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COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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B-197132

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The Honorable Stephen J. Solarz  
Chairman, Subcommittee on Africa  
Committee on Foreign Affairs  
House of Representatives

JAN 22 1980

Dear Mr. Chairman:

This is in response to your request for our legal opinion about the consistency of the Administration's proposed sales of military equipment to Morocco for use in the disputed Western Sahara with existing military assistance legislation, the United States - Morocco military agreement of 1960, and international legal standards which the United States has previously acknowledged.

You describe the circumstances as follows:

"According to press reports, the Administration will soon notify Congress under Section 36B of the Arms Export Control Act of its intention to sell Morocco certain offensive military equipment for use in the Western Sahara such as OV-10 armed reconnaissance aircraft, and AH-1 attack helicopters with anti-tank missiles. Previously the Administration has said that the provision of such equipment would necessitate a revision of the existing U.S. - Morocco military accord which restricts permitted uses of American equipment to the internationally-recognized boundaries of Morocco. However, the Administration has now indicated that it is prepared to change its interpretation of the bilateral military accord in order to permit the use of U.S. equipment in the Western Sahara to combat the armed struggle for independence mounted by the Polisario front.

\* \* \* \* \*

"Last year, Congressional concerns helped discourage the Administration from revising its bilateral military accord with Morocco and providing it with equipment for use in the war in the Western Sahara. When Congress reconvenes in January 1980, it is expected that the Administration will act under Section 36B and notify Congress of its intention to sell Morocco equipment similar to that which was originally proposed in 1978.

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The Subcommittees on Africa and International Organizations of the House Foreign Affairs Committee have recently held hearings on the conflict in the Western Sahara, as has the Senate Foreign Relations Committee, and there will be further House and Senate hearings in the 30 day period following the 36B notification expected next January. Therefore, I would like to receive your analysis and findings before that time."

In light of the change you expect in military sales policy, you ask several questions which will be specifically addressed in the last section of this report.

#### U.S. Statutes and Agreement with Morocco

The Arms Export Control Act, as amended, 22 U.S.C. § 2751 et seq. (1976), provides in pertinent part as follows:

"§ 2753(c) (1)(A) No credits (including participations in credits) may be issued and no guaranties may be extended for any foreign country under this chapter as hereinafter provided, if such country uses defense articles or defense services furnished under this chapter, or any predecessor Act, in substantial violation (either in terms of quantities or in terms of the gravity of the consequences regardless of the quantities involved) of any agreement entered into pursuant to any such Act (i) by using such articles or services for a purpose not authorized under section 2754 of this title or, if such agreement provides that such articles or services may only be used for purposes more limited than those authorized under section 2754 of this title for a purpose not authorized under such agreement;

\* \* \* \* \*

"(B) No cash sales or deliveries pursuant to previous sales may be made with respect to any foreign country under this chapter as hereinafter provided, if such country uses defense articles or defense services furnished under this chapter, or any predecessor Act, in substantial violation (either in terms of quantity or in terms of the gravity of the consequences regardless of the

quantities involved) of any agreement entered into pursuant to any such Act by using such articles or services for a purpose not authorized under section 2754 of this title or, if such agreement provides that such articles or services may only be used for purposes more limited than those authorized under section 2754 of this title, for a purpose not authorized under such agreement.

"(2) The President shall report to the Congress promptly upon the receipt of information that a violation described in paragraph (1) of this subsection may have occurred.

"(3)(A) A country shall be deemed to be ineligible under subparagraph (A) of paragraph (1) of this subsection, or both subparagraphs (A) and (B) of such paragraph in the case of a violation described in both such paragraphs, if the President so determines and so reports in writing to the Congress, or if the Congress so determines by joint resolution.

"(B) Notwithstanding a determination by the President of ineligibility under subparagraph (B) of paragraph (1) of this subsection, cash sales and deliveries pursuant to previous sales may be made if the President certifies in writing to the Congress that a termination thereof would have significant adverse impact on United States security, unless the Congress adopts or has adopted a joint resolution pursuant to subparagraph (A) of this paragraph with respect to such ineligibility.

"(4) A country shall remain ineligible in accordance with paragraph (1) of this subsection until such time as--

"(A) the President determines that the violation has ceased; and

"(B) the country concerned has given assurances satisfactory to the President that such violation will not recur."

Under the pertinent provisions of 22 U.S.C. § 2754, U.S. military sales are authorized for the following purposes:

"Defense articles and defense services shall be sold by the United States Government under this chapter to friendly countries solely for internal security, for legitimate self-defense, to permit the recipient country to participate in regional or collective arrangements or measures consistent with the Charter of the United Nations, or otherwise to permit the recipient country to participate in collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security, \* \* \*."

A bilateral military assistance agreement between the United States and Morocco was signed on June 29, 1960, at Rabat, Morocco. The State Department advises us that under the agreement Morocco shall use military articles and services furnished by the United States solely for the maintenance of internal security or the legitimate self-defense of the Kingdom of Morocco, which, in accordance with the U.N. Charter, excludes any act of aggression against another state.<sup>1</sup> We are further informed that there are no other United States - Morocco agreements which amend this agreement or which pertain to this subject.

#### Major Western Sahara Events

In order for the United Nations' (U.N.) General Assembly to be in a better position to decide on the policy to be followed in the decolonization of Western Sahara, it requested the International Court of Justice to render an advisory opinion--which did not call for an adjudication of existing territorial rights or sovereignty over territory. The Court in its advisory opinion of October 16, 1975 (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12) stated as follows:

"162. The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the

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<sup>1</sup>Unclassified informal summary of pertinent provisions.

materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514(XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory \* \* \*, " [ including the choice of emergence as a sovereign independent state; free association with an independent state; or integration with an independent state.]

Moroccans entered Western Sahara on November 1, 1975. The Tripartite Agreement on Spanish Sahara was signed at Madrid, Spain on November 14, 1975, the signatories being Spain, Morocco and Mauritania. The Spanish presence in the territory was to end by February 28, 1976. Spain was to immediately proceed with an interim administration with the participation of Morocco and Mauritania and in collaboration with the Jemaa, the provincial assembly. Assistant Governors, one proposed by Morocco and the other by Mauritania, were to be designated to assist the Spanish Governor-General of the Territory in his functions. The opinion of the Sahara population was to be respected, as it was expressed by the Jemaa.

On December 10, 1975, the U.N. adopted two resolutions which were in partial disagreement. The United States voted for the second General Assembly Resolution (3458B) which, in addition to noting the Court's advisory opinion, took note of the Madrid agreement and called upon the administrators of the Territory to ensure that the Saharans would be able to exercise their right of self-determination through free consultations organized with the assistance of a U.N. representative.

Spanish authorities withdrew from the Territory on January 28, 1976. Morocco has cited an endorsement by former members of the Jemaa in February 1976 and a subsequent vote by Saharan residents in parliamentary elections as indicative of an exercise of their right of self-determination in approving of partition by Morocco and Mauritania. This view is challenged by the Front for the Liberation of Saguia El Harma and Rio De Oro (Polisario) which organized the Saharan Democratic Arab Republic which is recognized by its principal supporter, Algeria, as well as by several other countries.

In the summer of 1977, a mutual defense treaty was signed by Mauritania and Morocco, and Moroccan troops were stationed in Mauritania.

In July, 1979, the Organization of African Unity (OAU) called for an immediate cease fire in Western Sahara and for a referendum to choose either total independence or the maintenance of the status quo.

A peace treaty between Mauritania and the Polisario was signed in Algiers on August 5, 1979, by which Mauritania relinquished all territorial and other claims in Western Sahara.

The U.N. General Assembly Resolution of October 30, 1979, took note of the Polisario-Mauritania peace agreement and the recent decision of the OAU regarding Western Sahara. It deplored the occupation of Western Sahara by Morocco and the extension of the occupation to the territory evacuated by Mauritania and urged Morocco to join the peace process and terminate its occupation of Western Sahara. The United States abstained from voting on this resolution.

#### Current State Department Position

Because of the short time we were afforded for our reply, we have not obtained formal comments from the State Department. Our response is based on informal discussions with State Department officials and materials made available by them as well as the documents forwarded with your request.

The United States' policy has been to limit the use of military equipment supplied under the 1960 executive agreement to Morocco proper--that is, within the internationally recognized boundaries of the Kingdom of Morocco. While there have been some reported instances of use of United States-supplied military equipment in Western Sahara, this has not been pursuant to stated American policy. The State Department apparently is now prepared to construe the 1960 agreement to allow some limited use of United States-origin military equipment in areas of Western Sahara which are under Moroccan administration. The basis for this is the necessity for legitimate self-defense, because of attacks within Morocco itself by the Polisario which seeks the establishment of a nation independent of Morocco in Western Sahara. Additionally, while not recognizing Morocco's claimed annexation of Western Sahara, the State Department acknowledges Morocco's administering authority under the Madrid Accord.

### Discussion

In your letter, you referred to the situations in Cyprus and Lebanon as instances where the use of United States-supplied military equipment for "legitimate self-defense" was at issue.

In a report to the Honorable Thomas F. Eagleton, United States Senate, B-125085, October 7, 1974 (120 Cong. Rec. 34616 (1974)) we were asked for our opinion regarding the use by Turkey of American-supplied defense articles and services for the purpose of intervening militarily in Cyprus. We said that--

"Turkey's unilateral military intervention on Cyprus certainly appears to run counter to the general tenor of the provisions of the Foreign Assistance Act and the terms of the 1947 agreement [ U.S. military-aid to Turkey] \* \* \* on the basis of our entirely unofficial understanding of developments on Cyprus it would seem that such intervention has gone beyond the bounds of possible defensive or peace-restoration efforts.

\* \* \* \* \*

"Nevertheless, the precise delimitation of the nature and purposes of Turkey's present intervention involves, in our view, complex questions dependent for their resolution upon analysis of factual information not available to us and the exercise of an expertise beyond our purview."

Under section <sup>2500</sup>2753(c), in effect at the time of the Cyprus intervention, foreign countries in substantial violation of the Act or an agreement entered into under the Act (the former Foreign Military Sales Act, now the Arms Export Control Act), "shall be immediately ineligible for further cash sales, credits, or guarantees." We recommended in the report of October 7, 1974, that the cognizant officials expeditiously consider and make appropriate determinations regarding possible Act violations (including the issue of use of U.S. arms for self-defense). However, no determination was made by the Executive Branch, and the Congress took action which halted the shipment of arms to Turkey.

In March, 1978, Israeli military forces entered Southern Lebanon. This military operation was characterized by the Israeli Government as self-defense against a pattern of terrorist

attacks from Lebanon which were carried out by Palestinians and which resulted in the deaths of many Israeli civilians.

Under the current version of section <sup>22 USC</sup> 2753(c)(2), the President is directed to report to the Congress promptly upon the receipt of information that a violation of the Act may have occurred. The Secretary of State, on April 5, 1978, reported that a violation of the 1952 Mutual Defense Assistance Agreement with Israel (which permits use of United States military equipment and devices for purposes similar to that contained in section 2754, including legitimate self-defense) might have occurred by reason of Israeli operations in Lebanon. He also stated that the Government of Israel had said that it intended to comply with U.N. Security Resolution 425 which included a call for Israeli withdrawal. Under these circumstances, the Secretary of State said that he was not recommending that the President take any further action.

By letter of August 6, 1979, the Secretary of State reported to the Congress "that a violation of the 1952 agreement may have occurred by reason of such actions as Israel's July 22 airstrikes and the deployment in Southern Lebanon of U.S. -supplied artillery subject to U.S. law." He said that further U.S. action would depend upon the course of events and his assessment of them.

The Lebanon and Cyprus situations indicate that limitations of the use of U.S. -supplied arms cannot be viewed in isolation but as part of the overall foreign policy of the United States. The President and the State Department's view of what constitutes "legitimate self-defense" in a particular case is influenced by what they consider to be the best interests of this Nation. Under current law, while the President is required to report to the Congress that the use of U.S. arms may not have been for self-defense or internal security purposes, he has the discretion to make a determination of improper use or no determination at all. Similarly, the Congress, subsequent to the President's report of a possible violation, may but is not required to make a determination which under Section 2753<sup>1</sup> would render the offending nation ineligible for military assistance. <sup>22 USC</sup>

Based on the foregoing, your questions are answered as follows:

Question 1. "Would the Administration's proposed re-interpretation of the U.S. -Morocco 1960 military accord be consistent with the specific language of that accord or is it necessary instead to renegotiate the accord itself?"



Answer. It does not appear necessary to renegotiate the terms of the 1960 accord in view of the linkage between the internal security and self-defense of Morocco and the proposed use of United States supplied weapons in Western Sahara for these purposes. The present agreement does not by its terms limit the arms use to Morocco proper or exclude use in Western Sahara. Whether the agreement would be violated will depend, as discussed below, upon the analysis made of the political and military situation.

Question 2. "Would the proposed sales of equipment be consistent with the legislation's primary emphasis on 'legitimate self-defense' of the recipient country, given the fact that the weapons would probably be used mainly in the Western Sahara for annexationist purposes rather than for the direct defense of Morocco proper? (In this regard it would be helpful to have an analysis of Congressional and executive interpretations of 'legitimate self-defense' in other cases related to existing legislation such as Lebanon, Cyprus etc.)"

Answer. The term "legitimate self-defense" is subject to varying interpretations. Often the facts are unclear or not fully known, and reasonable men may differ as to whether a course of conduct characterized by a particular nation as "legitimate self-defense" is aggression in disguise. It appears that while the Executive Branch was unwilling to characterize the landing of Turkish troops in Cyprus, as aggression so as to terminate U.S. military supplies, the Congress suspended military aid in the absence of executive action. The Secretary of State on two separate occasions reported to the Congress that Israeli operations in Lebanon may have violated the Arms Export Control Act. These were only findings as to the possibility of violations--they did not constitute determinations that the Israeli actions were not "legitimate self-defense."

In the case of Western Sahara, on the one hand we have a justification for the use of U.S. weapons there for the purpose of defense against Polisario attacks into Morocco itself, as well as for the defense of the Moroccan administration in Western Sahara to which we have given de facto status. On the other hand, we have not recognized Moroccan claims to the annexation of Western Sahara; we have noted but not endorsed the Madrid Agreement which gave Morocco a share of the interim administration; and we apparently support the OAU call for a cease fire and a referendum. In these circumstances, we are not in a position to determine if American arms would be used for self-defense or for impermissible purposes. Therefore, we cannot say as a matter of law that the use of such arms would not be for legitimate self-defense or internal security.

Question 3. "Would the proposed sales be consistent with recent U.S. efforts to adhere to international legal standards (such as the doctrine of 'proportional response' to attacks), and to cooperate with international institutions (viz the OAU's resolution for a cease fire and internationally-supervised referendum in the Western Sahara, the U.N.'s recent endorsement of the OAU vote and condemnation of Moroccan occupation of the Sahara)?"

Answer. In general, the President and the State Department have supported the U.N. and cooperated with international institutions to the maximum extent possible. At the same time, it must be recognized that not all actions of the U.N. General Assembly and Security Council are motivated by considerations of international law since the U.N. is a forum for the expression of many international rivalries. It is within the purview and special expertise of the Executive Branch in the conduct of United States foreign relations to evaluate and to support those U.N. actions which are most likely to result in an acceptable solution to the Western Sahara conflict and to pursue appropriate means to this end. In support of the reported new arms sales policy, it has been contended that bolstering Morocco's armed forces by supplying arms which may be used in Western Sahara will foster an end to hostilities and lead to a just settlement. Supporters of this view point to the Egypt-Israel peace agreement as impossible of achievement prior to the display of Egyptian military prowess in the Yom Kippur War. We are not in a position to offer an opinion on the merits of this view.

Question 4. "To the extent that the equipment to be sold would be used in the formerly Mauritanian portion of the Western Sahara whose occupation by Morocco has been condemned as 'aggression' by Mauritania and 'deplored' by the U.N., would such sales be consistent with the applicable legislative provisions?"

Answer. As in our answer to question 2, the situation in this area of Western Sahara is unclear. Under the Madrid Accord, Mauritania had a role in the interim administration of the Western Sahara and subsequently occupied about a third of the territory. Upon signing a peace treaty with the Polisario, it relinquished all claims to Western Sahara and withdrew its troops. Moroccan troops later occupied the portion formerly claimed by Mauritania. Under these circumstances, questions could be raised about Morocco's right to administer and occupy this portion of Western Sahara. The need to use United States supplied arms in this area to protect Morocco proper as well as the administration of the other two-thirds of Western Sahara would depend on military considerations not within our cognizance.

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Question 5. "To the extent that any of the equipment would be used to assist Moroccan troops who remain in Mauritania proper at Bir Moghreïn--which occupation Mauritania has condemned as aggression--would sales be consistent with applicable legislative provisions?"

Answer. We understand that the request for arms for Morocco will encompass use in Western Sahara but not in any portion of Mauritania. We assume that this will be made clear to Morocco prior to the delivery of any arms. Further, we have been informally advised by State Department officials that Moroccan troops have withdrawn from Bir Moghreïn, the area of Mauritania occupied by them.

Question 6. "Would the sale of the proposed counterinsurgency equipment therefore result in a 'substantial violation' of the U.S. arms sales law?"

Answer. We cannot say that the proposed sale would result in a violation of U.S. arms sales laws since we do not know whether such arms sales are necessary to Moroccan self-defense and internal security, or only needed because of an aggressive attempt to annex part of Western Sahara. Section 2753(c)(1) defines a "substantial violation" as one "either in terms of quantities or in terms of the gravity of the consequences regardless of the quantities involved." *2205c* You indicated that the sales proposal will probably include offensive military weapons, including OV-10 armed reconnaissance aircraft and AH-1 attack helicopters with anti-tank missiles. Since we do not know the quantities of weapons to be supplied nor the types and numbers of weapons used by the Polisario and by Morocco nor other pertinent military factors, we cannot say whether the additional counterinsurgency equipment would have a substantial effect on military operations in the area.

Question 7. "Does Morocco's current and past use of F-5 aircraft in the Western Sahara, as well as its probable use of M-113 Armored Personnel Carriers, 106mm recoilless rifles, and communications equipment constitute a 'substantial violation' of the U.S. arms sales law?"

Answer. The State Department has indicated in the past that some F-5 aircraft subject to the 1960 U.S.-Morocco agreement have been used in Western Sahara, but that in view of the small number of aircraft, this did not involve a substantial violation. We do not know the types or numbers of military equipment subject to the 1960 agreement which Morocco may be using outside of Morocco proper. However, under the reported current State Department concept of

"legitimate self-defense" as extending beyond the borders of Morocco into the Moroccan-administered areas of Western Sahara, the use of such equipment in these areas appears to conform to the 1960 agreement.

We hope that our comments are of assistance to you.

Sincerely yours,

SIGNED ELMER B. STAATS  
Comptroller General  
of the United States