

Global Diligence

Att: Mr Andrew Ianuzzi

Kemp House, 152 City Rd

London EC1V 2NX

United Kingdom

Brussels, 16.03.2021

**Re. ENGIE - Proposed Desalination Facility Near Dakhla - Stakeholder Engagement**

Dear Mr. Ianuzzi,

Thank you for your response of 15 February 2021 to our mail to Global Diligence of 3 February 2021.

We, again, wish to express our appreciation that you considered including WSRW in the study that you are undertaking, and we regret that based on what you have written to our organisation, we have had to reject taking part, as we believe there are flaws in the approach.

Morocco's decision to sign a controversial infrastructure contract with ENGIE for the occupied territory, and your company's involvement in it, deserves to be publicly commented on.

We regret that Global Diligence does not want to publicly share its methodology and reflections relating to your assignment, nor to answer our questions. These aspects are fundamentally important for the Saharawi people. Therefore, we will henceforth proceed to publish our correspondence on our website, so that the public opinion in Western Sahara and in Europe can have access to information about the existence of the so-called 'stakeholder engagement process' initiated by ENGIE in relation to its controversial infrastructure signed with the occupying power of Morocco in Dakhla.

The consequence of not receiving an answer to the set of questions in our previous letter, is that neither the purpose of the study, its terms of reference or its timeline are publicly available. It is furthermore not known if the results will be shared. It is not known how the selection of alleged 'stakeholders' for the study will be made, for instance whether any Saharawi person or organisation advocating for self-determination will be included, or if Global Diligence considers raising the matter with Moroccan bodies. It is also not known how Global Diligence relates to the separate and distinct status of Western Sahara, the legal status of Morocco under international humanitarian law in the territory and, henceforth, the legal validity of ENGIE's contract on occupied land signed with the neighbouring country of Morocco.

The type of questions that we raised to your company in the previous letter, are nearly identical to the questions asked by the Court of Justice of the EU to the European Commission and Council during the CJEU proceedings on 2 and 3 March 2021, relating to the illegal EU-Moroccan trade agreement on the territory.

We believe that there are certain paradoxes in what you write to us in your latest email of 15 February 2020.

We have four remarks and one question to which we would appreciate your views.

1) In its email of 15 February, Global Diligence has for the first time made reference to the right to self-determination, by stating that the 'stakeholder engagement' is to assess how "various rights--including, but in no way limited to, the right to self-determination--may be impacted by the Project".

First, according to the UN Human Rights Committee, General Comment No. 12 on article 1 of the International Covenant on Civil and Political Right (ICCPR):

“The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights”.

Your statement that “various rights—including, but in no way limited to, the right to self-determination—may be impacted by the Project” seems to suggest that there are other rights that may justify restrictions to the right to self-determination. However, the right to self-determination has an *erga omnes* character. Besides, article 47 of ICCPR clearly states that there cannot be any limitations to the right to self-determination (“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”). In our view, the project is, *in itself*, a violation of the right to self-determination.

Furthermore, as the CJEU states in paragraph 106 of Case C-104/16 P, it is “sufficient” to address the question of the consent of the Saharawi people when assessing the legality of such operation. As we see it, the issue of benefits is not necessary to assess.

In your concluding sentence, you write that the purpose of a WSRW participation would have been “with a view to ascertaining whether members of the Saharawi population would derive any material benefits from the Project.”. We strongly believe that it is not up to WSRW - nor Global Diligence, ENGIE or the government of Morocco - to assess matters relating to the territory. That is for the Saharawi people to decide on.

2) Your email states that “The recent decisions of the CJEU referenced in your response apply to state-to-state relations pursuant to established principles of public international law, which is not directly binding on private entities”.

The principle of relative effect of international treaties, derived from the general principle of law of the relative effect of conventions, applies to any contractual relation – whether under Moroccan law or any other domestic law.

3) Your email states that your analysis relates to the “entire Corell opinion”. It is then confusing why your correspondence makes such a narrow reference to it, failing to include the concluding prerequisite of self-determination.

4) Finally, Global Diligence has worked extensively on the situation in occupied Crimea. In 2019, Global Diligence partnered with The Ukrainian Helsinki Human Rights Union, in an important submission to the Office of the Prosecutor of the International Criminal Court. Global Diligence refers to the Crimean Peninsula as being “annexed” by Russia.<sup>1</sup>

“We call for the ICC Prosecutor to accelerate the process of the expert examination of war crimes and crimes against humanity committed at eastern Ukraine. Under conditions of the armed conflict, it is important for us to initiate a full investigation of the case since the Russian Federation continues its aggressive actions towards Ukraine, and as result, more and more people suffer every day. Of utmost importance is to stop this 5 year-long impunity of the aggressor state,” emphasized your delegation stated.<sup>2</sup>

It is unclear why Global Diligence in the case of Ukraine would call for the investigation of the exact same crimes that Morocco has perpetrated in Western Sahara, yet in Western Sahara it does the opposite: here it sets out to investigate how Morocco’s war crimes of annexation, occupation and settlement are trickling down to the benefit of the victims.<sup>3</sup>

Based on how Global Diligence relates to the legal nature of Russia’s presence in Crimea, we doubt that it would accept entering similar assignments as the one with ENGIE, for Russian infrastructure projects, without taking

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<sup>1</sup> <https://www.globaldiligence.com/self-determination-and-separatism>

<sup>2</sup> <https://helsinki.org.ua/en/articles/7th-submission-to-the-international-criminal-court-uhhru-has-submitted-another-proof-of-the-commission-of-war-crimes-at-the-east-of-ukraine-by-the-russian-federation/>

<sup>3</sup> See e.g. European Parliament Policy Department, “Occupation/Annexation of a territory: respecting international humanitarian law and human rights and consistent EU policy”. [https://wsrw.org/files/dated/2016-04-10/euparllegalreportcrimeaoptwsahara\\_2015.pdf](https://wsrw.org/files/dated/2016-04-10/euparllegalreportcrimeaoptwsahara_2015.pdf)

into account the legal status of the land, the contract and Russian claims, and while explaining that international public law is not binding for companies and bodies like your own.

As we see it, the fact that companies ignore basic human rights is the entire purpose of human rights due diligence mechanisms.

Has Global Diligence sought external help to understand the applicable international legal principles and the right to self-determination of peoples from territories pending decolonisation prior to undertaking this assignment for ENGIE?

We believe that Global Diligence should have considered what the risks are when undertaking such a study, specifically that of giving an air of legitimacy to an occupation. We find it concerning that Global Diligence hinted that it wants to compromise on the right to self-determination.

For ease of reference, the email exchange between Global Diligence and WSRW is attached below.

Sincerely

**Sara Eyckmans**

**Coordinator, Western Sahara Resource Watch**

[coordinator@wsrw.org](mailto:coordinator@wsrw.org)

**EMAIL from GLOBAL DILIGENCE TO WSRW, 21.01.2021.**

*Dear Ms Eyckmans and Mr Deglet:*

*My organization has be engaged by ENGIE SA to conduct a stakeholder engagement process in connection with the desalination facility near Dakhla referenced in your letter of 9 December 2020 to Claire Waysand (re: 'Engie's policy on Western Sahara').*

*I would be pleased to speak with one or both of you regarding this matter as soon as possible.*

*Please let me know a convenient time to contact you.*

*Best,*

*Andrew Ianuzzi  
Counsel, Global Diligence*

**EMAIL from GLOBAL DILIGENCE TO WSRW, 23.01.2021.**

*Dear Ms Eyckmans and Mr Deglet:*

*Further to my previous email, we have begun the initial phase of our preliminary stakeholder engagement process, which will focus on the intended and potential benefits of the desalination facility near Dakhla referenced in your letter to ENGIE (the 'Project').*

*As a starting point, we intend to: (i) adopt a broad view of 'stakeholders', understood by us to include individuals or groups affected by, or likely to be affected by, the Project, as well as those who may have an interest in the Project; (ii) apply the standard of review set out by former UN Under-Secretary-General for Legal Affairs Hans Corell in 2002, indicating that certain business activities should be 'conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf, or in consultation with their representatives'; (iii) adhere to the UN Guiding Principles on Business and Human Rights; and (iv) encourage all stakeholders to engage with us in a spirit of realism and compromise.*

*That said, we consider your organization to have an interest in the Project and would therefore like to discuss the best way forward as soon as possible. Preferably, and preliminarily, this could be done over the telephone, to be followed by an exchange of written inquiries. In any case, we would be grateful for your time and assistance—along with that of other stakeholders—in identifying and engaging with a broad range of the Project's intended and potential beneficiaries on an ongoing basis.*

*Please let me know when and how best to reach you, and I'll get back to you as soon as I can.*

*Best,*

*Andrew Ianuzzi  
Counsel, Global Diligence*

**EMAIL from WSRW TO GLOBAL DILIGENCE, 03.02.2021.**

Dear Mr Ianuzzi,

Thank you for your email of 21 January 2021 and your follow-up email with further information of 23 January 2021, inviting Western Sahara Resource Watch for a conversation regarding “a stakeholder engagement process” on ENGIE SA’s desalination facility in Dakhla, occupied Western Sahara.

Your mail to us explains that your assessment is based on UN legal opinion S/2002/161, often referred to as the Corell Opinion.

We are deeply concerned over your reference to that opinion. First, your reference seriously misrepresents the content of the document. Second, your organisation has seemingly failed to take into account the legal clarifications and developments which have taken place since then and to thoroughly consider the applicable principles of international law, as summarized by the EU Court of Justice in four consecutive rulings so far. Your interpretation of the Corell Opinion bears the exact same flaws as the one held by the EU Commission and Council for several years - an interpretation that has been thoroughly and explicitly dismissed by the EU Court of Justice.

1. As stated with great clarity by the EU Court of Justice, Western Sahara is a territory that is “separate and distinct” from Morocco, and the latter has no mandate to administer the territory. This is also explained in the Corell Opinion, which uses the competence of an administering power as a point of departure, yet explicitly states that this was done by analogy - “as any limitation of the powers of such entity acting in good faith would certainly apply a fortiori to an entity that did not qualify as an administering Power but de facto administered the Territory.” (Corell, Pretoria, 2008) It is worth recalling that the UN treats Western Sahara as the only Non-Self-Governing Territory without an administering power in place. We submit that there is a term in international law that applies to a State that manu militari controls another territory to which it has no tenable claim, all the while denying the people of that territory to express their views on the situation. ENGIE’s approach to the territory suggests that it regards Morocco as having a mandate or title over the territory. Any engagement process by Global Diligence would have to address this presumption.
2. The focus of your stakeholder engagement process is, based on your description, on the intended and potential benefits of ENGIE’s desalination project – and purports to rely on the Corell Opinion as a basis for such an approach. Yet the key-element of the Corell Opinion is not part of your mail to us. The conclusion of the Corell Opinion is to be found in the 25th - concluding - paragraph, where it states that activities “in disregard of the interests and wishes of the people of Western Sahara... would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories”. The crucial element that is not part of ENGIE’s approach to the desalination project in Western Sahara, nor of Global Diligence’s stakeholder process, is that of “wishes” - whether the people want the activity to take place or not. This is particularly dangerous. For years, the EU Commission and Council have argued along the same lines as your email to us, claiming that including Western Sahara in bilateral agreements with Morocco was to the benefit of the Saharawis (and therefore legal), referring to the Corell Opinion in the very same way as Global Diligence. This practice has led Hans Corell himself to state that “As a European I feel embarrassed” (<https://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>). The EU Court of Justice responded to the EU Council and Commission’s claims on the beneficial aspect of including Western Sahara in agreements with Morocco that it is not necessary “to determine whether such implementation is likely to harm it [the third party, i.e. the people of Western Sahara] or, on the contrary, to benefit it. It is sufficient to point out that, in either case, that implementation must receive the consent of such a third party.” (Art. 106, Case C-104/16 P, 21 December 2016, Council of the European Union v Front, Polisario) As evident from the Court’s ruling, consent is a natural corollary of the internationally recognised right to self-determination of the people of Western Sahara – the right to determine the status of the territory, and the resources harboured therein. Yet this cornerstone principle governing the entire UN approach to the conflict in Western Sahara is seemingly absent from the approach of both ENGIE and Global Diligence.
3. Your reference to paragraph 24 of the Corell Opinion, stating that “certain business activities should be ‘conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf, or in consultation with their representatives’;” merits attention. Again, due to the lack of precedents, the Corell Opinion was developed by taking the competences of an administering power as a point of departure. Morocco is not the administering power of Western Sahara. On the other hand, there is no dispute that the territory is Non-Self-Governing and that its people have a right to self-determination. As stipulated by the EU Court of Justice, this entails that their consent is required to lawfully undertake activities in their homeland. That is a manifestly different notion than consultation. Per their right to consent, the people of Western Sahara have the decisive voice whether or not ENGIE’s desalination project on their land will go ahead. In a consultation process, their voice is one of many

stakeholders and easily dismissed. To not ask for the consent of the people having the right to determine the status of the land, and assuming that your endeavour will be to their benefit, is eerily reminiscent of a colonial stance.

As a matter of principle, WSRW is ready to assist in advising businesses that consider undertaking operations in the territory, as part of companies' due diligence process. We are more sceptical, however, to give input to such a stakeholder engagement process as you mention, as we in general are concerned that our good name and input will be used by companies in an effort to legitimize operations that the Saharawis object to and hence are established in violation of international law.

We note that you do not qualify WSRW as a potential stakeholder, but rather invite us to give input to the process that you are to undertake. In general, WSRW, as an international Europe-based organization, is hesitant to be defined as a stakeholder relating to corporate activity on the territory of Western Sahara, where the Saharawi people have the right to self-determination. Giving advice on how Global Diligence is going to undertake this process could be equally problematic for us, as it implies accepting the existence of the process itself before we understood the purpose, method and scope of the study.

As long as the consultation is based on a misreading of international law, we have to regret that we do not wish to take part in the process.

Based on ENGIE's engagement, and Global Diligence's approach to the matters of applicable international law, Western Sahara Resource Watch has a series of questions for your company. This will be part of an article we are planning to write on our website.

1. What is the purpose of the "stakeholder engagement"?
2. What are the Terms of Reference for the "stakeholder engagement"? In particular, what is the definition of a "stakeholder" in the Terms of Reference?
3. Will the Terms of Reference of the "stakeholder engagement process" be shared with the people of Western Sahara? If yes, how will these terms be shared? If not, why?
4. What is the timeframe for the "stakeholder engagement process"?
5. Will the results of the "stakeholder engagement process" be shared by Global Diligence with the people of Western Sahara? If yes, how? If not, why?
6. Will Global Diligence travel to the territory of Western Sahara as part of the engagement with ENGIE?
7. Will Moroccan government/regional/municipal institutions or Moroccan politicians elected at Moroccan parliamentary elections or Moroccan research institutions or Moroccan organisations or Moroccan trade unions or Moroccan business interests be invited as 'stakeholders' for this process? If yes, why does Global Diligence consider these as relevant 'stakeholders', considering Dakhla is not located in Morocco, and that the Court of Justice of the EU states that Western Sahara is a "separate and distinct" territory from Morocco?
8. Does Global Diligence agree with the CJEU ruling of 21 December 2016, Article 106, which clarifies that the aspect of consent of the people of Western Sahara is a prerequisite for an activity affecting the territory to be considered lawful, and that the question of "benefits" is irrelevant?
9. How does Global Diligence define the right to self-determination in the context of Western Sahara? Does it encompass the right to permanent sovereignty over natural resources, to national unity and territorial integrity?
10. How does Global Diligence define the status of the people of Western Sahara? Are they an indigenous population or a colonial people? Do they enjoy the right to self-determination and independence?
11. Will this particular "stakeholder engagement" assess the Saharawi people's right to self-determination in relation to the establishment of infrastructure projects on their land - and how ENGIE's has related to this right?
12. What is your assessment of the legal status of Western Sahara under international law?
13. What is your assessment of the legal status of Morocco's presence in parts of Western Sahara under international law?
  - a) Does Morocco have sovereignty over Western Sahara?
  - b) Is Morocco the administering power of Western Sahara as defined by the UN Charter? If yes, please explain how Global Diligence has come to this conclusion.
  - c) Is Morocco occupying parts of parts of Western Sahara under international humanitarian law? If so, can Morocco act directly through its national administration in Western Sahara or does it have to establish a separate and distinct military authority as the Israeli government did in relation to the West Bank in 1967?
14. Has Global Diligence seen the permissions or contracts that ENGIE has obtained with the Moroccan authorities relevant to this operation? In which legal capacity do the Moroccan authorities issue those permissions or sign those contracts? Is Moroccan domestic law the applicable law to those permissions or contracts?
15. How does Global Diligence assess the legal validity of ENGIE's agreements for a facility in Dakhla, considering that ENGIE's engagement in the territory is made through permissions from the neighbouring country of Morocco?

16. Will your “stakeholder engagement process” include an analysis of whether ENGIE carried out a human rights due diligence prior to engaging with the government of Morocco in Western Sahara, and whether such due diligence included a study of the legal nature of the territory, of Morocco’s presence in the territory, and of the right to self-determination as a human right?

17. If Global Diligence is of the view that Morocco has no right to issue infrastructure permits like the one given to ENGIE, how does Global Diligence explain that it has, itself, undertaken such assignment for ENGIE?

18. Considering that Global Diligence’s reference to the 2002 legal opinion fails to quote the conclusion of the opinion, but instead uses arguments that have been explicitly found irrelevant by the highest European Court, please clarify which company - ENGIE or Global Diligence - was the first to apply this misleading Corell quote as a starting point for the assessment that was to be made.

19. The right to self-determination is a human right. This is well described by the Advocate General of the CJEU in 2018.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=198362&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=518656> This is also why the CCPR in 2016 ([www.wsrw.org/files/dated/2016-11-04/ccpr\\_c\\_mar\\_co\\_6\\_25813\\_f.docx](https://www.wsrw.org/files/dated/2016-11-04/ccpr_c_mar_co_6_25813_f.docx)) and the CESCR in 2015 ([https://www.wsrw.org/files/dated/2015-12-09/cescr\\_morocco\\_2015\\_eng.pdf](https://www.wsrw.org/files/dated/2015-12-09/cescr_morocco_2015_eng.pdf)) so strongly urged Morocco to respect the Saharawi people’s right to consent in relation to business operations in the territory. Does Global Diligence agree that the right to self-determination for the people of a Non-Self-Governing Territory in the process of decolonisation is a human right?

20. Your email to WSRW explains that Global Diligence intends to “encourage all stakeholders to engage with us in a spirit of realism and compromise”.

a) While it is still unclear to us what Global Diligence means by a ‘stakeholder’, may Global Diligence explain what it means by the two terms ‘realism’ and ‘compromise’?

b) Does Global Diligence ask for a compromise on the right to self-determination?

c) If the Saharawi people oppose ENGIE’s project on their territory, what, according to Global Diligence, would a compromise to that opposition look like?

21. Is Global Diligence of the view that human rights, in general, can be compromised? To what extent does Global Diligence believe that UNGP opens for compromising on certain human rights? To what extent does Global Diligence believe that it might now risk undermining the Saharawi people’s right to self-determination through its assessment? To what extent does Global Diligence believe that it, itself, is acting in violation of the UNGP through taking on such assignment for a business interest on occupied land without having first obtained the permission of the people of the territory?

Thank you in advance for your consideration of our questions, and we look forward to hearing from you, both with answers to the questions, as well as with a copy of the Global Diligence’s complete Terms of Reference with ENGIE, as described in question 2.

We want to be very clear that an assignment of the kind that Global Diligence is now undertaking, risks undermining the Saharawi people’s right to self-determination and legitimising ENGIE’s partnership with Morocco. As ENGIE’s project facilitates further infrastructure on the ground and influx of Moroccan settlers, it contributes to prolong the illegal occupation. We do not think Global Diligence wishes to be associated with such a business activity. A ‘consultation’ study by your company which includes Moroccan interests and groups supportive to the Moroccan position on the conflict also risks increasing social conflict on the ground in the short term.

We strongly recommend your company to study the relevant international law applicable to the decolonisation of the territory of Western Sahara, and not to proceed with an alleged ‘stakeholder engagement’ which the Saharawi people have probably never asked you to carry out.

A copy of this mail has been sent to Mrs. Estelle GABILLET, Ethics, Compliance & Privacy Deputy Director, ENGIE. A mail has today been sent to ENGIE with questions that are partially overlapping.

Note that we look forward to Global Diligence’s answers to these questions above, independently of what ENGIE might or might not respond to some of the same questions.

With best regards,  
Sara Eyckmans  
Coordinator, Western Sahara Resource Watch

**EMAIL from GLOBAL DILIGENCE TO WSRW, 15.02.2021.**

*Dear Ms Eyckmans,*

*Again, thank you for your response to our emails of 21 and 23 January 2021.*

*We understand that you do not wish to take part in our engagement process as a stakeholder, nor assist us in identifying any other stakeholders whose various rights--including, but in no way limited to, the right to self-determination--may be impacted by the Project. We also understand that you have taken the liberty of making a number of unfounded assumptions regarding our professional approach and ethics.*

*Accordingly, in reply to your response, please accept the following clarifications:*

- (1) Global Diligence is not acting in this matter as a representative of ENGIE, but rather as an independent assessor on various impacts related to the Project. As such, we do not speak for ENGIE on any issue.*
- 2) We stand by our understanding of the entire Hans Corell Opinion of 2002, current state practice and opinio juris, and various other international legal principles and guidelines relevant to our assessment.*
- (3) The recent decisions of the CJEU referenced in your response apply to state-to-state relations pursuant to established principles of public international law, which is not directly binding on private entities.*

*In any event, given your stated desire not to engage with us and--in particular--your stated reasons therefor, we cannot disclose any further information at this point. Should you at any time wish to reconsider your position, we would be open to cooperating with your organization in good faith and with a view to ascertaining whether members of the Sahrawi population would derive any material benefits from the Project.*

*Best,  
Andrew Ianuzzi  
Counsel, Global Diligence*