

COMMENTS OF KATLYN THOMAS
BEFORE THE SPECIAL POLITICAL AND
DECOLONIZATION COMMITTEE OF THE
UNITED NATIONS GENERAL ASSEMBLY

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Mr. Chairman, and Ladies and Gentlemen members of the Committee:

My name is Katlyn Thomas, and I am the former Chair of the United Nations Committee of The Association of the Bar of the City of New York.

The Association is an independent non-governmental organization with more than 23,000 members in over 50 countries. Founded in 1870, the Association has a long history of dedication to the advancement of principles of international law and the adoption of policies to implement the United Nations Charter, notably through its United Nations Committee.

For the past two years the United Nations Committee has conducted an intensive investigation of legal issues involved in the dispute over Western Sahara. Last year we published a report on issues involving Morocco's use of the natural resources of the territory pending a determination of sovereignty under law.

This past May we published our second report, this one dealing with the fundamental issue of Morocco's right to claim and occupy the territory of Western Sahara, and the right of the indigenous population to self determination under international law.

After examining every available legal argument to support Morocco's presence in the territory we have come to the conclusion that Morocco cannot claim a legal right to the territory on the basis of any historic relationship it had with the territory prior to its colonization by Spain. This was clearly established by a decision of the International Court of Justice in 1975 in a case brought at the request of Morocco. Morocco's action within weeks of that decision to avoid the implications of that ruling by sending its army into the territory against the wishes of its inhabitants arguably violates Article 2, Paragraph 4 and Chapter VII, as well as Article 3(a) of General Assembly Resolution 3314 (XXIX) to refrain from acts of aggression. The agreement Morocco reached in 1975 with Spain under which Spain agreed to withdraw from the territory and permit Morocco and Mauritania to occupy it does not justify any legal claim to the territory. Despite its more than 30 years of occupation of Western Sahara, neither the United Nations, nor the African Union, nor any individual state has recognized Morocco's claims to the territory as legitimate. Even the members of the Security Council who have advocated direct talks between Morocco and the Polisario that have taken place since 2007, as opposed to the

implementation of the Settlement Plan that would require a referendum, have maintained their support for the right to self-determination of the people of Western Sahara.

On the other hand, the right under well established international legal principles of the indigenous population of the territory – the Sahraouis – to exercise self determination in determining the political future of Western Sahara cannot be seriously disputed, and has not been diminished under law despite this long period of foreign occupation. Morocco has attempted to qualify this right by comparing it to the right of self determination of a population which inhabits a part of an established state. Under this argument the right to self determination of the Sahraouis should be considered subordinate to the right of Morocco to maintain its “territorial integrity.” The fallacy of this argument is easily apparent – Western Sahara is not now and has never been recognized under international legal principles to be a territory belonging to Morocco.

Our Committee concluded that the right to self-determination under international law requires that the Sahraouis have the opportunity to freely determine their political status and that this determination must include the option of independence. Accordingly, the exercise of self-determination, in whatever form it may take, must include the possibility that the final status of Western Sahara will be independence. Turning to the question of how this right can be exercised, the Committee noted that the following three procedures would, in principle, be among the options consistent with the Sahraouis’ right to self-determination under international law:

First, enforcement of the original U.N.-OAU 1991 Settlement Plan. Under this alternative, the referendum would be conducted by MINURSO in accordance with the provisions of the Settlement Plan agreed to by the parties to the conflict, and the list of eligible voters established by MINURSO, under the supervision of the Security Council and the African Union, and consistent with internationally recognized legal norms. We believe that the United Nations would be within its rights to demand that Morocco adhere to its agreement in 1991 to permit this referendum to take place, if not under its powers under Chapter 6 of the United Nations charter, then at least under its powers under Chapter 7 of the Charter.

Second, enforcement of a version of the Peace Plan advanced by former United States Secretary of State James Baker III when he was the Personal Envoy of the United Nations Secretary General to Western Sahara, or an alternative plan, which provides for an act of self-determination with an option for independence, and which ensures that the electorate will be those entitled to the right to self-determination under international law. Under this alternative, a referendum would ultimately be held which includes – among other options – a ballot option for independence.

Third, UN-ordered negotiations on a “political solution” with preconditions, which include (1) the requirement that all options for self-determination be included, including independence, and (2) a timetable for such negotiations, after which, if no agreement is reached, a referendum will be held with all options available. We note that the

Comprehensive Peace Agreement for Sudan included such a provision, so there is some recent precedent for such a procedure.

Each of these three options may require a mandatory order by the Security Council under Chapter 7 of the United Nations Charter. Whether to invoke the powers of Chapter 7 to resolve this dispute is a political issue and we are mindful of the political problems such a decision may entail. However, this would be a means – perhaps the only means – of enforcing the self-determination principles that apply to this dispute under international law. Thus far, in the face of the parties' entrenched and irreconcilable positions on sovereignty over the territory, there has been inconsistency between the principle of self-determination under international law, which has been repeatedly confirmed through General Assembly Resolutions on the matter to include an independence option, and the actions of the Security Council, in merely asking the parties to proceed with discussions on a political solution with no preconditions.

The international community needs to take steps to see that this dispute is resolved in the near future. The longer it takes to resolve the sovereignty issue, the more complicated will be the task of implementing any solution reached. On behalf of the United Nations Committee of The Association of the Bar of the City of New York, I call upon this Committee to adopt a position with regard to the settlement of the dispute over Western Sahara that is consistent with principles of international law.