

JANUARY 2025

POLICY BRIEF

# 2024 SECRETARY-GENERAL REPORT ON SAHARA: ALGERIA AND POLISARIO

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SHOJI MATSUMOTO

*According to the 2024 Secretary-General Report on Sahara (2024 Report), the biggest challenge may be the absence of progress in reaching a political solution to the Sahara Issue. Why has this conflict continued for half a century? In the 2024 Report, the Secretary-General has not attempted to give a stinging report on the resolution failure. The outline of the 2024 Report is largely as usual.*

*Generally, to resolve a conflict, the proper parties should first be exactly identified. One of the causes of the failure of the UN-led peace process may be the incorrect identification of the parties to the conflict. The correct parties are Morocco and Algeria, because the Polisario is under Algeria's 'agent control' in the territory of Algeria. Responsibility for internationally wrongful acts actually committed by that military group on behalf of Algeria is all attributable to Algeria. The Polisario is a state organ of Algeria, in conformity with the decisions of international tribunals and the Draft Articles on State Responsibility, formulated by the International Law Commission (ILC), based on state practice and judicial decisions.*

*Regarding the right of 'the people of Western Sahara' to self-determination, the identity of 'the people of Western Sahara' should not be decided on the illegitimate grounds of national or ethnic origin, because the notion of 'racial discrimination' is expanded that way in the International Convention on the Elimination of All Forms of Racial Discrimination. Besides, the prohibition of 'racial discrimination' is identified by the ILC as a peremptory norm of general international law (jus cogens), which invalidates any agreements in conflict with the norm. Therefore, representatives of the inhabitants of the Saharan provinces, other than a state organ of Algeria, the Polisario, should be invited to the meetings of the UN-led peace process, as parties to the 50 years-long conflict.*

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# 1. INTRODUCTION

The objective of the United Nations Secretary-General Report on the situation of 'Western Sahara', or the Saharan provinces, is to suggest the continuation of the UN Mission for the Referendum in Western Sahara (MINURSO). MINURSO is expected to deliver as follows:

- First, it is the main source of impartial information and advice to the Secretary-General, the Security Council, the Member States, and the Secretariat concerning developments in and related to the Saharan provinces;
- Second, it is the provider of a stabilizing presence, including by creating a conducive environment for the advancement of the political process led by the Secretary-General's Personal Envoy;
- Third, it is the representation of the UN commitment towards achieving a just, lasting, and mutually acceptable political solution to the Sahara Issue, in accordance with the relevant Security Council resolutions<sup>1</sup>.

To relaunch the peace process, the first step must be to identify the parties to the conflict, as a prior settlement. In particular, recently, the status of Algeria as a full-fledged party has been controversial<sup>2</sup>. To settle this matter, the relationship between the Polisario and Algeria must be established clearly. The relationship should be defined from the perspective of a state's 'agent control', such as 'effective control' and 'overall control', over a military or paramilitary group, as distinct from 'specific control' over a single act of an individual. For this purpose, whether the relationship is 'a principal-agent relationship', consisting of a non-state actor's 'complete dependence' and a state's 'effective control', must be verified.

Under international law, the responsibility for internationally wrongful acts committed by a non-state actor on behalf of a state is attributable to that state. Then, the non-state actor would be classified as a *de-facto* agent, and therefore an organ of that state. Thus, the Polisario would be identified as a state organ of Algeria, if Algeria keeps Polisario under its 'agent control'. If that is true, the Polisario would constitute part of the Algerian government. So, the Polisario's participation in the UN-led peace process would be conceived as equivalent to Algeria's participation. However, so far, Algeria has not been characterized in the peace process as a full-fledged party to the Sahara Issue.

Nevertheless, in recent Secretary-General reports on Western Sahara, Algeria is often referred to as a kind of party in the phrase "*Morocco, Frente POLISARIO, Algeria, and Mauritania*", and in another phrase "*the neighbouring Countries*" (sic)<sup>3</sup>. In addition, the newly-appointed Personal Envoy of the Secretary-General, Staffan de Mistura, has added a new but imprecise phrase: "*all concerned*"<sup>4</sup>. Thus, Algeria is not only referred to specifically, but is included in the other expressions in the *2024 Report*. The use of the word 'Algeria' is not unusual in the Secretary-General's reports on Sahara.

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1. UN, *Report of the Secretary-General on the Situation of Western Sahara*, UN Doc S/2024/707, 2024, para. 98. Hereinafter, this report will be cited as '*2024 Report*'.

2. Safaa Kasraoui, "*UN Report Confirms Algeria's Central Role in Western Sahara*", *Morocco World News*, October 17, 2024, <https://www.morocoworldnews.com/2024/10/365801/un-report-confirms-algerias-central-role-in-western-sahara>.

3. *2024 Report*, paras. 29, 90.

4. *Ibid.*, para. 89.

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## 2. PARTIES TO THE SAHARA ISSUE

The identification of the parties to the Sahara Issue is controversial. Morocco is clearly a party. The most controversial party is Algeria. Therefore, whether the Polisario is a party is also controversial, because of its relationship with Algeria, arguably a principal-agent relationship.

Against this backdrop, the Secretary-General Report mentions the parties in various phrases, including “Morocco and Frente POLISARIO”, “Morocco, Frente POLISARIO, Algeria, and Mauritania”, “the neighbouring Countries” and “the Group of Friends of Western Sahara”. The Personal Envoy, Staffan de Mistura, meanwhile, uses the self-created phrase, “all concerned”, although its exact meaning is yet to be unraveled.

The phrase “Morocco, Frente POLISARIO, Algeria, Mauritania, members of the Security Council, members of the Group of Friends of Western Sahara and other interested actors”, as well as “regional interlocutors”, hints at the meaning of “all concerned”<sup>5</sup>. As far as the use of these phrases is concerned, there is nothing especially new. However, the following phrasing may be new: The UN remains available to convene “them”, i.e. all concerned, “with the full and meaningful participation of women”<sup>6</sup>. Non-state actors other than the Polisario might be included in the expanded concept of “all concerned”. Non-state actors might also be covered by the phrases “other interested actors” and “regional interlocutors”.

The addition of non-state actors residing in the Saharan provinces, other than the Polisario, to the list of parties to the Sahara Issue, if realized, will enable those non-state actors to participate in meetings of the UN-led peace process, such as roundtable meetings. Such an expansion of the parties may help significantly materialize ‘the people of Western Sahara’, and may contribute to overcoming the stalemate that has lasted for more than four years. A number of non-state actors represent the populations of the Saharan provinces, or ‘the people of Western Sahara’.

Thus, a Saharan non-state group, the Royal Advisory Council for Saharan Affairs (CORCAS), has in fact participated in the meetings of the UN Human Rights Council<sup>7</sup> and the regional seminars of the UN Special Committee on Decolonization, which is generally known as the Special Committee of 24<sup>8</sup>. In particular, CORCAS has taken part in international meetings on the rights of women<sup>9</sup>. A clear difference between CORCAS and the Polisario is CORCAS’s lack of military power.

Although the Polisario was once recognized as one of the representatives of ‘the people of Western Sahara’ by the General Assembly in its resolutions in 1979 and 1980<sup>10</sup>, the expanded definition of ‘racial discrimination’ in the *International Convention on the Elimination*

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5. *Ibid.*, para. 29.

6. *Ibid.*, para. 89.

7. “CORCAS Participates in 57th Session of UN Human Rights Council in Geneva under Moroccan Presidency”, *Royal Advisory Council for Saharan Affairs*, September 9, 2024, [www.corcas.com/Default.aspx?tabid=708&ctl=Details&mid=1508&ItemID=79998](http://www.corcas.com/Default.aspx?tabid=708&ctl=Details&mid=1508&ItemID=79998).

8. “CORCAS Participates in Pacific Regional Seminar of the Committee of 24 in Bali”, *Royal Advisory Council for Saharan Affairs*, May 24, 2023, [www.corcas.com/Default.aspx?tabid=708&ctl=Details&mid=1508&ItemID=74816](http://www.corcas.com/Default.aspx?tabid=708&ctl=Details&mid=1508&ItemID=74816).

9. “CORCAS Takes Part in International Conference on Women Protection”, *Royal Advisory Council for Saharan Affairs*, March 18, 2021, [www.corcas.com/Default.aspx?tabid=708&ctl=Details&mid=1508&ItemID=55411](http://www.corcas.com/Default.aspx?tabid=708&ctl=Details&mid=1508&ItemID=55411); and “CORCAS Participates in Exhibition Denouncing Tragedy of Women Captive in Tindouf Camps”, *Royal Advisory Council for Saharan Affairs*, March 9, 2021, [www.corcas.com/Default.aspx?tabid=708&ctl=Details&mid=1508&ItemID=55324](http://www.corcas.com/Default.aspx?tabid=708&ctl=Details&mid=1508&ItemID=55324).

10. UN GA Res A/Res/34/37, 1979, para. 7. UN GA Res A/Res/35/19, 1980, para. 10.

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of *All Forms of Racial Discrimination (ICERD)* had already prohibited discrimination on the grounds of national or ethnic origin<sup>11</sup>. Moreover, a ban on ‘racial discrimination’ is prescribed as non-derogable in the *International Covenant on Civil and Political Rights (ICCPR)*<sup>12</sup>. Furthermore, the International Law Commission (ILC) identifies the prohibition of ‘racial discrimination’ as a peremptory norm of general international law (*jus cogens*)<sup>13</sup>, invalidating any agreement that conflicts with the norm<sup>14</sup>. Therefore, the concept of ‘the people of Western Sahara’ should not be defined based on national or ethnic origin. More significantly, Articles 1 (2) and 55 of the *UN Charter* famously declare “*the principle of equal rights and self-determination of peoples*”. Any peoples in the Saharan provinces shall have ‘equal rights’ in the exercise of their right to self-determination, excluding the possibility of granting a veto power to a specific ‘people’, such as the Polisario<sup>15</sup>.

### 3. ALGERIA AND POLISARIO

On the basis of the principle of the equal rights of the peoples of ‘Western Sahara’, enshrined in the *UN Charter*, the Saharan peoples, other than the Polisario, should be invited to the UN-led peace process, such as the roundtable meetings<sup>16</sup>.

However, there is a problem with this suggestion. It concerns the legal status of the Polisario in its relationship with Algeria under international law on state responsibility. The problem arises from some doubt about whether the relationship is a principal-agent relationship, and thus the Polisario is part of Algeria.

As is often pointed out, there is no doubt that understanding Algeria’s role in the Sahara Issue is necessary for a complete historical appreciation of this conflict. This appreciation is now a key to unlocking the 50-year-long peace process<sup>17</sup>. Among Algeria’s cynical motivations may be either destabilizing Morocco or justifying military spending, according to Jacob Mundy<sup>18</sup>. Whatever the correct motivations may be, “[m]easured in dollars, Algeria’s commitment to Western Saharan independence likely figures in the hundreds of millions”, Mundy estimated in 2010<sup>19</sup>.

It is described that much of the Polisario is located in Algeria, where it enjoys support and

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11. *ICERD*, art. 1.

12. *ICCPR*, art. 4.

13. *ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)*, *UN Doc A/77/10*, 2022, para. 43, Conclusion 23, Annex (e).

14. *Ibid.*, Conclusion 10.

15. Nevertheless, see the contrary interpretations, in the Court of the European Union, Judgments of the Court in Joined Cases C-778/21 P and C-798/21 P | *Commission and Council v Front Polisario* and in Joined Cases C-779/21 P and C-799/21 P | *Commission and Council v Front Polisario*, October 4, 2024, paras. 170-194. “*That presumption of consent may ... be reversed so long as legitimate representatives of that people establish that the system of benefits conferred on that people by the agreement in question, or the regular control mechanism which must accompany it, does not satisfy the conditions set out in paragraph 180 of the present judgment*”, the Court held. *Ibid.*, para. 184. The conditions are as follows. “*First, the agreement in question must not give rise to an obligation for that people. Second, the agreement must provide that the people itself, which cannot be adequately represented by the population of the territory to which the right of that people to self-determination relates, receives a specific, tangible, substantial and verifiable benefit from the exploitation of that territory’s natural resources which is proportional to the degree of that exploitation*”, *Ibid.*, para. 181. However, the consent shall be secured from ‘the people of Western Sahara’ as a whole, not privileging any group, let alone a state organ, to the detriment of other groups in the Saharan non-self-governing territory, in conformity with the *ICERD*.

16. Shoji Matsumoto, “2019 Secretary-General Report on Sahara: What’s New: ‘Neighbouring States as Parties’ in Roundtable”, *Policy Center for the New South, Policy Brief*, PB-19/22, June 2019.

17. Jacob Mundy, “Algeria and the Western Sahara Dispute”, *Maghreb Center Journal*, Issue 1, Spring/Summer 2010, p. 1.

18. *Ibid.*

19. *Ibid.*, p. 5.

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refuge, and probably tens of thousands live in the Tindouf refugee camps<sup>20</sup>. As such, the Polisario is kept under the territorial sovereignty of Algeria. So, the relationship between Algeria and the Polisario should be observed from the perspective of international law on attribution of responsibility under the ILC's *Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on State Responsibility)*<sup>21</sup>. Before discussing such attribution, a general principle of state responsibility should be reconfirmed.

In principle, a state does not assume responsibility for internationally wrongful acts committed by a group of private persons or a non-state actor<sup>22</sup>. Exceptionally, however, responsibility for internationally wrongful acts actually committed by a private non-state actor on behalf of a state is attributable to that state, for instance if the non-state actor has a relationship of 'complete dependence' with that state<sup>23</sup>, 'in all fields'<sup>24</sup>, based on the decision of the International Court of Justice (ICJ) on the *Military and Paramilitary Activities in and against Nicaragua case (Nicaragua case)*<sup>25</sup>. A non-state actor may be identified as 'completely dependent' on the aid of a state if the actor cannot operate without the state's support, and the cessation of the support would lead to the end of its operations<sup>26</sup>. The requirement for a non-state actor's 'complete dependence' on a state, and the state's 'effective control' of that non-state actor in all fields, in order to attribute responsibility for wrongful acts actually committed by the non-state actor to that state, is known as the 'Nicaragua test' after the *Nicaragua case*.

However, Antonio Cassese criticized the Nicaragua test for two reasons: first, it is not based on any judicial or state practice and *opinio juris*, so as to constitute a customary international law; second, it is inconsistent with "a basic principle underpinning the whole body of rules and principles on state responsibility"<sup>27</sup>.

Moreover, if such responsibility for wrongful acts in fact committed on the state's territory by a non-state actor was not attributable to that state, "one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received", the Spanish government pointed out<sup>28</sup>.

In relation to the Sahara Issue, as the main facts concerning the suspected wrongful acts actually committed by the Polisario may be kept secret as an Algerian 'national security' decision, the rule of proof established by the ICJ in the *Corfu Channel Case*, which is detailed below, should be applied to fact-finding around the Polisario's breach of ceasefire agreements, on or from Algeria's territory.

In the *Corfu Channel Case*, it was ruled in respect of Albania's mainlaying in its territorial

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20. Yael Miller, "Is Western Sahara's Polisario Still a Player in the Conflict?", *Morocco Tomorrow*, August 14, 2012, <https://www.moroccotomorrow.org/is-western-saharas-polisario-still-a-player-in-the-conflict/>.

21. *Draft Articles on State Responsibility*, art. 8. Also in the EU, under Article 8 of the *Draft Articles on State Responsibility*, "in situations where non-State actors act on the instructions or under the direction or control of a State, that conduct is attributable to the State". Council of the European Union, *Declaration on a Common Understanding of International law in Cyberspace*, November 18, 2024, Annex, p. 8.

22. *Draft Articles on State Responsibility*, art. 4.

23. A non-state actor's 'complete dependence' on a state is acknowledged as the lack of real autonomy, making the actor a mere instrument of that state. *Nicaragua case*, paras. 93, 94.

24. Antonio Cassese, "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, Vol. 18 No. 4, September 2007, p. 654, <https://academic.oup.com/ejil/article/18/4/649/453762?login=false>. Hereinafter, this paper is cited as 'Cassese'.

25. *Nicaragua case (Nicaragua v US)*, (Merits), ICJ Rep 1986, para. 109-110, 115. The Nicaragua test is applied also in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ Rep 2007.

26. *Nicaragua case*, para. 109.

27. Cassese, p. 653.

28. *Draft Articles on State Responsibility, with Commentaries*, Article 7, (2), UN Doc A/56/10, 2001. Hereinafter, the Commentaries will be cited as 'ILC Commentaries'.

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waters, that “the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events”.<sup>29</sup> “By reason of this exclusive control”, the ICJ observed, “the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility”<sup>30</sup>.

Therefore, as the ICJ concluded in the *Corfu Channel Case*, “a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence”<sup>31</sup>. Thus, A. Cassese was of the opinion, in respect of the *Nicaragua case*, that “the US, although admittedly it was most unlikely to have issued instructions or directives to Nicaraguan rebels to assassinate, rape or torture, was nevertheless to be held accountable for those operations”<sup>32</sup>. In the context of the Sahara Issue, Algeria exercises “exclusive territorial control” over internationally wrongful acts that are in fact committed by the Polisario, which is located in the Tindouf refugee camps, Algeria.

Nevertheless, Cassese does not wholly accept the *Nicaragua case*, and ultimately argued that state practice should use the ‘overall control’ test, instead of the Nicaraguan ‘effective control’ test, to determine the attribution of responsibility to a state for internationally wrongful acts committed on behalf of that state by a non-state military or paramilitary group, such as the Polisario<sup>33</sup>.

So, the Secretary-General should be allowed a more liberal recourse to inferences of fact and circumstantial evidence in finding the fact of the Polisario’s internationally wrongful acts against Morocco, i.e. on behalf of Algeria, launching from, and taking refuge in, the territory of Algeria<sup>34</sup>. As such, the Secretary-General should have drawn the conclusion that firing from Algeria’s territory could not have been accomplished without the knowledge of the Algerian government<sup>35</sup>. In its own territory, Algeria is enabled and internationally obliged to exercise *due diligence*<sup>36</sup>, to prevent the Polisario’s commission of wrongful acts in breach of the ceasefire agreements, although admittedly it was most unlikely to have issued instructions or directives to the Polisario to commit such acts.

## 4. ATTRIBUTION OF RESPONSIBILITY

According to Cassese, whenever responsibility for internationally wrongful acts committed by a non-state military or paramilitary group on behalf of a state is at issue, it suffices to demonstrate that the state to which that group may be linked exercises ‘overall control’, which is short of Nicaraguan ‘effective control’, over the group, in order for those acts to be attributed to that state<sup>37</sup>.

In a case at the International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v Dusko Tadic*, two particular standards for establishing ‘overall control’ were set out.

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29. *Corfu Channel Case*, (UK v Albania), (Merits), ICJ Rep 1949, p. 4.

30. *Ibid.*, p.18.

31. *Ibid.*

32. Cassese, p. 655.

33. *Ibid.*, p. 654.

34. Polisario’s Secretary-General, Brahim Ghali, called on Polisario armed forces to “escalate and advance the armed struggle”, *2024 Report*, para. 6.

35. *Corfu Channel Case*, p. 22.

36. Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I*, First Edition, Oxford University Press, 1983, pp. 161-162.

37. Mohammed Benhamou, “The Security Threat of Polisario”, *Autonomy for the Sahara Coalition, AUSACO Papers*, November 2022, p. 665.

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First, the state shall support “not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity”. Second, the state shall have “a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group”. When these standards are satisfied, internationally wrongful acts actually committed by a non-state military or paramilitary group on behalf of a state may be regarded as acts of a *de-facto* state organ, “regardless of any specific instructions by the controlling state concerning the commissions of those acts”<sup>38</sup>.

Although it is hard to obtain direct proof of Algeria’s coordination or assistance in the general planning of the Polisario, and its organizing, coordinating, or planning of the Polisario’s military forces, the Secretary-General, MINURSO, and Morocco should be allowed a more liberal recourse to inferences of fact and circumstantial evidence about Algeria’s ‘exclusive territorial control’ over the Polisario’s internationally wrongful acts in breach of the ceasefire agreements against Morocco.

As noted already, it is true that two different tests have been propounded by the ICJ and the ICTY for establishing a state’s ‘agent control’ over internationally wrongful acts actually committed by a non-state group: the Nicaragua test (effective control), and the less-strict Tadic test (overall control). Here, ‘agent control’ is a collective term for the notions of control that are more general than and different in kind from ‘specific control’. ‘Agent control’ involves ‘effective control’, ‘overall control’, ‘strict control’, ‘strict overall control’, and so on<sup>39</sup>, but not ‘specific control’.

The difference between ‘agent control’ and ‘specific control’ should not be blurred. While ‘agent control’ addresses a group of actors, specific control relates to an act of an individual. Thus, it is argued, while the Nicaragua test is applicable to ‘specific control’, the Tadic test is applicable to ‘agent control’<sup>40</sup>. According to Cassese, this approach has been followed in the case law since the *Tadic case*<sup>41</sup>.

On the basis of the *Tadic case*, for the attribution of responsibility for internationally wrongful acts actually committed by a group of private persons or a single individual, either of the following two tests can be applied: (i) the ‘effective control test’ requiring specific instructions under the Nicaragua test is applicable only to instances of single individuals acting on behalf of a state<sup>42</sup>; and (ii) the test applicable to actions by “organized and hierarchically structured groups”, such as military or paramilitary units, is ‘overall control’, which is defined as below:

*“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission*

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38. *Prosecutor v Dusko Tadic (a.k.a “Dule”)*, ICTY, Case No. IT-94-1, 1994, para. 137.

39. Makaela Fehlhaber, “The Evolution of ‘Control’ in Attributing Conduct of a Non-State Actor to a State in Public International Law”, *Australian International Law Journal*, Vol. 29, January 2022, pp. 21–44.

40. Cassese, p. 654.

41. *Ibid.*, p. 658, n. 18.

42. *Prosecutor v Dusko Taadic*, ICTY, Appeals Chamber, Case No. IT-94-1-A, 1999, paras. 118-119, 141. Hereinafter, this case will be cited as the ‘*Tadic case*’.



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of specific acts contrary to international law<sup>43</sup>.

Is the Nicaragua test or the Tadic test applicable to the relationship between Algeria and the Polisario? First, the applicability of the Nicaragua test should be considered. To establish under the Nicaragua test the Polisario's 'complete dependence' on Algeria, and Algeria's 'effective control' over the Polisario's conduct, in all fields, a comprehensive political analysis implemented by Mohammed Benhamou on the relationship between Algeria and the Polisario may be helpful. He observed that the persistence of the Sahara Issue is the result of the "diktats of the Algerian officials"<sup>44</sup>. Such diktats may be cited as an evidence of Algeria's 'effective control' over the conduct of the Polisario and the Polisario's 'complete dependence' on Algeria when committing military acts on behalf of Algeria. Based on Benhamou's observations, the Polisario should be classified as a *de-facto* agent, i.e. a state organ of Algeria, even under the Nicaragua test, let alone the Tadic test.

However, if the Polisario were not qualified as a *de-facto* agent of Algeria, as a common opinion, a military or paramilitary group, including terrorist groups, that is located within a state may be used to the fullest extent for attacking another state<sup>45</sup>. As the ICTY held in the Tadic case, the rationale for imputing to a state the responsibility for acts actually committed by non-state actors acting on behalf of that state as its *de facto* agents is "to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials". "In other words", the ICTY continued, "States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law"<sup>46</sup>. Otherwise, the controlling state would be enabled to attack another state with impunity, through its *de-facto* agent.

## 5. 'ATTRIBUTION OF RESPONSIBILITY' IN UN DOCUMENTS

The 'overall control' test was taken up by the UN Working Group on Arbitrary Detention in a report in 2000<sup>47</sup>. In an examination of the relationship between Israel and a non-state group, the South Lebanese Army, the following five criteria were applied: (a) financial assistance;

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43. . *Ibid.*, para. 131. Despite it being held in the Tadic case that "[a]lthough some States provided movements such as the PLO, SWAPO or the ANC with a territorial base or with economic and military assistance (short of sending their own troops to aid them), other States, including those against which these movements were fighting, did not attribute international responsibility for the acts of the movements to the assisting States" (*Ibid.*, para. 130), it is generally believed that the state practice and *opinio juris* on the attributability of responsibility for such wrongful acts to a territorial state has changed significantly, particularly after the September 11 terrorist attacks. See Dominic McGoldrich, *From '9-11' to the Iraq War 2003: International Law in an Age of Complexity*, Hart Publishing, 2004, pp. 89-91.

44. . Benhamou focused on Algeria's notorious inconsistency between the official statements of its non-involvement policy and the flagrant reality of its "multifaceted and tireless support" to the Polisario. "Through this ambiguous position", he wrote, "Algeria tries to hide the true motivations" that are arguably to weaken its regional rival, Morocco. Mohammed Benhamou, "The Security Threat of 'Polisario'", *CIRSD*, Issue No. 23, Spring 2023, <https://www.cirsd.org/en/horizons/horizons-spring-2023---issue-no23/the-security-threat-of-polisario>". In the CIA records, a "more compelling and perhaps more durable underpinning to the Algerian commitment to the Polisario is Algeria's deep-seated rivalry with Morocco for North African predominance. Indeed, the process of keeping that from happening-supporting the Polisario in a costly and debilitating conflict-seemed to be an end in itself under the Boumediene regime". CIA, "The Polisario Front: Status and Prospects", *CIA Records*, April 1, 1983, <https://www.cia.gov/readingroom/document/cia-rdp84s00556r000100150003-7>.

45. Kimberley N. Trapp, *State Responsibility for International Terrorism*, Oxford University Press, 2011, pp. 42-45.

46. *Prosecutor v. Dusko Tadić*, IT-94-1-AR72, ICTY, Appeals Chamber, Decision, October 2, 1995, "IV. The First Ground of Cross-Appeal by the Prosecution: The Trial Chamber's Finding That It Had not Been Proved That the Victims Were 'Protected Persons' under Article 2 of the Statute (on Grave Breaches)", para. 117. See also 'Tadic case', paras. 98-145.

47. UN Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, UN Doc A/CN.4/2000/4, 2000, para. 15.

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(b) logistical assistance; (c) training; (d) cooperation; and (e) coordination<sup>48</sup>. The Working Group concluded that responsibility for internationally wrongful acts committed by the South Lebanese Army, on behalf of the Israel Defense Force, could be attributed to Israel<sup>49</sup>.

In the UN Secretary-General Report on the United Nations Mission in East Timor (UNAMET), Antonio Cassese pointed out, reliance on the 'agent control' test has been made<sup>50</sup>. The Secretary-General acknowledged "*the direct and indirect involvement*" of the Indonesian National Army (TNI) and police "*in supporting, planning, assisting and organizing the pro-integration militia group*" in order to attribute responsibility for the atrocities committed by the militia group to Indonesia<sup>51</sup>. Then, the report noted that "[c]lose cooperation between militia elements and TNI has been witnessed and documented by UNAMET staff"<sup>52</sup>.

In the meantime, regarding 'specific control', in the *Report of the International Commission of Inquiry on Darfur to the UN Secretary-General*, it was stated that when militias "*attack jointly with the armed forces, it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in Tadić (Appeal)*". Thus, the militias were acting as *de-facto* state officials of Sudan. Finally, it was concluded that "*if it may be proved that all the requisite elements of effective control were fulfilled in each individual case, responsibility for their crimes is incurred not only by the individual perpetrators but also by the relevant officials of the army for ordering or planning, those crimes, or for failing to prevent or repress them, under the notion of superior responsibility*"<sup>53</sup>. The reference to "*individual perpetrators*" suggests that these statements address 'specific control', rather than 'agent control'. However, that is relevant in the wider context of attribution of responsibility to a state.

Although 'agent control' was not taken note of in the 2024 Secretary-General Report, António Guterres gave specific examples of the Polisario's internationally wrongful acts, which would enable an investigation into Algeria's 'agent control' over the Polisario's breaches of the ceasefire agreements that were specifically found by MINURSO.

Despite the Polisario's unilateral declaration in 2020 on withdrawal from the ceasefire agreements<sup>54</sup>, it is still under an international obligation to observe them, under the *Vienna Convention on the Law of Treaties*<sup>55</sup>. Morocco and the UN have reiterated a willingness to observe the agreements as before<sup>56</sup>. The Polisario's declaration itself suggests that the Polisario does not mind to breach the agreements. The 2024 Secretary-General Report listed the Polisario's military attacks against Morocco from the territory of Algeria in breach of the ceasefire agreements<sup>57</sup>. However, sometimes MINURSO did not receive permission from the Polisario to visit the sites<sup>58</sup>.

Is there any reason not to attribute responsibility for the Polisario's breaches to Algeria? Indeed, it may be alleged, although inaccurately, that as Algeria recognizes the self-declared SADR/

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48. *Ibid.*, para. 17.

49. *Ibid.*, para. 18.

50. Cassese, pp. 660-661.

51. UN, *Situation of Human Rights in East Timor*, Report of the Secretary-General, UN Doc A/54/660, 1999, para. 59.

52. *Ibid.*, paras. 60-61.

53. UN Doc S/2005/60, 2005, paras. 121-123.

54. Skarif Paget and Mitchell McCluskey, "*Western Sahara Independence Leader Declares the End of a 29-Year-Old Ceasefire with Morocco*", CNN, November 15, 2020, <https://edition.cnn.com/2020/11/15/world/polisario-front-morocco-western-sahara-ceasefire-intl/index.html>.

55. "*The termination of a treaty or the withdrawal of a party may take place: ... (b) at any time by consent of all parties after consultation with the other contracting States*", *Vienna Treaty Convention*, art. 54.

56. UN Doc S/2005/60, 2005, para. 123.

57. *2024 Report*, paras. 12-26.

58. *Ibid.*, paras. 23, 26.

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Polisario, responsibility for internationally wrongful acts committed by the Polisario is attributable to the self-declared SADR/Polisario itself, not to Algeria. However, as long as its parent state, Morocco, does not recognize it as a sovereign state, the act of granting state recognition constitutes 'premature recognition'<sup>59</sup>, which is internationally wrongful. After all, responsibility for the Polisario's internationally wrongful acts is attributable to Algeria, under Article 8 of the *Draft Articles on State Responsibility*.

In this way, Algeria, not its *de-facto* agent the Polisario, is not only a full-fledged party to, but also one of the key players in, the Sahara Issue, along with Morocco.

## 6. IN LIEU OF CONCLUSION: PARTITION OF THE TERRITORY?

As the Polisario is classified as a *de-facto* agent of Algeria, it follows that Algeria has so far participated in the UN-led peace process as a full-fledged party to the Sahara Issue. Therefore, Algeria has been a party to the ceasefire agreements. This state should have been brought to account for the Polisario's, therefore its own, breach of the ceasefire agreements, found in the *2024 Report*.

Also, regarding human rights violations, responsibility for the violations actually committed by the Polisario in the Tindouf refugee camps is attributable to Algeria. It should not be forgotten that, by blocking a census of the refugee camps, the Polisario and therefore Algeria assume responsibility for the diversion of humanitarian aid. According to a former Polisario member, embezzlement is made possible by the absence of data on the size of the population of the Tindouf camps, because of Algeria's refusal to allow a census of the camps<sup>60</sup>.

Regarding the concern over the human rights situation in the Saharan provinces, suffice it to say that, under the *ICCPR*, the exercise of human rights, other than absolute human rights which are prescribed in its Article 4 (2), may be subject to certain restrictions, if provided by legislation, on the basis of 'claw-back clauses'<sup>61</sup>. Among such 'relative human rights', are the right to freedom of expression<sup>62</sup>, freedom to manifest one's religion or beliefs<sup>63</sup>, the right of peaceful assembly<sup>64</sup>, freedom of association<sup>65</sup>, the right to liberty of movement and freedom to choose residence<sup>66</sup>, and so on. When the limitation of relative human rights is demonstrated as not necessary for the respect of the rights of others, or for the protection of national security or public order, or of public health or morals, the limitation would constitute a breach of international human rights.

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59. Shoji Matsumoto, "Manchukuo and the Self-Declared SADR: International Law of Recognition and the Sahara Issue", *Policy Center for the New South, Policy Paper*, PP-21/02, January 2021.

60. Yahia Hatim, "Former Polisario Member Denounces Separatist Front's Corruption", *Morocco World News*, June 4, 2020, <https://www.morocoworldnews.com/2020/06/304893/former-polisario-member-denounces-separatist-fronts-corruption>. It is reported that the Secretary-General has once condemned the Polisario's diversion of humanitarian aid destined for the Tindouf camps, enabled by the absence of census, on the basis of information submitted by the UN Office of the High Commissioner for Human Rights, "UN SG Draws Security Council's Attention to Diversion of Humanitarian Aid by Polisario", *North Africa Post*, October 12, 2021, <https://northafricapost.com/53104-un-sg-draws-security-councils-attention-to-diversion-of-humanitarian-aid-by-polisario.html>.

61. Mohamed Elewa Badar, "Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments", *International Journal of Human Rights*, Vol. 7, Issue 4, 2003, pp. 63–92. Regarding the *African Charter on Human and People's Rights*, see Loveness Mapuva, "Negating the Promotion of Human Rights Through "Claw-Back" Clauses in the African Charter on Human and People's Rights", *International Affairs and Global Strategy*, Vol. 51, 2016, pp. 1-4.

62. *ICCPR*, art. 19.

63. *Ibid.*, art. 18 (3).

64. *Ibid.*, art. 21.

65. *Ibid.*, art. 22.

66. *Ibid.*, art. 12.

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The next question is whether the Polisario is entitled to the right of people to self-determination in the Saharan non-self-governing territory. Given the status of the Polisario as a state organ of Algeria, this group would not always be entitled to exercise the right of people to self-determination as a representative of 'the people of Western Sahara'. Rather, representatives of the Saharan population, other than the Polisario, should be entitled to that right and invited to the meetings of the UN-led peace process, as parties to the Sahara Issue. The Personal Envoy's phrase 'all concerned' may give an impetus to the inclusion of such representatives<sup>67</sup>.

Despite the introduction of this new phrase, however, the *2024 Report* lacks the perspective of 'attribution of responsibility', such as 'agent control' and 'specific control', which will bring the notion 'the people of Western Sahara' to the point where it is practicable. When the notion is realized, a fresh start can be made on finding a just, lasting, and mutually acceptable political solution to the Sahara Issue.

Instead, however, soon after the publication of the *2024 Report*, the Personal Envoy of the Secretary-General, Staffan de Mistura, suddenly proposed, in a closed meeting of the Security Council, to divide the territory of the Saharan provinces into a Moroccan North territory and the Polisario's South territory. As discussed above, the Polisario's south territory would be nothing but Algeria's territory.

According to the Personal Envoy, such a plan "could allow for the creation on the one hand of an independent state in the southern part, and on the other hand the integration of the rest of the Territory as part of Morocco, with its sovereignty over it internationally recognised"<sup>68</sup>. However, in our conception, the Envoy's proposal would not lead to "the creation of an independent State" but to Algeria's territorial expansion, setting aside the issue of independence, which Morocco would never accept, no matter what happens.

This off-the-mark proposal was naturally rejected by both Morocco and the Polisario<sup>69</sup>. The proposal seems to be doomed, because around twenty years ago a similar proposal submitted by the then Personal Envoy James Baker, known as 'Baker II', formally the 'Peace Plan for Self-Determination of the People of Western Sahara'<sup>70</sup>, failed<sup>71</sup>.

The Envoy's partition suggestion was sudden, in that any such suggestion cannot be read even between the lines of the *2024 Report*. The report does say that in "guiding present and future approaches, due consideration should be given to the precedents set by previous Personal Envoys on Western Sahara in the framework of existing Security Council resolutions"<sup>72</sup>. Although Baker II is one such precedent, failure should not be repeated.

When asked in a press briefing if the Secretary-General signed off on the "previously rejected proposal" for resubmission, the UN Deputy Spokesperson replied that he would not characterize the Envoy's actions as a formal endorsement, stating that "I wouldn't characterize anything as a submission of a proposal"<sup>73</sup>. Then, according to a Spanish newspaper report, the Envoy said

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67. Then, even if the Polisario is admitted as a participant in the peace process from now, it should be regarded as a state organ of Algeria.

68. "UN Envoy Proposes Partitioning Western Sahara", *AP News*, October 18, 2024, <https://apnews.com/article/western-sahara-morocco-United-nations-ca8345164fdcf9696635aa481bcb>.

69. Rym Bousmid, "Partition of Western Sahara: UN Envoy's Suggestion Rejected by All Sides", *Africa Report*, October 23, 2024, <https://www.theafricareport.com/365619/partition-of-western-sahara-un-envoys-suggestion-rejected-by-all-sides/>.

70. UN, *Report of the Secretary-General on the Situation concerning Western Sahara*, UN Doc S/2003/565, 2003.

71. Samir Bennis, "UN Envoy's Partition Proposal: A Lifeline for Algeria's Faltering Sahara Strategy", *Morocco World News*, October 22, 2024, <https://www.morocoworldnews.com/2024/10/365878/un-envoys-partition-proposal-a-lifeline-for-algerias-faltering-sahara-strategy>.

72. *2024 Report*, para. 90.

73. UN, "Daily Press Briefing by the Office of the Spokesperson for the Secretary-General", *Meetings Coverage and Press Releases*, October 18, 2024, <https://press.un.org/en/2024/db241018.doc.htm>.

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that if by April 2025 “I have not reported significant progress and provided clarifications, I fear questions should be asked about the future modalities of UN facilitation of the political process in Western Sahara”<sup>74</sup>. This defiant stance may be caused by his impatience with the positions of ‘Morocco, Frente POLISARIO, Algeria and Mauritania’ on the peace process<sup>75</sup>. Although Morocco affirms its commitment to “supporting the efforts of the United Nations Secretary-General and his Personal Envoy aimed at relaunching the round-table process, with a view to reaching a political solution, based on the Moroccan Autonomy Initiative”<sup>76</sup>, the Polisario insists that the right to self-determination is “non-negotiable”<sup>77</sup>. Algeria has reiterated that it “is not a party to the Sahara Issue”<sup>78</sup>. And, Mauritania has reaffirmed the principle of “positive neutrality”<sup>79</sup>.

Reportedly, the Personal Envoy is of the opinion that the absence of progress in the peace process has led him suggest to the Security Council a reassessment of “whether there is space and willingness for us to still be useful”<sup>80</sup>. In the same vein, the Envoy has suggested that the Secretary-General should reevaluate whether MINURSO can still play a meaningful role<sup>81</sup>.

Even if that is the case, however, it cannot be expected that the Envoy’s doomed suggestion to divide the Saharan provinces would advance the peace process, in consideration of the hard experience of ‘Baker II’, which led Baker to resign his position as the Secretary-General’s Personal Envoy<sup>82</sup>.

In the final analysis, Morocco is the only party that is proactive in the UN-peace process for solving the Sahara Issue, and it is reaffirmed that “the only framework for the process is the roundtable format, which should come at a later ‘appropriate time’ when the context is ripe”<sup>83</sup>.

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74. . Ignacio Cemberero, “El enviado de la ONU para el Sáhara Occidental anuncia su fracaso y se despide del cargo”, *El Confidencial*, October 18, 2024, [https://www.elconfidencial.com/mundo/2024-10-18/enviado-onu-sahara-occidental-fracaso-marruecos-polisario\\_3986322/](https://www.elconfidencial.com/mundo/2024-10-18/enviado-onu-sahara-occidental-fracaso-marruecos-polisario_3986322/), quoted in Safaa Kasraoui, “UN Clarifies De Mistura’s Controversial Partition Plan for Western Sahara”, *Morocco World News*, October 21, 2024, <https://www.morocoworldnews.com/2024/10/365859/un-clarifies-de-misturas-controversial-partition-plan-for-western-sahara>.

75. *2024 Report*, paras. 3, 6.

76. *Ibid.*, para. 3.

77. *Ibid.*, para. 4.

78. *Ibid.*, para. 30.

79. *Ibid.*, para. 31.

80. *AP News*, *supra* note 68.

81. *R. Bousmid*, *loc. cit.*, *supra* note 69.

82. *Jacob A. Mundy*, “Stubborn Stalemate in Western Sahara”, *Middle East Report Online*, June 26, 2004, <https://www.mafhoum.com/press7/200P10.htm>.

83. *2024 Report*, para. 32.

## ABOUT THE AUTHOR



### SHOJI MATSUMOTO

Professor Shoji Matsumoto Senior Fellow at Policy Center for the New South. He is currently working in NGOs, namely as the President of Sapporo Institute for International Solidarity (Sapporo, Japan); Japan Center for Moroccan Studies (Sapporo, Japan); and the International Center on Separatism (Tokyo, Japan).

He was previously professor of international law at Sapporo Gakuin University, and has recently retired. Dr. Shoji continues to teach international law and other related subjects at the university as a lecturer.

Dr. Shoji was additionally a visiting fellow at the SOAS, University of London and also visiting professor at Mohamed V University.

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### Policy Center for the New South

Rabat Campus of Mohammed VI Polytechnic University,  
Rocade Rabat Salé - 11103  
Email : [contact@policycenter.ma](mailto:contact@policycenter.ma)  
Phone : +212 (0) 537 54 04 04  
Fax : +212 (0) 537 71 31 54



[www.policycenter.ma](http://www.policycenter.ma)

