in Europe as virus response earns respect*, *Nikkei Asian Review*, April 13, 2020, available at: <https://asia.nikkei.com/Politics/International-relations/Taiwan-sees-doors-open-in-Europe-as-virus-response-earns-respect>

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Taiwan, US, Japan celebrate strategic ties as China tensions rise, *The Mainichi*, June 1, 2020, available at:

<https://mainichi.jp/english/articles/20200601/p2g/00m/0in/128000c>

⁸⁴ *Ibid.*

⁸⁵ Jeffrey W. Hornung, *Strong but constrained Japan-Taiwan ties*, *Brookings Institution*, March 13, 2018, available at:

<https://www.brookings.edu/opinions/strong-but-constrained-japan-taiwan-ties/>

⁸⁶ Ralph Jennings, *Taiwan's Beleaguered Foreign Relations Find Stable Support in Singapore*, *Voice of America*, October 6, 2017, available at: <https://www.voanews.com/east-asia-pacific/taiwans-beleaguered-foreign-relations-find-stable-support-singapore>

⁸⁷ *Ibid.*

⁸⁸ Kelly Her, *Vietnam Ties Take Off*, *Taiwan Today*, January 1, 2018,

<https://taiwantoday.tw/news.php?unit=4,8,12,17,20&post=127498>

⁸⁹ *Ibid.*

Furthermore, in Southeast Asia, Taiwan has made a lot of progress in regards to the Association of Southeast Asian Nations (ASEAN)⁹⁰ through investments.⁹¹ Member countries such as Indonesia, Thailand, Malaysia, Vietnam and India have all been particularly receptive to trade with Taiwan.⁹² All of these trade deals have totalled billions of dollars.⁹³

Though not technically in Asia, Australia and New Zealand, two nations on the Pacific Rim, have been supportive of Taiwan. Although Australia officially recognises the One China policy, it has established a significant diplomatic office in Taiwan and has established over \$1 billion annually in trade, allowing for over 36,000 Taiwanese students to take part in a study programme in Australia.⁹⁴ New Zealand has continually supported Taiwan joining the WHO and has doubled down on it, despite pressure from China.⁹⁵

States of the wider international community

Though Taiwan does not have widespread recognition as an official state, it has succeeded in establishing *de facto* diplomatic ties throughout the world.⁹⁶ Taiwan has done this through its Taipei Economic and Cultural Offices that are dispersed throughout the world.⁹⁷ These offices promote trade and philanthropy from Taiwan.⁹⁸ The offices partner with non-profits in the community in order to host events affiliated with Taiwan.⁹⁹ The offices have succeeded in building relationships with these countries and winning the good will of their populaces.¹⁰⁰ Similarly, there are Taipei Economic and Cultural Representative Offices, which serve as “quasi-embassies.”¹⁰¹ During the COVID-19 crisis, Taipei’s US Representative, Stanley Kao, was in high demand in Washington, D.C. to provide information and even supplies to help the US fight the pandemic.¹⁰²

The United States is Taiwan’s second biggest trading partner and a major provider of aid through the Export-Import Bank¹⁰³. Taiwan employs over 12,000 workers in the US¹⁰⁴ and has 153 sister cities, being also a member of the US Visa Waiver Program.¹⁰⁵ Shortly after Donald Trump was elected President, he accepted a call from Taiwan’s president, breaking a long-established US protocol.¹⁰⁶ Washington has also called on the WHO to allow Taiwan to join.¹⁰⁷

⁹⁰ Hunter Marston and Richard C. Bush, Taiwan’s engagement with Southeast Asia is making progress under the New Southbound Policy, *Brookings Institution*, July 30, 2018, <https://www.brookings.edu/opinions/taiwans-engagement-with-southeast-asia-is-making-progress-under-the-new-southbound-policy/>

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Bruce Jacobs, Taiwan-Australia Relations: Humming Along, *China Policy Institute Blog*, February 6, 2014, <https://blogs.nottingham.ac.uk/chinapolicyinstitute/2014/02/06/taiwan-australia-relations-humming-along/>

⁹⁵ New Zealand says it backs Taiwan’s role in WHO due to success with coronavirus, *Reuters*, May 7, 2020, <https://www.reuters.com/article/us-health-coronavirus-newzealand-taiwan/new-zealand-says-it-backs-taiwans-role-in-who-due-to-success-with-coronavirus-idUSKBN22K0B9>

⁹⁶ Charlie Smith, Taipei Economic and Cultural Office shows how diplomatic soft power works on the ground in Vancouver, *Straight*, August 2, 2016, available at: <https://www.straight.com/news/746786/taipei-economic-and-cultural-office-shows-how-diplomatic-soft-power-works-ground>

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Adam Taylor, Taiwan’s de facto ambassador to the U.S. is optimistic in the age of coronavirus, *Washington Post*, May 6, 2020, <https://www.washingtonpost.com/world/2020/05/07/taiwans-de-facto-ambassador-us-is-optimistic-age-coronavirus/>

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Anne Gearan, Philip Rucker and Simon Denyer, Trump’s Taiwan phone call was long planned, say people who were involved, *Washington Post*, December 4, 2016, available at: <https://www.washingtonpost.com/politics/trumps-taiwan-phone->

In Latin America, Taiwan enjoys official ties with nine countries that have recognised its sovereignty¹⁰⁸: Belize, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Paraguay, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines.¹⁰⁹ In regards to Africa, Burkina Faso has been a steadfast ally of Taiwan and has turned down economic incentives from China to no longer recognise Taiwan.¹¹⁰

III. The Case of the Turkish Republic of Northern Cyprus

The Turkish Republic of Northern Cyprus (TRNC or Northern Cyprus) unilaterally declared its independence from the Republic of Cyprus on 15 November 1983. Since then, it has only been officially recognised by the Government of Turkey. Further complicating the recognition issue, the United Nations Security Council adopted Resolution 541 which *'calls upon States not to recognize any Cypriot State other than the Republic of Cyprus'*¹¹¹. Northern Cyprus does not possess its own monetary policy and uses the Turkish Lira.¹¹²

Positive steps taken by the United Nations

In 2004, due to the acceptance by the TRNC of the UN plan to reunite both Cypriot entities, which the Republic of Cyprus rejected, the UN 'recommended removing trade and political barriers against Northern Cyprus'.¹¹³

Positive steps taken by the European Union

In 2004, the Republic of Cyprus joined the European Union. Due to the absence of Northern Cyprus in the membership, the European Union said *'it would seek to find ways to end [its] economic isolation (...) [and] pledged to release close to 260 million euros to Turkish Cyprus as a gesture of appreciation for its approval of the United Nations reunification plan'*¹¹⁴ which the Republic of Cyprus rejected.

Positive steps taken by the international community

Shortly after the unilateral declaration of independence, Bangladesh, Pakistan, Iraq, Libya and Malaysia showed their intent to recognise the TRNC officially, but pressure from the international community and the UN dissuaded them to do so.¹¹⁵

call-was-weeks-in-the-planning-say-people-who-were-involved/2016/12/04/f8be4b0c-ba4e-11e6-94ac-3d324840106c_story.html

¹⁰⁷ Nike Ching, US Rallies Support to Back Taiwan's WHO Bid, *Voice of America*, July 7, 2020, <https://www.voanews.com/east-asia-pacific/us-rallies-support-back-taiwans-who-bid>

¹⁰⁸ Juan Fernando Herrera Ramos, Boosting Taiwan's Latin America ties, *Taipei Times*, April 3, 2019, available at: <http://www.taipeitimes.com/News/editorials/archives/2019/04/03/2003712693>

¹⁰⁹ Countries That Recognize Taiwan 2020, *World Population Review*, 2020, available at: <https://worldpopulationreview.com/countries/countries-that-recognize-taiwan/>

¹¹⁰ Jeremy Luedi, Saying no to China in 2018: Taiwan's last African allies, *Asia by Africa*, 2018, available at: <https://www.asiabyafrica.com/point-a-to-a/taiwan-allies-africa-burkina-faso>

¹¹¹ S/RES/541 (1983), point 7.

¹¹² Salih KATIRCIOGLU, 'Trade and growth in a non-recognized small island state: evidence from the Turkish Republic of Northern Cyprus', *Journal of Business Economics and Management* 11 : 1 (2010), p. 113, 114.

¹¹³ 'Azeris give support to Turkish Cyprus', *The New York Times*, July 1st, 2005, available at: <https://www.nytimes.com/2005/07/01/world/europe/azeris-give-support-to-turkish-cyprus.html>.

¹¹⁴ Cyprus Country Review, Country Watch Report 2020, p. 25.

¹¹⁵ James KER-LINDSAY, 'Great powers, counter secession and non-recognition: Britain and the 1983 unilateral declaration of independence of the "Turkish Republic of Northern Cyprus"', *Diplomacy and Statecraft* 28 : 3 (2017), p. 9, 10. Available at: http://eprints.lse.ac.uk/68642/7/Ker-Lindsay_Great%20powers%2C%20counter%20secession.pdf.

In 2005, Gambian president Yahya Jammeh stated that Gambia was ready to recognise the TRNC as a sovereign state.¹¹⁶ The same year, the government of Azerbaijan expressed its will to accept Turkish Cypriot passports.¹¹⁷ Despite the promises, Gambia and Azerbaijan still have not officially recognised the TRNC, although Azerbaijan '*promised to help [Turkish Cypriots] emerge from international isolation*',¹¹⁸ and inaugurated its first commercial passenger flight in 2005, today with 8 companies working in the TRNC.¹¹⁹

Several meetings between recognised states and the TRNC have taken place in the past years. In 2008, Slovenia's Foreign Minister met the TRNC's leader, as did Finland's Foreign Minister in 2009.¹²⁰ In 2014, three Nordic ambassadors met Ozdil Nami, Foreign Minister of the TRNC,¹²¹ an event which recognised the TRNC's '*responsibility for the conduct of the government of the State's diplomatic activities; representation of that government on interstate negotiations and intergovernmental meetings*'.¹²² Equatorial Guinea¹²³, Greece,¹²⁴ and Guinea¹²⁵ also conducted meetings with the TRNC's leader and representatives.

The United Kingdom met the TRNC's leader in 2007 and with the TRNC's Prime Minister in 2009 at the headquarters of the Republican Turkish Party.¹²⁶ In 2014, the British Minister for Europe met Ozdil Nami at the House of Commons.¹²⁷

Moreover, on 3 February 2017, the United Kingdom's High Court ruled that '*it was common ground in the High Court that the Security Council resolutions did not create a legally binding duty not to recognise Northern Cyprus even in international law (...) the resolutions amounted to recommendations only (...). In any event, Security Council resolutions may create obligations in international law but do not, without domestic legislative action, become part of domestic law of the United Kingdom*'.¹²⁸

¹¹⁶ Abdulkadir VAROGLU, Mehmet CAKAR, Nejat BASIM, 'An unusual bi-national military cooperation: The case of Turkish-Gambian relations'. In: Joseph SOETERS, Philippe MANIGART (eds.), *Military Cooperation in Multinational Peace Operations: Managing cultural diversity and crisis response*, (Routledge, 2008, New York), p. 124.

¹¹⁷ 'Azeris give support to Turkish Cyprus', *The New York Times*, July 1st, 2005, available at: <https://www.nytimes.com/2005/07/01/world/europe/azeris-give-support-to-turkish-cyprus.html>.

¹¹⁸ 'Azeris give support to Turkish Cyprus', *The New York Times*, July 1st, 2005, available at: <https://www.nytimes.com/2005/07/01/world/europe/azeris-give-support-to-turkish-cyprus.html>; See also: <https://iwpr.net/global-voices/azerbaijan-embraces-northern-cyprus>.

¹¹⁹ Rufat Abbasov, 'Azerbaijan Embraces Northern Cyprus', *Institute for War & Peace Reporting*, July 28th, 2005, available at: <https://iwpr.net/global-voices/azerbaijan-embraces-northern-cyprus>.

¹²⁰ James KER-LINDSAY, 'Engagement without recognition: the limits of diplomatic interaction with contested states', *International Affairs* 91 : 2 (2015), p. 276.

¹²¹ *Ibid.*, p. 278.

¹²² *Ibid.* citing: 'The Minister of Foreign Affairs', in Sir Ivor Roberts, (ed.), *Satow's Diplomatic Practice*, (7th edn, Oxford University Press), p. 184.

¹²³ Meetings of President Obiang during the 67th General Assembly of the United Nations', *Equatorial Guinea's Press and Information Office*, September 27th, 2012, available at:

<https://www.guineaequatorialpress.com/noticia.php?id=3042&lang=&lang=&lang=en>.

¹²⁴ See for example: Konstantinos Menzel, 'Meetings on Peace Talks over Cyprus Dispute Resume', *Greece Reporter*, February 27th, 2014, available at: <https://greece.greekreporter.com/2014/02/27/meetings-on-peace-talks-over-cyprus-dispute-resume/>.

¹²⁵ See for example: <http://www.cypriot.org.uk/Documents/Haber8/07-Nisan.htm>.

¹²⁶ James KER-LINDSAY, 'Engagement without recognition: the limits of diplomatic interaction with contested states', *International Affairs* 91 : 2 (2015), p. 277. See also: House of Commons Foreign Affairs Committee, Fifth Report of Session 2006-07, 'Visit to Turkey and Cyprus', 2007, para. 84, available at: <https://publications.parliament.uk/pa/cm200607/cmselect/cmfa/473/473.pdf>.

¹²⁷ *Ibid.*, p. 279.

¹²⁸ *R. (on the application of Akarçay) v Chief Constable of West Yorkshire Police, Secretary of State for the Home Department*, National Crime Agency, [2017] EWHC 159 (Admin), 2017 WL 00430743, para. 20.

The United States Secretary of State met the TRNC's leader at the United Nations headquarters in 2004.¹²⁹ More significantly, the TRNC's Foreign Minister Ozdil Nami travelled to Washington to meet US government officials.¹³⁰ In May 2014, Joe Biden visited Northern Cyprus to meet Turkish Cypriot Leader Dervis Eroglu in view to encourage peace talks between the Republic of Cyprus and the TRNC.¹³¹ However, the meeting did not amount to the recognition of the latter.¹³²

Regarding business and trade, Kyrgyzstan reiterated the importance of their cooperation with Northern Cyprus during the opening ceremony of the Cyprus Turkish-Kyrgyz Business Forum in 2016.¹³³ In addition, Northern Cyprus conducts trade relations (mainly imports) with more than 60 countries around the world, the major partners being Turkey and the United Kingdom,¹³⁴ although Hong Kong, Taiwan, Singapore, Sri Lanka and the European Union also import many goods from the TRNC.¹³⁵ As for exports, Israel, Kuwait, Saudi Arabia, Russia, Lebanon and the United States are the TRNC's most important partners.¹³⁶

The TRNC has established consular offices in Ankara, Istanbul, Mersin, Izmir, Gaziantep, Antalya, Trabzon (all seven located in Turkey), Brussels (Belgium), Washington, D.C., New York (USA), London (United Kingdom), Geneva (Switzerland), Rome (Italy), Baku (Azerbaijan), Abu Dhabi (United Arab Emirates), Islamabad (Pakistan), Doha (Qatar), Muscat (Oman), Kuwait City (Kuwait), Manama (Kingdom of Bahrain), Bishkek (Kyrgyzstan), Stockholm (Sweden), Berlin (Germany), Budapest (Hungary), Strasbourg (France), Helsinki (Finland). These offices will allow the TRNC 'to develop further the current relations that already exist in the areas of trade, tourism, higher education, culture, sports and other fields of mutual interest'.¹³⁷

Moreover, the TRNC has allowed states to establish their representative offices on its territory, such as the Turkish embassy, the USA ambassadorship office, the British High Commission Office, the Visa for Italy Information Desk, the Information Office of Embassy of Federal Government of Germany, the Australian High Commission Office, the European Union Support Office, and the North Cyprus Cultural Office of France.¹³⁸

¹²⁹ 'US Recognizes Mehmet Ali Talat as Turkish Cypriot Leader', *Voa News*, October 30th, 2009, available at: <https://www.voanews.com/archive/us-recognizes-mehmet-ali-talat-turkish-cypriot-leader-2004-05-26>.

¹³⁰ *Ibid.* See also: <https://mfa.gov.ct.tr/foreign-minister-ozdil-nami-continues-his-washington-contacts/>.

¹³¹ James KER-LINDSAY, 'Engagement without recognition: the limits of diplomatic interaction with contested states', *International Affairs* 91 : 2 (2015), p. 267.

¹³² 'Biden's visit will not 'upgrade the north'', *Cyprus Mail*, May 21st, 2014, available at: <https://cyprus-mail.com/2014/05/21/bidens-visit-will-not-upgrade-the-north/>; See also: 'Our View: Biden's visit everything the government could have hoped for', *Cyprus Mail*, May 23rd, 2014, available at: <https://cyprus-mail.com/2014/05/23/our-view-bidens-visit-everything-the-government-could-have-hoped-for/>.

¹³³ 'Cyprus Turkish – Kyrgyz Business Cooperation Forum', June 7th, 2016, available at: <https://mfa.gov.ct.tr/cyprus-turkish-kyrgyz-business-cooperation-forum/>.

¹³⁴ Salih KATIRCIOLU, 'Trade and growth in a non-recognized small island state: evidence from the Turkish Republic of Northern Cyprus', *Journal of Business Economics and Management* 11 : 1 (2010), p. 114.

¹³⁵ *Ibid.* p. 115.

¹³⁶ *Ibid.*

¹³⁷ Deputy Prime Ministry and Ministry of Foreign Affairs. Turkish Republic of Northern Cyprus. Available at: <https://mfa.gov.ct.tr/foreign-policy/reasons-with-gulf-states/>

¹³⁸ Deputy Prime Ministry and Ministry of Foreign Affairs. Turkish Republic of Northern Cyprus.

Northern Cyprus' membership in international organisations

Northern Cyprus 'enjoy[s] significant levels of international engagement'.¹³⁹ In the Organization of the Islamic Conference, Northern Cyprus enjoys observer status and was qualified as the 'Turkish Cypriot State' in 2004.¹⁴⁰ The TRNC also has two non-voting elected representatives at the Parliamentary Assembly of the Council of Europe.¹⁴¹ It also enjoys observer status within the Economic Cooperation Organization as the 'Turkish Cypriot State' since 2012. Finally, the Northern Cyprus Turkish Red Crescent was 'granted a special observer status to the 19th session of the [Cyprus Red Cross Society's] General Assembly (...) and future General Assemblies as a non-governmental organization'.¹⁴²

IV. The Case of the Republic of Kosovo

Kosovo declared independence from Serbia on 17 February 2008, following nearly fifteen months of unsuccessful negotiations between the leaders of Kosovo Albanians and Serbia. However, ambiguity besets the exact number of recognitions: while the Ministry of Foreign Affairs of Kosovo cites 114 recognitions,¹⁴³ Serbia asserts its diplomatic pressure to counteract Kosovo's ambitions of UN membership and claims that 18 countries withdrew their recognition as of March 2020.¹⁴⁴

Positive steps taken by the United Nations

Unlike in the case of Northern Cyprus, Kosovo does not have a Security Council resolution that prohibits its recognition. Although not a member of the UN, Kosovo enjoys 'a very high degree of international recognition'.¹⁴⁵

On 22 July 2010 the International Court of Justice (ICJ) delivered an advisory opinion regarding the accordance with international law of the unilateral declaration of independence in respect of Kosovo.¹⁴⁶ The Court considered that 'general international law contains no applicable prohibition of declaration of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law'.¹⁴⁷

More recently, in October 2019, the Head of the United Nations Interim Administration Mission in Kosovo Zahir Tanin congratulated the outcome of the elections which 'could trigger renewed

¹³⁹ Nina CASPERSEN, 'Degrees of legitimacy: Ensuring internal and external support in the absence of recognition', *Geoforum* 66 (2015), p. 187.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.* See also: <https://mfa.gov.ct.tr/foreign-policy/international-organisations/council-of-europe/pace/>.

¹⁴² 2013 Annual Report, *Cyprus Red Cross Society*, p. 14, available at: <http://www.redcross.org.cy/images/media/file/RED%20CROSS%20ANNUAL%20REPORT%20FULL%20TEXT%2030.9.2014%20low%20res.pdf>.

¹⁴³ Republic of Kosovo, Ministry of Foreign Affairs [online] available at: <https://www.mfa-ks.net/en/politika/483/njohjet-ndrkombtare-t-republiks-s-kosovs/483>.

¹⁴⁴ RFE/RL's Balkan Service, 'Serbia Claims Sierra Leone Is Latest Country To Rescind Kosovo Recognition', Radio Free Europe/Radio Liberty, March 3rd, 2020, available at: <https://www.rferl.org/a/serbia-claims-sierra-leone-is-latest-country-to-rescind-kosovo-recognition/30466817.html>.

¹⁴⁵ James KER-LINDSAY, 'Engagement without recognition: the limits of diplomatic interaction with contested states', *International Affairs* 91 : 2 (2015), p. 268.

¹⁴⁶ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010.

¹⁴⁷ *Ibid.*, para. 84.

efforts for rule of law, job creation and the Pristina-Belgrade dialogue', and said that international observers had positively assessed the elections.¹⁴⁸

Positive steps taken by the European Union

Shortly after Kosovo's unilateral declaration, a joint statement was released by the European Union stating that EU Member States had to decide individually whether or not to recognise Kosovo.¹⁴⁹ Despite the fact that five do not recognise Kosovo (Spain, Slovakia, Cyprus, Romania and Greece), 'the EU (...) is very active in Kosovo'.¹⁵⁰

Since October 2009, and despite the fact that unanimity needs to be reached for Kosovo's EU membership, the European Union and Kosovo have conducted dialogues in the frame of the Stabilization and Association Process (SAP) which aims to stabilise the country, promote regional cooperation, and confirm the prospect of EU accession.¹⁵¹ The 2016 Stabilization and Association Agreement (SAA) between the EU and Kosovo is an example of pragmatic, albeit limited, EU tools to address issues of unrecognised states.

Besides, Kosovo receives Pre-Accession Assistance (IPA) through which the European Commission 'supports progress on political criteria, economic criteria, European Standards (...) and cross-border co-operation'.¹⁵² The European Commission also ensures that it will continue to help Kosovo 'on the road to Europe',¹⁵³ wishing to strengthen trade relations and allow visa liberalisation for Kosovo citizens.¹⁵⁴

Kosovo is the only country in the Western Balkans that does not benefit from visa liberalisation for the Schengen Area. In September 2019, the European Parliament voted to commence talks on visa liberalisation for Kosovo with the EU Council.¹⁵⁵ However, the Council has refrained from doing so, thereby blocking one of the most important steps to improve Kosovo citizens' freedom of movement in Europe. This lack of development is primarily caused by some EU member countries' opposition to Kosovo's statehood.¹⁵⁶

In July 2010, the European Parliament adopted a resolution stating that:

'1. Notes the declaration of independence of Kosovo of 17 February 2008, which has been recognised by 69 countries; notes that 22 EU Member States have recognised Kosovo as an independent country and five have not; encourages Member States, in order to make EU policies more effective for all the people in Kosovo, to step up their common approach towards Kosovo with the objective of Kosovo's accession to the EU; welcomes the constructive attitude towards Kosovo emphasized by the Spanish

¹⁴⁸ 'Kosovo elections: 'Most significant change' in 12 years Security council hears', UN News, October 31st, 2019, available at: <https://news.un.org/en/story/2019/10/1050381>.

¹⁴⁹ James KER-LINDSAY, 'Engagement without recognition: the limits of diplomatic interaction with contested states', *International Affairs* 91 : 2 (2015), p. 274.

¹⁵⁰ Jitske HOOGENBOOM, 'The EU as a Peacebuilder in Kosovo', Paper produced for discussion during a Civil Society Dialogue Network Member State Meeting of June 28th, 2011 in Bucharest, Romania, p. 8, available at: http://eplo.org/wp-content/uploads/2017/02/CSDN_MS-Meeting_Romania_Policy_Analysis_EU_as_a_Peacebuilder_in_Kosovo.pdf.

¹⁵¹ Jitske HOOGENBOOM, *op. cit.*, p. 8.

¹⁵² Jitske HOOGENBOOM, *op. cit.*, p. 9.

¹⁵³ José Manuel Durão Barroso President of the European Commission Statement by President Barroso following his meeting with Hashim Thaçi, Prime Minister of Kosovo Press Point Pristina, May 20th, 2011, SPEECH/11/360, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_360.

¹⁵⁴ *Ibid.*

¹⁵⁵ 'EPP Leader: We Are Working on Visa Liberalization for Kosovo', Schengen Visa Info, December 5th, 2019, available at: <https://www.schengenvisa.info/news/epp-leader-we-are-working-on-visa-liberalization-for-kosovo/>.

¹⁵⁶ *Ibid.*

Presidency in spite of its non-recognition of the country; would welcome the recognition by all Member States of the independence of Kosovo;

2. (...) underlines that the prospect of accession to the EU is a powerful incentive for the necessary reforms in Kosovo and calls for practical steps to make this prospect more tangible (...);

3. (...) notes the fact that Kosovo has been admitted as a member of the World Bank, International Monetary Fund and other international organisations;

5. (...) calls on Serbia to be pragmatic on the status issue (...) and calls on Serbia to refrain from blocking Kosovo's membership of international organisations;

9. (...) calls on EU Member States and the Commission to make every effort to adopt quickly uniform provisional facilitated procedures in order to ease travel for Kosovo citizens, especially in the light of the possibilities offered under the new visa code (...).¹⁵⁷

More recently, the European Union and the governments of France, Germany, Italy, the United Kingdom and the United States in particular, have pushed towards the renewal of the EU-led dialogue between Serbia and Kosovo in order to '*provide a secure and prosperous future for the people of Kosovo and Serbia*'.¹⁵⁸

In 2018, The European Commission issued a Communication on the EU enlargement policy, which largely details Kosovo's efforts to comply with international and European standards, and the steps that still need to be taken to comply fully with the latter.¹⁵⁹

On 2 February 2020, the Commission issued a communication regarding the accession of the Western Balkans to the European Union.¹⁶⁰

Positive steps taken by the international community

The relationship between Belgrade and Pristina is particularly relevant to the case of Western Sahara, given that Serbia considers Kosovo as part of its territory, just as Morocco does in relation to Western Sahara.

Since 2011, an EU-mediated agreement on freedom of movement allows for a stay of up to 90 days, monitored through an entry document that must be presented when leaving the other country.¹⁶¹

In April 2013, Serbia and Kosovo signed a bilateral agreement titled the Brussels Agreement, creating the Association of Serb Majority Municipalities in Kosovo, which aims to strengthen

¹⁵⁷ European Parliament resolution on the European integration process of Kosovo, July 8th, 2010, P7_TA(2010)0281, available at: <https://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0281&language=EN&ring=B7-2010-0409>.

¹⁵⁸ Joint Statement by the Governments of France, Germany, Italy, the United Kingdom and the United States, U.S. Embassy Belgrade Public Announcement, August 13th, 2019, available at: <https://rs.usembassy.gov/joint-statement-by-the-governments-of-france-germany-italy-the-united-kingdom-and-the-united-states/>.

¹⁵⁹ European Commission COM(2018) 450final, Kosovo 2018 Report, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2018 Communication on EU Enlargement Policy, April 17th, 2018, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-kosovo-report.pdf>.

¹⁶⁰ European Commission COM(2020) 57 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the accession process – A credible EU perspective for the Western Balkans, February 2nd, 2020, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdf.

¹⁶¹ Marija RISTIC, 'Kosovo, Serbia Freedom of Movement Deal in Force', *Balkan Insight*, December 26th, 2011, available at: <https://balkaninsight.com/2011/12/26/kosovo-serbia-freedom-of-movement-deal-in-force/>.

local democracy, exercise full overview to develop the local economy, etc.¹⁶² The Agreement 'normalize[s] relations, clearing the way for both parties to move ahead with their application to join the EU',¹⁶³ for it is agreed that 'neither side will block, or encourage others to block, the other side's progress in their respective EU path'.¹⁶⁴ The Agreement contains provisions regarding 'Serbia's acceptance of Kosovan customs stamps (...), university degrees from Kosovo', as well as provisions on freedom of movement.¹⁶⁵ Since the agreement was signed, Serbia and Kosovo have mutually recognised each other's driver licenses and ID cards as travel documents, despite Serbia being the strongest opponent of Kosovo statehood.

On 17 June 2013, Serbia and Kosovo established liaison officers in the respective countries, a link which was qualified by Kosovo's Prime Minister as 'a strengthening of Serbia's recognition of the reality in Kosovo'.¹⁶⁶

On 20 January 2020, Serbia and Kosovo agreed to restore flights, which is 'a step towards normalization (...) at a time when a new European Union leadership is eager to resolve the simmering dispute between Kosovo and Serbia as part of its overall effort to instill peace in Europe's historically turbulent southeastern flank'.¹⁶⁷

On 26 February 2020, the Serbian President said that 'it is only a matter of time before Serbia has to recognize Kosovo's independence, at least in practice if not officially'.¹⁶⁸

Moreover, although Greece, Romania, Spain, Slovakia and Cyprus do not recognise Kosovo's declaration of independence, these countries allow Kosovan passport holders to enter with a valid visa, while engaging with the *de facto* authorities to different degrees: for example, Greece started to issue visas in actual Kosovan passports, including Kosovan diplomatic passports, and allows for vehicles with Kosovan license plates to enter its territory. People-to-people contacts have increased in recent years, with cooperation among civil society, academia, and youth groups. Similarly, many Kosovans study in private universities in Thessaloniki.¹⁶⁹

Romania allows Kosovan travellers to enter with a valid visa and recognises their documents if issued by the UN Mission to Kosovo, the Romanian liaison office in Pristina, or the certification office of the Foreign Ministry. However, people-to-people interaction is much lower than in the case of Greece.¹⁷⁰

While Spain is reluctant to recognise Kosovan passports, it allows Kosovan travellers to enter its territory following a special procedure: If Kosovans successfully applied for a visa, they

¹⁶² See for example: http://eeas.europa.eu/archives/docs/statements-eeas/docs/150825_02_association-community-of-serb-majority-municipalities-in-kosovo-general-principles-main-elements_en.pdf

¹⁶³ Nikolas K. GVOSDEV, 'Kosovo and Serbia Make a Deal', *Foreign Affairs*, April 24th, 2013, available at: <https://www.foreignaffairs.com/articles/kosovo/2013-04-24/kosovo-and-serbia-make-deal>.

¹⁶⁴ See for example: <https://www.srbija.gov.rs/cinjenice/en/120394>.

¹⁶⁵ Florian BIEBER, 'The Serbia-Kosovo Agreements: An EU Success Story', 40 *Review of Central and East European Law* (2015), p. 301.

¹⁶⁶ Serbia and Kosovo Begin Direct Liaisons. Balkan Insight. Available at <https://balkaninsight.com/2013/06/17/kosovo-and-serbia-exchange-liaison-officers/>

¹⁶⁷ Melissa EDDY, 'Serbia-Kosovo Flight to Resume Under U.S.-Brokered Deal', *The New York Times*, January 20th, 2020, available at: <https://www.nytimes.com/2020/01/20/world/europe/serbia-kosovo-flights-resume.html>.

¹⁶⁸ Talha OZTURK, 'Serbian president: Recognizing Kosovo 'matter of time'', *Anadolu Agency*, February 26th, 2020, available at: <https://www.aa.com.tr/en/europe/serbian-president-recognizing-kosovo-matter-of-time/1746130>.

¹⁶⁹ Ioannis ARMAKOLAS, 'Greece: Kosovo's Most Engaged Non-recogniser'. In: Ioannis ARMAKOLAS, James KER-LINDSAY (eds.), *The Politics of Recognition and Engagement: EU Member State Relations with Kosovo*, (Palgrave Macmillan, 2020), p. 123-146.

¹⁷⁰ Paul IVAN, 'Romania: Kosovo's Cautious Non-recogniser'. In: Ioannis ARMAKOLAS, James KER-LINDSAY (eds.), *The Politics of Recognition and Engagement: EU Member State Relations with Kosovo*, (Palgrave Macmillan, 2020), p. 173-192.

must follow a 'separate sheet' system, whereby the document "Limited Territorial Validity Schengen Visa" is attached to the unrecognised passport.¹⁷¹

States that do not recognise Kosovo have opened liaison offices in their territory and in Kosovo, such as China, Russia, and Slovakia.¹⁷²

Kosovo's membership in international organisations

Kosovo is a member of a few international organisations, such as the International Monetary Fund, the World Bank, the European Bank for Reconstruction and Development, the Council of Europe Development Bank, the Egmont Group of Financial Intelligence Units, and the Permanent Court of Arbitration. Kosovo is an applicant for NATO, as well as the Organization of Islamic Cooperation.

¹⁷¹ Ruth FERRERO-TURRIÓN, 'Spain: Kosovo's Strongest Opponent in Europe'. In: Ioannis ARMAKOLAS, James KER-LINDSAY (eds.), *The Politics of Recognition and Engagement: EU Member State Relations with Kosovo*, (Palgrave Macmillan, 2020), p. 215-235.

¹⁷² See for example: <https://www.beinkosovo.com/embassies-liaison-offices-in-kosovo/>.

Legal Analysis

Issue 1: Whether the Defendants individually and/or collectively are not under a legal obligation to defend the sovereignty, territorial integrity and independence of WS in accordance with Articles 3 and 4 of the Constitutive Act of the AU, Articles 1, 13 and 20 of the ACHPR, articles 1, 2 of the ICCPR and articles 1, 2 of the ICESCR.

The continuing situation in Western Sahara constitutes a violation of the right of Western Sahara to sovereignty, territorial integrity and independence (I). These rights are inextricably linked to the Sahrawi people's right to self-determination and, by virtue of the specific nature of this right, particular obligations arise for the Defendants (II).

I. Sovereignty, territorial integrity and independence of Western Sahara

The right to sovereignty, territorial integrity and independence of Western Sahara is violated as it is illegally occupied by Morocco (A), and as the holding of a referendum for Sahrawi people to exercise their political rights has not been implemented (B). This situation is in violation of the right to self-determination, which has a strong legal value in international law (C).

A. Illegal occupation of Western Sahara's territory contrary to the right to sovereignty, independence, and integrity

For years, Western Sahara's occupation has been recognized as illegal by several international bodies. Western Sahara was listed by the United Nations (UN) Committee on Information as a non-self-governing territory in 1963, after Spain communicated the information needed in article 73 of the UN Charter.¹⁷³ Then, in 1975, the International Court of Justice (ICJ) estimated that the Western Sahara's territory was not *terra nullius* at the time Spain occupied it, and qualified it as a *colonial situation*.¹⁷⁴ ICJ also considered that this situation does not derogate from the application of the self-determination principle, enshrined in the 1514 (XV) resolution.¹⁷⁵ Therefore, Western Sahara and its population have the right to self-determination, and benefit from the whole legal framework that it involves.¹⁷⁶

Besides, neither the Organization African Union (OAU) nor African Union (AU), nor the UN have ever approved Morocco's occupation of Western Sahara or recognized the legality of its forceful annexation of the territory. Indeed, the UN General Assembly, in its resolutions 3437¹⁷⁷ and 3519¹⁷⁸ held that Morocco was an occupying power of Western Sahara. Consequently, the Western Sahara's right to sovereignty, territorial integrity and independence has to be protected since Western Sahara was recognized as a territory in which the right to self-determination applies.

¹⁷³ Report of the Committee on Information from Non-self-Governing Territories, List of non-self-governing territories coming under UN Charter Chapter XI, Fourteenth Session, 1963, [A/5514].

¹⁷⁴ I.C.J., *Western Sahara*, Advisory opinion, 16th October 1975, I.C.J Reports 1975, §81.

¹⁷⁵ Resolution of the General Assembly 1514 (XV) of the 14th, December, 1960 "Declaration on the Granting of Independence to Colonial Countries and Peoples", [A/RES/1514 (XV)].

¹⁷⁶ I.C.J., *Western Sahara*, *op cit*, §162.

¹⁷⁷ Resolution of the General Assembly 34/37 of the 21st, November, 1979, "Question of Western Sahara", §5, §6 [A/RES/34/37].

¹⁷⁸ Resolution of the General Assembly 35/19 of the 11th, November, 1980, "Question of Western Sahara", §3 [A/RES/35/19].

This was also recognized by the General Assembly resolution 39/40, which linked this situation of occupation to Western Sahara's "*inalienable right to self-determination and independence*",¹⁷⁹ and by a resolution of the Assembly of the African Union calling upon the General Assembly of the UN to protect the integrity of Western Sahara as a non-self-governing territory.¹⁸⁰

Thereby, the right to independence, territorial integrity and sovereignty are regarded as linked to the right to self-determination of the Saharawi's people, legally enshrined in the African Charter on Human and People's Right, the UN Charter, and the two International Covenants.¹⁸¹ These linked rights are also protected by articles 3(b), 3 (g), 3(f), 3(h), 4(a) and 4(b), 4(e), 4(f), 4(g), 4(i), 4 (m), 4(o), 4 (p) of the Constitutive Act of African Union, as claimed by the applicant, since the Sahrawi Arab Democratic Republic is a member of a protection system which has the objective to "*defend the sovereignty, territorial integrity and independence of its Member States*".¹⁸²

All these rights to which Western Sahara is entitled have been mentioned in a recent resolution of the African Commission, that emphasized their importance and called for the holding of a referendum for the Sahrawi people to exercise their right to self-determination.¹⁸³ This reminds the importance of the process, called by the UN since more than fifty years.

B. The non-holding of a referendum violating political rights

According to the resolutions 1514 and 2625 of the General Assembly,¹⁸⁴ article 20 of the African Charter on Human and People's Rights (ACHPR), and articles 1 common to the International Covenant on civil and political rights (ICCPR) and the International Covenant on Economic, Social and Cultural rights (ICESCR), for the right to self-determination to be respected, there is an obligation to organize a referendum.

Indeed, the Security Council adopted numerous resolutions addressing the situation in Western Sahara and calling for a referendum.¹⁸⁵ So did the General Assembly of the United

¹⁷⁹ Resolution of the General Assembly 39/40 of the 27th, November, 1984, "*Question of Western Sahara*", §1[A/RES/39/40].

¹⁸⁰ Assembly, *Decision on the Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa*, June 15th, 2015, [Assembly/AU/Dec 583 (XXV)].

¹⁸¹ Article 55 of the Charter of the United Nations: "*With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote*"; Article 1§2 of the Charter of the United Nations: "*To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace*".

Article 1§1 of the ICCPR and the ICESCR: "*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*"; and Article 20 of the ACHPR: "*1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.*

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural".

¹⁸² Articles 3(b) of the Constitutive Act of the African Union: "*The objectives of the Union shall be to: defend the sovereignty, territorial integrity and independence of its Member States.*"

¹⁸³ Resolution on the Human Rights Situation in the Sahrawi Arab Democratic Republic, April 20th, 2016, [ACHPR/Res.340(LVIII)]: "*Reaffirming the relevant United Nations Resolutions recognizing the status of Non-Self-Governing Territories in Western Sahara, making them the subject of decolonization and calling for the holding of a free and fair referendum on the self-determination of Western Sahara...*".

¹⁸⁴ We will demonstrate later that these resolutions are part of customary international law.

¹⁸⁵ For instance the following resolutions of the UN Security Council : 658 (1990), 690 (1991), 1359 (2001), 1429 (2002), 1495

Nations.¹⁸⁶ For instance in its resolution 3940, the General Assembly of the United Nations requested the parties “to undertake direct negotiations with a view to bringing about a cease-fire to create the necessary conditions for a peaceful and fair referendum for self-determination of the people of Western Sahara”.¹⁸⁷ In addition, several African institutions also called for the holding of a referendum in Western Sahara.¹⁸⁸

The Organization of African Union (OAU) and African Union (AU) have demanded for self-determination and holding of a referendum since 1960. For example, in the plan of action, adopted by the AU Heads of State and Government meeting in Tripoli, Libya on the 31st of August 2009,¹⁸⁹ the AU leaders called for the intensification of efforts in order to hold a referendum to enable the people to choose between the option of independence and that of integration into the Kingdom of Morocco. Moreover, the AU Assembly of Heads of State and Government, meeting in its twenty-fifth Ordinary Session which was held in Johannesburg on the 14th and 15th of June 2015, called “on the UN General Assembly to determine a date for the holding of the self-determination referendum for the people of Western Sahara and protect the integrity of Western Sahara as non-self-governing territory from any act which may undermine it”.¹⁹⁰

However, despite these decisions and repeated calls of International Community for the holding of a referendum in Western Sahara, it never took place. Yet, international human rights law implies positive obligations to guarantee the enjoyment of political rights, as the system of representative democracy - and the political rights it contains¹⁹¹ - are protected in many international instruments.¹⁹² Therefore, this situation violated the political rights guaranteed by

(2003), 1541 (2004), 1570 (2004), 1598 (2005), 1634 (2005), 1675 (2006), 1720 (2006), 1754 (2007), 1783 (2007), 1813 (2008), 1871 (2009), 1920 (2010), 1979 (2011), 2044 (2012), 2099 (2013), 2152 (2014), 2218 (2015), 2285 (2016), 2351 (2017), 2414 (2018), 2440 (2018), 2468 (2019).

¹⁸⁶ For instance the following resolutions of the UN General Assembly that explicitly call for the holding of a referendum or recall the relevant UN Security Council resolutions:), 35/19 (1980), 36/46 (1981), 37/28 (1982), 38/40 (1983), 39/40 (1984), 40/50 (1985), 41/16 (1986), 42/78 (1987), 43/33 (1988), 44/88 (1989), 45/21 (1990), 46/67 (1991), 47/25 (1992), 48/49 (1993), 49/44 (1994), 50/36 (1995), 51/143 (1996), 52/75 (1997), (1998), 52/75 (1998), 53/18 (1999), 53/64 (1999), 54/87 (2000), 55/141 (2001), 56/69 (2002), 57/135 (2003), 58/109 (2003), 59/131 (2005), 60/114 (2006), 61/125 (2006), 62/116 (2007), 63/105 (2008), 64/101 (2009), 65/112 (2010), 65/304 (2011), 66/86 (2011), 66/278 (2012), 67/129 (2012), 67/283 (2013), 68/91 (2013), 68/296 (2014), 69/101 (2014), 70/98 (2015), 71/106 (2016), 72/95 (2017), 73/107 (2018), 73/324 (2019) 74/97 (2019).

¹⁸⁷ Resolution of the General Assembly 3940 of the 27th, November, 1984, “Question of Western Sahara”, §3 [A/RES/3940].

¹⁸⁸ For example: Executive Council, *Decision on the Activity Report of the Commission*, June 21st-25th, 2013;

[EX.CL/Dec.758(XXII)]: “Regarding Western Sahara, the Executive Council requested the Commission to take all the necessary measures for the organization of a referendum for self-determination of the people of Western Sahara in compliance with the relevant OAU decisions and UN resolutions.”

¹⁸⁹ Assembly, *Special Session of the Assembly of the Union on the Consideration and Resolution of conflicts in Africa*, August 3rd, 2009 [SP/ASSEMBLY/IPS/PLAN(I)].

¹⁹⁰ Assembly, *Decision on the Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa*, June 15th, 2015, [Assembly/AU/Dec 583 (XXV)].

¹⁹¹ Vienna Declaration on Human Rights and Program of Action, 1993, §8: “Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.”

¹⁹² IACtHR, *Case of Yatama v. Nicaragua*, Serie C No. 127, June 23rd, 2005, §201 and §192, referring to “the Inter-American Democratic Charter (Articles 2, 3 and 6); the American Convention on Human Rights (Article 23); the American Declaration of the Rights and Duties of Man (Article XX); the Universal Declaration of Human Rights (Article 21); the International Covenant on Civil and Political Rights (Article 25); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(c)); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 42); the Convention on the Elimination of All Forms of Discrimination against Women (Article 7); the Convention on the Political Rights of Women (Articles I, II and III); the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (Article 6); the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (Articles 2 and 3); International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal People (Article 6); Proclamation of Teheran, International Human Rights Conference at Teheran, May 13, 1968 (para. 5); Vienna Declaration and Programme of Action, World Conference on Human Rights, June 14 to 25, 1993 (I.(8) I(18), I(20), II(B)(2)(27)); Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3); and the African Charter on Human and Peoples' Rights “Banjul Charter” (Article 13).”

article 13 of the African Charter.¹⁹³ It is also a breach of articles 3 (g), (h) concerning the objectives and 4 (m) and (p) concerning the principles of the African Union Constitutive Act,¹⁹⁴ which protect democratic principles, institutions, popular participation, the rule of law and good governance.

C. The legal value of the right to self-determination

The Sahrawi people have currently not exercised its right to self-determination. As previously shown, the legal situation is an occupation, and the obligation to hold a referendum hasn't been fulfilled. Yet, numerous General Assembly resolutions remind that the Western Sahara situation is a decolonization case, and that the WS people have the right to self-determination and the right to independence.¹⁹⁵ Therefore, the violation of self-determination right is now recognized by several bodies,¹⁹⁶ since this right is widely acknowledged in treaties (1), custom (2) and as a *jus cogens* norm (3).

1. The right to self-determination enshrined in treaties

The right to self-determination is protected by article 1§2 and 55 of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights, article 1 of the International Covenant on Economic, Social and Cultural Rights and article 20 of the African Charter on Human and People's rights.¹⁹⁷ This wide consecration in several key legal instruments¹⁹⁸ is a hint about the importance of this right for the contemporary international legal order and the values on which it is based.

¹⁹³Article 13 of the ACHPR: "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law (...)."

¹⁹⁴Article 3 (g) of the ACHPR: "promote democratic principles and institutions, popular participation and good governance", Article 3(h) of the ACHPR: "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments", Article 4(m) of the ACHPR: "respect for democratic principles, human rights, the rule of law and good governance", Article 4 (p) of the ACHPR: "condemnation and rejection of unconstitutional changes of government".

¹⁹⁵For instance the following resolutions of the UN General Assembly : , 3292 (XXIX) (1974), 3458 (XXX) (1975), 31/45 (1976), 32/22 (1977), 33/31 (1978), 34/37 (1979), 35/19 (1980), 36/46 (1981), 37/28 (1982), 38/40 (1983), 39/40 (1984), 40/50 (1985), 41/16 (1986), 42/78 (1987), 43/33 (1988), 44/88 (1989), 45/21 (1990), 46/67 (1991), 47/25 (1992), 48/49 (1993), 49/44 (1994), 50/36 (1995), 51/143 (1996), 52/75 (1997), (1998), 52/75 (1998), 53/18 (1999), 53/64 (1999), 54/87 (2000), 55/141 (2001), 56/69 (2002), 57/135 (2003), 58/109 (2003), 59/131 (2005), 60/114 (2006), 61/125 (2006), 62/116 (2007), 63/105 (2008), 64/101 (2009), 65/112 (2010), 65/304 (2011), 66/86 (2011), 66/278 (2012), 67/129 (2012), 67/283 (2013), 68/91 (2013), 68/296 (2014), 69/101 (2014), 70/98 (2015), 71/106 (2016), 72/95 (2017), 73/107 (2018), 73/324 (2019)74/97 (2019).

¹⁹⁶For instance, the European Union Court of Justice issued a decision in which it annulled Acts concluded between the EU and Morocco, because it implied resources from Western Sahara. The Court considered that Morocco did not exercise sovereignty allowing it to sign such an Act. See: EUCJ, Council versus Front Polisario, n° 266/16, January, 10th, 2018.

¹⁹⁷Article 55 of the Charter of the United Nations: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote."; Article 1§2 of the Charter of the United Nations: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."; Article 1§1 of the ICCPR and the ICESCR: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."; Article 20 of the ACHPR: "1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural".

¹⁹⁸See also: Vienna Declaration on Human Rights and Program of Action, 1993, §2: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development."

2. The right to self-determination as a customary norm

The importance of the right to self-determination has been recognized by the ICJ, in the judgement *East Timor*, as “one of the essential principles of contemporary international law”.¹⁹⁹ Moreover, this right is part of the customary law, as it is contained in several resolutions of the UN General Assembly which have acquired customary value.

The article 38 (1) of ICJ Statute defines customary law “as evidence of a general practice accepted as law”.²⁰⁰ However, the ICJ concluded in 1996 that a serie of General Assembly resolutions could testify the transformation of an *opinio juris* from States and the emergence of a customary norm.²⁰¹ To that extent, the resolution 1514 (XV) dedicated to the self-determination principle²⁰² has acquired customary value. Indeed, the Resolution 1514 (XV) reflects the *opinio juris* and practice of almost all States.²⁰³ The declaration was adopted by eighty-nine votes in favour, zero against and nine abstention : this gives a clue about the existence of an *opinio juris* ; in addition to this, the decolonization process which has followed shows that there is a States' practice. As a matter of fact, between 1950 and 1960, thirty non-self-governing territories acceded to independence.²⁰⁴ Nowadays, we count eighty ex-colonies that gained independence.²⁰⁵ Besides, since the adoption of this resolution, the General Assembly mentions it in almost all the resolutions concerning the right to self-determination.²⁰⁶ Moreover the UN Security Council adopted several resolutions, to condemn the violation of this resolution.²⁰⁷ Therefore, this resolution is now used as an undisputed reference.

Self-determination right is also contained in resolution 2625²⁰⁸ of the General Assembly which is part of customary law. Indeed, this resolution was the subject of lengthy negotiation and elaboration between 1962 and 1970 by a special committee representing the diversity of opinion within the United Nations, including that of the great powers, except the People's Republic of China, which had not yet entered the United Nations.²⁰⁹ The special committee had adopted the method of consensus, which meant that the statement submitted to the vote of the

¹⁹⁹ I.C.J., *East Timor (Portugal v. Australia)*, Judgment, June 30th, 1995, I.C.J Reports 1995, §29.

²⁰⁰ Article 38(1)(b), ICJ Statute.

²⁰¹ I.C.J., *Legality of the threat or use of nuclear weapons*, Advisory Opinion, July, 8th 1996, I.C.J Reports 1996, p. 254-255, §70 : “The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.”

²⁰² Resolution of the General Assembly 1514, *op cit*.

²⁰³ Separate opinion of Vice-President Ammoun, in ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, June 21st, 1971, p. 74-75.

²⁰⁴ Official website of the United Nations the United Nations and Decolonisation, “*Trust and Non-Self-Governing Territories*” (1945-1999), URL: <http://www.un.org/fr/decolonization/nonselfgov.shtml> : Benin, Burkina Faso, Burma, Cambodia, Cameroon, Chad, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Gabon, Ghana, Guinea, India, Indonesia, Laos, Libya, Madagascar, Malaysia, Mali, Mauritania, Morocco, Niger, Nigeria, Philippines, Senegal, Somalia, Sri Lanka, Sudan, Togo and Tunisia.

²⁰⁵ Official website of the United Nations the United Nations and Decolonisation, “*Trust and Non-Self-Governing Territories*” (1945-1999), URL: <https://www.un.org/dppa/decolonization/fr/about>.

²⁰⁶ For instance the following resolutions of the UN General Assembly : 1064 (XI), 1568 (XV), 1579 (XV), 1596 (XV), 1065 (XV), 1626 (XVI), 1650 (XVI), 1724 (XVI), 1742 (XVI), 1746: (XVI), 1747 (XVI), 1807 (XVII), 1819 (XVII), 1897 (XVIII), 1913 (XVIII), 1949 (XVIII), 1954 (XVIII), 2063 (XX), 2107 (XX), 2184 (XX), 2183 (XXI), 2185 (XXI), 2226 (XXI), 2354 (XXII), 2379 (XXIII), 2383 (XXIII), 2428 (XXIII), 2983 (XXVII), 3162 (XXVIII) et 3292 (XXIX).

²⁰⁷ Resolution of the Security Council 163 , “*Question relating to Angola*”, June, 9th, 1961, (doc. S/4835) ; Resolution of the Security Council 180, “*Question relating to territories administered by Portugal*”, July, 31st 1963, (doc. S/5380).

²⁰⁸ Resolution of the General Assembly 2625 (XXV), October 24th, 1970 “*The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among State*”, [A/RES/2625 (XXV)]

²⁰⁹ Abi-Saab (G.), *Wars of National Liberation in the Geneva Conventions and Protocols* (165), Vol. 4, Collected Courses of the Hague Academy of International Law, M. Nijhoff, 1981, p. 370.

general assembly represented the various opinions of the members of the committee.²¹⁰ The declaration was also adopted by consensus, and for the first time, Western countries, among which the former colonial powers, had recognized the principle of self-determination as a violation of the Charter.²¹¹ The customary character and universal recognition of the declaration²¹² can be affirmed by this consensus in the General Assembly. This consensus was reached not on an imprecise formulation of the right to self-determination but on a detailed interpretation, with clear legal consequences for the application of this principle.²¹³ In that extent, the International Court of Justice in the Nicaragua case concluded that the unanimous consent of States to the declaration "*may be interpreted as an adherence to the value of the rule or set of rules declared by the resolution and taken in themselves.*"²¹⁴

3. The right to self-determination as a *jus cogens* norm

This self-determination right has known such development, that it is now recognized as an imperative standard in International Law,²¹⁵ as defined by article 53 of Vienna Convention on the Law of Treaties, in 1969.

Indeed, as early as 1963, some members of the International Law Commission had already referred to the right to self-determination as a rule of *jus cogens*.²¹⁶ During the works preceding the elaboration of the Vienna Convention on the Law of Treaties, when the concept of *jus cogens* was elaborated and detailed,²¹⁷ the latter was often linked to the right to self-determination. Hence, it was accepted that a treaty "*imposed on a former colony which had in the meantime become an independent State would certainly be void for non-licence*" because it violated a norm of *jus cogens*, in this case the right to self-determination.²¹⁸ In addition, as noted by the CERD in 2019, "*the International Law Commission has stated that the peremptory norms (jus cogens) that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.*' *The Committee further notes that in the case of Al-Dulimi and Montana Management INC. v. Switzerland, the European Court of Human Rights, has noted this affirmation of the International Law Commission.*"²¹⁹

Additionally, the Arbitration Commission of the Conference for Peace in the Former Yugoslavia, in its first opinion, provided that people and minorities' rights are peremptory norm

²¹⁰ Virally (M.), *L'Organisation Mondiale*, Paris, Librairie Armand Colin, 1972, p. 313.

²¹¹ Resolution of the General Assembly 2625 (XXV), *op cit*, principe 5, §2.

²¹² Ouguergouz (F.), *Chapitre V. Les droits des peuples dans La Charte africaine des droits de l'homme et des peuples : Une approche juridique des droits de l'homme entre tradition et modernité*, Genève, Graduate Institute Publications, 1993, p. 11.

²¹³ Abi-Saab (G.), *op cit*, p. 370.

²¹⁴ I.C.J., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment on the merits, June, 27th, 1986, I.C.J Reports 1986 p.100, §188.

²¹⁵ Doehring (K.), *Self-Determination as Jus cogens*, in [Various Authors,] *The Charter of the United Nations - A Commentary* (eds. B. Simma et alii), Oxford, Oxford University Press, 1994, p. 70-71, Brownlie (I), *Principles of Public International Law*, 1st ed., Oxford, Clarendon Press, 1966, p. 417-418; Rigo Sureda (A), *The Evolution of the Right to Self-Determination – A Study of United Nations Practice*, Leiden, Sijthoff, 1973, p. 353.

²¹⁶ U.N., *Yearbook of the ILC* (1963), vol. II, analytical reports of the fifteenth session, (6 may-12 july 1963), doc. A/CN.4/SER.A/1963, p. 155.

²¹⁷ U.N., *Yearbook of the ILC* (1963) vol. I, p. 59-79, 155, 192, 252-257 and 294; U.N., *Yearbook of the ILC* (1964) vol. II, p. 185-186 and 191; U.N., *Yearbook of the ILC* (1966) vol. II, p. 217, 239-240, 247-249, 261-267, 327 and 341; U.N., *Yearbook of the ILC* (1967) vol. II, p. 378, 390 and 394-395; U.N., *Yearbook of the ILC* (1968) vol. II, p. 220 and 231-232.

²¹⁸ U.N., *Yearbook of the ILC* (1963) vol. I, p. 155, § 56; and p. 257, § 37.

²¹⁹ CERD, *State of Palestine c. Israel*, CERD/C/200/5, December 12th, 2019, §3.23, referring to ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, p. 85, §5 and ECHR, *Al-Dulimi and Montana Management INC. v. Switzerland*. Judgment (merits and just satisfaction), Grand Chamber, 21 June 2016, §57.

of general international law,²²⁰ and it is also the opinion of several judges of the International Court of Justice.²²¹ Likewise, in 1978, the U.N. World Conference to Combat Racism and Racial Discrimination “drew attention to the principles of non-discrimination and self-determination as peremptory rules of international law”.²²² Furthermore, the Special Rapporteur of the former Sub-Commission on Prevention of Discrimination and Protection of Minorities, H. Gros Espiell, stated in a study that: “[t]oday, no one can dispute the fact that, in the light of contemporary international realities, self-determination undoubtedly has the value of *jus cogens*.”²²³

Last but not least, the African Union itself recognized self-determination as a norm of *jus cogens*. Its written statement in the Advisory Opinion about Chagos Archipelago, the AU evokes a “cardinal principle of International Law”, representing a “*jus cogens*” norm.²²⁴ Furthermore, this has not been exclusively recognized by International Law Commission and the African Union. Indeed, a lot of States argue that this right is a peremptory norm.²²⁵

Consequently, as *jus cogens* norm, the self-determination right triggers legal obligations for States.

II. Individual/collective legal obligation to defend

The Defendant States, even though they are not immediate cause of the violation of the rights of the Western Sahara’s people, have a responsibility. Indeed, the violated rights in this situation are specific rights, which imply specific obligations at the expense of third States. Defendants are then exposed to specific obligations, on behalf of the requirements of the African Union (A), but also because the nature of right to self-determination implies several obligations for third States (B).

A. Special obligations for member States of African Union

The Constitutive Act of UA lists the principles and objectives of the Union, giving essential guidance about how member States should behave. Amongst others, it refers to solidarity between States in order to promote peace, security and stability and fundamental rights,²²⁶

²²⁰ Arbitration Commission of the Conference for Peace in the Former Yugoslavia, Opinion n°1, November 29th, 1991.

²²¹ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *op cit*, p.153 and p. 199.

²²² Separate opinion of Judge Cançado Trindade, in I.C.J., *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory opinion, February 25th, 2019, I.C.J Reports 2019, §125.

²²³ Gros Espiell (H.), *The Right to self-Determination Implementation of United Nations Resolutions*, document des Nations Unies E/CN.4/Sub.2/405/Rev.1 (1980), NY, ONU, 1980, p. 11, §73 to 74 [our traduction]. See also §71 : he recalled that the *travaux préparatoires* of the Vienna Convention on the Law of Treaties of the International Law Commission, in which it had been mentioned that the right to self-determination should be cited as an example in the article on *jus cogens*.

²²⁴ Written statement of the African Union, ICJ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, §69: “No one can now dispute that the right of peoples to self-determination expressed for the first time in the 19th century is a cardinal principle of international law, and as such constitutes a peremptory norm (*jus cogens*)” [our traduction], §252.

²²⁵ Separate opinion of Judge Cançado Trindade, in I.C.J., *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory opinion, February 25th, 2019, I.C.J Reports 2019, §129.

²²⁶ Article 3 Constitutive Act of UA “The objectives of the Union shall be to: (a) achieve greater unity and solidarity between the African countries and the peoples of Africa; (b) defend the sovereignty, territorial integrity and independence of its Member States; [...] (f) promote peace, security, and stability on the continent; (g) promote democratic principles and institutions, popular participation and good governance; (h) promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instrument”.

and to principles such as sovereignty, equality and independence.²²⁷ Furthermore, one of the objectives in the UA is to “*promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments*”.²²⁸ So, it is necessary to link these obligations to the African Charter, and read the obligations in conjunction with it.²²⁹ Consequently, as the African Charter requires from the States that they respect the duties enshrined in the text by adopting measures,²³⁰ and as the Article 20 of the Charter provides the right to self-determination,²³¹ the Member States have an individual and collective obligation to act in solidarity to promote and protect the right to self-determination and, in doing so, the principles of sovereignty, equality and independence.

Even more so, the OAU Assembly of Heads of State and Government has adopted a resolution²³² on the question of Western Sahara. It took note of the advisory opinion given by the ICJ with respect to the principle of the right of the people of Western Sahara to self-determination and reaffirmed the responsibility of the OAU with regard to the search of a fair and peaceful solution in conformity with the principles of the OAU and UN Charters. Furthermore, it called upon all the States of the region to refrain from taking all actions likely to hamper the search of a fair and peaceful solution to this problem. As a successor of the OAU, the AU over the years has maintained the same principled stand. In that sense, in the Declaration of 50th Anniversary Solemn Declaration of African Union, it pledges to “*the completion of the decolonization process in African; to protect the right to self-determination of African peoples still under colonial rule [...] and resist all forms of influences contrary to the interest of the continent*”.²³³

Last, the Charter of the United Nations provides legal obligation for States in order to protect self-determination right.²³⁴ As member State of United Nations, the Defendant States are also committed to this obligation.

²²⁷ Article 4 Constitutive Act of UA: “*The Union shall function in accordance with the following principles: (a) sovereign equality and interdependence among Member States of the Union; (b) respect of borders existing on achievement of independence; (c) peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly; (d) prohibition of the use of force or threat to use force among Member States of the Union; (e) non-interference by any Member State in the internal affairs of another; (f) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity; (g) peaceful co-existence of Member States and their right to live in peace and security; (h) the right of Member States to request intervention from the Union in order to restore peace and security; (i) respect for democratic principles, human rights, the rule of law and good governance; (j) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; (k) condemnation and rejection of unconstitutional changes of governments.*”

²²⁸ Article 3 (h) Constitutive Act of UA.

²²⁹ ACtHPR, *Peter Joseph Chacha c. Tanzanie* (recevabilité) (2014), 1 RJCA p. 413, §124; *Abubakari c. Tanzanie* (fond) (2016), 1 RJCA p. 624, §51 ; *Onyango Nganyi et autres c. Tanzanie* (fond) (2016), 1 RJCA p. 526, §79.

²³⁰ Article 1 African Charter on Human and Peoples’ Rights “*The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them*”.

²³¹ Article 20 African Charter : “*1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.*

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural”.

²³² OAU Resolution 92 (XV), *Assembly of Heads of State and Government*, from 18 to 22 July 1978.

²³³ Declaration of 50th Anniversary Solemn Declaration, §B(i).

²³⁴ Article 56 Charter of United Nations: “*All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55 [respect for the principle of equal rights and self-determination of peoples]*”.

The Western Sahara's situation must be considered in light of these duties. The member States of the UA have the obligation to protect fundamental rights, which implies protection of Western Sahara's right to self-determination. Consequently, the Defendants individually and collectively are under a "*legal obligation to defend the sovereignty, territorial integrity and independence*". This obligation is enshrined in treaties such as the Constitutive Act, the African Charter, the UN Charter. Furthermore, it arises from the specific nature of the right to self-determination.

B. Special obligations to defend the right to self-determination

The special obligations required from the State are triggered by the special nature of the obligation to protect the self-determination right (1), and its *jus cogens* value (2).

1. Legal obligation arising from the special nature of the self-determination right

The right to self-determination has a special nature, justifying a special obligation for the contracting parties, even when they are not the ones committing the internationally wrongful act. It is indeed widely recognized – and it will be discussed in Issue 3 - that self-determination right implies *erga omnes* obligations and that States have legal obligations to take legal action in order to protect this right effectively.²³⁵

Thus, the common article of the International Covenants provides special obligation for Member State,²³⁶ which have been specified by the Committees.²³⁷ As a matter of fact, the HRC stated that every member State has legal interest in other States respect of their obligations, and this because "*rules about fundamental rights are erga omnes obligations*".²³⁸ It also explained that obligations from the International Covenant are required for every member State "*considered as a whole.*" Furthermore, the HRC specified the content of the Article 1§3 of the International Covenant: "*Paragraph 3, in the Committee's opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination*".²³⁹ Then, these obligations have required obligations from States to defend peoples deprived of their right to self-determination, regardless of the people in question. Consequently, all States are submitted to legal obligations to protect the right to self-determination.

²³⁵ ICJ, advisory opinion, *Reservations to the convention on the prevention and punishment of the crime of genocide*, May 28th 1951. ECHR, *Ireland versus UK*, January 18th 1978. §239 "*Unlike international treaties of the classic kind, the Convention compromises more than mere reciprocal engagements between contracting states. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'*".

²³⁶ Article 1 International Covenant on Civil and Political Rights and International Covenant and Economic, Social and Cultural Rights: "*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*".

²³⁷ The Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR) have both interpreted this right on the same basis, considering that its importance justifies the scope of the obligations. The Human Rights Committee considered that the right to self-determination must be guaranteed without discrimination between citizens and foreigners, whom benefit the general obligation of non-discrimination in respect of the rights guaranteed.

²³⁸ HRC, General Comment N°31, March 29th 2004. §2.

²³⁹ HRC, General Comment N°12, 1984, §6.

These obligations regarding the violation of the right to self-determination have been specified by the ICJ. First, in the legal advisory about Namibia, the ICJ specified that States must refrain from establishing conventional relations with the occupying power, and a duty of non-recognition.²⁴⁰ Then, ICJ specified the obligation not to provide aid or assistance in maintaining the situation created.²⁴¹ This interpretation followed the interpretation set by the General Assembly in Resolution 2625²⁴² which provides an obligation for every State to promote the principle of equal rights and self-determination of peoples. Yet, *in casu*, by accepting Morocco in the African Union, the Defendants States have spread a message that Morocco respected the Union principles, and that therefore the occupation situation is not unprincipled to democracy, rule of law, and fundamental rights.

Finally, these obligations have been recognized by the African Union recently: “[i]t is evident that both the UN and AU must exercise their responsibilities and put pressure on Morocco to comply with principles of the UN and relevant international law on the right to self-determination and exploitation of natural resources. The uncertainty that has marked the issue of Western Sahara for over four decades cannot be allowed to continue”²⁴³. Therefore, the Defendants individually and collectively are “under a legal obligation to defend the sovereignty, territorial integrity and independence of Western Sahara”, because, the right to self-determination leads to States’ obligations, and its violation combined with their passivity commits their international responsibility.

2. Legal obligations arising from the *jus cogens* nature of the right

The *jus cogens* nature of this norm, demonstrated above, implies for States particular obligations, provided in the article 41 of the Draft article on Responsibility of States for Internationally Wrongful Acts.²⁴⁴ This article does not precisely define terms and conditions of cooperation, or measures to adopt, but this will be analysed in the following development for the Issue 3. However, the obligation to cooperate is required from every State, and according to the commentary of the project, a “concerted and coordinated effort by all States is required to counteract its effects”.²⁴⁵

But first, it must be demonstrated that the draft article applies to the situation in Western Sahara. Indeed, for the application of special consequences enshrined in the article 41, it must

²⁴⁰ ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1970. §§122-124.

²⁴¹ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, July 4th 2004. §159

²⁴² Resolution of the General Assembly 2625, October 24th, 1970 “The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among State”, [A/RES/2625 (XXV)]: “Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter”.

²⁴³ The office of the legal counsel and directorate for legal affairs of the African Union Commission, *Legal opinion on the legality in the context of International law, including the relevant United Nations resolutions and OAU/AU decisions, of actions allegedly taken by the Moroccan authorities or any other State, group of States, foreign Companies or any other entity in the exploration and/or exploitation of renewable and non-renewable natural resources or any other economic activity in Western Sahara*, October 15th, 2015.

²⁴⁴ Article 40: “1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation”.

Article 41: “1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law”.

²⁴⁵ Commentary of the Article 41 of Draft Article on Responsibility of States for Internationally Wrongful Acts, §3.

not only be shown that there has been a violation of a *jus cogens* norm. According to the article 40 of the draft article, the violation has to be a “*serious breach*” of a *jus cogens* norm. And, as a matter of fact, the violation of Sahrawi’s self-determination right is a serious breach, since Morocco ignored the International Community’s position for 50 years and the UN Council of Security’s request to set up a democratic referendum, as it has been demonstrated above.²⁴⁶

Thus, the illegal occupation of Western Sahara by Morocco and violation of Sahrawi’s people’s right to self-determination is a serious breach of a peremptory norm of general international law. The Defendant States have a duty to not cooperate to end the situation, not recognize the situation as legal, and to not cooperate. In other words, the Defendants have an obligation to defend the sovereignty, territorial integrity and independence of Western Sahara, that is to say, the right to self-determination of the people of Western Sahara.

Issue 2: Whether the Defendants individually and/or collectively are not under a legal obligation to prevent Morocco from further violating the HR of the people of WS to dispose of their wealth and natural resources, to their economic, social and cultural development and peace guaranteed by Articles 19, 21, 22, 23 and 24 of the ACHPR, and similar provisions in common Article 1 of both the ICCPR and of the ICESCR.

The UN particularly acknowledges the right of peoples to self-determination, which can be found in explicit provisions of the San Francisco Charter,²⁴⁷ and was subsequently taken up in several General Assembly²⁴⁸ resolutions, as well as by the International Court of Justice.²⁴⁹ However, we have seen that, despite the wide recognition of Western Sahara’s right to self-determination by the international community, this right has not been respected, for the time being. Therefore, to find whether the defendants are “*under a legal obligation to prevent Morocco from further violating the human rights of the people of Western Sahara to dispose of their wealth and natural resources and of their economic, social and cultural development and right to peace guaranteed by Articles 19, 21, 22, 23 and 24 of the ACHPR, and similar provisions in common Article 1 of both the ICCPR and of the ICESCR*”, it will first have to be found to what extent the infringement of the right to self-determination entails an infringement

²⁴⁶ The followings Resolution of the UN Council of Security addressed the situation in Western Sahara and called for a referendum: For instance the following resolutions of the UN Security Council : 658 (1990), 690 (1991), 1359 (2001), 1429 (2002), 1495 (2003), 1541 (2004), 1570 (2004) , 1598 (2005), 1634 (2005), 1675 (2006), 1720 (2006), 1754 (2007), 1783 (2007), 1813 (2008), 1871 (2009), 1920 (2010), 1979 (2011), 2044 (2012), 2099 (2013), 2152 (2014), 2218 (2015), 2285 (2016), 2351 (2017), 2414 (2018), 2440 (2018), 2468 (2019).

Concluding observation on report submitted by Morocco, 82nd session, December 1st 2004: the HRC expressed “*concern at the lack of progress on the issue of the implementation of the right to self-determination of the people of Western Sahara*”. In the same spirit, a decision of the Peace and Security Council of the AU, was adopted during its 496th meeting held on 27 March 2015 & the decision of the Peace and Security Council at its 588th meeting held on 6 April 2016, which called on the Commission to undertake, as soon as possible, a mission to Western Sahara and to the refugee camps in Tindouf, to assess the human rights situation and make recommendations to the Peace and Security Council (PSC).

²⁴⁷ Article 1§2 of the UN Charter: “[*The purposes of the United Nations are*] *To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace* » and Article 55 « *With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote [...] conditions of economic and social progress and development ; (...)universal respect for, and observance of, human rights and fundamental freedoms for all*”.

²⁴⁸ I.'UNGA resolutions n°1514, 1654 and 2189.

²⁴⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21st June 1971, I.C.J. Reports 1971, pp. 33-34, §§ 58 and 59. *Western Sahara*, Advisory Opinion, October 16th, 1975, I.C.J. Reports 1975, pp. 31-22 §§ 54-59. Through these advisory opinions, the Court has completed important stages in the evolution of the law of peoples under foreign domination (P. Dupuy, Y. Kerbrat, *Droit international public*, Dalloz, Précis, September 2016, pp. 49-50).

of the rights mentioned (I), and, then, it will have to be deduced what are the consequences in terms of the obligations incumbent on the respondent States (II).

I. The interdependence of the rights in question, a source of composite violation

The right of people to self-determination had initially been associated with the principle of self-determination in the context of the decolonization process. For this reason, it is “*indivisible*”, “*interdependent*” and “*interrelated*”²⁵⁰ with the right to dispose of one's resources (A),²⁵¹ from which also derives the right to development, other economic and social rights, and the right to peace (B).

A. The interdependence of the right of people to self-determination and sovereignty over resources

In the light of international texts and case law, the right of peoples to self-determination is linked to the right of peoples to dispose of their resources. It is possible to find this declination of the right of peoples at the political and economic levels in common Article 1 of the ICCPR and ICESCR,²⁵² since the first paragraph enshrines the right to self-determination, while the second declares that all peoples have the right to dispose of their natural resources. The two rights are combined in a single article and their interdependence is explicit. The Human Rights Committee, in its General Comment No. 12 of 1984, also stressed that Article 1 of the ICCPR protects an “*inalienable right of all peoples*”.²⁵³ In the same logic, Article 25 of the ICESCR establishes a safeguard clause in favour of the “*inherent right of all peoples*” over their natural resources.²⁵⁴

Moreover, the interdependence of self-determination and sovereignty over resources is reflected in the African Charter, since Article 20²⁵⁵ is logically followed by Article 21.²⁵⁶ The

²⁵⁰ Vienna Declaration on Human Rights and Program of Action, 1993, §5: “*All human rights are universal, indivisible and interdependent and interrelated.*”

²⁵¹ ACHPR, *Social and Economic Rights Action Center, Center for Economic and Social Rights v. Nigeria*, Communication 155/96, October 13, 2001, §56: “*The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.*”

²⁵² Article 1 §1§2 ICCPR & ICESCR: “*1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. 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.*”

²⁵³ Complete quote: “*Article 1 enshrines an inalienable right of all peoples, as defined in paragraphs 1 and 2 of that article. By virtue of this right, peoples freely determine their political status and freely pursue their economic, social and cultural development. The article imposes on all States the obligations corresponding to this right. This right, and the corresponding obligations relating to its implementation, are indivisible from the other provisions of the Covenant and from the rules of international law.*”

²⁵⁴ Article 25 of the ICESCR: “*Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.*”

²⁵⁵ Article 20 of the African Charter on Human and Peoples' Rights: “*All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. 3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.*”

²⁵⁶ Article 21 of the African Charter on Human and Peoples' Rights: “*All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. [...] The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting*

African Commission in 2001 thus implicitly linked self-determination and the right to resources, recalling the extent of the ravages of colonialism in Africa²⁵⁷ and the need to put an end to "modern" translations of this phenomenon by recognising the right of communities to enjoy their natural resources.²⁵⁸ Also, the first three sections of the Universal Declaration on the Rights of Peoples²⁵⁹ indirectly mention the link between the "inalienable" right to self-determination and the exclusive right to natural resources. Thus, the exploitation of the natural resources of an occupied territory comes up against the exercise of the right to self-determination. Finally, this principle is also found under the term of permanent sovereignty over resources as set out in UNGA Resolution No. 1803, which qualifies it as "*a fundamental element of the right of peoples and nations to self-determination*".

Consequently, the interdependence of the right to self-determination and sovereignty over resources is widely known in international law. This may have led the Advocate General of the CJEU to state: "*having been concluded by Morocco on the basis of the unilateral integration of Western Sahara into its territory and the assertion of its sovereignty over that territory, the Saharawi people have not freely disposed of their natural resources, as required by the right to self-determination*".²⁶⁰ Thus, the CJEU declared the fisheries agreement signed between Morocco and the EU "invalid", recalling the ICJ advisory opinion on Western Sahara.²⁶¹

In conclusion, the right of peoples to freely dispose of natural resources is not an autonomous right but is directly related to the right to self-determination. Thus, the indivisibility and interdependence of these two collective rights imply that the infringement of one can lead to the infringement of the other. The responsible State would thus be committing a composite violation.²⁶² Consequently, obligations arising from the violation of the right of peoples to self-determination - which are special because of its value as a peremptory norm and because of the *erga omnes* obligations it entails - also apply to the violation of the right of peoples to their natural resources.

In other words, if the Court were to recognise that it is incumbent on the Defendant States to defend the Saharan people's right to self-determination, it would necessarily come to specify their obligations to prevent future violations of the right of the people of Western Sahara to dispose of their wealth and natural resources.

Moreover, the indivisibility of human rights is not limited to the relationship between self-determination and sovereignty over resources: the rights to economic, social and cultural development and peace of the guaranteed by Articles 19, 21, 22, 23 and 24 of the ACHPR, and similar provisions in common Article 1 of both the ICCPR and of the ICESCR are intrinsically linked to the right to resources.

international economic cooperation based on mutual respect, equitable exchange and the principles of international law".

²⁵⁷ ACHPR, *Social and Economic Rights Action Center v. Nigeria*, October 13rd -27th, 2001, n° 155/96, §56.

²⁵⁸ L. Hennebel, H. Tigroudja, *Traité de Droit International des Droits de l'Homme*, 2nd edition, Pedone, 2018, p.1088.

²⁵⁹ Universal declaration of the rights of Peoples, 1974, Section I ; II ; III.

²⁶⁰ CJEU, *Press Release No 1/18, Luxembourg, 2018*, Opinion of the Advocate General in Case C-266/16, *The Queen et Western Sahara Campaign/Secretary of State for Environment, Food and Rural Affairs et Commissioners for Her Majesty's Revenue and Customs*.

²⁶¹ CJEU, *Council versus Front Polisario*, n° C-104/16, 2016, §104.

²⁶² Article 15 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001: "1. *The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.* 2. *In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.*"

B. The interdependence of sovereignty over resources, the right to development, economic and social rights and the right to peace

As seen above, the indivisibility between the right of peoples to self-determination and the right to dispose of resources undeniably entails a correspondence between the violations committed of these rights respectively. However, this relationship of interdependence is not confined to these elements alone. This is due to the fact that the right to self-determination in its internal dimension, as noted by the CERD,²⁶³ places on States a number of obligations relating to the political, economic, cultural and social development of peoples,²⁶⁴ thus raising the question of natural resources.²⁶⁵ Thereupon, with regard to the peoples of colonised or non-self-governing territories such as Western Sahara, there is a distinction between activities that may harm the populations of the territory in question - depriving them of their right to dispose of their natural resources, in violation of the Charter of the United Nations²⁶⁶ - and those carried out in their interest.²⁶⁷ In other words, regardless of who has permanent sovereignty over natural resources, their exploitation is consistent with international law only if it is carried out for the benefit of the people concerned and with a view to their development.

Thus, the Declaration on the Right to Development expressly links the right to development to the right to self-determination.²⁶⁸ Besides, CERD recalls "*the right of all peoples to freely pursue their economic, social and cultural development without external interference*".²⁶⁹ In addition, Article 19 of the African Charter states that nothing can justify the domination of one people by another.²⁷⁰ In *Sudan Human Rights Organization on Housing Rights and Eviction v. Sudan*, the African Commission emphasizes the importance of recognizing the right to equality for all peoples, while diversity should not be seen as a source of conflict.²⁷¹

²⁶³ CERD, General Recommendation 21, *The right to self-determination*, 48th session, 1996, §9.

²⁶⁴ Vienna Declaration on Human Rights and Program of Action, 1993, §8 : . "*Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.*"

²⁶⁵ L. Hennebel, H. Tigroudja, *Traité de Droit International des Droits de l'Homme*, 2nd edition, Pedone, 2018 p.1092.

²⁶⁶ Article 1 UN Charter: 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; 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; 3. To achieve international cooperation 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 4. To be a center for harmonizing the actions of nations in the attainment of these common ends.* Article 55 UN Charter : *With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.*

²⁶⁷ ICJ, *Armed activities on the territory of Congo*, December 19th, 2005 §237-250 ; General Assembly resolution 1803 (XVII) of December 14th, 1962, "Permanent sovereignty over natural resources", §1.

²⁶⁸ Article 1 of the Declaration on the Right to Development Adopted by General Assembly resolution 41/128 of December 4th, 1986: "*1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.*"

²⁶⁹ CERD, General Recommendation No. 21, *The right to self-determination*, 48th session, 1996.

²⁷⁰ Article 19 African Charter on Human and Peoples' Rights: "*All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.*"

²⁷¹ ACHPR, *Sudan Human Rights Organization, Centre on Housing Rights and Evictions v. Sudan, Soudan*, 279/03-296/05, May 27th, 2009.

Likewise, Articles 22²⁷² and 24²⁷³ of the African Charter refer to the right of peoples to development in an atmosphere of solidarity and participation in a common global objective. According to the African Commission, Article 24 "requires the state to take reasonable and other measures [...] to secure an ecologically sustainable development and use of natural resources".²⁷⁴ Article 23²⁷⁵ of the African Charter and Article 73 of the United Nations Charter²⁷⁶ stress the need for individual development and the strengthening of peace. Hence, in *Sudan Human Rights Organization on Housing Rights and Eviction v. Sudan*, the African Commission refers to the right to economic, social and cultural development as a collective right of a people.²⁷⁷ Moreover, the Commission has clearly inferred a violation of the right to development from the right to free disposal of resources in the *Democratic Republic of Congo/Burundi, Rwanda, Uganda* case in 2003²⁷⁸ and in the *Centre for Minority Rights Development* case.²⁷⁹

Ultimately, it is clear from the texts and case law that Articles 19 (equality of peoples), 21 (right to resources), 22 (economic social and cultural development), 23 (peace and security) and 24 (enabling environment for development) of the Charter are inextricably linked to the right of peoples to self-determination. The right of a people to freely dispose of its resources is thus presented as a right that is a condition²⁸⁰ for the effective implementation of the collective rights of the Charter, and failure to respect the right of the people of Western Sahara to self-determination is likely to constitute an infringement of their rights guaranteed in Articles 19, 21, 22, 23 and 24 of the ACHPR, and similar provisions in common Article 1 of both the ICCPR and of the ICESCR. Having established this, it is necessary to consider whether the obligations of States in case of a violation of the right to self-determination apply equally to related violations, due to the composite nature of the wrongful act, or whether the obligations of States differ.

²⁷² Article 22 of the African Charter on Human and Peoples' Rights: "1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

²⁷³ Article 24 of the African Charter on Human and Peoples' Rights: "All peoples shall have the right to a general satisfactory environment favorable to their development."

²⁷⁴ ACHPR, *Social and Economic Rights Action Center, Center for Economic and Social Rights c. Nigeria*, Communication 155/96, §52: "The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources".

²⁷⁵ Article 23§1 of the African Charter on Human and Peoples' Rights: "All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States."

²⁷⁶ Article 73 of the United Nations Charter: "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".

²⁷⁷ Extract from the African Commission's decision, 13th -27th May 2009, §218.

²⁷⁸ Communication 227/99 - D. R. Congo / Burundi, Rwanda and Uganda: "The Commission therefore finds the illegal exploitation/looting of the natural resources of the complainant state in contravention of Article 21 of the African Charter [...] The deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation – their right to their economic, social and cultural development and of the general duty of States to individually or collectively ensure the exercise of the right to development, guaranteed under Article 22 of the African Charter", §94-95.

²⁷⁹ ACHPR, *Centre for Minority Rights Development*, n°276/03, February 4th, 2010, §§252-298.

²⁸⁰ M. Ailicai, S. Lavorel, « Exploitation des ressources naturelles et protection des droits de l'homme », *Pedone*, 2013, p.51.

II. States' obligations to prevent future violations

Under international law, States can have an obligation to act to prevent the commission of an act that may constitute a violation. In that respect, in international human rights law, the positive obligation of States to "ensure respect" has a primary role in preventing possible future violations (A). Moreover, the violation of the right to self-determination, as a norm of *jus cogens*, entails particular obligations on States (B).

A. Positive obligations of States under the African Charter

According to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among State, "[e]very State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination" and "peoples [resisting against forcible actions] are entitled to seek and to receive support in accordance with the purposes and principles of the Charter."²⁸¹ Furthermore, the ICJ affirmed the right to political self-determination of the peoples of the occupied territories, adding that UN Member States had an obligation to recognize the illegality of the occupation. Therefore, under international law, a situation of violation of the right to self-determination imposes obligations on third States.²⁸²

The African Charter itself imposes positive obligations on States, which must assist peoples in their struggle for liberation. (Article 20§3),²⁸³ exercise individually and collectively the right of free disposal of natural wealth and resources (Article 21§4)²⁸⁴ and ensure, individually or in cooperation, the exercise of the right to development (Article 22§2).²⁸⁵ It is clear from the terms used that these obligations to cooperate are positive obligations, which imply more than mere abstention.

The Committee on Economic and Social Rights has thus defined the obligations to "respect, implement" which the African Commission has used for establishing its typology of States' obligations under the African Charter.²⁸⁶ In particular, the African Commission has developed jurisprudence in line with the theory of positive obligations²⁸⁷: a violation of the Charter under may result from the failure of national authorities to act or because of their passivity. In this sense, the case *Legal Resources Foundation v. Zambia* mentions this notion of positive obligation: "[i]n addition, the Commission is mindful of the positive obligations incumbent on State Parties to the Charter in terms of Article 1 not only to 'recognise' the rights under the

²⁸¹ Resolution of the General Assembly 2625, October 24th, 1970, "The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among State", [A/RES/2625 (XXV)], pp. 123-234.

²⁸² ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia, §117-119, 21/06/71.

²⁸³ Article 20§3 of the African Charter on Human and Peoples' Rights: "All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."

²⁸⁴ Article 21§4 of the African Charter on Human and Peoples' Rights: "States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity."

²⁸⁵ Article 22§2 of the African Charter on Human and Peoples' Rights: "States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

²⁸⁶ ACHPR, *Social and economic Rights Action Center, Centre for Economic and social Rights / Nigeria*, 13rd -27th October 2001, n° 155/96, §44-47 and f.

²⁸⁷ R. Illa Maikassoua, « La Commission africaine des droits de l'homme et des peuples », *Karthala*, 2013, p.140.

Charter but to go on to 'undertake to adopt legislative or other measures to give effect to them'.²⁸⁸

It should be pointed out here that positive obligations are attached to Article 1 of the Charter and that it is therefore not necessary for clauses such as those mentioning the duty to provide assistance (Article 20§3)²⁸⁹ and to exercise the right (Articles 21§4 and 22§2)²⁹⁰ to be included. In other words, all the rights enshrined in the Charter require action by the state to ensure that these rights are effectively respected.²⁹¹ Moreover, while positive obligations are generally for the States concerned and for the benefit of the persons under their jurisdiction, they may also exist between states.²⁹²

Therefore, it follows from the letter of the African Charter, and from the African organs' interpretation of the positive obligations of States, that the Defendant States may be required to prevent future violations of the rights held by the Saharawi people under Articles 19, 21, 22, 23 and 24 of the ACHPR, and similar provisions in common Article 1 of both the ICCPR and of the ICESCR.

B. Obligations of third States arising from the violation of a *jus cogens* norm

As stated in Issue 1, the right of peoples to self-determination is a *jus cogens* norm,²⁹³ the violation of which entails special obligations towards third States, including the obligation to cooperate to end the violation,²⁹⁴ as we will see in Issue 3. However, we have seen that the alleged violations may constitute a composite violation because of the interdependence of the rights involved. Since a violation of one may lead to a consequent violation of the other, the obligation to cooperate, that applies to one, should apply equally to the other. This interpretation is also consistent with the African Commission's interpretation of Article 1 of the African Charter, which: "*imposes a general obligation on all States parties to recognise the rights enshrined therein and requires them to adopt measures to give effect to those rights*".²⁹⁵

In conclusion, with regard to the letter and the interpretation of the legal documents and with the generally accepted principles of international law, the States are individually and collectively "*under a legal obligation to prevent Morocco from further violating the human rights of the people of Western Sahara to dispose of their wealth and natural resources and of their economic, social and cultural development and right to peace guaranteed by Articles 19, 21,*

²⁸⁸ ACHPR, *Legal resources foundation v. Zambia*, May 7th, 2001, 211/98, §62.

²⁸⁹ Article 20§3 of the African Charter on Human and Peoples' Rights: "*All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.*"

²⁹⁰ Article 21§4 of the African Charter on Human and Peoples' Rights: "*States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.*"

; Article 22§2 of the African Charter on Human and Peoples' Rights: "*States shall have the duty, individually or collectively, to ensure the exercise of the right to development.*"

²⁹¹ "*Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights, both civil and political rights and social and economic, generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties*", ACHPR, *Social and Economics Rights Action Center v. Nigeria*, October 13th-27th, n° 155/96, §57. See also ACHPR, *Association of Victims of Post Electoral Violence & INTERIGHTS / Cameroon*, 272/03, November 25th, 2009, §93-121.

²⁹² L. Hennebel, H. Tigroudja, *Traité de Droit International des Droits de l'Homme*, 2nd edition, Pedone, 2018, p. 664.

²⁹³ Article 40 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001.

²⁹⁴ Article 41§1 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001.

²⁹⁵ ACHPR, *Sudan Human Rights Organization on Housing Rights and Eviction v. Sudan*, 279/03-296/05, May 27th, 2009, §227.

22, 23 and 24 of the ACHPR, and similar provisions in common Article 1 of both the ICCPR and of the ICESCR”.

Issue 3: Whether the defendant individually and/or collectively are not under a legal obligation to call an emergency session of the Assembly of the African Union and to sponsor a resolution for the adoption of legal, political and other measures by the African Union to restrain Morocco from further occupying parts of the territory of Western Sahara in any manner whatsoever and howsoever.

African normative instruments do not provide any explicit obligation incumbent on Member States of the African Union “to call an emergency session of the Assembly of the African Union and to sponsor a resolution for the adoption of legal, political and other measures”. However, international law does provide an obligation to act to “refrain Morocco from further occupying parts of the territory of Western Sahara in any manner whatsoever and howsoever” (I) and, additionally, it specifies measures that may be taken by Member States of the African Union to comply with their obligation to act (II).

I. The obligation to act of the member States of the African Union

As stated in Issue One, States are under an obligation to act regarding the violation of *erga omnes* norms (A) as well as *jus cogens* norms (B). Thus, the ICJ and the African Union have had the opportunity to specify the form that these obligations may take.

A. Obligations incumbent upon third States as a result of the violation of *erga omnes* norms

The ICJ considered in its judgement *Barcelona Traction, Light and Power Company, Limited*, that, in view of the importance of certain rights, “all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”²⁹⁶ The Court then stated in the *East Timor (Portugal v. Australia)* judgment that “the right of peoples to self-determination [...] has an *erga omnes* character.”²⁹⁷

Thus, the right of peoples to self-determination, a right *erga omnes*, entails an interest in acting for third States through collective action but also an obligation to act in relation to those third States. Indeed, the African Union has clearly stated that interest and obligation to act are intertwined with regard to the right of peoples to self-determination, in its written statement submitted to the ICJ in the context of the request for an advisory opinion on the *Legal Effects of the Separation of the Chagos Archipelago from Mauritius* in 1965. The African Union stated in this regard that the *erga omnes* character of the right of peoples to self-determination makes third States and international organizations responsible for ensuring respect for this right.²⁹⁸

²⁹⁶ ICJ, *Barcelona Traction, Light and Power Company, Limited*, Judgment, February 5th, 1970, I.C.J. Reports 1970, p. 3, §33.

²⁹⁷ ICJ, *East Timor (Portugal v. Australia)*, Judgment, June 30th, 1995, I.C.J. Reports 1995, §29. See also: ICJ, *South West Africa*, Judgment, July 18th, 1966, I.C.J. Reports 1966, §88; F. Voefray, « L'« actio popularis » ou la défense de l'intérêt collectif devant les juridictions internationales », *Graduate Institute Publications*, 2004.

²⁹⁸ ICJ, *Legal Consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, Request for Advisory Opinion, Written statement of the African Union, March 1st, 2018, §69. Complete quote: “It is no longer a matter of dispute in international law, that the right of peoples to self-determination –first expressed in the nineteenth century– is a cardinal principle

Furthermore, the ICJ has clarified in its jurisprudence which obligation to act lies on third States as a result of the violation of obligations *erga omnes*. In the case of the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, the ICJ held that the South African presence in Namibia is opposable “to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law.”²⁹⁹ It concluded that the creation of the illicit situation due to the South African presence in Namibia results in an obligation for third States to “recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.”³⁰⁰

Thus, it follows, regarding the illegality of Morocco's presence in Western Sahara, that the obligation to recognize the illegality of Morocco's presence, as well as the obligation to refrain from any act that would imply the recognition of the legality of such presence, rest on the member States of the African Union. And yet, the decision to admit Morocco as a new member of the African Union at the 28th ordinary session of the Assembly of the African Union is an act that constitutes aid or assistance to Morocco with regard to its illegal presence in Western Sahara. In this regard, as stated by the office of the legal counsel and directorate for legal affairs of the African Union Commission in a legal opinion: “Member States of the UN and their companies are under obligation [...] to refrain from helping in the perpetuation or legitimization of the colonial situation in Western Sahara [...] and should therefore refrain from entering into agreements/contracts with Morocco as the occupying Power.”³⁰¹ Similarly, the members of the African Union have the obligation to refrain from adopting acts that would legitimize the presence of Morocco in Western Sahara.

Moreover, in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ stressed that obligations are imposed on third States as a result of the fact that “the obligations violated by Israel include certain obligations *erga omnes*”.³⁰² The Court recognizes as obligations *erga omnes* violated by Israel “the obligation to respect the right of the Palestinian people to self-determination”.³⁰³ Consequently, the Court has identified three kinds of obligations for third States: “obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory [...], obligation not to render aid or assistance in maintaining the situation created by such construction, [...] [obligation] to ensure compliance by Israel with international humanitarian law as embodied in [the Geneva Convention].”³⁰⁴ Thus, the ICJ recalls the obligation imposed on States parties to the Geneva Convention relative to the Protection of

in modern international law, regarded as jus cogens. This erga omnes character means that the right to self-determination entails a corresponding duty on the part of all States and international organizations to enforce this right.”

²⁹⁹ ICJ, *Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion, June 21st, 1971, I.C.J. Reports 1971, §126.

³⁰⁰ ICJ, *Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, advisory opinion, June 21st, 1971, I.C.J. Reports 1971, §133.

³⁰¹ The office of the legal counsel and directorate for legal affairs of the African Union Commission, *Legal opinion on the legality in the context of International law, including the relevant United Nations resolutions and OAU/AU decisions, of actions allegedly taken by the Moroccan authorities or any other State, group of States, foreign Companies or any other entity in the exploration and/or exploitation of renewable and non-renewable natural resources or any other economic activity in Western Sahara*, October 15th, 2015, §72.

³⁰² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, July 9th, 2004, I.C.J. Reports 2004, §155.

³⁰³ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, July 9th, 2004, I.C.J. Reports 2004, §155.

³⁰⁴ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, July 9th, 2004, I.C.J. Reports 2004, §159.

Civilian Persons in Time of War to ensure respect by Israel for international humanitarian law. Similarly, in the present case, the States parties to the Constitutive Act of the African Union and the African Charter on Human and Peoples' Rights have an obligation to ensure respect for these instruments. This follows from the fact that the States parties to the treaties are subject, under the *pacta sunt servanda* principle, to the binding nature of international legal obligations, as well as to the obligation to fulfill these obligations in good faith.³⁰⁵ Consequently, it is up to the States Parties to these instruments to ensure that they are respected, in particular with regard to articles 3³⁰⁶ and 4³⁰⁷ of the Constitutive Act of the African Union as well as articles 20³⁰⁸ and 21³⁰⁹ combined to article 1³¹⁰ of the African Charter of Human and Peoples' Rights. As the African Court has repeatedly affirmed in its jurisprudence,³¹¹ one of the objectives of the Union is to protect the rights of peoples in accordance with Article 21 of the African Charter on Human and Peoples' Rights and Articles 3 and 4 of the Constitutive Act. In this regard, the office of the legal counsel and directorate for legal affairs of the African Union Commission has stated that the African Union must exercise its responsibility and put pressure on Morocco to comply with the relevant mechanisms relating to the right to self-determination and the exploitation of natural resources.³¹² Therefore, the member states of the African Union have an obligation to act in order to ensure respect for the right of peoples to self-determination.

B. Obligations incumbent upon third States as a result of the violation of *jus cogens* norms

The ICJ held in its *East Timor (Portugal v. Australia)* judgment that “the principle of self-determination of peoples is [...] one of the essential principles of contemporary international

³⁰⁵ C. Binder, and J. Hofbauer, “The Pacta Sunt Servanda Principle or the Limits of Interpretation - The Gabčíkovo-Nagymaros Case Revisited”, May 6th, 2019, p.5.

³⁰⁶ Article 3 of the Constitutive Act of the African Union: “The objectives of the Union shall be to (a) achieve greater unity and solidarity between the African countries and the peoples of Africa ; (b) defend the sovereignty, territorial integrity and independence of its Member States , (f) promote peace, security, and stability on the continent.”

³⁰⁷ Article 4 of the Constitutive Act of the African Union: “The Union shall function in accordance with [...] (a) sovereign equality and interdependence among Member States of the Union, (b) respect of borders existing on achievement of independence, (e) peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly, (f) prohibition of the use of force or threat to use force among Member States of the Union, (g) non-interference by any Member State in the internal affairs of another, (m) respect for democratic principles, human rights, the rule of law and good governance.”

³⁰⁸ Article 20 of the African Charter of Human and Peoples' Rights: “1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. ; 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. ; 3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.”

³⁰⁹ Article 21 of the African Charter of Human and Peoples' Rights: “1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. ; 2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. ; 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. ; 4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity. ; 5. State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.”

³¹⁰ Article 1 of the African Charter of Human and Peoples' Rights: “The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.”

³¹¹ ACtHPR, *Peter Joseph Chacha v. United Republic of Tanzania*, Judgment, March 28th, 2015, 1 RJCA 413, §124 ; ACtHPR, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment, June 3rd, 2016, 1 RJCA 624, §51 ; ACtHPR, *Wilfred Onyango Nganyi and 9 others v. United Republic of Tanzania*, Judgment, March 18th, 2016, 1 RJCA 526, §79.

³¹² The office of the legal counsel and directorate for legal affairs of the African Union Commission, *Legal opinion on the legality in the context of International law, including the relevant United Nations resolutions and OAU/AU decisions, of actions allegedly taken by the Moroccan authorities or any other State, group of States, foreign Companies or any other entity in the exploration and/or exploitation of renewable and non-renewable natural resources or any other economic activity in Western Sahara*, October 15th, 2015, §66.

law".³¹³ The African Union, for its part, has affirmed that the right of peoples to self-determination "*is a cardinal principle in modern international law, regarded as jus cogens.*"³¹⁴ And, as we have seen, the *jus cogens* character of the right of peoples to self-determination imposes specific obligations on the international community as a whole : some are positive obligations, others are negative obligations.³¹⁵

Thus, article 41, paragraph 1 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, provides that "*States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.*" It imposes a positive obligation to cooperate in order to terminate. The provision does not specify the form that such cooperation should take, but the commentary states that it could be organized within the framework of a competent international organization, such as the African Union. In any case, in the face of serious violations, a concerted and coordinated effort by all States, whether or not they have been directly affected by the serious violation, is required to counteract its effects. International law establishes a positive duty of cooperation in this regard.³¹⁶ Indeed, the duty of cooperation between States "*is not a mere political gesture of goodwill, but a legal imperative of good faith. There is a close link between the duty to cooperate and the commitment to honor in good faith the obligations entered into under the Charter.*"³¹⁷ In addition to this, under international human rights law too, there is also an obligation to cooperate. Indeed, the European Court of Human Rights, in its judgment *Ireland v. UK*, considered that the Convention, and more broadly the instruments for the protection of human rights, create "*over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'.*"³¹⁸

On the other hand, article 41, paragraph 2, states that "*No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.*" In this respect, States have a duty of abstention which consists of two distinct obligations. The second of these obligations prohibits States from providing aid or assistance for the maintenance of any situation created by a serious breach within the meaning of article 40.³¹⁹ The first of these obligations imposes on the international community as a whole the collective non-recognition of the lawfulness of situations created by a serious violation within the meaning of article 40. This obligation applies in the case of "situations" created by such violations, such as, for instance, the attempt to acquire sovereignty over a territory through the denial of the right of peoples to self-determination. It

³¹³ ICJ, *East Timor (Portugal v. Australia)*, judgment, June 30th, 1995, I.C.J. Reports 1995, §29.

³¹⁴ ICJ, *Legal Consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, I.C.J., Request for Advisory Opinion, Written statement of the African Union, March 1st, 2018, §69. Complete quote: "*It is no longer a matter of dispute in international law, that the right of peoples to self-determination –first expressed in the nineteenth century– is a cardinal principle in modern international law, regarded as jus cogens.*"

³¹⁵ Article 40 of the Draft articles on Responsibility of States for Internationally Wrongful Acts: "*1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.*"

³¹⁶ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, p. 114.

³¹⁷ Human rights council, *Study of the Human Rights Council Advisory Committee on the enhancement of international cooperation in the field of human rights*, A/HRC/19/74, February 29th, 2012. See also General Assembly, Resolution 26/25 (XXV) *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, October 24th, 1970.

³¹⁸ ECHR, *Ireland v. UK*, no. 5310/71, Judgement, January 18th, 1978, §239. See also: IACtHR, *Mapiripán Massacre v. Colombia*, 2005, Series C n°134, §§-104105.

³¹⁹ Regarding the elements of "*aid or assistance*", article 41 must be read in conjunction with article 16 which presupposes that the State had knowledge of the circumstances of the internationally wrongful act. See: International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, p. 115.

aims not only at the official recognition of such situations but also at the prohibition of all acts that would imply such recognition.³²⁰

Thus, in the present case, member States of the African Union have the obligation to recognize the illegality of Morocco's presence as well as the obligation to refrain from any act that would imply the recognition of the legality of such presence. The consequence of this, as explained above, is that the decision of the African Union Member States to admit Morocco to the African Union constitutes a violation of the prohibition to adopt any act that would provide aid or assistance to maintain the illegal situation in Western Sahara. Furthermore, member States have the obligation to act, to cooperate to end the violation of the right to self-determination. Consequently, the African Union would be the ideal cooperation forum to restore international legality.

II. Free choice of measures to be adopted “to restrain Morocco from further occupying parts of the territory of Western Sahara”

Thus, international law provides for both coercive measures,³²¹ and diplomatic measures that may be taken by States to comply with their obligation to act. In particular, the measures that member States may adopt, in order to exert diplomatic pressure, may take various forms. They may include vigorous and repeated protests by as many parties as possible in their respective countries to the ambassadors representing the State in question and, conversely, by the representatives of those parties accredited to the government of that State, public denunciation by one or more of the parties and/or by a particularly influential regional organization, as well as diplomatic pressure exerted, through intermediaries, on the violator.³²²

Regarding African hermeneutics, the diplomatic channel appears to be the most appropriate for African Union member States to comply with their obligations to “*refrain Morocco from further occupying parts of the territory of Western Sahara.*” Indeed, the instruments of the African Union³²³ as well as United Nations instruments,³²⁴ place emphasis on international and

³²⁰ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, p. 115.

³²¹ Among the coercive measures that States may take is the measure of retaliation, an “*intrinsicly lawful measure, which is part of the exercise of the State's competence under international law.*” [our translation] in P. Dupuy, Y. Kerbrat, *Droit international public*, Dalloz, Précis, September 2016, §498, p. 563. The International Law Commission, which uses the term “*countermeasure*” to refer to such acts, considers that the initial illegality constitutes a circumstance which precludes in advance the illegality of the response. The Draft article of The International Law Commission Report states that “*The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.*”

³²² U. Palwanjar, “Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law”, *International Review of the Red Cross*, No. 298, February 2, 1994.

³²³ Article 3 of the Constitutive Act of the African Union: “*The objective of the Union is to (e) encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights*”, Article 22§2 of the African Charter of Human and Peoples' Rights: “*States shall have the duty, individually or collectively, to ensure the exercise of the right to development*”; Article 2§1 of the African Union Convention on Cross-Border Cooperation: “*The objective of the present convention [is] to promote cross-border cooperation, at local, sub-regional and regional level*”; Article 77 of the Treaty Establishing the African Economic Community assert that “*Member States agree to consult with one another, through appropriate Community organs, for the purpose of harmonizing their respective policies in other fields*”.

³²⁴ Article 1§3 of the Charter of the United Nation provides that States shall “*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*”; Article 56 of the Charter of the United Nation states that “*All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.*”; Article 2 of the International Covenant on Economic Social and Cultural Rights: “*Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measure*”; Article 1§2 common to the International Covenant on Civil and Political Rights and the International Covenant On Economic Social and Cultural Right: “*All peoples*

regional cooperation. Furthermore, the African instruments, while stressing the obligation of States Parties to cooperate, also affirm the commitment of States Parties to mutually defend their independence in a spirit of solidarity and peaceful conflict resolution,³²⁵ leaving the right to the African Union to intervene on its own initiative or at the request of its member States in order to restore peace and security.³²⁶ If the letter of the Constitutive Act seems to imply a coercive intervention by the African Union, in reality nothing seems to go against the consecration of an obligation to act at the diplomatic level, using the channels of dialogue offered by the African Union, such as the possibility to “*to call an emergency session of the Assembly of the African Union*”.

All the more so, the Court has competence to make “*appropriate orders to remedy the violation*”.³²⁷ Therefore, the Court has the ability to grant the plaintiffs' request. Indeed, following the model of the African Commission on Human and Peoples' Rights which, in the decision *Sudan Human Rights Organization & Centre on Housing Rights and Evictions/Soudan, “dr[ew] the attention of the Assembly of the African Union to the serious and massive violations of human and peoples' rights in the Darfur”*,³²⁸ the Court has the ability to draw the attention of the African Union to the situation in Western Sahara and to advise the member States to organize an “*emergency session of the Assembly of the African Union and to sponsor a resolution for the adoption of legal, political and other measures by the African Union*”.

Thus, all of these elements lead us to consider that the applicants' request to “*call an emergency session of the Assembly of the African Union and to sponsor a resolution for the adoption of legal, political and other measures by the African Union*” is appropriate.

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.” ; The preamble of the Universal Declaration of Human Rights: “*Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms*”.

³²⁵ Article 3 of the Constitutive Act of the African Union: “*The objectives of the Union shall be to (a) achieve greater unity and solidarity between the African countries and the peoples of Africa ; (b) defend the sovereignty, territorial integrity and independence of its Member States , (f) promote peace, security, and stability on the continent*” ; Article 4 of the Constitutive Act of the African Union: “*The Union shall function in accordance with [...] (a) sovereign equality and interdependence among Member States of the Union, (b) respect of borders existing on achievement of independence, (e) peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly, (f) prohibition of the use of force or threat to use force among Member States of the Union, (g) non-interference by any Member State in the internal affairs of another, (m) respect for democratic principles, human rights, the rule of law and good governance.*”

³²⁶ Article 4 of the Constitutive Act of the African Union: “*The Union shall function in accordance with [...] (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity, (j) the right of Member States to request intervention from the Union in order to restore peace and security.*”

³²⁷ Article 27§1, of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights.

³²⁸ African Commission on Human and Peoples Rights, *Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) / Soudan*, 279/03-296/05, May 27th, 2009, §225.

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