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The approach of the EU towards the conflict of Western Sahara

Questioning the legality of the fisheries
agreements with Morocco

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Abstract

A partire dalla fondazione delle Nazioni Unite, più di ottanta ex colonie hanno raggiunto l'indipendenza, un processo che ha coinvolto più di un miliardo di persone e nel quale le Nazioni Unite hanno svolto un ruolo determinante. Il processo di decolonizzazione del continente africano è considerato uno dei più grandi successi delle Nazioni Unite; tuttavia, il caso del Sahara occidentale rimane, insieme ad altri, ancora non risolto e la popolazione saharai non ha ancora esercitato il diritto a decidere sul futuro del proprio territorio. Il continuo diniego del diritto all'autodeterminazione del popolo saharai affonda le sue radici nell'invasione del territorio, ex colonia spagnola, da parte del Marocco nel 1975. Nel corso degli anni, il Marocco ha consolidato la propria amministrazione e il proprio controllo attraverso la costruzione di un muro che attraversa il Sahara occidentale per circa 1500 chilometri e che oggi rappresenta il confine *de facto* tra la parte amministrata dal Marocco e quella amministrata dal Fronte per la Liberazione del Sahara occidentale, il Fronte Polisario.

Il Sahara occidentale è ancora oggi considerato dalle Nazioni Unite un territorio non autonomo mentre la presenza del Marocco è stata definita dalla stessa, occupazione militare. Inoltre, l'assoggettamento dei saharai all'occupazione marocchina risulta essere molto più ostile rispetto alla precedente colonizzazione spagnola del territorio durata fino al 1975.

Il fatto che la Spagna abbia abbandonato il territorio del Sahara occidentale circa quaranta anni fa e che la questione della sovranità rimanga tuttora irrisolta, è la testimonianza di un fallimento odierno delle istituzioni internazionali e del diritto internazionale nel generare un meccanismo adeguato per dare avvio ai principi universalmente riconosciuti di decolonizzazione e del diritto all'autodeterminazione dei popoli indigeni.

Il caso del Sahara occidentale è sempre stato considerato nella dimensione politica del diritto all'autodeterminazione; tuttavia, durante il processo di decolonizzazione, si è sviluppato il cosiddetto principio di sovranità permanente dei popoli sulle risorse naturali, considerato corollario del principio

di autodeterminazione e diretto a garantirne la dimensione economica e permettere ai paesi colonizzati di poter usufruire delle proprie risorse.

L'area occupata del Sahara occidentale è uno tra i paesi più ricchi al mondo di risorse alieutiche, di fosfati e in parte di petrolio e di gas. La sua ricchezza in termini di risorse naturali è stata tuttavia anche la sua condanna e la motivazione principale dietro l'occupazione marocchina del Sahara occidentale. L'invasione illegale del Marocco, infatti, sembra ricevere un solido supporto dal commercio internazionale. Nel momento in cui le potenze commerciali straniere cooperano con le autorità marocchine per avviare attività nella zona occupata del Sahara occidentale, si vengono a determinare problematiche etiche, giuridiche e sociali. Le società coinvolte affermano che il loro intervento intende contribuire a fornire uno sviluppo economico positivo in Marocco. Tuttavia, lo sviluppo si trasforma in un contributo attivo nel supporto dell'occupazione illegale da parte del Marocco del Sahara occidentale. Secondo le norme del diritto internazionale infatti, l'uso delle risorse di un territorio occupato da parte della potenza occupante, è considerato legittimo qualora la popolazione locale goda dei relativi benefici. Tuttavia, la maggior parte dei saharai vive nei campi profughi nel deserto dell'Algeria, in condizioni di povertà, senza ricevere i benefici che derivano dal commercio delle risorse della propria terra. I saharai che vivono nella zona occupata dal Marocco, invece, sono soggetti ad una violazione sistematica dei diritti umani da parte del governo marocchino, come è stato riportato in diverse occasioni dalle organizzazioni governative Amnesty International e Human Rights Watch.

Le compagnie straniere e l'UE ricoprono un ruolo sempre più importante nel conflitto del Sahara occidentale. Esse, infatti, forniscono occupazione ai colonizzatori marocchini nonché entrate economiche alla potenza occupante, nonostante debbano rispettare il principio di non riconoscimento di situazioni illegittime e le loro azioni commerciali nella zona occupata del Sahara occidentale sia stata denunciata dalla società civile e considerata illegittima dal Sottosegretario ONU agli Affari giuridici, Hans Corell.

Grazie alla sua posizione geografica strategica, il Marocco ha relazioni molto strette con l'Unione Europea. Il Marocco inoltre è cosciente del fatto che l'Unione Europea preme per una cooperazione stretta per aiutare a risolvere problemi legati al terrorismo, all'immigrazione e al traffico di droga ed è riuscito a diventare un importante alleato dell'Occidente.

A livello europeo, il più grande alleato del Marocco è la Francia. Ogni volta che il caso del Sahara occidentale è stato trattato in seno al Consiglio di Sicurezza o nell'Unione Europea, la Francia ha fatto pressione affinché gli interessi del Marocco prevalessero.

La Spagna invece risulta ancora essere la potenza amministrante del Sahara occidentale e tale ruolo che essa ricopre comporta determinati doveri legati al diritto internazionale. Tuttavia, da quando la Spagna ha abbandonato il Sahara occidentale nel 1975, la maggior parte dei governi spagnoli ha cercato di mantenere buone relazioni con il Marocco. Dietro questo comportamento sembra esserci la motivazione che solo attraverso la cooperazione con il suo vicino meridionale, la Spagna spera di impedire un'ondata di traffico di droga e immigrati che sfocino attraverso i suoi confini molto vulnerabili. Uno dei più grandi e potenti gruppi di interesse nella politica estera spagnola è l'industria alieutica spagnola, e nel 2006 e nel 2013 la Spagna è riuscita a far concludere accordi molto controversi tra Marocco e Unione Europea. Attraverso questi accordi, infatti, il Marocco riceve un compenso economico e in cambio all'Unione Europea viene garantita la possibilità di pescare nelle acque sotto il controllo marocchino, che includono le acque del Sahara occidentale. Quasi tutte le quote di questi accordi sono garantite alla Spagna. Il diffuso supporto del pubblico spagnolo per i saharai e per il Fronte Polisario, riscontra diverse difficoltà nell'influenzare le politiche del governo centrale sul Marocco.

Considerato il supporto spagnolo e francese per il Marocco, l'Unione Europea è diventata incapace di agire in termini di pressione politica sul Marocco. I governi amichevoli nei confronti della causa saharai, principalmente i paesi

scandinavi, non sono riusciti fino a questo momento a superare la lobby pro-marocchina.

La scelta dell'argomento della presente tesi, con uno specifico focus sulle risorse naturali del Sahara occidentale, deriva da una delle esperienze più significative e formative che da circa un anno occupa parte del mio tempo e del mio interesse. Da circa un anno infatti ho la possibilità di supportare attivamente il lavoro di Western Sahara Resource Watch (WSRW), un'organizzazione internazionale non governativa fondata nel 2004 come risposta all'opinione giuridica del 2002 del Sottosegretario ONU agli Affari giuridici. WSRW si è ispirata ai metodi lavorativi della campagna anti-Apartheid, ricercando le compagnie e i governi che scelgono di concludere accordi con il governo marocchino sulle risorse che appartengono al Sahara occidentale. WSRW controlla se tali compagnie consultano i proprietari di tali risorse o concludono accordi solamente con il governo marocchino. Nel corso degli anni, WSRW ha mostrato come ogni piccolo angolo del mondo sia intrinsecamente connesso al conflitto del Sahara occidentale attraverso legami commerciali. Il coinvolgimento commerciale ha spinto e fatto accrescere interessi locali. WSRW ha come obiettivo quello di rendere i politici, le compagnie e i consumatori di tutto il mondo consapevoli dei loro legami stretti al conflitto, attraverso lo sfruttamento del Marocco nel territorio. WSRW oggi è formata da organizzazioni ed individui da più di quaranta paesi e crede che l'occupazione del Sahara occidentale non si fermerà fintanto che il Marocco continuerà a sfruttare le risorse naturali. Nel 2006, WSRW ha lanciato la campagna *Fish Elsewhere!* che ha lavorato per impedire all'UE di firmare un accordo di pesca con il Marocco che avrebbe permesso alle imbarcazioni dell'UE di pescare nelle acque del Sahara occidentale.

Introduction

“Europe has stuffed herself excessively with the gold and raw materials of the colonial countries: Latin America, China and Africa. [...] Europe is literally the creation of third world. The wealth which smothers her is that which was stolen from the underdeveloped peoples. The wellbeing and the progress of Europe have been built up with the sweat and the dead bodies of Negroes, Arabs, Indians and the Asian races”.⁽¹⁾

“I dream of an Africa which is in peace with itself”.⁽²⁾

The question of Western Sahara is one of the most controversial situations in the history of the decolonization process since it has entailed problems which have not been solved until the current days.

Western Sahara has been occupied by neighboring Morocco for more than forty years now. For decades, the Sahrawis coexisted with the Spanish colonists but during the 1970s the Sahrawis began to believe that Western Sahara was their land, their nation. By then, the UN was decolonizing Africa and Spain was encouraged to leave Western Sahara and start negotiating independence with the Sahrawis. Nevertheless, the then King of Morocco, Hassan II, claimed that the territory was and had always been part of Morocco and invaded the country even though his claims of the territory had been rejected by the International Court of Justice a few months earlier. Thousands of Saharawis fled to Algeria where they settled a refugee camp in the desert. Here they established an exile State and for more than 15 years the Sahrawi liberation movement, the Polisario Front, fought the Moroccan invaders. During the war, the Moroccans extended a wall across the desert which still today separates the occupied territories from the rest of Western Sahara. In the occupied territories the Saharawis live under Morocco's brutal occupation where peaceful resistance is met by violence, imprisonment and torture. Outside the occupied territories, many Sahrawis live

¹ F. FANON, *The Wretched of the Earth*, preface by J. P. SARTRE, translated by C. FARRINGTON, New York, 1963, at 102.

² *Cit.* by Nelson Mandela.

in refugee camps surviving through international food aid. In 1991 the UN Security Council managed to negotiate a ceasefire between Polisario and Morocco. One of the conditions of the ceasefire was a promised referendum on the status of Western Sahara, and the UN mission for the referendum, the MINURSO, was established with the mandate of keeping the parties to respect the ceasefire and the right to self-determination of the Sahrawis through a free referendum. But now, 25 years later, the Saharawis are still waiting for the referendum. No country in the world recognizes Morocco's occupation of Western Sahara and the UN Security Council has repeatedly maintained the right of the Saharawi to self-determination. Yet, nobody managed to create peace in this territory, making this case a frozen conflict.

The term "frozen conflict" has become a political concept which is frequently used to refer to those conflicts that persist over years or even decades and therefore give the impression of stagnation.⁽³⁾ Even though negotiations and armed conflicts take place, such conflicts are referred as frozen conflict since there exists still a situation of *status quo* without a clear end to the conflict.

The fate of Western Sahara "continues to be hostage to the geopolitics of the interests of regional and international actors".⁽⁴⁾

If the external powers are unable or unwilling to organize a powerful impetus to change the *status quo*, either by coordinating their mediation efforts or by agreeing on a single leading mediator, the *de facto* secession normally becomes more entrenched. Where there is international competition, the opposing parties gravitate into the economic, security and political sphere of their protecting power.

³ C. CHAVEZ FREGOSO, N. ZIVKOVIC, *Western Sahara: A Frozen Conflict*, Journal of Regional Security, 7:2, 139-150, 2012, Belgrade Centre for Security Policy, at 40.

⁴ L. GHETTAS, *Western Sahara: No longer a low intensity frozen conflict*, Situation Analysis – LSE Ideas. International Affairs, Diplomacy and Strategy, London School of Economics and Political Science, at 1.

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This leads to a new equilibrium which stretches indefinitely into the future.⁽⁵⁾

One of the reasons of the deadlock is the plundering of the natural resources of Western Sahara by several multinational corporations across the world, and by the European Union as well. The European Union indeed is playing an increasingly important role as a result of the trade agreements signed with Morocco concerning fishing and agriculture. Although it has tried to keep a neutral position towards the conflict of Western Sahara in order to maintain good diplomatic relations and economic benefits, it has shown more support towards Morocco, which today results one of its biggest trade partners. Inside this institution, positions towards the conflict are divided: while the European Parliament has been more sensitive to the rights of the Sahrawis, the Council and the Commission have moved them to the background compared to the political and economic interests by concluding agreements which do not benefit the Sahrawis.

Western Sahara has been blessed with several natural resources which are condemning its future.⁽⁶⁾ Experts on Western Sahara claim that Moroccan access to the resources in Western Sahara might prolong the conflict. Occupied Western Sahara indeed possesses one of the world's largest phosphate deposits and its coastline is one of the richest fishing grounds in Africa. Moreover, it is likely its coasts host considerable reserves of oil and gas.

The phosphate factor plays a considerable role in explaining both Morocco and multinational corporations' interest in Western Sahara.⁽⁷⁾

⁵ G. NOUTCHEVA, N. TOCCI, B. COPPIETERS, T. KOVZIRIDZE, M. EMERSON, M. HUYSEUNE, *Europeanization and Secessionist Conflicts: Concepts and Theories*, *Journal of Ethnopolitics and Minority Issues in Europe*, 13-61, at 1.

⁶ For an overview on the natural resources in question, see E. HAGEN, *The role of natural resources in the Western Sahara conflict, and the interests involved*, *International conference on Multilateralism and International Law with Western Sahara as a case study*, Pretoria, 4 and 5 December 2008.

⁷ For a comment, see C. A. RARICK, G. FALK, C. C. BARCZYK, *An Element of Concern in North Africa: The case of Morocco's phosphate industry*, in *Journal of the International Academy for case studies*, Volume 19, Number 6, 2013.

Phosphate is an important component of the fertilizers, which, along with nitrogenous and potassic fertilizers, is used for much of the global food production and food security. A phosphate mine in Bou Craa was opened in 1972 under the supervision of the Spanish settlers and was handed over to the Moroccan state-owned company *Office Chérifien des Phosphates* (OCP) in 1956.

Today, the exports of phosphates represent Morocco's main source of income from the occupied territories who holds the world's biggest phosphate reserves and is the third largest producer of phosphates in the world. Each year approximately two tons of phosphate are mined in Western Sahara which is today equivalent to an export value of approximately USD 200 million.⁽⁸⁾

As regards the production of hydrocarbons, Morocco does not produce them and it is dependent on them. From 2001, it started making its own findings in its territory, and lately in Western Sahara, by granting oil reconnaissance licenses to the French firm Total and to the American energy company Kerr-McGee which caused the immediate reaction by the Polisario Front and led to the 2002 legal opinion of the Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, Hans Corell, who stated that "if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the peoples of Western Sahara, they would be in violation of the principles of international law". Consequently, the two companies left the territory. Nevertheless, the first drilling took place from December 2014 while the first results were announced in March 2015. The US company Kosmos Energy, in partnership with its Scottish partner Cairn Energy, was given licenses by the Moroccan state oil company ONHYM to carry out an operation of drillings on a block named "Boujdour Offshore". The other project in Western Sahara consists of joint ventures headed by the small Irish oil company Island Oil and Gas which have a contract for a block onshore Western Sahara which overlaps the city of Smara covering both territories under

⁸ WSRW Report *P for Plunder: Morocco's exports of phosphates from occupied Western Sahara*, April 2016, available at <<http://wsrw.org/files/dated/2016-04-07/p-for-plunder-2015-web.pdf>>. [Last accessed 20 September 2016].

Moroccan and Polisario control. Over the years, a few more key business have emerged, such the exportation of sand which is mainly used in the Canary Island and Madeira for construction industry purposes, and for maintenance of tourist beaches.

Moreover, in Dakhla, in southern Western Sahara, a big fruit and vegetable industry has developed since around 2004, based on usage of underground fresh water reservoirs.

Finally, Morocco is investing in renewable energies by trying to use the shores of the occupied Western Sahara for wind and sun installations.⁽⁹⁾

One of the most important valuable resources of Western Sahara area however, is represented by the fisheries offshore its territory. On this resource, one can distinguish three different levels, namely the bilateral or multilateral agreements between the European Union or foreign states with Morocco⁽¹⁰⁾; private commercial fishing under Moroccan flag and small-scale fishermen, living in the settlements along the Western Sahara coast. The focus of the present work is the bilateral agreements between the EU and Morocco.

What is clear, however, is that Morocco's exploitation of the natural resources of Western Sahara helps to financially maintain and strengthen its illegal occupation. Moreover, the exploitation of non-renewable resources deprives the Sahrawi people of their future right to natural resources when they achieve self-determination.

Indeed, Western Sahara's natural resources have important implications for an eventually independent Sahrawi nation. As it has been asserted:

⁹ See the WSRW Report: *Dirty Green March: Morocco's controversial renewable energy projects in occupied Western Sahara*, August 2013, available at <<http://www.wsrw.org/a106x2638>>. [Last accessed 20 September 2016]. The report detailed how Morocco intends to build over 1000 megawatts of renewable energy plants in Western Sahara.

¹⁰ On this issue, consider for example the Russian agreement with Morocco signed on 3 June 2010. For a comment see *Russian government violates own fisheries agreements with Morocco*, available at <<http://www.wsrw.org/a106x1580>> and *Russia-Morocco fisheries agreement signed yesterday*, available at <<http://www.wsrw.org/a105x2517>>. [Last accessed 20 September 2016].

The prospects for economic returns from the territory's resources are promising. With a small population and an abundance of natural resources, the future independent SADR [Sahrawi Arabic Democratic Republic] will be a viable and flourishing nation that will be a factor of stability and peace in the Maghreb region and an example of a modern and democratic nation in North Africa, one tolerant and willing to interact with all its neighbors and with the international community. Such a state is keen to attract investment in a transparent and open manner and for the benefit of all.⁽¹¹⁾

Generally, the question of Western Sahara can be studied from different perspectives and even within the International Law framework, it raises several issues, such as the right to self-determination, the principle of the *uti possidetis juris* and its role in setting up new territories in the African continent, the applicability of the Humanitarian Law and the respect of the human rights.

The perspective considered in the present work is the applicability of the principle of permanent sovereignty over natural resources, as corollary of the principle of self-determination, to the case of Western Sahara.

The first chapter of the present work aims at giving an historical and legal background of the issues related to the Western Sahara. It is showed that Western Sahara was not a *terra nullius* at the moment of the Spanish colonization at the end of the nineteenth century and one can talk about a Sahrawi identity. This has converged in the creation of a liberation movement, known as Polisario Front, which today, together with Morocco, is recognized as party to the conflict. When the African continent was undergoing the process of decolonization and the United Nations was pressuring Spain to facilitate the process of self-determination of the Saharawis, Morocco and Mauritania claimed the territory of the Spanish Sahara and appealed the International Court of Justice for an advisory opinion which would have established the

¹¹ F. KAMAL, *The role of natural resources in the building of an independent Western Sahara*, *Global Change, Peace & Security*, 2015, 27:3, 345-359, DOI: 10.1080/14781158.2015.1080235, at 351. [Last accessed 15 February 2016].

status of the Spanish Sahara before the colonization and the legal ties between it and Morocco and Mauritania. The advisory opinion of 1975 is important since it does not recognize any tie between the two countries and Western Sahara. This basically means that the subsequent invasion by Morocco of that territory, as it has been defined as well by the UN Security Council, is an illegal occupation. In the chapter it is also argued that the Madrid Agreements, which transferred the sovereignty of the Spanish Sahara to a tripartite administration, is to be considered null and void. An overview of the war and of the parties to the conflict is considered. The last part of the chapter is finally dedicated to the UN efforts to settle the dispute and to organize a referendum, together with the reasons linked to its failure at achieving this goal.

The second chapter focuses on the law governing the principle of permanent sovereignty over natural resources and the International Humanitarian Law. The first principle prohibits states and individuals from taking the territory's natural resources without the consent of the Saharawi people and a benefit to them. The obligation to respect a people's sovereignty over natural resources originated from the UN Charter and developed through several GA resolutions. As regards the IHL, its applicability to the occupied Western Sahara and the related consequences have not been taken into consideration for a long time and the point of views may be different on the question. As regards the IHL within the natural resources, the Fourth Geneva Convention and the Nuremburg Trials following the Second World War, contain the principles by which IHL only permits the taking of the resources of an occupied territory in order to meet the immediate needs of the population under occupation which, moreover, cannot consent to the taking of their resources. The aim of this chapter is to apply the aforementioned law to the case of Western Sahara and it wants to be a legal basis which will support the thesis that any agreement entertained with Morocco, which implies the natural resources of Western Sahara, has to be considered illegal. At this purpose the status of Western Sahara under international law and the role of Spain and Morocco will be clarified.

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The third chapter is the core of the present work and applies the norms considered in the previous chapter to the specific case of the Fisheries Partnership Agreements between the EU and Morocco, taking into account as well the historical and legal issues presented in the first chapter. As it will be discussed, the pure economic point of view is not sufficient to understand and give a complete framework of the environment which has led to the adoption of such agreements: one has to consider the political aspect as well. At this purpose, a background of the relations between the EU and Morocco and the advanced status Morocco has reached in the Community, will help to understand as well the approach of the EU organs, with particular reference to the different opinions offered by the Legal Service of the European Parliament. The last chapter finally, will offer an overview of the very recent legal actions pending before the EU Court of Justice. Two cases have been brought by the Polisario Front and affect the 2013 Protocol of the Fisheries Agreement and the 2012 Liberalization Agreement, while the third case has been brought by a UK Court regarding the labelling of goods.

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Chapter One



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Western Sahara and its background

OVERVIEW: 1.1 The land and the people – 1.1.1 The origins of Spanish Sahara – 1.1.2 The Sahrawi nationalism: the Polisario Front – 1.2 The failure of the decolonization process – 1.2.1 The Spanish decolonization at the United Nations – 1.2.2 The advisory opinion of the ICJ – 1.2.3 The Green March and the intervention of the Security Council – 1.2.4 The Madrid Accords – 1.2.5 The war – 1.2.6 The UN Settlement Plan – 1.3 The failure of the UN process and the problem of the identification – 1.3.1 The interpretation of Pérez de Cuéllar – 1.3.2 The mandate of Kofi Annan and the Baker Plan

1.1 The land and the people

Western Sahara is located in the northwest coast of Africa bordered by Morocco to the north, Algeria to the northeast, Mauritania to the east and south, and the Atlantic Ocean to the west. Its territory covers 266,000 square kilometers and the population is estimated at 586,000.⁽¹²⁾

Most of its territory consists of vast rocky plains alternated by extensive sandy zones. Vegetation is extremely sparse and supported by meager rainfalls and the only river presented in the territory is the Sakiet al-Hamra. Other permanent sources of water are limited to a few small scattered wells. These sources of water, however, support not only the vegetation but the migrant grazing as well.⁽¹³⁾

The territory of Western Sahara has been blessed with a variety of natural resources: the most notable is the phosphate, with the highest grade of presence in Bou Craa, while the fertile fishing ground contained by two-thousand-mile coastal zone from northern Morocco to southern Mauritania represents another

¹² Data is from UN data (<http://data.un.org>), a database by the United Nations Statistics Division of the Department of Economic and Social Affairs, United Nations. [Last accessed 19 September 2016]

¹³ E. JENSEN, *Western Sahara: Anatomy of a Stalemate*, Boulder, Colorado, Lynne Rienner Publishers, 2005, at 21.

valuable natural resource. Moreover, iron deposits were discovered at Agracha.⁽¹⁴⁾

As regards the inhabitants, the Sahrawi identity is a unique and complex regional hybrid, a mixture of autochthonous, Arab, and sub-Saharan African factors.⁽¹⁵⁾ While in prehistoric times Western Sahara was probably inhabited by blacks, the first known inhabitants of the territory were Berber tribes of the Sanhaja, one of the three largest Berber confederations of northwest Africa during the Roman period. The major descendants of the Berbers in the current Western Sahara are the *Tekna*. Between the eleventh and the twelfth century, a large Bedouin tribe from the Arabian peninsula, the *Maqil*, settled mostly in Morocco. Forced out of southern Morocco, a Maqil tribe – the *Oulad Delim* – gradually moved and established in the southern Sahara. From about 1400 to 1700, intermarriages and tribal alliances between the Oulad Delim and the Berbers, led the latter to assimilate Arab blood and culture. During this period, the *Hassaniyya* Arabic dialect⁽¹⁶⁾ of the *Oulad Delim* largely replaced Berber, and the conversion of Berbers to Islam accelerated. Together with the *Tekna* and the *Oulad Delim*, the *Reguibat* represent the third major component of the Western Saharan population. The *Reguibat* is a large Bedouin tribe whose vast grazing lands included southern Morocco, the eastern part of Western Sahara, northern and central Mauritania, and parts of Mali and Western Algeria.⁽¹⁷⁾

¹⁴ T. SHELLEY, *Endgame in Western Sahara: What Future for Africa's Last Colony?*, London, Zed Books Ltd, 2004, at 61-80. As it will be considered below, the presence of the natural resources in the territory has signed the destiny of Western Sahara and its population, from the Spanish colonization and the interests of the neighboring countries of Morocco and Algeria, to the current exploitation by the EU and other international companies.

¹⁵ S. ZUNES, J. MUNDY, *Western Sahara: War, Nationalism and Conflict Irresolution*, New York, Syracuse University Press, 2010, at 95.

¹⁶ The Hassaniyya is still the official language of the Sahrawi people.

¹⁷ J. DAMIS, *Conflict in Northwest Africa: The Western Sahara Dispute*, Stanford, Hoover Institution Press, 1983, at 4-9. The author underlines that language, together with shared ethnicity, cultural tradition and religion is one of the major affinities linking the Sahrawis of Western Sahara to Sahrawis in southern Morocco and Western Algeria and to the Moors of northern and central Mauritania. These affinities will be claimed through the GA Resolution 3292 of 13 December 1974, which requested the ICJ to give

However, the continuity of Sahrawi society's specific traits was made possible through a level of rigidity toward other nations. The community's equilibrium and cohesion was guaranteed by the *Djeema*, which incarnated "legislative, executive and judiciary" powers, and where the representatives of the principle families deliberated.⁽¹⁸⁾

Since the fifteenth century, the European interest in Western Sahara led Spain and Portugal to conclude an agreement in 1479, defining their respective zones of influence, since "the coastal regions [of Western Sahara] became part of commercial circuit which integrated them more with the external market than with internal networks, from which they were also physically isolated".⁽¹⁹⁾ According to the agreement, Spain dominated the Canary Islands and, in 1494, the stretch of coastline north of Cape Bojador up to Agadir, while the Portuguese obtained control over the coast to the South, up to Guinea.⁽²⁰⁾

1.1.1 The origins of Spanish Sahara

At the end of the nineteenth century, as the European powers "scrambled for Africa"⁽²¹⁾ and the Congress of Berlin (November 1884 – February 1885) was laying down the rules for the division of the continent, Spain renewed its interests in the coast opposite the Canaries in order to forestall France and England⁽²²⁾ and staked a claim by fishing interests in the Canaries, which valued the fishing resources off the Saharan coast.⁽²³⁾

an advisory opinion on the *status* of Western Sahara at the time of colonization and on the legal ties between the territory and Morocco and Mauritania.

¹⁸ G. LASCHI (a cura di), *Il sistema internazionale alla prova: il caso del Sahara Occidentale*, Forlì, Europe Direct, Università di Bologna, 2009, at 103.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ T. HODGES, *Western Sahara: the Roots of a Desert War*, Westport, Lawrence Hill & Co., 1983, at 40.

²² France's interests were expanding in name of a policy of "pacification" along the Mediterranean by launching the conquest of Algeria in 1830 and in the present-day Mauritania up to the mouth of Senegal river.

²³ T. HODGES, *supra* note (21), at 40.

During the 1870s, several Spanish societies were founded with the aim of sponsoring expeditions to Africa.⁽²⁴⁾

In 1884 the *Sociedad Española de Africanistas y Colonistas* was founded and decided to send Señor Bonelli to the Saharan coast where the “Acts of Adhesion” was signed. As pointed out by M. de Froberville:

Said operation constituted the first stage of Spain’s colonization of the Sahara: a royal decree dated 26 December 1884 attests that the Spanish government assumed under its own protection the strip of territory between Capo Blanco and Cape Bojador, on the basis of agreements with independent tribal chiefs from this part of the coast.⁽²⁵⁾

On 10 July 1885, Spain declared its protectorate over the region and the entire coast between Cape Blanc and Bojador fall under the administrative responsibility of Spain.⁽²⁶⁾

The decisions of the Congress of Berlin had given European powers the right to the territory inland from the points under their control on the African coast; however, Spanish claims to the interior were limited by French colonial designs on Mauritania. Accordingly, a series of conventions between 1900 and 1904 led to the demarcation of the borders of Western Sahara.⁽²⁷⁾

Importantly, the Convention of 3 October 1904, at Article VI stated that:

²⁴ T. GARCÍA FIGUERAS, *Santa Cruz de Mar Pequeña, Ifni, Sahara. La acción de España en la costa occidental de Africa*, Madrid, Ediciones Fe, 1941, at 123-127. Among the societies, the *Sociedad de Geografía de Madrid* was founded in 1876 and proposed the establishment of fishing stations on the coast opposite the Canaries.

²⁵ M. DE FROBERVILLE, *Sahara Occidental: la confiance perdue*, Paris, L’Harmattan, 1996, at 26.

²⁶ The decree was motivated by the need to comply with Art. 35 of the General Act of the Congress of Berlin, requiring the colonial powers to establish an effective administration in their colonies.

²⁷ T. HODGES, *supra* note (21), at 45-48. See also J. J. SMITH, *State of Self-Determination: the Claim to Sahrawi Statehood*, Toronto, 2010, at 25-27, available at <[http://www.arso.org/Self-Determination\]Smith310310.pdf](http://www.arso.org/Self-Determination]Smith310310.pdf)>. [Last accessed 19 September 2016]. The author analyzes the conventions between Spain and France which led to the demarcation of the territory of Western Sahara.

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Spain has henceforward “full liberty of action” in the coastal strip between 26° and 27°40′ North latitude and the 11° meridian West of Paris, all of which was said to be “outside Moroccan territory.”⁽²⁸⁾

Spain’s “fully liberty of action” was confirmed eight years later, on 12 November 1912, by the final convention demarcating the French and the Spanish zones in Morocco and the Sahara.⁽²⁹⁾

Within the territory, instead, Spain did not move until 1934, when it divided the territory into two administrative parts, Saguía el-Hamra in the North and Río de Oro in the South.⁽³⁰⁾ In 1936, Spain reached Smara on the southern coast. However, during the late 1950s, armed resistance to Spanish control in the Sahara broke out, mainly from Morocco. Against this background, Spain made two political decisions: in January 1958 Western Sahara was made Spanish African province through a decree issued by the Spanish government that incorporated the territory into metropolitan Spain and three deputies were elected to represent the Sahara in the Spanish parliament in Madrid; the region of Tarfaya, which had been administered by Spain since 1912 as a protectorate under the name of Spanish South Morocco, was retroceded to Morocco and since April 1958 it became the Moroccan province of Tarfaya.⁽³¹⁾

²⁸ Article VI, *Convention between France and Spain respecting Morocco*, 3 October 1904, 102 B.F.S.P. 432. See I. BROWNLIE, *African boundaries: a legal and diplomatic encyclopaedia*, London, C. Hurst & Co., 1979, at 151. The territory came to be known as Saguía el-Hamra, after the name of the river.

²⁹ HODGES, *supra* note (21), at 48. The 1912 convention sets as well the present land frontier between Western Sahara and Morocco by stating that “Saguía el-Hamra was “outside Moroccan territory” and could become an outright Spanish colony rather than part of Spain’s protectorate zone in Morocco”.

³⁰ J. DAMIS, *supra* note (17), at 11.

³¹ *Ibid.*, at 12.

1.1.2 The Sahrawi nationalism: the Polisario Front

The national conscience of the Sahrawis dates back to the period of the Spanish colonization, particularly when Spain started exploiting the phosphate resources of the territory and developed the urban centers.

This led many Sahrawis to move from the periphery to the center in order to earn higher salaries. Nevertheless, the Sahrawis experienced discrimination acts in the cities by the Spanish settlers: the city of Al Ayoun was divided between the rich part which hosted the administrative offices and the Spanish settlers, and a poor part inhabited by the Sahrawis. The particular economic situation of the Sahrawis, together with the general political situation of decolonization that the African continent was undergoing, set the ground for the birth of the nationalist feeling of the people of the Sahara.⁽³²⁾

A Sahrawi elder, now living in Smara refugee camp, noted:

The Sahrawis saw they were the only people in the Maghreb who had not got independence and when Spain offered a century of training and autonomy, the Sahrawis decided they had the same rights.⁽³³⁾

The first real and conscious form of nationalism is that expressed by the Vanguard Movement of Mohamed Sid Brahim Bassiri, a reformer and moderate young man born in Western Sahara.⁽³⁴⁾ Bassiri formed the Movement in a clandestine way in 1967 under the name *Liberation Movement of Saguía El-Hamra El-Ouad ed Dahab*. The aim of the Movement was to reach decolonization and equal rights of the Sahrawis by starting a non-violent revolution.

³²G. LASCHI, *supra* note (18), at 117-118.

³³T. SHELLEY, *supra* note (14), at 169.

³⁴G. LASCHI, *supra* note (18), at 119. The first form of Sahrawi rebellion to mark a crucial stage for the national cohesion of the Sahrawi troops was the attack against the Spanish troops in the Tarfaya province in 1957, which was repressed by a Spanish-French-Moroccan joint action.

On 17 June 1970 the Spanish administration organized a demonstration to support its policy of integration. When the Spanish Sahara was annexed as a province of Spain, the Vanguard Movement organized a counter-demonstration in Zemla in order to condemn the colonialism; nevertheless the demonstration was brutally repressed by Spain and almost 100 people were killed and many other, among whom Bassiri, were arrested. The repression of the Zemla demonstration led the Movement to abandon non-violent tactics and to replace them by a commitment to armed struggle.⁽³⁵⁾

During the reign of Hassan II, the Sahrawis began to formulate the objectives and means necessary for obtaining independence with more clarity: a resistance movement called *Frente Popular para la Liberación de Saguía el Hamra y Río de Oro*, or Polisario, was born in 1973 at a secret congress and was led by Mustafa Sayed El-Ouali who became secretary-general of the movement. The Polisario born primarily as an anti-Spanish movement.⁽³⁶⁾ Indeed, on 10 May 1973, the executive committee issued a Manifesto announcing that the Front had been founded as the “unique expression of the masses, opting for revolutionary violence and the armed struggle as the means by which the Sahrawi Arab African people can recover its total liberty and foil the maneuvers of Spanish colonialism”.⁽³⁷⁾

During the second congress, held in August 1974, the Polisario proclaimed the political line of the Front and the main objectives of the independence of Western Sahara, declaring that:

³⁵ *Ibid.*

³⁶ F. CORREALE, relation to the workshop *L'approccio dell'Unione Europea alla questione del Sahara occidentale*, *cit.*

³⁷ T. HODGES, *supra* note (21), at 161. For the full text of the Manifesto, see G. LASCHI, *supra* note (18), at 124. During the first phase of Polisario's existence, the aim of the movement was to create consent among the people in the fight against colonialism; moreover, “the Front tries to instill a sense of Saharan nationalism through chants, poetry, songs, demonstrations and allusions to the just struggle”, cited in J. DAMIS, *supra* note (17), at 41-42.

The Sahrawi people have no alternative but to struggle until wresting independence, their wealth and their full sovereignty over their land.⁽³⁸⁾

Among the most important actions of this phase, the sabotage against the phosphate extraction center at Bou Craa can be pointed out: the aim was to provoke as much damage as possible in one of the most important interests in Spanish administration.⁽³⁹⁾ At the Third National Congress of August 1976, the main goal of the Front was still the independence: after having reached that goal, other political and economic issues would have been decided in a democratic way by the Sahrawis.⁽⁴⁰⁾

The Polisario has been widely recognized, including by the United Nations and Morocco, as the legitimate representative of the Sahrawi people and as an equal for purposes of negotiating self-determination.⁽⁴¹⁾ As it will be discussed below, qualifying the Polisario as an international liberation movement has an important consequence from the legal point of view: there is an *erga omnes* duty of non-assistance toward those governments which repress the self-determination fight of the liberation movements.⁽⁴²⁾ Moreover, the Polisario can represent the interest of Sahrawis at the international level.⁽⁴³⁾

For most Sahrawis, however, the Polisario is a very simple idea:

To be a Polisario means to be committed to the liberation of your country. It is only such a concept as national liberation for which one

³⁸ *Manifeste politique, adopté par le deuxième congrès*, in *Le peuple Saharoui en lute* (Polisario Front, 1975) at 50, cited in T. HODGES, *supra* note (21), at 163.

³⁹ G. LASCHI, *supra* note (18), at 128.

⁴⁰ *Ibid.* Generally, the overriding goal of the Polisario is an internationally recognized, independent Saharan state and people: this goal is reached within the framework and guidelines issued by the national congresses.

⁴¹ F. MARCELLI, *La condizione giuridica internazionale del Frente Polisario*, in *Rivista di Diritto Internazionale*, 1989, vol. LXXII, fasc. 2, at 282. See also J. J. SMITH, *supra* note (27), at 32.

⁴² A. GIOIA, *Manuale breve di diritto internazionale*, Milano, Giuffrè, 2013, at 277.

⁴³ *Ibid.*, at 274; F. MARCELLI, *supra* note (41), at 303.

can expect such total identification from the people. You cannot get that kind of commitment to a party or ideology.⁽⁴⁴⁾

1.2 The failure of the decolonization process

1.2.1 The Spanish decolonization at the United Nations

Although the Spanish colonization of Western Sahara began in 1880s, its effective presence date back to 1958, precisely when in the African continent, and particularly in the Maghreb, there was a countertrend. The United Nations (UN), and particularly the General Assembly (GA), pressured Spain, which joined the UN on 14 December 1955, to include Western Sahara in the List of the Non-Self-Governing Territories (NSGT) indicated in Resolution 66 (I) of the GA, in accordance with Article 73 e) of the UN Charter.⁽⁴⁵⁾ In February 1956, the Secretary-General (SG) of the UN sent a letter to the Spanish government requesting to declare whether it was administering a NSGT under the aforementioned Resolution. The Spanish government did not reply until November 1958: this move allowed Madrid to convert the *Dirección General de Marruecos y Colonias* into *Dirección General de las Plazas Y Provincias Africanas*,⁽⁴⁶⁾ while, through a second decree, it divided its colonies in the province of Ifni and the province of the Spanish Sahara. Finally, Spain declared to not have NSGTs, but only “Spanish provinces”. This behavior led the Soviet Union to threaten Spain by proposing to the Fourth Committee to include the Canary

⁴⁴ S. ZUNES, interview, Rabouni, Algeria, 17 June 1987, cited in S. ZUNES, J. MUNDY, *supra* note (15), at 115.

⁴⁵ GA Res. 66 (I) of 14 December 1946; UN Charter, Art. 73 e) states that the Members of the UN which have a NSGT, accept “to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply”.

⁴⁶ J. SOROETA LICERAS, *El conflicto del Sahara Occidental, reflejo de las contradicciones y carencias del Derecho Internacional*, Bilbao, Universidad de País Vasco, Servicio Editorial, 2001, at 36.

Islands in the List of the NSGTs, together with Ifni and Western Sahara: obviously, the Canary Islands were playing a strategic role in Spanish interests.⁽⁴⁷⁾ Spanish behavior changed on 11 November 1960, when the Representative of the Spanish delegation to the UN, Félix De Lequerica, declared that Spain was ready to transmit the information required by Art. 73 e) related to the NSGTs it was administering, indirectly admitting that Ifni and Western Sahara were administered by Spain.⁽⁴⁸⁾ With this declaration, Resolution 1514 (XV) of the GA *on the Granting of Independence to Colonial Countries and Peoples*⁽⁴⁹⁾ is applied to Western Sahara.⁽⁵⁰⁾

Another circumstance that hampered the Spanish colonization was the independence gained by Morocco in 1956.⁽⁵¹⁾ This country was claiming the Spanish Sahara on the basis of the theory of “Greater Morocco” which was embraced first by Mohammed V and later by his son Hassan II. According to this theory, the Moroccan borders would have included as well the Spanish Sahara, all of Mauritania, northwest Mali and much of northwest Algeria.⁽⁵²⁾

Finally, in December 1965, the GA adopted Resolution 2072 (XX) on the question of Ifni and Sahara⁽⁵³⁾, requesting the Spanish administering power to take “all necessary measures for the liberation of the territories of Ifni and

⁴⁷ M. BALBONI, *L'Autodeterminazione del Popolo Sahrawi nel Diritto Internazionale*, Forlì, 16 March 2009, at 1, available at <<http://www.arso.org/confBalboni2009.pdf>>. [Last accessed 20 September 2016].

⁴⁸ J. SOROETA LICERAS, *supra* note (43), at 38.

⁴⁹ GA Res. 1514 (XV) of 14 December 1960.

⁵⁰ M. BALBONI, *supra* note (46), at 1. The author underlines that this is a crucial issue since, from the juridical point of view, the situation never changed. As it will be discussed below, Western Sahara is still a NSGT and Spain is its administering power, with all the rights and duties deriving from this *status*. That means that Spain has the duty to ensure that Western Sahara can express its right of self-determination.

⁵¹ Morocco joined the UN on 12 November 1956.

⁵² The theory of “Greater Morocco” was propagated and popularized by the Istiqlal party, which was the leading force in the independence struggle of Morocco. The leader of the party was Al-Fassi, who argued that the Moroccan nation had a legitimate right to exercise its sovereignty over former territories of those empires. “Greater Morocco” corresponds to the area ruled by the Almoravid dynasty in the eleventh and twelfth centuries. See T. HODGES, *supra* note (21), at 89; J. DAMIS, *supra* note (17), at 15.

⁵³ GA Res. 2072 (XX) of 16 December 1965. This Resolution represents the first international attempt to weaken the Spanish colonization policy.

Spanish Sahara from colonial domination and to enter into negotiations on the problems relating to sovereignty presented by these two Territories".⁽⁵⁴⁾

The 1960s represent a turning point in the decolonization process of the Spanish Sahara: in 1965/1966, within the General Assembly, there is a certain degree of consent to go beyond the resolutions of the 1950s.⁽⁵⁵⁾ Morocco expressed to the Fourth Committee its new position of accepting the self-determination of the aforementioned territories by demanding to take part to the negotiations which would have led to the exercise of the right to self-determination.⁽⁵⁶⁾

Mauritania and Algeria were equally involved by requesting the exercise of the right to self-determination of the Spanish Sahara under the supervision of international observers.⁽⁵⁷⁾

On 20 December 1966, GA Resolution 2229 (XXI)⁽⁵⁸⁾ finally distinguished the case of Ifni from that of the Spanish Sahara. In the case of Ifni, Spain was requested to determine with the Government of Morocco "the procedures for the transfer of powers in accordance with the provisions of General Assembly resolution 1514 (XV)".⁽⁵⁹⁾

In the case of the Spanish Sahara, the procedure was different. The GA invited Spain, acting as administering power:

[...] to determine at the earliest possible day, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation of Mauritania and Morocco and any other interested party, the procedures for the holding of a referendum under United

⁵⁴ *Ibid.*, para. 2.

⁵⁵ M. BALBONI, *supra* note (47), at 1.

⁵⁶ J. SOROETA LICERAS, *supra* note (46), at 42. Moreover, Morocco requested the withdrawal of the Spanish army from the Spanish Sahara under international supervision; the halt of the immigration of settlers organized by Madrid; and the authorization for the return of the Spanish army from the Spanish Sahara under international supervision; the halt of the immigration of settlers organized by Madrid; and the authorization for the return of the refugees.

⁵⁷ *Ibid.*

⁵⁸ GA Res. 2229 (XXI) of 20 December 1966. With the agreement between Morocco and Spain signed in Fez on 4 January 1969, Ifni becomes part of Morocco.

⁵⁹ *Ibid.*, para. 3.

Nations auspices with a view to enabling the indigenous populations of the Territory to exercise freely its right to self-determination [...].⁽⁶⁰⁾

The resolution also determines “to provide all the necessary facilities to a United Nations mission so that it may be able to participate actively in the organization and holding of the referendum”⁽⁶¹⁾ and requests the SG, in consultation with the administering power and the Special Committee, to appoint a special mission to be sent to the Spanish Sahara with the aim of recommending “practical steps” for the full implementation of the relevant resolutions of the GA.⁽⁶²⁾

The approval of the GA Resolution 2711 (XXV)⁽⁶³⁾ represented a new important step in the process of decolonization because for the first time it makes reference to the need of safeguarding the natural resources of the Sahrawis.⁽⁶⁴⁾ The Resolution invited Spain “to comply with the resolutions of the General Assembly on the activities of foreign economic, financial and other interests” operating in the Spanish Sahara⁽⁶⁵⁾, and invites all States to refrain from making investments in the Territory “in order to speed the achievement of self-determination by the people of the Sahara”.⁽⁶⁶⁾

In the consecutive years, the General Assembly approved Resolution 2983 (XXVII)⁽⁶⁷⁾ and Resolution 3162 (XXVIII)⁽⁶⁸⁾ which substantially reiterated the position adopted in the previous resolutions.⁽⁶⁹⁾ Spain did not oppose those resolutions.

⁶⁰ *Ibid.*, para. 4.

⁶¹ *Ibid.*, para.4 d).

⁶² *Ibid.*, para.5.

⁶³ GA Res. 2711 (XXV) of 14 December 1970.

⁶⁴ J. SOROETA LICERAS, *supra* note (46), at 44.

⁶⁵ *Ibid.*, para. 6 c).

⁶⁶ *Ibid.*, para. 7.

⁶⁷ GA Res. 2983 (XXVII) of 14 December 1972.

⁶⁸ GA Res. 3162 (XXVIII) of 14 December 1973.

⁶⁹ Particularly, Res. 2983 (XXVII) reaffirms “the inalienable of the people of the Sahara to self-determination” and Resolution 3162 (XXVIII) repeats “its invitation to the

On 20 August 1974, the Spanish representative to the United Nations, Jaime De Piniés, informed the SG about the Spanish commitment to comply with the resolutions and to implement the procedures in order to organize a referendum. One of the procedures adopted by Spain was a census of the territory.⁽⁷⁰⁾

The census caused the immediate reaction of Morocco which feared that the process could have led the Spanish Sahara to self-determination. In order to halt the process of the referendum, Morocco decided to appeal to the International Court of Justice (ICJ) presenting the case of the Spanish Sahara as a “*conflicto hispano-marroquí*”.⁽⁷¹⁾

Nevertheless, Spain did not accept to appeal to the ICJ and Morocco recalibrated its strategy by supporting the approval of GA Resolution 3292 (XXIX)⁽⁷²⁾ together with Mauritania, which was claiming the Spanish Sahara as well. This resolution revolves around three points: the request for an advisory opinion from the ICJ on the *status* of the territory⁽⁷³⁾; the direct request to Spain to temporarily postpone the referendum⁽⁷⁴⁾; and the sending of a Visiting Mission to the Spanish Sahara.⁽⁷⁵⁾ The Mission was dispatched from 8 May to 14 June 1975 and issued a report which examined the political and social situation of the territory and the positions expressed by Spain, Mauritania, Morocco and Algeria, which had been visited by the Mission.⁽⁷⁶⁾ Although the report complained the absence of a precise mandate on the objectives of the Missions,

administering Power to determine, in consultation with the Governments of Mauritania and Morocco and any other interested party, to procedures for the holding of the referendum under United Nations auspices”.

⁷⁰ G. LASCHI, *supra* note (18), at 127. The census produced a list of 73,497 Sahrawis, who were given personal and administrative documents, issued by Spain. The census also included 20,156 Spanish settlers, 548 foreign people and 857 residents, who were Sahrawis who had left Western Sahara prior to the census with the intention to re-establish themselves there in the future.

⁷¹ J. SOROETA LICERAS, *supra* note (46), at 47.

⁷² GA Res. 3292 (XXIX) of 13 December 1974.

⁷³ *Ibid.*, para. 1.

⁷⁴ *Ibid.*, para. 3.

⁷⁵ *Ibid.*, para. 5.

⁷⁶ See Report of the United Nations Visiting Mission to Spanish Sahara, 1975, UN Doc. Official Records: Thirtieth Session, Supp. no. 23, Volume 3, Chapter XIII, A/10023/Ad.

the mandate finds “an overwhelming consensus among Saharans within the territory in favor of independence and opposing integration with any neighboring country”.⁽⁷⁷⁾

1.2.2 The advisory opinion of the ICJ

The GA requested the ICJ to give an advisory opinion on two questions through Resolution 3292 (XXIX)⁽⁷⁸⁾:

I. Was Western Sahara (Río de Oro and Sakiet el Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?

If the answer to the first question is negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?⁽⁷⁹⁾

The questions asked by the GA to the ICJ stress some ambiguities which characterize the advisory opinion of 16 October 1975.

This request indeed has two main problems: the first one related to the competence of the Court and the second one refers to the content.⁽⁸⁰⁾

According to its Statute⁽⁸¹⁾, the ICJ has a discretionary power to give an advisory opinion which is however limited by the duty to collaborate with the other organs of the UN. Indeed, two conditions are necessary: the request has to

⁷⁷ *Ibid.*, at 7.

⁷⁸ GA Res. 3292 (XXIX) of 13 December 1974.

⁷⁹ *Ibid.*, para. 1.

⁸⁰ M. BALBONI, *supra* note (47), at 3.

⁸¹ According to Art. 65 of the Statute of the ICJ:

“The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”.

concern a legal question⁽⁸²⁾ and the opinion of the Court has to be “useful” to the organs of the UN and their activities.⁽⁸³⁾

As regards the first condition, the request does not need to revert only to a crucial issue from the historical point of view: the international law with respect to the self-determination of peoples is not based on the situation at the time of the colonization, but at the time of the decolonization.⁽⁸⁴⁾ The principle of the *uti possidetis juris*, which regulates the issue, indicates that the process of decolonization has to respect the borders that the preceding area had before its independence.⁽⁸⁵⁾ In this way, the two questions of the Resolution do not present a legal issue because from the legal point of view it is not relevant whether the Western Sahara was a *terra nullius* at the moment of the colonization.⁽⁸⁶⁾ For what concerns the second condition, the GA had already deliberated in respect of the self-determination of the Sahrawis. The usefulness of the advisory opinion was arguable. If it was positive, the opinion of the ICJ would have not been useful since the GA had already deliberated; in case of a negative reply, the advisory opinion could have never overcame the decision of the GA which is binding, having regard to self-determination, while the opinion of the ICJ is not binding.

So it would have created confusion among the organs of the UN.⁽⁸⁷⁾

⁸² *Ibid.* See also Art. 96 of the UN Charter: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question”.

⁸³ M. BALBONI, *supra* note (47), at 3; J. SOROETA LICERAS, *supra* note (43), “El Tribunal debe dar una respuesta útil”, at 101.

⁸⁴ To this respect, Judge Gros concluded on the competence of the Court asserting that it had no competence to deliver an opinion because of the historical nature of the questions and since “economics, sociology and human geography are not law”, see the Advisory opinion on Certain Expenses of the United Nations, (1962) ICJ, 155, at 77.

⁸⁵ The principle of *uti possidetis juris* was adopted by the ICJ in the case of *Burkina Faso v. Mali*, 1986, ICJ 554, December 22.

⁸⁶ M. BALBONI, *supra* note (47), at 3. To this respect, J. SOROETA LICERAS, adds that the questions asked by the GA to the ICJ: “no constituyen una cuestión jurídica real y existente, sino una simple pregunta de carácter académico”, *supra* note (43), at 98.

⁸⁷ *Ibid.* As pointed out by J. Smith: “In retrospect, there was perhaps only a single question that ought to have been properly put to the Court if the UN’s decolonization process was to be credibly maintained. That was simply whether the Sahrawi people in

Nevertheless, the Court rejected the narrow definition of legal questions and stated that the questions were “scarcely susceptible of a reply otherwise than on the basis of law”.⁽⁸⁸⁾

After having resolved the problem of the competence, the Court analyzed the questions presented in the Resolution 3292 (XXIX).

The first question was aimed at establishing whether Western Sahara was *terra nullius* at the time of colonization by Spain and whether it could be occupied.⁽⁸⁹⁾

The conclusion reached by the Court was negative. The decision was supported by two arguments. On one hand, the territory was inhabited by a politically and socially organized population; on the other hand, the Court noticed that Spain, when colonizing Western Sahara, did not treat the case as one of occupation of *terra nullius*. In the Royal Decree of 26 December 1884, the King of Spain took Western Sahara under his protection on the basis of agreements entered with the local tribes.⁽⁹⁰⁾

The second question the GA posed to the ICJ called to determine Western Sahara’s legal ties with Morocco and “the Mauritanian entity” at the time of Spanish colonization. After having analyzed Resolution 3292 (XXIX), the ICJ asserted that those “legal ties” must be understood “as referring to such “legal ties” as may affect the policy to be followed in the decolonization of Western Sahara”⁽⁹¹⁾, specifying a tie not only with the territory but also with the people living in it. The Court established the territory of Western Sahara historically and treated separately the question of Morocco and Mauritania.

the Spanish Sahara colony were entitled to exercise a right to self-determination”, *supra* note (15), at 6.

⁸⁸ Advisory opinion on Certain Expenses of the United Nations, (1962) ICJ, 155, at 18. Moreover, the Court held that: “An opinion given by the Court in the present proceedings will furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara”, *ibid.*, at 37.

⁸⁹ See M.A. MORENO LÓPEZ, *Sahara Español: una descolonización controvertida*, in *Revista de Política Internacional*, May-June 1975, at 90. According to the author the evolution of the International Law has emptied the concept of *terra nullius* based on the development of the principle of equal rights and self-determination of peoples.

⁹⁰ *Western Sahara*, ICJ Rep (1975) at 37 ss., para. 75. See also J. SOROETA LICERAS, *supra* note (46), at 108-109.

⁹¹ *Western Sahara*, ICJ Rep (1975) at 40-41, para. 85.

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As regards Morocco, it claimed Western Sahara “on the public display of sovereignty, uninterrupted and uncontested for centuries”.⁽⁹²⁾ However, the Court found that, although the Sultan of Morocco displayed some religious authority over some of the nomadic tribes, there was little other evidence to support Morocco’s claim to sovereignty.⁽⁹³⁾

The Court then considers the internal and the international aspects in the case of Morocco. As regards the internal aspect and the proofs presented by Morocco which were supposed to testify its internal authority in the territory, the Court states:

[...] the material so far examined does not establish any tie of territorial sovereignty between Western Sahara and that State. It does not show that Morocco displayed effective and exclusive State activity in Western Sahara. It does however provide indications that a legal tie of allegiance had existed at the relevant period between the Sultan and some, but only some of the nomadic peoples of the territory.⁽⁹⁴⁾

As regards the international aspect, the ICJ took into consideration the topic of the international recognition, considering a series of international acts which were supposed to show the Moroccan sovereignty directly or indirectly recognized by the international community.⁽⁹⁵⁾ On this respect, the Court did not find demonstrated ties of sovereignty:

⁹² *Ibid.*, at 42.

⁹³ *Ibid.*, at 43. The Court asserts that “Common religious links have, of course, existed in many parts of the world without signifying a legal tie of sovereignty or subordination to a ruler”, *ibid.*, para. 95.

⁹⁴ *Ibid.*, para. 107.

⁹⁵ *Ibid.*, para. 108. The ICJ Advisory Opinion at this purpose, considers four heads: a) the Hispano-Moroccan Treaty of Marrakech (1767), and the Treaties made with the United States of America (1836), Great Britain (1856) and Spain (1861) referring to the rescue of shipwrecked persons in the coasts adjacent to those of Noun or in its proximity; b) Anglo-Moroccan Treaty of 1895, whereby Great Britain would have recognized Moroccan sovereignty over the territories located south of Cape Bojador; c)

Examination of the various elements adduced by Morocco in the present proceedings does not, therefore, appear to the Court to establish the international recognition by other States of Moroccan territorial sovereignty in Western Sahara at the time of the Spanish colonization. Some elements, however, more especially the material relating to the recovering of shipwrecked sailors, do provide indications of international recognition at the time of colonization of authority or influence of the Sultan, displayed through Tekna caids of the Noun, over some nomads in Western Sahara.⁽⁹⁶⁾

As regards the “Mauritanian entity”⁽⁹⁷⁾, the legal ties to be demonstrated, had a different nature from the ones presented by Morocco. Particularly, Mauritania supported the existence of a “human unit” called *Bilad Shinguitti*, characterized by a common language, way of life and religion and a uniform social structure.⁽⁹⁸⁾ Although the Court recognized determined ties of a legal nature among the tribes of Western Sahara and those who lived in the territories which today form part of the Islamic Republic of Mauritania, it asserted:

[...] at the time of colonization by Spain there did not exist
between the territory of Western Sahara and the Mauritanian entity

Hispano-Moroccan correspondence concerning the execution of the provisions of Art. 8 of the Treaty of Tetuan of 1860, and of a subsequent agreement made with Spain in 1900, in which Spain had recognized Moroccan sovereignty south of Cape Bojador; d) an exchange of Franco-German letters in 1911, where it was agreed that “Morocco includes all the territory in the North of Africa between Algeria, French West Africa and the Spanish colony of Río de Oro”.

⁹⁶ *Ibid.*, para. 128.

⁹⁷ The term was first employed during the session of the General Assembly in 1974 and denotes the “cultural, geographical and social entity which existed at the time in the region of Western Sahara” since the Islamic Republic of Mauritania was created later in 1960. *Ibid.*, para. 131. This term shows the lack of a distinct collective personality at the time of the colonization of the territory with respect to the emirates and tribes which composed it, J. SOROETA LICERAS, *supra* note (46), at 113.

⁹⁸ *Ibid.*, par 132.

any tie of sovereignty, or of allegiance of tribes, or of “simple inclusion” in the same legal entity.⁽⁹⁹⁾

Although some legal ties were recognized between the tribes living in the two regions, the final conclusion of the ICJ stated:

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 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.⁽¹⁰⁰⁾

However, the exercise of the right to self-determination by the Saharawis, would be denied them, and the subsequent events set the impasse that continues still today.

1.2.3 The Green March and the intervention of the Security Council

Although the advisory opinion of the ICJ was clear on the issue, it left some controversial elements as regards the existence of legal ties between Morocco

⁹⁹ *Ibid.*, para. 150.

¹⁰⁰ *Ibid.*, para. 162. [Emphasis added in bold].

and Western Sahara. The existence of those ties gave Morocco reasons to justify the invasion, known as Green March.⁽¹⁰¹⁾

On the same day the ICJ advisory opinion was released, King Hassan II addressed the Moroccan nation on television proclaiming that the kingdom's historical claim to the Sahara had been vindicated and that the time for decisive action had come:

We have proof that this land belongs to us and that the Sahara is ours, if anyone asks. Therefore, dear people, we have only one option: we have to start a Green March from the North to the South of Morocco, and from the East to the West of Morocco. We should, dear people, stand as one man, organized until we get the Sahara, and preserve our blood bonds.⁽¹⁰²⁾

The Green March was intended to be a massive peaceful march of 350,000 civilians, "armed only with their Korans", into Western Sahara and should be understood as "manifestation of the unanimous will of the Moroccan people to assert its legitimate right over its Sahara".⁽¹⁰³⁾

The Green March⁽¹⁰⁴⁾ represented the first occasion in which the Security Council (SC) intervened on the case of Western Sahara. The SC was called on by Spain to exercise its competences according to Art. 35 of the UN Charter⁽¹⁰⁵⁾ on

¹⁰¹ "The Moroccan government interpreted the ICJ advisory opinion as a clear and strong endorsement of the kingdom's position. Moroccans seized upon the court's finding of legal ties to the Sahara, equated them with territorial sovereignty, and concluded that the United Nations' legal advisory organ had recognized Morocco's claim to the Spanish colony. The parts of the opinion that did not support Morocco were either ignored or discounted as misunderstandings of Moroccan legal traditions", J. DAMIS, *supra* note (17), at 60.

¹⁰² Declaration made by King Hassan II, taken by the documentary: Álvaro Longoria, *The Sons of the Clouds*, 2012.

¹⁰³ Report by the Secretary-General in Pursuance of Security Council Resolution 379 (1975) Relating to the Situation Concerning Western Sahara, UN Doc. S/11874, para. 16.

¹⁰⁴ The color green is an evident reference to Islam.

¹⁰⁵ UN charter, art. 35, para. 1: "Any member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly".

the assumption that the “invasion” could undermine the international security and hamper the process of decolonization and the right to self-determination of the Sahrawis. The SC approved Resolution 377 (1975)⁽¹⁰⁶⁾ which reaffirmed the terms of GA Resolution 1514 (XV) and all the other GA resolutions relative to Western Sahara⁽¹⁰⁷⁾, requested the SG to enter into immediate consultations with the parties interested and to report to the SC as soon as possible on the result of his consultations⁽¹⁰⁸⁾. Moreover, it appealed to the parties to exercise moderation in order to facilitate the mission of the SG.⁽¹⁰⁹⁾

On 31 October 1975, the SG presented a report⁽¹¹⁰⁾ in which he explained the positions of the parties involved: Morocco considered that the issue of the Green March could not be separated by the issue of the decolonization and did not agree with the conclusions of the advisory opinion of the ICJ; Mauritania held the same position as Morocco, Algeria rejected the position adopted by Morocco and Mauritania and supported the need of the Sahrawis to freely express their decision through a referendum, organized by the UN; finally, Spain, which was in direct contact with the governments of Morocco and Mauritania, expressed its wish to come to an agreement among the parties involved, in order to temporarily administer the territory until the Sahrawis expressed their wishes.⁽¹¹¹⁾

The SG Kurt Waldheim, recognizing in the position of the parties the will to collaborate with the UN, elaborated the so-called “Waldheim Plan” which called for the Spanish withdrawal from the territory, a provisional international administration of the territory and the consultation of the population to be held for six months.⁽¹¹²⁾ Two days after the issue of the report of the SG, the SC met again and approved *by consensus* Resolution 379 (1975)⁽¹¹³⁾ in which it urged “all

¹⁰⁶ SC Res. 377 (1975) of 22 October 1975.

¹⁰⁷ *Ibid.*, para. 1.

¹⁰⁸ *Ibid.*, para. 2.

¹⁰⁹ *Ibid.*, para. 3.

¹¹⁰ Secretary-General report of 31 October 1975, S/11863.

¹¹¹ *Ibid.*, para. 16.

¹¹² J. SOROETA LICERAS, *supra* note (46), at 132.

¹¹³ SC Resolution 379 (1975) of 2 November 1975.

the parties concerned and interested to avoid any unilateral or other action which might further escalate the tension in the area”⁽¹¹⁴⁾ and requested the SG to intensify his consultations with the parties concerned and to report to the Security Council on the results of these consultations.⁽¹¹⁵⁾ Finally, Resolution 380 (1975)⁽¹¹⁶⁾ openly “deplores the holding of the march”⁽¹¹⁷⁾ and “calls upon Morocco immediately to withdraw from the territory of Western Sahara all the participants in the march”.⁽¹¹⁸⁾ Nevertheless, on the same day, the Green March took place and 350.000 Moroccans entered the Sahara.

1.2.4 The Madrid Accords

On 14 November 1975, a few days after the beginning of the Green March and the Moroccan invasion of the Sahara⁽¹¹⁹⁾, Spain, Morocco and Mauritania issued a joint *communiqué* noting agreement on a set of principles for an interim administration in Western Sahara. The *Declaración de Principios de Madrid* took the issue of the decolonization forward and it testified how the Plan Waldheim, which contemplated the consultation of the population, was ignored. The will of excluding the UN from the process of decolonization became concrete. Indeed, the Madrid Accords were a proposal of decolonization expressed through six paragraphs which provided that Spain would have terminated its presence in the territory of Western Sahara by 28 February 1976 and, in the interim, it would have transferred its responsibilities as administering power to a temporary tripartite administration composed of the Spanish Governor-General and a Moroccan and Mauritanian Deputy Governor, respectively. The

¹¹⁴ *Ibid.*, para. 1.

¹¹⁵ *Ibid.*, para. 2.

¹¹⁶ SC Resolution 380 (1975) of 6 November 1975.

¹¹⁷ *Ibid.*, para. 1.

¹¹⁸ *Ibid.*, para. 2.

¹¹⁹ King Hassan II instructed the marchers to return to Morocco on 9 November 1975. See UN doc. S/11876, para. 2.

Djeema, which expressed the views of the Saharan population, would collaborate in the interim administration and its views would be respected.⁽¹²⁰⁾

Some authors observed that the Madrid Accords also contained secret terms: Spain allegedly received considerable economic concessions, including a major share of the Bou Craa phosphate operations and fishing right off the Saharan and Moroccan coasts in return for transferring control of Western Sahara to Morocco and Mauritania.⁽¹²¹⁾

This undisclosed agreement, in parallel to the Accord, had divided the natural resources of the Sahara between the parties.⁽¹²²⁾

The Accords produced a debate within the Fourth Committee and the GA which approved on 10 December 1975 Resolution 3458 A (XXX)⁽¹²³⁾ and 3458 B (XXX)⁽¹²⁴⁾. Both Resolutions reaffirmed the inalienable right of the people of Spanish Sahara to self-determination; however, they were contradictory: while Resolution 3458 A (XXX) requested Spain, as administering power, to adopt all the measures to organize a referendum for the Sahrawis, Resolution 3458 B requested the interim administration to adopt all the necessary measures to allow the Sahrawis to exercise their right to self-determination. The topic of these resolutions showed a change in the behavior of the GA which abandoned its strong position in defending the right of the Sahrawis to self-determination by ceding to Morocco's claims. In a letter dated 26 February 1976, the Representative of Spain addressed the SG and announced that, because of the

¹²⁰ The Madrid Declaration came into force on 19 November 1975, the date of the publication in the Spanish Official Gazette of the Act authorizing the Government of Spain to implement its provisions, in accordance with paragraph 6.

¹²¹ J. DAMIS, *supra* note (17), at 67.

¹²² J. J. SMITH, *supra* note (27), at 8. "In 1978 the Spanish press revealed that secret agreements on minerals and fisheries had been signed on November 14, 1975. One gave 'joint recognition by Morocco and Mauritania to fishing rights in the waters of the Sahara benefitting eight hundred Spanish boats, for a duration of twenty years ...' Another ... provided that Spanish capital 'would have the right in principle to 35 percent of the equity' in joint-venture companies for the exploration and exploitation of minerals in Western Sahara", T. HODGES, *supra* note (21) at 224. See also T. SHELLEY, *supra* note (14), at 73.

¹²³ GA Res. 3458 A (XXX) of 10 December 1975.

¹²⁴ GA Res. 3458 B (XXX) of 10 December 1975.

“persistence of circumstances beyond its control” the organization of the consultation with the population was impossible and “considers itself henceforth exempt from any responsibility of an international nature in connection with the administration of the said territory” and terminates its presence in the territory.⁽¹²⁵⁾ At the same time, the second resolution gave legitimacy to Morocco and Mauritania to occupy the territory.

The common position of the international doctrine on the legality of the Madrid Accords is that they “lack a legal basis”.⁽¹²⁶⁾ Generally, the Tripartite Agreement is in conflict with a peremptory norm of *jus cogens*, that is to say the right to self-determination, on the basis of Article 53 of the Vienna Convention on the Law of the Treaties⁽¹²⁷⁾, since the real intent of the Accords was to deny the right to self-determination.

From another point of view, the parties to the Madrid Accords lacked legitimacy. Indeed, according to Resolution 2625 (XXV) of the GA⁽¹²⁸⁾:

The territory of a colony or other Non-self-Governing Territory has, under the Charter, a status separate and distinct from the territory of

¹²⁵ Letter dated 26 February 1976 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, UN doc. GA: A/31/56, S11997.

¹²⁶ I. BROWNLIE, *supra* note (28), at 149. At this respect, see also M. W. JANIS, *The International Court of Justice: Advisory Opinion on the Western Sahara*, Harvard International Law Journal, Volume 17, Number 3, Summer 1976; J. SOROETA LICERAS, *supra* note (46), at 157; M. BALBONI, *supra* note (47), at 4; C. JIMÉNEZ SÁNCHEZ, *El Conflicto del Sáhara Occidental: el papel del Frente Polisario*, available at <<http://www.eumed.net/libros-gratis/2014/1425/index.htm>>, [Last accessed 26 September 2016]; GONZÁLES CAMPOS, *Los Acuerdos Nulos de Madrid*, El País, 18 September 1977, available at <http://elpais.com/diario/1977/09/18/internacional/243381616_850215.html>. [Last accessed 26 September 2016].

¹²⁷ Art. 53 of the Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

¹²⁸ GA Res. 2625 (XXV) of 24 October 1970.

the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.⁽¹²⁹⁾

This basically implies that Spain had no right on the territory of the Sahara, since its new role, after the rise of the right to self-determination of the Sahrawis, was that of administering power of a NSGT, quality that cannot be passed to another country without the consent of the UN.⁽¹³⁰⁾

1.2.5 The war

During the last months of 1975, the Moroccan and Mauritanian troops invaded Western Sahara where they found the resistance of the Polisario. This represents the beginning of the exodus of the population: part of it moved towards the border with Algeria with the help of the Front. Algeria is the only country which did not invade Western Sahara and offered humanitarian, logistic and military help to the Sahrawis.⁽¹³¹⁾ On 27 February 1976, the Provisional Sahrawi National Council proclaimed the Sahrawi Arab Democratic Republic (SADR) in order to “avoid a juridical *fait accompli* being created by the Spanish withdrawal and Moroccan-Mauritanian occupation of the towns” of the territory.⁽¹³²⁾ The SADR is a “free, independent, sovereign state ruled by an

¹²⁹ *Ibid.*, Annex.

¹³⁰ Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN doc. S/2002/161 (Corell Opinion), para. 6.

¹³¹ Algeria supports the self-determination of the Sahrawis both for an ideational factor and for hegemonic competition, since it wants access to the Atlantic to ease exports of its hydrocarbons and minerals to the Americas. See S. ZUNES, J. MUNDY, *supra* note (15), at 40-43.

¹³² T. HODGES, *supra* note (21), at 238.

Arab national democratic system of progressive unionist orientation and of Islamic religion”.⁽¹³³⁾

During the first phase of the conflict, the Polisario was committed at helping the Sahrawis to flee towards Tindouf, in Algeria. In the meanwhile, Moroccan and Mauritanian troops divides the territory of Western Sahara according to the Rabat agreements.⁽¹³⁴⁾ After the death of El Ouali, the Sahrawi Popular Liberation Army (SPLA), the armed wing of the Polisario Front, attacks more decisively. The third congress of the front elect Mohamed Abdelaziz the new secretary-general.⁽¹³⁵⁾ The war intensified particularly against Mauritania, which was considered the weakest enemy. Finally, on 10 August 1979, the Algiers Accord was signed between Polisario Front and the Mauritanian government. In a letter dated 18 August 1979, the Permanent Representative of Mauritania to the UN, informed the SG of the Accord and Mauritania “renounced all territorial claims to Western Sahara and decided to withdraw definitely from the war taking place there” and “has assumed a position of strict neutrality”. Moreover, Mauritania recognized the Polisario Front as the legitimate representative of the Sahrawis.⁽¹³⁶⁾ When Mauritanian troops withdraw Western Sahara, the Moroccan troops took possession of the area of Western Sahara which Mauritania was committed to restore the SADR.⁽¹³⁷⁾ On 21 November

¹³³ The full text of the 1976 SADR Constitution is available at <<http://www.arso.org/03-1.htm>>. [Last accessed 20 September 2016].

¹³⁴ The two Rabat Agreements were concluded on 14 April 1976: the first one divided the territory of Western Sahara in the northern part which was under the Moroccan authority and the southern part, administered by Mauritania. The second agreement provided for an economic cooperation between Mauritania and Morocco. The Rabat Agreements do not respect the International Law, since they violate the right to self-determination of the Sahrawis and the resolutions adopted by the GA. See J. SOROETA LICERAS, *supra* note (46), at 166-167.

¹³⁵ He died on 31 May 2016. After his death, the Polisario Front has declared forty days of national mourning and Khatri Addouh has been the Secretary General of Polisario and President of the Republic until the election of the current President Brahim Ghali who took office on 12 July 2016.

¹³⁶ Letter dated 18 August 1979 from the Permanent Representative of Mauritania to the United Nations addressed to the Secretary-General, 20 August 1979, UN doc. S/13503, Annex I.

¹³⁷ G. LASCHI, *supra* note (18), at 137-138.

1979, the GA issued Resolution 34/37⁽¹³⁸⁾: the AG “welcomes the peace agreement” between the two parties considering it “an important contribution to the process of achieving peace” in Western Sahara.⁽¹³⁹⁾ Moreover, it “deeply deplores the aggravation of the situation resulting from the occupation of Western Sahara by Morocco and the extension of that occupation to the territory recently evacuated by Mauritania.”⁽¹⁴⁰⁾ Finally, the AG “urges Morocco to join in the peace process and to terminate the occupation of the Territory of Western Sahara”⁽¹⁴¹⁾, recognized the Polisario as the legitimate representative of the Sahrawis and recommended its involvement in the search for a definitive solution of the question of Western Sahara.⁽¹⁴²⁾ Nevertheless, the parties did not negotiate, and while the SPLA, supported by Algeria, Libya, Cuba and Syria, attacked the Moroccan army, liberating some parts of the territory, king Hassan II decided to occupy the territories of the “useful Sahara”, that is, the mining cities of Smara, Bou-Craa and Al Ayoun.⁽¹⁴³⁾

The 1980s represented a new phase in the conflict, since Morocco decided to adopt the “wall strategy”, in order to contain the guerrilla actions undertaken by the Polisario Front.⁽¹⁴⁴⁾ In 1984 Morocco started elevating what is considered “the largest functional military barrier in the world”.⁽¹⁴⁵⁾ The *Berm* was built in six waves and nowadays is a system of 3m-high walls 2,720 square km long and

¹³⁸ GA Resolution 34/37 of 21 November 1979.

¹³⁹ *Ibid.*, para. 4 .

¹⁴⁰ *Ibid.*, para. 5.

¹⁴¹ *Ibid.*, para. 6.

¹⁴² *Ibid.*, para. 7.

¹⁴³ G. LASCHI, *supra* note (16), at 138-139.

¹⁴⁴ *Ibid.*, at 140-141.

¹⁴⁵ S. ZUNES, J. MUNDY, *supra* note (15), at 21. The wall is a series of sand and stone walls of two to three meters high. It is protected by bunkers, ditches, trenches, barbed wire, mines and electronic detection systems and defended by more than 160,000 Moroccan soldiers. Over every 5 km of the wall, there is a military base of about 100 Moroccan soldiers. About four km behind each major observation post, there is a mobile rapid intervention force and a series of overlapping fixed and mobile radars, with a range of 60 to 80 km, are placed along the wall. See *International Campaign Against the Wall of the Moroccan Occupation in Western Sahara*, available at <<http://removethewall.org/>>. [Last accessed 20 September 2016].

separates the Free Zone controlled by the SADR, at the east, from the area at the west of the wall, which is considered Moroccan southern provinces.⁽¹⁴⁶⁾

The 1980s also saw a more involved commitment of the Organization for the African Unity (OAU), now the African Union (AU).⁽¹⁴⁷⁾ In 1980, during the 17th Conference in Freetown, the SADR demanded the OAU to be admitted as member of the Organization. The demand caused the reaction of Morocco that denied the SADR had all the conditions that the International Law needs for the constitution of a new State, asking the interpretation of Articles 4, 27 and 28 of the OAU Charter.⁽¹⁴⁸⁾ The question was put aside temporarily and during the 18th Conference in Nairobi in 1981, King Hassan II, decided for the first time to accept the organization of a referendum in the territory of Western Sahara, which however was denied later in time.⁽¹⁴⁹⁾

Nevertheless, the SADR was recognized by many states and in 1982, 26 member states of the OUA recognized it, so that, having reached the simple majority of the member states of the organization, the SG appointed the SADR as a new

¹⁴⁶ From an economic point of view, it is known that the Moroccan economy is becoming increasingly dependent on the illegal plundering of the natural resources in the occupied territories of Western Sahara; the wall prevents the Sahrawi citizens who live under occupation to benefit of their basic socio-economic rights. See L. ACOSTA HURTADO, *Los Muros de la Vergüenza*, 2015, available at <<http://removethewall.org/resources/studies/>>; P. SAN MARTÍN, J. C. ALLAN, *The largest prison in the world: landmines, walls, UXOs and the UN's role in the Western Sahara*, 2007, available at <<http://removethewall.org/resources/studies/>>. [Last accessed 20 September 2016].

¹⁴⁷ The OAU had already been active in the case of Western Sahara during the 1970s, through AHG/Res. 81 (XIII) of 6 July 1976 which called on all the interested parties “to co-operate in finding a peaceful solution to the dispute”; AHG/Res. 92 (XV) of 22 July 1978 reaffirmed the responsibility of the OAU with regard “to the search of a fair and peaceful solution in conformity with the principles of the Charters of the OAU and the United Nations Organization”; AHG/Res. 114 (XVI) of 20 July 1979 called on the referendum as mean to solve the issue in Western Sahara.

¹⁴⁸ The articles of the OUA Charter pointed out by Morocco states: “Art. 4. Each independent sovereign African State shall be entitled to become a Member of the Organization. Art. 27. Any question which may arise concerning the interpretation of this Charter shall be decided by a vote of two thirds of the Assembly of Heads of State and Government of the Organization. Art. 28. Any independent sovereign African State may at any time notify the Secretary-General of its intention to adhere or accede this Charter”. On this topic, see J.J. SMITH, *supra* note (27).

¹⁴⁹ J. SOROETA LICERAS, *supra* note (46), at 77.

member of the Organization.⁽¹⁵⁰⁾ This caused an intern crisis of the Organization that halted its work during some months and then annulled the ordinary session in Tripoli which was supposed to be held the first week of August.⁽¹⁵¹⁾ The year after an agreement foresaw the voluntary recession to occupy the seat, so that allowed to keep on the work. The Organization approved Resolution AHG/Res. 104 (XIX)⁽¹⁵²⁾ which recognized for the first time the Polisario as part to the conflict and invited it, together with Morocco, to negotiate in order to bring about a ceasefire and the organization of a referendum for the self-determination of the Sahrawis under the auspices of the OAU and the UN.

The SADR officially joined the OUA during the 20th conference held in Addis Abebi, causing the recess of Morocco from it.⁽¹⁵³⁾ Henceforward, the OAU will give a decisive support to the fight of the Sahrawis for their right to self-determination, by electing the President of the SADR Mohamed Abdelaziz, vice-president of the OAU.⁽¹⁵⁴⁾ During the same year, the GA voted Resolution 40/50⁽¹⁵⁵⁾ in which it reaffirmed that the solution of the question of Western Sahara should have implemented the decisions taken in Resolution AHG/Res. 104 (XIX) of the OAU.

1.2.6 The UN Settlement Plan

On 11 August 1988, the SG Javier Pérez de Cuéllar and the President of the OAU, Kenneth Kaunda, proposed in Geneva to Polisario and Morocco, the so-called Settlement Plan, which contained the guidelines for the implementation of the peace plan which was to lead, following the ceasefire, to the referendum

¹⁵⁰ The SADR was first recognized by Algeria on 6 March 1976, and subsequently by 84 States (as of January 2014), even though 44 of them have withdrawn or “frozen” their recognition. Data from the Report A. FAUPIN, B. GUILLAUMIN, *The Western Sahara Issue: A Security Stake for the European Union. European Security in Need of a Settled and Developed Western Sahara*, Report by the French Mediterranean Sub-Group EWG 11 bis (2014), at 36-43.

¹⁵¹ E. JENSEN, *supra* note (13), at 33.

¹⁵² AHG/Res. 104 (XIX) of 12 June 1983.

¹⁵³ J. SOROETA LICERAS, *supra* note (46), at 83.

¹⁵⁴ *Ibid.*

¹⁵⁵ GA Res. 40/50 of 2 December 1985.

for the self-determination of the Sahrawi population and the placing in action of its results.⁽¹⁵⁶⁾

The plan was accepted by both the parties in August 1988⁽¹⁵⁷⁾ and the SC adopted in 1988 Resolution 621 (1988)⁽¹⁵⁸⁾ which authorized the SG to appoint a Special Representative to Western Sahara who would have been the sole responsible for questions regarding the undertaking of the peace plan⁽¹⁵⁹⁾ and requested the SG “to transmit a report [...] on the holding of a referendum for the self-determination of the people of Western Sahara and on ways and means to ensure the organization and supervision of such a referendum by the United Nations in co-operation with the Organization of the African Union”.⁽¹⁶⁰⁾ The GA approved in November of the same year, Resolution 43/33⁽¹⁶¹⁾, which welcomed the agreement reached between the two parties and demanded the President of the OAU and the SG to encourage the parties to negotiate for the ceasefire and the holding of the referendum.

¹⁵⁶ G. LASCHI, *supra* note (18), at 143. The plan called for the institution of a Special Representative who would be the sole, exclusive authority on all questions relative to the referendum regarding its organization and undertaking, assisted by a Support Group; the institution of a mission of international Observers, responsible for the undertaking of the peace plan; the establishment of a ceasefire which would bring all hostilities to an end; the organization of a referendum which would have allowed those having the right, to decide their own future freely and democratically. Moreover, an Identification Commission was set up in order to revise and update the 1974 census calculating the real growth of the Sahrawis population in the period from 1974 to the date of the organization of the referendum. The express agreement of the parties stated: “[A]ll Western Saharans to whom the 1974 census undertaken by the Spanish authorities related and who are aged 18 years or over will have the right to vote, whether they are currently present in the Territory or living outside it as refugees or for other reasons. The Commission’s mandate to update the 1974 census will include (a) removing from the lists the name of persons who have since died and (b) considering applications from persons who claim the right to participate in the referendum on the grounds that they are Western Saharans and were omitted from 1974 census”. S/22464/1991 of 19 April 1991, at 6. For the detailed content of the Settlement Plan, see *Id.*, at 144-145.

¹⁵⁷ S/21360/1990 of 18 June 1990, at 4.

¹⁵⁸ SC Resolution 621 of 20 September 1988.

¹⁵⁹ *Ibid.*, para. 1.

¹⁶⁰ *Ibid.*, para. 2.

¹⁶¹ GA Res. 43/33 of 22 November 1988.

The negotiations took place in Marrakech in February 1989 between the King of Morocco, Hassan II, and a delegation of the Polisario Front.

On 18 June 1990, the SG confirmed the agreement in principle of the parties that the future of the territory would be determined by a referendum conducted under the auspices of the OAU and the UN, in which the indigenous population, defined as “all Sahrawis included on the Spanish census of 1974 eighteen years of age or older” would be allowed to vote.⁽¹⁶²⁾

The SC finally approved the Settlement Plan with Resolution 690 (1991) of 29 April 1991⁽¹⁶³⁾ and instituted the MINURSO⁽¹⁶⁴⁾, which was mandated to monitor the ceasefire, identify and register qualified voters, monitor the confinement of Moroccan and the Polisario Front troops to designated locations and to organize and ensure a free and fair referendum and proclaim the results.⁽¹⁶⁵⁾

The Settlement Plan was approved by both Morocco and Polisario and the ceasefire entered into force on 6 September 1991.

1.3. The Failure of the UN process and the problem of the identification

The identification of the people entitled to vote constitutes the third problem which halted again the process of self-determination of the Sahrawis.⁽¹⁶⁶⁾ The problems of the identification of the eligible voters were linked to the nomadic character of the Sahrawis, the difficulty to identify the refugees, particularly those from the diaspora, the problem of the colonization and whether the Moroccan occupiers who had established in the territory of the Western Sahara had the right to vote. However, a part from these objective problems, Morocco intended to boycott the process of identification asking to include as eligible

¹⁶² S/21360/1990 of 18 June 1990.

¹⁶³ SC Res. 690 of 29 April 1991.

¹⁶⁴ Acronym from the French name *Mission des Nations Unies pour l'Organisation d'un Référendum au Sahara Occidental*.

¹⁶⁵ See the official website of the MINURSO, available at <http://www.un.org/en/peacekeeping/missions/minurso/>. [Last accessed 20 September 2016].

¹⁶⁶ M. BALBONI, *supra* note (47), at 6.

voters also the population that, during the period of the colonization and Spanish repression, at the end of the '50, had left Western Sahara to seek refuge in Morocco.

1.3.1 The interpretation of Pérez de Cuéllar

The 1991 Report of the SG Pérez de Cuéllar⁽¹⁶⁷⁾ is considered to be “one of the fundamental stages marking the identification and peace processes, because it offered a new unilateral interpretation of identification, amplifying the vision of the electoral base indicated in the Settlement Plan accepted by the parties, and adding new criteria of identification”.⁽¹⁶⁸⁾

However, the Report welcomed a series of measures favorable to Morocco, referred to the eligibility criteria, the demonstration of them and the procedure to follow for the identification.⁽¹⁶⁹⁾ As concern the eligibility criteria, the Report welcomed the Moroccan proposal to include those of residence and birth, which cannot be related to a nomad population. With regard to the demonstration of the criteria, the report suggested that it could be both oral and written and that a written demonstration by the Spanish or Moroccan administrations could be considered valid. Finally, as regards the procedure, the Report contemplated the agreements between two tribe chiefs and, in the case of absence of a written demonstration of the agreement, an UN official would have been uncharged.⁽¹⁷⁰⁾

The Polisario Front opposed the Report, since it was in favor of Morocco. The same position was adopted by the UN through SC Resolution 725/91⁽¹⁷¹⁾ that took into consideration the proposal of the SG but it reiterated it and invited the SG to submit a further report to the SC.

¹⁶⁷ Report of 19 December 1991 – S/23299.

¹⁶⁸ G. LASCHI, *supra* note (18), at 147.

¹⁶⁹ For full the list of the criteria, see *Ibid.*, at 149.

¹⁷⁰ M. BALBONI, *supra* note (47), at 6.

¹⁷¹ Security Council Resolution 725 (1991) of 31 December 1991.

Pérez de Cuéllar was succeeded by Boutros Boutros-Ghali in 1992. The new compromise on the interpretation of the criteria was presented in a Report⁽¹⁷²⁾ and it seemed to lead to an attenuation of the impasse, thanks to some important concessions.

Nevertheless, the process of identification was halted and the number of the forces of MINURSO was reduced.⁽¹⁷³⁾

1.3.2 The mandate of Kofi Annan and the Baker Plan

The process was revitalized again with the mandate of Kofi Annan who proposed a bargaining approach on the dispute, together with the approach of the Settlement Plan. With this aim, Kofi Annan introduced the role of the Personal Envoy and appointed the former Secretary of State James Baker III to this role.⁽¹⁷⁴⁾ Baker was requested to “assess the implementability of the plan, to examine ways of improving the chances of resuming its implementation in the near future and, if there is none, to advise [...] on other possible ways of moving the peace process forward”.⁽¹⁷⁵⁾

One can distinguish different phases during the mandate of Baker.

In a first moment, Baker tried to revitalize the process of identification by promoting a series of agreements⁽¹⁷⁶⁾ which allowed to reach a compromise. This compromise foresaw the extension of the identification criteria, accompanied by a greater rigor in the verification, with the UN uncharged of it. The process of identification took place: 200.000 demands of identification were presented, but only 80.000 were welcomed. With the aim of hampering the process, Morocco invited all the excluded to take part. There were more than 100.000 appeals which halted the process.

For the first time, in a Report from February 2000, the SG emphasized the lack of means to enforce the result of a referendum, suggested that it was time to

¹⁷² Report of 28 July 1993 - S/26185.

¹⁷³ M. BALBONI, *supra* note (47), at 6.

¹⁷⁴ Report of the Secretary-General of 5 May 1997 - UN doc. S/1997/358.

¹⁷⁵ *Ibid.*, para. 3.

¹⁷⁶ In London, Lisbon and Houston.

consider “other ways” of resolving the dispute over self-determination, and started placing pressure on the parties to accept a settlement based on “quasi autonomy” for the territory. This was a political solution to the problem. In May 2001, Baker proposed the Framework Agreement, under which Morocco would be recognized as the administering power in the territory and would delegate certain governance powers to the inhabitants of the territory for a period of five years, after which a referendum would be held.⁽¹⁷⁷⁾ The Framework Agreement presented two key differences from the Settlement Plan, which were the expansion of the voters who would be entitled to vote in the referendum; and the implied addition of an option for semi-autonomy of Western Sahara within the sovereign state of Morocco to the previously-established referendum options of independence or integration.⁽¹⁷⁸⁾ The expansion of the voters list would allow all people living in the territory for one year prior to the referendum to vote.⁽¹⁷⁹⁾

In June, the Secretary-General endorsed the plan and the Framework Agreement substituted the Settlement Plan.⁽¹⁸⁰⁾ The Framework Agreement, however, was completely rejected by Polisario since the goal was to provide a plan for an immediate change in the *status quo* providing for increased autonomy, while not foreclosing self-determination rights.

In 2003, Baker put forward a second and final proposal, the Peace Plan, which was based on a goal of allowing each side a fair chance to win a referendum on self-determination after a period of self-governance by Western Sahara.⁽¹⁸¹⁾ The structure was similar to that of the Framework Agreement but key differences on the final referendum and on the electorate affected how the right to self-

¹⁷⁷ COMMITTEE ON THE UNITED NATIONS, *The Legal Issues Involved in The Western Sahara Dispute: the Principle of Self-Determination and the Legal Claims of Morocco*, New York City Bar Association, June 2010, at 18.

¹⁷⁸ *Ibid.*, at 19. See Annex to the Report of the Secretary-General, S/2002/41 of 11 January 2002.

¹⁷⁹ *Ibid.*

¹⁸⁰ The report observed that it was doubtful whether any other adjustments to the Settlement Plan would resolve problems, since the endgame would still produce one winner and one loser. Report of 20 June 2001 - S/2001/613.

¹⁸¹ S/2003/565, Annex II, at 14.

determination was proposed to be addressed. As regards the final referendum, the Peace Plan required that it would include an independence option as well as a “third way”, that is to say a semi-autonomous “Western Sahara Authority” entitled to govern the territory for a transitional period of four to five years leading up to the referendum.⁽¹⁸²⁾ As regards the electorate for the referendum, a potential eligible voter would have needed to be on the provisional voters list published by MINURSO, or on a repatriation list made by the UNHCR on October 3, 1999.⁽¹⁸³⁾ The Peace Plan was approved in 2003 by the SG⁽¹⁸⁴⁾ and the same year the SC voted to support it.⁽¹⁸⁵⁾

The Peace Plan was rejected by Morocco and accepted by Polisario; nevertheless, Morocco made an objection on the status of the territory after self-determination vote by rejecting the chance to have independence as an option and proposing a negotiated solution under which it would offer to integrate Western Sahara into Morocco as an “autonomous region”.⁽¹⁸⁶⁾

In 2004, Baker resigned as Personal Envoy of the SG to Western Sahara.

In 2007 the SC issued Resolution 1754⁽¹⁸⁷⁾ that:

Calls upon the parties to enter into negotiations without preconditions in good faith, taking into account the developments of the last months, with a view to achieving a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara.⁽¹⁸⁸⁾

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ S/2003/565 of 23 May 2003.

¹⁸⁵ SC Res. 1495 of 31 July 2003. The Peace Plan was described as “an optimum political solution on the basis of agreement between the two parties” and called upon the parties to work with the UN toward acceptance and implementation of the Peace Plan.

¹⁸⁶ SC Res. 1754 of 30 April 2007.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*, para. 2.

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Since 2007, the parties have held numerous formal and informal talks but these talks are nowadays at an impasse since the Moroccans are willing to discuss only a plan for an autonomous region whereas the Polisario does not accept any solution that do not permit the Sahrawis the option of choosing independence for the territory.⁽¹⁸⁹⁾

¹⁸⁹ COMMITTEE ON THE UNITED NATIONS, *supra* note (177), at 22.

Chapter two

The status of Western Sahara under International Law

OVERVIEW: 2.1 Western Sahara as a Non-Self-Governing Territory - 2.2 International obligations towards NSGTs - 2.2.1 The role of Spain as administering Power and related obligations - 2.3 Morocco as occupying power - 2.3.1 Occupation under International Law - 2.3.2 The controversy over the legal status of Morocco: *de facto* occupation vs *de jure* administration - 2.4 Rules governing the use of natural resources - 2.4.1 The PPSNR - 2.4.2 The Corell opinion - 2.4.3 The PPSNR in the occupation: rights and duties of the occupying powers - 2.5 The duty of non-recognition

2.1 Western Sahara as a Non-Self-Governing Territory

There is a wide and approved consent about the qualification of Western Sahara as a NSGT.⁽¹⁹⁰⁾ Western Sahara indeed still appears in the UN list of NSGTs since it was first included in 1963.⁽¹⁹¹⁾

A first definition of NSGTs has been provided for by Art. 73 of the UN Charter which defines them as those “territories whose peoples have not yet attained a full measure of self-government”.⁽¹⁹²⁾ Under the UN Charter, moreover, NSGTs have “a status separate and distinct from the State administering it; and such separate and distinct status under the Charter shall exist until the people of the Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles”.⁽¹⁹³⁾

The GA has developed through years a series of resolutions from which one can extrapolate more elements useful for a general definition of NSGTs. At this

¹⁹⁰ M. N. SHAW, *International Law*, Cambridge, Cambridge University Press, 2008, at 236 ss.

¹⁹¹ See the webpage of the United Nations and Decolonization, available at <<http://www.un.org/en/decolonization/nonselgoverterritories.shtml>>. [Last accessed 20 September 2016].

¹⁹² Art. 73 of the UN Charter of 26 June 1945.

¹⁹³ GA Res. 2625 (XXV) of 24 October 1970, Annex.

respect, one should mention GA Resolution 742 (VIII) in which the GA approved a list made by the *ad hoc* Committee (NSGTs)⁽¹⁹⁴⁾ which contained the factors to take into consideration when qualifying a territory as NSGT.⁽¹⁹⁵⁾

Practically, the list contained some elements which excluded the qualification of NSGT on the basis of the effective realization of a certain degree of self-government.⁽¹⁹⁶⁾

An important step forward was reached through GA Resolutions 1514 (XV) and 1541 (XV). While the first resolution identified the self-determination as the aim the NSGTs had to reach⁽¹⁹⁷⁾, the second resolution set up a list of “principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e) of the Charter of the United Nations”⁽¹⁹⁸⁾, that is to say a list of principles useful for the definition of NSGTs giving at the same time important specifications on how to realize the self-determination in the colonial context. Specifically, principle II contemplated that the qualification of NSGT would have been applied until the territory and its people had attained a “full measure of self-government” and principle VI specified that a NSGT can be said to have reached a full measure of self-government by independence, free association or integration with an independent State. What is important to underline is that the exercise of the right to self-determination is considered a condition for the NSGTs to lose this *status*.

As regards instead the international law regulating NSGTs, one should refer to economic and political obligations of the administering Powers and those of the

¹⁹⁴ The *ad hoc* Committee was set up by GA Res. 66 (I) of 14 December 1946, paras. 4-6.

¹⁹⁵ GA Res. 742 (VIII) of 27 November 1953, Annex.

¹⁹⁶ Specifically, the first part contained the factors indicative of the attainment of the independence, both with regards to the international relations and to the internal dimension; the second part contained the factors indicative of the attainment of other separate systems of self-government and the third part the factors indicative of the free association of a territory on equal basis with the metropolitan or other country as integral part of that country or in any other form.

¹⁹⁷ GA Res. 1514 (XV) of 14 December 1960, para. 5.

¹⁹⁸ GA Res. 1541 (XV) of 15 December 1960, Annex.

third states. These obligations will be discussed in the present chapter and are relevant to the aim of this work.

At the present, the Saharawis have not benefited from a referendum through which they can decide their future political *status*: this basically means that the situation is still the same since 41 years and Western Sahara is still a NSGT.

What is still important to underline is that Western Sahara is under Moroccan military occupation: indeed, even if the term “occupied” is not applied by the United Nations, it is important to state it, since an occupation implies determined provisions.

2.2 International obligations towards NSGTs

Two stages can be distinguished on the recognition of obligations of UN members regarding NSGTs.⁽¹⁹⁹⁾ Initially, some obligations were recognized to the UN as such and not its member states, if not involved in the colonization process.⁽²⁰⁰⁾ At this stage, one should point out Art. 1.2 of the UN Charter which contemplates the obligation for the UN “to develop friendly relations among nations based on respect of the principle of **equal rights and self-determination of peoples**, and to take other appropriate measures to strengthen universal peace”.⁽²⁰¹⁾

In a second stage, new political and economic obligations arose for the UN Member States. Politically, the “Declaration on the granting of independence to colonial countries and peoples”⁽²⁰²⁾ and the “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among

¹⁹⁹ C. RUIZ MIGUEL, *Spain's Legal Obligations as Administering Power of Western Sahara*, International conference on *Multilateralism and International Law with Western Sahara as a case study*, Pretoria, 4 and 5 December 2008, at 1-9. The author offers an historical overview of the antecedents regarding the obligations of the colonial powers; in the present work however, only the obligations deriving from the UN Charter will be analyzed.

²⁰⁰ Art. 2 of the UN Charter makes no reference to an obligation for Member States regarding the colonies if not involved in the colonization process.

²⁰¹ Art. 2.1 of the UN Charter of 26 June 1945. [Emphasis added in bold].

²⁰² GA Res. 1514 (XV) of 14 December 1960.

States in Accordance with the Charter of the United Nations”⁽²⁰³⁾ gave the strongest contribution, since they declared the right to self-determination not only as a principle of the Law of the UN, but also as a right of the peoples of the NSGTs.⁽²⁰⁴⁾ As it has been pointed out, this evolution of the right to self-determination “has an important consequence, i.e. as a right, it has a character *erga omnes* that necessarily implies a correspondent obligation for all the UN members to respect it”.⁽²⁰⁵⁾

Moreover, as it has been noted⁽²⁰⁶⁾ the “Declaration on the granting of independence to colonial countries and peoples” is relevant in the Western Sahara case, since it includes a call for restraint in subjugating peoples to alien domination⁽²⁰⁷⁾, underscores the right to self-determination⁽²⁰⁸⁾, prohibits “armed action” and requires to respect territorial integrity⁽²⁰⁹⁾, and exhorts to take “immediate steps [...] to transfer all powers to the peoples of those territories [...] in order to enable them to enjoy complete independence and freedom”.⁽²¹⁰⁾

The “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of

²⁰³ GA Res. 2625 (XXV) of 24 October 1970.

²⁰⁴ GA Res. 1514 (XV): “ **All States** shall observe faithfully and strictly the provisions of the [...] present resolution”; GA Res. 2625 (XXV): “**Every State** has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by a by the Charter regarding the implementation of the principle”. [Emphasis added in bold].

²⁰⁵ C. RUIZ MIGUEL, *supra* note (199), *cit.* at 5. The *erga omnes* character of the right to self-determination has been confirmed by the ICJ in the Case concerning East Timor (Portugal v. Australia): “In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable”, Case concerning East Timor (Portugal v. Australia), ICJ, 30 June 1995, para. 29. For a detailed overview of the development of the right to self-determination and its application to the case of Western Sahara, see COMMITTEE ON THE UNITED NATIONS, *supra* note (177).

²⁰⁶ J.J. SMITH, *supra* note (27), at 14-19.

²⁰⁷ GA Res. 1514 (XV) of 14 December 1960, para. 1.

²⁰⁸ *Ibid.*, para. 2.

²⁰⁹ *Ibid.*, paras. 4-7.

²¹⁰ *Ibid.*, para. 5.

the United Nations” instead, contained a restriction against secession in non-post-colonial settings, stating that “the territorial integrity and political independence of the State are inviolable”.⁽²¹¹⁾

Economically, the “Programme of Action for the full implementation of the Declaration on the granting of independence to colonial countries and peoples”⁽²¹²⁾ considered the economic practice in NSGTs as an obstacle to the achievement of the self-determination and called upon all UN Member States to avoid any economic activity in the aforementioned Territories:

Member States shall wage a vigorous and sustained campaign against activities and practices of foreign economic, financial and other interests operating in colonial Territories and on behalf of colonial Powers and their allies, as these constitute a major obstacle to the achievement of the goals embodied in resolution 1514 (XV). Member States shall consider the adoption of necessary steps to have their nationals and companies under their jurisdiction discontinue such activities and practices; these steps should also aim at preventing the systematic influx of foreign immigrants into colonial Territories, which disrupts the integrity and social, political and cultural unity of the peoples under colonial domination.⁽²¹³⁾

This obligation was explicitly referred to Western Sahara in GA Resolution 3292 (XXIV)⁽²¹⁴⁾ through which the GA invited all States “to observe the resolutions of the General Assembly regarding the activities of foreign economic and financial interests in the Territory and to abstain to contribute by their investments or immigration policy to the maintenance of a colonial situation in the Territory”.⁽²¹⁵⁾

²¹¹ GA Res. 2625 (XXV) of 24 October 1970.

²¹² GA Res. 2621 (XXV) of 12 October 1970.

²¹³ *Ibid.*, para. 3(4).

²¹⁴ GA Res. 3292 (XXIV) of 13 December 1974.

²¹⁵ *Ibid.*, para. 4.

A different analysis however, should be made on the specific obligations of the administering Powers towards the NSGTs they administer. In the case of Western Sahara, a clarification on the role of Spain and Morocco is needed.

2.2.1 The role of Spain as administering Power and related obligations

The *status* of administering Power is granted by the UN and imposes certain rights and obligations which are enshrined in Chapter XI and XII of the UN Charter which application is monitored by the Trusteeship Council.⁽²¹⁶⁾

Art. 73 of the UN Charter sets the basis for the political and economic obligations of the administering Powers, that is to say promoting the social, economic and educational well-being of the colonized people and developing the self-government of the territory.

Specifically, Art. 73 states as follows:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace established by the present Charter, the **well-being of the inhabitants of these territories**, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their **political, economic, social and educational advancement**, their just treatment, and their protection against abuses;

²¹⁶ The Trusteeship Council is one of the main organs of the UN with the task of supervising the administration of Trust Territories placed under the Trusteeship System. See

<<http://www.un.org/en/sections/about-un/trusteeship-council/index.html>> and <<http://www.un.org/en/decolonization/trusteeship.shtml>>. [Last accessed 20 September 2016].

- b. to **develop self-government**, to take due account of the political aspiration of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- c. to further international peace and security;
- d. to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the **social, economic and scientific purposes** set forth in this Article;
- e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, **statistical and other information of a technical nature** relating to economic, social and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.⁽²¹⁷⁾

It is worth underlining that Art. 73 applies both to the “inhabitants” and “peoples”. The two terms need to be distinguished, since it is the peoples, including the indigenous peoples, who have the right over the natural resources of a NSGT. The term “inhabitants” is a wider concept than “peoples” and in the specific case of Western Sahara, it can include the Moroccans established in the Territory.⁽²¹⁸⁾

The political obligations were deeply developed during the 1960s when the “Declaration on the granting of independence to colonial countries and

²¹⁷ Art. 73 of the UN Charter of 26 June 1945. [Emphasis added in bold].

²¹⁸ H. M. HAUGEN, *The Right to Self-Determination and Natural Resources: the Case of Western Sahara*, 3/1 Law, Environment and Development Journal, 2007, at 76, available at <<http://www.lead-journal.org/content/07070.pdf>>. [Last accessed 20 September 2016].

peoples” was passed.⁽²¹⁹⁾ As it has been mentioned above and in the first paragraph, the Declaration not only considers self-determination a “principle” of the UN, but also a “right” of the peoples by imposing on the administering Powers to start immediately the process of independence which has to be made in accordance with the freely expressed will of the peoples:

Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom.⁽²²⁰⁾

GA Resolutions 1541 (XV) and 2625 (XXV) extensively regulated the aforementioned obligations considering the possibility that the colonized people may choose freely between full independence, free association with or integration in any other State.⁽²²¹⁾

As regards the economic obligations instead, they were developed in the Principle of Permanent Sovereignty over Natural Resources (PPSNR), which will be analyzed below, and through several GA Resolutions.

On a first stance, it can be said that the administering Powers were asked to respect the economic rights of NSGTs to take benefit of their resources.

²¹⁹ GA Res. 1514 (XV) of 14 December 1960.

²²⁰ *Ibid.*, para. 5.

²²¹ GA Res. 1541 (XV) of 15 December 1960, Annex, Principle VI: “A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: a) Emergence as a sovereign independent State; b) Free association with an independent State; or c) Integration with an independent State”. GA Res. 2625 (XXV) of 24 October 1970, Annex, at 124: “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by that people”.

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GA Resolution 44/84⁽²²²⁾ asserted:

[...] any administering Power that deprives the colonial peoples of Non-Self-Governing Territories of the exercise of their legitimate rights over their natural resources, or subordinates their rights and interests of those peoples to foreign economic and financial interests, violates the solemn obligations it has assumed under the Charter of the United Nations.⁽²²³⁾

GA Res. 48/46⁽²²⁴⁾ moreover, urged the administering Powers :

[...] to take effective measures to safeguard and guarantee the inalienable rights of the peoples of Non-Self-Governing Territories to their natural resources, and to establish and maintain control over the future development of those resources, and requests the administering powers to take all necessary steps to protect the property rights of the people of those Territories.⁽²²⁵⁾

GA Resolution 62/120⁽²²⁶⁾ called upon the administering Powers to ensure “that economic and other activities in the Non-Self-Governing Territories under their administration do not adversely affect the interests of the peoples but instead promote development, and to assist them in the exercise of their right to self-determination” and that the exploitation of the marine and other natural resources in the Non-Self-Governing Territories under their administration is not in violation of the relevant resolutions of the United Nations, and does not adversely affect the interests of the peoples of those Territories”.⁽²²⁷⁾

It can be underlined that the obligation of the administering Powers to safeguard the resources has become a peremptory norm of international law.

²²² GA Res. 44/84 of 11 December 1989.

²²³ *Ibid.*, para. 2.

²²⁴ GA Res. 48/46 of 10 December 1993.

²²⁵ *Ibid.*, para. 8.

²²⁶ GA Res. 62/120 of 17 December 2007.

²²⁷ *Ibid.*, paras. 10-11.

This has been stated by the recent GA Resolution 69/98 which emphasizes “the right of the peoples of the Non-Self-Governing Territories to self-determination in conformity with the Charter of the United Nations and with General Assembly resolution 1514(XV) [...] as well as their right to the enjoyment of their natural resources and their right to dispose of those resources in their best interest”.⁽²²⁸⁾

In his dissent to the ICJ’s 1995 East Timor (Portugal/Australia) decision, Judge Christopher Weeramantry discussed the development of this area of law and concluded that the 1989 Timor Gap Treaty was illegal, noting the obligation *erga omnes* on states to oppose the operation of the treaty:

At such time as the East Timorese people exercise their right to self-determination, they would become entitled as a component of their sovereign right, to determine how their wealth and natural resources should be disposed of. Any action prior to that date which may in effect deprive them of this right must thus fall clearly within the category of acts which infringe on their right to self-determination, and their future sovereignty, if indeed full and independent sovereignty be their choice. This right is described by the General Assembly, in its resolution [1803] [...]. The exploration, development and disposition of the resources of the Timor Gap, for which the Timor Gap Treaty provides a detailed specification, has most certainly not been worked out in accordance with the principle that the people of East Timor should ‘freely consider’ these matters, in regard to their ‘authorization, restriction or prohibition’. The Timor Gap Treaty, to the extent that it deals with East Timorese resources prior to the achievement of self-determination by the East Timorese people, is thus in clear violation of this principle.⁽²²⁹⁾

²²⁸ GA Res. 69/98 of 16 December 2014, para. 1.

²²⁹ Dissenting Opinion in East Timor, 198.

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As regards the specific case in question, in 1965 GA Resolution 2072 (XX) qualified Spain as the administering Power of Western Sahara for the first time.⁽²³⁰⁾

Spain is still today the *de jure* administering Power of Western Sahara although its attempts to relieve from this status have been many. The UN made its own statement of the Spanish attempt to relieve itself from its obligation under the UN Charter by asserting that:

On 26 February 1976, Spain informed the Secretary-General that as of that date it had terminated its presence in the Territory of the Sahara and deemed it necessary to place on record that Spain considered itself thenceforth exempt from any responsibility of any international nature in connection with the administration of the Territory, in view of the cessation of its participation in the temporary administration established for the Territory. In 1990, the General Assembly reaffirmed that the question of Western Sahara was a question of decolonization which remained to be completed by the people of Western Sahara.⁽²³¹⁾

²³⁰ GA Res. 2072 (XX) of 17 December 1965. The GA “urgently requests the Government of Spain, as the administering Power, to take immediately all necessary measures for the liberation of the Territories of Ifni and Spanish Sahara from colonial domination and, to this end, to enter into negotiations on the problems relating to sovereignty presented by these two Territories”. The quality conferred to Spain of administering power was confirmed by the GA in several successive resolutions. See GA Res. 2229 of 20 December 1966, GA Res. 2354 of 19 December 1967, GA Res. 2428 of 27 December 1968, GA Res. 2591 of 16 December 1969, GA Res. 2711 of 14 December 1970, GA Res. 2983 of 14 December 1972 and GA Res. 3162 of 14 December 1973.

²³¹ United Nations Non-Self-Governing Territories listed by GA in 2002, note 2; available at <http://www.un.org/en/decolonization/nonselvgovterritories.shtml#foot1>. [Last accessed 20 September 2016].

This declaration however, has no legal value.⁽²³²⁾ This has been clearly underlined by the former UN Under-Secretary-General for Legal Affairs, Hans Corell, who stated that the status of an administering Power is “a status which Spain alone could not have unilaterally transferred”.⁽²³³⁾

Moreover, the declaration has never been formally endorsed, neither in the Special Committee on the situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, nor in the Trusteeship Council or in the Fourth Committee of the GA.⁽²³⁴⁾

As regards the Madrid Agreement, it has already been analyzed that it lacks of legitimacy and it is considered null *ab initio*, according to Art. 53 of the Vienna Convention on the Law of Treaties.⁽²³⁵⁾

Art. 53 of the 1969 Vienna Convention on the Law of the Treaties, states that “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.⁽²³⁶⁾

²³² The basis upon which Spain claimed to have exempted itself from its obligation as administering Power was a unilateral declaration. H. M. Haugen has pointed out that such declaration is in contradiction to the two resolutions on self-determination, which are GA Res. 1514 (XV), asserting that self-determination is exercised when formerly colonial peoples freely determine their political status; and GA Res. 1541 (XV) which gives three options for when a NSGT can be said to have reached a full measure of self-government: a) emergence as a sovereign independent State; b) Free association with an independent State; or c) Integration with an independent State. See H.M. HAUGEN, *The UN and Western Sahara- Revising the UN Charter*, in A.E.D.I., vol. XXV (2009), at 361.

²³³ Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, Un document S/2002/161, para. 6. See also J. CRAWFORD, *The Creation of States in International Law*, Oxford, Oxford University Press, 2006, at 117.

²³⁴ H.M. HAUGEN, *supra* note (218), at 362.

²³⁵ On this issue, see also I. BROWNLIE, *supra* note (28), at 149.

²³⁶ Art. 53 of the Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969.

As it has been pointed out, the definition of *jus cogens* (peremptory norm) in the second sentence of the article appears to have been accepted as the general legal definition of international *jus cogens* by the international community of States as a whole.⁽²³⁷⁾

One should remind that *jus cogens* constitutes the highest category of norms in international law, since it permits no conflicting norms, instruments or regimes⁽²³⁸⁾; however, “the criteria for peremptory norms are very strict and, thus, the number of these norms is limited”.⁽²³⁹⁾

The International Law Commission (ILC)⁽²⁴⁰⁾ identified as *jus cogens* the prohibition of aggression and the illegal use of force, the prohibitions against slavery and the slave trade, genocide and racial discrimination and apartheid, the prohibition against torture, the basic rules of IHL and the right to self-determination.⁽²⁴¹⁾ As regards the Madrid Agreement, the peremptory norm which has been breached is the right to self-determination; however, for the aim of these thesis, it is crucial to remind that the PPSNR is also considered forming part of the *jus cogens*.⁽²⁴²⁾

²³⁷ L. HANNIKAINEN, *The case of Western Sahara from the Perspective of Jus Cogens*, in ARTS, KARIN, P. PINTO LEITE (éd), *International Law and the Question of Western Sahara*, IPJET, 2007, at 59-77.

²³⁸ C. FOCARELLI (a cura di), *Le nuove frontiere del diritto internazionale: Attori non statali, spazio virtuale, valori fondamentali e governo multinazionale di territori*, Perugia, Morlacchi Editore, 2008, at 119 ss.; D. CARREAU, F. MARRELLA, *Diritto Internazionale*, Milano, Giuffrè Editore, 2016; A. GIOIA, *supra* note (42), at 8 ss.; C. FOCARELLI, *Diritto Internazionale I*, Trento, Cedam, 2012, at 266 ss.

²³⁹ *Ibid.*, cit. at 62.

²⁴⁰ The International Law Commission was established by the General Assembly, in 1947, to undertake the mandate of the Assembly, under article 13 (1) (a) of the Charter of the United Nations to "initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification". See the webpage <<http://legal.un.org/ilc/>>. [Last accessed 20 September 2016].

²⁴¹ S. TALMON, *The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, at 99, available at <<http://users.ox.ac.uk/~sann2029/6.%20Talmon%2099-126.pdf>>. [Last accessed 20 September 2016].

²⁴² *Ibid.*, at 100. See also I. BROWNLIE, *Principles of Public International Law*, 6th ed., Oxford, 2003, at 489.

Even if Spain continues to be the *de jure* administering Power, Morocco is administering *de facto* the territory of Western Sahara preventing in this way the Sahrawis from exercising their right to self-determination. According to De Martín-Pinillos, the legal façade which allows Morocco to do so, is Spain.⁽²⁴³⁾ The author points out that according to international law and the UN, Spain is still responsible for the self-determination of the territory and the protection of its population and natural resources.⁽²⁴⁴⁾ Nevertheless, Spain considers Morocco as the new administering Power, and the Moroccan occupation of Western Sahara as perfectly valid and legal.

As observed by Ruiz Miguel, identifying Morocco as administering Power or as occupying power of Western Sahara, has severe practical, political and economic consequences and the most immediate ones relate to the possibility of exploiting the natural resources of Western Sahara.⁽²⁴⁵⁾

The aim of the next paragraph is indeed to qualify Morocco as occupying power and consider the law applicable to the issue.

2.3 Morocco as occupying Power

One question which is needed to be raised is the applicability of the law of occupation to Morocco's presence in Western Sahara. Asserting that Western Sahara has met the legal criteria for occupation under International Humanitarian Law (IHL) is crucial since it entails the prohibition of certain commercial dealings and attract individual criminal responsibility as war

²⁴³ E.T. DE MARTÍN-PINILLOS, *Spain as Administering Power of Western Sahara*, in ARTS, KARIN, P. PINTO LEITE (éd), *International Law and the Question of Western Sahara*, IPJET, 2007, at 83.

²⁴⁴ *Ibid.* See also M. DAWIDOWICZ, *Trading Fish Or Human Rights in Western Sahara? Self-Determination, Non-Recognition and The EC-Morocco Fisheries Agreement*, in Dr FRENC, *Statehood, Self-Determination and Minorities: Reconciling Tradition and Modernity in International Law*, Cambridge University Press, 2014, at 23-24.

²⁴⁵ C. RUIZ MIGUEL, *El acuerdo de pesca UE-Marruecos o el intento español de considerar a Marruecos como "potencia administradora" del Sáhara Occidental*, in *Anuario de Derecho internacional*, vol. XXII (2006), at 395-412.

crimes.⁽²⁴⁶⁾ In this paragraph it will be argued that the presence of Morocco in Western Sahara is regarded as occupation and that the status of Morocco is not the one of administering Power.

2.3.1 Occupation under international law

Before the adoption and the entering into force of the UN Charter⁽²⁴⁷⁾, the States were free to use the force and undertake military operations against other States to solve their controversies.

In this context, the international law intervened to regulate the conduct of the parties involved in an armed conflict (the so-called *jus in bello*).⁽²⁴⁸⁾

Nowadays there is a system which is based on the Hague Conventions (IV) of 1907 respecting the Laws and Customs of War on Land and its annexed Regulation, the Fourth Geneva Conventions of 1949, the Second Geneva Conventions of 1949 and the Protocol II Additional to the Geneva Conventions of 1977.

The Hague Convention and the Fourth Geneva Conventions are now considered customary law.⁽²⁴⁹⁾

²⁴⁶ B. SAUL, *The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources*, in *Global Change, Peace & Security*, Volume 27, Issue 3, 2015, at 1.

²⁴⁷ Art. 2.4 of the UN Charter of 26 June 1945 states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in another manner inconsistent with the purposes of the United Nations". The only exceptions contemplated by the UN Charter are the self-defense (Art. 51), the measures involving the use of the force adopted by the Security Council according to Chapter VII of the Charter, and finally, the action against the ex-enemies (Art. 107).

²⁴⁸ V. ZAMBRANO, *Il principio di sovranità permanente dei popoli sulle risorse naturali tra vecchie e nuove violazioni*, Milano, Giuffrè Editore, 2009, at 113.

²⁴⁹ The consideration of the provisions of the Hague Regulations as part of the customary law has been affirmed by the ICJ in *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 26 November 1984, ICJ Reports 1984. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, ICJ Reports 2004, para. 89; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996 (I), para. 75.

Specifically, Art. 42 of the Hague Convention provides for the traditional definition of occupation and asserts that a “territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised”.⁽²⁵⁰⁾

However, as it has been noted by Mundy, Morocco is “rarely described as an occupying power”⁽²⁵¹⁾ since the focus has always been on other legal issues, such as the status of Western Sahara as NSGT. Indeed, the organized international community has been reluctant to contemplate the application of IHL to Western Sahara and particularly within its resources for different reasons: first of all because few states have any interest in the legal protection of the territory’s natural resources, since the main question linked to Western Sahara is one of an incomplete self-determination process; secondly, since Spain renounced its role of administering Power, the Saharawis have been left without colonial interlocutor to pursue diplomatic or legal redress for self-determination, without that meaning however that Morocco has become responsible for it.⁽²⁵²⁾

The applicability of the IHL to the occupied part of Western Sahara could be contested.⁽²⁵³⁾ However, there are some reasons why the IHL does apply.

²⁵⁰ *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907.

²⁵¹ J. MUNDY, *The Legal Status of Western Sahara and the Laws of War and Occupation*, Collaborations No. 1790, Strategic Studies Group, 22 June 2007.

²⁵² J.J. SMITH, *The taking of the Sahara: the role of natural resources in the continuing occupation of Western Sahara*, in *Global Change, Peace & Security*, Volume 27, Issue 3, 2015, at 12-13.

²⁵³ See for example E. MILANO, *The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: Fishing too South?*, in *Anuario de Derecho Internacional*, 2006, at 448-449. The author reasons that the law of sovereignty over natural resources for a Non-Self-Governing Territory is somehow to be preferred or has eclipsed IHL: “[...] the situation of Western Sahara hardly fits in concrete the standard features of military occupations” so “while the rules of usufruct do apply [...] to the case under examination, the special status of the Territory and the nature of the occupation lead us to conclude that they should be interpreted in light of other applicable rules, such as that of permanent sovereignty over natural resources in

Firstly, the criminal courts of Spain have recently declared in two occasions that Spanish criminal law has continued to apply in Western Sahara since 1975. There are indeed two *Audencia Nacional* Decisions which have directed investigations to proceed against alleged serious crimes in the occupation of Western Sahara on the basis of international criminal law.⁽²⁵⁴⁾ In the first Decision the court concluded that international criminal law applied in the territory as a result of Spain's adoption of such law into its national legal system.⁽²⁵⁵⁾ The latter decision effectively set aside Spain's November 1975 statute that purported to abrogate the country's colonial responsibility for Western Sahara.⁽²⁵⁶⁾ Secondly, as it will be discussed below the GA has declared Western Sahara occupied and the facts on the ground, such as the international nature of the conflict, the parties' 1991 ceasefire referendum arrangement, the building of the berm and the presence of the occupying military force, are compelling and "displaces the suggestion that international humanitarian law can apply".⁽²⁵⁷⁾

One should also refer to Fourth 1949 Geneva Conventions which establishes that an armed conflict can arise where there are armed hostilities between two or more states, including through the use of irregular forces belonging to a state⁽²⁵⁸⁾ and where one state partially or totally occupied the territory of another state, "even if the said occupation meets with no armed resistance".⁽²⁵⁹⁾

NSGTs, hence to prohibit any exploitation of natural resources which is not conducted for the benefit and is not in accordance with the wishes of the local population".

²⁵⁴ J.J.SMITH, *supra* note (252), at 12 and note 44.

²⁵⁵ See the Decisions of the *Audencia Nacional*, Autono. 40/2014 (4 July 2014), and Sumario1/2015 (9 April 2015). The Decision directed an investigating magistrate to proceed on a criminal complaint about the death of a dual Saharawi/Spanish citizen at Gdeim Izek in November 2010.

²⁵⁶ See F.J. PEREZ, *Ruz procesa 11 mandos militares marroquies por genocidio en el Sáhara*, El País, 9 April 2015.

²⁵⁷ J.J. SMITH, *supra* note (252), *cit.* at 15.

²⁵⁸ Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 1949, common Article 2(1).

²⁵⁹ *Ibid.*, common Article 2(2). As it will be discussed below, the extension of these Conventions to Western Sahara as regards the pillage of natural resources is more problematic than the Hague Regulations or the Protocols Additional to the Geneva Conventions.

Moreover, the adhesion of the Polisario Front to the Geneva Conventions in June 2015⁽²⁶⁰⁾, confirms the applicability of the IHL to the belligerent occupation of Western Sahara.

After this premise, in order to understand the law of occupation applicable to NSGTs under alien domination, Chapaux⁽²⁶¹⁾ recalls the 2004 advisory opinion on the Legal Consequences of a Wall in the occupied Palestinian Territory.⁽²⁶²⁾ The ICJ recognized the occupying Power status of Israel in the Palestinian Territory and the application of IHL in the regions it occupies.⁽²⁶³⁾

The Court indeed insisted on the fact that the limitation *rationae personae* of the 1949 Conventions⁽²⁶⁴⁾ did not impede to apply the Geneva Conventions on the territory since it begins when an armed conflict arises between two or several High Contracting Parties and did not consider as relevant the question of the status of the territory which is occupied as consequence of this conflict.⁽²⁶⁵⁾

In the case of Western Sahara, first of all one has to point out that the Polisario Front joined the Geneva Convention in 2015. By similitude to the case of Palestine, it has been asserted that Western Sahara as well is the result of an armed conflict between Morocco and Algeria. One should briefly recall that at the end of 1975, Moroccan troops penetrated in the Western Sahara Territory and in January 1976, various confrontation took place between Morocco and

²⁶⁰ Federal Department of Foreign Affairs FDFA, Notification to the Governments of States parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, Unilateral declaration pursuant to Article 96, paragraph 3, of Protocol I, available at

<https://www.eda.admin.ch/content/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/150626-GENEVE_en.pdf>. [Last accessed 22 September 2016].

²⁶¹ V. CHAPAUX, *The sovereignty over natural resources: the question of the EU-Morocco fisheries agreement*, in ARTS, KARIN, P. PINTO LEITE (éd), *International Law and the Question of Western Sahara*, IPJET, 2007, at 8.

²⁶² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Judgement, 9 July 2004, ICJ Reports 2004.

²⁶³ *Ibid.*, para. 101.

²⁶⁴ The limit is to the event of an armed conflict arising between two contracting Parties.

²⁶⁵ V. CHAPAUX, *supra* note (261), *cit.* at 10.

Algeria.⁽²⁶⁶⁾ Another point of view is given by Saul who bases his argument on the lack of consent to the presence of foreign troops in Western Sahara.⁽²⁶⁷⁾ It is indeed widely accepted that the absence of consent is “a central element and a precondition for establishing occupation”.⁽²⁶⁸⁾

It is useful recalling that when Spain withdraw from Western Sahara in 1975, the GA called it to hold a referendum for the self-determination of the indigenous population. However, the referendum had to be postponed because of the request made by Morocco and Mauritania which resulted in the ICJ advisory opinion of 16 October 1975. Moroccan military threats culminated in the Green March of November 1975 and lead to the Madrid Agreement of 14 November 1975. Saul’s view is that Spain could have resisted the Moroccan invasion but chose to de-escalate and not defend its territory, faced with the more harmful alternative of full scale hostilities against Morocco.⁽²⁶⁹⁾

Morocco has invoked the Madrid Agreement as the justification for its presence in Western Sahara. Nevertheless, as it has been recalled, the Agreement is considered null and void.

As asserted by the Under-Secretary-General for Legal Affairs, Hans Corell, in a letter to the President of the Security Council:

²⁶⁶ *Ibid.*, at 9-10. One can also mention the international conflict arising between national liberation movement and a state party under Additional Protocol I of 1977. In June 2015 Polisario deposited a unilateral declaration of adherence to the Geneva Conventions and Protocol I under the procedure provided for in article 96(3) of Protocol I. Morocco signed the Protocol I in 1977 but ratified it only in 2011, transforming in this way the conflict from a non-international one among state and non-state actors (Spain and Polisario in 1974-1975; Spain and Morocco in 1975; Polisario and Mauritania from 1975 to 1979; Morocco and Algeria in 1976) to an international one by the persisting occupation of Spanish Sahara since 1975. See B. SAUL, *supra* note (246), at 5-6.

²⁶⁷ B. SAUL, *supra* note (246), at 11- 17.

²⁶⁸ ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, Expert Meeting, March 2012, at 21, *ibid.*, at 11.

²⁶⁹ “But the [Madrid] Agreement would not have been concluded on that date, on those terms, but for Moroccan aggression. Moroccan coercion was more than a mere influence on Spain’s consent: it was a decisive factor, even if it was not the sole or essential reason, or Spain could have resisted at considerable cost”. B. SAUL, *supra* note (246), at 17.

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[...] The Madrid Agreement did not transfer sovereignty over the Territory, nor did it confer upon any of the signatories the status of an administering Power, a status which Spain alone could not have unilaterally transferred [...].⁽²⁷⁰⁾

The letter kept on:

[...] Morocco, however, is not listed as the administering Power of the Territory in the United Nations list of Non-Self-Governing Territories, and has, therefore, not transmitted information on the Territory in accordance with Article 73 e) of the Charter of the United Nations.⁽²⁷¹⁾

The legal ties moreover had already been denied in the 1975 ICJ Advisory Opinion:

[T]he 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.⁽²⁷²⁾

It has been noted as well that Mauritania admitted its wrongful occupation of Western Sahara in the treaty signed with Polisario in 1979. This fact is useful in applying the IHL to the case of Western Sahara, since “if a court has yet to pronounce definitively on the legal situation resulting from Morocco’s occupation, the statement of an occupier asserting a similar historic claim as

²⁷⁰ Letter dated 29 January 2009, *supra* note (130), para. 6.

²⁷¹ *Ibid.*, para. 7.

²⁷² *Western Sahara*, Advisory Opinion, para. 162.

Morocco (and which agreed with Morocco to partition the territory in 1976) is compelling".⁽²⁷³⁾

Moreover, Morocco has expressly been considered an occupying power by the UN.

GA Resolution 34/37 of 21 November 1979⁽²⁷⁴⁾ qualified the presence of Morocco in Western Sahara as occupation. Indeed the GA was deeply deploring "the aggravation of the situation resulting from the **continued occupation** of Western Sahara by Morocco and the extension of that occupation to the territory recently evacuated by Mauritania" and urged Morocco "to join in the peace process and to terminate the **occupation** of the Territory of Western Sahara".⁽²⁷⁵⁾

Resolution 35/19⁽²⁷⁶⁾ reaffirmed that the GA was "deeply concerned at the aggravation of the situation derived from the **continued occupation** of Western Sahara by Morocco and from the extension of that **occupation to the part of Western Sahara** which was subjected of the peace agreement concluded on 10 August 1979 between Mauritania and the Frente para la Liberación de Saguía el-Hamra y Río de Oro".⁽²⁷⁷⁾

Moreover, Morocco's claim to Western Sahara has not been recognized by any state. As it has been noted, "that is a useful start to making out the norm of territorial integrity as it applies to Western Sahara and accepting the legal circumstances of the existence of an occupation".⁽²⁷⁸⁾

²⁷³ J.J. SMITH, *supra* note (252), at 16, note 64.

²⁷⁴ GA Res. 34/37 of 21 November 1979.

²⁷⁵ *Ibid.*, paras. 5-6. [Emphasis added in bold].

²⁷⁶ GA Res. 35/19 of 11 December 1980.

²⁷⁷ *Ibid.*, para. 3. [Emphasis added in bold].

²⁷⁸ J.J. SMITH, *supra* note (252), *cit.* at 17.

2.3.2 The controversy over the legal status of Morocco: *de facto* occupation vs *de jure* administration

In the report of SG on the situation concerning Western Sahara of 25 October 2000⁽²⁷⁹⁾, for the first time, the SG introduced the expression “administrative power” to refer to Morocco.⁽²⁸⁰⁾

This denomination is reused in the SG report⁽²⁸¹⁾ of 20 February 2001 and in the SG report of 24 April 2001.⁽²⁸²⁾

In Chapaux’s vision, the creation of the category of “administrative power”, which however does not exist in the current state of positive international law, “aims at granting Morocco a new statute, similar to the one of administering power”.⁽²⁸³⁾

The so-called theory of the quasi administering power⁽²⁸⁴⁾ has been developed by Hans Corell in the note he sent to the Security Council in February 2002. Although the legal adviser recognized that Morocco is not the administering Power of Western Sahara, Corell gives Morocco rights to which it is not entitled under the articles of the UN Charter regarding the NSGTs. This status is justified by Correl on the basis of a *de facto* administration that Morocco have exerted over the Territory.⁽²⁸⁵⁾

²⁷⁹ Report of the Secretary-General on the situation concerning Western Sahara of 25 October 2000, UN document S/2000/1029.

²⁸⁰ *Ibid.*, para. 30. “[...] further meetings of the parties to seek a political solution cannot succeed, and indeed can be counterproductive, unless the government of Morocco as administrative Power in Western Sahara is prepared to offer or support some devolution of governmental authority, for all inhabitants and former inhabitants of the Territory, that is genuine, substantial and in keeping with international norms”.

²⁸¹ Report of the Secretary-General on the situation concerning Western Sahara of 20 February 2001, UN document S/2001/148, paras. 2 and 22.

²⁸² Report of the Secretary-General on the situation concerning Western Sahara of 24 April 2001, UN document S/2001/398.

²⁸³ V. CHAPAUX, *supra* note (261), at 6. Ruiz Miguel asserts as well that the presence of the term “administrative power” has the meaning of alluding to the fact that Morocco has established an effective power in Western Sahara. See C. RUIZ MIGUEL, *supra* note (199), at 9.

²⁸⁴ V. CHAPAUX, *supra* note (261), at 6.

²⁸⁵ The notion of *de facto* administering Power is used also in the Legal Opinion of the European Parliament regarding the Fisheries Agreement, which will be analyzed in the next chapter.

When a State is not recognized as an administering Power by the UN, its presence has to be considered *prima facie* illegal.⁽²⁸⁶⁾

2.4 Rules governing the use of natural resources

2.4.1 The Principle of Permanent Sovereignty over Natural Resources (PPSNR)

The PPSNR is a corollary of the principle of self-determination.⁽²⁸⁷⁾ Its origins date back to the 1950s, when the GA passed several resolutions on the issue.⁽²⁸⁸⁾ It has been argued on the value of the GA recommendations which are not binding from a legal point of view; however, in many cases the GA resolutions have considerably contributed to the formation of customary international law⁽²⁸⁹⁾, so that today the PPSNR is part of the contemporary international law.⁽²⁹⁰⁾

²⁸⁶ V. CHAPAUX, *supra* note (261), *cit.* at 7. See also *International Status of South-West Africa*, Advisory opinion, 11 July 1950, I.C.J. Reports 1950, at 133. It is worth reminding that there have been other cases within the UN in which a State was occupying a NSGT without the consent of the UN and the international Community never recognized those situations as the presence of a *de facto* administering power, but as an illegal presence. See *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, I.C.J. Reports 1971, at 16; UN Security Council Res. 242 of 22 November 1967 as regards the presence of Israel in Palestine; UN Security Council Res. 384 of 22 December 1975 on the presence of Indonesia in East Timor.

²⁸⁷ The principle developed together with the decolonization process, when the UN welcomed the claims of the developing countries with the aim to ensure to the peoples under colonial domination the control over the natural resources and their benefits.

²⁸⁸ N. SCHRIJVER, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge, 2008, at 399-401; GA Res. A/523 (VI) of 12 January 1952; GA Res. 626 (VII) of 21 December 1952; GA Res. 1515 (XV) of 15 December 1960; GA Res. 1803 (XVII) of 14 December 1962; GA Res. 3016 (XXVII) of 18 December 1972.

²⁸⁹ *Ibid.*, at 373; V. ZAMBRANO, *supra* note (244), at 6-7.

²⁹⁰ S. R. CHOWDHURY, *Permanent Sovereignty Over Natural Resources*, in HOSSAIN and CHOWDHURY, *Permanent Sovereignty Over Natural Resources in International Law*, New York, St. Martin's Press, 1984, at 1 ss.; E. DURUIGBO, *Permanent Sovereignty Over Natural Resources in International Law*, in *George Washington International Law Review*, 2006, vol. 33, at 39-40.

Among the resolutions passed by the GA, one has to point out Resolution 1314 (XIII)⁽²⁹¹⁾ which established the UN Commission on Permanent Sovereignty over Natural Resources whose aim was to conduct a full survey on the extent and nature of the right of peoples and nations to exercise the permanent sovereignty over their natural resources, which was expressly considered “a basic constituent of the right to self-determination”.⁽²⁹²⁾ In 1961 the Commission adopted a draft resolution concerning the principle in question. Subsequently, the GA adopted Resolution 1803 (XVII)⁽²⁹³⁾ which has been considered the reference document on the issue for a long time.⁽²⁹⁴⁾

The Resolution was particularly interesting since it gives crucial indications on the content of the principle, its aims, the rights deriving from it, its limits, the involved subjects and the duties they have.

The first paragraph of the Resolution stated that:

The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.⁽²⁹⁵⁾

The Resolution pointed out that all peoples and nations⁽²⁹⁶⁾, included the ones under colonial domination, have the right to exercise the PSNR.⁽²⁹⁷⁾

²⁹¹ GA Res. 1314 (XIII) of 12 December 1958.

²⁹² N. SCHRIJVER, *supra* note (288), *cit.* at 57.

²⁹³ GA Res. 1803 (XVII) of 14 December 1962.

²⁹⁴ V. ZAMBRANO, *supra* note (248), at 12.

²⁹⁵ GA Res. 1803 (XIII) of 14 December 1962, para. 1.

²⁹⁶ It is important to underline that the Resolution refers both to “peoples” and “nations”. As pointed out by J. Summers, the term nation can be referred, in the international law, to the concept of a people extended to its political institutions. However, while a nation has been used synonymously with a state, it is difficult to equate a state with a people, particularly in a moment when the second term was used within the UN to refer to the communities under colonial domination. See J. SUMMERS, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, Leiden, Martinus Nijhoff Publishers, 2007, at 2-3.

²⁹⁷ As pointed out by V. Zambrano, if it is considered that the administering powers had the duty to create the conditions to allow the non-independent peoples to reach

Resolution 1803 moreover considered the exploration, development and disposition of natural resources⁽²⁹⁸⁾, nationalization and expropriation⁽²⁹⁹⁾, foreign investment⁽³⁰⁰⁾, the sharing of profits⁽³⁰¹⁾, and other related issues.

With the end of the process of decolonization and the birth of new States, the international community focused more on the right of the States than of the peoples to exercise the sovereignty over natural resources.⁽³⁰²⁾

With the aim of having more control on the resources, and generally on all the economic activities on their territories, the developing countries referred to the organs of the UN which have been very active on the issue by passing new resolutions, before the GA adopted the Declaration on the Establishment of a New International Economic Order.

For example, GA Resolution 2692 (XXV)⁽³⁰³⁾ recognized:

[...] the necessity for all countries to exercise fully their rights so as to secure the optimal utilization of their natural resources, **both land and marine**, for the benefit and welfare of their peoples and for the protection of the environment [...].⁽³⁰⁴⁾

On the same line, GA Resolution 3016 (XXVII)⁽³⁰⁵⁾ confirmed:

[...] the right of States to permanent sovereignty over all their natural resources, on land within their international boundaries **as well as**

the full independence, the natural resources were the means to exercise the self-determination and to reach the aforementioned independence. V. ZAMBRANO, *supra* note (244), at 12.

²⁹⁸ GA Res. 1314 (XIII) of 12 December 1958, para. 2.

²⁹⁹ *Ibid.*, para. 4.

³⁰⁰ *Ibid.*, para 8.

³⁰¹ *Ibid.*, para. 3.

³⁰² This is mainly due to the fact that the new interests of the former colonizing countries were not linked to the independence anymore but to take control over the resources in order to enforce their own development policies.

³⁰³ GA Res. 2692 (XXV) of 11 December 1970.

³⁰⁴ *Ibid.*, preamble. [Emphasis added in bold].

³⁰⁵ GA Res. 3016 (XXVII) of 18 December 1972.

those found in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters.⁽³⁰⁶⁾

GA Resolution 3171 (XXVIII) was particularly important since it supported “the efforts of developing countries and the peoples of the territories under colonial and racial domination and foreign occupation in their struggle to regain effective control over their natural resources”.⁽³⁰⁷⁾

It can be observed that the aforementioned Declaration of the New International Economic Order (NIEO) was not isolated but it is inserted in the wider context of the principle of PSNR. As it has been stated before, during the 1970s, the GA adopted two important documents: the Declaration on the Establishment of a New International Economic Order⁽³⁰⁸⁾ and its Programme of Action.⁽³⁰⁹⁾

The NIEO was founded on the respect for “sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States”.⁽³¹⁰⁾

These principles were considered crucial for maintaining the international peace and for guaranteeing to every State and peoples the right to exercise their sovereignty on internal questions, particularly on the economic ones. As regards the principle of PSNR, the Declaration confirmed:

Full permanent sovereignty of every States over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situations [...]. No State

³⁰⁶ *Ibid.*, para. 1. [Emphasis added in bold].

³⁰⁷ GA Res. 3171 (XXVIII) of 17 December 1973, para. 2.

³⁰⁸ GA Res. 3201 (S-VI) of 1 May 1974.

³⁰⁹ GA Res. 3202 (S-VI) of 1 May 1974.

³¹⁰ GA Res. 3201 (S-VI) of 1 May 1974, para. 4 a).

may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.⁽³¹¹⁾

The Programme of Action instead, pointed out that efforts should have been made in order to “put an end to all forms of foreign occupation, racial discrimination, apartheid, colonial, neocolonial and alien domination and exploitation through the exercise of permanent sovereignty over natural resources”.⁽³¹²⁾

The aim of reaching the equality among States and to accelerate the economic and social development of the developing countries, highlighted the role of principle of PSNR which has to be exercised in the interest of the State and of its economic development.⁽³¹³⁾

In this context one has to point out the Charter of Economic Rights and Duties of States (CERDS) adopted by GA Resolution 3281 (XXIX) of 12 December 1974.⁽³¹⁴⁾ The CERDS confirmed the right of all States “to exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities”.⁽³¹⁵⁾

Moreover it is crucial to point out Art. 16 of the CERDS which stated:

1. It is the right and duty of all States, individually and collectively, to eliminate colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practice such coercive policies are economically responsible to the countries, territories, and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all

³¹¹ *Ibid.*, para. 4 e).

³¹² GA Res. 3202 (S-VI), of 1 May 1974, para. 1 a).

³¹³ V. ZAMBRANO, *supra* note (248), at 24.

³¹⁴ GA Res. 3281 (XXIX) of 12 December 1974.

³¹⁵ *Ibid.*, Art. 2, para. 1.

other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

2. No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force.⁽³¹⁶⁾

The second paragraph results particularly important since it refers to the generality of States which should not encourage the occupation through investments.

As regard the wide acceptance of the principle of PSNR constituting customary international law, one has to highlight its inclusion in the International Covenant on Civil and Political Rights (ICCPR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁽³¹⁷⁾

The first Article of the two Covenants is the same and states that:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁽³¹⁸⁾

This Article was inserted thanks to the pressure by the GA which passed Resolution 545 (VI) that stated that

[...] This Article shall be drafted in the following terms: "All peoples shall have the right of self-determination", and shall stipulate that all States, including those having responsibility for the administration of Non-Self-Governing Territories, should promote the realization of

³¹⁶ *Ibid.*, Art. 16.

³¹⁷ International Covenant on Civil and Political Rights of 16 December 1966; International Covenant on Economic, Social and Cultural Rights of 16 December 1966. The two Covenants are the result of a path deriving from the adoption of the Universal Declaration of Human Rights (UDHR) of 1948, through GA Res. 217 (III) of 10 December 1948 which proclaimed the UDHR and asked the Commission on Human Rights to study a binding draft covenant on the fundamental human rights.

³¹⁸ *Ibid.*, art. 1.

that right, in conformity with the Purpose and Principles of the United Nations [...].⁽³¹⁹⁾

What is important is that the right of peoples to exercise freely their resources is inserted in the article relative to the self-determination, as to emphasize the latter as a crucial element for the achievement of the independence.

2.4.2 The Corell Opinion

In 2001, the Under-Secretary-General for Legal Affairs and the Legal Counsel of the UN, Hans Corell, was requested to express his opinion on “the legality in the context of international law [...] of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara”.⁽³²⁰⁾ After verifying that no legal opinion had been delivered on the same or similar issue in the past, the Legal Counsel passed under scrutiny two contracts, concluded in October 2001, namely one between the *Moroccan Office National de Recherches et d’Exploitations Pétrolières* (ONAREP) and the United States *McGee du Maroc Ltd.*, and the other between ONAREP and the French oil Company *TotalFinaElf E&P Maroc*.⁽³²¹⁾

In order to reply to the question posed by the Security Council and establish whether the contracts were legal, Corell analyzed the status of Western Sahara under Moroccan administration and the law applicable to mineral resources activities in NSGTs. As regards the last issue, Corell recalled Art. 73 of the Charter of the UN and the operate of the GA. He pointed out GA Res. 50/33⁽³²²⁾ which drew a distinction between economic activities which are detrimental to

³¹⁹ GA Res. 545 (VI) of 5 February 1952, para. 1.

³²⁰ Letter dated 29 January 2002, *supra* note (130).

³²¹ The two contracts were concluded for an initial period of 12 months and they both included standard options for the relinquishment of the rights under the contract or its continuation, *supra* note (108), para.2.

³²² GA Res. 50/33 of 6 December 1995.

the peoples of NSGTs and those directed to benefit them. As regards the latter, the Resolution affirmed “the value of foreign economic investment undertaken in collaboration with the peoples of Non-Self-Governing Territories and in accordance with their wishes in order to make a valid contribution to the socio-economic development of the Territories”.⁽³²³⁾

This same position has been reaffirmed by the GA in later resolutions.⁽³²⁴⁾

Corell underlines as well that the case of Western Sahara has been dealt both as a question of decolonization by the GA and as a question of peace and security by the SC; however, the SC resolutions related to the political process are not considered in the letter since are not relevant “to the legal regime applicable to mineral resource activities in Non-Self-Governing Territories”.⁽³²⁵⁾ He briefly recalled the principle of PSNR and reminded that it is part of customary international law, but he underlined that in this context “the question is whether the principle of “permanent sovereignty” prohibits *any* activities related to natural resources undertaken by an Administering power [...] in a Non-Self-Governing Territory, or only those which are undertaken in disregard of the needs, interests and benefits of the people”.⁽³²⁶⁾

Corell passed to examine the case law of the ICJ and examined two cases, that is to say the case of East Timor (Portugal v. Australia) and the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia). “In neither case, however, was the question of the legality of resource exploitation activities in Non-Self-Governing Territories conclusively determined”.⁽³²⁷⁾ Neither the practice of States provided much guidance: of particular interest in this context was the exploitation of uranium and other natural resources in Namibia by South Africa and a number of Western multinational corporations, and the case

³²³ *Ibid.*, para. 2.

³²⁴ See GA Res. 52/72 of 10 December 1997; GA Res. 53/61 of 3 December 1998; GA Res. 55/138 of 8 December 2000; GA Res. 56/66 of 10 December 2001.

³²⁵ *Ibid.*, para. 13.

³²⁶ *Ibid.*, para. 14.

³²⁷ *Ibid.*, para. 15.

of East Timor under the United Nations Transitional Administration in East Timor.

The conclusion drawn by Hans Corell was that the legality of the resource exploitation activities in Western Sahara would be guaranteed if those activities were conducted for the benefit of the people of that territory, on their behalf or in consultation with their representatives:

[...] if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories.⁽³²⁸⁾

2.4.3 The PPSNR in the occupation: rights and duties of the occupying powers

In this paragraph the rights and duties of the occupying power in the economic sector are taken into consideration. Compared to the other aspects which are considered in the Hague Conventions and in the Fourth Geneva Conventions, the economic sector is the less developed, mainly because the two Conventions had the main objective of setting up a legal framework that allowed to maintain the *status quo* previous to the occupation and to protect the population from the war violence which had developed through years. So, the worries relative to the protection of the economic resources were inferior.⁽³²⁹⁾

However, some laws can be identified which relate to the economic rights and duties in the occupied territories.

Firstly, it is appropriate to remind that under IHL, the plunder (also known as pillage) of natural resources is prohibited. A definition of pillage is offered by

³²⁸ Letter dated 29 January 2002, *supra* note (130), para. 25.

³²⁹ V. ZAMBRANO, *supra* note (248), at 125-126.

Stewart, who defines the crime as the “unlawful appropriation of private and public property during armed conflict”.⁽³³⁰⁾

Nowadays, the crime of pillage is considered part of customary international law and has been sufficiently recognized to have become *jus cogens*.⁽³³¹⁾

The treaties which are considered the basis of the prescription of the pillage are the Regulations of the Fourth Hague Convention of 18 October 1907 respecting the Laws and Customs of Wars on Land, the Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War (and its 1977 Protocols) and the Rome Statute of the International Criminal Court.

The Fourth Geneva Convention states at Art. 33(2) that the “pillage is prohibited”⁽³³²⁾, while Art. 47 of the Hague Regulations prescribes that “pillage is formally forbidden”.⁽³³³⁾

The Rome Statute of the International Criminal Court gives a basic description of pillage at Art. 9:

War crime of pillaging

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict.

³³⁰ See J. G. STEWART, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, New York, New York: Open Society Institute, 2010, at 15-17.

³³¹ J.J. SMITH, *The pillaging of the Sahara: Criminal liability of European Commission officials resulting from proposed renewal of the 2007 EU-Morocco Fisheries Partnership Agreement*, Global Change, Peace & Security, Volume 27, Issue 3, 2015. See also J.M. HENCKAERTS, L. DOSWALD-BECK, *Customary International Humanitarian Law*, Cambridge University Press/International Committee of the Red Cross, 2005, vol. 1, at 182.

³³² Art. 33(2) of the Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War.

³³³ Art. 47 of Fourth Hague Convention of 18 October 1907 respecting the Laws and Customs of Wars on Land.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁽³³⁴⁾

However, the juridical definition of pillage was given by the prosecutions in the International Military Tribunal, following the Second World War.⁽³³⁵⁾

Numerous cases addressed the nature of the crime, including its occurrence with other war crimes, together with the liability of individuals for assistance to states and persons directly engaged in pillage.⁽³³⁶⁾

As regards the obligations of the occupying Power, it is crucial underlining that pillage is also prohibited after cessation of hostilities for the entire period a state or territory is occupied:

In the case of occupied territory [...] the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the present Convention.⁽³³⁷⁾

The ICJ, in the Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda) considered that the exploitation of natural resources by an occupying Power could be assimilated to plundering.⁽³³⁸⁾

³³⁴ Rome Statute of the International Criminal Court, 1998 (in force 1 July 2002), available at www.iccpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm. [Last accessed 22 September 2016].

³³⁵ J.J. SMITH, *supra* note (331), at 2.

³³⁶ *Ibid.* See also 8 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 ("Trials of War Criminals") 1081; 9 Trials of War Criminals 1461; 6 Trials of War Criminals 1191, 14 Trials of War Criminals 784, IT-95-14-T, judgment of 3 March 2000 (the "Lasva Valley case").

³³⁷ Art. 6 of the Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War.

³³⁸ *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ reports 2005, para. 244.

What should be pointed out is that the occupying Power has *de jure* sovereignty over the occupied territory but its role, and the powers linked to its status, are those of administrator and usufructuary:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.⁽³³⁹⁾

Art. 55 of the Fourth Geneva Convention instead, tends to justify the exploitation of the natural resources:

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods. The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories,

³³⁹ Art. 55 of the Fourth Hague Convention of 18 October 1907 respecting the Laws and Customs of Wars on Land.

except where temporary restrictions are made necessary by imperative military requirements.⁽³⁴⁰⁾

In this case, what should be underlined is that the exploitation of the natural resources of the occupied territory has to direct to the benefit of the local occupied population or the troops. An exploitation which would not have the precise objective to transfer the natural resources to the population or to the troops could not be justified on the basis of art 55.⁽³⁴¹⁾

It derives that, according to the rules of the IHL, the occupying Power can administer and exploit the resources of the occupied territory only in order to meet the military needs or to benefit the population. In the case of resources belonging to private entities, they can be confiscated only to reply to the needs of the occupying army. This limit comes from the duty to not attack the sovereignty of the occupied State and to the duty for the occupying Power to respect the mandatory rules of the human rights, among which the right to self-determination and the PSNR as a corollary of the first.⁽³⁴²⁾

This means that in any case the occupying Power, as simple administrator of the territory, has the authority to exploit the resources until they are finished or to jeopardize the well-being of the population or of the environment, because the control, the administration and exploitation of the natural resources does not depend simply on the *de facto* power exercised on the territory but it is a quality of the sovereignty and a means through which the peoples express and realize their right to self-determination. Thus the occupying Power must respect two limits: the limit deriving from the humanitarian law and the limit deriving from the right to self-determination and the PSNR.⁽³⁴³⁾

³⁴⁰ Art. 55 of the Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War.

³⁴¹ V. CHAPAUX, *supra* note (261), at 13.

³⁴² For instance, see SC Res. 1483 of 22 May 2003 asserted that the Iraqi people, during and after the occupation, has to continue to control its natural resources, in the name of the right to self-determination.

³⁴³ V. ZAMBRANO, *supra* note (248), at 131.

Another limit is the one deriving from the fact that some resources are limited: in this case the occupying Power has the authority to exploit the resources only if this is absolutely indispensable for the reaching of important objectives.

Finally, the international law admits the intervention of the occupying power on the organization and economic activities of the territory under occupation only to the aim of: a) maintaining the public order and security; b) protecting and guaranteeing the well-being of the occupied peoples; c) covering cost related to the occupation.⁽³⁴⁴⁾

As it has been stated above, the application of the IHL to the occupied part of Western Sahara could be contested, but as it has been discussed, there are few reasons why it actually applies. What is relevant however, is not the applicability of the IHL per se, but the fact that IHL compels the organized international community to address the reality of an occupation, and so condemn Morocco, or at least to refrain from dealing with it when it comes to Western Sahara. As it has been pointed out by Smith, “recognizing the annexation of Western Sahara as a continuing occupation would make inescapable the obligation on states to deny support to Morocco in its project”.⁽³⁴⁵⁾

It is in this view that one should refer to the main obligation that third states have to respect, that is to say the duty of non-recognition.

2.5 The duty of non-recognition

An important legal rule which applies to the case of Western Sahara and which has important consequences for the question of natural resources is the so-called duty of non-recognition. The purpose of the doctrine has been described in different words: just to quote some examples, “the object of the policy of non-recognition is not to render illegal an otherwise lawful and valid act; its object is

³⁴⁴ *Ibid.*

³⁴⁵ J.J. SMITH, *supra* note (252), at 12.

to prevent the validation of what is a legal nullity”⁽³⁴⁶⁾, or in other words the duty of non-recognition means “not producing legal effects at the international level and in the respective national systems”.⁽³⁴⁷⁾

The legal basis of the duty of non-recognition can be found in the principle of international law *ex injuria jus non oritur*.⁽³⁴⁸⁾

This principle of law has its historical origins in the doctrine inaugurated in 1931 by the former US Secretary of State Henry Stimson at the peak of the Manchurian crisis.⁽³⁴⁹⁾ In that occasion, the United States of America, together with a large majority of members of the League of Nations, would not:

admit the legality of any situation *de facto* nor [...] recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the [...] sovereignty, the independence or the territorial and administrative integrity of the Republic of China, [...] nor recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligation of the Pact of Paris of August 27, 1928.⁽³⁵⁰⁾

The norm later developed and was applied to many cases of illegal occupation⁽³⁵¹⁾, becoming customary law.⁽³⁵²⁾

³⁴⁶ H. LAUTERPACHT, *Recognition in International Law*, Cambridge University Press, Cambridge, 1947, at 413.

³⁴⁷ S. TALMON, *supra* note (241), at 116 citing Gaetano Arangio-Ruiz, the Fourth Special Rapporteur on State Responsibility.

³⁴⁸ From Latin “Law does not arise from injustice”.

³⁴⁹ On the Stimson Doctrine see W. MENG, *Stimson Doctrine*, in V. R. BERNHARDT (ed.), *EPIL*, 1982, Vol. IV 690 and D. TURNS, *The Stimson Doctrine of Non-Recognition: its historical genesis and influence on Contemporary International Law*, 2 *Chinese Journal of International Law*, 2003, at 105.

³⁵⁰ ILC Draft Articles on State Responsibility for Internationally Wrongful Acts with Commentaries, in *Yearbook of the International Law Commission*, 2001, vol. II, part 2 (ILC Articles 2001), at 144, art. 41, para. 6.

³⁵¹ The political organs of the UN have frequently called upon States not to recognize illegal States such as Rhodesia, the South African Bantustans and the Turkish Republic of Northern Cyprus.

The duty of non-recognition was codified particularly in 2001 by the International Law Commission on the Responsibility of States for Internationally Wrongful Acts. The main article to be pointed out for the issue is Art. 40 which provides that:

1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a **peremptory norm of general international law**.
2. A breach of such an obligation is serious if it involves a **gross** or systematic failure by the responsible State to fulfil the obligation.⁽³⁵³⁾

The requisites for identifying a situation of breach of general international law are two. First of all, the norm to be breached has to be a peremptory norm of general international law (*jus cogens*). On a second hand, the breach of the norm has to be “gross”, that denotes “violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule”.⁽³⁵⁴⁾

Art. 41(2) instead provided that:

No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining this situation.⁽³⁵⁵⁾

As concerns the content of the duty of non-recognition, the Commission specifies that States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. In its Commentaries, the Commission states:

³⁵² J. CRAWFORD, *The creation of States in International Law*, Clarendon Press, Oxford, 2nd ed., 2006, at 159-160; J. DUGARD, *Recognition and the United Nations*, Grotius Publications, Cambridge, 1987, at 135-137.

³⁵³ ILC Articles 2001, Art. 40.

³⁵⁴ I. BROWNLIE, *supra* note (28), at 489.

³⁵⁵ ILC Articles 2001, Art. 41.

the obligation applies to “situations” created by [...] attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.⁽³⁵⁶⁾

The most significant articulation of this doctrine⁽³⁵⁷⁾ is provided by the ICJ in its 1971 Namibia advisory opinion.⁽³⁵⁸⁾

In that occasion, the Court established that:

[...] the termination of the Mandate and the declaration of the illegality of South Africa’s presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters in relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof.⁽³⁵⁹⁾

In this case, the term *erga omnes* refers to the effect of the illegality determined by the UN political organs with regard to the violation of certain rights belonging to the people of Namibia.⁽³⁶⁰⁾

Moreover, in its opinion, the ICJ identified the relations which were incompatible with the determination of illegality made by UN political organs, such as “entering into treaty relations with South Africa in all cases

³⁵⁶ ILC Articles 2001, art. 41, para. 5, at 114.

³⁵⁷ E. MILANO, *The doctrine(s) of non-recognition: theoretical underpinnings and policy implications in dealing with de facto regimes*, cit. at 1, available at < http://www.esil-sedi.eu/fichiers/en/Agora_Milano_060.pdf>. [Last accessed 20 September 2016].

³⁵⁸ *Legal Consequences for States of the Continued Presence of South-Africa in Namibia notwithstanding Security Council Resolution 276, 1970*, ICJ Reports, 1971, at 6.

³⁵⁹ *Ibid.*, para. 126, at 56.

³⁶⁰ On the meaning of the term *erga omnes* with reference to the Doctrine of Non-Recognition, see E. MILANO, *supra* note (357), at 3.

in which the Government of South Africa purports to act on behalf of or concerning Namibia”⁽³⁶¹⁾; “sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia”⁽³⁶²⁾; abstaining from “entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory”.⁽³⁶³⁾

This is particularly crucial since it entailed that if a third state signed an agreement with the occupying Power in violation of the right to self-determination it would be in breach of the implicit duty of non-recognition.

On the fact that the duty of non-recognition refers also to the agreements on the exploitation of the resources between the States, the doctrine agrees on it.⁽³⁶⁴⁾

Nevertheless, according to the ICJ, “the non-recognition of South Africa’s administration of the Territory should not result in the depriving the people of Namibia of any advantages derived from international co-operation”.⁽³⁶⁵⁾

In particular, the duty “cannot be extended to those acts such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory”.⁽³⁶⁶⁾

An important endorsement of the Namibia approach is the *Legality of the Wall* advisory opinion. The ICJ in this occasion asserted that the construction of the wall by the occupying power of Israel in the Occupied Palestinian

³⁶¹ *Legal Consequences for States of the Continued Presence of South-Africa in Namibia notwithstanding Security Council Resolution 276, 1970*, ICJ Reports, 1971, para. 122.

³⁶² *Ibid.*, para. 123.

³⁶³ *Ibid.*, para. 124.

³⁶⁴ M. PERTILE, *La relazione tra risorse naturali e conflitti armati nel diritto internazionale*, Padova, CEDAM, 2012, at 200 ss.; J CRAWFORD, *Opinion: Third Parties Obligations with respect to Israeli Settlements in Occupied Palestinian Territories*, 2012, at 18, available at <www.tuc.org.uk>; V. DUIBISSON, *The International Obligations of the European Union and its Member States with regard to Economic Relations with Israeli Settlements*, February 2014, available at <www.madeinillegality.org/accueil?lang=fr#10>. [Last accessed 20 September 2016].

³⁶⁵ *Legal Consequences for States of the Continued Presence of South-Africa in Namibia notwithstanding Security Council Resolution 276, 1970*, ICJ Reports, 1971, para. 125.

³⁶⁶ *Ibid.* In this sense, it has been referred to the “Namibia exception”. See M. PERTILE, *supra* note (364), at 202.

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Territory, and its associated regime, were contrary to international law and were denying to the Palestinian people obligation *erga omnes* such as the right to self-determination and certain obligations under international humanitarian law.⁽³⁶⁷⁾

The ICJ then stated:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.⁽³⁶⁸⁾

³⁶⁷ *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, ICJ Advisory Opinion, 2004, paras. 155-158.

³⁶⁸ *Ibid.*, para. 159.

Chapter three

The Fisheries Partnership Agreements

OVERVIEW: 3.1 Introduction – 3.2 Background of the EU-Morocco relations – 3.3 The EU’s Common Fisheries Policy – 3.3.1 The FPAs – 3.4 Historical background of the fisheries agreement between Spain and Morocco – 3.5 The fisheries agreements between the EC and Morocco – 3.6 The 2006 EC-Morocco FPA – 3.6.1 The geographical scope of the 2006 FPA and the delimitation of the fishing zone – 3.6.2 The 2006 Legal Service’s Opinion – 3.7 The Blocking of the 2011 Protocol – 3.8 The 2013 FPA – 3.9 Considerations on the FPAs between the Kingdom of Morocco and the EU – 3.10 The attitude of the organs of the EU – 3.10.1 The European Parliament – 3.10.2 The European Commission

3.1 Introduction

The norms considered in the previous chapter are here applied to a concrete case which contemplates the EU and Morocco as the actors of the illegal plundering of Western Sahara’s fishery resources. Specifically, the Fisheries Partnership Agreements (FPAs) between the EU and the Kingdom of Morocco will be under scrutiny. However, the FPAs cannot be studied out of the context of politics; indeed, as it has been noticed, “it is in the overall framework of political cooperation between Morocco and the EU that the fisheries agreements must be viewed”.⁽³⁶⁹⁾

Therefore, a brief consideration of the EU’s external policy and of the relations between the EU and Morocco will be taken into consideration in order to give a complete framework of the case. Moreover, the attitude of the EU Parliament, Commission and Council will be taken into consideration.

First of all, one has to highlight that the overall aim of the EU’s external policy is to preserve its common values, promote peace and security in accordance

³⁶⁹ E. HAGEN, *Fish before peace. The EU’s controversial fisheries in occupied Western Sahara*, at 3. The full article is available at <http://wsrw.org/files/dated/2015-12-11/hagen_2015_fish_before_peace.pdf>. [Last accessed 20 September 2016].

with the UN Charter and international cooperation as well as a better governance through the development and consolidation of democracy, the rule of law and the upholding of human rights and fundamental freedoms.⁽³⁷⁰⁾

In the specific case of the African continent, in December 2005, the European Council adopted a EU strategy for Africa which rested on three pillars, that is to say 1) the promotion of peace, security and good governance as prerequisites for sustainable development, 2) the support for regional integration, trade and interconnectivity to promote economic development and 3) an improved access to basic social services, decent work and environmental protection.⁽³⁷¹⁾

In order to implement its external policy, the EU makes use of a large array of instruments. Specifically, the EU's relations with the countries of North Africa are based on the Euro-Mediterranean Partnership and the Association Agreements, on the European Neighbourhood Policy (ENP) and the ENP Action Plans. Below, the specific EU relations with Morocco are underlined. Moreover, the EU's Common Fisheries Policy is presented.

3.2 Background of the EU-Morocco relations

EU-Morocco relations date back to 1960 and 1976, when Morocco demanded the opening of negotiations with the EU in order to conclude the first commercial agreement and a cooperation agreement.⁽³⁷²⁾

³⁷⁰ See *European Neighbourhood and Partnership Instrument, Morocco, Strategy Paper 2007-2013*, at 4, available at

<http://www.eeas.europa.eu/enp/pdf/pdf/country/enpi_csp_morocco_en.pdf>. [Last accessed 20 September 2016].

³⁷¹ See Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *EU Strategy for Africa: towards a Euro-African pact to accelerate Africa's development*, available at

<<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0489&from=EN>>. [Last accessed 20 September 2016].

³⁷² L. CARAFA, K. KORHONEN, *European Neighborhood Policy: A case-study of Morocco*, Social Science Research Network, SSRN Electronic Working Paper Series, 27 April 2008, available at

<<http://ssrn.com/abstract=1158427>>. [Last accessed 20 September 2016].

In 1995, the Euro-Mediterranean Conference speeded up the degree of relations by gathering the EU and twelve Mediterranean countries and leading to the adoption of the Barcelona Declaration, a programme for the dialogue, the exchange and the cooperation in order to guarantee peace, stability and prosperity in the region. This political commitment included “Political and Security Partnership”, “Economic and Financial Partnership” and “Partnership in Social, Cultural and Human Affairs”.⁽³⁷³⁾

This partnership was established bilaterally through an Association Agreement between the EU and each Mediterranean partner.

On 26 February 1996 Morocco signed its Association Agreement which entered into force on 1 March 2000.⁽³⁷⁴⁾ The Association Agreement is considered the legal framework for relations between the EU and Morocco and aims *inter alia* to promote economic, social, cultural and financial cooperation between the Kingdom of Morocco and the EC and its member states.⁽³⁷⁵⁾ The agreement provided for an Association Council (with 7 theme-based sub-committees) and an Association Committee which together form the institutional framework for the Euro-Mediterranean Partnership.⁽³⁷⁶⁾ The main text of the Agreement referred to crucial issues such as good governance and human rights, combating terrorism, effective management of migration flows, institutional support to align Moroccan legislation with EU standards and legislation, economic modernisation, that is to say liberalising trade in services, attraction of Foreign Direct Investments and sustainable growth, the development of social policies, development of transport sector and energy sector.⁽³⁷⁷⁾

³⁷³ See the *Barcelona Declaration*, adopted at the Euro-Mediterranean Conference, on 27-28 November 1995, available at <http://eeas.europa.eu/euromed/docs/bd_en.pdf>. [Last accessed 20 September 2016].

³⁷⁴ Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States and the Kingdom of Morocco, Official Journal of the European Union, L 70/2, 18 March 2000.

³⁷⁵ *Ibid.*, Art. 1.

³⁷⁶ L. CARAFA, K. KORHONEN, *supra* note (372), at 2.

³⁷⁷ For a general overview, see European Union External Action, The Association Agreement EU-Morocco, available at

As regards the territorial scope, the Agreement is to apply “on the one hand to the territories in which the treaties establishing the European Community and the European Coal and Steel Community are applied and [...] on the other hand to the territory of the Kingdom of Morocco.”⁽³⁷⁸⁾ No reference is made to the annexed territory of Western Sahara.

In 2003, the ENP was launched and it completed and strengthened the Euro-Mediterranean Partnership. This initiative was carried out through the adoption of a bilateral Action Plan indicating a programme for political and economic reforms. The EU-Morocco Action Plan was based on the principles of free trade, sustainable development and reduction of poverty and aimed at strengthening the dialogue and the cooperation on foreign policy and security to ensure regular consultations on international issues.⁽³⁷⁹⁾

In October 2008, a new phase of privileged relations was guaranteed to Morocco through the provision of the *statut avancé*. This status resulted in the strengthening of political dialogue, economic and social cooperation in the parliamentary, security and judicial fields and in various sectors, including agriculture, transport, energy and the environment and the gradual integration of Morocco in the common internal market of the EU through legislative and regulatory convergence.⁽³⁸⁰⁾

As regards the budgetary resources allocated to Morocco, they were initially framed under four financial protocols signed between 1976 and 1996 with the European Investment Bank. After the financial protocols, MEDA I programme for the period 1996-1999 increased the aid destined to Morocco that received loans of EUR 887 million to support its economic transition and socio-economic balance. The previous programme was amended in 2000 by MEDA II

< http://www.eeas.europa.eu/morocco/association_agreement/index_en.htm>. [Last accessed 20 September 2016].

³⁷⁸ Euro-Mediterranean Agreement, *supra* note (374), Art. 94.

³⁷⁹ See *Politique Européenne de Voisinage: Project de Plan d'Action Maroc pour la mise en œuvre du statut avancé (2013-2017)*, available at

<http://eeas.europa.eu/enp/pdf/pdf/action_plans/morocco_enp_ap_final_en.pdf>. [Last accessed 20 September 2016].

³⁸⁰ *Ibid.*

programme through which Morocco received EUR 812 million over a period of six years. These programmes are the main financial instruments for the implementation of the Euro-Mediterranean Partnership.

After 2007, the ENP Instrument has financed the cooperation between the EU and Morocco with a budget provided by the National Indicative Programme of EUR 654 million for the period 2007-2010. This made Morocco the first beneficiary of the European funds. Finally, a three years Country Strategy Paper set up the EU's cooperation objectives while a three years National Indicative Programme proposes how to allocate the budgetary resources which are directed to Morocco under the ENP.⁽³⁸¹⁾

3.3 The EU's Common Fisheries Policy

A Common Fisheries Policy (CFP) was first formulated in the Treaty of Rome. Initially, the CFP was linked to the Common Agricultural Policy⁽³⁸²⁾ but it gradually developed a separate identity as the Community evolved: in 1970 Member States started adopting the Exclusive Economic Zones (EEZs)⁽³⁸³⁾ and new Member States with substantial fishing fleets joined the Union. So the Community had to tackle new specific fisheries problems such as the access to common resources, the conservation of stocks, structural measures for the fisheries fleet and international relations in fisheries.⁽³⁸⁴⁾

³⁸¹ L. CARAFA, K. KORHONEN, *supra* note (372), at 4.

³⁸² Article 38(1) of the TFUE states: “[...] “Agricultural products” means the products of the soil, of stock farming and of fisheries and products of first-stage processing directly related to these products. References to the common agricultural policy or to agriculture and the use of the term “agricultural”, shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector.”

³⁸³ Without entering into too detail, the concept of EEZ was introduced within the framework of international law of the sea with the UNCLOS, concluded in Montego Bay on 10 December 1982. The EEZ is the area beyond and adjacent to the territorial sea (Art. 55) which shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (Art. 57) where the coastal state has sovereign rights over the living and non-living resources of the waters superjacent to the seabed and of the seabed and its subsoil (Art. 56).

³⁸⁴ See *The Common Fisheries Policy: Origins and Development*, available at <[http://www.europarl.europa.eu/RegData/etudes/fiches_techniques/2013/050301/04A_FT\(2013\)050301_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/fiches_techniques/2013/050301/04A_FT(2013)050301_EN.pdf)>. [Last accessed 20 September 2016].

Early developments were reached in 1972, with a move of the exclusive rights to national coastal fishing from the territorial waters, lying within 12 nautical miles of the coast, to the EEZs, reaching 200 nautical miles from the coast.

In 1983, the Council adopted Regulation (EEC) No 170/83 which formulated the concept of “relative stability” and provided for conservatory management measures based on Total Allowable Catches (TACs) and quotas.⁽³⁸⁵⁾

The withdrawal of Greenland from the Community in 1985, the accession of Spain and Portugal in 1986 and the reunification of Germany in 1990 had an impact on the size and structure of the Community fleet and on its catch potential. The alarming decline of stocks in EU waters compared to the fleet capacity led to Regulation (EEC) No 3760/92⁽³⁸⁶⁾ that introduced the concept of “fishing effort” with a view to restoring and maintaining the balance between available resources and fishing activities.⁽³⁸⁷⁾ Moreover, it provided for access to resources through an effective licensing system.⁽³⁸⁸⁾

However, the Council adopted in December 2002 a reform which entered into force on 1 January 2003⁽³⁸⁹⁾ and whose primary objective was to ensure a sustainable future for the fisheries sector by guaranteeing stable incomes and

³⁸⁵ TACs are catch limits that are set for most commercial fish stocks; they are shared among EU members through national quotas. Under the principle of relative stability, TACs for each fish stock are shared out between the EU Member States according to a fixed allocation key based on historic catches. See http://ec.europa.eu/fisheries/cfp/fishing_rules/tacs/index_en.htm. [Last accessed 20 September 2016].

³⁸⁶ Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fishing and aquaculture.

³⁸⁷ *Ibid.*, Art. 3(f): “Fishing effort of a vessel is the product of its capacity and its activity, and fishing effort of a fleet or group of vessels is the sum of the fishing effort of each individual vessel”.

³⁸⁸ *Ibid.*, Art. 5.1: “The Council, acting in accordance with the procedure laid down in Article 43 of the Treaty, shall, before 31 December 1993, establish a Community system which shall apply from a date no later than 1 January 1995 laying down rules for the minimum information to be contained in fishing licenses, to be issued and managed by Member States”.

³⁸⁹ Framework Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy. This Regulation has been amended by Council Regulation (EC) No 1224/2009 of 20 November 2009.

jobs for fishermen, and supplying consumers, while preserving the balance of marine ecosystems.⁽³⁹⁰⁾

To ensure more effective, transparent and fair controls, the Community Fisheries Control Agency was established in Vigo, Spain. The 2002 reform gave fishermen a greater role in decisions-making affecting them through the creation of Regional Advisory Councils, consisting of fishermen, scientific experts, representatives of other sectors related to fisheries and aquaculture, regional and national authorities, environmental groups and consumers.⁽³⁹¹⁾

In 2009 the Commission launched a public consultation on the reform of the CFP with the aim of integrating the new principles that should govern EU fisheries in the 21st century. An agreement was reached on 1 May 2013 on a new fisheries regime based on three main pillars: 1) the new CFP⁽³⁹²⁾, 2) the common organisation of the markets in fishery and aquaculture products⁽³⁹³⁾, 3) the new European Maritime and Fisheries Fund.⁽³⁹⁴⁾

The new CFP is meant to ensure that the activities of the fishing and aquaculture sectors are environmentally sustainable in the long term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits.

³⁹⁰ *Ibid.*, Art. 3: “ [...] the Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimize the impact of fishing activities on marine eco-systems. It shall aim at a progressive implementation of an eco-system-based approach to fisheries management. It shall aim to contribute to efficient fishing activities within an economically viable and competitive fisheries and aquaculture industry, providing a fair standard of living for those who depend on fishing activities and taking into account the interests of consumers.”

³⁹¹ *Ibid.*, Art. 31.

³⁹² Regulation (EU) No 1380/2013 of the European Parliament and the Council of 11 December 2013 on the Common Fisheries Policy.

³⁹³ Regulation (EU) No 1379/2013 of the European Parliament and the Council of 11 December 2013 on the common organization of the markets in fishery and aquaculture products.

³⁹⁴ Regulation (EU) No 508/2014 of the European Parliament and the Council of 15 May 2014 on the European Maritime and Fisheries Fund.

3.3.1 FPAs

Under the CFP, the EU developed different types of relationships with third countries. In order to face the challenges of responsible fishing, the European Commission transformed its bilateral agreements into FPAs through financial contributions.⁽³⁹⁵⁾ The Community contribution was calculated taking account of the fishing opportunities made available to Community vessels, the identification of measures to encourage the development of sustainable fisheries and, lastly, the impact of the partnership agreement and the participation of European interests on the partner coastal state's fisheries sector as a whole.⁽³⁹⁶⁾ Among the objectives of the FPAs proclaimed by the Commission, the protection of the interests of distant-water fishing fleet and the encouragement of sustainable fisheries need to be pointed out. Moreover, FPAs are supposed to encourage the transfer of capital, technology and know-how and have to be considered the basis for external bilateral and sub-regional action under the CFP.⁽³⁹⁷⁾

3.4 Historical background of the fisheries agreement between Spain and Morocco

The sea fishing has traditionally represented a crucial factor in the relationship between Spain and Morocco. When analyzing the historical development of the fishery agreements, one should take into account that the fishery sector is one of the economic activities which has changed its structure and mode of operation

³⁹⁵ The financial contribution paid by the EU consisted of the contribution itself which is financed by the private sector in the form of fees and is assessed according to the access to resources, and the financial compensation which is allocated to the development of sustainable fishing.

³⁹⁶ See *Communication from the Commission on an integrated framework for fisheries partnership agreements with third countries* of 23 December 2002, COM 2002 637 final, available at

<<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0637&from=EN>>. [Last accessed 20 September 2016].

³⁹⁷ *Ibid.*

during the years, especially due to the change in the international maritime order and the rights of property over the maritime space.⁽³⁹⁸⁾

The Treaty of Marrakech of 1767⁽³⁹⁹⁾, the *Tratado de Paz, Amistad, Navegación, Comercio y Pesca* of Meknes of 1799⁽⁴⁰⁰⁾ and the Treaty of Commerce of 1861 gave Spain the free exercise of its traditional fishing rights in the Moroccan waters acquiring the official recognition of its fishing monopoly over Northern Santa Cruz de Mar Pequeña.⁽⁴⁰¹⁾

In 1912 Spain established its protectorate in Morocco and obtained the right to receive the licenses for the exercise of the fishing in the Moroccan waters on the basis of the Treaty of Algeciras of 1906 that established the politics of the economic equality according to which from the 6th mile from the coast, the sea was opened to the international fishing through the payment of licenses.⁽⁴⁰²⁾

When Morocco gained its independence from Spain in 1956, it aspired to exploit its waters: this influenced the fishing, opening a period characterized by full sovereignty and territorial conflicts. The two countries entered into bilateral fishing relationships which were regulated by a provisional regime according to which they were allowed to fish at the most favorable conditions in the other

³⁹⁸ M. HOLGADO MOLINA, M. OSTOS REY, *Los acuerdos de pesca marítima entre España y Marruecos: evolución histórica y perspectivas*, in *Revista española de estudios agrosociales y pesqueros*, 2002, n° 194, at 194 ss.

³⁹⁹ The Treaty of Marrakech was signed between the King of Spain and the Sultan of Sherifian state in the imperial city of Marrakech in 1767 and concerned a fishing project by Canary Islanders.

⁴⁰⁰ The *Tratado de Paz, Amistad, Navegación, Comercio y Pesca* was signed in Meknes between the Sultan Moulay Slimane and the King Carlos IV. The treaty underlined the relevance of diplomacy to solve the issues in both countries. Arts. 35-36 alluded to the existence of a “*problema de pesca a nivel de las costas canarias-africanas*”. See *Una vecindad conflictiva marcada por las reivindicaciones territoriales*, in *RedMarruecos*, available at <<http://www.redmarruecos.com/articulo/sociedad/vecindad-conflictiva-marcada-reivindicaciones-territoriales/20140427023446000484.html>>. [Last accessed 20 September 2016].

⁴⁰¹ M. HOLGADO MOLINA, M. OSTOS REY, *supra* note (398), at 191.

⁴⁰² *Ibid.* See also *GENERAL ACT of the Algeciras Conference relating to the Affairs of Morocco* (Great Britain, Austria-Hungary, Belgium, France, Germany, Italy, Morocco, Netherlands, Portugal, Russia, Spain, Sweden, United States), signed at Algeciras on the 7 April 1906, available at <<https://www.loc.gov/law/help/us-treaties/bevans/must000001-0464.pdf>>. [Last accessed 20 September 2016].

country's territorial waters within a territorial limit of 3 nautical miles and to sell the products of the fishing in their ports.⁽⁴⁰³⁾

This regime lasted 12 years until the signing of the 1969 *Convenio de Fez*. A new regime was introduced which basically maintained the previous benefits and allowed different methods of fishing according to the area. A Commission was created in order to mitigate the conflicts and its role was to facilitate the application and interpretation of the *Convenio*. The bilateral cooperation consisted basically in the creation of mixed societies in Spain and Morocco through the reduction of the cost of the licenses.⁽⁴⁰⁴⁾

The situation began to change when in 1973 Morocco extended its EEZ up to 70 nautical miles⁽⁴⁰⁵⁾ and when in 1974 the uncertainties over the Spanish Sahara arose, since Morocco pressured Spain to recognize its sovereignty over the territory after the annexation. When entering the 1975 Tripartite Agreement on Western Sahara, Spain made sure that the access of its vessels to the waters off Western Sahara would not have been impaired. Indeed, the Madrid Accords contained three undisclosed protocols which allowed Spain to continue fishing and participate in the operation of Fosboucraa. The first protocol gave Spain the exclusive third state access to Saharawi resources for up to 800 vessels until it joined the EEC in 1986. The second protocol ratified Spain's ownership stake in Fosboucraa, as well as technical assistance to Morocco for geological exploration, the building of vessels to transport phosphate, tourism and agriculture. The third protocol confirmed an arrangement dating from 1964 for Spain to fish in Mauritanian waters.⁽⁴⁰⁶⁾

In 1977 Morocco and Spain signed the first fisheries treaty which provided for the creation of joint ventures between Spanish and Moroccan fishermen:

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Morocco had already extended its territorial waters from 6 to 12 nautical miles in June of 1962.

⁴⁰⁶ J.J. SMITH, *Fishing for Self-determination: European Fisheries and Western Sahara. The case of Ocean Resources in Africa's Last Colony*, *Ocean Yearbook* 27 267, 2013, at 274.

however it never entered into force due to the lack of ratification by the Moroccan Parliament.⁽⁴⁰⁷⁾

An important change in the agreements since that moment has been the distinction in terms of fishing rights between the area north of Cape Noun and the Mediterranean and that south of Cape Noun. As it has been pointed out by Milano, “according to the then Secretary of State of Spain, the differentiation was intentionally made in order to distinguish Morocco’s waters and the fisheries of Western Sahara and the conclusion of the agreement should not have been interpreted as a recognition of Morocco’s sovereignty over the territory”.⁽⁴⁰⁸⁾

In 1981 Morocco adopted the limit of 200 nautical miles so that the other countries had to ask for the permission to fish. This caused deep changes in the fishing since Morocco had exclusive fishing rights in a wide Atlantic area which was very rich and had been shared for centuries with the Spanish and Portuguese. Spain saw its interests worsen and had to negotiate agreements which exacerbated the tensions between the two countries and had to ask for licenses to have the right to fish in those waters.

3.5 The fisheries agreements between the EC and Morocco

When Spain joined the European Community in 1986⁽⁴⁰⁹⁾, the negotiation of fisheries agreements with Morocco became a responsibility of the Community.⁽⁴¹⁰⁾ As it has been pointed out, the fisheries agreements with

⁴⁰⁷ E. MILANO, *supra* note (253), at 422.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Spain joined the European Community on 1 January 1986, when the *Tratado de Adhesión* of 12 June 1985 entered into force. See *Boletín Oficial del Estado* (BOE) of 1 January 1986.

⁴¹⁰ In this sense, Art. 167, para. 1 of the *Tratado de Adhesión* of 12 June 1985 states: “Upon accession, the administration of fisheries agreements concluded by the Kingdom of Spain with third countries shall be responsibility of the Community”. Moreover, one should point out that, since the Common Fisheries Policy is an exclusive competence of EU, this policy entails also the celebration of the fisheries agreements with third countries. On this respect, see I. GONZÁLEZ GARCÍA, *Los acuerdos comunitarios de pesca con Marruecos y el problema de las aguas del Sáhara Occidental*, in REDE 36, October-December 2010, at 527-528.

Morocco have been strategically crucial for Spain since the technical conditions of its fleets did not allow it to fish in farther waters and since they were important for the economy of the particular coastal areas of Andalusia, Galicia and the Canaries.⁽⁴¹¹⁾

Morocco knew the situation Spain was facing and used the fisheries as one of the basic points for its claims with Brussels.

Since the 1980s, Morocco insisted in reducing the access of the Community ships to its fishing ground and in ensuring more quantitative and qualitative control on the Community activities. In order to avoid excessive catches, the fisheries negotiations reached an agreement on the TACs according to the scientific estimates on the resources so that the limitation was made according to the restriction of the potential of the ships or the period of fishing. At the same time, Morocco pressured to obtain more financial compensations, a higher number of Moroccan employees working on the Community fleets and more imports by the Community. These measures limited the Spanish fishing rights and provoked antagonism in the bilateral relations.

In 1988 the EC, in the exercise of its exclusive competence in the field of fisheries, entered into bilateral agreements with Morocco with the conclusion of the 1988-1992 fisheries agreement.⁽⁴¹²⁾

The agreement gave the EC a total of 800 licenses for four years at a cost of EUR 282 million.⁽⁴¹³⁾ The waters covered were to be in "Morocco's fishing zone" which included "all waters over which Morocco has sovereignty or jurisdiction".⁽⁴¹⁴⁾ The agreement did not mention Western Sahara and the European Commission refused to clarify the geographical boundaries of this area.⁽⁴¹⁵⁾ The European Parliament was concerned over the territorial issue and delayed in the first renewal of the agreement. In 1992 the agreement was

⁴¹¹ M. HOLGADO MOLINA, M. OSTOS REY, *supra* note (398), at 198.

⁴¹² 1988 Agreement on relations in the sea fisheries sector between the European Community and the Kingdom of Morocco, OJ L181, of 23 June 1988.

⁴¹³ *Ibid.*, Annex.

⁴¹⁴ *Ibid.*, Art.1.

⁴¹⁵ T. SHELLEY, *supra* note (14), at 74.

renewed and the cost was of EUR 310 million for 650 licenses (636 of which went to Spain).⁽⁴¹⁶⁾

In 1995 there were tensions and the Spanish fleet tied until May, when a new agreement was reached and the cost reached €500 million for fewer licenses.⁽⁴¹⁷⁾ Morocco requested that the new agreement was the last one for a duration of three years, period in which the Spanish fishing sector had to be renewed through subsidies to the fishermen, their relocation in other sectors or fishing grounds and the breaking up of the ships.⁽⁴¹⁸⁾ Indeed Morocco had developed its own fishing industry and looked for other partners.⁽⁴¹⁹⁾

The agreement expired in November 1999 and this time renegotiation proved impossible. The process collapsed and the irritation was evident.

In a written question to the Commission in the autumn of 2004, a Spanish Member of the European Parliament underlined the consequences of the halt of the fisheries and called for a rapprochement of the Community with Morocco:

Many Community fishermen are suffering the consequences of the absence of negotiations since the breakdown of the agreements in 1999. In Andalusia, more than 200 vessels have been affected and a total of 151 vessels remain tied up pending an improvement in fishing relations between Morocco and the EU. As a result of this crisis, business has dropped by half in the markets of the ports of Almería, Barbate, Huelva, Malaga and Algeciras. Even though the Andalusian Government is earmarking aid for the fishermen affected, the regional government hopes that the EU, within the context of the good relations which have been established with Morocco since the change of government in Spain, might help to lay

⁴¹⁶ 1992 Agreement in the sea fisheries sector between the European Community and the Kingdom of Morocco, OJ L407 of 31 December 1996.

⁴¹⁷ 1995 Agreement in the fisheries sector between the European Community and the Kingdom of Morocco, OJ L30 of 31 January 1997.

⁴¹⁸ On this issue, see I. GONZÁLEZ GARCÍA, *supra* note (410), at 531-532.

⁴¹⁹ *Ibid.* The author underlines that “*la pesca en Marruecos se fue convirtiendo en un sector estratégico de su economía*”.

the necessary foundations which would make it possible to consider new fisheries agreements.⁽⁴²⁰⁾

3.6 The 2006 EC-Morocco FPA

At the end of May 2006, the EC and the Kingdom of Morocco concluded a FPA⁽⁴²¹⁾ which entered into force on 28 February 2007 and was incorporated into the Community legal order through a Council regulation.⁽⁴²²⁾

It is worth recalling that the time between the 1999 Agreement and the 2006 FPA corresponds to two new proposals: the reform of the CFP of 2003 and the new forms of cooperation in the fishery sector that Morocco proposed and which have been made evident in the Joint Declaration of 24 April 2004 between Spain and Morocco.⁽⁴²³⁾

The 2006 FPA adapted to the guidelines promoted by the reform, that is to say the sustainability of the fisheries and the Moroccan development of its fishery sector through the control of the exploitation, economic, scientific, technical and commercial cooperation and the safeguard of the environment, among others, by constituting a break in the initial understanding of the Community relations with Morocco in the fishery sector.⁽⁴²⁴⁾

As regard the content of the Agreement, this is composed of the text of the Agreement proper which defines the general principles of the partnership, that is to say the promotion of responsible fishing based on the principle of non-

⁴²⁰ Written question by María Salinas García (PSE) to the Commission, available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E20042679&format=XML&language=EN>>. [Last accessed 20 September 2016].

⁴²¹ Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, OJ L141 of 29 May 2006. The Agreement was approved and officially signed by a delegation of the Council and Morocco on 30 May 2006 in Brussels.

⁴²² Council Regulation (EC) No 764/2006 of 22 May 2006.

⁴²³ I. GONZÁLEZ GARCÍA, *supra* note (410), at 529-530.

⁴²⁴ *Ibid.*

discrimination, prior consultations as regards the implementation of sectoral fisheries policy and the respect of the Law of the Sea.⁽⁴²⁵⁾

The text establishes as well the principles of a scientific cooperation and a joint annual scientific meeting and lays the foundation for the promotion of European investments in the Moroccan fisheries sector⁽⁴²⁶⁾; moreover it sets up a Joint Committee between the two parties which is uncharged of monitoring the implementation of the agreement itself.⁽⁴²⁷⁾ The Joint Committee has to meet at least once a year and it holds a special meeting at the request of either of the parties.

As regards the financial contribution, this is composed of two elements relating to (a) a financial contribution for access by Community vessels to Moroccan fishing zone and (b) Community financial support for introducing a national fisheries policy based on responsible fishing and on the sustainable exploitation of fisheries resources in Moroccan waters.⁽⁴²⁸⁾

The agreement finally establishes that licenses for fishing in Moroccan waters will be issued only to the fishing categories covered by the Protocol.⁽⁴²⁹⁾ Fishing licenses for fishing categories not covered by the Protocol, may be granted to Community vessels by the Moroccan authorities and will be dependent on a favourable opinion from the European Commission.

The Protocol, the Annexes and the appendices form an integral part of the FPA.⁽⁴³⁰⁾

The fishing opportunities and the financial contribution provided in the Agreement is set out in the Protocol⁽⁴³¹⁾ and its period of application is applied for four years. Article 2 of the Protocol sets out the financial contribution: Morocco would receive a total of EUR 144.4 million in annual payments of EUR 36,1 million during the period of application of the Protocol. The Protocol

⁴²⁵ 2006 FPA, *supra* note (421) Art. 3.

⁴²⁶ *Ibid.*, Art. 4.

⁴²⁷ *Ibid.*, Art. 10.

⁴²⁸ *Ibid.*, Art. 7, para. 1.

⁴²⁹ *Ibid.*, Art. 6.

⁴³⁰ *Ibid.*, Art. 16.

⁴³¹ *Ibid.*, Art. 1, Protocol.

moreover defines six fishing opportunities which are allocated among 11 Member States. As regards the first five fishing opportunities, excluding the industrial fishing for pelagic species, Spain benefits of 97 licenses out of a total of 119 licenses available. Portugal is the second Member State with 14 licenses; Italy benefits of 1 license and France of 4 licenses.

3.6.1 Geographical scope of the 2006 FPA and the delimitation of the fishing zone

One of the critics sparked at the Community level is the alleged extension of the geographical scope of the Agreement to the waters off Western Sahara.⁽⁴³²⁾

In Article 2(a) of the Agreement proper, the definition of “Moroccan fishing zone” refers to “the waters falling within the **sovereignty** or **jurisdiction** of the Kingdom of Morocco.”⁽⁴³³⁾

It was probably the fact that the same formulation was used in the previous agreements that Sweden opposed to the agreement:

Sweden has decided to vote against [...] the Fisheries Partnership Agreement between the European Community and Morocco as it does not take into full consideration that Western Sahara is not a part of the territory of Morocco under international law and a process is underway to find a [...] political solution to the conflict, which will allow for the self-determination of the people of Western Sahara [...]; all concerned are not ensured to benefit from the implementation of this agreement in accordance with the will of the people of Western Sahara, as provided by international law.⁽⁴³⁴⁾

⁴³² At this respect see E. MILANO, *supra* note (253), at 424-425; M. DAWIDOWICZ, *supra* note (244), at 21 ss.

⁴³³ 2006 FPA, *supra* note (417), Art. 2a). [Emphasis added in bold].

⁴³⁴ Quoted in E. MILANO, *supra* note (253), at 428, note 61. On the Swedish position on the issue of Western Sahara, see P. WRANGE, *The Swedish Position on Western Sahara and International Law*, in ARTS, KARIN, P. PINTO LEITE (éd), *International Law and the Question of Western Sahara*, IPJET, 2007, at 299-303.

Finland and the Netherlands abstained for that same reason while Ireland supported it with a separate statement.⁽⁴³⁵⁾

At this respect, it is useful to remind that while the territorial sovereignty is the “supreme authority and control” over a delimited territorial space⁽⁴³⁶⁾, the jurisdiction “denotes the authority to affect legal interests”, that is to say, the authority a State exercises over natural and juridical persons and property within a delimited territory.⁽⁴³⁷⁾

Now, while the term “sovereignty” certainly refers to the territorial waters of Morocco, the term “jurisdiction” instead, may indicate the whole of the areas in which an Exclusive Economic Zone (EEZ) is enforced by Morocco, including the waters off the coast of Western Sahara.⁽⁴³⁸⁾

This has been suggested by Hans Corell as well, during a public intervention in 2008, during which he supposed that “the expression “of jurisdiction” [...] refers to the Moroccan EEZ. But it is obviously also used to indicate the waters belonging to Western Sahara. Under all circumstances there is no distinction made with respect to the waters adjacent to Western Sahara”.⁽⁴³⁹⁾

A part from the definition of “Moroccan fishing zone”, the geographical limits in the FPA are very vague: in order to have more information one has to turn to

⁴³⁵ E. MILANO, *supra* note (253), at 428. Even if Ireland supported the Agreement, it was still concerned about the rights of the Saharawis and asks the Joint Committee to “make use of all instruments under the Agreement to ensure that the Agreement is implemented to the benefit of all the people concerned and in accordance with the principles of international law.”

⁴³⁶ G. ODUNTAN, *Sovereignty and Jurisdiction in the Airspace and Outer Space: Legal Criteria for Spatial Delimitation*, London, New York, Routledge, 2012, at 21.

⁴³⁷ *Ibid.*, at 31. See also F. CRISTANI, *The Policy of the European Union toward Western Sahara: a case-study on the compatibility of the new EU-Morocco Fisheries Protocol with international law*, at 12.

⁴³⁸ E. MILANO, *supra* note (253), at 425. See also SYMMONS, *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, Islands of Las Palmas Case of 23 January 1925, 4 April 1928, Volume II at 829-871, 2009, at 328.

⁴³⁹ H. CORELL, *The legality of exploring and exploiting natural resources in Western Sahara*, Western Sahara Conference Proceedings 2008, at 242.

Chapter III of the Annexes⁽⁴⁴⁰⁾, which refers to Appendix 2, and to Appendix 4. The fishing datasheets presented in Appendix 2 indicate the geographical limits for six fishing categories.⁽⁴⁴¹⁾

In Appendix 4, entitled “Limits of Moroccan Fishing Zones - Coordinates of Fishing Zones”, while the fishing zone in the north clearly includes only the Moroccan waters, there is a vague delimitation failing to include a southern limit: the southern-most zone is south 29°00’N, a geographical point north of the recognized maritime boundary between Morocco and Western Sahara fixed at 27° 40’ N.⁽⁴⁴²⁾

As it has been stressed:

This geographical indication could mean either that certain fishing rights of EC vessels under the FPA are limited to a rather narrow strip of water north of Western Sahara – that is, in uncontested Moroccan waters – or that the southernmost geographical limit of the FPA extends to the commencement of Mauritanian waters at around 21° N.⁽⁴⁴³⁾

As it stands, one can find out that four of the six categories are allowed to fish in Western Sahara waters, that is to say the small-scale fishing, the demersal fishing, the tuna fishing and the industrial pelagic trawler.

However, as it is analysed below, the 2006 European Parliament Legal Service’s opinion noted that the agreement “neither includes nor excludes the waters of Western Sahara.”⁽⁴⁴⁴⁾

⁴⁴⁰ Chapter III, entitled “Fishing Zones” states: “The fishing zones for each type of fishery in Morocco’s Atlantic zone are defined in the datasheets (Appendix 2). Morocco’s Mediterranean zone, located east of 35° 48’N - 6° 20’W (Cape Spartel), shall be excluded from this Protocol.”

⁴⁴¹ Small-scale fishing/north: pelagic species; small-scale fishing/north; small-scale fishing/south; demersal fishing; tuna fishing; industrial pelagic fishing.

⁴⁴² I. BROWNLIE, *supra* note (28), at 155-157.

⁴⁴³ M. DAWIDOWICZ, *supra* note (244), at 22.

⁴⁴⁴ Legal Opinion of the Legal Service of the European Parliament, 20 February 2006, SJ-0085/06, available at <<http://www.arso.org/LegalopinionUE200206.pdf>>. [Last accessed 20 September 2016].

Indeed, it is the failure to specify the precise coordinates of the Agreement that leaves it up to Morocco to interpret where the fishing zone lies.

This has been confirmed by Commissioner Borg as well who made different statements before the vote in the European Parliament plenary session, 15 May 2006:

I would like to emphasise again that the agreement is fully in conformity with international law. [...] The content of the agreement does not contain any provision dealing with the legal status of the maritime waters pertaining to Western Sahara. It defines the Moroccan fishing zone as the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco. This neither defines nor prejudices the legal status of the waters concerned. According to the provisions of the agreement, it is up to the Moroccan authorities as the contracting party concerned to define the fishing zones on the basis of which fishing licences will be issued.⁽⁴⁴⁵⁾

3.6.2 The 2006 Legal Service's Opinion

The Parliament's Development Committee requested the Legal Service of the European Parliament a legal opinion as to whether "the Council Regulation concluding an Agreement with Morocco that would allow EU vessels to fish in the waters of the Western Sahara is compatible with the principles of International Law."⁽⁴⁴⁶⁾

⁴⁴⁵ Commissioner Joe Borg in European Parliament, 15 May 2006, available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20060515&secondRef=ITEM-018&format=XML&language=EN>>. [Last accessed 20 September 2016].

⁴⁴⁶ 2006 Legal Opinion of the Legal Service of the European Parliament, *supra* note (444).

After briefly considering the historical and political background concerning Western Sahara⁽⁴⁴⁷⁾, the Legal Service analyzed the legal framework, including the UN law on NSGTs, the ICJ's advisory opinion of 16 October 1975 and the opinion of 12 February 2002 by H. Corell.⁽⁴⁴⁸⁾

The Legal Service offered then a legal analysis of the 2006 FPA. The first question it considered was whether the waters of Western Sahara were included in the provisions of the Agreement. In this respect, it stated that "the text of the Agreement was not sufficiently clear as to its territorial area of application because it did not entail any element stating that the fishing activities allowed under the Agreement south of the parallel 29°0'00'' cannot in anyway extend to the area south of the parallel 27°40', which is approximately the latitude of southern limit of Moroccan territorial waters."⁽⁴⁴⁹⁾

In order to assess the compatibility of the Agreement with international law, the Legal Service took into consideration the status of Western Sahara as NSGT, the fact that Spain no longer fulfils its role as *de jure* administering Power and the territory is *de facto* administered by Morocco.⁽⁴⁵⁰⁾

The Legal Service recalled the various resolutions of the GA on the rights of the NSGTs to self-determination and to natural resources and it considered their political significance but not their binding power in international law. However, according to these resolutions, the right to self-determination and PPSNR have to be respected only if economic activities are undertaken in collaboration with the indigenous people and in a way that would permit them to fully benefit from the exploitation of their natural resources.⁽⁴⁵¹⁾

The Legal Service also recalled the letter of the UN Under-Secretary-General for Legal Affairs and Legal Counsel in which it was stated that the exploration and

⁴⁴⁷ *Ibid.*, paras. 1-6.

⁴⁴⁸ *Ibid.*, paras. 7-21.

⁴⁴⁹ *Ibid.*, para. 34.

⁴⁵⁰ *Ibid.*, para. 37.

⁴⁵¹ *Ibid.*, para. 39.

exploitation activities in NSGTs violate the principles of international law if they disregard the interests and wishes of the people of the NSGT.⁽⁴⁵²⁾

As regards the question on the waters of Western Sahara, the Legal Service was asserting that the Agreement was not explicitly foreseeing that the waters of Western Sahara were included in its area of application but nor did it expressly excluded them.⁽⁴⁵³⁾

In the conclusions, the Legal Service was asserting that:

At this stage, it cannot be prejudged that Morocco will not comply with its obligations under international law vis-à-vis the people of Western Sahara. It depends on how the agreement will be implemented. In this respect, the Agreement explicitly acknowledges that the Moroccan authorities have a “full discretion” regarding the use to which this financial contribution is put (Article 2 (6) of the Protocol). It is therefore up to them assume their responsibilities in that respect.⁽⁴⁵⁴⁾

It continued:

As to the effects of the agreement for the people of Western Sahara, the way in which the Moroccan authorities intend to implement this agreement and the extent to which they foresee the benefits that it brings to the local people, it would be useful for Parliament to receive indications from the Commission and/or from the Council.⁽⁴⁵⁵⁾

Finally, the Legal Service concluded that:

If the implementation of the agreement raises difficulties, it should be noted that a Joint Committee is set up in order to supervise the

⁴⁵² *Ibid.*, para. 40.

⁴⁵³ *Ibid.*, para. 41.

⁴⁵⁴ *Ibid.*, para 45 d).

⁴⁵⁵ *Ibid.*, para. 45 d).

implementation of the Agreement (Article 10 of the Agreement). In case the Moroccan authorities disregard manifestly their obligations under international law vis-à-vis the people of Western Sahara, the Community could eventually enter into bilateral consultations with a view to suspending the Agreement (Article 15 of the Agreement and Article 9 of the Protocol).⁽⁴⁵⁶⁾

This monitoring mechanism, which has been created under the FPA, has been criticized by many since it focuses more on Morocco's obligations towards the people of Western Sahara, rather than the Community obligations.⁽⁴⁵⁷⁾

3.6.3 The 2009 Legal Service's opinion

Three years after the signing of the 2006 FPA, two main developments that intervened since the legal opinion of 20 February 2006, that is to say the declaration of jurisdiction over an EEZ of 200 nautical miles off the Western Sahara by Law No 03/2009 of 21 January 2009 establishing the Maritime Zones of the SADR⁽⁴⁵⁸⁾, and the admission by the Commission that the EU-flagged vessels had fished in the waters off Western Sahara⁽⁴⁵⁹⁾, led the Development

⁴⁵⁶ *Ibid.*, para. 45 e).

⁴⁵⁷ E. MILANO, *supra* note (252), at 437; F. CRISTANI, *supra* note (437), at 15; M. BALBONI, *The EU's approach towards Western Sahara, in Multilateralism and International Law with Western Sahara as a case study*, Pretoria, 4-5 December 2008, at 3.

⁴⁵⁸ Law No 03/2009 of 21 January 2009 establishing the Maritime Zones of the SADR, available at <<http://www.arso.org/03-0.htm>>. [Last accessed 20 September 2016]. Art. 7 of the Law in question asserts: "An exclusive economic zone is hereby established beyond and adjacent to the territorial sea, out to a distance of 200 nautical miles from the baselines used to measure the breadth of the territorial sea." Art. 8 defines instead the rights and the duties to be respected in the EEZ. At this respect, see also the comment in the Letter of the representative of the Polisario Front to the United Nations, Ahmed Boukhari, dated 8 April 2012, at UN Doc. A/63/871-S/2009/198. In the letter, it was asserted: "[...] Pursuant to this legislation [Law No 03/2009], the Government of the SADR renders illegal any activities related to the exploration or exploitation of the marine living and non-living resources of Western Sahara conducted without its express authorization."

⁴⁵⁹ *EU Commission admits fishing in occupied Western Sahara*, available at <<http://www.wsrw.org/a128x770>>. [Last accessed 20 September 2016].

Committee to request a new opinion on the legal consequences of the FPA between the European Community and the Kingdom of Morocco.⁽⁴⁶⁰⁾

As regards the first development, the Legal Service specified that the effect of the declaration of the EEZ depended on the legal status of the SADR and on the Western Sahara territory under international law.⁽⁴⁶¹⁾

The Legal Service asserted that “the status of the SADR under international law remains largely uncertain” even if it presents some elements that are typical of a state, such as a government structure with a President, a Prime Minister and a Parliamentary Assembly and a Constitution.⁽⁴⁶²⁾ The Legal Service then pointed out that the legal regime of the EEZ is laid down in the UNCLOS and the RASD is not party and cannot sign it either according to Art. 305 of the Convention.⁽⁴⁶³⁾ Moreover, it was noted that the territory on which the RASD declared its sovereignty was a NSGT, according to Art. 73 of UN Charter.

Considering these aspects, the Legal Service was concluding that the declaration made by the SADR concerning the EEZ off Western Sahara could not produce legal effects for three different reasons:

1. SADR does not enjoy the characteristic of statehood⁽⁴⁶⁴⁾;
2. It is not and cannot be a signatory party of UNCLOS⁽⁴⁶⁵⁾;

⁴⁶⁰ *Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco - Declaration by the SADR of 21 January 2009 of jurisdiction over an Exclusive Economic Zone of 200 nautical miles off the Western Sahara - Catches taken by EU-flagged vessels fishing in the waters off Western Sahara*, available at <<http://www.wsrw.org/a105x1346>>. [Last accessed 20 September 2016].

⁴⁶¹ *Ibid.*, para. 7.

⁴⁶² *Ibid.*, para. 8.

⁴⁶³ *Ibid.*, para. 10.

⁴⁶⁴ At this respect, see J.J. SMITH, *supra* note (27). The author recalls the 1933 Montevideo Convention on Rights and Duties of States, which is the most widely accepted criteria of the legal existence of a State. While the application of the criteria of permanent population, defined territory, government and capacity to enter into relations with other states are not controversial, the actual test of statehood, that is to say the acceptance as a member state in the UN system, is not fulfilled by Western Sahara.

⁴⁶⁵ Art. 305 of the UNCLOS determines the subjects to whom the Convention is open for signature; the RASD is not comprised among them.

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3. The territory which it claims not only is barely to a limited extent subject to its control, but is considered as a whole to be a Non-Self-Governing Territory within the meaning of Article 73 of the United Nations Charter.⁽⁴⁶⁶⁾

As regards instead the second development, the data provided by the Member States to the Commission and the explicit declarations made by the Commission in several occasions, showed that EU-flagged vessels had fished in the waters off Western Sahara.⁽⁴⁶⁷⁾ Indeed, at least three countries, that is to say Lithuania, Spain and the UK had fished in the waters off Western Sahara.

The Legal Service partially changed its approach in the new legal opinion by recognizing the obligations the Commission has to respect:

With regard to the European Community, it is clear that it must play its role in that regard in so far as it has concluded an international agreement whose scope of application may also cover natural resources that are subject to a specific legal regime in international law. In this respect, the European Community is clearly bound in the exercise of its powers by the respect of the rules of international law.⁽⁴⁶⁸⁾

Moreover, in reply to a certain number of parliamentary questions concerning the respects of the rights of the Saharawis over their natural resources, “the Commission pointed out that the support for the fisheries sector in the Western

⁴⁶⁶ Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, *supra* note (460), para. 13.

⁴⁶⁷ The revelation about the EU actually fishing in Western Sahara came only after members of the EU Parliament had asked seven different written questions to the Commission. The revelation came when MEPS Caroline Lucas from UK, Raül Romeva from Spain and Karin Scheele from Austria asked on the EU catch volumes under the 2006 FPA reported from FAO’s so-called fishing area 34.1.3, partially overlapping the Western Sahara waters. See *EU Commission admits fishing in occupied Western Sahara*, available at <<http://wsrw.org/a128x770>>. [Last accessed 20 September 2016].

⁴⁶⁸ *Ibid.*, para. 19.

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Sahara [...] is taken into account in the programming of measures to be undertaken in the framework of the Agreement.”⁽⁴⁶⁹⁾

The Commission had also pointed out that some Sahrawi sailors had been engaged by European ship-owners on the vessels fishing off Western Sahara. Nevertheless, the Legal Service noted that there were no provisions about specific actions with a view to benefit the population of Western Sahara.⁽⁴⁷⁰⁾ The only reference was linked to the improvement of the infrastructure of the port towns situated in the territory of Western Sahara. However, “this is not necessarily equal to benefiting the people of Western Sahara insofar as they are not mentioned in the programming document and it is not known whether and to what extent they are able to take advantage of such improvements.”⁽⁴⁷¹⁾

Moreover, the Legal Service underlined that:

[...] it is not demonstrated that the EC financial contribution is used for the benefit of the people of Western Sahara. Yet, compliance with international law requires that economic activities related to the natural resources of a Non-Self-Governing Territory are carried out for the benefit of the people of such Territory, and in accordance to their wishes.⁽⁴⁷²⁾

The Legal Service then called the Joint Committee to do the assessment in concrete terms whether and to what extent the actions targeting ports of Western Sahara actually benefited the population of Western Sahara and recommended the next annual meeting or a special meeting of the Joint Committee to address these issues with a view to find an amicable settlement by respecting the right of the Sahrawi people under international law.⁽⁴⁷³⁾

The Legal Service finally concluded that:

⁴⁶⁹ *Ibid.*, para. 23.

⁴⁷⁰ *Ibid.*, para. 25.

⁴⁷¹ *Ibid.*, para. 28.

⁴⁷² *Ibid.*, para. 27.

⁴⁷³ *Ibid.*, para. 32.

In the event that it could not be demonstrated that the FPA was implemented in conformity with the principles of international law concerning the rights of the Saharawi people over their natural resource, principles which the Community is bound to respect, the Community should refrain from allowing vessels to fish in the waters off Western Sahara by requesting fishing licenses only for fishing zones that are situated in the waters off Morocco.⁽⁴⁷⁴⁾

3.7 The blocking of the 2011 Protocol

On 11 February 2011, the European Commission sent a recommendation to the European Council to authorize the Commission to open negotiations on behalf of the EU for the renewal of the protocol to the FPA with the Kingdom of Morocco.⁽⁴⁷⁵⁾

In the Council, the UK, Sweden and Denmark voted against the Commission's mandate insisting to see clear and adequate information proving that the Sahrawi people had benefited from the FPA. Finland and Germany abstained for the same reason.⁽⁴⁷⁶⁾ After two days of talks, however, the EU Commission and Rabat signed the one-year renewal of the protocol on 25 February 2011.

The extension passed to the Council which approved the extension with the opposition of Sweden, Denmark and the Netherlands and with the abstention of the UK, Finland, Austria and Cyprus.⁽⁴⁷⁷⁾

⁴⁷⁴ *Ibid.*, para. 37.

⁴⁷⁵ *Here is what the Commission asks the EU Member States*, available at <<http://wsrw.org/a204x1855>>. [Last accessed 20 September 2016]. The article underlines that the text of the letter makes no reference to the NSGT of Western Sahara, nor is there any mention of consulting the Sahrawis about the taking of their natural resources.

⁴⁷⁶ *EU Commission and Morocco sign extension of controversial fish pact*, available at <<http://wsrw.org/a204x1880>>. [Last accessed 20 September 2016].

⁴⁷⁷ *Split EU Council decides to renew EU-Morocco fish pact*, available at <<http://wsrw.org/a204x2038>>. [Last accessed 20 September 2016].

However, the additional Protocol had to be voted by the European Parliament before being approved. Indeed the 2009 Lisbon Treaty introduced the co-decision procedure between the Council and the Parliament⁽⁴⁷⁸⁾ and gave the Parliament the power to review several kinds of international agreements.⁽⁴⁷⁹⁾

The Parliament rejected the Protocol since it considered it too onerous, not respectful to ensure a sustainable fishing in the Moroccan waters and most of all, not respectful of the rights of the Sahrawis.⁽⁴⁸⁰⁾

It has been noted as well that the legal opinion of 2009 was crucial in the rejection of the new Protocol of 2011.⁽⁴⁸¹⁾

⁴⁷⁸ Art. 218(6) of the TFEU writes: “[...] the Council shall adopt the decision concluding the agreement: (a) after obtaining the consent of the European Parliament in the following cases [...] (iv) agreements with important budgetary implications for the Union [or] (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.” For the role of the European Parliament’s Fisheries Committee in the decision-making process, see I. LÖVIN, *Silent Seas: The Fish Race to the Bottom*, Rothersthorpe, Paragon Publishing, 2012, at 151-152. Basically, the Council of Ministers asks the Commission to put forward a proposal; or it could also receive a proposal from the Commission prepared by the Directorate-General for Maritime Affairs and Fisheries, that is to say DG Mare. This is a large organization that takes every conceivable aspect of fisheries into account across various sub-sections. For different issues, other Directorates-General are involved along with committees of representatives from member states and industry or scientific experts. One of these is the Advisory Committee on Fisheries and Aquaculture (ACFA). Once the proposals have been prepared, they are sent to the Council of Ministers. After the Lisbon Treaty, the European Parliament can accept or refuse what would become Community Law. The Council has its own groups for internal and external fisheries policies who seek to find a balance between the different positions of the member states. At the same time, the proposals will have gone to the European Parliament’s Committee on Fisheries for deliberation. Then, when committees and the Parliament have had their say, the proposal goes back to the Council of Ministers, is adjusted a notch by the Committee of Permanent Representatives, after which the fisheries ministers vote. Decisions are reached by a qualified majority with member states’ votes weighted according to population.

⁴⁷⁹ Art. 43(2) of the TFEU writes: “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organization of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.”

⁴⁸⁰ E. MILANO, *Il nuovo Protocollo di pesca tra Unione europea e Marocco e i diritti del popolo Sahrawi sulle risorse naturali*, in *Diritti Umani e Diritto Internazionale*, 2014, vol. 8, n.2, at 502.

⁴⁸¹ *Ibid.*, at 507.

When considering the rejection of the Protocol, an ex-post evaluation report evaluating the first four years of the FPA with Morocco, on behalf of the Commission, was crucial in determining the draft recommendation of the rapporteur of the Fisheries Committee of the EU Parliament, Carl Haglund.⁽⁴⁸²⁾

The rapporteur highlighted that the Agreement failed to fulfill two major objectives, that is to say stabilizing the EU market and developing the fisheries sector. Moreover, the Agreement was not efficient from a financial perspective⁽⁴⁸³⁾ and there were many concerns from the ecological point of view.⁽⁴⁸⁴⁾ The Agreement had little impact as well on the Moroccan fisheries sector since it did not meet the financial and technical needs of Morocco. A part from the economical, ecological and environmental aspects, a sensitive question was referred to whether the Agreement directly benefited the Sahrawi people; however this question was not clarified.

The rapporteur finally complained about the lack of inter-institutional cooperation between the Commission and the Parliament: “The lack of inter-institutional cooperation has obstructed the rapporteur’s work through the

⁴⁸² *Fisheries rapporteur recommends end to EU-Morocco fish pact*, available at <<http://www.wsrw.org/a204x2097>>. [Last accessed 20 September 2016]. See also European Parliament - Committee of Fisheries, Draft Recommendation on the draft Council decision on the conclusion of a Protocol between the European Community and the Kingdom of Morocco, 20 September 2011, EU doc. 11226/2011 - C7-0201/2011/0139(NLE). At this respect, it is worth recalling that other two reports from Parliamentary rapporteurs were critical of the Agreement. The first one received little attention and it was done by Swedish MEP Isabella Lövin who stated that it was “unacceptable that Morocco has totally neglected the European Commission’s questions on the benefits and the wishes of the Sahrawi people”; the second one was made by the French MEP François Alfonsi who recommended not to extend the Protocol and noted that payment under the FPA was 25 percent of the entire budget for EU bilateral fisheries treaties. See J.J. SMITH, *supra* note (38), at 284.

⁴⁸³ Draft Recommendation, *supra* note (114). “[...] in terms of economic cost-effectiveness, the agreement is the least successful of all the bilateral Fisheries Partnership Agreements.”

⁴⁸⁴ *Ibid.* “Of the 11 demersal stocks fished in the Moroccan waters, five appear overexploited [...], four appear fully exploited [...] while two stocks could not be sufficiently analyzed due to lack of data [...]. The almost total depletion of these stocks begs the question whether the principle of EU vessels only fishing surplus stocks is adhered to. The fishing activities off the coast of Morocco also have adverse impacts on the environment, most notably through the widespread problem of discards, catches of sharks and probable catches of marine mammals by pelagic trawlers.”

entire process of preparing this draft recommendation. Hopefully this was an anomaly rather than an indicator of how the Commission intends to work with the Parliament in the future.”⁽⁴⁸⁵⁾

Finally, the rapporteur concluded:

There are no reasons for the Parliament to give its consent on the extension of a Protocol to an Agreement that is a waste of taxpayers’ money, ecologically and environmentally unsustainable and that has no significant macro-economic effect on either the EU or Morocco. The rapporteur therefore recommends that the Parliament declines to give its consent to an extension of the Protocol.⁽⁴⁸⁶⁾

On 14 December 2011, the EU Parliament rejected the one-year extension of the FPA between the EU and Morocco with 326 votes against the extension, 296 in favor and 58 abstained.⁽⁴⁸⁷⁾

Following the rejection, the EU Fisheries Commissioner, Maria Damanaki, who had already expressed her opinion in several occasions, stated:

If a new fisheries Protocol with Morocco were to be proposed and agreed, it would have to give convincing answers to the key issues of environmental sustainability, economic profitability and international legality.⁽⁴⁸⁸⁾

As regards the rights of the Sahrawis, the Parliament, in its resolution of rejection of the Protocol, had requested the Commission to “ensure that the

⁴⁸⁵ *Ibid.*

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *European Parliament rejects EU fisheries*, available at <<http://wsrw.org/a105x2187>>. [Last accessed 20 September 2016]. As it has been commented by E. Hagen, “it was one of the very unique occasions in the history of the EU that a trade deal has been blocked by the lawmakers and the only time it has happened to a fisheries agreement”.

⁴⁸⁸ *Fish Commissioner insists on international law*, available at <<http://www.wsrw.org/a204x2189>>. [Last accessed 20 September 2016].

future Protocol fully respects international law and benefits all local population groups affected.”⁽⁴⁸⁹⁾

3.8 The 2013 FPA

A new Protocol to the 2006 FPA, negotiated by the Commission, was approved by the EU Parliament on 10 December 2013 with 310 votes in favor, 204 votes against and 49 abstained.⁽⁴⁹⁰⁾

The Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco⁽⁴⁹¹⁾ finally entered into force in February 2014. As regards the text of the Protocol, Art. 1 is newly included and contains a reference to the Association Agreement and human rights, in the sense that the Protocol “contributes to realizing the Association Agreement, and aims to assure the ecological, economical and social viability of the fisheries resources. The implementation of the Protocol is to be carried out in conformity with Article 1 of the Association Agreement on the development of a dialogue and cooperation and Article 2 of the same Agreement concerning the respect for democratic principles and fundamental human rights”.⁽⁴⁹²⁾

This new clause was the result of the requests by the EU Parliament to the Commission that the new Protocol had to ensure the full compatibility with international law.⁽⁴⁹³⁾

This request has been taken into consideration also through the strengthening of the control mechanisms on the benefits that the use of the European financial

⁴⁸⁹ European Parliament resolution of 14 December 2011 on the future Protocol setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (2001/2949(RSP)), para. 9.

⁴⁹⁰ E. MILANO, *supra* note (480), at 505.

⁴⁹¹ Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, OJ L 328 of 7 December 2013.

⁴⁹² *Ibid.*, Art. 1.

⁴⁹³ E. MILANO, *supra* note (480), at 506. See also note 104, and European Parliament Resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements (2009/2219(INI)).

contribution is supposed to produce on the development of the fishery sector and the coastal population.⁽⁴⁹⁴⁾

On this issue, the New Protocol expected Morocco to report back on usage or impact of sectoral support. Moreover, it called for reporting on geographical distribution of impact and expenditure.⁽⁴⁹⁵⁾

As regards the financial contribution, Art. 3 stipulated an annual contribution of EUR 40 million for access to the resource and as support for the fisheries sector in Morocco; and 10 million for the issuing of the fishing licenses by Morocco. As regards the application for and issue of licenses provided for in the annexes to the Protocol, the procedure for applying for fishing licenses, the issue of licenses, their validity and utilization, the fishing license fee and other fees remained largely unchanged, with a few additional points laid down in the new Protocol.

A difference with the previous Protocol is related to the fishing zones. Chapter III of the Annex reads:

Morocco will communicate to the European Union, before the entry into force of the Protocol, the basic geographical coordinates, its fishing zones, as well as fishing zones where fishing is forbidden, apart from the Moroccan Mediterranean zone which is excluded from the Protocol. The fishing zones for each category in Morocco's Atlantic zone are defined in the datasheets (Appendix 2).⁽⁴⁹⁶⁾

⁴⁹⁴ 2013 Protocol, *supra* note (491), Art. 6.

⁴⁹⁵ *Ibid.*, Art. 5, para. 6: "Depending on the nature of projects and the duration of their implementation, Morocco will present to the Joint Committee a report on the implementation of projects that were completed within the framework of the sectoral support as provided for under this Protocol, including their expected economic and social impact, especially the effects on employment, investments and any measurable impact of taken actions as well as their geographical distribution. These data will be developed based on indicators that will be meticulously defined by the Joint Committee."

⁴⁹⁶ *Ibid.*, Annex.

The difference lies in the sentence that Morocco will communicate all relevant geographical data relevant for fishing before the entry into force. In the previous Protocol, these zones were already defined in the Appendix, and no mention was made of Morocco defining this before application.

On the legality of the FPA, some countries still had some doubts.

It is worth to point out at this respect the opinion of the Legal Service related to the Agreements, requested by the Fisheries Committee.⁽⁴⁹⁷⁾

In a letter dated 8 October 2013, the Chairman of the Committee on Fisheries, Mr. Gabriel Mato Adrover, requested a legal opinion on the following questions:

1. Has Morocco declared an exclusive economic zone off the waters of Western Sahara (i.e. south of 27.40 N latitude)?
2. If not, would Morocco have the legal basis upon which to make a claim of an EEZ there, and what would it be?
3. If not, what is the legal requirement for the EU to pay for fishing in international waters?

After having recalled the conclusions of the previous legal opinions⁽⁴⁹⁸⁾, the Legal Service offered its legal analysis. As regards the first question, it was recalled that the legal regime governing all uses of world's ocean, seas and related resources, including the rules on the EEZ is established by the UNCLOS, to which the EU and Morocco are Contracting Parties.⁽⁴⁹⁹⁾

⁴⁹⁷ European Parliament, Legal Service, Legal Opinion on the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution - 2013/0315 (NLE), 4 November 2013, SJ-0665/13 (Legal Service 2013), available at <www.emmausstockholm.se>. [Last accessed 20 September 2016].

⁴⁹⁸ *Ibid.*, paras. 3-5. The Legal Service recalled another legal opinion it delivered to INTA Committee on the question whether a proposed Agreement between the EU and Morocco concerning reciprocal liberalization measures on agricultural products was in conformity with the EU's obligations under international law. In its legal opinion, the Legal Service noted that it lacked information on whether and how it would benefit the local people of Western Sahara. See Legal Opinion SJ-0699/10.

⁴⁹⁹ *Ibid.*, para. 6. EU acceded to the UNCLOS on 1 April 1998, while Morocco ratified it on 31 May 2007.

Arts. 55 and 57 of the UNCLOS related to the definition of EEZ and to its extensions are underlined⁽⁵⁰⁰⁾ and Art. 75 of the UNCLOS provided the procedure for the States to declare their EEZ.⁽⁵⁰¹⁾ Morocco established its EEZ in 1980⁽⁵⁰²⁾; however, according to the UN official database, Morocco did not deposit its maritime limits under the UNCLOS concerning the EEZ relating to the waters off Western Sahara.⁽⁵⁰³⁾

On this first question, the Legal Service concluded:

Therefore it can be inferred that Morocco has not claimed an EEZ for the waters off the coast of Western Sahara. It has not made the declaration foreseen in Article 75 UNCLOS specifying the geographical coordinates of the EEZ relating to those waters.⁽⁵⁰⁴⁾

In order to reply to the second question, the Legal Service recalled the status of NSGT of Western Sahara and that Morocco as *de facto* administrator of the territory. Moreover, it was underlined that under international law and in conformity with the UNCLOS, Morocco must make the claim on the geographical coordinates of the respective zone in order to establish an EEZ.⁽⁵⁰⁵⁾ In order to be entitled of the right to exploit the waters off the coast of Western Sahara corresponding to the EEZ, “Morocco should make the claim in conformity with Article 75 UNCLOS relating to the EEZ on behalf of Western Sahara, acting as a *de facto* administrator of that non self-governing territory.”⁽⁵⁰⁶⁾ As stated above, Morocco did not make the referred claim. The Legal Service however, by recalling Art. 73 of the UN Charter, reminded that Morocco, as *de facto* administering power, is responsible for the economic advancement of the territory of Western Sahara. The Legal Service stated that “by exploiting the waters off the coast of Western Sahara corresponding to the

⁵⁰⁰ *Ibid.*, para. 7.

⁵⁰¹ *Ibid.*, para. 8.

⁵⁰² *Ibid.*, para. 9.

⁵⁰³ *Ibid.*, para. 10.

⁵⁰⁴ *Ibid.*, para. 11.

⁵⁰⁵ *Ibid.*, para. 13.

⁵⁰⁶ *Ibid.*, para. 14.

EEZ, it can be advanced that Morocco is contributing to the socio-economic advancement of those territories, within the meaning of Article 73(a) UN Charter.”⁽⁵⁰⁷⁾

The Legal Service took into consideration the position taken by Hans Corell, that is to say that the exploration and exploitation activities in NSGTs violate the principles of international law if they disregard the interests and wishes of the people of the NSGT, and the fact that Morocco has implemented the fisheries protocols in its relations with the EU which paid financial compensation for the access to fish resources in Western Sahara waters.⁽⁵⁰⁸⁾

On this second question, the Legal Service was concluding that:

[...] nothing prevents Morocco to exercise its jurisdiction as a *de facto* administering power over the waters off the coast of Western Sahara corresponding to the EEZ, but only if it at the same time fulfills its obligations vis-à-vis the people of Western Sahara, which stem from international law, and from Article 73 of UN Charter in particular. The legal basis for a possible declaration of the EEZ over the waters of Western Sahara would be Article 75 UNCLOS, in conjunction with Article 73 UN Charter.⁽⁵⁰⁹⁾

As regards the last question, the Legal Service considered whether the Western Sahara waters fall under the area of application of the FPA and whether the Union is under obligation to pay for using these resources.

The conclusion of the last question was that:

If the Protocol is applied in a way that Morocco issues licenses authorizing the Union vessels to fish in the waters off the coast of Western Sahara, which were not declared as falling under the Morocco’s EEZ, then the respective allocations and Union fishing activities have to benefit the population of Western Sahara. It is for

⁵⁰⁷ *Ibid.*, para. 17.

⁵⁰⁸ *Ibid.*, para. 19.

⁵⁰⁹ *Ibid.*, para. 20.

the PECH committee to assess whether the Protocol under examination does or does not entail any more explicit indication concerning the benefits for the population of Western Sahara than the previous protocols. [...] The PECH committee should thus examine the way in which the Moroccan authorities intend to implement the Protocol and the extent to which they foresee the benefits that it brings to the local people of Western Sahara.⁽⁵¹⁰⁾

3.9 Considerations on the FPAs between the Kingdom of Morocco and the EU

There exists a wide consent on the illegality of the EU-Morocco FPAs.

From a legal point of view, the French Lawyers NGO SHERPA commented on the illegality of the 2006 FPA on the basis that it neither respected the legal status of NSGT recognized to Western Sahara nor made reference to the rights of the Sahrawis. Moreover, the text of Agreement did not consider any consequence of the 1975 ICJ advisory opinion and did not refer to the benefits the Sahrawis should gain from the FPA. Thus, the EC failed to respect its duty not to recognize and sustain unlawful situations and misrepresented the Corell opinion.⁽⁵¹¹⁾

Also the Association of the Bar of the City of New York commented on the illegality of the FPA and issued in 2011 a "Report on Legal Issues involved in the Western Sahara Dispute: Use of Natural Resources."⁽⁵¹²⁾

The report confirmed that the use of natural resources by Morocco was a violation of international law:

Assuming the legal status most favorable to the Moroccan position – that is, treating Morocco as an administering power in the territory – to the extent Morocco is using natural resources located within the

⁵¹⁰ *Ibid.*, para. 32.

⁵¹¹ See *Analyse Juridique «Fisheries Partnership Agreement»* of 3 April 2006 by SHERPA, available at <<http://www.wsrw.org/a193x1479>>. [Last accessed 20 September 2016].

⁵¹² COMMITTEE ON UNITED NATIONS, *Report on Legal Issues involved in the Western Sahara dispute: Use of Natural Resources*, New York City Bar, April 2011.

The approach of the EU towards the conflict of Western Sahara:
Questioning the legality of the fisheries agreements with Morocco

territory of Western Sahara, unless such use is in consultation with and to the direct benefit of the people of Western Sahara, Morocco's use of natural resources of the territory constitutes a violation of international law.⁽⁵¹³⁾

As regards specifically the question of the FPA, the Committee was of the opinion that retention by Morocco of any portion of the funds paid by the EU for fishing activities in Western Sahara's territorial waters, or disbursement of such funds without consideration for the interests of Western Sahara or the Sahrawis would violate international law. Moreover, it was underlining that the activities must be in consultation with the Sahrawis and any benefit should flow to them.⁽⁵¹⁴⁾

The same conclusions about the illegality of the 2006 FPA were reached by the European Association of Lawyers for Democracy and World Human Rights, ELDH, which demanded from the European Union, *inter alia*, not to be an accomplice of the Moroccan Government by illegally exploiting the fishery grounds beside the coast of Western Sahara, in case of a prolongation of the fishery agreement, to exclude the fishing grounds beside the coast of Western Sahara and to negotiate a separate agreement about these fishing grounds with the political representatives of the Sahrawi people and to consider the interests, wishes and conditions of the Sahrawis in any negotiations of fishery agreements with Morocco and to guarantee that the payment of the EU for the exploitation of the fishing grounds benefits the Sahrawi people. Moreover, it suggested that any future agreement between Morocco and the EU should take into consideration *inter alia*, the respect of the resolutions of the UN SC concerning the referendum of the Sahrawis and to respect the human rights of the Sahrawis in the occupied part of the territory.⁽⁵¹⁵⁾

⁵¹³ *Ibid.*, at 30.

⁵¹⁴ *Ibid.*, at 31-32.

⁵¹⁵ ELDH, European Association of Lawyers for Democracy and World Human Rights, *Fishery Agreement between European Union and Morocco Illegal*, Press Release, 9 February 2011, available at

A group of Swedish jurists from four Universities concluded as well, in their analysis, that a renewed FPA with Morocco would violate international law, that is to say recognition and assistance to serious breaches of international law by Morocco. Moreover, it underlined that an FPA covering waters outside Western Sahara must conform to two conditions, namely the explicit exclusion of Western Sahara as a part of the territory of Morocco and the accordance with the wishes and interests of the people of Western Sahara. It called upon Morocco to provide an answer in public to how the FPA had benefitted the people of Western Sahara and if it is according to the wishes of the Sahrawis before any negotiation is undertaken.⁽⁵¹⁶⁾

It results crucial to apply the Hans Corell's 2002 Legal Opinion to the case of the FPAs, since the exploration and exploitation of mineral resources applies also to other resources, such as fisheries, as "the law applicable to NSGT does not make a distinction between different resources" which "must all be used in the interests of the peoples in such territories."⁽⁵¹⁷⁾

Also the Legal Opinion released by the African Union on "the Illegality of the Exploitation or Exploration of the Natural Resources of Western Sahara by Morocco as Occupying Force and any Other Entity, Company or Group" states:

Morocco has no right to explore and exploit any natural resources, renewable or non-renewable located in the occupied territories of Western Sahara or to enter into agreements/contracts with third parties concerning these resources. [...] Agreements entered into by Morocco should be limited exclusively to its territory internationally recognized under its sovereignty (which does not include Western Sahara); [...] Accordingly, the people of Western Sahara and their

<<http://www.eldh.eu/publications/publication/press-release-fishery-agreement-between-european-union-and-morocco-illegal-61/>>. [Last accessed 20 September 2016].

⁵¹⁶ *Western Sahara and the EU-Morocco Fisheries Partnership Agreement (FPA)*, available at <http://www.wsrw.org/files/dated/2011-02-17/swedish_legal-opinion_16.02.2011.pdf>. [Last accessed 20 September 2016].

⁵¹⁷ H. CORELL, *supra* note (439), at 241-242.

legitimate representatives must not only be consulted but they must consent and effectively participate in reaching any agreement that involves the exploitation of natural resources in the territory of Western Sahara.⁽⁵¹⁸⁾

In 2008, Hans Corell openly condemned the FPA as it was clearly in violation of the International Law since there is no evidence that there had been consultation for the benefit of the Sahrawi population.⁽⁵¹⁹⁾

On this issue, the civil society has played an important role in showing that the Sahrawis never benefitted from the agreements.

For instance, in 2006, the NGO Western Sahara Resource Watch (WSRW) established the “Fish Elsewhere!” campaign working to prevent the EU to sign fisheries agreements with Morocco which included in their geographical scope the waters off the coast of Western Sahara. The campaign denounced the EU-Morocco fisheries agreements to be ethically, politically, legally, wasting EU tax money and ecologically wrong.⁽⁵²⁰⁾

Moreover, in a letter to the European Commissioner for Fisheries, dating back to 28 September 2010, 799 organizations including, among all, almost all Sahrawi civil society groups, urged the European Union to halt all fisheries in occupied Western Sahara, since there was no evidence that the Saharawis had been consulted or that they were benefiting from the agreement.⁽⁵²¹⁾

In another letter to the European Parliament’s President⁽⁵²²⁾, three Sahrawi human rights defenders and political prisoners condemned the Moroccan

⁵¹⁸ Legal Opinion by the African Union, *Any Exploration and Exploitation of Natural Resources in Western Sahara by Morocco is illegal*, 3 September 2015, paras. 68 and 69 a) and c), available at

<<http://allafrica.com/stories/201509040962.html>>. [Last accessed 29 September 2016].

⁵¹⁹ E. MILANO, *supra* note (480), at 510.

⁵²⁰ See *Fish Elsewhere: Stop the EU fisheries in occupied Western Sahara*, at <<http://www.fishelsewhere.eu/>>. [Last accessed 20 September 2016].

⁵²¹ *799 organizations, and a refugee in Brussels, protest EU fisheries*, available at: <<http://www.wsrw.org/a159x1614>>. [Last accessed 20 September 2016].

⁵²² *Sahrawi political prisoners demand halt to EU fisheries*, available at: <<http://www.wsrw.org/a159x1591>>. [Last accessed 20 September 2016].

human rights violations and referred to the geopolitical and economical partnership between Morocco and the EU, explicitly citing the 2007 Fisheries Partnership Agreement:

It is a concern that the European Union allows its image to be tainted by Morocco. Nowhere is this more obvious than in the case of the 2007 Fisheries Partnership Agreement, where the European Union has been made an accomplice to the illegal theft of the Saharawi people's natural resources. [...] Your Excellency, we never had a voice in this undertaking, and the only outcome of the fisheries agreement that our people have noticed, is that our voices are suppressed even more, as Morocco feels itself supported by the European Union in its illegal and unfounded claim over our homeland. Since the Saharawi people have not agreed to nor benefits from the agreement, as required under international law, we respectfully ask that all European fisheries in Saharawi waters be halted immediately.⁽⁵²³⁾

As it has been already pointed out, third states must comply with the duty of non-recognition in unlawful situations. In the case in consideration, once the EU and its member states decided to enter into contractual relations with Morocco, they are obliged to ensure that those relations accord with their duty of non-recognition.

In the case of the bilateral relations between the EU and Morocco, it is worth underlining that the Association Agreement is the type of agreement to which the duty of non-recognition is applicable.⁽⁵²⁴⁾ Moreover, it constitutes

⁵²³ *Open letter by Salé prisoners to European Parliament's President Mr. Jerzy Buzek*, available at: <<http://www.wsrw.org/a159x1593>>. [Last accessed 20 September 2016].

⁵²⁴ S. KOURY, *The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law*, in ARTS, KARIN, P. PINTO LEITE (éd), *International Law and the Question of Western Sahara*, IPJET, 2007, at 190.

Community law and the European Commission is responsible for ensuring the correct implementation of the agreement by third countries.⁽⁵²⁵⁾

Nevertheless, the EC-Moroccan Association Agreement facilitates the violation of the Sahrawis rights because it does not contain any explicit clause excluding the Western Sahara from its territorial scope.

Moreover, the European Community has certain obligations under the UN Charter, including those pertaining to the right of self-determination and breaches of that obligation. At this respect, one should point out that the Court of first instance hold that although the:

Community was not directly bound by the UN Charter by reason that it is not a member of the United Nations, or an addressee of the resolutions of the Security Council or the successor to the rights and obligations of Member States for the purposes of public international law, the Community is bound by the obligations of Member States for the purposes of public international law, the Community is bound by the obligations under the United Nations Charter in the same way as its Member States by virtue of the Treaty establishing the EU.⁽⁵²⁶⁾

Moreover, under Art. 3 of the Treaty of the European Union (TEU) “[...] the Union [...] shall contribute [...] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”⁽⁵²⁷⁾

It follows that not only Morocco has to respect the rights of the Sahrawis, but also the EU has the obligation deriving from international law to guarantee that the wishes of the Sahrawis on the use of their natural resources are respected, through the consultation of the Polisario.⁽⁵²⁸⁾ Hence, since the FPAs have been

⁵²⁵ *Ibid.*, at 194.

⁵²⁶ *Yassin Abdullah Kadi v. Council of Europe and Commission*, C-315/01, para. 192-193, European Court Reports 2005, p. II-3649, on appeal. See *ibid.*, at 196-197.

⁵²⁷ Art. 3, para. 5 of the TEU.

⁵²⁸ E. MILANO, *supra* note (480), at 510.

applied to the waters off Western Sahara, the EU violated the international obligation of non-recognition and the PPSNR of Sahrawis and de facto acknowledged and supported the occupation by Morocco of the territory of Western Sahara.⁽⁵²⁹⁾

Another crucial issue is pointed out by Smith who asserts that “because Morocco’s continuing occupation of Western Sahara is illegal any extension of the Fisheries Partnership Agreement having the effect of allowing a renewed taking of fishery resources in Saharan waters would effectively contribute to the pillage of such resources, ostensibly subjecting individual responsible EC officials to criminal liability”.⁽⁵³⁰⁾

As regards instead the geographical scope of the Agreement, Smith reminds that Morocco is unable to claim jurisdiction over Saharan waters because it is a NSGT occupied by army force. Moreover Morocco has not established through national legislation an EEZ in the area.⁽⁵³¹⁾

At this respect, one should take in account two claims made by the SADR. An initial claim of 200 nautical mile Economic Exclusive Zone (EEZ) which has been underlined above, was deposited on 22 January 2009, but it did not precisely defined the maritime borders to the neighbouring States, or extension into international waters.⁽⁵³²⁾

As it has been stated by the former SADR President Mohamed Abdelaziz:

[...] The EEZ declaration is an expression and exercise by the Saharawi people of their inalienable right to self-determination and permanent sovereignty over their natural resources. It is also a further step towards full statehood, and to taking control of our

⁵²⁹ F. CRISTANI, *supra* note (437), at 21.

⁵³⁰ J.J. SMITH, *supra* note (331), at 1.

⁵³¹ *Ibid.*, at 2.

⁵³² Law No. 03/2009 of 21 January 2009 Establishing the Maritime Zones of the Saharawi Arab Democratic Republic, available at <www.arso.org/03-0.htm>. [Last accessed 20 September 2016].

natural riches, which have been plundered illegally for many years by Morocco and other foreign interests.⁽⁵³³⁾

With this legislation, the SADR has made clear its views regarding unauthorised activities in the Western Saharan EEZ.

President Abdelaziz continued:

This declaration bears out the illegality of all unauthorised natural resource-related activities conducted by Morocco and other foreign interests in Western Sahara's waters. We call on all parties to revisit immediately any agreements with Morocco that do not explicitly exclude the Western Saharan territory and its offshore areas, including the EEZ." [...] In particular, we call on the European Union to suspend immediately the 2005 EU-Morocco Fisheries Agreement in its current form, and to prevent EU vessels from encroaching upon the waters of Western Sahara. We are investigating various legal avenues to ensure that this theft of our world class fisheries resources does not continue.⁽⁵³⁴⁾

Very recently, on 5 March 2016, the UN Secretary General Ban Ki-moon, visited the Sahrawi refugee camps in Algeria and the liberated territories of Western Sahara, as part of efforts to restart negotiations to end the dispute between Morocco and the Polisario Front group.⁽⁵³⁵⁾

The SADR, led by the Frente POLISARIO, took advantage of this visit and took the additional step of depositing with the UN Secretary General, as depositary of the UNCLOS, the coordinates and charts delineating the outer limits of

⁵³³ *Western Sahara declares Offshore Zones: President Abdelaziz calls on EU to cease illegal fishing in Western Sahara's waters*, Media Release, 22 January 2009, available at <http://www.wsrw.org/files/dated/2009-01-23/eez_media_release.pdf>. [Last accessed 20 September 2016].

⁵³⁴ *Ibid.*

⁵³⁵ See *Ban Ki-moon tours Western Sahara refugee camp to push for negotiations*, available at <<http://www.africanews.com/2016/03/06/ban-ki-moon-tours-western-sahara-refugee-camp-to-push-for-negotiations/>>. [Last accessed 20 September 2016].

Western Sahara's EEZ.⁽⁵³⁶⁾ In clarifying the outer limits of Western Sahara's EEZ, the SADR Government made clear that it is not willing to tolerate the illegal exploitation of its natural resources, including rich offshore fisheries resources, nor ongoing efforts by Morocco and complicit foreign companies to explore the seabed resources in Western Sahara's waters.⁽⁵³⁷⁾

3.10 The attitude of the organs of the EU

The political point of view of the FPAs is finally considered in this paragraph. In 2006, Morocco's Minister of Agriculture, Mr. Laenser, stated that "the financial aspect [of the Fisheries Agreement] is not necessarily the most important aspect of this agreement. The political aspect is just as important."⁽⁵³⁸⁾ The topics used by Morocco in order to obtain the favor of the EU are well-known: the question of the illegal immigration or the threat of terrorism require a strong and stable State which is possible to achieve through the economic support from the EU, and this stability would be jeopardized if Western Sahara reached its independence.⁽⁵³⁹⁾

Indeed, as it has been showed in the first chapter, Morocco has a nationalist project, that is to say the creation of Greater Morocco and today, together with the issues of Islam and the Kingdom, there is another topic on which it is

⁵³⁶ *Western Sahara declares the outer limits of its 200-mile exclusive economic zone (EEZ)*, available at <http://wsrw.org/files/dated/2016-03-06/fp_media_release_05.03.2016.pdf>. [Last accessed 20 September 2016].

⁵³⁷ *Ibid.* Moreover it claimed that the SADR EEZ borders those of Morocco, Mauritania and the Canary Islands (Spain). The new legislation provides that where the SADR's maritime entitlements overlap with those of its neighbours, the SADR will negotiate and conclude agreements delimiting maritime boundaries in accordance with international law.

⁵³⁸ See the statement of Morocco's Minister of Agriculture, Mr. Laenser, *Aujourd'hui Le Maroc*, 24 May 2006, *Accord de pêche: naufrage polissarien*, available at <http://www.fishelsewhere.eu/files/dated/2009-10-25/laenser_2006_in_alm.pdf>. [Last accessed 20 September 2016].

⁵³⁹ J. SOROETA LICERAS, *La posición de la Unión Europea en el conflicto del Sahara Occidental, una muestra palpable (más) de la primacía de sus intereses económicos y políticos sobre la promoción de la democracia y de los derechos humanos*, in *Revista de Derecho Comunitario Europeo*, ISSN 1138-4026, no. 34, Madrid, September/December, 2009, at 839.

forbidden to discuss, that is to say Western Sahara. The 13 kilometers between Morocco and the EU, the high number of Moroccan illegal immigrants living in the EU, and the importance of the role played in the fight against terrorism, makes Morocco a crucial ally for Europe.⁽⁵⁴⁰⁾ Moreover, Morocco used this issue to denounce the Polisario Front and its role in training and in the refugee camps terrorist cells.

3.10.1 The European Parliament

The EU Parliament has been the most active European institution in the Western Sahara issue to speak openly for the right of Sahrawis to self-determination and to blame Morocco for its failure to cooperate with the UN in the settlement of the issue.⁽⁵⁴¹⁾

Initially, in 1981, the Political Committee prepared a report which was presented to the EU Parliament and defined the situation as a conflict between Morocco and Algeria, while the Polisario was designed as “neither representative of a nation nor a legitimate political party. Polisario is a foreign legion in the pay of the Libyan tyrant Gaddafi”. The groups of the left protested against it and proposed an alternative text which entailed the right of the Sahrawis to be independent: finally, the report contained just a vague amendment mentioning the right to self-determination.⁽⁵⁴²⁾

During the following years, the intergroup “Peace for the Sahrawi people” was born within the EU Parliament and still today the role it plays is crucial in keeping the Parliament active in the defense of the right to self-determination of the Sahrawis.

In 1989 the position of the EU Parliament crystallized. In its resolutions, the European Parliament not only asserted that in the framework of the negotiations with Morocco the EU had to put pressure on it to respect the

⁵⁴⁰ *Ibid.*, at 841.

⁵⁴¹ J. VAQUER I FANÉS, *The European Union and Western Sahara*, in *European Foreign Affairs Review* 9:93-113, 2004, at 102.

⁵⁴² *Ibid.*, at 103. See also Official Journal, Annex: Debates of the EP 1980-1981 session. “Report of Proceedings from 10-13 March 1981”, 12 March 1981, at 167-178.

international resolutions and the human rights and it openly reclaimed the right of the Sahrawis to self-determination. In Resolution of 15 March 1989, the EU Parliament had defined the issue of Western Sahara as a problem of decolonization which must be resolved in accordance with the right of the Sahrawis to self-determination and urged Member States and the EU Council to use their influence in order to promote a solution of the conflict; moreover it encouraged Morocco and the Frente Polisario to enter in direct negotiations, and called on the European Commission to increase its humanitarian aid to the refugees.⁽⁵⁴³⁾

A crucial impact was achieved in 1992 when the EU Parliament did not give its consent to the fourth financial protocols with Morocco. A previous resolution to the negative vote called on the Commission not to start the implementation of the protocols “until those countries meet the [...] conditions concerning human rights and the UN Security Council resolutions”.⁽⁵⁴⁴⁾

In several occasions moreover, the EU Parliament has supported the UN Peace Plan but it was ignored by the Council and the Commission. In front of this situation, the position of the EU Parliament lead towards more practical issues with the objective of defending the rights of the Sahrawis. Even if they were not successful, the efforts undertaken by the EU Parliament asking that the FPAs were beneficial to the Sahrawis, have to be underlined. Even if its opinion on the FPA was rejected by the Commission, it contained the proposal of suspension of the agreement in the case in which, in its application, there existed breaches of international duties, with reference to the need of respecting the right to self-determination of the Sahrawis. Even if the proposal did not assert that the FPA was not in breach of the PPSNR of the Saharawis, it had the effect to oblige the Commission to take into consideration the international law. In December of 2008, for the first time, the President of the SADR met the foreign affairs ministers of the EU, and in January 2009, for the first time since

⁵⁴³ Texts adopted by the European Parliament, March 1989, Doc. A2-374/88 of 15 March 1989, at 20-22.

⁵⁴⁴ *Ibid.* See also Official Journal C 39, 17 January 1992, at 4 and 26.

2002, a delegation of the EU visited the occupied territory of the Western Sahara. Considering the limitations imposed by the structure of the Community, the EU Parliament has paid attention to the breaches of the human rights. Indeed, the EU Parliament has always taken into consideration the reports coming from the main non-governmental organizations on human rights which operate in the territory, such as Amnesty International and Human Rights Watch and considered that Morocco systematically violated the human rights of the Sahrawis and the roots of those breaches came from the denial of the right to self-determination.⁽⁵⁴⁵⁾

In this sense, in Resolution of 27 October 2005 the EU Parliament was “deeply concerned at the latest reports by Amnesty International and the World Organization Against Torture regarding serious human rights violations by Morocco against the Sahrawi people” and called “for the protection of the Sahrawi population, respect for their fundamental rights, including freedom of expression and freedom of movement, in accordance with the Universal Declaration of Human Rights and the international treaties and conventions on human rights”.⁽⁵⁴⁶⁾

The EU Parliament decided as well to send an *ad hoc* delegation to ascertain the situation of the human rights in the territory. The delegation visited Algeri and Tindouf in September 2006 and Morocco halted the visit. Even if the mandate of the EU Parliament established that the delegation should have abstained from sending out any judgment on the political status of the territory, since its objective was to verify the respect of the human rights of the population, the report asserted that the situation of the human rights was limited by the impossibility to solve the question of the exercise of the right to self-determination of the Sahrawis.⁽⁵⁴⁷⁾

⁵⁴⁵ J. SOROETA LICERAS, *supra* note (539), at 847- 849.

⁵⁴⁶ Text adopted by the European Parliament, October 2005, Doc. B6-0561/2005 of 27 October 2005.

⁵⁴⁷ J. SOROETA LICERAS, *supra* note (539), at 849. See also Rapport sur la situation au Sahara Occidental et documents issus des travaux de la Délégation *ad hoc* pour les relations avec les pays du Maghreb, CR\776007FR.doc.

In 2010 again, a delegation from the European Parliament's Fisheries Committee was supposed to visit Western Sahara in 2010 to assess how the Sahrawis were consulted and benefitting. Finally, Morocco officially rejected the proposal claiming that "the timing for such a visit was not opportune."⁽⁵⁴⁸⁾

On this issue, one has to stress that MINURSO is the only UN missions in the world which has no mandate to monitor the respect of the human rights. The *ad hoc* delegation of the European Parliament proposed to enlarge the mandate of MINURSO, including the monitoring of the situation of the human rights in the territory and asked the EU Member States taking part to the SC to work in this sense. Moreover, as it was expected, Morocco notified to the EU Parliament its complete disapproval of this proposal, which was considered an interference in the Moroccan internal affairs. Therefore, the European Commission was invited to follow the situation of the human rights in the occupied territory.⁽⁵⁴⁹⁾

3.10.2 The EU Commission

The EU Commission has carefully been trying to avoid getting involved in the Western Sahara dispute and it has refrained from adopting any initiatives that might look beneficial to one of the sides in conflict.⁽⁵⁵⁰⁾ As it has been noted, the first time that the Commission was forced to make difficult choices on Western Sahara was during the negotiations of the 1988 EC-Morocco fisheries agreement: in that occasion, the Commission tried to avoid the issue of openly recognizing the Moroccan annexation of the territory by using in the agreement the expression "waters subject to sovereignty or jurisdiction of the Kingdom of Morocco".⁽⁵⁵¹⁾

The Commission took most of the criticism from the EU Parliament despite the fact that the Member States in the Council fully supported the ambiguous stance.

⁵⁴⁸ *Morocco rejects visit from European Parliament*, available at <<http://fishelsewhere.eu/a140x1143>>. [Last accessed 20 September 2016].

⁵⁴⁹ *Ibid.*, at 853-854.

⁵⁵⁰ J. VAQUER I FANÉS, *supra* note (541), at 105.

⁵⁵¹ *Ibid.*, at 105-106.

In response to the EU Parliament declarations⁽⁵⁵²⁾, the Commission started a humanitarian program in order to support the refugees in the camp in Algeria through its department ECHO which has been providing humanitarian aid to the Sahrawi refugees since its creation in 1993 in collaboration with the World Food Program and the UN High Commissioner for Refugees.⁽⁵⁵³⁾

The humanitarian aid however, is a double-edged weapon since it allows the survival of the refugees but it limits the resolution of the conflict to the need of financial support.

Although the EU Commission tried not to get involved in the dispute, it used throughout the four

years of the 2006 FPA some arguments which defended the agreement.⁽⁵⁵⁴⁾

In an answer given by the EU Fisheries Commissioner Ms. Damanaki on behalf of the Commission to a question whether the FPA was benefitting the Sahrawis, it was asserted that “the UN Corell opinion confirms that [...] exploitation activities should be carried out “for the benefit of the peoples of those Territories, on their behalf or in consultation with their representatives”. The Commission is of the view that it is Morocco’s responsibility to ensure that this is the case.”⁽⁵⁵⁵⁾

Moreover, the EU Commission has systematically misrepresented the Corell opinion in order to defend the 2006 FPA by never referring to the conclusion of the Corell opinion, only to segments inside or to the wishes of the Sahrawis

⁵⁵² Resolution of the EU Parliament of 14 April 2005 DOUE, C33E of 9 February 2006, at 596-597.

⁵⁵³ Since 1993, the European Commission has provided EUR 213 million in humanitarian aid, and is one of the leading donors among others. In 2015, the Commission gave EUR 10 million to improve the living conditions of the Sahrawi refugees. Food aid is a major component of this funding, indeed EUR 6.4 million has been allocated to supply basic food items through World Food Program and Oxfam. See ECHO Factsheet – Algeria- Sahrawi Refugees, available at <http://ec.europa.eu/echo/files/aid/countries/factsheets/algeria_en.pdf>. [Last accessed 20 September 2016].

⁵⁵⁴ E. HAGEN, *supra* note (369), at 12-13.

⁵⁵⁵ Answer given by Ms. Damanaki on behalf of the Commission, 21 June 2010, available at <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-2633&language=EN>>. [Last accessed 20 September 2016].

regarding the agreement. For instance, in a letter from the Commission on 27 May 2010, the Commission selected an out-of-context part of the opinion which does not at all reflect its conclusion:

Regarding the compliance of the current Agreement with international law, and the legal opinion of the European Parliament [...], we would like to reiterate that in his letter of 2002, Mr. Corell, concluded that (economic) activities in a Non-Self-Governing Territory by an administering Power are illegal “only if conducted in disregard of the **needs** and interests of the people of that Territory.”⁽⁵⁵⁶⁾

At this respect, Hagen pointed out that “by referring to other parts of the text than the final conclusion [of the Corell opinion], the EU gave the image that it can decide, on their behalf, what it is that the Saharawis are wishing. It also stressing something that the EU mentions repeatedly: that Morocco is the *de facto* administering Power of the territory.”⁽⁵⁵⁷⁾

Moreover, one has to underline that the Commission has also replaced the word in the UN document’s conclusion “wishes” with a completely different word, that is to say “needs”. In this way the EU has not considered the wishes of the Sahrawis as presented in the UN document and gives the image that it can decide what it is that the Sahrawis are wishing on their behalf.

Fortunately, this misuse by the Commission has not passed unnoticed by Corell, who still supported the illegality of the FPA:

It has been suggested that the legal opinion I delivered in 2002 has been invoked by the European Commission in support of the Fisheries Partnership Agreement. I do not know if this is true. But if it is, I find it incomprehensible that the Commission could find any

⁵⁵⁶ *European Commission defends its fisheries*, available at <<http://www.fishelsewhere.eu/a140x1151>>. [Emphasis added]. [Last accessed 20 September 2016].

⁵⁵⁷ E. HAGEN, *supra* note (369), at 6.

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such support in the legal opinion, unless, of course, it has established that the people of Western Sahara had been consulted, had accepted the agreement, and the manner in which the profits from the activity were to benefit from them. However, an examination of the agreement leads to a different conclusion.⁽⁵⁵⁸⁾

⁵⁵⁸ H. CORELL, *supra* note (71), at 242.

Chapter four

The challenges before the European Union Court of Justice

OVERVIEW: 4.1 Introduction - 4.2 Action brought on 14 March 2014 - *Front Polisario v Council* - 4.3 Western Sahara Campaign UK regarding labelling of goods - 4.4 The annulment of the trade agreement between Morocco and the EU - 4.4.1 The Advocate-General Opinion

4.1 Introduction

This chapter offers an overview of the very recent legal actions pending in the EU Court of Justice. The 2013 Protocol was challenged by Frente Polisario on 14 March 2014 and asked for the annulment of the EU-Morocco fisheries agreement. This case is still pending before the Court. In November 2012, Frente Polisario had already challenged the Agreement in the form of an exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part⁽⁵⁵⁹⁾, adopted by Council Decision 2012/497/EU of 8 March 2012.⁽⁵⁶⁰⁾

⁵⁵⁹ Agreement in the form of an exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, OJ 2012 L 241, at 2.

⁵⁶⁰ Court of First Instance, *Front Polisario v Council*, Case T-512/12, 19 November 2012. This has been the first time that Polisario took such legal measures to stop the illegal

In December 2015, the CJEU annulled the agreement in so far as it applies to Western Sahara. Very recently, the Advocate-General Wathelet has issued his opinion on the CJEU decision in which he has asserted that Western Sahara is not part of Morocco and the agreements with Morocco therefore do not apply to the NSGTs. Another case instead, was initiated by Western Sahara Campaign UK regarding the labelling of goods and was forwarded to the CJEU by a UK Court.

Before analyzing the legal actions, particularly the ones regarding the 2013 Protocol and the trade agreement between the EU and Morocco, one should briefly consider the entitlement of Frente Polisario to start action before the CJEU.

The Polisario Front started actions for annulment of the agreements according to Article 263 TFEU.⁽⁵⁶¹⁾

Art. 263, para. 4 TFEU writes that “any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”

Frente Polisario derives its legal personality from the international legal order, namely from UNGA Resolutions⁽⁵⁶²⁾ and SC Resolutions.⁽⁵⁶³⁾ This should pose

plundering of Western Sahara. On this issue, the Frente Polisario official Emhammed Khadad stated: “The EU cannot continue to ignore international law and antagonize the people of Western Sahara. By including the territory of occupied Western Sahara in its trade agreements with Morocco, the EU is directly undermining the rights of the Sahrawis and obstructing the efforts of the UN to resolve the conflict”. See *Frente Polisario tries EU trade deal in court*, available at <<http://wsrw.org/a217x2531>>. [Last accessed 22 September 2016].

⁵⁶¹ F. CRISTANI, *supra* note (437), at 23; E. MILANO, *supra* note (253), at 451; A. STEINBACH, *The Western Sahara Dispute: a Case for the ECJ?*, 18 *Columbia Journal of European Law*, 2012, at 420.

⁵⁶² See for instance GA Res. 34/37 of 21 November 1979, para. 7, which refers to Frente Polisario as “the representative of the people of Western Sahara.”

⁵⁶³ See for instance SC Res. 690 (1991) of 29 April 1991.

no obstacle to its *locus standi*, given that non-member states have filed Actions for Annulment before.⁽⁵⁶⁴⁾

In the cases aforementioned, there appears as well the requirement that the act should be “of a direct and individual concern”.

On this issue, the CJEU has confirmed in the *Inuit* case that “natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason or circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed”.⁽⁵⁶⁵⁾

In the cases considered, the act in question should have a “direct and individual effect on the legal position” of Frente Polisario, and in particular, it should be proved that the act produces legal effects which are of particular gravity for the applicants, comparing to the legal effects the same act produces to other persons to whom acts may apply.⁽⁵⁶⁶⁾

Generally, an applicant is individually concerned where the act adversely affects the specific rights of the applicant.⁽⁵⁶⁷⁾ Instead, as regards the natural or legal persons who may bring an action for annulment, they can do it in so far as they can establish that they have an interest, that is, that they will benefit from the annulment of the contested act.⁽⁵⁶⁸⁾

Below, the aforementioned cases are considered.

⁵⁶⁴ G. VIDIGAL, Trade Agreements, EU Law , and Occupied Territories – A Report on Polisario v Council, EJIL:Talk!, 1 July 2015, available at <<http://www.ejiltalk.org/trade-agreements-eu-law-and-occupied-territories-a-report-on-polisario-v-council/>>. [Last accessed 20 September 2016].

⁵⁶⁵ ECJ (Grand Chamber), *Inuit Tapiriit Kanatam et. al v. European Parliament and Council of the European Union*, Case C-583/11 P, Judgment, 3 October 2013, para. 72. For a comment, see G. VIDIGAL, *supra* note (564).

⁵⁶⁶ F. CRISTANI, *supra* note (437), *cit.* at 24; G. VIDIGAL, *supra* note (564).

⁵⁶⁷ F. CRISTANI, *supra* note (437), *cit.* at 24. See also, among others, the following cases before the CJEU: *Codorniu v Council*, Case C-309/89, ECR I-1853 (1994), *Asocarne v Council*, Case C-10/95, Order 23 November 1995, ECR I-4149 (1995).

⁵⁶⁸ F. CRISTANI, *supra* note (437), *cit.* at 25. See also, among others, the following cases before the CJEU: *Europe Chimi-Con v Council*, Case T-89/00, ECR II-3651 (2002), para. 35 and *ATM v Commission*, Case T-184/94, ECR II-2529.

4.2 Action brought on 14 March 2014 - *Front Polisario v Council*

The 2013 Protocol has been challenged by the Polisario Front before the Court of First Instance on 14 March 2014.⁽⁵⁶⁹⁾ The action was taken against the Council Decision 2013/785/EU of 16 December 2013 on the conclusion of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco.

Firstly, the applicant considered that, as representative of the Sahrawis, it is directly and individually affected by that act. The applicant contested the breach of the principle of consultation since the contested decision was adopted without the Frente Polisario being consulted, whereas, as it has been discussed in the present work, international law requires that the exploitation of natural resources of a people of NSGT be conducted in consultation with its representative. The breach of the principle of consistency is also contested, since the decision allowed the entry into force of an international agreement which applied in the territory of Western Sahara even though no Member State has recognized the sovereignty of the Kingdom of Morocco over Western Sahara. Moreover, the Polisario contested the breach of the right to self-determination, the PPSNR and Article 73 of the UN Charter since the applicant had never been consulted even though the contested decision permits the exploitation of natural resources under the sole sovereignty of the Sahrawi people. Finally, the contested decision engaged the international responsibility of the EU.⁽⁵⁷⁰⁾

As regards the issue of the *locus standi* of Frente Polisario in the case at hand, Frente Polisario should prove that the 2013 Protocol was concluded without its

⁵⁶⁹ Court of First Instance, *Front Polisario v Council*, Case T-180/14, 14 March 2014.

⁵⁷⁰ *Ibid.* The other pleas in law which were contested by Frente Polisario were the breach of the obligation to state reasons, the failure to achieve the goal of sustainable development, the breach of the principle of legitimate expectations, the breach of the Association Agreement between the European Union and the Kingdom of Morocco, the breach of the UNCLOS, the breach of the principle of the relative effect of treaties and the infringement of International Humanitarian Law.

expressed consent, that it would benefit from the annulment of the Protocol that, without the Protocol, there would be any other legal grounds for Morocco to issue fishing licenses to EU vessels with regards to waters off Western Sahara and particularly that the 2013 Protocol has been implemented in the senses of implicitly including the waters off Western Sahara in its scope of application, which seems to be the most difficult task for Frente Polisario.⁽⁵⁷¹⁾

4.3 Western Sahara Campaign UK regarding labelling of goods

In October 2015, Western Sahara Campaign UK⁽⁵⁷²⁾ issued proceedings arguing that the UK was unlawfully allowing products, originating from or processed in Western Sahara, to be imported into the UK under a trade agreement with Morocco.⁽⁵⁷³⁾ Specifically, two claims were contended, that is to say the preferential tariff given on import to the UK of goods that are classified as being of Moroccan origin but in fact originate from Western Sahara, and the intended application of the EU-Morocco FPA to policy formation relating to fishing in the territorial waters of Western Sahara.⁽⁵⁷⁴⁾

The judgment gave a brief introduction to the issues in dispute and examined the status of Western Sahara⁽⁵⁷⁵⁾, the terms of the EU agreements in question⁽⁵⁷⁶⁾ and the respective arguments as to why it is contended that the agreements do or do not breach international law.⁽⁵⁷⁷⁾

As regards the EU agreements, the judgement recalled the Association Agreement between the EU and the Kingdom of Morocco. Specifically, Article 9

⁵⁷¹ F. CRISTANI, *supra* note (437), *cit.* at 25.

⁵⁷² Western Sahara Campaign UK is an independent voluntary organization founded in 1984 and a member of Western Sahara Resource Watch; it works in solidarity with the Sahrawi people to generate political support in order to advance their right to self-determination and to promote their human rights. See the official webpage, available at <<http://www.smalgangen.org/1EN>>. [Last accessed 22 September 2016].

⁵⁷³ UK Court refers Western Sahara imports case to EU Court, available at <<http://wsrw.org/a240x3283>>. [Last accessed 22 September 2016].

⁵⁷⁴ Court of First Instance, *Western Sahara v HMRC & SSEFRA*, Case CO/1032/2015, CO/1034/2015.

⁵⁷⁵ *Ibid.*, paras. 15-22.

⁵⁷⁶ *Ibid.*, paras. 23-33.

⁵⁷⁷ *Ibid.*, para. 34.

dealt with industrial products and stated “products originating in Morocco shall be imported into the Community free of customs duties and charges having equivalent effect”⁽⁵⁷⁸⁾; Article 17 related to agricultural and fishery products and refers to more detailed schemes of tariff free entry into the EU⁽⁵⁷⁹⁾; Article 94 stated that it shall apply to “the territory of the Kingdom of Morocco”⁽⁵⁸⁰⁾ and Article 6 (4) of Protocol 4 to the Agreement stated that “the terms Morocco and the Community shall also cover the territorial waters which surround Morocco and the Member States of the Community”.⁽⁵⁸¹⁾

As regards the origin of the products under the 2000 Association Agreement, Mr. Justice Blake asserted that “it is arguable that this agreement refers to products that originate in Morocco and Morocco means the internationally recognized sovereign territory of Morocco and its associated territorial waters on the one hand and the similar territories of the Member states on the other.”⁽⁵⁸²⁾

Mr. Blake then recalled the 2006 FPA between the EU and Morocco and the formulation contained in Article 2 of the agreement, that is to say “Moroccan fishing zone means the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco”, and Article 11 of the same, which states that its area of application is “the territory of Morocco and to the waters under Moroccan jurisdiction”.⁽⁵⁸³⁾

Despite the formulations used in the agreements, Mr. Blake pointed out that there is evidence that agricultural products originating from Western Sahara have been imported in the UK tariff-free on the basis of a declaration that they originate from Morocco and it is undisputed that fishing has taken place within

⁵⁷⁸ Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States and the Kingdom of Morocco, *supra* note (374), Art. 9.

⁵⁷⁹ *Ibid.*, Art. 17.

⁵⁸⁰ *Ibid.*, Art. 94.

⁵⁸¹ *Ibid.*, Protocol 4, Art. 6, para. 4.

⁵⁸² Court of First Instance, *Western Sahara v HMRC & SSEFRA*, Case CO/1032/2015, CO/1034/2015, para. 25.

⁵⁸³ *Ibid.*, para. 27. 2006 FPA, *supra* note (421), Arts. 2-11.

the territorial waters of the Western Sahara and catches have been landed and port fees paid to the Moroccan authorities in ports located within the territory of Western Sahara.⁽⁵⁸⁴⁾

As regards the claimant's contentions on conflict with international law, it has been contended that the EU and the Commission, in entering into these agreements with Morocco, have acted on a mistaken and erroneous understanding of international law. Indeed, "a vague expression of intent by Morocco to benefit the local population by these agreements is insufficient to make them lawful agreements by an administering power pending the expression of self-determination by the people of the territory concerned."⁽⁵⁸⁵⁾ Moreover, it is stressed that Morocco's claim over Western Sahara to be part of its sovereign territory is not recognized by the international community and the EU.

In the judgement finally, Mr. Blake said: "I conclude that there is an arguable case of a manifest error by the Commission in understanding and applying international law relevant to these agreements."⁽⁵⁸⁶⁾

On the present case, John Gurr of Western Sahara Court UK said: "This is a landmark step forward for the Saharawi people. For too long governments have ignored their obligations under international law and made agreements with Morocco to exploit resources that do not belong to Morocco and that Morocco only controls by military force".⁽⁵⁸⁷⁾

4.4 The annulment of the trade agreement between Morocco and the EU

In November 2012 Frente Polisario challenged the Liberalization Agreement between the EU and the Kingdom of Morocco.⁽⁵⁸⁸⁾ The agreement was an

⁵⁸⁴ *Ibid.*, paras. 28-29.

⁵⁸⁵ *Ibid.*, para. 34.

⁵⁸⁶ *Ibid.*, para. 55.

⁵⁸⁷ *UK Court refers Western Sahara imports case to EU Court, supra note (568).*

⁵⁸⁸ Agreement in the form of an exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their annexes and amendments to the Euro-Mediterranean

extension of the 2000 EU-Morocco Association Agreement and meant the trade liberalization of a wide range of agriculture and fisheries products between the Moroccan and EU markets. More specifically, it allowed Morocco to immediately liberalize 45% of the value of imports from the EU, while the Community liberalized 55% of its imports from Morocco; moreover the agreement provided for increased concessions in the fruit and vegetables concession.⁽⁵⁸⁹⁾

However, even this time, the problem was the same as the fisheries agreements because of the vague geographical scope of the agreement. It has been pointed out that the agreement was scheduled to directly benefit companies that export fish and agricultural products from Morocco, but many of these businesses operated from occupied Western Sahara.⁽⁵⁹⁰⁾ Moreover, the report "Label and Liability" made by the NGO WSRW and Emmaus Stockholm identified eleven agricultural plantations in the region around the town of Dakla, owned by either the Moroccan king or by French and Moroccan agriculture companies.⁽⁵⁹¹⁾ Similarly, fish processing companies in Western Sahara and southern Morocco used fish caught or landed in Western Sahara.

Once again, it is worth underlining that "these two sectors together are an important part of Morocco's strategy to cement the occupation, by employing Moroccan settlers in Western Sahara."⁽⁵⁹²⁾

Few weeks before the approval of the agreement, in December 2011, the EU Parliament had rejected the renewal of the FPA covering the waters offshore the occupied territory which created tensions with the Kingdom of Morocco. That refusal was used as argument not to vote against the trade agreement.

Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, OJ 2012 L 241, at 2.

⁵⁸⁹ WSRW, EMMAUS STOCKHOLM, *Label and Liability – How the EU turns a blind eye to falsely stamped agricultural products made by Morocco in occupied Western Sahara*, Brussels/Stockholm, 18 June 2012, at 5.

⁵⁹⁰ E. HAGEN, *supra* note (369), at 24.

⁵⁹¹ *Ibid.*, at 14-16.

⁵⁹² *Ibid.*, at 24.

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The position of some European countries, like the Netherlands and Sweden, on the new controversial agreement, was in support of the Sahrawis rights.

The Dutch Minister for Foreign Affairs, Uri Rosenthal, stated on behalf of his Cabinet and the Cabinet for Economic Affairs, Agriculture and Innovation: “the agricultural agreement between the EU and Morocco [...] is solely applicable to the territory of Morocco. Therefore, Morocco cannot claim tariff preferences for products from Western Sahara on the basis of said agreement.”⁽⁵⁹³⁾

A similar statement was given by the Swedish Minister for Trade, Ewa Björling, in the Swedish Parliament. The minister clarified that no state in the EU recognize Moroccan sovereignty over Western Sahara, and that therefore products made in the territory cannot be given trade preference under the EU-Morocco trade agreements.⁽⁵⁹⁴⁾

On 16 February 2012 the European Parliament consented the new agreement with 369 votes in favor, 225 votes against and 31 abstained. The agreement finally entered into force on 1 October 2012.⁽⁵⁹⁵⁾

The EU Commission welcomed the positive outcome. The Commissioner for Agriculture and Rural Development said: “This is an important agreement, not only in economic terms, but also in political terms”.⁽⁵⁹⁶⁾

On the same line, Catherine Ashton, EU Foreign Policy Chief, stated that “the vote also sends a strong message to our partners in the Southern Neighborhood that we are serious in our promises to respond to their reform efforts. I trust that this is only the beginning of a new phase in EU-Moroccan relations”.⁽⁵⁹⁷⁾

⁵⁹³ *The Netherlands: Western Sahara products are not Moroccan*, available at <<http://www.wsrw.org/a214x2364>>. [Last accessed 20 September 2016].

⁵⁹⁴ *Sweden: Products from Western Sahara not part of EU-Morocco trade deal*, available at <<http://www.wsrw.org/a105x2516>>. [Last accessed 20 September 2016].

⁵⁹⁵E. HAGEN, *supra* note (369), at 24.

⁵⁹⁶ European Commission, 17 February 2012, Press Release: *EU-Morocco: Agricultural Agreement sign of credibility*, available at <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/143>>. [Last accessed 20 September 2016].

⁵⁹⁷ *Ibid.*

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On 10 December 2015, the CJEU ordered the annulment of the trade agreement in question between Morocco and the EU since it included the territory of Western Sahara.⁽⁵⁹⁸⁾

It is worth stressing this judgment for the purpose of the present work since, as it has been asserted:

Hopefully this will be the first step in stopping not only the overall trade, but also the unfounded EU fisheries practices which originate from the Franco era.⁽⁵⁹⁹⁾

The judgment is also important for the international community and the future of Moroccan and other investments in Western Sahara, as it has been mentioned by the Secretary-General of the United Nations, Ban Ki-Moon, in the section entitled “Human Rights” of his report of 19 April 2016 on the situation concerning Western Sahara.⁽⁶⁰⁰⁾

The decision was also welcomed by the African Union. The Chairperson of the Commission of the African Union, Dr. Nkosazana Dlamini Zuma, in a press release, asserted that:

⁵⁹⁸ Judgement of the General Court of 10 December 2015 on *Frente Polisario v. Council*, Case T-512/12, 19 November 2012.

⁵⁹⁹ Statement by Sara Eyckmans, coordinator of Western Sahara Resource Watch, in *European Court annuls EU trade agreement with Morocco*, available at <<http://www.wsrw.org/a105x3314>>. [Last accessed 20 September 2016].

⁶⁰⁰ UN Security Council, Report of the Secretary General on the situation concerning Western Sahara, 19 April 2016, S/2016/355, para. 73. The UN Secretary-General writes: “Moroccan and international investments in Western Sahara and its territorial waters continue to be a subject of contention between the Government of Morocco and Frente Polisario. On 10 December 2015, the General Court of the European Court of Justice delivered a judgement in the case of *Frente Polisario v. Council of the European Union* (case T-512/12) granting Frente Polisario standing before the Court and annulling the European Union-Morocco agreement on agricultural products, processed agricultural products, and fish and fishery products insofar as it applies to Western Sahara. Morocco has denounced this judgement as politically motivated. On 19 February, the Council of the European Union brought an appeal against the judgement, alleging that the Court’s decision had erred in law on six grounds, including by holding that Frente Polisario had the capacity to bring proceedings before the Courts of the European Union and by holding that Frente Polisario was directly and individually concerned by the case (case C-104/16 P)”.

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The decision marks an important step in the global efforts aimed at ensuring that the natural resources of Western Sahara, as a non-self-governing territory, are protected for the benefit of its own people.⁽⁶⁰¹⁾

The judgment of the General Court was firstly delivered only in French.

The legal background of Western Sahara is recalled.⁽⁶⁰²⁾ The judgment then took into consideration the contested decision and its background of the Euro-Mediterranean agreement establishing the Association Agreement between the EC and the Kingdom of Morocco.⁽⁶⁰³⁾

The capacity of Frente Polisario to bring proceedings is analyzed. An important part of the argumentation of the Council and Commission has indeed regarded the absence of legal standing of Polisario in such a process; even though Polisario represents the Sahrawis in the UN talks, the EU institutions claimed that this does not mean that they can represent the Sahrawis in a court.

The applicant, the Polisario Front, states that it is “a subject of international law which has the international legal personality granted to national liberation movements under international law.” It also claims that it has been recognized as representing the Sahrawi people by the bodies of the UN, the EU and Morocco in negotiations.⁽⁶⁰⁴⁾

On this issue, paragraph 53 contains some conditions, that is to say constituting documents and an internal structure giving it the independence necessary to act as a responsible body in legal matters. Those conditions are fulfilled as far as concerns Frente Polisario. It has its own constituting document and a fixed internal structure, having a secretary-general who gave authority to his

⁶⁰¹ African Union, 12 December 2015, Press Release: *The African Union notes the importance of the judgment of the European Union Court of Justice on the exploitation of the natural resources of Western Sahara and calls for renewed international efforts to address this issue*, available at <<http://www.peaceau.org/uploads/auc.com-western-sahara-12-12-15.pdf>>.

⁶⁰² General Court, *Fronte Polisario v Council*, Case T-512/12, paras. 1-16.

⁶⁰³ *Ibid.*, paras. 17-21.

⁶⁰⁴ *Ibid.*, para. 37.

representative to bring the present action. That structure enables it to act as a responsible body in legal relations.⁽⁶⁰⁵⁾

On this issue, it is finally held that the Polisario Front must be regarded as a legal person within the meaning of Article 263 of the TFEU and that it may bring an action for annulment before the courts of the EU even though it does not have legal personality according to the law of a member state or a third state. It can only have such a personality in accordance with the law of Western Sahara, which however, at the present time is not a state recognized by the EU and its member states and does not have its own law.⁽⁶⁰⁶⁾

As regard the direct and individual concern to the Frente Polisario of the contested decision, the Council, supported by the Commission, denied it.⁽⁶⁰⁷⁾

The Commission recalled the terms of the resolution 2625 (XXV). According to the Commission, it follows that a NSGT does not belong to the administering power, but has a separate status under international law. International agreements concluded by the power administering a NSGT do not apply on that territory, except by express extension. Therefore, the Commission asserted that, in the present case, in the absence of such extension, the Association Agreement with Morocco applies only to products originating in the Kingdom of Morocco, a State which, under international law, does not include Western Sahara but occupies it militarily.⁽⁶⁰⁸⁾

Frente Polisario asserted that the Kingdom of Morocco applies to Western Sahara the agreement concluded with the EU including the Association Agreement with Morocco and both the Council and the Commission know it. Moreover, Frente Polisario relied on a number of elements in support of that statement. The first element is a common response given by the High Representative of the Union for Foreign Affairs and Security Policy, Vice-President of the Commission, Catherine Ashton, on behalf of the

⁶⁰⁵ *Ibid.*, para. 54.

⁶⁰⁶ *Ibid.*, para. 60.

⁶⁰⁷ *Ibid.*, para. 63.

⁶⁰⁸ *Ibid.*, paras. 75-76.

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Commission⁽⁶⁰⁹⁾; there is a number of documents on the website of the Commission Directorate-General (DG) which show that after the conclusion of the Association Agreement with Morocco, the Food and Veterinary Office, which is part of that DG, made a number of visits to Western Sahara to check of compliance by the Moroccan authorities.⁽⁶¹⁰⁾ Finally, it is argued that the list of Moroccan exporters approved under the Association Agreement contains 140 undertaking established in Western Sahara.⁽⁶¹¹⁾

One has to underline that it is recalled that the Council stated that it fully supported the UN's effort to find a stable and permanent solution to the question of Western Sahara and that "no EU institutions had ever recognized, *de facto* or *de jure*, Moroccan sovereignty over Western Sahara".⁽⁶¹²⁾

Moreover, the fact that the EU addressed the Moroccan authorities as the only ones which could implement the provisions of the agreement in the Western Sahara territory, did not lead to any recognition *de facto* or *de jure* of any sovereignty of the Kingdom of Morocco over the territory of Western Sahara.⁽⁶¹³⁾

In addition, both the Commission and the Council indicated that the agreement referred to by the contested decision was applied *de facto* to the territory of Western Sahara.

All these factors show that the EU institutions were aware that the Moroccan authorities also applied the provisions of the Association Agreement with

⁶⁰⁹ Joint answer given by High Representative/Vice-President Ashton on behalf of the Commission. Written questions : E-001004/11 , P-001023/11 , E-002315/11, OJ 2011 C 286 E, available at

<<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-001023&language=EN>>. [Last accessed 20 September 2016]. "The Commission would like to clarify that the EU-Morocco Association Agreement does not contain any reference to the Western Sahara. [...] In addition, neither the Association Agreement, nor the envisaged Agreement on the liberalization of trade on agriculture and fisheries products foresees any specific rules regarding requirements as to the labelling of products. Products originating in Morocco and imported in the EU can thus not be differentiated on a regional basis".

⁶¹⁰ *Ibid.*, para. 79.

⁶¹¹ *Ibid.*, para. 80.

⁶¹² *Ibid.*, para. 81.

⁶¹³ *Ibid.*, paras. 82-83.

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Morocco to the part of Western Sahara it controlled and did not oppose that application. To the contrary, the Commission cooperated to a certain extent with Morocco with a view to that application, by including undertakings established in Western Sahara.⁽⁶¹⁴⁾

There is a divergence between the respective views of the European Union and the Kingdom of Morocco as to the international status of Western Sahara: while the Commission and the Council do not recognize the annexation of Western Sahara by Morocco, the Kingdom of Morocco considers Western Sahara as an integral part of its territory.⁽⁶¹⁵⁾

In article 94 of the Association Agreement with Morocco, the reference to the territory of the Kingdom of Morocco may have been understood by the Moroccan authorities as including Western Sahara or at least the part controlled by it. Although the EU institutions were aware of it, the Association Agreement with Morocco did not include any interpretation clause and no other provision which would have the result of excluding the territory of Western Sahara from its scope.⁽⁶¹⁶⁾

It should also be taken into account the fact that the agreement was concluded 12 years after the approval of the Association Agreement had been implemented for the whole of that period. If the EU institutions wished to oppose the application to Western Sahara of the Association Agreement, they could have insisted on including a clause excluding such application into the text of the agreement approved by that decision. Their failure to do so shows that they accept, at least implicitly, the interpretation of the Association Agreement with Morocco and the Agreement approved, according to which those agreements apply also to the part of Western Sahara controlled by Morocco.⁽⁶¹⁷⁾

⁶¹⁴ *Ibid.*, para. 99.

⁶¹⁵ *Ibid.*, para. 100.

⁶¹⁶ *Ibid.*, para. 101.

⁶¹⁷ *Ibid.*, para. 102.

In those circumstances it must be held that the agreement, the conclusion of which was approved by the contested decision, also applies to the territory of Western Sahara or, more precisely, to the largest part of that territory which is controlled by Morocco.⁽⁶¹⁸⁾

The Polisario Front must be regarded as being individually concerned by the contested decision.⁽⁶¹⁹⁾ Therefore, it must be held that since the Polisario Front is directly and individually concerned by the contested decision, there is, from that point of view, no doubt as to the admissibility of the action, contrary to the Council and Commission's arguments. The Polisario Front seeks the annulment of the contested decision since it approves the application to Western Sahara of the Agreement to which it refers. The Polisario Front is directly and individually concerned by the contested decision.⁽⁶²⁰⁾

In support of the application, the Polisario Front put forward 11 pleas in laws. The failure to state adequate reasons in the contested decision and the failure to comply with principle of consultation are two pleas related to the external legality of the contested decision, while the infringement of fundamental rights, the breach of the principle of consistency of the policy of the EU by failing to observe the principle of sovereignty, the breach of the fundamental values of the EU and the principle governing its external action, the failure to achieve the objective of sustainable development, the incompatibility of the contested decision with the principles and objectives of the EU's external actions in the area of development cooperation, the breach of the principle of protection of legitimate expectations, the incompatibility of the contested decision with several agreements concluded by the EU, the incompatibility of the contested decision with general international law and the law of international liability in EU law are the pleas related to the internal legality of the contested decision.

What can be underlined is that nothing in the applicant's pleas and arguments supports the finding that, under EU law or international law, the conclusion of

⁶¹⁸ *Ibid.*, para. 103.

⁶¹⁹ *Ibid.*, para. 111.

⁶²⁰ *Ibid.*, para. 114.

an agreement with a third state which may be applied on a disputed territory is absolutely prohibited.⁽⁶²¹⁾ A reference to the Corell opinion is also made.⁽⁶²²⁾

The Council argued that the fact of having concluded an agreement with a non-member state does not and cannot make the EU liable for any action committed by that country whether or not they correspond to infringements of fundamental rights.⁽⁶²³⁾

That argument is correct, but it ignores the fact that, if the EU allows the export to its member states of products originating in that other country which do not respect the fundamental rights of the population of the territory from which they originate, it may indirectly encourage such infringements or profit from them.⁽⁶²⁴⁾ That consideration is important in the case of a territory like Western Sahara which is in fact administered by a non-member State, that is to say Morocco, although it is not included in the recognized international frontiers of that non-member State.⁽⁶²⁵⁾

The Council contended that none of the provisions of the contested decision or the agreement approved by it “lead to the conclusion that the exploitation of the resources of Western Sahara is conducted to the detriment of that territory or prevent Morocco from guaranteeing that the exploitation of natural resources is carried out for the benefit of Western Sahara in their interests.”⁽⁶²⁶⁾

However, the exports to the EU of products, originating, in particular from Western Sahara, is facilitated by the agreement at issue. In fact, that is one of the objectives of that agreement. Accordingly, if it were the case that the Kingdom of Morocco was exploiting the resources of Western Sahara to the detriment of its inhabitants, that exploitation could be indirectly encouraged by the conclusion of the agreement approved by the contested decision.⁽⁶²⁷⁾

⁶²¹ *Ibid.*, para. 215.

⁶²² *Ibid.*, para. 222.

⁶²³ *Ibid.*, para. 230.

⁶²⁴ *Ibid.*, para. 231.

⁶²⁵ *Ibid.*, para. 232.

⁶²⁶ *Ibid.*, para. 236.

⁶²⁷ *Ibid.*, para. 238.

Given the fact, *inter alia*, that the sovereignty of the Kingdom of Morocco over Western Sahara is not recognized by the European Union or its Member States, or more generally by the UN, and the absence of any international mandate capable of justifying Moroccan presence on that territory, the Council, in the examination of all the relevant facts of the present case, with a view to exercising its wide discretion as to whether or not to conclude an agreement with the Kingdom of Morocco which may also apply to Western Sahara, should have satisfied itself that there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights. The Council cannot merely conclude that it is for the Kingdom of Morocco to ensure that no exploitation of that nature takes place.⁽⁶²⁸⁾

The Conclusion is that Council Decision 2012/497/EU of 8 March 2012 on the conclusion of the Liberalization Agreement is annulled in so far as it approves the application of that agreement to Western Sahara.

It has been noted that:

This judgment shows how clear-cut the Western Sahara case is legally. Neither Morocco nor the EU have the right to exploit the resources of Western Sahara. No state in the world recognizes the baseless Moroccan claims to that land. If the EU wants to deal with the goods of Western Sahara, they need first to consult the people of the territory, not Morocco.⁽⁶²⁹⁾

The judgement however, did not please the Moroccan government which reacted by freezing the relations with the EU. The day after the ruling, the High Representative of the EU for Foreign Affairs and Security Policy, F. Mogherini, declared that the EU institutions were about to examine the decision in order to identify the different options, notably the preparatory work for a possible

⁶²⁸ *Ibid.*, para. 241.

⁶²⁹ Statement by Sara Eyckmans, coordinator of Western Sahara Resource Watch, in *European Court annuls EU trade agreement with Morocco*, available at <<http://wsrw.org/a105x3314>>. [Last accessed 20 September 2016].

appeal. It was also underlined that Morocco holds the *statut avancé* in its relations with the EU and that the bilateral relations had not been challenged.⁽⁶³⁰⁾

The Council officially brought on an appeal on 19 February 2016. The Official Journal of the EU published it on 29 March 2016.⁽⁶³¹⁾

The Council raised several pleas alleging errors of law. It argued that the Court erred in law by holding that the Frente Polisario had the capacity to bring proceedings before the Courts of the EU and that it was not direct and individually concerned by the decision annulled. In addition, the Council argues that the Court has erred in its interpretation of the applicable law and it particularly disagreed that it had any responsibility to examine the impact of the agreement on the human rights situation in Western Sahara and that it had to verify whether the agreement could be carried out to the detriment of the Sahrawis and their fundamental rights.⁽⁶³²⁾

The final judgment is now expected before the end of the current year.

Belgium, France, Germany, Portugal and Spain have asked to speak before the Court.⁽⁶³³⁾

The position hold by Spain is still controversial⁽⁶³⁴⁾ if it is considered again that on 4 July 2014 the *Audencia Nacional* newly confirmed that Spain is the

⁶³⁰ EU appeals ECJ annulment of EU-Morocco Free Trade deal, available at <<http://wsrw.org/a240x3326>>. See also *Déclaration de la HR/VP Federica Mogherini sur l'arrêt du Tribunal de l'Union européenne*, 11 December 2015, available at <https://eeas.europa.eu/headquarters/headquarters-homepage/5500_fr>.

⁶³¹ Appeal brought on 19 February 2016 by the Council of the European Union against the judgment of the General Court (Eighth Chamber) delivered on 10 December 2015 in Case T-512/12 Polisario Front v Council, Case C-104/16 P, 2016/C 111/20.

⁶³² *Ibid.*

⁶³³ A. ERIKSSON, *Five EU States gang up on Africa's last colony*, 18 July 2016, in Euobserver, available at <<https://euobserver.com/justice/134391>>. [Last accessed 20 September 2016]. The author stresses the reasons of the five countries to act. French is the main ally of Morocco in the EU and in the UN and many agricultural companies in the occupied Sahrawi territory belong to French nationals; Spain is the main beneficiary of the FPA with Morocco; Belgium and Germany signed readmission agreements for Moroccan nationals while Sweden asserted that any ruling would be worth if it was upheld by a higher court.

⁶³⁴ *España interviene contra el Sahara Occidental en el Tribunal de la UE*, available at <<http://wsrw.org/a110x3489>>. [Last accessed 29 September 2016].

administering Power of Western Sahara, not Morocco and that the territory cannot be considered Moroccan.⁽⁶³⁵⁾

4.4.1 The Advocate-General Opinion

On 13 September 2016, the Advocate-General Melchior Wathelet set out his opinion to EU judges in Luxembourg on the CJEU judgement in question.⁽⁶³⁶⁾

Firstly, one has to consider that the role of the Advocate-General is to assist the Court in some of the cases presented before it by delivering reasoned submissions, which are known as opinions.⁽⁶³⁷⁾ These opinions are not binding to the CJEU. Nevertheless, scholars often assume that they influence the final decisions made by the Court. That could mean means, in the ambit of the Court of Justice, “the power of the Advocate-General to persuade the Court”.⁽⁶³⁸⁾

In his opinion, the Advocate-General notes that the two Agreements in question do not contain any provisions seeking to extend their scope of application to Western Sahara, nor was such an extension expressly provided for when those agreements were ratified by Morocco.

⁶³⁵ Audencia Nacional, Autono. 40/2014 (4 July 2014), and Sumario1/2015 (9 April 2015), available at <http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7197131&links=sahara%20occidental&optimize=20141028&publicinterface=true>. [Last accessed 22 September 2016].

⁶³⁶ Opinion of Advocate General Wathelet, delivered on 13 September 2016, ECLI:EU:C:2016:677. See *EU Court Advocate; Western Sahara is not part of EU-Morocco trade deal*, available at <http://wsrw.org/a105x3567>. [Last accessed 22 September 2016]. For a comment see J. SOROETA LICERAS, *Algunas notas sobre el informe del abogado general del TJUE de 13 de septiembre de 2016*, available at www.aiodh.org. [Last accessed 22 September 2016]; *Interview with Gilles Devers, Polisario's lawyer in the EU Courts*, available at <http://wsrw.org/a105x3584>. [Last accessed 22 September 2016].

⁶³⁷ Art. 252 of the TFEU reads: “The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General. It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement”.

⁶³⁸ For an overview about the work and influence of the Advocate-General in the CJEU, see C. ARREBOLA, A. J. MAURICIO, H. JIMÉNEZ PORTILLA, *An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union*, University of Cambridge Faculty of Law Legal Studies Research Paper Series, Paper No. 3/2016, January 2016, at 5-6.

He emphasizes as well that the EU and its Member States have never recognized that Western Sahara is part of Morocco or that the latter has sovereignty over the territory.⁽⁶³⁹⁾

The Advocate General rejects as well the argument according to which it should be recognized that the scope of the two agreements at issue includes Western Sahara on the ground that those agreements are applied *de facto* to that territory. The Advocate-General recalls that, in principle, international law does not permit the extension of the scope of a bilateral treaty to a territory which constitutes a third party in relation to other parties to that treaty. Since Western Sahara is still today a NSGT, it “constitutes a third party in relation to the European Union and the Kingdom of Morocco”.⁽⁶⁴⁰⁾

Even the theory of the “*de facto* administrative power”, which has been discussed in the second chapter of the present work, cannot be sustained anymore. Indeed, the Advocate-General writes that “the Council does not explain at all how it might be lawfully possible to apply an agreement concluded with a country in a certain territory without recognizing that that country has any legal competence or authority in that territory”.⁽⁶⁴¹⁾

On this point, the Polisario’s lawyer in the EU’s Courts, G. Devers, states that:

This is the end of the EU’s “*de facto* administrative power” excuse. From now on, the EU institutions will have to face reality, namely that, having no sovereign rights over the Sahrawi territory and no international mandate to administer it, Morocco occupies Western Sahara according to international humanitarian law.⁽⁶⁴²⁾

Consequently to the fact that the two agreements do not apply to Western Sahara, the Advocate-General proposes that the Court should set aside the

⁶³⁹ Opinion of Advocate General Wathelet, *supra* note (636), para. 83.

⁶⁴⁰ *Ibid.*, para. 105.

⁶⁴¹ *Ibid.*, para. 84.

⁶⁴² Interview with Gilles Devers, Polisario’s lawyer in the EU Courts, *supra* note (636).

judgment of the General Court and dismiss the action brought by the Polisario Front as inadmissible as the latter no longer has any interest in having the contested decision annulled.

On the issue referred to the *locus standi* of the Polisario Front, one has to distinguish two points. The first point relates to the assessment on the legal personality of the Polisario as able to bring a case before the CJEU. On this point, the Advocate-General asserts that “the Polisario Front has the capacity to be a party to proceedings before the EU Courts”.⁽⁶⁴³⁾

Moreover he recognizes the Polisario Front as a National Liberation Movement:

the “recognition [of the POLISARIO Front] as a national liberation movement by a number of States, as the representative of the people of Western Sahara by the UN General Assembly, its membership in the African Union international organization, the conclusion of agreements with the Islamic Republic of Mauritania and the Kingdom of Morocco and its undertaking to respect the Geneva Conventions of 12 August 1949 on the protection of victims of war, made in accordance with Article 96(3) of the Additional Protocol relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, tend to militate in favor of recognition of the legal personality which international law confers on national liberation movements.”⁽⁶⁴⁴⁾

The second point to consider is whether the Polisario Front, as representative of the Sahrawi people, can be concerned by the decision of the Council to conclude an international agreement with the Kingdom of Morocco. On this point, the Advocate-General’s point of view is that the Polisario Front cannot be concerned by EU-Morocco agreements only applicable to the Moroccan

⁶⁴³ *Ibid.*, para. 143.

⁶⁴⁴ *Ibid.*, para. 146.

territory, since the aforementioned agreements are not applicable to Western Sahara.⁽⁶⁴⁵⁾

The Advocate-General notes as well that the Polisario Front does not appear to be the sole representative of the people of Western Sahara in international relations because it is conceivable that Spain, the former colonial power of that territory, still has responsibility in that regard.

However, despite the *locus standing* of the Frente Polisario, the overall conclusion of the Advocate-General is that none of the EU's agreements with Morocco apply in Western Sahara.

⁶⁴⁵ *Ibid.*, paras. 176-201.

Conclusions

The aim of the present work has been to discuss on the legality of the fisheries partnership agreements between the European Union and Morocco. It has been demonstrated throughout the chapters that these agreements can be considered illegal.

In order to support the aforementioned statement, the history of Western Sahara, with a focus on the legal background, has been briefly recalled. It has been discussed that the land of Western Sahara was inhabited before the Spanish colonization and the indigenous population, the Sahrawis, have manifested their identity through the liberation movement, known as Polisario Front, which today represent them and govern, together with the Sahrawi Arab Democratic Republic, the liberated zone of Western Sahara, while Morocco administers *de facto* the area which faces the Atlantic ocean.

Morocco has invoked the 1975 Madrid Agreement as the justification for its presence in Western Sahara. However, it has been argued that the agreement has been considered null and void since it is contrary to a peremptory norm of *jus cogens*, namely the right to self-determination, and because of the lack of legitimacy of the parties to the Agreement.

Moreover, in the 1975 ICJ advisory opinion, any claim made by Morocco with reference to the territory of Western Sahara had been denied.

The role and the classification of Spain and Morocco under international law with regard to Western Sahara have been clarified: Spain is still today the *de jure* administering power and under art. 73 of the UN Charter, it has political and economic obligations towards Western Sahara. From the political point of view, Spain has to ease the process of self-determination of Western Sahara, which has been denied for more than 40 years, while from the economic point of view, it has been mainly referred to the principle of permanent sovereignty over natural resources.

However, many attempts have been made by Spain to lose its status and Morocco is now administering *de facto* Western Sahara.

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The qualification of Morocco as occupying power has been highlighted considering several GA Resolutions, the system which today regulates the *jus in bello*, that is to say the Hague Conventions (IV) of 1907 respecting the Laws and Customs of War on Land and its annexed Regulation, the Fourth Geneva Conventions of 1949, the Second Geneva Conventions of 1949 and the Protocol II Additional to the Geneva Conventions of 1977.

It has been showed then the IHL applies to Western Sahara by pointing out the *Audencia Nacional* Decisions, the UNGA Resolutions and some facts on the grounds, such as the presence of a wall which divides the territory of Western Sahara. Even though Morocco has been classified as occupying power, there have been tendencies to refer to it as “administrative power”, which aims at giving it new rights on the basis that it is de facto administering the territory.

A study of the PPSNR, which today is considered customary law, has been presented together with the so-called Corell opinion which basically asserts that the legality of the resource exploitation activities in Western Sahara would be guaranteed if those activities were conducted for the benefit of the people of that territory, on their behalf or in consultation with their representative.

This basically implies that an occupying power may enter into agreements regarding the use of natural resources of an occupied territory as an occupying or de facto administering power, under the condition that this must be for the benefit of the people of the occupied territory and that it must be in accordance with the wishes of that people. Moreover it has been showed that pillage is prohibited and may constitute a war crime.

As regards the role of third parties, instead, like the European Union, they have an obligation not to recognize an illegal annexation and not to assist in the continued occupation.

Once the role of Morocco and Spain with reference to Western Sahara and the law applicable to the case with the aim of ensuring the protection of the natural resources have been clarified, the case study presented refers to the fishery agreements between the EU and Morocco.

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An overview of the relations between EU and Morocco has helped to complete a framework which could not be based only on the economic aspect. The 1996 Association Agreement is considered the legal framework for relations between the EU and Morocco and since 2008 Morocco has been benefitting of an advanced status in its relationships with the EU.

In 2006 a Fisheries Partnership Agreement was signed with Morocco, and the most controversial aspects, later pointed out by the European Parliament Legal Service, was the vague geographical scope and the phrase contemplated by the Agreement which did not explicitly excluded the waters off Western Sahara. At the time of the 2006 Legal Service's Opinion, however, it was not still demonstrated that the EU-flagged vessels were fishing in the waters off Western Sahara, thus, in the Legal Service's view, it was up to Morocco to implement the agreement according to international law.

In 2009 two events were crucial and lead to the blocking by the EU Parliament of a one-year renewal of the agreement, namely the enactment by the SADR of its Law establishing the Maritime Zones of the Sahrawi Arab Democratic Republic and the admission by the Commission that the EU-flagged vessels had fished in the waters off Western Sahara.

In 2013 however, a new Protocol entered into force, which this time, in Art. 1 made reference to the Association Agreement and human rights. However, still some doubts about the legality of the agreements led to request another legal opinion which concluded that the agreement would have been legal if applied in a way that the agreements would have benefitted the population of Western Sahara.

The contradictory attitude of the EU organs have been also shown: while the Parliament has acknowledged in different occasions the right to self-determination of the Sahrawis and has been more sensitive to the conflict, the Council has enacted international agreements with Morocco, detrimental to the PPSNR of the Sahrawis, and the Commission has been more in favor of the Morocco's position, by misrepresenting the international law.

At the light of the present work then, one can conclude that the Fisheries Agreement applied so to allow the issuing of fishing licenses for the waters off Western Sahara would be compatible with international law and with the PPSNR of the Sahrawis in two cases:

1. the Saharawis had been consulted during the negotiation of the agreements;
2. the Sahrawis would benefit from this practice.⁽⁶⁴⁶⁾

It has been shown at this regard that none of the previous conditions have been fulfilled. Moreover, one can still resume the reasons why the agreements are considered illegal:

1. The legal status of Western Sahara is still that of NSGT, thus, there are obligations to be respected;
2. No reference has been made to the rights of the Sahrawis;
3. The consequences of the 1975 ICJ opinion, which recognized no claim of Morocco to the territory of Western Sahara, have not been taken into consideration;
4. The agreements do not respect the PPSNR, to the extent that the Saharawis had not been consulted during the negotiation of the agreements and the Polisario Front, the legitimate representative of the people of Western Sahara, has never given its consent for the conclusion of an international agreement by Morocco with third countries for the exploitation of natural resources;
5. The Sahrawis did not benefit from such agreements and have not been consulted.
6. The EU is in violation of the duty of non-recognition.

In one author's view, three different solutions can be envisaged:

⁶⁴⁶ F. CRISTANI, *supra* note (437), at 12.

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1. The provision of two different legal regimes, one for Morocco and one for Western Sahara which has to be negotiated and agreed with the Sahrawis;
2. An explicit exclusion of the waters off Western Sahara in the agreement with Morocco;
3. An implicit exclusion of the waters off Western Sahara when applying the agreement.⁽⁶⁴⁷⁾

The United States, for example, excluded Western Sahara from the scope of the territorial application of the Free Trade Agreement between Morocco and the EU⁽⁶⁴⁸⁾, as the European Free Trade Association also did.⁽⁶⁴⁹⁾

Moreover, as specifically regards the duty of non-recognition, one may recall the Association Agreement concluded with Israel, which is not applicable to the importation of goods from the Occupied Palestinian Territories⁽⁶⁵⁰⁾ and the Association Agreement with Cyprus, which is not applicable to Northern Cyprus.⁽⁶⁵¹⁾

Even in the case of the occupation of Crimea by Russia, condemned by the EU Council, the EU has taken different measures, such as diplomatic sanctions, asset freeze and visa ban for individuals and entities that have supported or benefitted from the annexation, an embargo on trade and investment in Crimea

⁶⁴⁷ F. CRISTANI, *supra* note (437), at 18.

⁶⁴⁸ In July 2004, the United States Trade Representative, stated in reference to the Free Trade Agreement (FTA) between the USA and Morocco that “the FTA will cover trade and investment in the territory of Morocco as recognized internationally, and will not include Western Sahara”. Statement available at <http://www.vest-sahara.no/files/pdf/Zoellick_FTA_2004.pdf>. [Last accessed 29 September 2016].

⁶⁴⁹ EFTA is an intergovernmental organization set up for the promotion of free trade and economic integration to the benefit of its four Member States, namely Iceland, Liechtenstein, Norway and Switzerland. For a comment on the exclusion of Western Sahara from the free trade agreement with Morocco, see *Western Sahara not part of EFTA-Morocco free trade agreement*, available at <<http://wsrw.org/a159x1410>>. [Last accessed 29 September 2016].

⁶⁵⁰ See European Court of Justice (Fourth Chamber), Case *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, Judgement, 25 February 2010.

⁶⁵¹ European Court of Justice, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others (Anastasiou I)*, Case C-432/92, Judgement, 5 July 1994, ECR I-3807, 1994; F. CRISTANI, *supra* note (437), at 22.

and an embargo on certain financial transactions with a number of Russian banks.⁽⁶⁵²⁾

In a recent report published by the Policy Department of the European Parliament⁽⁶⁵³⁾, several recommendations have been pointed out specifically for the European Parliament, which include, *inter alia*:

- The European Parliament should refuse to give its assent to treaties and other agreements and measures which violate the obligation of non-recognition and/or which support an ongoing illegal occupation or annexation.
- The European Parliament and its Members should regularly ask the Commission and other responsible EU bodies about information regarding the implementation of agreements with - and projects in occupying states, in order to ensure that no illegal occupation or annexation is recognized or supported.⁽⁶⁵⁴⁾

These recommendations should be applied also with reference to the agreements with Morocco.

Another possible solution is the appeal to the European Court of Justice, as it has been showed in the last chapter of the present work. Three cases have been pointed out and two of them have been endorsed by the Polisario Front. What it has been discussed and questioned, is actually *the locus standi* of the Polisario Front.

Very recently, the Advocate-General issued a restrictive-approach opinion on the case of the liberalization agreement. It has been argued that if the ECJ

⁶⁵² Policy Department of the European Parliament Report, Occupation/Annexation of a territory: Respect for international law and human rights and consistent EU policy, at 25-27, available at

<http://wsrw.org/files/dated/2016-0410/euparillegalreportcrimeaoptwsahara_2015.pdf>. [Last accessed 29 September 2016].

⁶⁵³ *Ibid.*

⁶⁵⁴ *Ibid.*, at 54.

adopts the opinion, the Polisario Front will not be able to challenge the fisheries agreement in other case pending before the ECJ.⁽⁶⁵⁵⁾

Different visions however are presented.

According to José Bové, a French MEP for the Green Party, and the negotiator for the 2012 EU-Morocco trade agreement, “the only solution would be to bring the Western Sahara people to the table to discuss how they should be represented, but it’s a key point the Moroccans will not accept”.⁽⁶⁵⁶⁾

On this point, though, Mr. Devers, Polisario’s lawyer, disagrees by arguing that the 2013 Protocol and the 2006 FPA are agreements organizing the exploitation of natural resources of Western Sahara by the EU:

As the sole representative of the Sahrawi people in their right to self-determination, which includes their right to permanent sovereignty over the natural resources of Western Sahara, the Polisario Front is logically concerned by the fishing activities of the EU vessels in the Sahrawi waters.⁽⁶⁵⁷⁾

Cailin Birch instead, Morocco’s analyst from the Economist Intelligence Unit in London, points out that “the only other option at this point is that the SADR would take the helm and take action on behalf of the Sahrawi people”.⁽⁶⁵⁸⁾

⁶⁵⁵ See for example, L. A. BAGNETTO, *Legal analysis of EU-Morocco trade deal leaves Western Sahara in limbo*, 16 September 2016, available at <<http://m.en.rfi.fr/africa/20160916-legal-analysis-eu-morocco-trade-deal-leaves-western-sahara-limbo>>. [Last accessed 29 September 2016]. The author asserts: “If the Polisario’s claim that Morocco was committing human rights violations, then the December 2015 tribunal decision blocking the original agreement would also be thrown out. Not only would the treaty, in theory, continue outside of Western Sahara waters, but the Polisario would not be able to challenge any treaties in the future because of its new EU distinction that it is not the sole voice of the Western Sahara people”.

⁶⁵⁶ *Ibid.*

⁶⁵⁷ *Interview with Gilles Devers, Polisario’s lawyer in the EU Courts, supra note (636).*

⁶⁵⁸ L. A. BAGNETTO, *Legal analysis of EU-Morocco trade deal leaves Western Sahara in limbo, supra note (655)*. For a comment, see K. ASMAR, *Growing international recognition of Western Sahara offers new hope for Africa’s last colony*, 25 August 2016, available at <<https://ceasefiremagazine.co.uk/growing-international-recognition-western-sahara-offers-hope-africas-colony/>>. [Last accessed 29 September 2016].

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However, the final ruling of the ECJ will clarify the issues at stake. In Mr. Devers' words, "the Polisario Front and the Sahrawi people have every reason to trust the EU judicial system".⁽⁶⁵⁹⁾

⁶⁵⁹ *Interview with Gilles Devers, Polisario's lawyer in the EU Courts, supra note (657).*

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