DIALOGUES
A DIALOGUE ON *FRONT POLISARIO*

FRONT POLISARIO AND THE EXPLOITATION OF NATURAL RESOURCES BY THE ADMINISTRATIVE POWER

ENRICO MILANO*

ABSTRACT: Drawing from the recent *Front Polisario* judgments of the General Court (judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*) and the Court of Justice (judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC]), the present *Dialogue* questions whether and to what extent international law limits the power of a State administering a non-self-governing territory to dispose of the latter's natural resources. While in recent times we have seen a distinctive consolidation of international practice backed by a widespread expression of *opinio juris* pointing to the emergence of a customary rule substantially limiting the powers and rights over natural resources of States exercising authority over non-self-governing territories, elements of uncertainty remain as to the precise content of such rule and its coordination with concurring and potentially applicable legal regimes. It is also submitted that the recent judgment of the Court of Justice, while avoiding to rule on the matter in point, has reinforced the view that exploitation of natural resources in NSGTs shall be conducted with a full and substantial involvement of the representatives of the people.

KEYWORDS: non-self-governing territories – exploitation of natural resources – powers and obligations of administrative power – Western Sahara – consultation – CJEU.

I. THE EU JUDICIARY FACED WITH THE EXPLOITATION OF NATURAL RESOURCES IN WESTERN SAHARA

The judgments rendered by the General Court and by the Court of Justice in *Front Polisario* are noteworthy in two respects.[1] Firstly, after more than 40 years of Moroccan

* Associate Professor of International Law, University of Verona, enrico.milano@univr.it.

[1] General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*; Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC].

administration of Western Sahara, for the very first time, a judicial body has been faced with and has addressed in the merits the Polisario's claims concerning the exploitation of natural resources in Western Sahara by Morocco and third States and international organizations cooperating in such endeavour. Secondly, albeit with different arguments and reasoning, both the General Court and the Court of Justice have come to the conclusion that the 2012 Agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fisheries products (hereinafter "Liberalisation Agreement") shall not apply to the territory of Western Sahara. Little surprise that Polisario has welcomed both judgments as historical victories in their quest for self-determination of the Sahrawi people.

In terms of international legal issues raised by proceedings and by the ensuing judgments, one stands out in the legal challenge brought by Polisario and yet, relatively underscrutinised in the two judgments: namely, the right and power of the State administering a non-self-governing territory (NSGT), whose people have not yet exercised their right to self-determination, to exploit its natural resources, such as gas and oil fields, other mineral resources, fisheries, forestry and agricultural products. While the General Court's annulment of the Liberalization Agreement as far as it concerned Western Sahara was based on the consideration that no adequate effort was made by the EU institutions to ensure that the exploitation of natural resources would benefit the local population, the judgment of first instance rejected all challenges based on international law and came to its conclusion in the context of scrutinizing the way political discretion in concluding an international agreement was exercised. The issue has not been directly considered in the judgment of the Court of Justice: according to the Court, any misconduct by the EU had to be based on the assumption that the Liberalization Agreement extended to Western Sahara, an assumption that could not be sustained on the basis of a systematic interpretation of the agreement in light of other applicable rules of international law.[2]

The present *Dialogue* examines the state of the art concerning the regulation under international law of the exploitation of natural resources in NSGTs, drawing significant insights from the EU practice of concluding agreements with Morocco allowing a cooperative effort in the exploitation of natural resources in Western Sahara.

II. Administrative powers and the exploitation of natural resources in non-self-governing territories

A first conceptual clarification is in order. When we employ the expression "administrative power" with reference to a NSGT, such as Western Sahara, we indicate any governmental authority which is displaying full control and jurisdiction over the territory in question, re-

[2] *Council of the European Union v. Front Polisario* [GC], cit., paras 81-106.

gardless of the latter's designation as "administering power" under Chapter XI of the UN Charter or as "occupying power" under the law of belligerent occupation. The choice to employ the category of "administrative power" for Morocco's control over Western Sahara is warranted by the fact that Morocco cannot qualify as administering power under Chapter XI and that its designation as occupying power is not uncontroversial.[3]

The starting point in order to ascertain the "state of the art" in international law on the application of the principle of permanent sovereignty over natural resources in NSGTs – as well as sticking point in the arguments variably employed by the Commission, by States in the Council and by members of the European Parliament in arguing against or in favour of the conclusion of bilateral agreements applying to Western Sahara and facilitating the exploitation of natural resources and trade in agricultural and fishing products – is the 2002 legal opinion rendered by the UN Legal Counsel concerning the exploitation of natural resources in NSGTs, in particular in Western Sahara.[4] The legal advice was issued upon request by the UN Security Council on the matter of the legality of the actions taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in the seabed off the coast of Western Sahara. The UN Legal Counsel pointed to the significant evolution of international law on the matter, exemplified by a series of General Assembly (GA) resolutions, highlighting the shift from a general prohibition of exploitation of natural resources in NSGTs towards a regime where international law only prohibits "those economic activities which are not undertaken in accordance with the interests and wishes of the people of the territory and deprive them of their legitimate rights over their natural resources".[5] The UN Legal Counsel concluded that the exploratory concessions *per se* were not in violation of the right to permanent sovereignty over natural resources of the people of Western Sahara and yet "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 international law principles applicable to mineral resource activities in Non-Self-Governing-Territories".[6]

The UN Legal Counsel's reference to the normative standards as developed in the practice of the GA seems essentially correct. Since 1995, the GA has adopted a series of resolutions on the regime regulating economic activities in NSGTs that corroborate the

[3] C. Ruiz Miguel, *El acuerdo de Pesca UE – Marruecos o el intento español de considerar a Marruecos como "potencia administradora" del Sahara Occidental*, in *Anuario español de derecho internacional*, 2006, pp. 395-412; M. Pertile, *La relazione tra risorse naturali e conflitti armati nel diritto internazionale*, Padova: CEDAM, 2012, p. 189.

[4] Letter from the Under-Secretary-General for Legal Affairs, the Legal Counsel, of 29 January 2002 from, addressed to the President of the Security Council, UN Doc. S/2002/161.

[5] *Ibid.*, paras 21-24.

[6] *Ibid.*, para. 25, emphasis added.

conclusions drawn by the UN Legal Office in 2002. In the latest resolution adopted on 6 December 2016, the GA has re-affirmed

> "the value of foreign economic investment undertaken in collaboration with the peoples of the 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, especially during times of economic and financial crisis" and "its concern about any activities aimed at the exploitation of the natural resources that are the heritage of the peoples of the Non-Self-Governing Territories [...] to the detriment of their interests, and in such a way as to deprive them of their right to dispose of those resources".[7]

The GA is not calling upon States, especially administering Powers, to refrain from any economic activity in NSGTs as inherently prejudicial to the people's permanent sovereignty over natural resources; it is only prohibiting those which are detrimental to the interests of the population and disregard their wishes. The wording employed by the GA considerable differs from that found in the resolutions adopted before 2002 in which "foreign economic investment" in collaboration with the administering power for the exploitation of natural resources in the NSGTs was cast under a wholly negative light and considered as an obstacle to the realization of the right to self-determination.[8] It is also in tune with the provision of Chapter XI, in particular Art. 73 of the UN Charter, according to which administering powers undertake to promote the economic progress of the territories and peoples under their administration; the provision clearly stresses an active role by the administering powers, which is hard to reconcile with an understanding of international law as setting an absolute prohibition on the undertaking of economic activities in NSGTs. The fact that the above resolutions have been adopted with a large majority of States voting in favour, together with the fact that they have been adopted by the UN organ compe-

[7] General Assembly, Resolution 71/103 of 6 December 2016, Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories, UN Doc. A/RES/71/103, paras 2 and 4 (emphasis added).

[8] See for instance General Assembly: Resolution 48/46 of 10 December 1992, Activities of foreign economic and other interests which impede the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Territories under colonial domination, UN Doc. A/RES/48/46; Resolution 49/40 of 9 December 1994, Activities of foreign economic and other interests which impede the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Territories under colonial domination, UN Doc. A/RES/49/40. The view that economic activities undertaken by Morocco and foreign States and actors are generally prohibited is still maintained in the recent Legal Opinion issued by the Office of the Legal Counsel and Directorate for Legal Affairs of the African Union (Office of the Legal Counsel and Directorate for Legal Affairs of the African Union, Legal Opinion on the Legality in the Context of International Law, Including the Relevant United Nations Resolution and OAU/AU Decisions, of Actions allegedly Taken by the Moroccan Authorities or Any Other State, Group of States, Foreign Companies or Any Other Entity in the Exploration and/or Exploitaion of Renewable or Non-Renewable Resources or Any Other Economic Activity in the Western Sahara, 14 October 2015, www.au.int).

tent for matters of decolonization, is indicative of a widespread *opinio juris* backing the emergence of a rule under customary international law, which is direct expression of the principle of permanent sovereignty over natural resources.

The practice related to the fisheries agreements between the EU/EC and Morocco, currently also challenged before the EU judicial institutions, is quite interesting in this respect as it shows that the normative standards expressed in the UN Legal Counsel opinion and in the practice of the GA, albeit with some degree of ambiguity, are applied in the current practice of States and international organizations.

A protocol extending the 2006 Fisheries Partnership Agreement (FPA) between Morocco and the European Community had been rejected by the European Parliament in 2011 as it was considered too expensive for the EU, environmentally unsustainable, and not in compliance with the rights of the population of Western Sahara under international law.[9] In the resolution stating the dismissal of the protocol, the Parliament had called on the Commission "to ensure that the future protocol *fully respects international law and benefits all the local population groups affected*".[10]

The rejection of the protocol in point was directly linked to the vexed question of the territorial scope of application of the FPA, namely whether the latter extended to the waters off the coast of Western Sahara, hence prompting the question of its compatibility with international law. Already in May 2006, Sweden had voted against the approval by the Council of the FPA following the consideration that the agreement did not take "into full consideration that Western Sahara is not a part of the territory of Morocco under international law [...]"; and that "*all concerned [were] 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" (emphasis added). Similar concerns, regarding in particular the implementation of the FPA, had been put forward by Finland and the Netherlands in their statement of abstention.[11] The decision of the Council to eventually approve the FPA, and the positive opinion expressed by the Parliament, had been significantly influenced by the positive legal advices of the respective Legal Services.

According to the Parliament's Legal Service, the agreement did not exclude, nor include, the waters of Western Sahara, and, in any case, it would be the duty of Morocco to comply with its international obligations *vis-à-vis* the people of Western Sahara; the Community could eventually enter into consultations with a view to suspending the agreement, should the implementation by Morocco have disregarded the interests of

[9] Regulation (EC) 764/2006 of the Council of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco.

[10] European Parliament Resolution P7_TA(2011)0573 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, para. 9, emphasis added.

[11] E. Milano, *The New Fisheries Partnership Agreement between the European Community and Morocco: Fishing too South?*, in *Anuario español de derecho internacional*, 2006, pp. 413-457, footnote 61.

the local population.[12] In 2009, as a result of several parliamentary questions presented by MEPs, the Commission "disclosed" the first data revealing that the fishing licenses issued by the Moroccan authorities, and distributed to the fishing operators through the Delegation of the European Commission in Rabat, extended also to fishing areas off Western Sahara's shores. After this revelation, the Committee on development of the EU Parliament asked the Parliament's Legal Service for a new legal opinion. In the document, issued on 13 July 2009, the Legal Service acknowledged the extension of the scope of application of the FPA to the waters of Western Sahara. It also maintained that there was no evidence that the EU financial contribution had been used for the benefit of the Sahrawi population. As the EU (back then European Community) is bound by the principle of permanent sovereignty over natural resources, the EU should have resorted to the implementation mechanisms envisaged by the EC-Morocco joint committee in order to ensure that the local population would actually take advantage from the European financial contribution. Had these conditions not been met, the EC should have refrained from requesting further fishing licenses in the waters of Western Sahara or should have suspended the FPA.[13] The legal opinion in point was decisive in leading the Parliament to reject the provisional protocol in December 2011. Within the Council, Sweden, Denmark and the Netherlands decided to cast a negative vote against the protocol, while United Kingdom, Cyprus, Austria and Finland abstained, because of the potential breaches of international law.

As far as the 2013 protocol is concerned – which has eventually been concluded and is currently into force –, the Commission has followed through the invitation of the Parliament to negotiate and draft a new protocol in full compliance with international law, in particular through the strengthening of implementation mechanisms concerning the European financial contribution outreach in regard to the development of fishing industry and of the coastal population in general.[14] For that purpose, Art. 1 of the Protocol sets out a new provision: the protocol shall be implemented in compliance with the democratic conditionality clause and with human rights, as provided for by Art. 2 of the Association Agreement between the EU and Morocco.[15] These adjustments have

[12] Legal Opinion by the European Parliament's Legal Service of 20 February 2006 regarding the Proposal for a Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Compatibility with the principles of international law, SJ-0085/06, D(2006)7352, para. 45.

[13] Legal Opinion regarding the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco by the European Parliament's Legal Service, 14 July 2009, SJ 0269/09, D(2009)37828.

[14] 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, in OJ L 328 of 12 July 2013.

[15] Art. 2 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, in OJ L 70 of 18 March 2000.

not been found fully persuasive by some States within the Council: Sweden and Denmark have voted against; Finland, the United Kingdom and the Netherlands abstained. The declaration of the Dutch representative is particularly significant in this regard:

> "The protocol does not explicitly refer to the Western Sahara, but allows for its application to maritime areas adjacent to the Western Sahara that are not under the sovereignty or jurisdiction of Morocco. Morocco, as the administering power of the Western Sahara, *may not disregard the interests and wishes of the people of the Western Sahara, when applying the protocol to such maritime areas. The Netherlands notes that the protocol does not contain any provision ensuring that Moroccan authorities will use the amount paid for access to the resource in accordance with their obligations under international law owed to the people of Western Sahara*. The Netherlands considers that, under international law, a proportionate share of this amount should benefit the people of the Western Sahara. Compliance with international law will therefore depend on the implementation of the protocol by Moroccan authorities".[16]

Support for the proposition that exploitation of natural resources shall be conducted for the benefit of the population and in accordance with its wishes can also ben found in the UN Secretary General (SG) report of 10 April 2014, concerning the situation in Western Sahara. The document stated that

> "Moroccan and international investments in the part of the Territory under Moroccan control, as well as in the territorial waters adjacent to Western Sahara, were the subject of contention between Morocco and the Frente Polisario, given the longstanding status of Western Sahara as a Non-Self-Governing Territory. A new protocol of the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco was signed in the final quarter of 2013 and came into effect in February 2014, following ratification by Morocco. The Secretary-General of the Frente Polisario wrote to me repeatedly to condemn Morocco's exploitation of the Territory's resources and publicly announced his intention to consider a possible judicial appeal against the Agreement".[17]

The SG mentioned information received from Front Polisario about the extension of the contracts between Morocco and foreign oil companies to explore the continental shelf of Western Sahara, recalling the 2002 legal opinion and quoting the passage regarding the need to respect the interests and wishes of the people.[18]

[16] General Secretariat of the Council, Proposal of 13 December 2013 for a Council Decision on the conclusion, on behalf of the European Union, 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 in force between the two parties, UN Doc. 17194/13, ADD 1 COR 1, PECHE 590 (emphasis added).

[17] Security council, Report of the Secretary General of 10 April 2014, on the situation concerning Western Sahara, UN Doc. S/2014/258, para. 11.

[18] *Ibid*., para. 12.

III. "Grey areas" and unsettled issues

Despite the substantial practice and expression of *opinio juris* pointing to the emergence of a rule of customary international law prohibiting economic activities which are not undertaken in the interest and in accordance with the wishes of the people inhabiting a NSGT, some grey areas and unsettled issues still remain.

First of all, as the UN Legal Counsel conceded in 2002, recent instances of State practice supporting the emergence of a customary international law standard "have, for obvious reasons, been few and far apart".[19] The UN Legal Counsel has mentioned the Spanish exploitation of natural resources in Western Sahara in the final phase of its administration, UN practice towards South Africa's administration of Namibia and UN practice in East Timor concerning the joint exploitation of natural resources in continental shelf in cooperation with Australia.[20] The most recent practice related to Western Sahara, as already highlighted, surely contributes to the consolidation of the standard. Also US, French and British economic policies in NSGTs are officially based on the need to act as trustees for the local population in consultation with local institutions. Moreover, remaining NSGTs are few and it is not surprising that the instances of State practice are limited; on balance, the expression of *opinio juris* is likely to play a more prominent role in the consolidation of the relevant customary rule. Hence, it is submitted that the real grey area is not so much the limited instances of practice, but the fact that the relevant GA resolutions titled "Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories" have been regularly met with the opposition of Israel and the United States, with France and United Kingdom regularly abstaining, the three latter countries currently administering a great majority of NSGTs.[21] The few public statements that can be found by the delegates of the three countries in the work of the GA are critical of the general attitude and the "anti-colonial" rhetoric employed by the Special Committee on Decolonization, rather than on specific normative standards, and yet the fact remains that their *opinio juris* is absent in the practice of the GA.[22]

A degree of ambiguity can also be found in the requirement that exploitation shall be conducted "in collaboration and in accordance with the wishes" of the people. In a much quoted passage of the UN Legal Counsel 2002 opinion, the Counsel stated that

> "State practice, though limited, is illustrative of an *opinio juris* on the part of both administering Powers and third States: where resource exploitation activities are concluded in Non-Self-Governing Territories *for the benefit of the people, on their behalf, or in consultation with their representatives*, they are considered compatible with the Charter obliga-

[19] Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, cit., para. 18.

[20] *Ibid.*, paras 18-20.

[21] The three countries administer 14 out 16 remaining NSGTs on the list of the UN. The list also includes Western Sahara.

[22] E.g. UN Doc. A/53/PV.78.

> tions of the Administering Power, and in conformity with the General Assembly resolutions and the principle of 'permanent sovereignty over natural resources' enshrined therein".[23]

The use of the apparently disjunctive "or" has provided interpretative room for EU institutions and some Member States in emphasizing the element of the "benefits" for the population of Western Sahara, neglecting the need to hold consultations with the legitimate representatives of Sahrawi people, stemming from the obligation to ensure that economic activities are "in collaboration with them" and "in accordance with their wishes". For instance, the Legal Service of the Parliament, in the legal advice rendered to the Committee on Fisheries in November 2013, has underlined the obligation under international law that the FPA and related protocols are implemented in a way that will bring about benefits for the Sahrawi population.[24] In the joint declaration of vote issued by Austria, Germany and Ireland, the three countries have asked the Commission to inform the Council on the income resulting for the population of Western Sahara from the application of the agreement and to ensure that an appropriate quota is dedicated to that effect in line with the interests of the local population.[25] During the debate in the parliament regarding the vote on the protocol, the Commissioner on fisheries, Maria Damanaki, has stated the following:

> "I would like to make one point very clear: no legal authority until now – including the United Nations, the European Court of Justice or the Legal Services of any of the EU institutions (Commission, Council and Parliament) – has ever said that an agreement with Morocco covering Western Sahara is illegal. Nobody. What they do say – and rightly so – is that such an agreement must fulfil certain conditions; in particular, referring to the fisheries agreement, that fishing activities must benefit the local population".[26]

Even the General Court, when addressing Front Polisario's request for annulment based on the lack of consultation during the EU legislative procedure, has stated that international law does not impose any obligation to that effect.[27] When identifying the failure of EU political institutions to keep into account the rights of the local population of Western Sahara, it has not mentioned the need to act in accordance with their wishes.[28] The importance of acquiring the consent of the Front Polisario is instead men-

[23] Letter from the Under-Secretary-General for Legal Affairs, the Legal Counsel, of 29 January 2002, addressed to the President of the Security Council cit., para. 24.

[24] Legal Opinion of the Legal Service of the European Parliament, regarding the Proposal for a Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Compatibility with the principles of international law, 4 November 2013, SJ 0665-13, D(2013)50041.

[25] General Secretariat of the Council, Proposal for a Council Decision, Doc. 17194/13, cit.

[26] European Parliament debate on North-East Atlantic: deep-sea stocks and fishing in international waters – Status of the North-East Atlantic mackerel fishery, CRE 09/12/2013.

[27] General Court, *Front Polisario v. Council of the European Union*, cit., para. 138.

[28] *Ibid.*, paras 223-247.

tioned in the part the judgment of the Court of Justice dealing with the application of the *pacta tertiis* principle to reinforce the conclusion that the Liberalization Agreement cannot be interpreted to include the territory of Western Sahara.[29]

Already in 2008, Corell had criticised the misuse of the 2002 opinion by the European Commission to justify the conclusion of bilateral fisheries agreements under international law without the involvement of Front Polisario. Corell had declared:

> "I find it incomprehensible that the Commission could find any such support in the legal opinion, unless, of course, it had 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 them. However, an examination of the agreement leads to a different conclusion".[30]

Corell also underlined the need to hold consultations and to find an agreement with the representatives of the population. In a more recent speech, published in 2017, he has further elaborated on the requirements entailed in his opinion:

> "[...] if you are to use the resources of a Non-Self-Governing-Territory for the benefit of the people, this is the first condition: it has to be for the benefit of the people, and you have to be able to prove that. You have to consult with them or their representatives, whoever it is depending on the situation in the decolonization as it were. And then you have to also realize that it has to be done either on behalf of or in consultation with representatives of the people. What do I mean by 'on behalf of" that I draw from resolutions by the General Assembly over the years? This means that they must have come so far in the decolonization process that they have a representative body that can decide to hand over and ask an administering power to deal with this matter and to sell for their benefit resources from the territory".[31]

There is a strong case to be made that the EU attitude on the matter has been dictated by reasons of political convenience and opportunism. It was unthinkable that Morocco could agree to an economic deal, which involved, even though only through consultation, Front Polisario. The emphasis on the element of the benefit for the "local population", rather than the "people" of Western Sahara, has also to do with "realities on the ground": namely, that most of the population currently living in Western Sahara has been settled from Morocco in the last decades, with most of the original Sahrawi living in the Algerian refugee camps of Tindouf. Be that as it may, the fact remains that the practice emerging from the EU/Morocco international agreements casts a shadow

[29] *Council of the European Union v. Front Polisario* [GC], cit., para. 106.

[30] H. CORELL, *The Legality of Exploring and Exploiting Natural Resources in Western Sahara*, Conference on Multilateralism and International Law with Western Sahara as a Case Study, Pretoria, 4-5 December 2008, www.havc.se, p. 242.

[31] H. CORELL, *The Principle of Sovereignty of Natural Resources and its Consequences*, in M. BALBONI, G. LASCHI (eds), *The European Union Approach Towards Western Sahara*, Brussels: Peter Lang, 2017, p. 131.

over the adherence to and the compliance with the requirement of consultation, even in a case in which the people do have a representation with an international standing. Also, consultation does not equal consent: practice and the 2002 UN Legal Opinion are inconclusive as to whether the representatives of the people must express consent to any exploitation of natural resources or whether any involvement in the decision-making process is in itself sufficient to fulfil the international requirement.

Another relatively unsettled issue in State practice is that of the coordination between the legal regime of NSGTs and that of belligerent occupation. The 2002 UN Legal Opinion does not shed light on the possible intersection between the two regimes. This is what Corell had to say in 2008 with regard to the relevance of the law of occupation in the case of Western Sahara:

> "In preparing for the formulation of the opinion I had my collaborators look at several options. Among those was certainly the option of basing the opinion on the laws of occupation, all the more so since I had officers with particular expertise in this matter in my Office. However, in view of the way in which the UN had addressed the situation in Western Sahara and the result of the various analyses, I came to the conclusion that the best way to form a basis for the legal opinion was to make an analysis by analogy taking as a point of departure the competence of an administering Power. Any limitation of the powers of such entity acting in good faith would certainly apply *a fortiori* to an entity that did not qualify as an administering Power but *de facto* administered the Territory".[32]

Regardless of the application of the law of belligerent occupation to a situation such as Western Sahara – an application that is highly dependant upon the controversial proposition that the conflict was internationalized at its very outset in the 1970s –, the conclusion of the UN Legal Counsel seems essentially correct. The law pertaining to NSGTs is *lex specialis* with regard to any occupation of the territory as it is specifically targeted at regulating a specific decolonization context and ultimately aimed at a higher level of protection of the people inhabiting the territory. Even assuming, for instance, that the rules of usufruct under Art. 55 of the 1907 Hague Regulations would in principle apply where an international conflict has taken place,[33] such broad rules should be interpreted in conformity with the other obligations incumbent upon the administrator, including those deriving from the specific status of the occupied territory and from the principle of self-determination: hence any exploitation of natural resources should be conducted for the benefit of the people and in consultation with their representatives, once a political representation is in place. Even in a case of traditional inter-state conflict with the clear application of the law of belligerent occupation, such as the Anglo-American occupation of Iraq between 2003 and 2004, the UN Security Council in Resolu-

[32] H. CORELL, *The Legality of Exploring and Exploiting Natural Resources in Western Sahara*, cit., p. 238.

[33] Art. 55 of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War (The Hague Regulations), adopted on 18 October 1907.

tion 1483, after recalling in the preamble "the right of the Iraqi people freely to determine their own political future and control their own natural resources", unanimously endorsed the establishment of a Development Fund to which most proceeds from export of oil and gas resources should be transferred, the Fund being directed "to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq";[34] in the subsequent Resolution 1546 it decided that an additional voting member should be added in the International Monitoring and Advisory Board to include a representative of the Iraqi Interim Government.[35]

Finally, another issue of regime coordination can arise with regard to the regime of non-recognition of situations produced by gross violations of peremptory norms. In this latter respect, one must underline that the problem of regime coordination has to do with the rights and obligations of third parties, rather than powers and obligations of the administrative authority. And yet the alleged existence of an absolute prohibition upon third parties to conclude agreements with the administrator, when the relevant territorial situation is deemed to be consequential to a gross violation of peremptory norms, inevitably curtails the possibility of the administrator exercising its powers with regard to the NSGT. To put it simply with regard to Western Sahara: even if the Moroccan authorities, in cooperation with the EU, were to devise a mechanism of full consultation of the Sahrawi representatives with the aim of transferring the proceeds of any economic activity to the local population, the EU in concluding such agreement may be found in violation of its obligation of non-recognition under general international law.[36] A practical deal specifically benefitting the local population would likely fall under the purview of the so-called "Namibia exception", according to which the non-recognition of the legality of a territorial situation should not result in the depriving the people of the territory of any advantages derived from international cooperation. In particular, the ICJ famously stated that "invalidity [...] 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".[37] However, it is hard to believe that any international economic agreement, extending to Western Sahara, however beneficial to the people of the territory, could fall under the above exception, as it would clearly imply a right to act internationally on behalf of the territory despite the alleged gross violation of a peremptory norm.

[34] Security Council, Resolution 1483 of 22 May 2003, UN Doc. S/RES/1483 (2003), preamble and para. 14.

[35] Security Council, Resolution 1546 of 8 June 2004, UN Doc. S/RES/1546 (2004), para. 24.

[36] International Court of Justice, *Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion of 21 June 1971, p. 56.

[37] *Ibid.*, p. 55.

As rightly shown by Kassoti, the obligation in point has been clearly circumvented by the General Court, when it has asserted that no obligation under international law prevents a State from concluding an international agreement with a third party with regard to a "disputed territory".[38] The possibility of "circumvention" is magnified by the fact that absent a mechanism of authoritative third-party determination for the triggering of the obligation of non-recognition, outside those rare instances in which it is the Security Council to determine a gross violation of peremptory norms (e.g. Iraq in 1990 or Namibia in 1970), it is in the hands of each State or international organization to make its own legal qualification of a given territorial situation.[39]

IV. Of the uncertainty principle and of *Voelkerrecthsfreundlichkeit*

In his famous enunciation of the "uncertainty principle" in 1927, Werner Karl Heisenberg revolutionised quantum mechanics in pointing to the impossibility of detecting with certainty the position in space and time of atomic particles.[40] The more accurate the measurement of the position in space of the particle, the more indeterminate the moment in time in which such position was achieved; and *vice versa*. The "uncertainty principle", *mutatis mutandis*, often applies when ascertaining the content of customary international law. The more *opinio juris* becomes precise in determining the scope an obligation arising under customary international law, the more State practice is led to depart or deviate from the normative standard. On the other hand, identifying a core of sufficiently widespread and consistent State practice often entails watering down the expression of *opinio juris* and hence the normative content of the customary rule. The rule conditioning the rights and powers of States administering NSGTs is a good case in point. On balance, there is increasing support in the *opinio juris* of States and international organizations towards the consolidation of a rule of customary international law prohibiting exploitation of natural resources contrary to the interests and wishes of the people, with State practice generally supporting the rule, but with important deviations as to the involvement and consultation with the representatives of the people and extent thereof.

One could not reasonably expect the General Court or the Court of Justice to cast definitive light over such a complex issue of international law. The CJEU is generally concerned with upholding and guaranteeing the consistency and coherence of the EU

[38] E. Kassoti, *The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, pp. 352-353.

[39] 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?*, in C. Tomuschat, J. Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Leiden: Martinus Nijhoff, 2006, p. 99.

[40] D. Cassidy, *Uncertainty: The Life and Science of Werner Heisenberg*, San Francisco: W.H. Freeman & Co, 1994.

legal order, rather than contributing to the development of international law or projecting the image of the EU as a *Voelkerrechtsfreundlich* actor. And yet it is submitted that the judgment of the Court of Justice is an important milestone in the search for justice of the Sahrawi people and should be seen as ultimately *Voelkerrechtsfreundlich*. The Court of Justice has clearly and strongly reaffirmed Western Sahara's distinct territorial status, the right of self-determination of the Sahrawi people and the *erga omnes* nature of such right.[41] Most importantly, it has affirmed the need to acquire the consent of the people of Western Sahara and its representatives in decisions affecting their rights and interests.[42] In this latter respect, one can see a strong interpretation of the principle of involvement and consultation (requiring consent) entering through the back door and reinforcing the international norm that exploitation of natural resources in a NSGT, however legally framed, is an activity that, while not generally prohibited, shall be conducted in the interest and according to the wishes of the people.

[41] *Council of the European Union v. Front Polisario* [GC], cit., paras 88-92.
[42] *Ibid*., para. 106.