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OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 10 January 2018 [1]

Case C-266/16

Western Sahara Campaign UK,
The Queen
v
Commissioners for Her Majesty's Revenue and Customs,
Secretary of State for Environment, Food and Rural Affairs

(Request for a preliminary ruling from the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), United Kingdom)

(Reference for a preliminary ruling — Partnership Agreement between the European Community and the Kingdom of Morocco in the fisheries sector — Protocol setting out the fishing opportunities provided for by the agreement — Acts approving the conclusion of the agreement and of the protocol — Regulations allocating among the Member States the fishing opportunities set out by the protocol — Validity in the light of Article 3 TEU and of international law — Application to Western Sahara and the waters adjacent thereto)

1 Original language: French.

EN

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I. Introduction

1. The present request for a preliminary ruling concerns the validity of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco [2] ('the Fisheries Agreement'), 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 Agreement [3] ('the 2013 Protocol'), and of Council Regulation (EU) No 1270/2013 of 15 November 2013 on the allocation of fishing opportunities under the 2013 Protocol, [4] in that they establish and implement the exploitation by the European Union and the Kingdom of Morocco of the biological maritime resources of Western Sahara.

2. This is the first request for a preliminary ruling on the validity of the international agreements concluded by the Union and their acts of conclusion. In that sense, it raises new questions of law concerning the Court's jurisdiction to rule on the validity of international agreements concluded by the Union, the conditions which individuals must satisfy in order to rely on the rules of international law in the context of the examination of the validity of those international agreements and also the interpretation of those rules. Those questions are of fundamental importance as regards judicial review of the external actions of the Union and the process of decolonisation of Western Sahara which has been under way since the 1960s.

3. Admittedly, a number of the answers to those questions will have political ramifications. However, as the International Court of Justice has held, 'the fact that a legal question also has political aspects, "as, in the nature of things, is the case with so many questions which arise in international life", does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute …". Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task …'. [5]

[2] OJ 2006 L 141, p. 4. The conclusion of that agreement was approved by Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (OJ 2006 L 141, p. 1).

[3] OJ 2013 L 328, p. 2. The conclusion of that protocol was approved by Council Decision 2013/785/EU of 16 December 2013 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 between the European Union and the Kingdom of Morocco (OJ 2013 L 349, p. 1).

[4] OJ 2013 L 328, p. 40.

[5] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (ICJ Reports 2004, p. 136, paragraph 41).

II. Legal context

A. The Fisheries Agreement

4. The Fisheries Agreement follows on from a series of fisheries agreements concluded after 1987 between the Union and the Kingdom of Morocco. Its conclusion was approved on behalf of the Community by Regulation No 764/2006. Pursuant to Article 17 of that regulation, it entered into force on 28 February 2007. [6]

5. In the words of its preamble and Articles 1 and 3, the Fisheries Agreement establishes a partnership designed to contribute to the effective implementation of the fisheries policy of the Kingdom of Morocco and, more broadly, to the sustainable preservation and exploitation of living sea resources, by means of rules on economic, financial, technical and scientific cooperation between the parties, the conditions governing access by fishing vessels flying the flag of a Member State of the Union to Moroccan fishing zones, the arrangements for policing fishing activities in those zones, and cooperation between undertakings in the fisheries sector.

6. Article 2, entitled 'Definitions', provides as follows:

'For the purposes of this Agreement, the Protocol and the Annex:

(a) "Moroccan fishing zone" means the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco;

…'

7. Article 5, entitled 'Access by Community vessels to fisheries in Moroccan fishing zones', provides:

'1. Morocco undertakes to authorise [Union] vessels to engage in fishing activities in accordance with this Agreement, including the Protocol and Annex thereto.

…

4. The [Union] undertakes to take all the appropriate steps required to ensure that its vessels comply with this Agreement and the legislation governing fisheries in the waters over which Morocco has jurisdiction, in accordance with the United Nations Convention on the Law of the Sea.'

8. Article 7, entitled 'Financial contribution', provides:

[6] See OJ 2007 L 78, p. 31.

'1. The [Union] shall grant Morocco a financial contribution in accordance with the terms and conditions laid down in the Protocol and Annexes. This contribution shall be composed of two related elements, namely:

(a) a financial contribution for access by Community vessels to Moroccan fishing zones, without prejudice to the fees due by Community vessels for the licence fee;

(b) [Union] financial support for introducing a national fisheries policy based on responsible fishing and on the sustainable exploitation of fisheries resources in Moroccan waters.

2. The component of the financial contribution referred to in point (b) of paragraph 1 shall be determined by mutual agreement and in accordance with the Protocol in the light of objectives identified by the two parties to be achieved in the context of the sectoral fisheries policy in Morocco and an annual and multiannual programme for its implementation.'

9. Article 11, entitled 'Area of application', provides as follows:

'This Agreement shall apply, on the one hand, to the territories in which the [FEU] Treaty … applies, under the conditions laid down in that Treaty and, on the other, to the territory of Morocco and to the waters under Moroccan jurisdiction.'

10. Article 13, entitled 'Settlement of disputes', provides that 'the contracting parties shall consult each other on any dispute concerning the interpretation or application of this Agreement'.

11. According to Article 16, 'the Protocol and the Annex and appendices thereto shall form an integral part of this Agreement'. That protocol and the Annex and the Appendices thereto had been concluded for a period of four years. [7] They are therefore no longer in force, but have been replaced by the 2013 Protocol and the Annex and Appendices thereto.

B. The 2013 Protocol

12. On 18 November 2013, the Union and the Kingdom of Morocco signed the 2013 Protocol, which sets out the fishing opportunities and financial contribution set out in the Fisheries Agreement. It entered into force on 15 July 2014. [8]

13. Article 1 of that protocol, entitled 'General principles', provides as follows:

[7] See Article 1(1) of the Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (OJ 2006 L 141, p. 9).

[8] OJ 2014 L 228, p. 1.

'This Protocol, together with its Annex and Appendices, form an integral part of the [Fisheries Agreement] … which forms part of the [Association] Agreement …

The Protocol is implemented in accordance with … Article 2 of the same Agreement concerning the respect for democratic principles and fundamental human rights.'

14. Article 2, entitled 'Period of application, duration and fishing opportunities', provides:

'From the application of this Protocol and for a period of four years, the fishing opportunities granted under Article 5 of the Fisheries Agreement shall be those stated in the table attached hereto.

The first subparagraph above shall apply subject to the provisions of Articles 4 and 5 of this Protocol.

…'

15. In the words of Article 3, entitled 'Financial contribution':

'1. The estimated total annual value of the Protocol is EUR 40 000 000 for the period referred to in Article 2, distributed as follows:

(a) EUR 30 000 000 by way of the financial contribution referred to in Article 7 of the Fisheries Agreement, allocated as follows:

 (i) EUR 16 000 000 as a financial contribution for access to the resource;

 (ii) EUR 14 000 000 as support for the fisheries sector in Morocco;

(b) EUR 10 000 000 corresponding to the estimated amount of fees owed by shipowners under the fishing licences granted under Article 6 of the Fisheries Agreement and in accordance with the provisions of Chapter I, Sections D and E, of the Annex to this Protocol.

…

4. The financial contribution referred to in paragraph 1(a) shall be paid to the Treasurer-General of the Kingdom of Morocco into an account opened with the Public Treasury of the Kingdom of Morocco, the references of which shall be communicated by the Moroccan authorities.

5. Subject to the provisions of Article 6 of this Protocol, the Moroccan authorities shall have full discretion regarding the use to which this financial contribution is put.'

16. Article 6, entitled 'Support for sectoral fisheries policy in Morocco', provides as follows:

‘1. The financial contribution referred to in Article 3(1)(a)(ii) of this Protocol will help to develop and implement Morocco’s sectoral fisheries policy as part of the “Halieutis” strategy for developing the fisheries sector.

2. The contribution shall be allocated and managed by Morocco on the basis of the setting up by the two parties, by mutual agreement within the Joint Committee, of the objectives to be met and of the relevant annual and multiannual programme, in accordance with the “Halieutis” strategy and based on an estimation of the anticipated impact of the projects to be carried out.

…

6. Depending on the nature of the projects and the duration of their implementation, Morocco shall submit a report to the Joint Committee on the implementation of projects that have been completed with sectoral support as provided for by this Protocol; the report shall include information on any social and economic consequences, particularly the impact on employment, investment and any other quantifiable repercussions of the measures taken, together with their geographical distribution. This information is to be prepared on the basis of indicators to be defined in greater detail by the Joint Committee.

7. Morocco shall also submit, prior to the expiry of this Protocol, a final report on the implementation of the sectoral support provided for by this Protocol, including the elements referred to in the paragraphs above.

8. The two parties shall, if necessary, continue to monitor the implementation of the sectoral support beyond the expiry of this Protocol or, as the case may be, in the event of its suspension in accordance with the provisions of this Protocol.

…’

C. Regulation No 764/2006

17. In the words of recital 1, ‘the [Union] and the Kingdom of Morocco have negotiated and initialled a Fisheries Partnership Agreement providing [EU] fishermen with fishing opportunities in the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco’.

18. According to Article 1, ‘the [Fisheries Agreement] is hereby approved on behalf of the [Union]’.

D. Decision 2013/785

19. In accordance with recital 2, ‘the Union has negotiated with the Kingdom of Morocco a new Protocol granting vessels of the Union fishing opportunities in the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco as regards fishing’.

20. In the words of Article 1, ‘the [2013 Protocol] is approved on behalf of the Union’.

E. Regulation No 1270/2013

21. In accordance with recital 2, ‘the Union has negotiated with the Kingdom of Morocco a new Protocol to the Partnership Agreement which grants European Union vessels fishing opportunities in the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco as regards fishing. The new Protocol was initialled on 24 July 2013’.

22. Article 1(1) allocates among the Member States the fishing opportunities established under the 2013 Protocol. According to that allocation, the United Kingdom of Great Britain and Northern Ireland is to receive a quota of 4 525 tonnes in the industrial pelagic fishing zone.

III. The dispute in the main proceedings and the questions referred for a preliminary ruling

23. Western Sahara Campaign UK (‘WSC’) is an independent voluntary organisation established in the United Kingdom whose aim is to support the recognition of the right of the people of Western Sahara to self-determination.

24. WSC has brought two related claims against the Commissioners for Her Majesty’s Revenue and Customs, United Kingdom (‘HMRC’) and the Secretary of State for Environment, Food and Rural Affairs, United Kingdom (‘the Secretary of State’).

25. HMRC is the defendant in the first action, whereby WSC disputes the preferential tariff treatment of products originating in Western Sahara, certified as products originating in the Kingdom of Morocco. The Secretary of State is the defendant in the second action, whereby WSC disputes the opportunity offered to the Secretary of State by the contested measures to issue licences to fish in the waters adjacent to Western Sahara.

26. In those actions, WSC disputes the legality of 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, signed in Brussels on 26 February 1996 (OJ 2000 L 70, p. 2, ‘the Association Agreement’) and the Fisheries Agreement in so far as they apply to Western Sahara. In WSC’s submission, those agreements are invalid on the ground that they are contrary to the general principles of EU law and to Article 3(5) TEU, under which the Union is required to respect international law. In that connection, WSC maintains that those agreements, concluded in the context of an illegal occupation, infringe several rules of international law, in particular the right of the people of Western Sahara to self-determination, Article 73 of the Charter of the

United Nations, the principle of permanent sovereignty over natural resources and the rules of international humanitarian law applicable to military occupations.

27. HMRC and the Secretary of State contend that WSC does not have *locus standi* to rely on the rules of international law in order to challenge the validity of those agreements and that in any event its actions, which seek to challenge before the Courts of England and Wales the policy of the Kingdom of Morocco with respect to Western Sahara, are not justiciable. As regards the substance, they maintain that there is nothing in those agreements to substantiate the conclusion that the Union has recognised or assisted in the infringement of binding rules of international law. Furthermore, they submit that the fact that the Kingdom of Morocco continues to occupy Western Sahara does not preclude the conclusion with the Kingdom of Morocco of an agreement on the exploitation of the natural resources of that territory and that in any event the parties to those agreements recognise that that exploitation must benefit the people of that territory.

28. In that context, the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) ('the High Court' or 'the referring court') considers that '[the institutions of the European Union are not] always entitled to be indifferent to where the sovereign borders of a [non-member State] end, particularly where there is an unlawful occupation of territory of another [State]', [9] without infringing the principles of the Charter of the United Nations and the principles that bind the European Union, however wide the discretion which they enjoy with respect to foreign affairs may be.

29. The referring court is of the view that even though the Kingdom of Morocco claims that Western Sahara is part of its sovereign territory, that claim is not recognised by the international community generally or by the Union in particular. On the contrary, the referring court considers that the presence of the Kingdom of Morocco is an occupation, which it even characterises as a 'continued occupation'. [10] The question, therefore, is whether it is lawful for an organisation such as the European Union, which respects the principles of the United Nations Charter, to conclude with a third State an agreement relating to a territory outside the recognised borders of that State.

30. In that regard, the referring court considers that, even if the institutions of the Union did not make a manifest error of assessment in concluding that the continued occupation of the territory of Western Sahara by the Kingdom of Morocco does not preclude, under international law, the conclusion of any agreement for the exploitation of the natural resources of the territory, the fundamental question is whether the specific agreements concerned are contrary to

[9] See judgment of 19 October 2015 in *Western Sahara Campaign UK, R (on the application of) v HM Revenue and Customs* [2015] EWHC 2898 (Admin), paragraph 39. This is the judgment of the referring court on which it based its request for a preliminary ruling.

[10] See judgment of 19 October 2015 in *Western Sahara Campaign UK, R (on the application of) v HM Revenue and Customs* [2015] EWHC 2898 (Admin), paragraphs 40, 43, 48 and 49.

certain principles of international law and whether sufficient account has been taken of the will of the population of Western Sahara and its recognised representatives.

31. According to that court, there is an arguable case of a manifest error of assessment by the institutions of the Union in their application of international law, in that those agreements were concluded without the Kingdom of Morocco recognising its status as an administrating power or complying with either the obligations arising under Article 73 of the Charter of the United Nations or the obligation to support the self-determination of the people of Western Sahara.

32. In those circumstances, the High Court decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In the [Association Agreement], do the references to “Morocco” in Articles 9, 17 and 94 and Protocol 4 refer only to the sovereign territory of Morocco as recognised by the United Nations and the European Union … and therefore preclude products originating in Western Sahara from being imported into the EU free of customs duties pursuant to the Association Agreement?

(2) If products originating in Western Sahara may be imported into the EU free of customs duties pursuant to the Association Agreement, is the Association Agreement valid, having regard to the requirement under Article 3(5) [TEU] to contribute to the observance of any relevant principle of international law and respect for the principles of the United Nations Charter and the extent to which the Association Agreement was concluded for the benefit of the Saharawi people, on their behalf, in accordance with their wishes and/or in consultation with their recognised representatives?

(3) Is the [Fisheries Agreement] (as approved and implemented by Regulation No 764/2006, Decision 2013/785 and Regulation No 1270/2013) valid, having regard to the requirement under Article 3(5) [TEU] to contribute to the observance of any relevant principle of international law and respect for the principles of the United Nations Charter and the extent to which the [Fisheries Agreement] was concluded for the benefit of the Saharawi people, on their behalf, in accordance with their wishes, and/or in consultation with their recognised representatives?

(4) Is the [applicant] entitled to challenge the validity of EU acts based on alleged breach of international law by the EU, having regard, in particular, to:

(a) the fact that, although the [applicant] has standing under national law to impugn the validity of the EU acts, it does not assert any rights under EU law; and/or

(b) the principle in Case of the Monetary Gold Removed from Rome in 1943 (ICJ Reports 1954, p. 19) that the International Court of Justice may not make findings that impugn the conduct of, or affect the rights of, a State that is not before the Court and has not consented to be bound by the decisions of the Court?'

33. By order of 23 November 2016, the referring court joined the Confédération marocaine de l'agriculture et du développement rural (Comader) as an interested party in the proceedings pending before it.

IV. Procedure before the Court

34. The request for a preliminary ruling was lodged at the Court Registry on 13 May 2016. The Spanish, French and Portuguese Governments and the Council and the European Commission lodged written observations.

35. By letter of 17 January 2017, the Court asked the referring court whether, in the light of the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), it wished to maintain its first and second questions.

36. By letter of 3 February 2017, the referring court withdrew its first and second questions, as it considered that there was no longer any need to answer them.

37. By letter of 17 February 2017, the Court invited the parties to the main proceedings and the interveners to comment before it on any impact that the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973) might have on the answer to the third question, and to answer a number of questions within three weeks, which WSC, Comader, the Spanish and French Governments [11] and the Council and the Commission did.

38. A hearing was held on 6 September 2017, at which WSC, Comader, the Spanish and French Governments and the Council and the Commission submitted their oral observations.

V. The third and fourth questions

39. By its third question, the referring court asks the Court to rule on the validity of the Fisheries Agreement, as approved by Regulation No 764/2006 and implemented by the 2013 Protocol (approved by Decision 2013/785) and Regulation No 1270/2013, having regard to Article 3(5) TEU, which places the EU under an obligation to 'contribute … to the strict observance … of international law [and] respect for the principles of the United Nations Charter' and, moreover, to the extent to which that agreement was concluded for the

[11] The French Government was granted a one-week extension of the deadline.

benefit of the Saharawi people, on their behalf, in accordance with their wishes and/or in consultation with their recognised representatives.

40. By its fourth question, the referring court asks the Court to rule on the conditions on which international law may be relied on in the context of the judicial review of the acts of the Union by a request for a preliminary ruling on validity.

41. To my mind these questions are closely linked and should be examined together.

A. The jurisdiction of the Court

42. The third question targets the Fisheries Agreement (as supplemented by the 2013 Protocol) and asks the Court to rule on the validity of that international agreement concluded by the Union. However, it also refers to the acts approving and implementing that agreement that were adopted by the Council.

43. The Council contends that the Court does not have jurisdiction to give a preliminary ruling on the validity of the Fisheries Agreement, since, as an international agreement, it is not an act of the institutions within the meaning of subparagraph (b) of the first paragraph of Article 267 TFEU. In the Council's submission, the validity of an international agreement concluded by the Union can be examined only before that agreement is concluded, by means of the opinion procedure laid down in Article 218(11) TFEU. In the alternative, the Council, supported by the Commission and the Spanish and French Governments, maintains that the request for a preliminary ruling may be considered to relate in reality to the validity of the acts approving the conclusion of the Fisheries Agreement and the 2013 Protocol, namely Regulation No 764/2006 and Decision 2013/785.

44. To my mind, that plea of lack of jurisdiction must be rejected, for the following reasons.

45. In the words of subparagraph (b) of the first paragraph of Article 267 TFEU, the Court is to have jurisdiction to give preliminary rulings concerning 'the validity and interpretation of acts of the institutions … of the Union'.

46. It is settled case-law that, for the purposes of that provision, an international agreement concluded by the Union constitutes, 'in so far as concerns [the Union], an act of one of the institutions of the [Union]' within the meaning of Article 267 TFEU. [12] On that basis, the Court has often had occasion to interpret,

[12] Judgment of 30 April 1974, *Haegeman* (181/73, EU:C:1974:41, paragraph 4). See also, to that effect, judgments of 30 September 1987, *Demirel* (12/86, EU:C:1987:400, paragraph 7); of 15 June 1999, *Andersson and Wåkerås-Andersson* (C-321/97, EU:C:1999:307, paragraph 26); and of 25 February 2010, *Brita* (C-386/08, EU:C:2010:91, paragraph 39).

by way of a preliminary ruling, provisions of such agreements concluded by the Union, [13] including, moreover, the Fisheries Agreement. [14]

47. Furthermore, according to the Court, the review of validity in the preliminary ruling procedure extends to all acts of the institutions 'without exception', [15] as the FEU Treaty has 'established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a *complete* system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union'. [16]

48. That said, the international agreements concluded by the Union are part of the international legal order, since they are concluded with a third party, and at the same time of the legal order of the Union.

49. Although in the international legal order an international agreement may be declared invalid only on one of the grounds exhaustively listed in Articles 46 to 53 of the Vienna Convention on the Law of Treaties, concluded in Vienna on 23 May 1969 [17] ('the Vienna Convention on the Law of Treaties'), it follows from Article 218(11) TFEU that 'the provisions of … an agreement [entered into by the European Union] must … be entirely compatible with the [EU and FEU] Treaties and with the constitutional principles stemming therefrom'. [18]

50. It is in order to avoid as far as possible the legal and international political complications that would result if an international treaty concluded by the European Union were incompatible with the EU and FEU Treaties yet remained valid in international law that the authors of the Treaties created the preventive opinion procedure now laid down in Article 218(11) TFEU.

51. In order to found its jurisdiction to assess the compatibility of international agreements in the opinion procedure, the Court has also relied on the fact that that jurisdiction was in any event conferred on it by virtue of Articles 258, 263 and 267 TFEU. It has held that 'the question whether the conclusion of a given

13 More recently, see judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraphs 108 to 117).

14 See judgment of 9 October 2014, *Ahlström and Others* (C-565/13, EU:C:2014:2273).

15 See judgment of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 8). See also, to that effect, judgments of 11 May 2006, *Friesland Coberco Dairy Foods* (C-11/05, EU:C:2006:312, paragraph 36), and of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 30).

16 Judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 66 and the case-law cited). Emphasis added.

17 *United Nations Treaty Series*, Vol. 1155, p. 331.

18 See Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017 (EU:C:2017:592, paragraph 67).

agreement is within the power of the [Union] and whether, in a given case, such power has been exercised in conformity with the provisions of the Treaty [was], in principle a question which [might] be submitted to the Court of Justice, either directly, under Article [258 TFEU] or Article [263 TFEU], or in accordance with the preliminary procedure'. [19]

52. The Court therefore has jurisdiction to examine 'all questions that are liable to give rise to doubts as to the substantive or formal validity of the [international] agreement with regard to the [EU and FEU] Treaties'. [20]

53. In that sense, in order to avoid the abovementioned complications, where the Court has delivered a negative opinion on the compatibility of an 'envisaged' international agreement with the EU and FEU Treaties, that agreement may not enter into force unless it has first been amended. [21] In any event, the Court will be able to review *ex post facto* the substantive or formal *compatibility* [22] of the agreement with the EU and FEU Treaties if an action for annulment of the agreement is brought before it or if a reference is made to it for a preliminary ruling on the validity of the agreement.

54. It follows from the foregoing that the Court has jurisdiction to review the act of the Council approving the conclusion of an international agreement, [23] which includes the review of the internal lawfulness of that decision in the light of the agreement in question. [24] In that context, the Court may review the lawfulness of the act of the Council (including the provisions of the international agreement the conclusion of which it approves) with regard to the EU and FEU Treaties and the constitutional principles stemming from those Treaties, including respect for

[19] Opinion 1/75 (*OECD Understanding on a Local Cost Standard*) of 11 November 1975 (EU:C:1975:145).

[20] Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017 (EU:C:2017:592, paragraph 70).

[21] See judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 309) and Article 218(11) TFEU.

[22] I say 'compatibility' and not 'validity' in order to avoid confusion with the grounds on which a treaty may be declared invalid, which are exhaustively listed in Articles 46 to 53 of the Vienna Convention on the Law of Treaties.

[23] See judgment of 9 August 1994, *France* v *Commission* (C-327/91, EU:C:1994:305, paragraphs 13 to 17), where the Court held that the action for annulment brought by the French Republic should be directed against the act whereby the Commission had authorised the conclusion of the international agreement in question rather than against the agreement itself.

[24] See, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 289), which refers to the judgment of 10 March 1998, *Germany* v *Council* (C-122/95, EU:C:1998:94).

fundamental rights [25] and international law, [26] in accordance with Article 3(5) TEU.

55. The Court therefore has jurisdiction to annul (in case of an action for annulment) or to declare invalid (in case of a request for a preliminary ruling) the Council decision approving the conclusion of the international agreement at issue [27] and to declare that agreement incompatible with the EU and FEU Treaties and with the constitutional principles stemming from those Treaties.

56. In those situations, the international agreement continues to bind the parties in international law and it is for the EU institutions to eliminate the incompatibilities between that agreement and the EU and FEU Treaties and with the constitutional principles stemming from those Treaties. [28] If the incompatibilities prove impossible to eliminate, the institutions must denounce the agreement or withdraw from it, [29] in accordance with the procedure laid down in Articles 56 and 65 to 68 of the Vienna Convention on the Law of Treaties [30] and, in this instance, Article 14 of the Fisheries Agreement. In that sense, an analogy may be drawn with Article 351 TFEU, which envisages the same situation as regards the Treaties concluded by Member States before their accession to the Union.

25 See judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 283, 284, 289, 304, 308, 316 and 326).

26 See Article 3(5) TEU and judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 101 and the case-law cited).

27 See Etienne, J., ‘L’accord de pêche CE-Maroc: quels remèdes juridictionnels européens à quelle illicéité internationale?’, *Revue belge de droit international*, 2010, pp. 77 to 107, especially pp. 104 and 105.

28 See, to that effect, judgment of 22 December 2008, *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 124 and the case-law cited).

29 See, to that effect, judgments of 14 September 1999, *Commission* v *Belgium* (C-170/98, EU:C:1999:411, paragraph 42), and of 4 July 2000, *Commission* v *Portugal* (C-84/98, EU:C:2000:359, paragraph 40).

30 This procedure provides for the notification of an instrument designed to declare the Treaty invalid or the decision to withdraw from the Treaty. If an objection is raised by the other party and the parties are unable to reach a solution, it is provided that the dispute will be referred to the International Court of Justice or to an ad hoc arbitral tribunal. The same applies for the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, concluded in Vienna on 21 March 1986, which, however, has not yet entered into force (see Articles 65 to 68 of that convention). As international organisations cannot bring a matter before the International Court of Justice, that convention provides that the matter may be brought before the Court by means of the advisory opinion procedure laid down in Article 96 of the Charter of the United Nations. If the United Nations General Assembly or Security Council does not grant the request to initiate that procedure, the dispute may be submitted to arbitration.

57. Last, it should be made clear that the principle stated by the International Court of Justice in the Case of the Monetary Gold removed from Rome in 1943 [31] and referred to in the fourth question for a preliminary ruling, namely that that court cannot exercise its jurisdiction to settle a dispute between two States where, in order to do so, it must examine the conduct of a third State which is not a party to the proceedings, [32] is not, as the Council and the Commission maintain, relevant in this case. That principle, which is to be found in the Statute of the International Court of Justice, does not exist in the Statute of the Court of Justice of the European Union and, in any event, could not exist in EU law since it would automatically preclude the possibility of reviewing the compatibility with the EU and FEU Treaties of the international agreements concluded by the Union if the third State that signed the agreement with the Union was not a participant in the proceedings before it.

58. In the light of those considerations, the questions for a preliminary ruling seek to establish:

– the validity of Regulation No 764/2006, in that it approves the Fisheries Agreement ‘providing [EU] fishermen with fishing opportunities in the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco’; [33]

– the validity of Decision 2013/785, in that it approves the 2013 Protocol ‘granting vessels of the Union fishing opportunities in the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco as regards fishing’ [34] and fixing the corresponding financial contribution;

– the validity of Regulation No 1270/2013, in that it allocates among the Member States the fishing opportunities established under the 2013 Protocol; and

– the compatibility of the Fisheries Agreement and the 2013 Protocol with the EU and FEU Treaties and with the constitutional principles stemming from those Treaties, including, in particular, the protection of fundamental rights and observance of international law which Article 3(5) TEU imposes on the European Union’s external action.

59. In what follows I shall refer to those acts together as ‘the contested acts’.

[31] ICJ Reports 1954, p. 19.

[32] As the International Court of Justice has observed, ‘one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction’ (East Timor (Portugal v. Australia), judgment (ICJ Reports 1995, p. 90, paragraph 26 and the case-law cited)).

[33] See recital 1 and Article 1 of Regulation No 764/2006.

[34] See recital 2 and Article 1 of Decision 2013/785.

B. Substance

1. Preliminary observations

60. Both for the parties to the main proceedings and for the interveners before the Court, the contested acts are applicable to the territory of Western Sahara and to the adjacent waters. However, that situation is not clear from the wording of the Fisheries Agreement and the 2013 Protocol. Indeed, none of their provisions expressly refers to Western Sahara.

61. It is therefore appropriate to examine first of all whether the contested acts are applicable to Western Sahara, because, if they were not, their validity could not be challenged by reference to the rules to which the referring court and WSC refer. [35]

62. To my mind, an interpretation of the Fisheries Agreement and the 2013 Protocol consistent with the rules on the interpretation of treaties set out in Article 31 of the Vienna Convention on the Law of Treaties leads to the conclusion that they are indeed applicable to the territory of Western Sahara and to the adjacent waters, for the following reasons.

63. According to Article 31(1) of that convention, 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. According to Article 31(2), 'the context … shall comprise, in addition to the text, including its preamble and annexes[,] any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty'. The context therefore includes the 2006 Protocol, which is no longer in force but the content of which was, in essence, as regards the scope of the Fisheries Agreement, the same as that of the 2013 Protocol.

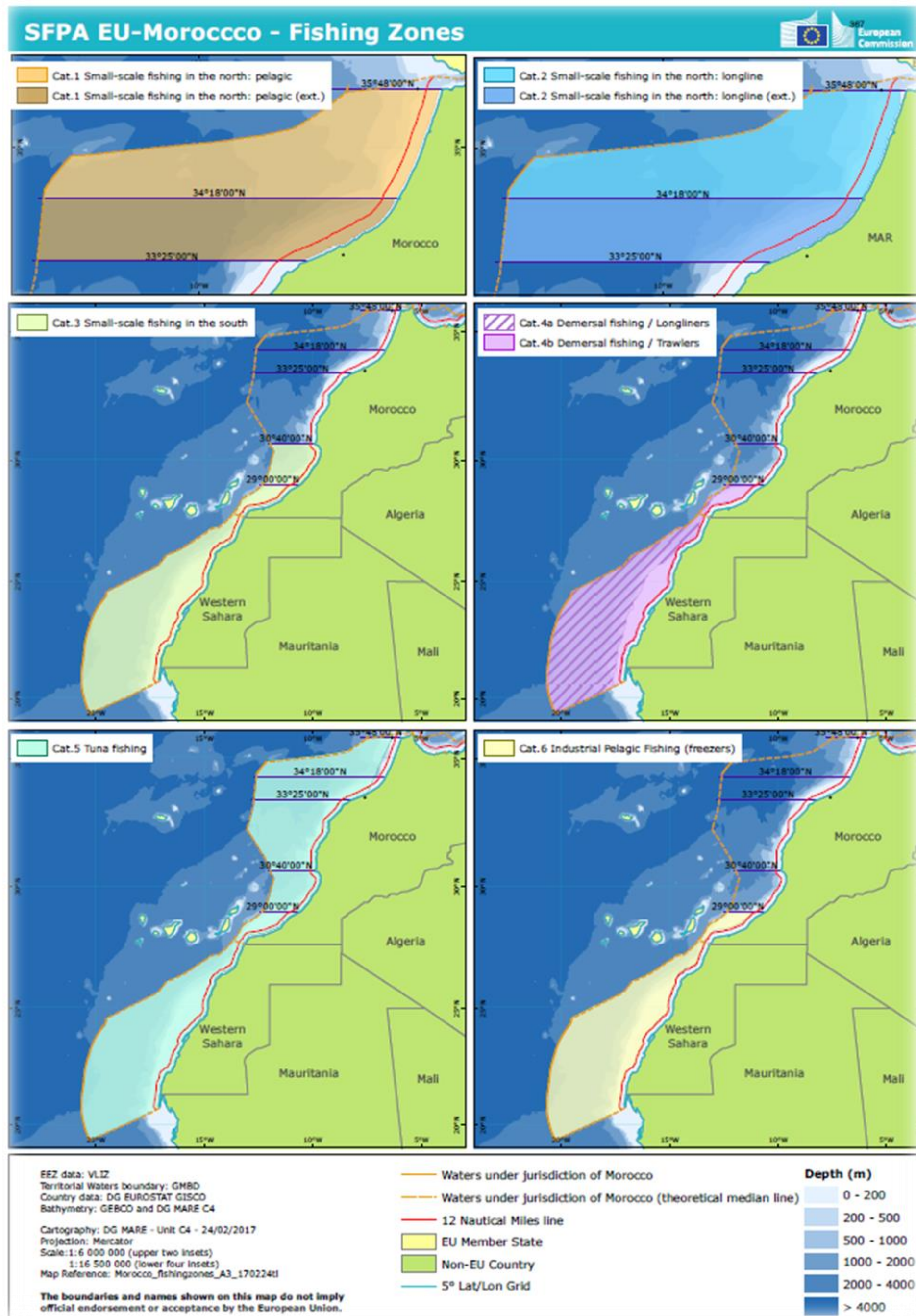
64. Article 31(3) of that convention also requires that, together with the context, 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' is to be taken into account. Therefore, when interpreting the scope of the Fisheries Agreement, it is necessary to take the relevant provisions of the 2013 Protocol into account.

65. In this instance, in accordance with Article 11 thereof, the Fisheries Agreement is to apply, so far as the Kingdom of Morocco is concerned, 'to the territory of Morocco and to the waters under Moroccan jurisdiction'. Article 2(a) of that agreement defines the 'Moroccan fishing zone' in which the fishing

[35] See, to that effect, judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973).

activities provided for in that agreement take place as 'the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco'. [36]

66. Those terms are specified in Appendices 2 and 4 to the Annex to the 2013 Protocol. At the Court's request, the Commission produced six charts showing the extent of the fishing zones in accordance with the specifications set out in those appendices:



[36] See also recital 1 of Regulation No 764/2006.

67. As is apparent from those charts, fishing zone No 3 (cat. 3: small-scale fishing/south) extends south of parallel 30°40’00”N and beyond three nautical miles; fishing zone No 4 (cat. 4: demersal fishing) extends south of parallel 29°N and beyond the 200 meters isobath for trawlers and beyond 12 nautical miles for longliners; fishing zone No 5 (cat. 5: tuna fishing) covers all of Morocco’s Atlantic zone beyond 3 nautical miles, apart from a protected area east of a line from 33°30’N/7°35’W to 35°48’N/6°20’W; and fishing zone No 6 (cat. 6: industrial pelagic fishing) extends south of parallel 29°N and beyond 15 nautical miles for freezer trawlers and beyond 8 nautical miles for RSW trawlers. [37]

68. As regards the latter fishing zone, it is apparent from the minutes of the third Joint Committee of the Fisheries Agreement, which met in Brussels on 17 and 18 March 2008, that the Union and the Kingdom of Morocco agreed that the activity in that zone could operate only south of parallel 26°07’N. In fact, Chapter III of the Annex to the 2013 Protocol and Appendix 4 to that annex allow the Kingdom of Morocco to alter those geographical coordinates unilaterally provided that any change is notified to the Commission one month in advance.

69. The southern edge of those fishing zones is not specified, either in the Fisheries Agreement or in the 2013 Protocol. [38] Since the border between Western Sahara and the Kingdom of Morocco is at parallel 27°42’N (Pointe Stafford), [39] only fishing zone No 6, by subsequent agreement between the Union and the Kingdom of Morocco, explicitly covers the waters adjacent to Western Sahara. However, it is apparent from the charts produced by the Commission that fishing zones Nos 3 to 5 go as far as the maritime border between the Islamic Republic of Mauritania and Western Sahara, thus covering the waters adjacent to Western Sahara.

70. Furthermore, the quantities of catch per fishing zone stated by the Commission at the hearing confirm that the Fisheries Agreement and the 2013 Protocol apply almost exclusively to the waters adjacent to Western Sahara. [40] According to the Commission’s figures, catches in fishing zone No 6 alone represent around 91.5% of total catches taken within the framework of the Fisheries Agreement and the 2013 Protocol. That clearly shows that the

[37] See Appendix 2 to the Annex to the 2013 Protocol.

[38] See Appendix 4 to the Annex to the 2013 Protocol.

[39] See Bennafla, K., ‘Illusion cartographique au Nord, barrière de sable à l’Est: les frontières mouvantes du Sahara occidental’, *L’Espace politique*, 2013, paragraph 212, available on the website at http://espacepolitique.revues.org/2644.

[40] According to the Commission, the catches taken are apportioned among the six fishing zones established by the Fisheries Agreement and the 2013 Protocol as follows: 1 138 tonnes in fishing zone No 1; 406 tonnes in fishing zone No 2; 191 tonnes in fishing zone No 3; 5 035 tonnes in fishing zone No 4; 234 tonnes in fishing zone No 5; and 75 686 tonnes in fishing zone No 6. Although all the tonnage fished does not have the same value, it is clear that the Fisheries Agreement and the 2013 Protocol apply almost exclusively to the waters adjacent to Western Sahara.

application of the Fisheries Agreement and the 2013 Protocol to the waters adjacent to Western Sahara is precisely what the parties envisaged from the outset.

71. As regards the application of the Fisheries Agreement and the 2013 Protocol on land, Article 3(1)(a)(ii) of the 2013 Protocol provides that a part of the financial contribution paid by the Union to the Kingdom of Morocco and equivalent to EUR 14 million is to be paid as support for the fisheries sector in the Kingdom of Morocco, which, according to the Council and the Commission, includes investments in infrastructure on the territory of Western Sahara. In addition, Chapter X of the Annex to the 2013 Protocol provides that a part of the catches must be landed in Moroccan ports, which, according to the Council and the Commission, includes the ports of Western Sahara. Last, the Fisheries Agreement and the 2013 Protocol should, according to the Council and the Commission, benefit the people of Western Sahara, which in itself constitutes an application on land of that agreement and that protocol.

72. In the second place, the assertion that the Fisheries Agreement is applicable to Western Sahara and to the adjacent waters is supported by its genesis. As the Commission observes, the origin of the Fisheries Agreement lies in the fisheries agreements concluded with the Kingdom of Morocco by the Kingdom of Spain before the latter acceded to the Union, [41] which covered the waters adjacent to Western Sahara as waters under Moroccan jurisdiction. [42] I would also observe that the fisheries agreements concluded between the EU and the Kingdom of Morocco after 1988 have already given rise to a number of cases relating to fishing in the waters adjacent to Western Sahara. [43] In that sense, I consider that,

[41] The existence of a direct link between the Fisheries Agreement at issue in the main proceedings and the fisheries agreements concluded between the Kingdom of Spain and the Kingdom of Morocco is confirmed by the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23), 'Articles 167(3) and 354(3) of [which], in so far as they refer to fishing activities, therefore require the Council to continue the fishing activities in which Spain and Portugal were engaged on the basis of fisheries agreements concluded by them before their accession to the [Union]' (judgment of 8 March 1995, *HANSA-Fisch* v *Commission*, T-493/93, EU:T:1995:47, paragraph 37).

[42] See the Agreement on cooperation in sea fisheries between the Government of the Kingdom of Spain and the Government of the Kingdom of Morocco, signed in Rabat on 17 February 1977 (which has never entered into force), and the Protocol on the Transitional Agreement on sea fisheries, signed in Rabat on 29 June 1979 (BOE No 253 of 22 October 1979, p. 24551), which refer to the fishing zone south of Cap Noun (which is situated at parallel 29°N, corresponding to the base line for fishing zones No 4 and No 6 of the Fisheries Agreement) and describe that zone as waters under Moroccan jurisdiction ('*aguas bajo jurisdicción marroquí*'). See also Agreement of 1 August 1983 on cooperation on sea fisheries between the Kingdom of Spain and the Kingdom of Morocco (BOE No 243 of 11 October 1983, p. 27588), Article 1 of which refers to the waters under Moroccan jurisdiction ('*aguas bajo jurisdicción marroquí*'). Annex II to that agreement also distinguishes two fishing zones, one to the north and one to the south of Cap Noun. The fishing zone to the south covers the waters adjacent to Western Sahara.

[43] See judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973, paragraph 17). See also order of 30 April 1999, *Pescados Congelados Jogamar* v *Commission* (T-311/97, EU:T:1999:89, paragraph 6), concerning a fishing vessel belonging to a Spanish

like their predecessors, the Fisheries Agreement and the 2013 Protocol merely reprise and pursue the fishing activities of the Kingdom of Spain that already existed in the waters adjacent to Western Sahara before that Member State acceded to the European Union.

73. In the third and last place, Article 31(4) of that convention gives fundamental importance to the intentions of the parties when it states that ‘a special meaning shall be given to a term if it is established that the parties so intended’. To my mind, it was the intention of the European Union and the Kingdom of Morocco that the Fisheries Agreement should apply to Western Sahara and to the adjacent waters as waters under Moroccan sovereignty or jurisdiction. In 1976, the Kingdom of Morocco annexed the part of Western Sahara north of a straight line from the point at which the Atlantic coast intersects parallel 24°N to the point at which parallel 23°N intersects meridian 13°W, [44] in accordance with the Convention on the line of the State border established between the Islamic Republic of Mauritania and the Kingdom of Morocco, concluded in Rabat on 14 April 1976. [45] The annexation of Western Sahara by the Kingdom of Morocco was supplemented in 1979 when the southern part of Western Sahara [46] which that convention had granted to the Islamic Republic of Mauritania, was joined to the Kingdom of Morocco. The Kingdom of Morocco thus considers that Western Sahara comes under its sovereignty and that, consequently, the waters adjacent to Western Sahara are covered by the scope of the Fisheries Agreement and the 2013 Protocol.

74. As regards the European Union, it is clear from the declarations made by a number of Member States within the Council on the occasion of the approval of the 2013 Protocol that both it and the Fisheries Agreement are applicable to Western Sahara. [47] It was for that reason, moreover, that, as the referring court and the Commission explain, the European Parliament had initially blocked the renegotiation of the protocol establishing the fishing opportunities and the

shipowner that was intercepted by a Moroccan patrol boat and diverted to the port of El Aaiun in Western Sahara.

44 See dahir for Law No 1-76-468 of 6 August 1976 amending dahir No 1-59-351 of 2 December 1959 on the administrative division of the Kingdom, *Bulletin officiel du Royaume du Maroc*, No 3328, p. 914.

45 See Convention on the line of the State border established between the Islamic Republic of Mauritania and the Kingdom of Morocco, signed in Rabat on 14 April 1976, *Annuaire de l’Afrique du Nord*, 1976, Vol. 15, pp. 848 and 849, and dahir No 1-76-380 of 16 April 1976 ratifying and publishing that convention, *Bulletin officiel du Royaume du Maroc*, No 3311-bis, p. 499.

46 See dahir No 2-79-430 of 14 August 1979 amending and supplementing Articles 1 and 2 of dahir No 1-59-351 of 2 December 1959 establishing the administrative division of the Kingdom, *Bulletin officiel du Royaume du Maroc*, No 3485, p. 489.

47 Available on the Council’s website at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015723%202013%20ADD%201.

financial contribution provided for in the Fisheries Agreement. It was also for that reason that the Kingdom of Denmark and the Kingdom of Sweden voted against the approval of the conclusion of that protocol, that the Kingdom of the Netherlands, [48] the Republic of Finland and the United Kingdom abstained and that the Federal Republic of Germany, Ireland and the Republic of Austria expressed reservations. [49]

75. In that context, contrary to the Association Agreement at issue in the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), the parties' intention seems to me to be manifestly established: the Fisheries Agreement and the 2013 Protocol are applicable to Western Sahara and to the waters adjacent thereto. The Court must therefore examine whether that intention, implemented by the contested acts, affects their legality under Article 3(5) TEU and the rules of international law on which WSC relies.

2. The possibility of relying on the rules of international law in order to challenge the validity of the contested acts

(a) General principles

76. WSC's arguments seek, in essence, to challenge the contested acts from two aspects. In the first place, WSC maintains that the European Union cannot lawfully conclude with the Kingdom of Morocco agreements applicable to the territory of Western Sahara and the adjacent waters. In the second place, even on the assumption that the European Union could lawfully conclude such agreements, WSC maintains that the contested acts are, as regards their content, invalid in the light of Article 3(5) TEU and international law. For the purposes of its argument, WSC relies on a number of rules of international law, including, in particular, the right of peoples to self-determination, Article 73 of the Charter of the United Nations, the principle of permanent sovereignty over natural resources and international humanitarian law in so far as those rules govern the conclusion of international agreements applicable to occupied territories and the exploitation of their natural resources. At the hearing, WSC made clear that it was not challenging the validity of the contested acts in the light of international law of the sea.

[48] According to the Kingdom of the Netherlands, 'the [2013] Protocol *does not explicitly refer* to … Western Sahara, *but allows for its application* to maritime areas adjacent to … Western Sahara that are not under the sovereignty or jurisdiction of [the Kingdom of] Morocco'. See Statement by the Kingdom of the Netherlands in Council document 15723/13 ADD 1 of 14 November 2013, available on the Council's website at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015723%202013%20ADD%201. Emphasis added.

[49] See Statements in Council Document 15723/13 ADD 1 of 14 November 2013, available on the Council's website at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015723%202013%20ADD%201.

77. In that context, on the basis of the principles stated in the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), the Secretary of State, Comader, the Spanish, French and Portuguese Governments, the Council and the Commission contend that WSC cannot rely on those rules of international law.

78. It should be borne in mind that, according to paragraphs 51 to 55 of the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), the ability to rely on the rules of international treaty law is subject to the following conditions: the EU must be bound by those rules; their content must be unconditional and sufficiently precise; and, last, their nature and their broad logic must not preclude judicial review of the contested act.

79. In the words of paragraphs 101 to 103 and 107 of the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), the possibility of relying on the rules of customary international law is subject to the following conditions: those rules must be capable of calling in question the competence of the European Union to adopt the contested act and the act must be liable to affect rights which the individual derives from EU law or to create obligations under EU law in his regard.

80. To my mind, if individuals must satisfy certain conditions in order to be able to plead the rules of international law in the context of judicial review of acts of the Union, the principles set out in that judgment are not automatically capable of being transposed to the present case. In effect, those principles relate to judicial review of unilateral acts of purely internal secondary law (regulations, directives, etc.), [50] whereas, as the Commission observes, [51] the present case raises the separate issue of the validity of an international agreement concluded by the Union by means of the act approving its conclusion (treaty secondary law). [52]

81. In that regard, it should be borne in mind that the capacity of member of the United Nations Organisation (‘the United Nations’) is restricted to States. [53] Not being a member of the United Nations, the European Union is not a party to the Statute of the International Court of Justice, which members of the United Nations are pursuant to Article 93 of the United Nations Charter. In addition, Article 34 of

[50] See paragraphs 48, 74, 84 and 102 of the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), where the Court refers to the ‘legality’, the ‘invalid[ity]’ or the ‘validity of an act of the European Union, *such as* Directive 2008/101’. Emphasis added.

[51] See paragraphs 23 and 24 of its answers to the written questions put by the Court.

[52] See, to that effect, the distinction drawn between the review of the validity of international agreements concluded by the Union (including in the light of international law, to which Article 3(5) TEU refers) and review of the validity of the internal acts of the Union in the light of international law in Lenaerts, K., Maselis, I., and Gutman, K., *EU Procedural Law*, Oxford University Press, Oxford, 2014, §§ 10.05 and 10.08.

[53] See Articles 3 to 6 of the Charter of the United Nations.

the Statute of the International Court of Justice states that only States may be parties in cases before it.

82. It follows that review of the external action of the European Union does not fall within the jurisdiction of an international court or even of the International Court of Justice. Consequently, even if its action infringed a peremptory norm of international law within the meaning of Article 53 of the Vienna Convention on the Law of Treaties or the obligations '*erga omnes*' of customary international law, [54] no international court would have jurisdiction to adjudicate on such an infringement.

83. However, certain international agreements allow the EU to 'submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions', an option recognised by the Court's case-law. [55]

84. That does not apply to the Fisheries Agreement, Article 13 of which, entitled 'Settlement of disputes', provides that 'the contracting parties shall consult each other on any dispute concerning the interpretation or application of this Agreement'. Since no independent and impartial court, with jurisdiction to resolve any disputes arising under the Fisheries Agreement, has been created, the settlement of such disputes depends on the goodwill of the parties, and each of them can therefore easily block such settlement. [56]

85. If the Court of Justice is therefore, by default, the only court with jurisdiction to review the external action of the Union and to ascertain that that action contributes to 'the *strict observance* … of international law [and] respect for the principles of the United Nations Charter', [57] it is scarcely surprising that it

[54] For the concept of obligations *erga omnes*, see the Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ Reports 2004, p. 136, paragraph 155). That concept was also recognised by the Court in paragraph 88 of the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973).

[55] Opinion 2/15 (*EU-Singapore Free Trade Agreement*) of 16 May 2017 (EU:C:2017:376, paragraph 298 and the case-law cited).

[56] See, to that effect, order of 30 April 1999, *Pescados Congelados Jogamar* v *Commission* (T-311/97, EU:T:1999:89, paragraph 12): 'By letter of 29 July 1997, and at a meeting which took place on the same day between Mr Gallimore, *Chargé d'Affaires* at the Delegation, and Mr Rhanmi, Secretary-General with the Moroccan Fisheries Ministry, the [EU] authorities requested an extraordinary session of the Joint Committee set up under Article 10 of the [1996 EU-Morocco Fisheries] Agreement. That request was repeated on several occasions, *but consistently refused, since the Moroccan authorities took the view that the Agreement had not been infringed*'. Emphasis added.

[57] Article 3(5) TEU. Emphasis added. See also the first subparagraph of Article 21(1) TEU, Article 21(2)(b) and (c) TEU and Articles 23 TEU and 205 TFEU. The Court has held that, far from being programmatic, those provisions require, inter alia, compliance with human rights and international law on the part 'of all actions of the European Union, including those in the

has held that 'exercise of the powers delegated to the [EU] institutions in international matters cannot escape judicial review … of [validity]'. [58]

86. In that context, although individuals must satisfy certain conditions in order to be able to rely on international law in order to challenge the compatibility of an international agreement concluded by the European Union with Article 3(5) TEU, those conditions cannot be such as to render effective judicial review of the external action of the Union impossible in practice.

87. However, that would in my view be the case if the principles set out in the situation referred to in the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), were transposed as such to review of the validity of the contested acts.

88. In fact, some of the rules of international law relied on in the present case are both rules of customary law and rules of treaty law, since they have been codified in a number of international treaties and conventions, whereas other rules, such as the right to self-determination, are part of general international law [59] and, on that basis, do not come exclusively under international treaty or customary law, the possibility of relying on which was addressed by the Court in its judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864).

89. Furthermore, while it was with the objective of not automatically precluding the possibility of relying on the rules of customary international law that the Court imposed different conditions applicable to such rules from those applicable to international treaty law, it would be contrary to that same objective if, as the Secretary of State, the Spanish, French and Portuguese Governments and the Council and the Commission propose, the possibility of relying on the rules of general international law were made subject to the conditions governing the possibility of relying on the rules of customary international law, where they satisfy the conditions that determine the possibility of relying on the rules of international treaty law.

90. Such a solution would automatically preclude the possibility for individuals to rely on rules, however essential, of international law, such as the peremptory norms of general international law or the obligations *erga omnes* of international law, for the following reasons.

area of the CFSP' (see judgment of 14 June 2016, *Parliament* v *Council*, C-263/14, EU:C:2016:435, paragraph 47).

58 Judgment of 9 August 1994, *France* v *Commission* (C-327/91, EU:C:1994:305, paragraph 16).

59 See Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion (ICJ Reports 2010, p. 403, paragraph 79).

91. First of all, according to the first of the conditions governing the possibility of relying on the rules of customary international law laid down by the Court where the contested act is an act of purely internal unilateral secondary law, the rules relied on must be capable of calling in question the competence of the Union to adopt that act. I recall that in the case that gave rise to the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), and in the cases that gave rise to the judgments cited in paragraph 107 of that judgment, the competence of the Union to adopt the contested act, which was claimed to produce extraterritorial effects, was at issue.

92. In the present case, no one is challenging the competence [60] of the Union to conclude the Fisheries Agreement and the 2013 Protocol or to adopt Regulation No 764/2006, Decision 2013/785 and Regulation No 1270/2013. On the contrary, WSC is challenging the compatibility of the Fisheries Agreement and of the 2013 Protocol with primary EU law and the internal lawfulness of Regulation No 764/2006, Decision 2013/785 and Regulation No 1270/2013. It would be absurd to limit review of the contested acts solely to the question of the competence of the Union and automatically to preclude substantive review of those acts by reference to the most fundamental norms of international law which are relied on in the present case.

93. Next, the application of the second condition governing the possibility of relying on the rules of customary international law in the context of a case such as that at issue is even more problematic. According to that condition, the contested act must be liable to affect rights which the individual derives from EU law or to create obligations under EU law with regard to him. [61]

94. In the present case, the contested acts confer rights and obligations only on the European Union and the Kingdom of Morocco. I see no provision in those acts that would create rights or obligations with regard to individuals, other than, potentially (but I doubt it), the EU shipowners whose vessels have a fishing licence issued under the Fisheries Agreement. Therefore, even on the assumption that a category of individuals might initiate a judicial review of the contested acts on the basis of that condition, such a category would consist exclusively of those who benefit from the Fisheries Agreement and therefore have no interest in challenging it before the Court.

[60] For a more flexible reading of that condition, but one that is not really supported by the wording of paragraph 107 of that judgment, see Lenaerts, K., 'Direct applicability and direct effect of international law in the EU legal order', published in Govaere, I., Lannon, E., van Elsuwege, P., and Adam, S., (eds), *The European Union in the World: Essays in Honour of Marc Maresceau*, Brill, Leiden, 2013, pp. 45 to 64, especially p. 61.

[61] The criterion seems to be very similar to that of the standing and interest in bringing an action, which, in the context of a reference for a preliminary ruling, should in my view be assessed only by reference to national law.

95. Last, why should judicial review be limited 'to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles', [62] when those principles have 'the same degree of precision as a provision of an international agreement' [63] because they have been codified?

96. To conclude on this point, I consider that in the context of the judicial review of the international agreements concluded by the European Union and of the acts of the European Union approving or implementing such agreements, the possibility of relying on the rules of international law must indeed be subject to certain conditions, but independently of whether they strictly belong to one or more sources of international law according to the classification set out in Article 38(1) of the Statute of the International Court of Justice. Those conditions are the ones set out in paragraphs 53 to 55 of the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), namely that the Union must be bound by the rule relied on, the content of which must be unconditional and sufficiently precise and, last, the nature and the broad logic of which do not preclude judicial review of the contested act.

97. It is by reference to those principles that I shall examine the possibility of relying on the rules of international law relied on by WSC that are relevant in the present case.

(b) The possibility of relying on the rules of international law applicable to the conclusion of international agreements relating to the exploitation of the natural resources in Western Sahara

98. By the contested acts, the European Union concluded with the Kingdom of Morocco and implemented an international agreement which provides for the exploitation by the Union of the fish resources of Western Sahara. In that context, I shall examine the possibility of relying on the rules of international law that might call in question both the conclusion with the Kingdom of Morocco of an international agreement applicable to Western Sahara and the adjacent waters and the exploitation of its natural resources. In doing so, I shall take into account the facts that the Kingdom of Morocco regards itself as having sovereignty over Western Sahara; that from the viewpoint of the EU institutions, the Kingdom of Morocco is the de facto administering power of Western Sahara; and that in the view of the referring court and WSC, the Kingdom of Morocco is the occupying power of Western Sahara.

[62] Judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 110).

[63] Judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), paragraph 110).

(1) The right to self-determination

(i) The right to self-determination forms part of 'human rights'

99. First of all, I consider that the right to self-determination is not subject to the conditions governing the possibility of relying on the rules of international law because it forms part of human rights.

100. As the Court held in paragraphs 284 and 285 of the judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461), respect for human rights is a condition of the lawfulness of EU acts and measures incompatible with respect for human rights are not acceptable in the EU legal order. Thus, the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EU and FEU Treaties, such as Article 3(5) TEU and Article 21 TEU, which provide that the Union's external action is to respect human rights. It is therefore incumbent on the Court to ensure that human rights are respected in the context of the full system of remedies established by the EU and FEU Treaties.

101. According to the Court's settled case-law, 'fundamental rights form an integral part of the general principles of law whose observance the Court ensures'. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States *and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories*'. [64]

102. All the Member States (and the Kingdom of Morocco) are parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) [65] and the International Covenant on Civil and Political Rights (ICCPR), [66] signed in New York on 16 December 1966, of which the common Article 1 provides as follows:

'1. 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.

[64] Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 283 and the case-law cited). Emphasis added. The fact that the Charter of Fundamental Rights of the European Union became mandatory in 2009 does not preclude the relevance of the reference to the international instruments binding on all Member States.

[65] *United Nations Treaty Series*, Vol. 993, p. 3.

[66] *United Nations Treaty Series*, Vol. 999, p. 171.

2. All peoples may, for their own ends, *freely* dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations'. [67]

103. Furthermore, Title VIII of the Helsinki Final Act of 1975, entitled 'Equal rights and self-determination of peoples', to which Article 21(2)(c) TEU refers and to which all Member States are parties, enshrines the right to self-determination in terms almost identical to those of Article 1 common to the ICESCR and the ICCPR. That title provides as follows:

'The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.'

104. The right to self-determination is therefore a human right, which has been recognised as such by several international authorities and instruments and also in academic literature. [68] According to the International Court of Justice, the

[67] Emphasis added.

[68] See paragraph 1 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by United Nations General Assembly Resolution 1514 (XV) of 20 December 1960; Opinion No 2 of the Arbitration Commission of the European Peace Conference on Yugoslavia (composed of Robert Badinter, President of the Conseil constitutionnel (Constitutional Council of France), Roman Herzog, President of the Bundesverfassungsgericht (Federal Constitutional Court of Germany), Aldo Corasaniti, President of the Corte costituzionale (Constitutional Court of Italy), Francisco Tomás y Valiente, President of the Tribunal Constitucional (Constitutional Court of Spain) and Ms Irène Pétry (President of the Cour d'arbitrage (Arbitration Court, Belgium)), 1993, *International Law Reports*, Vol. 92, pp. 168 and 169, paragraphs 2 and 3; Gros-Espiell, H., 'Le droit à l'autodétermination — Application des résolutions de l'ONU', 1980, E/CN.4/Sub.2/405/Rev. 1., paragraph 57;

beneficiaries of that right are the peoples of non-self-governing territories and people subject to alien subjugation, [69] domination and exploitation. [70]

(ii) The right to self-determination as a principle of general international law, of international treaty law and as an obligation erga omnes

105. In any event, as a rule of general international law [71] and an obligation *erga omnes* [72] which is codified in a number of international treaty instruments, [73] the right to self-determination satisfies the criteria governing the possibility of relying on it set out in point 96 of this Opinion, namely that it is binding on the Union, that its content is unconditional and sufficiently precise and that its nature and its broad logic do not preclude judicial review of the contested acts.

– *The European Union is bound by the right to self-determination*

106. As the Court held in its judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), the Union is bound by the right to self-determination, which is a legally enforceable right *erga omnes* and one of the essential principles of international law. [74] On that basis, '[it] forms part of the

Doehring, K., 'Self-Determination', published in Simma, B. (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed., Oxford University Press, Oxford, 2002, Vol. 1, pp. 48 to 53; Dobelle, J.-F., 'Article 1, paragraphe 2', published in Cot, J.-P., Pellet, A., and Forteau, M., *La Charte des Nations unies: commentaire article par article*, 3rd ed., Economica, Paris, 2005, pp. 337 to 356, especially pp. 340 to 341; Dinstein, Y., *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 51; Saxer, U., *Die international Steuerung der Selbstbestimmung und der Staatssentstehung*, Springer, Heidelberg, 2010, pp. 238 to 249; Oeter, S., 'Self-Determination', published in Simma, B., Khan, D.-E., Nolte, G., and Paulus, A. (eds), *The Charter of the United Nations: A Commentary*, 3rd ed., Oxford University Press, Oxford, 2012, Vol. I, pp. 313 to 333, especially p. 322; Crawford, J., 'Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories', legal opinion of 24 January 2012, paragraph 26, available on the website at https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf.

[69] Footnote not relevant to the English translation.

[70] See Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion (ICJ Reports 2010, p. 403, paragraph 79 and the case-law cited).

[71] See Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion (ICJ Reports 2010, p. 403, paragraph 79).

[72] See East Timor (Portugal v. Australia), judgment (ICJ Reports 1995, p. 90, paragraph 29, and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraphs 88 and 156).

[73] See, for example, Article 1(2) of the Charter of the United Nations and Article 1 common to the ICESCR and the ICCPR.

[74] Paragraph 88 of the judgment.

rules of international law applicable to relations between the European Union and the Kingdom of Morocco'. [75]

107. The right to self-determination is enshrined in Article 1(2) of the United Nations Charter. [76] Article 3(5) TEU, Article 21(1) TEU, Article 21(2)(b) and (c) TEU and Articles 23 TEU and 205 TFEU require the European Union to respect the principles of the United Nations Charter. Declaration 13 concerning the common foreign and security policy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed in Lisbon on 13 December 2007, states that 'the European Union and its Member States will remain *bound* by the provisions of the Charter of the United Nations'. [77]

108. In addition, the right to self-determination is among the principles of the Helsinki Final Act referred to in Article 21(2)(c) TEU. [78]

109. Last, as is apparent from Article 1 of the 2013 Protocol, its implementation is subject to respect for democratic principles and fundamental human rights, which includes respect for the right of peoples to self-determination.

– *The right to self-determination is a rule of international law which, from the viewpoint of its content, is unconditional and sufficiently precise*

110. As the Court held in paragraph 55 of the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), '[this] condition … is satisfied where the provision relied on contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.

111. As shown in paragraphs 90, 92 and 93 of the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), where the Court applied that right to Western Sahara and its people without expressing any doubt as regards its content and/or its scope, the right to self-determination satisfies that condition.

112. The fact that the International Court of Justice held that the construction of a wall by Israel in the territory of Transjordan constituted a violation of the right of the Palestinian people to self-determination because it was tantamount to a de

75 Paragraph 89 of the judgment.

76 'The Purposes of the United Nations are: … to develop friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*, and to take other appropriate measures to strengthen universal peace; …' Emphasis added.

77 Emphasis added. The use of the participle 'bound' is significant, since the Union is not a party to the Charter of the United Nations.

78 See Title VIII, entitled 'Equal rights and self-determination of peoples'.

facto annexation [79] shows that the right to self-determination is a right the content of which is sufficiently clear and precise to be applied.

113. Indeed, its content is sufficiently detailed in a number of instruments.

114. In that regard, the International Court of Justice has established, in Article 1(2) of the United Nations Charter, the existence of a 'right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation'. [80]

115. The content of that right is stated in detail in Article 1 common to the ICESCR and the ICCPR [81] and the details of its implementation are set out in a number of United Nations General Assembly resolutions, including Resolutions 1514 (XV), 1541 (XV) and 2625 (XXV), to which the International Court of Justice has often referred. [82]

116. In that regard, Resolution 1514 (XV) states the following:

'1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

…

[79] See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraphs 121 and 122).

[80] See Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion (ICJ Reports 2010, p. 403, paragraph 79 and the case-law cited).

[81] See points 102 to 103 of this Opinion and also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraph 88).

[82] See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (ICJ Reports 1971, p. 16, paragraph 52); Western Sahara, Advisory Opinion (ICJ Reports 1975, p. 12, paragraphs 55 to 58); and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraph 88). See also, to that effect, Oeter, S., 'Self-Determination,' published in Simma, B., Khan, D.-E., Nolte, G., and Paulus, A. (eds), *The Charter of the United Nations: A Commentary*, 3rd ed., Oxford University Press, Oxford, 2012, Vol. I, pp. 313 to 333, especially pp. 320 and 321; and Dobelle, J.-F., 'Article 1, paragraphe 2', published in Cot, J.-P., Pellet, A., and Forteau, M., *La Charte des Nations unies: commentaire article par article*, 3rd ed., Economica, Paris, 2005, pp. 337 to 356.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

…'

117. Resolution 1541 (XV) establishes the Principles which should guide the administering powers in the exercise of their obligations under Article 73 of the United Nations Charter. It should be noted that Principle VI provides that the right to self-determination is considered to have been exercised when the non-autonomous territory becomes a sovereign independent State or when it associates freely with an independent State or when it is integrated with an independent State.

118. As regards the integration of an independent State, Principle IX(b) states that 'the integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The [United Nations] could, when it deems it necessary, supervise these processes'.

119. Last, Resolution 2625 (XXV) contains the 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations'. Under the heading 'The principle of equal rights and self-determination of peoples', that resolution imposes on all States 'the duty to promote, through joint and separate action, realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter [of the United Nations]'.

120. It also imposes on States 'the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence'.

121. As regards, more particularly, the non-self-governing territories, such as Western Sahara, that resolution states such a territory has 'a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the [United Nations] 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'. [83]

122. Last, in the general part, Resolution 2625 (XXV) declares that 'the principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and [the General Assembly] consequently appeals

[83] See also, to that effect, judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973, paragraphs 90 to 92).

to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles'.

123. It follows from the foregoing that the right to self-determination is not subjected, in its implementation or in its effects, to the adoption of any subsequent measure.

124. In the present case, as the International Court of Justice and this Court have held, the people of Western Sahara enjoy the right to self-determination. [84]

– *The nature and the broad logic of the right to self-determination do not preclude judicial review of the contested acts*

125. In paragraph 89 of the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), the Court held that 'the General Court was obliged to take [the right to self-determination] into account' in the context of the action for annulment of the Association Agreement brought by Front Polisario. It follows that the nature and the broad logic of that right do not preclude judicial review of the acts of the Union.

126. In fact, Article 103 of the United Nations Charter provides that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

127. In addition, according to the International Court of Justice, 'the right of peoples to self-determination has an *erga omnes* character'. [85] That means that 'such obligations are by their very nature "the concern of all States" and, "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection"'. [86] In that sense, the International Court of Justice has held that 'all States are under an obligation not to recognise the illegal situation resulting from the [breach of an obligation *erga omnes*]. They are also under an obligation not to render aid or assistance in maintaining the situation created by such [breach]. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the [breach],

[84] See Western Sahara, Advisory Opinion (ICJ Reports 1975, p. 12) and judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973).

[85] See East Timor (Portugal v. Australia), judgment (ICJ Reports 1995, p. 90, paragraph 29), and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraphs 88 and 156).

[86] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraph 155). See also, to that effect, Barcelona Traction, Light and Power Company, Limited, Second Phase, judgment (ICJ Reports 1970, p. 32, paragraph 33).

to the exercise by the … people [concerned, in this instance the Palestinian people] of its right to self-determination is brought to an end'. [87]

128. Last, the right to self-determination is frequently cited as a peremptory norm of international law, infringement of which may render an international agreement invalid in accordance with Article 53 of the Vienna Convention on the Law of Treaties. [88] It should be emphasised that, during the advisory opinion proceedings before the International Court of Justice in the Western Sahara case, the Kingdom of Spain recognised that the right to self-determination constituted in itself a peremptory norm of international law, [89] whereas the Kingdom of Morocco recognised that the principle of decolonisation, of which self-determination is one form, is a peremptory norm. [90]

129. It follows that, far from precluding judicial review, the nature and the broad logic of the right to self-determination require the Court to determine whether, by the contested acts, the Union respected that right, did not recognise an illegal

87 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraph 159). To my mind that 'non-recognition' obligation is in itself a principle of international law that satisfies the criteria applicable to the possibility of relying on particular rules set out in point 96 of this Opinion.

88 See judgment of 25 June 1985 No 1981 de la Corte suprema di cassazione (Court of Cassation, Italy) in the Case of Yasser Arafat, *Rivista di Diritto Internazionale*, 1986, pp. 885 to 889; order of 26 October 2004 of the Bundesverfassungsgericht (Federal Constitutional Court, Germany), 2 BvR 955/00, 1038/01, paragraph 97; Separate Opinion of Vice-President Ammoun, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (ICJ Reports 1971, p. 16, pp. 77 and 78); International Law Commission, 'Draft articles on the Law of Treaties with comments', *Yearbook of the International Law Commission*, 1966, Vol. II, p. 248 [p. 270 in the French version]; International Law Commission, 'Draft articles on responsibility of States for internationally wrong acts with commentary', *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 85 [p. 91 in the French version]; point 3.2 of the Written Statement of the Kingdom of the Netherlands, Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion (ICJ Reports 2010, p. 403); Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge, 2005, pp. 133 and 136; Raič, D., *Statehood and the Law of Self-Determination*, Kluwer Law International, Alphen an den Rijn, 2012, pp. 218 and 219; Oeter, S., 'Self-Determination', published in Simma, B., Khan, D.-E., Nolte, G., and Paulus, A. (eds), *The Charter of the United Nations: A Commentary*, 3rd ed., Oxford University Press, Oxford, 2012, Vol. I, pp. 313 to 333, p. 316.

89 See ICJ Pleadings, Western Sahara, Vol. I, p. 207, paragraph 344.

90 See ICJ Pleadings, Western Sahara, Vol. V, p. 179. The Kingdom of Morocco stressed the integrity of its territory as a basis for claiming the territory of Western Sahara, but the International Court of Justice rejected its argument and held that the people of Western Sahara fully enjoyed their right to self-determination.

situation resulting from a breach of that right and did not render aid or assistance in maintaining such a situation. [91]

(2) The principle of permanent sovereignty over natural resources

130. The principle of permanent sovereignty over natural resources guarantees the sovereign right of each State and each people to the free disposition of the natural wealth and resources of its territory in the interest of national development and of the well-being of its people. [92] It is a principle of customary international law [93] which as such is binding on the Union.

131. As the Under-Secretary-General for Legal Affairs of the United Nations, the Legal Counsel, Hans Corell, observed in his letter of 29 January 2002 to the President of the United Nations Security Council, '[the] exact legal scope and implications [of the principle of permanent sovereignty over natural resources] are still debatable'. [94]

132. In fact, his legal opinion is testimony to that difficulty, since he uses different expressions to characterise what the exploitation of natural resources for the benefit of the people of the non-self-governing territory is. He speaks of exploitation which is not carried out 'in disregard of the needs, interests and benefits of the people [of the non-self-governing territory]' [95] or of exploitation 'on … behalf [of the peoples of the non-self-governing territories] or in consultation with their representatives' [96] and concludes that exploitation cannot proceed 'in disregard of the interests and wishes of the people of [the non-self-governing territory]'. [97]

133. Thus, in spite of the variation in terminology, it is certain that, at a minimum, the exploitation of natural resources must be carried out for the benefit of the people of the non-self-governing territory, which is sufficient to render that criterion of the principle of permanent sovereignty over natural resources sufficiently clear and precise.

[91] The case-law of the International Court of Justice cited in point 127 of this Opinion also refers to the obligation imposed on States to ensure that impediments to the exercise of the right of a people to self-determination are removed. There is no need to refer to that case-law here.

[92] See United Nations General Assembly Resolution 1803 (XVII).

[93] See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), judgment (ICJ Reports 2005, p. 168, paragraph 244).

[94] S/2002/161, paragraph 14.

[95] S/2002/161, paragraph 14.

[96] S/2002/161, paragraph 24.

[97] S/2002/161, paragraph 25.

134. It is also capable of forming the basis for a judicial review of the contested acts. In fact, the Parliament had initially blocked the adoption of the protocol eventually concluded in 2013, as it considered that the protocol did not provide sufficient safeguards to ensure that the fishery exploitation of the natural resources of Western Sahara by European Union vessels would be done for the benefit of the people of that territory. In addition, the Council and the Commission accept that the criterion of benefit for the people of Western Sahara is a condition of the lawfulness of the agreements concluded between the European Union and the Kingdom of Morocco which relate to Western Sahara.

(3) The rules of international humanitarian law applicable to the conclusion of international agreements concerning the exploitation of the natural resources of the occupied territory

135. In the referring court's view, and in the submissions of WSC and of HMRC and the Secretary of State, Morocco's presence in Western Sahara constitutes an occupation. [98]

136. In that regard, I would observe that the question whether the Kingdom of Morocco is or is not the occupying power of Western Sahara and whether it concluded the Fisheries Agreement and the 2013 Protocol in that capacity is a question of interpretation of international law to which the conditions governing the possibility of relying on international law in EU law do not apply.

137. However, if the Kingdom of Morocco is the occupying power of Western Sahara (a question to which I shall return below [99]), it must be possible to rely on the rules of international humanitarian law, codified in the regulations annexed to the Hague Convention of 18 October 1907 Respecting the Laws and Customs of War on Land ('the 1907 Hague Regulations') and the Geneva Convention of 12 August 1949 Relative to the Protection of Civilian Persons in Time of War ('the Fourth Geneva Convention'), which concern the conclusion of international agreements applicable to the occupied territory (Article 43 of the 1907 Hague Regulations and the second paragraph of Article 64 of the Fourth Geneva Convention) and the exploitation of the natural resources of the occupied territory (Article 55 of the 1907 Hague Regulations).

138. Indeed, those provisions thus satisfy the criteria governing the possibility of relying on international law set out in point 96 of this Opinion.

139. In the first place, the provisions of the 1907 Hague Regulations and the Fourth Geneva Convention are intransgressible principles of customary

[98] See paragraphs 27, 44.1 and 47.4 of the request for a preliminary ruling and paragraphs 40, 43, 48 and 49 of the judgment of 19 October 2015 in the case of *Western Sahara Campaign UK, R (on the application of) v HM Revenue and Customs* [2015] EWHC 2898 (Admin).

[99] See points 234 to 255 of this Opinion.

international law which can be relied on *erga omnes* [100] and as such are binding on the European Union.

140. In the second place, their content is sufficiently precise and unconditional in that the obligations which they impose on the occupying powers are not subject, in their implementation or their effects, to the adoption of any subsequent measure.

141. In the third and last place, their nature and their broad logic as intransgressible rules do not preclude judicial review of the contested acts, and in particular of Regulation No 764/2006, Decision 2013/785 and Regulation No 1270/2013 in that they approve and implement an exploitation of the natural resources of Western Sahara agreed between the European Union and the Kingdom of Morocco. In fact, the European Union is under an obligation not to recognise an illegal situation resulting from a breach of those provisions and not to render aid or assistance in maintaining the situation created by that breach. [101]

142. Having determined the rules of international law that may be relied on, I shall now examine the compatibility of the contested acts with those rules.

3. The validity of Regulation No 764/2006, Decision 2013/785 and Regulation No 1270/2013 and the compatibility of the Fisheries Agreement and the 2013 Protocol with the rules of international law referred to in Article 3(5) TEU that may be relied on

(a) Respect by the contested acts of the right of the people of Western Sahara to self-determination and of the obligation not to recognise an illegal situation resulting from that right and not to render aid or assistance in maintaining that situation

143. In its judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), the Court held that the Association Agreement concluded between the European Union and the Kingdom of Morocco, which, according to its wording, is to apply to ‘the territory of the Kingdom of Morocco’, is not applicable to the territory of Western Sahara since such application would be incompatible with the right of the people of that territory to self-determination and also with Articles 29 (territorial application of treaties) and 34 (principle of the relative effect of treaties, according to which treaties must not harm or profit third parties without their consent) of the Vienna Convention on the Law of Treaties. [102]

[100] See point 238 of this Opinion.

[101] See point 127 of this Opinion.

[102] See paragraphs 87, 92, 93, 97, 106 to 108, 114, 116, 123 and 125.

144. According to the Council and the Commission, the present case must be distinguished from the case that gave rise to the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), in that, unlike the Association Agreement, the Fisheries Agreement and the 2013 Protocol are applicable to Western Sahara. According to their reading of that judgment, the problem of the Association Agreement was that it was applied to Western Sahara without being legally applicable there, because such application would be incompatible with the right of the people of that territory to self-determination and with Articles 29 (territorial application of treaties) and 34 (principle of the relative effect of treaties, according to which treaties must not harm or profit third parties without their consent) of the Vienna Convention on the Law of Treaties. It is on the basis of that argument that the solution envisaged by the Council and the Commission in order to render the application of the Association Agreement to Western Sahara consistent with the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973) would be to extend its scope by agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco so that Western Sahara would be expressly covered.

145. I am not persuaded by that line of argument. If the application to Western Sahara of an international agreement concluded with the Kingdom of Morocco, the territorial scope of which does not expressly include that territory, would be incompatible with the right of the people of that territory to self-determination, then an international agreement which, like the Fisheries Agreement and the 2013 Protocol, is applicable to the territory of Western Sahara and the adjacent waters [103] and authorises the exploitation by the European Union [104] of the fishery resources of Western Sahara would a fortiori also be incompatible with that right.

146. A fortiori, that argument seems to me to be sufficient to establish a breach of the right of the people of Western Sahara to self-determination. In the interest of completeness, I would add that the contested acts do not respect the right of the people of Western Sahara to self-determination in that they do not correspond to either the *free* pursuit of its economic development or to the *free* disposal of its wealth and of its natural resources [105] and that in any event, even if they did not in themselves breach the right to self-determination, they would not respect the European Union’s obligation not to recognise an illegal situation resulting from the breach of the right of the people of Western Sahara to self-determination and not to render aid or assistance in maintaining that situation. [106]

[103] See points 60 to 74 of this Opinion.

[104] See, to that effect, judgment of 9 October 2014, *Ahlström and Others* (C-565/13, EU:C:2014:2273, paragraph 33).

[105] See Article 1, common to the ICESCR and the ICCPR, paragraph 2 of United Nations General Assembly Resolution 1514 (XV) and Title VII of the Helsinki Final Act of 1975.

[106] See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraph 159).

(1) The existence of a free will of the people of Western Sahara to pursue by the contested acts its economic development and to dispose of its wealth and of its natural resources

147. The fact that no such will exists seems to be borne out by the following facts, [107] the substance of which was pleaded by WSC before the referring court and set out in its judgment. [108]

148. On 20 December 1966, the United Nations General Assembly adopted Resolution 2229 (XXI) on the Question of Ifni and Spanish Sahara, in which it 'reaffirm[ed] the inalienable right of the peoples of … Spanish Sahara to self-determination' and invited the Kingdom of Spain, in its capacity as administering Power, to determine at the earliest possible date 'the procedures for the holding of a referendum under [United Nations] auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination'.

149. On 20 August 1974, the Kingdom of Spain informed the United Nations that it proposed to hold, under United Nations auspices, a referendum in Western Sahara. [109]

150. In May 1975, in spite of the difficulties encountered, the United Nations Visiting Mission to Western Sahara 'was able to conclude, after its stay in the territory, that the majority of the population within Spanish Sahara was manifestly in favour of independence'. [110]

[107] For a full account of the facts, see 'Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (A/31/23/Rev.1), *Official Documents of the General Assembly*, 1977, Vol. II, pp. 203 to 225; 'Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (A/31/23/Rev.1), *Official Documents of the General Assembly*, 1980, Vol. II, pp. 105 to 117.

[108] See paragraphs 12 to 18 of the judgment of 19 October 2015 in *Western Sahara Campaign UK, R (on the application of) v HM Revenue and Customs* [2015] EWHC 2898 (Admin).

[109] The idea of a referendum was not enthusiastically received by the Kingdom of Morocco. In a private discussion with Mr Kissinger, the Secretary of State of the United States of America, the King of Morocco, Hassan II, told him: 'I told [the Spanish Minister for Foreign Affairs] that I agree that Spain remains, but I do not agree in [Western] Sahara becoming independent. I prefer the Spanish presence to self-determination for 30 000 people'. Mr Kissinger replied: '[The Algerian President] asked me yesterday what I thought about that and I said self-determination for 30-40 000 persons who do not even know where they live?' See Memorandum of Conversation (Rabat, 15 October, 1.15 p.m.), published in Burton, M.F., *Foreign Relations of the United States, 1969-1976*, United States Government Printing Office, Washington, 2014, Vol. E-9, Part 1 (Documents on North Africa, 1973-1976), pp. 258 to 261, especially p. 258.

[110] See Report of 10 October 1975 of the United Nations Visiting Mission to Spanish Sahara, published in the 'Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and

151. On 16 October 1975, the International Court of Justice, following a request by the United Nations General Assembly in the context of its work relating to the decolonisation of Western Sahara, delivered an Advisory Opinion according to which Western Sahara was not a territory belonging to no one (*terra nullius*) at the time of colonisation by Spain and also that although certain material showed the existence, at the time of Spanish colonisation, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara, it did not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco. [111] The Court therefore did not find legal ties of such a nature as might affect the application of United Nations General Assembly Resolution 1514 (XV) as regards the decolonisation of Western Sahara and, in particular, the application of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory. [112]

152. In a speech delivered on the day of the publication of the Advisory Opinion, 'the King of Morocco took the view that "the whole world [had] recognised that [Western] Sahara belonged" to the Kingdom of Morocco and that it only remained for the Kingdom "to peacefully occupy that territory"'; he called, to that end, for the organisation of a march in which 350 000 persons took part, called 'the Green March'. [113]

153. Upon application by the Kingdom of Spain, the United Nations Security Council requested the United Nations Secretary-General, K. Waldheim, to report on the results of his consultations with the parties concerned, including in particular the Kingdom of Morocco. [114]

154. The Kingdom of Morocco's argument, described in that report, was that a referendum was unnecessary because the International Court of Justice had recognised the historic links of allegiance between the Sultan of Morocco and the tribes traditionally living in the territory of Western Sahara and that, in any event, 'the populations of the territory had already de facto exercised their right to self-determination and had declared themselves in favour of returning the territory to Morocco', the most recent evidence being 'the oath of allegiance to the King of Morocco taken on behalf of the Saharawi tribes by [Mr Khatri Ould Said a Ould

Peoples' (A/10023/Rev.1), *Official documents of the General Assembly*, 1977, Vol. III, pp. 12 to 133, paragraph 229.

111 See Western Sahara, Advisory Opinion (ICJ Reports 1975, p. 12, paragraph 162).

112 See Western Sahara, Advisory Opinion (ICJ Reports 1975, p. 12, paragraph 162).

113 See paragraph 30 of the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973).

114 See United Nations Security Council Resolution 379 (1975) of 2 November 1975.

El Jomaini], President of the Yema'a[[115]]' at a ceremony held on 4 November 1975 at the Palace of Agadir. [116]

155. Following the Kingdom of Spain's protests against the Green March, the United Nations Security Council adopted, on 6 November 1975, Resolution 380 (1975) on Western Sahara, in which it 'deplore[d] the holding of the march' announced and 'call[ed] upon [the Kingdom of] Morocco immediately to withdraw from the territory of Western Sahara all the participants in [that] march'. The Kingdom of Morocco complied with that request a few days later.

156. During the crisis caused by the Green March, the Kingdom of Spain, the Kingdom of Morocco and the Islamic Republic of Mauritania took part in trilateral negotiations which led, on 14 November 1975, to the Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania [117] ('the Madrid Agreement'). In the words of that agreement, 'Spain [would] proceed forthwith to institute a temporary administration in the Territory [of Western Sahara], in which Morocco and Mauritania [would] participate in collaboration with the Yema'a and to which would be transferred all the responsibilities and powers [which it possessed over that territory as administering Power]', which was done.

157. The Madrid Agreement also provided that 'the termination of the Spanish presence in the Territory [would] be completed by 28 February 1976 at the latest' and that 'the views of the Saharan population, expressed through the Yema'a, [would] be respected'.

158. It subsequently became apparent that that agreement was accompanied by a series of agreements between those three countries, formally called 'acts of conversations', designed to regulate certain economic aspects of the transfer of the administration of Western Sahara, including, in particular, fishing rights in the waters adjacent to that territory. [118] The existence of those agreements and the fact

[115] Established in 1967 by the Spanish administration, the Yema'a was an advisory body composed of 103 members, including the mayors of large towns, 40 tribal chiefs (sheiks), 40 representatives of family groups and 16 representatives of professional groups. See Report of 10 October 1975 of the United Nations Visiting Mission to Spanish Sahara, published in the 'Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (A/10023/Rev.1), *Official Documents of the General Assembly*, 1977, Vol. III, pp. 12 to 133, paragraphs 126 to 142.

[116] See report of 8 November 1975 by the Secretary-General in application of Resolution 379 (1975) on the situation concerning Western Sahara (S/11874), paragraph 17. See also record of the 1954th Meeting of the Security Council on 6 November 1975 (S/PV.1854), paragraphs 47 and 48.

[117] *United Nations Treaty Series*, Vol. 988, p. 259.

[118] Under the terms of these agreements, the Spanish, Moroccan and Mauritanian delegations agreed to recognise fishing rights in the waters adjacent to Western Sahara in favour of 800 Spanish vessels for a period of 20 years on the same conditions as those existing on 14 November 1975. See Cortes, Diario de sesiones del Congreso de los diputados, 1978, No 15, p. 498 (speech by Mr Manuel Marín González, a Partido Socialista Obrero Español deputy,

that they related to fishing were confirmed by the Minister for Foreign Affairs of the Kingdom of Spain, Mr Oreja Aguirre, during the parliamentary debate on the ratification of the 1977 Fisheries Agreement between the Kingdom of Spain and the Kingdom of Morocco. [119] According to that minister, those agreements amounted to 'guidelines [or] directives'. [120]

159. The existence of an agreement on fishing rights in the waters adjacent to Western Sahara, and the fact that its existence was not notified to the United Nations Secretary-General, are also confirmed by the diplomatic cables of the Secretary of State of the United States of America. [121]

160. On 28 November 1975, 67 members of the Yema'a, including its Vice-President, meeting at El Guelta Zemmur (Western Sahara), unanimously declared that as the Yema'a was not democratically elected by the people of Western Sahara it could not decide on its self-determination. They unanimously decided that the Yema'a should be definitively dissolved. [122]

161. On 10 December 1975, the United Nations General Assembly passed two resolutions on the Question of Western Sahara, the content of which is not identical, [123] because there was no consensus on how the Madrid Agreement was to be understood. Thus, Resolution 3458 A (XXX) makes no reference to that

subsequently Vice-President and Acting President of the European Commission). See also, to that effect, Dessaints, J., 'Chronique politique Maroc', *Annuaire de l'Afrique du Nord,* 1975, Vol. 14, pp. 457 to 476, especially p. 463; Alemany Torres, F., 'Acuerdo de pesca con Marruecos', *El País*, 8 February 1978.

119 See Cortes, Diario de sesiones del Congreso de los diputados, 1978, No 15, pp. 522 and 546.

120 See Cortes, Diario de sesiones del Congreso de los diputados, 1978, No 15, p. 546.

121 See cable 1975MADRID08029 of 15 November 1975 from Ambassador W. Stabler to Secretary of State H. Kissinger ('[Minister] Herrera [Esteban] also stated that "framework agreements" had been worked out with Morocco and Mauritania on other related issues: … and fishing rights'); cable 1975STATE276309 of 21 November 1975 from Secretary of State H. Kissinger to the Permanent Mission of the United States of America to the United Nations ('[according to the Moroccan Ambassador, Mr Abdelhadi Boutaleb, a] copy of agreement to be deposited by signatories with [United Nations] Secretary-General K. Waldheim but version to be left with UNSYG will not [repeat] not include subsidiary agreements providing for fishing rights for Spain in [Western] Saharan waters and 35[%] Spanish participation in phosphate mines'). The diplomatic cables are available on the website at https://wikileaks.org/.

122 See 'Document historique d'El Guelta (Sahara occidental) signé le 28 November 1975 par 67 membres de l'Assemblée générale sahraouie, 3 membres sahraouis des Cortes (Parliament espagnol), les représentants des autres membres de la [Yema'a] et par plus de 60 Chioukhs et notables des tribus sahraouies', (historic document of El Guelta (Western Sahara) signed on 28 November 1975 by 67 members of the Saharan General Assembly, 3 Saharan members of the Cortes (Spanish Parliament), the representatives of other members of the Yema'a and more than 60 sheikhs and notables of the Saharan tribes) annexed to the letter of 9 December 1975, sent to the United Nations Secretary-General by the Permanent Representative of Algeria to the United Nations (S/11902).

123 See Resolutions 3458 A and B (XXX) of 10 December 1975.

agreement and refers to the Kingdom of Spain 'as the administering Power' of Western Sahara, [124] whereas Resolution 3458 B (XXX) 'takes note' [125] of that agreement and does not refer to an administering Power but to the 'parties to the Madrid Agreement of 14 November 1975' [126] and to 'the interim administration'. [127]

162. It should be noted, however, that among the 144 State participants in the 2435th plenary session of the General Assembly, 88 voted for Resolution 3458 A (XXX), none against, 41 abstained and 15 did not vote. The present Member States of the European Union voted for that resolution, with the exception of the Portuguese Republic and the Kingdom of Spain, which abstained, and the Republic of Malta, which did not vote. The Kingdom of Morocco also did not vote.

163. More heavily contested, Resolution 3458 B (XXX) was approved by only 56 States, whereas 42 States voted against, 34 abstained and 12 did not vote. Only 11 of the present Member States of the European Union voted for that resolution, [128] 10 voted against, [129] 6 abstained [130] and one did not vote. [131] The Kingdom of Morocco voted for.

164. In spite of their discrepancies, both resolutions 'reaffirm the inalienable right of the people of [Western] Sahara to self-determination', [132] in accordance with United Nations General Assembly Resolution 1514 (XV), and agree that that right must be exercised freely. [133]

165. In addition, Resolution 3458 A (XXX) provides that the right to self-determination must be exercised 'under United Nations supervision' and 'requests

124 See paragraph 8 of the resolution.

125 See paragraph 1 of the resolution.

126 See paragraph 3 of the resolution.

127 See paragraph 4 of the resolution.

128 The then nine Member States plus the Kingdom of Spain and the Republic of Malta.

129 The Republic of Bulgaria, the Republic of Cyprus, the Republic of Poland, the Czech Republic and the Slovak Republic, which at the time composed Czechoslovakia, and the Slovenian Republic and the Republic of Croatia (as Federal States of Yugoslavia) and Estonia, the Republic of Latvia and the Republic of Lithuania (as Federal States of the USSR).

130 The Hellenic Republic, Hungary, the Republic of Austria, the Portuguese Republic, Finland and the Kingdom of Sweden.

131 Romania.

132 Paragraph 1 of Resolution 3458 A (XXX). See also, to that effect, paragraph 2 of Resolution 3458 B (XXX).

133 See paragraph 7 of Resolution 3458 A (XXX) and paragraph 4 of Resolution 3458 B (XXX).

the Secretary-General, in consultation with the Government of Spain, as the administering Power, … to make the necessary arrangements for the supervision of the act of self-determination'. [134]

166. Likewise, Resolution 3458 B (XXX) provides for the exercise by the people of Western Sahara of its right to self-determination 'through free consultations organised with the assistance of a representative of the [United Nations] appointed by the Secretary-General'. [135]

167. At the end of 1975, the Kingdom of Spain began to withdraw its administration from Western Sahara. While the Spanish troops were withdrawing, the Moroccan and Mauritanian forces were entering the territory of Western Sahara. In some places there was armed confrontation between their forces and the forces of the Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario). [136]

168. At a press conference in February 1976, Mr Olof Rydbeck, Swedish Ambassador to the United Nations and Special Envoy of the United Nations Secretary-General for Western Sahara, stated that 'the military situation [in Western Sahara] as it [stood] [made] a meaningful consultation of the Saharans very difficult if not impossible'. [137]

169. By its memorandum of 25 February 1976 to the United Nations Secretary-General, the Kingdom of Spain informed the Secretary-General that it had decided to put an end to its presence in Western Sahara on the following day (26 February 1976) and that a meeting of the Yema'a had been convoked for that day during which the Spanish Governor, acting in his capacity as a member of the interim administration, would inform the Yema'a of that decision. [138]

170. On 26 February 1976, the Kingdom of Spain definitively terminated its presence on the territory of Western Sahara and by its letter of the same date to the United Nations Secretary-General declared that it was 'absolved of all international responsibility for the administration [of Western Sahara] by ceasing

[134] See paragraphs 7 and 8 of the resolution.

[135] See paragraph 4 of the resolution.

[136] See 'Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (A/31/23/Rev.1), *Official Documents of the General Assembly*, 1977, Vol. II, pp. 203 to 225, paragraph 44; Dessaints, J., 'Chronique politique Maroc', *Annuaire de l'Afrique du Nord*, 1975, Vol. 14, pp. 457 to 476, especially p. 464.

[137] See *Keesing's Record of World Events*, 13 February 1976, p. 27746.

[138] 'Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (A/31/23/Rev.1), *Official Documents of the General Assembly*, 1977, Vol. II, pp. 203 to 225, paragraph 45.

to participate in the interim administration put in place there' [139] and asserted that 'the decolonisation of Western Sahara will be achieved when the Saharawi population will have been able to make its views known in a proper manner'. [140]

171. On the same day, in spite of the dissolution decided on by 67 of its members, the Yema'a approved 'the reintegration [of Western Sahara] in Morocco and Mauritania' and 'thus expressed the unanimous opinion of the Saharawi populations and all the tribes of which it is the emanation and the authentic and legitimate representative'. [141] From the Kingdom of Morocco's viewpoint, that decision gives concrete form to the provision of the Madrid Agreement that 'the opinion of the Saharawi population, expressed through the Yema'a, will be respected'.

172. As regards that meeting of the Yema'a, neither the Kingdom of Spain nor the United Nations recognised it as the exercise of the right of the people of Western Sahara to self-determination, in accordance with United Nations General Assembly Resolutions 3458 A and B (XXX). [142]

173. According to the memorandum dated 25 February 1975 which the Kingdom of Spain sent to the United Nations Secretary-General, 'that sitting [will] not take the place of the consultation with the population as provided for in the Madrid Agreements of 14 November 1975 and in General Assembly Resolution 3458 B (XXX), unless the necessary conditions are fulfilled, including, in particular, the presence of a representative of [the United Nations] appointed by

[139] That is not wholly accurate. The Kingdom of Spain continues to administer the air space of Western Sahara, which is part of the 'OCE' of the Canary Isles Flight Information Region (FIR). See maps published on the website of Enaire (http://www.enaire.es/csee/ccurl/130/603/fir_canarias.swf).

[140] Letter dated 26 February 1976, addressed to the Secretary-General by the Permanent Representative of Spain to the United Nations (S/11997).

[141] The motion of 27 February 1976 voted by the Yema'a, *Annuaire de l'Afrique du Nord*, 1976, Vol. 15, pp. 847 and 848. By his message to the United Nations Secretary-General, Mr Khatri Ould Said a Ould El Jomaini, President of the Yema'a, informed him that 'the Saharan Yema'a, meeting in special session today, Thursday 26 February 1976, in El Aaiun, has unanimously approved the reintegration of the Territory of the Sahara with Morocco and Mauritania, in conformity with the historical realities and with the links which have always united the Saharan population to these two countries'. See 'Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (A/31/23/Rev.1), *Official Documents of the General Assembly*, 1977, Vol. II, pp. 203 to 225, paragraph 51.

[142] According to the United States Secretary of State, Mr Cyrus Vance, 'Waldheim told me that … King Hassan considers that the problem has been resolved and that the self-determination criterion has been satisfied by consultation of the [Saharawi] Assembly, However, neither Spain nor Algeria accepts it, pointing out that [King] Hassan has consulted only a rump assembly consisting of Moroccan stooges'. See telegram from Secretary of State Vance to the United States Embassy in Morocco, dated 20 May 1977, published in Burton, M.F., *Foreign Relations of the United States, 1977-1980*, United States Government Printing Office, Washington, 2017, Vol. XVII, Part 3 (Documents on North Africa), pp. 507 and 508, especially p. 508.

[the Secretary-General] in accordance with paragraph 4 of the abovementioned resolution’. [143]

174. In his reply to the Kingdom of Spain’s memorandum of 25 February 1975, the United Nations Secretary-General referred to paragraphs 7 and 8 of Resolution 3458 A (XXX) and to paragraph 4 of Resolution 3458 B (XXX) and concluded as follows:

‘It is evident from the paragraphs cited above that neither the Government of Spain, as the administering Power, nor the interim administration, of which Spain is a member, has taken the necessary steps to ensure the exercise of the right to self-determination by the populations of Western Sahara. Accordingly, even if time had permitted and the necessary clarifications had been furnished regarding the meeting of the Yema’a of which you informed me yesterday your Government was not aware, the presence at that meeting of a representative of the United Nations appointed by me would not, by itself, constitute fulfilment of the General Assembly resolutions referred to above’. [144]

175. On 14 April 1976, the Kingdom of Morocco concluded with the Islamic Republic of Mauritania a treaty on the partition of the territory of Western Sahara [145] and formally annexed the provinces attributed to it by that treaty. [146]

[143] The same question was again asked in the Spanish Parliament in the debate on the ratification of the 1977 Fisheries Agreement between the Kingdom of Spain and the Kingdom of Morocco, during which the Minister for Foreign Affairs of the Kingdom of Spain, Mr Oreja Aguirre, stated that Spain did not recognise the sovereignty of the Kingdom of Morocco over Western Sahara and that the process of decolonisation of Western Sahara would not be complete until the time when the original people of that territory exercised its right to self-determination in accordance with United Nations General Assembly Resolution 1514 (XV). See Cortes, Diario de sesiones del Congreso de los diputados, 1978, No 15, pp. 522 and 523. See also, to that effect, ‘Contestación del Gobierno a la pregunta formulada por don Gregorio López Raimundo, del Grupo Parlamentario Mixto, sobre política española hacia el Sáhara’, *Boletín Oficial de las Cortes Generales*, Series D, 23 September 1983, pp. 223 and 224.

[144] ‘Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples’ (A/31/23/Rev.1), *Official Documents of the General Assembly*, 1977, Vol. II, pp. 203 to 225, paragraph 46.

[145] See Convention relative au tracé de la frontière d’État établie entre la République islamique de Mauritanie et le Royaume du Maroc, signed at Rabat on 14 April 1976, *Annuaire de l’Afrique du Nord*, 1976, Vol. 15, pp. 848 and 849.

[146] See point 73 of this Opinion and the documents cited. On 14 April 1976, the Kingdom of Morocco and the Islamic Republic of Mauritania signed the Cooperation Agreement for the development of the recovered Saharan territories (*Annuaire de l’Afrique du Nord*, 1976, Vol. 15, pp. 849 and 850), which provided for participation by the Islamic Republic of Mauritania in the capital of the Société Fos Bucraâ (which exploited the phosphates of Western Sahara) and cooperation in the fishing sector.

176. In the meantime, an armed conflict had broken out in that region between the Kingdom of Morocco, the Islamic Republic of Mauritania and the Front Polisario.

177. In May 1979, the Islamic Republic of Mauritania informed the United Nations Secretary-General that it was prepared to apply the provisions of United Nations General Assembly Resolutions 3458 A (XXX) and 3458 B (XXX) and to study the ways and means of arriving at the exercise of the right to self-determination in Western Sahara. [147] However, 'since July 1978, the Moroccan Government [had] repeatedly stated that it would not give up any of "its recovered Saharan provinces", nor would it agree to a mini-State under the Front [Polisario] in Mauritania's sector of Western Sahara'. [148]

178. On 10 August 1979, the Islamic Republic of Mauritania concluded a peace agreement with the Front Polisario, under which it renounced all territorial claims to Western Sahara. [149] The Kingdom of Morocco immediately took control of the territory evacuated by the Mauritanian forces [150] and proceeded to annex it. [151]

179. On 21 November 1979, the United Nations General Assembly adopted Resolution 34/37 on the question of Western Sahara, in which it 'reaffirm[ed] the inalienable right of the people of Western Sahara to self-determination and independence, in accordance with the Charter of the United Nations ... and the objectives of [its] Resolution 1514 (XV)', 'deeply deplore[d] the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco', 'urge[d] Morocco to join in the peace process and to terminate the occupation of the Territory of Western Sahara' and 'recommend[ed] to that end that the [Front Polisario], the representative of the people of Western Sahara, should participate fully in any search for a just, lasting and definitive political solution of the question of Western Sahara, in accordance with the resolutions and declarations of the United Nations'. [152]

147 See letter dated 23 May 1979, addressed by the Acting Chargé d'Affaires of the Permanent Mission of Mauritania to the United Nations to the United Nations Secretary-General (A/34/276).

148 'Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (A/34/23/Rev.1), *Official Documents of the General Assembly*, 1977, Vol. II, pp. 105 to 117, paragraph 32. According to this report, 'King Hassan II stated that "any peace solution must not … lead to the insertion of a foreign State between Morocco and Mauritania"' (paragraph 32).

149 See Mauritano-Sahraoui Agreement, signed at Algiers on 10 August 1979, annexed to the letter dated 18 August 1979 from the Permanent Representative of Mauritania to the United Nations to the United Nations Secretary-General (A/34/427).

150 See Hodges, T., 'The Western Sahara', *Chicago Review Press*, Chicago, 1984, p. 12.

151 See point 73 of this Opinion and the documents cited.

152 Eighty-five States voted for, 6 against, 41 abstained and 20 did not vote. The current Member States of the European Union voted for or abstained. See also, to that effect, paragraph 3 of

180. The armed conflict between the Kingdom of Morocco and the Front Polisario continued until, on 30 August 1988, the parties accepted in principle proposals for settlement put forward, in particular, by the United Nations Secretary-General and providing, in particular, for the proclamation of a ceasefire and the organisation of a referendum on self-determination under United Nations supervision. [153]

181. Since that period no progress towards allowing the people of Western Sahara to exercise its right to self-determination has been recorded. As the United Nations Secretary-General observed in his last report on Western Sahara, 'the fundamental difficulty [in seeking a solution] is that each party has a different vision and reading of the history and documents relating to the conflict. Morocco insists that Western Sahara is already part of Morocco, that the sole basis for negotiations is its initiative for autonomy under Moroccan sovereignty and that Algeria must be a party to those negotiations. [The Front] Polisario insists that, since the General Assembly identifies Western Sahara as a Non-Self-Governing Territory, its autochthonous population must decide its future in a referendum with independence as an option, that all proposals and ideas the parties put forward should be on the table and that the only parties to the negotiation are [the Front] Polisario and Morocco'. [154]

182. It follows from all of the above facts that, instead of being able to exercise its right to self-determination along the lines stated by the International Court of Justice in its Advisory Opinion on Western Sahara, [155] the people of Western Sahara have thus far been deprived of the opportunity even to exercise that right on the conditions set out in United Nations General Assembly Resolutions 1514 (XV), 1541 (XV), 2625 (XXV) and 3458 A and B (XXX), by a series of measures culminating in the partition of the territory of Western Sahara in 1976 and its annexation in 1976 and 1979. The fact that some of those measures are imputable to several States does not detract from the existence and gravity of the breach of that people's right to self-determination.

United Nations General Assembly Resolution 35/19 (88 States voted for, 8 against, 43 abstained and 15 did not vote).

153 See United Nations Security Council Resolution 621 (1988) of 20 September 1988 and United Nations General Assembly Resolution 43/33 of 22 November 1988.

154 Report of 10 April 2017 of the United Nations Secretary-General on the situation concerning Western Sahara (S/2017/307), paragraph 82.

155 I note with interest that, after leaving office, the Netherlands Ambassador, Mr Peter van Walsum, United Nations Special Envoy for Western Sahara (2005-2008) acknowledged that 'on the basis of the International Court of Justice's advisory opinion, [Front] Polisario has the stronger case under international law'. See van Walsum, P., 'The question of Western Sahara', 16 December 2012, and 'The question of Western Sahara (II)', 7 February 2013, published on his website at http://www.petervanwalsum.com/the-question-of-western-sahara/.

183. Furthermore, whereas those resolutions provide that the right to self-determination entails a free choice between three options, [156] including independence, [157] association with another independent State and integration within an independent State, and also the organisation of a referendum [158] (instead of consultation of the Yema'a), the Kingdom of Morocco proceeded to integrate Western Sahara in its territory by partition and annexation, without consulting the people of Western Sahara and without United Nations supervision.

184. In that sense, the taking of an oath of allegiance to the King of Morocco pronounced on behalf of the Saharawi tribes by the President of the Yema'a on 4 November 1975 and the meeting of the Yema'a on 26 February 1976, which were not recognised by the United Nations and the Kingdom of Spain as administering Power of Western Sahara and member of the interim administration of Western Sahara, do not constitute the consultation of the people of Western Sahara on self-determination required by United Nations General Assembly Resolutions 1514 (XV), 1541 (XV), 2625 (XXV) and 3458 A and B (XXX).

185. It follows from the foregoing that Western Sahara was integrated within the Kingdom of Morocco without the people of that territory having freely expressed its will in that respect. As the Fisheries Agreement and the 2013 Protocol were concluded by the Kingdom of Morocco on the basis of the unilateral integration of Western Sahara into its territory and the assertion of its sovereignty over that territory, it is clear that the people of Western Sahara have not freely disposed of its natural resources, as required by Article 1 common to the ICESCR and the ICCPR, paragraph 2 of United Nations General Assembly Resolution 1514 (XV) and Title VII of the Helsinki Final Act of 1975.

[156] See Principle VI of United Nations General Assembly Resolution 1541 (XV).

[157] See paragraphs 3 and 4 of United Nations General Assembly Resolution 1514 (XV); Bedjaoui, M., 'Article 73', published in Cot, J.-P., Pellet, A., and Forteau, M., *La Charte des Nations unies: commentaire article par article*, 3rd ed., Economica, Paris, 2005, pp. 1751 to 1767, especially p. 1761; Fastenrath, U., 'Chapter XI Declaration Regarding Non-self-governing Territories', published in Simma, B., Khan, D.-E., Nolte, G., and Paulus, A. (eds), *The Charter of the United Nations: A Commentary*, 3rd ed., Oxford University Press, Oxford, 2012, Vol. II, pp. 1829 to 1839, especially pp. 1834 and 1835.

[158] See United Nations Security Council Resolution 2351 (2017), which 'recall[s] and reaffirm[s] all its previous resolutions on Western Sahara' and 'decides to extend the mandate of the [United Nations Mission for the Referendum in Western Sahara] (Minurso)'. See also, to that effect, United Nations General Assembly Resolution 2229 (XXI) of 20 December 1966, paragraphs 4 and 5; United Nations Security Council Resolution 621 (1988) of 20 September 1988, paragraph 2; and United Nations General Assembly Resolution 43/33 of 22 November 1988.

186. The fisheries exploitation of the waters adjacent to Western Sahara established and implemented by the contested acts therefore does not respect the right of the people of that territory to self-determination. [159]

(2) The obligation not to recognise an illegal situation resulting from a breach of the right of the people of Western Sahara to self-determination and not to render aid or assistance in maintaining that situation

187. Even if the Court held that the contested acts did not in themselves breach the right of the people of Western Sahara to self-determination and that the breach of that right is not imputable to the Union, but solely to the Kingdom of Morocco, the fact would remain that the contested acts would not respect the Union's obligation not to recognise an illegal situation resulting from the breach of the right of the people of Western Sahara to self-determination and not to render aid or assistance in maintaining that situation. [160]

188. As is clear from their wording, the Fisheries Agreement and the 2013 Protocol cover Western Sahara and the waters adjacent thereto as an agreement exclusively applicable to the territory recognised as the *sovereign* territory of the Kingdom of Morocco by the international community.

189. It should be emphasised, in that regard, that, as the Permanent Court of International Justice has held, 'the right of entering into international engagements is an attribute of State sovereignty' [161] over the territory to which those engagements relate.

190. That also applies to international agreements relating to the sea. According to the settled case-law of the International Court of Justice, 'maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarised as "the land dominates the sea" … It is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State'. [162]

[159] See Crawford, J., 'Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories', Legal Opinion of 24 January 2012, paragraph 131, available on the website at https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf.

[160] See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraph 159).

[161] Case of SS Wimbledon (United Kingdom and Others v. Germany), judgment of 17 August 1923 (PCIJ Series A, No 1, p. 25).

[162] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, judgment (ICJ Reports 2001, p. 40, paragraph 185). See also, to that effect, North Sea Continental Shelf, judgment (ICJ Reports 1969, p. 3, paragraph 96); Aegean Sea Continental Shelf, judgment (ICJ Reports 1978, p. 3, paragraph 86); Maritime Delimitation in the Black Sea (Romania v. Ukraine), judgment (ICJ Reports 2009, p. 61, paragraph 77); and Territorial and Maritime Dispute (Nicaragua v. Colombia), judgment (ICJ Reports 2012, p. 624, paragraph 140).

191. However, according to the International Court of Justice, 'it is well established that "the title of a State to … the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts" … As the Court stated … "the land is the legal source of the power which a State may exercise over the territorial extensions to seaward" …'. [163]

192. If the land therefore dominates the sea, there is no doubt that, as Comader maintains, when the Kingdom of Morocco concluded the Fisheries Agreement it considered that it had sovereignty over Western Sahara with the rights and obligations over the waters adjacent to that territory that international law confers on the coastal State. [164] In fact, as King Mohammed VI declared on the occasion of the 39th anniversary of the Green March, 'I say no to the attempt to alter the nature of this regional conflict by presenting it as a case of decolonisation. Morocco has never been an occupying power or an administering power in its Sahara. Rather, it exercises the attributes of its sovereignty over its land'. [165]

193. For that reason, the Council's and the Commission's argument that, in referring to the 'waters coming under the sovereignty or the jurisdiction of the Kingdom of Morocco', the contested acts contain no recognition of the Kingdom of Morocco's claim to sovereignty over the territory of Western Sahara and of the sovereignty or jurisdiction which that State claims to exercise over the waters adjacent to that territory, must be rejected.

194. In the first place, the negotiation and conclusion with the Kingdom of Morocco of an international agreement applicable to Western Sahara and to the waters adjacent thereto constitutes in itself *de jure* recognition of the integration [166] of Western Sahara in the Kingdom of Morocco by the annexation effected in 1976 and 1979, which means recognition of its sovereignty over the territory, the inland waters and the territorial sea of Western Sahara and of the sovereign rights and jurisdiction which international law confers on the coastal State over the maritime zones beyond the territorial sea.

[163] Territorial and Maritime Dispute (Nicaragua v. Colombia), judgment (ICJ Reports 2012, p. 624, paragraph 140 and the case-law cited).

[164] See, to that effect, point 73 of this Opinion and the Moroccan legislation cited.

[165] Speech of His Majesty King Mohammed VI on the 39th anniversary of the Green March, 6 November 2014, available on the website at http://www.sahara.gov.ma/blog/messages-royaux/discours-de-sa-majeste-le-roi-mohammed-vi-a-loccasion-du-39eme-anniversaire-de-la-marche-verte/.

[166] In the meaning which that expression has in the context of the exercise of the right of self-determination. See Principles VI, VIII and IX of the Principles which should guide United Nations Member States in determining whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter of the United Nations, approved by United Nations General Assembly Resolution 1541 (XV) (see points 117 and 118 of this Opinion).

195. I recall that, in the East Timor case, between the Portuguese Republic (as the administering power expelled from East Timor by the Republic of Indonesia) and the Commonwealth of Australia (as a third country which had concluded with the Republic of Indonesia an international agreement applicable to East Timor), the Commonwealth of Australia had considered that '[the start of the negotiations for the conclusion of the 1989 Treaty concerning the Timor Gap] signif[ied] *de jure recognition* by Australia of the Indonesian incorporation of East Timor'. [167]

196. The fact that a fisheries agreement applicable to a territory and its maritime zones is apt to constitute proof of recognition of sovereignty is demonstrated by the actual history of Western Sahara. I recall in that regard that the Kingdom of Morocco had adduced as proof of its sovereignty over Western Sahara the international agreements which it had concluded with several States, including in particular trade and fisheries agreements concluded with the Kingdom of Spain since 1767. [168]

197. As the International Court of Justice has held, the annexation of a territory whose people benefit from the right to self-determination while that people have not yet exercised that right constitutes a breach of the obligation to respect that right. [169] Consequently, a third party breaches its obligation not to recognise an illegal situation resulting from a breach of that right when it *de jure* recognises, by concluding an international agreement, the annexation of such a territory.

198. In the second place, the words 'waters coming under the sovereignty or the jurisdiction of the Kingdom of Morocco' do not suffice to preclude *de jure* recognition of the sovereignty of the Kingdom of Morocco over Western Sahara, for two main reasons.

199. The first reason is that the Fisheries Agreement and the 2013 Protocol do not apply solely to the waters adjacent to Western Sahara, but also to its territory. [170] In that sense, the use of the words 'waters coming under the sovereignty or the jurisdiction of the Kingdom of Morocco' cannot preclude *de jure* recognition of the sovereignty of the Kingdom of Morocco over the territory of Western Sahara and therefore breach of the right of the people of that territory to self-determination.

[167] See East Timor (Portugal v. Australia), judgment (ICJ Reports 1995, p. 90, paragraph 17) (emphasis added). See also paragraph 69 of the defence of the Commonwealth of Australia lodged in that case. The International Court of Justice did not adjudicate on the merits of that case, being of the view that the absence from the dispute of the Republic of Indonesia did not allow it to exercise its jurisdiction.

[168] See Western Sahara, Advisory Opinion (ICJ Reports 1975, p. 12, paragraphs 108 to 127 and, in particular, paragraphs 109, 110, 113 and 121).

[169] See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraphs 121 and 122).

[170] See point 71 of this Opinion.

200. The second reason relates to the application of the Fisheries Agreement and of the 2013 Protocol to the waters adjacent to Western Sahara. Contrary to the Commission's contention, the expression 'waters under Moroccan jurisdiction, [171] taken from the fisheries agreements concluded between the Kingdom of Spain and the Kingdom of Morocco before the accession of the Kingdom of Spain to the European Union, does not allow the waters adjacent to Western Sahara to be identified without recognition of the *sovereign* rights and the jurisdiction which the Kingdom of Morocco claims to exercise over those waters as coastal State. [172] Like the principle that the land dominates the sea, recognition of sovereignty over the land entails recognition of sovereign rights over the sea and vice versa.

201. In that regard, it should be emphasised that the fisheries agreements concluded by the Kingdom of Spain and the Kingdom of Morocco date from before the ratification of the United Nations Convention on the Law of the Sea, concluded at Montego Bay on 10 December 1982 [173] ('the UNCLOS'), by the European Union, [174] its Member States and the Kingdom of Morocco, whereas the Fisheries Agreement at issue in the present case was signed and ratified on the basis of that convention, which 'shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958'. [175]

202. The Convention on Fishing and Conservation of the Living Resources of the High Seas, done at Geneva on 29 April 1958, did not establish the right for States to establish an exclusive economic zone (EEZ), but Article 2 of that latter convention provided that no State could subject the high seas to its sovereignty and that freedom of the high seas entailed freedom of fishing. In addition, according to Article 6 of that convention, ships on the high seas were to be subject to the exclusive jurisdiction of the State of their flag.

[171] Article 11 of the Fisheries Agreement.

[172] See Cortes, Diario de sesiones del Congreso de los diputados, 1978, No 15, pp. 523, 546 and 547 (speech by Mr Oreja Aguirre, Minister for Foreign Affairs) on the Agreement on cooperation with the sea fisheries sector between the Government of the Kingdom of Morocco and the Government of the Kingdom of Spain, signed at Rabat on 17 February 1977, and 'Contestación del Gobierno a la pregunta formulada por don Gregorio López Raimundo, del Grupo Parlamentario Mixto, sobre política española hacia el Sáhara', *Boletín Oficial de las Cortes Generales*, Series D, 23 September 1983, p. 224, on all the fisheries agreements concluded up to that time between the Kingdom of Spain and the Kingdom of Morocco.

[173] *United Nations Treaty Series*, Vol. 1834, p. 3.

[174] See Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).

[175] See Article 311(1) of the UNCLOS. The Geneva Conventions on the Law of the Sea are the Convention on the Territorial Sea and the Contiguous Sea, done at Geneva on 29 April 1958 (*United Nations Treaty Series*, Vol. 516, p. 205), the Convention on the High Seas, done at Geneva on 29 April 1958 (*United Nations Treaty Series*, Vol. 450, p. 11), the Convention on Fishing and Conservation of the Living Resources of the High Seas, done at Geneva on 29 April 1958 (*United Nations Treaty Series*, Vol. 559, p. 258) and the Convention on the Continental Shelf, done at Geneva on 29 April 1958 (*United Nations Treaty Series*,Vol. 499, p. 311).

203. Not only does the legal context in which the words ‘waters under Moroccan jurisdiction’ (‘*aguas bajo jurisdicción marroquí*’) had a meaning no longer exist between the Union and the Kingdom of Morocco, but it has been replaced by the UNCLOS. The phrase ‘waters coming under the sovereignty or the jurisdiction of the Kingdom of Morocco’ must therefore be assessed in the light of the legal regime established by the UNCLOS, which established in international law the concept of the EEZ, which already existed in the practice of States.

204. That reading of the Fisheries Agreement in the light of the UNCLOS is confirmed both by recital 2 of the Fisheries Agreement [176] and by Article 5(4) of that agreement, which refers to the Moroccan legislation ‘governing fisheries in the waters over which Morocco has jurisdiction, in accordance with [the UNCLOS]’.

205. According to the UNCLOS, the internal waters of a State and its territorial sea are the waters under its sovereignty, [177] whereas the EEZ comes under ‘the jurisdiction’ of the coastal State. [178] In that sense, the first part of the phrase used in the contested acts, ‘waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco’, refers to the internal waters and the territorial sea of the Kingdom of Morocco (waters coming under its sovereignty), whereas the second part refers to its EEZ (waters coming within its jurisdiction).

206. However, as the Commission acknowledges in paragraph 14 of its replies to the written questions put by the Court, unlike the EEZ established by the Saharawi Arab Democratic Republic (an entity not recognised by the European Union and its Member States), the present Moroccan EEZ, established in 1981 even before the ratification of the UNCLOS by the Kingdom of Morocco, does not cover the waters adjacent to Western Sahara which are covered by fishing zones Nos 3 to 6 of the Fisheries Agreement, [179] which is why the Governing Council of the Kingdom of Morocco also adopted, on 6 July 2017, draft Law

[176] ‘Having regard to the United Nations Convention on the Law of the Sea.’

[177] See Article 2(1) of the UNCLOS, which states that ‘the sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea’.

[178] See Article 55 of the UNCLOS, which states that ‘the [EEZ] is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in [Articles 55 to 75 of that Convention], under which the rights and *jurisdiction* of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention’. Emphasis added.

[179] See Articles 8 and 9 of dahir No 1-81-179 of 8 April 1981 promulgating Law No 1-81 establishing an exclusive economic zone of 200 nautical miles along the Moroccan coasts, *Bulletin officiel du Royaume du Maroc*, No 3575, p. 232, and Article 4 of Decree No 2-75-311 of 21 July 1975 determining the closing lines of bays on the Moroccan coasts and the geographic coordinates of the limit of the Moroccan territorial waters and the exclusive fishing zone, *Bulletin officiel du Royaume du Maroc*, No 3276, p. 996. According to those provisions, the Moroccan EEZ does not extend south of Cape Juby/Pointe Stafford, which corresponds to the border between the Kingdom of Morocco and Western Sahara.

No 38-17 amending and supplementing Law No 1-18 establishing an exclusive economic zone of 200 nautical miles along the coasts of Morocco and Western Sahara. [180]

207. In those circumstances, fisheries 'in the waters over which Morocco has jurisdiction, in accordance with [the UNCLOS]]' [181] should stop at the parallel 27°42'N, which serves as both the external limit of the present Moroccan EEZ [182] and the border between the Kingdom of Morocco and Western Sahara. [183] However, fishing zones Nos 3 to 6 essentially cover the waters south of that border which are adjacent to Western Sahara.

208. As the Commission acknowledges, fishing in an EEZ is a *sovereign* right of the coastal State. [184] Consequently, in concluding the Fisheries Agreement covering the waters constituting the EEZ of Western Sahara, the European Union recognises *de jure* that the Kingdom of Morocco exercises a sovereign right in those waters.

209. Last, contrary to the Commission's submission, the terms 'waters under the jurisdiction' and 'waters falling within the sovereignty and the jurisdiction' are not peculiar to the contested acts, which would indicate that they referred to the specific situation of Western Sahara. On the contrary, they are standard terms used to describe the scope of the fisheries agreements concluded by the Union [185] and,

[180] See 'Domaine maritime: Le Conseil de gouvernement adopte deux projets de lois', *Huffington Post Maroc*, 7 July 2017, and available on the website at http://www.huffpostmaghreb.com/2017/07/07/loi-domaine-maritime-_n_17422798.html. According to the Minister for Foreign Affairs and International Cooperation of the Kingdom of Morocco, the creation of an EEZ along the coasts of Western Sahara was necessary in order to 'cement the legal supervision of Morocco over those waters and to bar the route to all allegations challenging Morocco's sovereignty over that area'.

[181] See Article 5(4) of the Fisheries Agreement.

[182] See footnote 181.

[183] In that sense, I do not understand why the European Union pays the Kingdom of Morocco several million euros per year by way of financial contribution in order to be able to fish in the waters adjacent to Western Sahara over which the Kingdom of Morocco has not established a maritime zone, or of course an EEZ, when the instruments which it has deposited with the United Nations in accordance with Article 75(2) of the UNCLOS do not include the waters adjacent to Western Sahara in the Moroccan maritime zones.

[184] See Article 56(1)(a) of the UNCLOS ('in the [EEZ], the coastal State has … *sovereign* rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil …'). Emphasis added.

[185] See, for example, Article 5(4) of the Fisheries Partnership Agreement between the European Community and the Republic of the Seychelles (OJ 2006 L 290, p. 2); Article 2(a) and Article 11 of the Fisheries Partnership Agreement between the European Community and the Islamic Republic of Mauritania (OJ 2006 L 343, p. 4); Article 2(a) and Article 11 of the Fisheries Partnership Agreement between the European Community and the Republic of Guinea-Bissau for the period 16 June 2007 to 15 June 2011 (OJ 2007 L 342, p. 5); Article 2(c) of the Fisheries Partnership Agreement between the Republic of Côte d'Ivoire and the European

in that sense, they refer to the internal waters and the territorial sea of the third country (waters falling within its sovereignty) as well as to its EEZ (waters falling within its jurisdiction).

210. Consequently, contrary to the Council's and the Commission's contention, the use of the expression 'waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco' constitutes recognition of the exercise by the Kingdom of Morocco of sovereign rights over Western Sahara and the waters adjacent thereto. That recognition will be even clearer upon the entry into force of draft Law No 38-17, whereby the Kingdom of Morocco will establish an EEZ on the waters adjacent to Western Sahara.

211. In addition, by the contested acts, the Union rendered aid and assistance in maintaining the illegal situation resulting from the breach of the right of the people of Western Sahara to self-determination. That aid takes the form of economic advantages (in particular the financial contribution) which the Fisheries Agreement and the 2013 Protocol confer on the Kingdom of Morocco. [186]

212. Since the assertion of Moroccan sovereignty over Western Sahara is the result of a breach of the right of the people of that territory to self-determination, for the reasons which I have stated in points 147 to 186 of this Opinion, the European Union has failed to fulfil its obligation not to recognise the illegal situation resulting from the breach of the right of the people of Western Sahara to self-determination by the Kingdom of Morocco and also not to render aid or assistance in maintaining that situation. [187] For that reason, in so far as they apply to the territory of Western Sahara and to the waters adjacent thereto, the Fisheries Agreement and the 2013 Protocol are incompatible with Article 3(5) TEU, the first subparagraph of Article 21(1) TEU, Article 21(2)(b) and (c) TEU and Articles 23 TEU and 205 TFEU, which impose on the European Union the obligation that its external action is to protect human rights and strictly respect international law.

213. Regulation No 764/2006, Decision 2013/785 and Regulation No 1270/2013 are therefore contrary to Article 3(5) TEU, the first subparagraph of Article 21(1)

Community (OJ 2008 L 48, p. 41); and Article 1(f) of the Sustainable Fisheries Partnership Agreement between the European Union and the Republic of Senegal (OJ 2014 L 304, p. 3).

[186] See Article 7 of the Fisheries Agreement and Article 3(1), (4) and (5) and Article 6 of the 2013 Protocol. Those provisions do not ensure that the financial contribution benefits the people of Western Sahara in proportion to the quantities of catches taken in the waters adjacent to Western Sahara. See points 271 to 285 of this Opinion.

[187] See Milano, E., 'The New Fisheries Partnership Agreement between the EC and Morocco: Fishing too South?', *Anuario español de derecho internacional*, 2006, Vol. 22, pp. 413 to 457, especially pp. 442 to 447, and Dawidowicz, M., 'Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement', published in French, D. (ed.), *Statehood, Self-Determination and Minorities: Reconciling Tradition and Modernity in International Law*, Cambridge University Press, Cambridge, 2013, pp. 250 to 276.

TEU, Article 21(2)(b) and (c) TEU and Articles 23 TEU and 205 TFEU in that they approve and implement the application of the Fisheries Agreement and of the 2013 Protocol in the territory of Western Sahara and the waters adjacent thereto.

(3) Would the international agreements applicable to Western Sahara have been concluded with the Kingdom of Morocco on a basis other than its assertion of sovereignty over that territory?

214. The preceding analysis is based on the Kingdom of Morocco's assertion of its sovereignty over Western Sahara that enabled it to conclude the Fisheries Agreement and the 2013 Protocol with the European Union.

215. However, as Comader said at the hearing, whatever the Kingdom of Morocco's view of that question, the latter accepts that the European Union and its Member States may have a different view.

216. I shall therefore consider whether the conclusion of the Fisheries Agreement and the 2013 protocol might be justified on the basis of another capacity that the Kingdom of Morocco might have with respect to Western Sahara, which would give it what the Commission called at the hearing 'treaty-making power' binding on the non-autonomous territory of Western Sahara.

217. In that regard, the French Government, the Commission and the Council maintain that the Kingdom of Morocco is the 'de facto administering power' of Western Sahara, which permits the conclusion of the international agreements applicable to Western Sahara and the adjacent waters without any breach of the right of its people to self-determination.

218. On the other hand, WSC maintains that, as the occupying power of Western Sahara, [188] the Kingdom of Morocco cannot conclude any international agreement applicable to Western Sahara and the adjacent waters.

219. The Spanish and Portuguese Governments have not taken a position on that issue, the Spanish Government merely stating that the Kingdom of Morocco is not the occupying power of Western Sahara, but without stating in what capacity it might then conclude international agreements applicable to that territory and the adjacent waters.

220. The question of the existence in international law of a legal basis that would allow the Union to conclude international agreements applicable to

[188] The referring court shares that assessment. So do HMRC and the Secretary of State. See paragraphs 27 and 44.1, 47.4 of the decision making the request for a preliminary ruling and paragraphs 40, 43, 48 and 49 of the judgment of 19 October 2015 in *Western Sahara Campaign UK, R (on the application of) v HM Revenue and Customs* [2015] EWHC 2898 (Admin). The Commission does not rule out the possibility that the Kingdom of Morocco might be regarded as an occupying power in Western Sahara. See paragraph 43 of its answers to the written questions put by the Court.

Western Sahara and the adjacent waters with the Kingdom of Morocco is a question of interpretation of international law to which the conditions governing the possibility of relying on international law are not applicable.

(i) The Kingdom of Morocco as de facto administering power of Western Sahara

221. In my view, the theory put forward by the French Government, the Council and the Commission that the Kingdom of Morocco is the 'de facto administering power' of Western Sahara must be rejected. It should be emphasised that neither the Spanish Government nor the Portuguese Government has used those words.

222. It follows from Article 73 of the United Nations Charter that the expression 'administering power' means 'Members of the United Nations which have or assume responsibilities for the administration of [non-self-governing] territories'. The Kingdom of Morocco did not have responsibility for the administration of Western Sahara when it acceded to the United Nations in 1956 and has never assumed such responsibility, since it considers itself to have sovereignty over that territory. [189]

223. Furthermore, the concept of 'de facto administering power' does not exist in international law and was used for the first time by the Commission in the answer given on its behalf by the High Representative of the European Union for Foreign Affairs and Security Policy, Vice-President of the Commission, Baroness Catherine Ashton, to the parliamentary questions having the references E-001004/11, P-001023/11 and E-002315/11. [190]

224. In fact, the Council and the Commission have been unable to give a single other example in which that expression has been used to describe the relationship between a State and a non-self-governing territory. It should be pointed out in that regard that in the contemporary and very similar case of the annexation of East Timor by the Republic of Indonesia, the expression 'de facto administering power' was not used to describe the status of the Republic of Indonesia in its relationship with East Timor. On the contrary, the International Court of Justice described the military intervention of the Republic of Indonesia in East Timor as an occupation. [191]

[189] See point 192 of this Opinion. See Milano, E., 'The New Fisheries Partnership Agreement between the EC and Morocco: Fishing too South?', *Anuario español de derecho internacional*, 2006, Vol. 22, pp. 413 to 457, especially p. 430.

[190] OJ 2011 C 286 E, p. 1. In the words of that answer, 'according to the United Nations position on the subject, which the EU adheres to, Western Sahara is considered a "non-self-governing territory" and Morocco its de facto administering power'.

[191] See East Timor (Portugal v. Australia), judgment (ICJ Reports 1995, p. 90, paragraph 13). In that case, the Portuguese Republic had maintained that, in spite of the occupation of East Timor by the Republic of Indonesia, the Commonwealth of Australia could conclude an international treaty applicable to East Timor only with the Portuguese Republic, given its status as

225. Nor can the fact that, by the Madrid Agreement, the Kingdom of Morocco became a member of the interim administration of Western Sahara confer on it the status of administrative power able to conclude international agreements applicable to Western Sahara without breaching the right of the people of that territory to self-determination. First, the legitimacy of the Madrid Agreement is strongly contested, [192] which is confirmed by the fact that Resolution 3458 B (XXX), which takes note of that agreement, was approved by only 56 States, while a number of Member States of the European Union voted against or abstained. [193] Second, as is apparent from paragraph 4 of Resolution 3458 B (XXX), the United Nations General Assembly took note of the Madrid Agreement and the existence of the interim administration only in so far as that administration was supposed to take all necessary steps to ensure that the people of Western Sahara would be able to exercise their right to self-determination. In that sense, even the States that voted for that resolution, including in particular the United States, do not recognise that the Kingdom of Morocco has the status of administering power, but recognise that the Kingdom of Morocco has placed Western Sahara under its 'administrative control'. [194] In that context, the

administering power of that territory. It is therefore scarcely surprising that, in its written observations lodged in the present case, the Portuguese Government did not adopt a position on the validity of the contested measures and merely said that their validity could not be determined by reference to Article 3(5) TEU and that the rules of international law invoked by WSC were not capable of being invoked. Nor did the Portuguese Government answer the questions put to it by the Court, or participate in the hearing.

192 See judgment of 19 October 2015 in *Western Sahara Campaign UK, R (on the application of) v HM Revenue and Customs* [2015] EWHC 2898 (Admin), paragraph 40, and United Nations General Assembly Resolution 3458 A (XXX), which does not mention that agreement and refers to the Kingdom of Spain as the administering power. See also, to that effect, Brownlie, I., *African Boundaries: a Legal and Diplomatic Encyclopaedia*, C. Hurst & Company, London,1979, pp. 149 to 158, according to which 'in 1976 Spain transferred the territory of Spanish Sahara to Morocco and Mauritania and a partition was arranged … Since the legitimacy of the partition arrangement is in question and lacks a legal basis, the frontiers of Western Sahara merit examination'. According to the same author, 'until the political situation evolves further, it is unsafe to accept the *fait accompli* (if that is what it is) arranged by Spain, Morocco and Mauritania. Non-recognition of the outcome by other States has a basis in International Law'. See, last, Soroeta Liceras, J., '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', *Revista de Derecho Comunitario Europeo*, 2009, Vol. 34, pp. 823 to 864, at p. 832, and Saul, B. 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources', *Sydney Law School Legal Studies Research Paper*, No 15/81 (September 2015), p. 18.

193 See point 163 of this Opinion. Conversely, Resolution 3458 A (XXX), which did not recognise the Madrid Agreement, was approved by 88 States, without any vote against it, the current Member States of the European Union voting in favour of that resolution, with the exception of the Kingdom of Spain and the Portuguese Republic, which abstained, and the Republic of Malta, which did not vote.

194 See, for example, Burton, M.F., *Foreign Relations of the United States, 1977-1980*, United States Government Printing Office, Washington, 2017, Vol. XVII, Part 3 (Documents on North Africa), pp. 90, 371, 372 and 575.

conclusion of the international agreements, and especially the agreements for the exploitation of the natural resources of Western Sahara like the Fisheries Agreement, goes much further than even the broadest interpretation that might be placed on the mandate entrusted to the interim administration of Western Sahara, of which the Kingdom of Morocco was a member.

226. In any event, only the United Nations General Assembly has the power to recognise a territory as non-self-governing and, accordingly, to identify its administering power. [195]

227. The two examples given by the Commission, relating to the Cocos (Keeling) Islands and Western New Guinea, [196] confirm that privileged role of the United Nations General Assembly. In the case of the Cocos (Keeling) Islands, the United Kingdom had withdrawn those islands from the colony of Singapore and placed them under the authority of the Commonwealth of Australia. [197] Although the United Nations General Assembly had not given prior authorisation for that transfer, the Commonwealth of Australia continued the United Kingdom's practice of transmitting to the United Nations the information provided for in Article 73(e) of the United Nations Charter from 1957 [198] and the General Assembly subsequently approved that transfer by showing the Commonwealth of Australia as the administering power of the Cocos (Keeling) Islands in its list of non-self-governing territories. [199]

228. As regards Western New Guinea, whose administering power was the Kingdom of the Netherlands, contrary to the Commission's contention, the transfer of that territory by the Kingdom of the Netherlands to the United Nations Temporary Executive Authority, and by that authority to the Republic of

[195] See Bedjaoui, M., 'Article 73', published in Cot, J.-P., Pellet, A., and Forteau, M., *La Charte des Nations unies: commentaire article par article*, 3rd ed., Economica, Paris, 2005, pp. 1751 to 1767, especially p. 1763; Fastenrath, U., 'Chapter XI Declaration Regarding Non-self-governing Territories', published in Simma, B., Khan, D.-E., Nolte, G., and Paulus, A. (eds), *The Charter of the United Nations: A Commentary*, 3rd ed., Oxford University Press, Oxford, 2012, Vol. II, pp. 1829 to 1839, especially p. 1836. See also, to that effect, paragraph 3 of United Nations General Assembly Resolution 742 (VIII) of 27 November 1953.

[196] See paragraph 57 of the Commission's answers to the written questions put by the Court.

[197] See the Cocos Islands Act 1955 and the Cocos Islands Order in Council 1955, SI 1955/1642. See, to that effect, Kerr, A., *A Federation in These Seas*, Attorney General's Department of the Commonwealth of Australia, 2009, pp. 271 to 273 and 308 to 310; Spagnolo, B., *The Continuity of Legal Systems in Theory and Practice*, Hart Publishing, Oxford, 2015, p. 62.

[198] See *Repertory of Practice of United Nations Organs*, supplement No 2 (1955-1959), Vol. 3, paragraph 6.

[199] See *Repertory of Practice of United Nations Organs*, supplement No 3 (1959-1966), Vol. 3, paragraph 215. See also, to that effect, United Nations General Assembly Resolution 39/30, which refers to the Commonwealth of Australia as the administering power.

Indonesia, was done by international treaty which entered into force only *after it had been approved* by the United Nations General Assembly. [200]

229. In the present case, although Western Sahara was recognised in 1960 by the United Nations General Assembly as a non-self-governing territory, [201] the General Assembly has never recognised that the Kingdom of Morocco has the status of administering power (*de jure* or *de facto*) and even continues, to the present time, to show the Kingdom of Spain as administering power in its list of non-self-governing territories and administering powers. [202]

230. That conclusion is reinforced by the letter of 29 January 2002 to the President of the Security Council from the Under-Secretary-General for Legal Affairs, the Legal Counsel, Hans Corell, in which it was stated that 'the Madrid Agreement did not transfer sovereignty over the Territory, nor did it confer on any of the signatories the status of an administering Power, a status which Spain alone could not have unilaterally transferred'. [203] Furthermore, although the writer noted that '[since 1976] Morocco has administered the Territory of Western Sahara alone', which is an indisputable fact, he added that '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'. [204]

231. For the remainder, the Under-Secretary-General for Legal Affairs analysed *by analogy* the legality of the decisions 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, on the basis of the principles applicable to the powers and responsibilities of an administering Power in matters of mineral resource activities in non-self-governing territories. [205] He based that analogy with the legal regime applicable to administering Powers on the idea that, as Western Sahara is a non-self-governing territory and as that regime exists for

[200] See Articles I and XXVII of the Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), signed at the headquarters of the United Nations, New York, on 15 August 1962, *United Nations Treaty Series*, Vol. 437, p. 274. See also, to that effect, United Nations General Assembly Resolution 1752 (XVII).

[201] See *Repertory of Practice of United Nations Organs*, supplement No 3 (1959-1966), Vol. 3, paragraphs 52 to 55.

[202] See Report of 3 February 2017 of the United Nations Secretary-General on information from Non-Self-Governing Territories transmitted under Article 73(e) of the Charter of the United Nations (A72/62).

[203] S/2002/161, paragraph 6.

[204] S/2002/161, paragraph 7.

[205] S/2002/161, paragraphs 8 and 21.

the benefit of its people, the Kingdom of Morocco should at a minimum have the same obligations as an administering Power.

232. However, that letter cannot serve as a basis for the existence, in international law, of the concept of ‘de facto administering power’, in particular with respect to the question of the conclusion of international agreements which, unlike the signature of contracts with private companies, is ‘an attribute of … sovereignty’. [206]

233. Last, it should be noted that the ability of the administering power to conclude international agreements applicable to the non-self-governing territory and concerning essential elements of the right of peoples, including the right to self-determination and the principle of permanent sovereignty over natural resources, is restricted from the time when ‘the activity [of a national liberation movement] had an international impact’. [207] Consequently, even if the Kingdom of Morocco were recognised as having the status of administering power, its ability to conclude international agreements applicable to Western Sahara would have been ‘restricted’. [208]

(ii) The Kingdom of Morocco as occupying power of Western Sahara

234. The referring court and WSC maintain that the Kingdom of Morocco is in occupation of Western Sahara. Unlike the referring court, however, WSC maintains that, as occupying power, the Kingdom of Morocco cannot in any case conclude an international agreement with the European Union that would be applicable in Western Sahara and the adjacent waters.

235. As regards the EU institutions, there is a significant difference between the positions adopted by the Council and the Commission. The Council categorically denies that the rules of international law on military occupations are applicable to Western Sahara, whereas the Commission does not preclude the applicability of

[206] Case of SS Wimbledon (United Kingdom and Others v. Germany), judgment of 17 August 1923 (PCIJ Series A, No 1, p. 25).

[207] See Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal, decision of 31 July 1989, *Reports of International Arbitral Awards*, Vol. XX, pp. 119 to 213, paragraphs 51 and 52. The validity of that decision was confirmed by the International Court of Justice (see Arbitral Award of 31 July 1989, judgment (ICJ Reports 1991, p. 53)). According to the arbitral tribunal, the activities of the national liberation movement ‘have an impact at international level from the time when they constitute an unusual event in the institutional life of the territorial State that forces it to take exceptional measures, that is to say when, in order to control or attempt to control events, it finds it necessary to have recourse to means which are not those generally used in order to deal with occasional disruptions’. The fact that an armed conflict broke out between Front Polisario and the Moroccan or Mauritanian armies means that that criterion is satisfied.

[208] See Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal, decision of 31 July 1989, *Reports of International Arbitral Awards*, Vol. XX, pp. 119 to 213, paragraph 52.

those rules and maintains that the legal regimes applicable to administering powers and to occupying powers are not mutually exclusive.

236. I do not support WSC's argument, since, in certain circumstances, an occupying power can conclude international agreements applicable to the occupied territory. Is that the case here?

– *The applicability of international humanitarian law to Western Sahara*

237. The provisions of international humanitarian law (or law relating to armed conflicts) relevant for the analysis which follows are Articles 42 and 43 of the 1907 Hague Regulations, Articles 2 and 64 of the Fourth Geneva Convention and Article 1(4) of the First Protocol additional of 8 June 1977 to the Geneva Conventions of 12 August 1949 relating to the protection of victims of international armed conflicts [209] ('Additional Protocol I'). [210]

238. It should be noted at the outset that, as the International Court of Justice has held, '[the fundamental rules of international humanitarian law, including the 1907 Hague Regulations] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law' [211] and 'incorporate obligations which are essentially of an *erga omnes* character'. [212]

239. In fact, in the words of Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, 'the High Contracting Parties undertake to respect and *to ensure respect for* the present Convention in all circumstances'. [213]

[209] *United Nations Treaty Series*, Vol. 1125, p. 3.

[210] In any event, these provisions satisfy the criteria governing the possibility of relying on rules of international law set out in point 96 of this Opinion, for the same reasons as those stated in point 139 of this Opinion.

[211] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (ICJ Reports 1996, p. 226, paragraph 79). See also, to that effect, judgment of 1 October 1946 of the International Military Tribunal at Nuremberg in *The United States of America and Others v. Goering and Others*, published in *Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, 14 November 1945 — 1 October 1946)*, 1947, pp. 171 to 341, especially pp. 253 and 254; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraphs 89 and 157).

[212] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraph 157).

[213] Emphasis added. All the Member States of the Union and the Kingdom of Morocco are parties to those conventions and to Additional Protocol I. In addition, by a unilateral declaration of 23 June 2015 lodged with the Swiss Federal Council in its capacity as depository of the Geneva Conventions, which was notified to the States Parties to those conventions, Front Polisario undertook to apply the four 1949 Geneva Conventions and Additional Protocol I of 1977 in the conflict between it and the Kingdom of Morocco.

240. According to the International Court of Justice, 'it follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with'. [214]

241. In that sense, in accordance with Article 3(5) TEU, acting in strict compliance with international law, the Union is under an obligation not to recognise an illegal situation resulting from a breach of those rules and not to render aid or assistance in maintaining that situation. [215]

242. The Fourth Geneva Convention is applicable where two conditions are fulfilled, namely where an armed conflict exists (whether or not a state of war has been recognised) and where that conflict has arisen between two contracting parties. [216] According to the International Court of Justice, 'the object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable'. [217]

243. Furthermore, Article 1(4) of Additional Protocol I extends the application of the four 1949 Geneva Conventions to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation … in the exercise of their right of self-determination'. [218] That is the case of the people of Western Sahara, who have not yet exercised that right and are in a procedure of decolonisation. [219]

214 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraph 158).

215 See point 127 of this Opinion.

216 See Article 2 of that convention and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraph 95).

217 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraph 95).

218 Article 1(4) of Additional Protocol I and Commentary of the International Committee of the Red Cross (ICRC) of 1987, paragraph 114. See also, to that effect, Roberts, A., 'What is military occupation?', *British Yearbook of International Law*, 1985, Vol. 55, pp. 249 to 305, especially pp. 254 and 255.

219 See David, É., *Principes de droit des conflits armés*, 5th ed., Bruylant, Brussels, 2012, pp. 189 and 190; Milanovic, M., 'The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts', published in Clapham, A., Gaeta, P., and Sassòli, M. (eds), *The 1949 Geneva Conventions: A commentary*, Oxford University Press, Oxford, 2015, pp. 27 to 50, paragraph 43; Saul, B., 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources', *Sydney Law School Legal Studies Research Paper*, No 15/81, September 2015, pp. 5 and 6.

244. It follows from the foregoing that the armed conflict that took place in Western Sahara between 1976 and 1988 is an international armed conflict and that the 1907 Hague Regulations are therefore applicable to Western Sahara.

– *The existence of a military occupation in Western Sahara*

245. In that context, it is appropriate to examine whether the Kingdom of Morocco's presence in Western Sahara is an occupation within the meaning of Article 42 of the 1907 Hague Regulations that the Union cannot recognise or to which it cannot render aid or assistance. According to that provision, 'territory is considered occupied when it is actually placed under the authority of the hostile army'.

246. In that regard, it should first of all be stated that the existence of a state of occupation is a question of fact. [220] The referring court, HMRC and the Secretary of State maintain that Western Sahara is under Moroccan occupation, [221] which is confirmed by United Nations General Assembly Resolution 34/37, [222] to which the Court referred in paragraphs 35 and 105 of its judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973).

247. Furthermore, the existence of a Moroccan occupation in Western Sahara is widely recognised, [223] even by Hans Corell, [224] who, as United Nations Under-

[220] See judgment of 31 March 2003 of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the case of *Prosecutor v. Mladen Naletilić and Vinko Martinović* (No IT-98-34-T), paragraph 211; Stato maggiore de la difesa, *Manuale di diritto umanitario*, 1991, Vol. I, paragraph 32; Federal Ministry of Defence of the Federal Republic of Germany, *Humanitarian Law in Armed Conflicts Manual*, 1992, paragraph 526; Office of the Judge Advocate General of Canada, *Law of Armed Conflict*, 2001, paragraph 1203(1); United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, paragraph 11.2; Ministerio de defensa, *El derecho de los conflictos armados*, 2nd ed., Centro Geográfico del Ejército, Madrid, 2007, Vol. I, pp. 2 to 20; United States Department of Defense, *Law of War Manual*, 2015, p. 744; Dinstein, Y., *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 42, paragraph 96; Sassòli, M., 'The Concept and the Beginning of Occupation', published in Clapham, A., Gaeta, P., and Sassòli, M. (eds), *The 1949 Geneva Conventions*: *A commentary*, Oxford University Press, Oxford, 2015, pp. 1389 to 1419, paragraph 8.

[221] See paragraphs 27, 44.1 and 47.4 of the decision making a request for a preliminary ruling and paragraphs 40, 43, 48 and 49 of the judgment of 19 October 2015 in *Western Sahara Campaign UK, R (on the application of) v HM Revenue and Customs* [2015] EWHC 2898 (Admin).

[222] See paragraphs 5 and 6. Eighty-five States voted for, 6 against, 41 abstained and 20 did not vote. See also, to that effect, United Nations General Assembly Resolution 35/19.

[223] See, in particular, Roberts, A., 'What is military occupation?', *British Yearbook of International Law*, 1985, Vol. 55, pp. 249 to 305, especially pp. 280 and 281; Gasser, H.P., 'The Conflict in Western Sahara — An Unresolved Issue from the Decolonisation Period', *Yearbook of International Humanitarian Law*, 2002, Vol. 5, pp. 375 to 380, especially p. 379; Arai-Takahashi, Y., *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, The Hague, 2009, p. 140; Chinkin, C., 'Laws of occupation', published in Botha, N., Olivier, M., and van Tonder, D. (eds), *Multilateralism and International Law with Western Sahara as a Case Study*,

Secretary-General for Legal Affairs and Legal Counsel, had delivered the legal consultation on the legality of the decision taken by the Moroccan authorities to enter into contracts with foreign companies for the exploration of mineral resources in Western Sahara. [225]

248. Last, according to the International Court of Justice, in order to know whether 'a State, the military forces of which are present on the territory of another State as a result of an intervention, is an "occupying Power" in the meaning of the term as understood in the *jus in bello*, [it is necessary to examine] whether there is sufficient evidence to demonstrate that the … authority [of the hostile army] was in fact established and exercised by the intervening State in the areas in question'. [226]

249. That is clearly the case for the greater part of Western Sahara, which extends to the west from the sand wall built and controlled by the Moroccan army and which has been under the authority of the Kingdom of Morocco since its

VerLoren van Themaat Centre, Pretoria, 2010, pp. 197 to 221, especially pp. 197 to 200; Benvenisti, E., *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, p. 171; Fastenrath, U., 'Chapter XI Declaration Regarding Non-self-governing Territories', published in Simma, B., Khan, D.-E., Nolte, G., and Paulus, A. (eds), *The Charter of the United Nations: A Commentary*, 3e ed., Oxford University Press, Oxford, 2012, Vol. II, pp. 1829 to 1839, especially p. 1837; Koutroulis, V., 'The application of international humanitarian law and international human rights law in prolonged occupation: only a matter of time?', *International Review of the Red Cross*, 2012, Vol. 94, pp. 165 to 205, especially p. 171; David, É., *Principes de droit des conflits armés*, 5th ed., Bruylant, Brussels, 2012, p. 192; Ruiz Miguel, C., 'La responsabilité internationale et les droits de l'homme: le cas du Sahara occidental', *Cahiers de la recherche sur les droits fondamentaux*, 2013, Vol. 11, pp. 105 to 130, especially p. 107; Dawidowicz, M., 'Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement', published in French, D. (ed.), *Statehood, Self-Determination and Minorities: Reconciling Tradition and Modernity in International Law*, Cambridge University Press, Cambridge, 2013, pp. 250 to 276; Bothe, M., 'The Administration of Occupied Territory' published in Clapham, A., Gaeta, P., and Sassòli, M. (eds), *The 1949 Geneva Conventions: A commentary*, Oxford University Press, Oxford, 2015, pp. 1455 to 1484, especially p. 1459; Kontorovich, E., 'Economic Dealings with Occupied Territories', *Columbia Journal of Transnational Law*, 2015, Vol. 53, pp. 584 to 637, especially pp. 611 and 612; Saul, B., 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources', *Sydney Law School Legal Studies Research Paper*, No 15/81 (September 2015). See also judgment of 15 June 2017 of the High Court of South Africa in Case No 1487/17, *The Saharawi Arab Democratic Republic and Front Polisario v The Owner and charterers of the MV 'NM Cherry Blossom'*, paragraph 29.

224 See Corell, H., 'Western Sahara — status and resources', *New Routes*, 2010, Vol. 15, pp. 10 to 13, especially p. 11.

225 See letter dated 29 January 2002, addressed to the President of the Security Council by the Under-Secretary-General for Legal Affairs, the Legal Counsel (S/2002/161).

226 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), judgment (ICJ Reports 2005, p. 168, paragraph 173). The same principle applies to the occupation of non-self-governing territories, under Article 1(4) of Additional Protocol I.

annexation in two stages (in 1976 and in 1979 [227]). It has been administered in a structured manner [228] by the Kingdom of Morocco since that time, without the consent of the people of Western Sahara, which has not yet exercised its right to self-determination. [229]

250. It should further be noted that the existence of an occupation is not limited to the continental territory, but also extends to the internal waters and to the territorial sea. [230] As an EEZ does not come under the sovereignty of the coastal State, an occupation does not extend to that zone but the occupying power of the coastal territory, in this instance the Kingdom of Morocco, may exercise in that zone the jurisdiction which the law of the sea confers on the coastal territory. [231]

– *The capacity of the occupying power to conclude international agreements applicable to the occupied territory and the conditions of legality to which the conclusion of such agreements is subject*

251. As regards the capacity of an occupying power to conclude international agreements applicable to the occupied territory, it should be noted that it follows from Article 43 of the 1907 Hague Regulations [232] and from the second subparagraph of Article 64 of the Fourth Geneva Convention [233] that the

[227] I recall that the Islamic Republic of Mauritania withdrew from Western Sahara on 14 August 1979 after signing a peace agreement with Front Polisario. On the same day the Kingdom of Morocco annexed the part of Western Sahara initially occupied by the Islamic Republic of Mauritania, which recognised that 'occupation by force' by the declaration of its Prime Minister, dated 14 August 1979, annexed to the letter dated 18 August 1979, addressed to the United Nations Secretary-General by the Permanent Representative of the Islamic Republic of Mauritania to the United Nations (A/34/427).

[228] For a detailed report of the placing of Western Sahara under Moroccan authority, see Dessaints, J., 'Chronique politique Maroc', *Annuaire de l'Afrique du Nord*, 1975, Vol. 14, pp. 457 to 476, especially pp. 463 to 465; Santucci, J.-C., 'Chronique politique Maroc', *Annuaire de l'Afrique du Nord*, 1976, Vol. 15, pp. 357 to 379, especially pp. 359 to 361.

[229] I would also emphasise that, even if it were considered valid, the Madrid Agreement did not in any way authorise a Moroccan military presence on the territory of Western Sahara without the consent of its people, which has never been given.

[230] See Dinstein, Y., *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 47 and 48; Benvenisti, E., *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, p. 55; Sassòli, M., 'The Concept and the Beginning of Occupation' published in Clapham, A., Gaeta, P., and Sassòli, M. (eds), *The 1949 Geneva Conventions: A commentary*, Oxford University Press, Oxford, 2015, pp. 1389 to 1419, paragraph 15.

[231] See Benvenisti, E., *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, p. 55.

[232] 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

[233] 'The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the

occupying power may promulgate laws in order to ensure the public life and the orderly government of the occupied territory. [234] As the Commission observes, that legal power which the occupying power enjoys in that occupied territory includes the capacity to conclude international agreements applicable to that territory. [235] In that regard, it should be noted that the International Court of Justice has not excluded outright the possibility that third parties will conclude international agreements applicable to a non-self-governing territory solely with the administering power which is no longer carrying out its mission because of the military intervention. [236]

252. However, in concluding an international agreement applicable to the occupied territory, the occupying power must act in its capacity as occupying power and not as having sovereignty over the occupied territory, [237] because the annexation of an occupied territory is strictly forbidden. [238]

present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.'

234 See Sassòli, M., 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', *European Journal of International Law*, 2005, Vol. 16, pp. 661 to 694; Dinstein, Y., *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 115 and 116; Arai-Takahashi, Y., *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, The Hague, 2009, pp. 120 and 121.

235 See Benvenisti, E., *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, pp. 83 to 86; Bothe, M., 'The Administration of Occupied Territory' published in Clapham, A., Gaeta, P., and Sassòli, M. (eds), *The 1949 Geneva Conventions: A commentary*, Oxford University Press, Oxford, 2015, pp. 1455 to 1484, paragraph 98.

236 See East Timor (Portugal v. Australia), judgment (ICJ Reports 1995, p. 90, paragraphs 13 and 32). If the Court did not exercise its jurisdiction in that case, that was because it would have had to determine the lawfulness of the integration of East Timor in the Republic of Indonesia. However, that did not prevent it from describing the Indonesian military intervention as an occupation (see paragraph 13 of the judgment), which, moreover, is a question of fact (see point 246 of this Opinion).

237 See Benvenisti, E., *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, p. 85; Bothe, M., 'The Administration of Occupied Territory', published in Clapham, A., Gaeta, P., and Sassòli, M. (eds), *The 1949 Geneva Conventions*: *A commentary*, Oxford University Press, Oxford, 2015, pp. 1455 to 1484, paragraph 98.

238 See Article 4 of Additional Protocol I; Article 47 of Geneva Convention IV; award of 18 April 1925 in the Case of Dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie), *Reports of International Arbitral Awards*, Vol. 1, pp. 529 to 614, especially p. 555; judgment of 10 March 1948 of Military Tribunal No I in the RuSHA case (United States of America v. Greifelt and Others), *Trials of War Criminals before the Nuremberg Military Tribunals*, U.S. Government Printing Office, Washington, 1950, Vol. V, p. 154; Oppenheim, L., 'The Legal Relations between an Occupying Power and the Inhabitants', *Law Quarterly Review*, 1917, Vol. 33, p. 363, p. 364; Dinstein, Y., *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 49 to 51; David, É., *Principes de droit des conflits armés*, 5th ed., Bruylant, Brussels, 2012, pp. 582 and 583; Benvenisti, E., *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, p. 85; Bothe,

253. In that sense, for example, the Swiss Confederation concluded with the Coalition Provisional Authority [239] acting expressly on behalf of the Republic of Iraq an agreement on the export risks guarantee, [240] being of the view that 'an occupying State has the legal power in the State which it occupies (Article 43 of the 1907 Hague Regulations) [which] means in particular that the occupying power may promulgate laws or conclude international agreements on behalf of the occupied State'. [241] That practice was supported by United Nations Security Council Resolutions 1483 (2003) of 23 May 2003 [242] and 1511 (2003) of 16 October 2003. [243]

254. It is clear from its wording that that framework agreement was not concluded with the occupying powers of the Republic of Iraq but with the Coalition Provisional Authority, which, 'in application of the laws and customs of war … [had] temporarily the force of governmental authority in Iraq'. [244] There was thus no question of recognition by the Swiss Confederation of an illegal situation resulting from a breach of the intransgressible rules of international customary laws which incorporate obligations *erga omnes*.

M., 'The Administration of Occupied Territory' published in Clapham, A., Gaeta, P., and Sassòli, M. (eds), *The 1949 Geneva Conventions: A commentary*, Oxford University Press, Oxford, 2015, pp. 1455 to 1484, paragraph 10.

239 This is the occupation authority established in the Iraq by the United States of America and their coalition in order to govern the country between 2003 and 2004.

240 See the Framework Agreement between the Coalition Provisional Authority ('the Authority') which, in application of the laws and customs of war and the relevant United Nations Security Council resolutions, in particular Resolution 1483 (2003), temporarily has the force of governmental authority in Iraq, the Trade Bank of Iraq (TBI), set up under Regulation No 20 of the Authority, and the Export Risk Guarantee Agency (ERG), acting on behalf of the Swiss Confederation, signed in Rome on 5 December 2003, *Recueil systématique du droit fédéral*, 0.946.144.32.

241 Note of 15 December 2003 of the Directorate of Public International Law of the Swiss Confederation, reproduced in Ferraro, T. (ed.), Rapport des experts du CIRC 'Occupation and other forms of administration of foreign territory', 2012, p. 59. See also, to that effect, Caflisch, L.C., 'La pratique suisse en matière de droit international public 2003', *Revue Suisse de droit international et de droit européen*, 2004, Vol. 5, pp. 661 to 719, especially pp. 663 and 664.

242 See paragraph 4, according to which the Security Council 'call[ed] upon the [Coalition Provisional] Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people *through the effective administration of the territory*, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future'. Emphasis added.

243 See paragraph 1, according to which the Security Council 'reaffirm[ed] the sovereignty and territorial integrity of Iraq, and underscore[d], in that context, the *temporary nature of the exercise by the [Authority] of the specific responsibilities, authorities, and obligations under applicable international law* recognised and set forth in Resolution 1483 (2003), which will cease when an internationally recognised, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority'. Emphasis added.

244 See title of the Framework Agreement (*Recueil systématique du droit fédéral*, 0.946.144.32).

255. In this instance, the wording of the Fisheries Agreement and the 2013 Protocol does not expressly state that those instruments were concluded with the Kingdom of Morocco in its capacity as occupying power of Western Sahara. On the contrary, to all appearances, the Kingdom of Morocco concluded those agreements as the sovereign of Western Sahara. Consequently, contrary to the Commission's assertion in paragraph 139 of its observations, Article 43 of the 1907 Hague Regulations and Article 64(2) of the Fourth Geneva Convention do not authorise the conclusion of the Fisheries Agreement and of the 2013 Protocol in the form and manner in which they were concluded, even if the Kingdom of Morocco were to be considered to be the occupying power of Western Sahara.

(b) Compliance by the contested acts with the principle of permanent sovereignty over natural resources and with the rules of international humanitarian law applicable to the exploitation of natural resources of the occupied territory

(1) The principle of permanent sovereignty over natural resources

256. Western Sahara is a non-self-governing territory in the course of being decolonised. On that basis, the exploitation of its natural wealth comes under Article 73 of the United Nations Charter and the customary principle of permanent sovereignty over natural resources. [245] In addition, the UNCLOS provides in Resolution III annexed to the Final Act of the Third United Nations Conference on the Law of the Sea that 'in the case of a territory whose people have not attained full independence or other self-governing status recognised by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the [UNCLOS] shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development'.

257. In that context, the exploitation of the natural resources of a non-self-governing territory, including the fishing of the waters adjacent to that territory, must benefit its people. [246]

(2) Article 55 of the 1907 Hague Regulations

258. As the occupying power of Western Sahara, [247] the Kingdom of Morocco is bound by Article 55 of the 1907 Hague Regulations, which concerns the exploitation of the public property of the occupied country. According to that article, 'the occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates

[245] See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), judgment (ICJ Reports 2005, p. 168, paragraph 244).

[246] See points 130 to 134 of this Opinion.

[247] See points 245 to 249 of this Opinion.

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'.

259. Like the Commission, I consider that Article 55 of the 1907 Hague Regulations may also be applied to the exploitation of the fisheries stocks of maritime zones situated alongside the coasts of the occupied territory.

260. Usufruct is the right to use assets (*jus utendi*) belonging to others and to receive the proceeds of those assets (*jus fruendi*), without altering their substance. [248] That means that the occupying power cannot dispose of the public assets of the occupied country but that it may exploit them, receive and sell the proceeds of those assets and use the profits generated by the disposal of the proceeds of that exploitation, but that that exploitation may not exhaust, abandon or destroy the economic value of the assets in question or go beyond what is necessary or habitual. [249]

261. The wording of Article 55 places no specific limits on the purposes of the disposal of the proceeds of exploitation of the public property. [250] However, it has been held that 'Articles 53, 55, and 56 [of the 1907 Hague Regulations], dealing with public property, make it clear that under the rules of war the economy of an occupied country can only be required to bear the expenses of the occupation, and

[248] See 'Iustiniani Institutiones', Book II, Chapter IV '(De usu fructu), principium', published in Krueger, P. (ed.), *Corpus Iuris Civilis*, Weidmann, Berlin, 1889, Vol. I; U.S. Department of State, 'Memorandum of Law on Israel's right to develop new oil field in Sinai and the Gulf of Suez', 1 October 1976, *International Law Materials*, 1977, Vol. 16, pp. 733 to 753, especially p. 736; Ministry of Foreign Affairs of Israel, 'Memorandum of Law on the Right to develop new oil fields in Sinai and the Gulf of Suez', 1 August 1977, *International Law Materials*, 1978, Vol. 17, pp. 432 to 444, paragraph 2; Dinstein, Y., *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 214; Van Engeland, A., 'Protection of Public Property', published in Clapham, A., Gaeta, P., and Sassòli, M. (eds), *The 1949 Geneva Conventions: A commentary*, Oxford University Press, Oxford, 2015, pp. 1535 to 1550, paragraphs 20 to 22.

[249] See Dinstein, Y., *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 215; Office of the Judge Advocate General of Canada, *Law of Armed Conflict*, 2001, paragraph 1243; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, paragraph 11.86; U.S. Department of Defense, *Law of War Manual*, 2015, p. 793.

[250] See Ministry of Foreign Affairs of Israel, 'Memorandum of Law on the Right to develop new oil fields in Sinai and the Gulf of Suez', 1 August 1977, *International Law Materials*, 1978, Vol. 17, pp. 432 to 444, paragraph 12; Cassese, A., 'Powers and Duties of an Occupant in Relation to Land and Natural Resources', published in Cassese, A., Gaeta, P., and Zappalà, S. (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, 2008, Oxford University Press, Oxford, pp. 250 to 271, especially p. 258; Dinstein, Y., *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 217.

these should not be greater than the economy of the country can reasonably be expected to bear'. [251]

262. In addition, an exploitation of public property in order to satisfy the needs of the people of the occupied territory is permitted under Article 55 of the 1907 Hague Regulations, a fortiori in the context of a prolonged occupation. [252]

263. Thus, during the occupation of Iraq, the United States of America, the United Kingdom and the members of the coalition immediately accepted that 'Iraq's oil [would be] protected and used for the benefit of the Iraqi people' [253] and, in accordance with paragraph 20 of United Nations Security Council Resolution 1483 (2003), established the Development Fund for Iraq [254] in order to pay into that fund all the proceeds of the export sales of petroleum, petroleum products and natural gas from Iraq until an internationally recognised, representative government of Iraq was properly constituted.

(3) Compliance by the contested acts with the principle of permanent sovereignty over natural resources and with Article 55 of the 1907 Hague Regulations

264. It should be observed, first of all, that international humanitarian law, including Article 55 of the 1907 Hague Regulations, constitutes a *lex specialis* by

[251] Judgment of 1 October 1946 of the International Military Tribunal at Nuremberg in *The United States of America and Others v. Goering and Others*, published in *Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, 14 November 1945 — 1 October 1946)*, 1947, pp. 171 to 341, especially p. 239. See also, to that effect, U.S. Department of State, 'Memorandum of Law on Israel's right to develop new oil field in Sinai and the Gulf of Suez', 1 October 1976, *International Law Materials*, 1977, Vol. 16, pp. 733 to 753, especially. p. 743; Ministry of Foreign Affairs of Israel, 'Memorandum of Law on the Right to develop new oil fields in Sinai and the Gulf of Suez', 1 August 1977, *International Law Materials*, 1978, Vol. 17, pp. 432 to 444, especially p. 437.

[252] See U.S. Department of State, 'Memorandum of Law on Israel's right to develop new oil field in Sinai and the Gulf of Suez', 1 October 1976, *International Law Materials*, 1977, Vol. 16, pp. 733 to 753, especially pp. 743 to 745; Cassese, A., 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' published in Cassese, A., Gaeta, P., and Zappalà, S. (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, 2008, Oxford University Press, Oxford, pp. 250 to 271, especially pp. 257 and 261; Benvenisti, E., *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, p. 82.

[253] See letter dated 8 May 2003, addressed to the President of the Security Council by the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the United Nations Organisation (S/2003/538).

[254] See Coalition Provisional Authority, Regulation No 2 of 15 June 2003, Development Fund for Iraq.

comparison with the other rules of international law, including human rights, which may also be applicable to the same factual context. [255]

265. Admittedly, the International Court of Justice has held, as regards the principle of permanent sovereignty over natural resources, that 'there is nothing … which suggests that [that principle is] applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State'. [256]

266. However, the present case does not concern looting or pillage and exploitation of natural resources by individual members of the army, but an official and systematic policy of exploitation of the fisheries resources [257] put in place jointly by the Kingdom of Morocco and the European Union.

267. In that sense, certain situations may come exclusively within international humanitarian law; or exclusively within the law applicable to the exploitation of the natural resources of non-self-governing territories; while other situations may come at the same time within both of those branches of international law. [258]

268. As the Commission observes in paragraph 43 of its answers to the written questions put by the Court, the legal regimes applicable to non-self-governing territories and to occupied territories are not mutually exclusive. Furthermore, as regards the present case, the principle of permanent sovereignty over natural resources and Article 55 of the 1907 Hague Regulations converge on one point, namely that the exploitation of the natural resources of Western Sahara (as a non-self-governing territory and an occupied territory) cannot be carried out for the economic benefit of the Kingdom of Morocco (other than the costs of occupation in so far as Western Sahara may reasonably provide for them) but must be carried out for the benefit of the people of Western Sahara.

269. In that regard, it should be borne in mind that both the Council and the Commission are agreed that the exploitation of the fishing zones alongside the coasts of Western Sahara must benefit the people of that territory, while considering that the provisions of the Fisheries Agreement and of the 2013 Protocol are apt to ensure that that is indeed the case.

[255] See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (ICJ Reports 1996, p. 226, paragraph 25); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraphs 105 and 106).

[256] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), judgment (ICJ Reports 2005, p. 168, paragraph 244).

[257] See, to that effect, Dinstein, Y., *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 219 and 220.

[258] See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ Reports 2004, p. 136, paragraph 106); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), judgment (ICJ Reports 2005, p. 168, paragraphs 216, 217 and 220).

270. I do not agree with that argument, for the following reasons.

271. It should be noted that the Fisheries Agreement provides for the sustainable exploitation of the fisheries stocks [259] and in that sense does not lead to the exhaustion of that resource. On that basis, the Fisheries Agreement seems at first sight to be consistent with the usufruct rules referred to in Article 55 of the 1907 Hague Regulations [260] and with the principle of permanent sovereignty over natural resources. In fact, an exploitation of the waters adjacent to Western Sahara that exhausted the fisheries stocks could not be considered to be for the benefit of the people of that territory.

272. However, it is apparent from Article 2 of Regulation No 764/2006, fishing zone datasheets Nos 3 to 6 [261] and the information provided by the Commission at the hearing [262] that most of the exploitation provided for in the Fisheries Agreement and the 2013 Protocol relates exclusively to the waters adjacent to Western Sahara. In fact, the catches taken in fishing zone No 6 alone (which covers only the waters adjacent to Western Sahara) represent around 91.5% of the total catches in the context of the fisheries exploitation established by the Fisheries Agreement and the 2013 Protocol.

273. If, therefore, the Fisheries Agreement applies almost exclusively to Western Sahara and the waters adjacent thereto, it follows that the financial contribution paid to the Kingdom of Morocco pursuant to Article 7 of the Fisheries Agreement should also, as the Council and the Commission accept, benefit almost exclusively the people of Western Sahara (unless it is used to cover the costs of occupation in so far as that territory may reasonably provide for them). [263]

274. However, Article 3(1) of the 2013 Protocol provides that the annual financial contribution of EUR 40 million is to be divided into two parts, one of EUR 30 million paid under Article 7 of the Fisheries Agreement (EUR 16 million as a financial contribution for access to the resource and EUR 14 million as support for the fisheries sector in Morocco) and one of EUR 10 million corresponding to the estimated amount of fees owed by shipowners under the fishing licences granted under Article 6 of the Fisheries Agreement.

259 See preamble and Article 1, Article 3(1) and Articles 4, 8 and 9 of the Fisheries Agreement. See also, to that effect, Articles 4 and 5 of the 2013 Protocol.

260 See points 258 and 260 of this Opinion.

261 These datasheets are in Appendix 2 to the Annex to the Fisheries Agreement. Pursuant to Article 16 of the Fisheries Agreement, the Annex and the Appendices thereto are to form an integral part of the agreement.

262 See point 70 of this Opinion.

263 See point 261 of this Opinion. The file contains no information in that respect, since, being of the view that the Kingdom of Morocco is the 'de facto administering authority' of Western Sahara, the EU institutions did not ask themselves the question.

275. In accordance with Article 3(4) of the 2013 Protocol, that contribution is to be paid to the Treasurer-General of the Kingdom of Morocco into an account opened with the Public Treasury of the Kingdom of Morocco (whereas in the case of the occupation of Iraq the proceeds of the sales of oil were paid to the Development Fund for Iraq).

276. As regards the use to which it is put, Article 3(5) and Article 6(1) of the 2013 Protocol provide that the Moroccan authorities are to have *full* discretion regarding the annual financial contribution of EUR 40 million, but for the EUR 14 million (support for the sectoral fisheries policy in Morocco), they establish a mechanism for the monitoring and control by the EU, within a joint committee, of its use by the Moroccan authorities.

277. In accordance with Article 5(6) of the 2013 Protocol, that mechanism permits only the general monitoring of the 'social and economic consequences [of the Fisheries Agreement], particularly the impact on employment, investment and any other quantifiable repercussions of the measures taken, together with their geographical distribution'.

278. According to the Commission, that monitoring mechanism enabled it to ensure that for the period of validity of the 2013 Protocol (2014 to 2018), EUR 54 million was or will be used for the construction of new-generation markets, premises for fishers and managed landing sites for aquaculture products, and that around 80% of the projects funded by that aid are located in Western Sahara.

279. To my mind, it follows from those factors that neither the Fisheries Agreement nor the 2013 Protocol contains the necessary legal safeguards for the fisheries exploitation to satisfy the requirements of the criterion which requires that that exploitation is for the benefit of the people of Western Sahara.

280. In the first place, the 2013 Protocol does not contain any commitment on the part of the Kingdom of Morocco to use the financial contribution paid by the Union for the benefit of the people of Western Sahara in proportion to the quantities of the catches taken in the waters adjacent to Western Sahara. On the contrary, whereas 91.5% of the catches are taken solely in fishing zone No 6 (which covers only the waters adjacent to Western Sahara), only 35% of the financial contribution (EUR 14 million out of EUR 40 million) come within the monitoring mechanism established by Article 6 of the 2013 Protocol.

281. In the second place, there is no evidence that the EUR 14 million is actually used for the benefit of the people of Western Sahara. On the contrary, the information supplied by the Commission shows that of the EUR 160 million payable over a period of 4 years (2014 to 2018), only EUR 54 million (or 33.75%) was used for the development of the projects, 80% of which are in Western Sahara.

282. In the third place, the fact that 80% of the projects that benefit from that EUR 54 million are in Western Sahara does not in itself mean anything. What

matters is the proportion of that sum of EUR 54 million that is used to fund projects in Western Sahara, but the Commission has not provided that information.

283. Last, it should be observed that Article 49, paragraph 6 of the Fourth Geneva Convention prohibits the occupying power from ‘transfer[ring] parts of its own civilian population into the territory it occupies’. [264] However, there is no provision in the Fisheries Agreement or the 2013 Protocol that would require the Kingdom of Morocco to use the part of the financial contribution corresponding to the fisheries exploitation of the fishing zones alongside the coasts of Western Sahara in a way that would benefit, in particular, the ‘Saharans originating in the Territory’ [265] or the ‘Saharan populations originating in the Territory’. [266]

284. For example, the datasheet for fishing zone No 6 (industrial pelagic fishing) establishes a requirement to embark between 2 and 16 ‘Moroccan seamen’ depending on the tonnage of the Union vessel, [267] although that fishing zone relates exclusively to the waters adjacent to Western Sahara.

285. Consequently, I consider that the provisions of the Fisheries Agreement and the 2013 Protocol provide no safeguard that the fisheries exploitation of the waters adjacent to Western Sahara is done for the benefit of the people of that territory. In that sense, the contested acts do not comply with either the principle of permanent sovereignty over natural resources [268] or Article 55 of the 1907

264 Such a transfer constitutes a serious breach of Additional Protocol I (see Article 85(4)(a) of that protocol) and a war crime (Article 8(2)(b)(viii) of the Rome Statute of the International Criminal Court, *United Nations Treaty Series*, Vol. 2187, p. 3). It should be noted that the Kingdom of Morocco has signed but not ratified the Rome Statute.

265 See paragraph 7 of United Nations General Assembly Resolution 3458 A (XXX).

266 See paragraphs 2 and 4 of United Nations General Assembly Resolution 3458 B (XXX).

267 See Appendix 2 to the Annex to the 2013 Protocol.

268 See Milano, E., ‘The New Fisheries Partnership Agreement between the EC and Morocco: Fishing too South?’, *Anuario español de derecho internacional*, 2006, Vol. 22, pp. 413 to 457, especially pp. 435 to 442; Soroeta Liceras, J., ‘La posicíon 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’, *Revista de Derecho Comunitario Europeo*, 2009, Vol. 34, pp. 823 to 864, especially pp. 829 to 837 and pp. 844 to 847; Corell, H., ‘The legality of exploring and exploiting natural resources in Western Sahara’, published in Botha, N., Olivier, M., and van Tonder, D. (eds), *Multilateralism and International Law with Western Sahara as a Case Study*, VerLoren van Themaat Centre, Pretoria, 2010, pp. 231 to 247, especially p. 242; Etienne, J., ‘L’accord de pêche CE-Maroc: quels remèdes juridictionnels européens à quelle illicéité internationale’, *Revue belge de droit international*, 2010, pp. 77 to 107, especially pp. 86 to 88; Saul, B., ‘The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources’, *Sydney Law School Legal Studies Research Paper*, No 15/81 (September 2015), pp. 29 to 31. See also, to that effect, ‘Legal opinion [of the Office of the Legal Counsel of the African Union] on the legality in the context of international law, including the relevant United Nations resolutions and Organisation of African Unity/African Union decisions, of actions allegedly taken by the Moroccan authorities or any other State, group of States, foreign

Hague Regulations, or with the European Union's obligation not to recognise an illegal situation resulting from a breach of those provisions and not to render aid or assistance in maintaining that situation.

286. It follows from the foregoing that, in that they apply to the territory of Western Sahara and the waters adjacent thereto, the Fisheries Agreement and the 2013 Protocol are incompatible with Article 3(5) TEU, the first subparagraph of Article 21(1) TEU, Article 21(2)(b) and (c) TEU and Articles 23 TEU and 205 TFEU, which impose on the European Union a requirement that its external action strictly observe international law.

287. Regulation No 764/2006, Decision 2013/785 and Regulation No 1270/2013 are contrary to Article 3(5) TEU, the first subparagraph of Article 21(1) TEU, Article 21(2)(b) and (c) TEU and Articles 23 TEU and 205 TFEU in that they approve and implement the Fisheries Agreement and the 2013 Protocol in the territory of Western Sahara and the waters adjacent thereto.

(c) The limitations on the obligation not to recognise an illegal situation

288. In that regard, at the hearing both Comader and the Commission maintained that the obligation not to recognise an illegal situation resulting from a breach of rules *erga omnes* of international law and of the obligation not to render aid or assistance in maintaining that situation cannot lead to a prohibition on concluding international agreements promoting the economic development of the people of Western Sahara, since such a prohibition would ultimately operate to the detriment of the people of Western Sahara.

289. They thus rely on paragraph 125 of the Advisory Opinion on Namibia, [269] where the International Court of Justice had held that 'the non-recognition of

companies or any other entity in the exploration and/or exploitation of renewable and non-renewable natural resources of any other economic activity in Western Sahara', annexed to the letter dated 9 October 2015 from the Permanent Representative of Zimbabwe to the United Nations to the President of the Security Council (S/2015/786).

[269] In 1970, South Africa had not yet withdrawn its administration from Namibia, notwithstanding that the United Nations General Assembly had terminated its mandate over that territory which the League of Nations had granted it, that the General Assembly had itself directly assumed responsibility for governing Namibia and that United Nations Security Council had requested South Africa to withdraw its administration from Namibia immediately. It should be borne in mind that, as in its own territory, South Africa had imposed the apartheid regime in Namibia. For those reasons, by Resolution 276 (1970), the Security Council declared that 'the continued presence of the South African authorities in Namibia is illegal and … consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal' (paragraph 2). It also called upon 'all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution' (paragraph 5). The Security Council subsequently asked the International Court of Justice to give its opinion on the consequences for States of the continued presence of South Africa in Namibia, notwithstanding its Resolution 276 (1970).

South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation'. [270]

290. To my mind, that limitation of the obligation not to recognise illegal situations has no impact in the present case.

291. In the first place, the Commission has already attempted to use paragraph 125 of the Advisory Opinion on Namibia to justify the acceptance by the United Kingdom customs authorities of movement certificates for agricultural products originating in occupied Cypriot territory which had been issued by the so-called 'Turkish Republic of Northern Cyprus', an entity not recognised by the European Union and its Member States. [271] However, the Court rejected that approach and held that no analogy could be drawn between the situation in Namibia and the military occupation that still exists in Northern Cyprus. [272] In my view the same applies in the present situation.

292. In the second place, the limitation of the obligation not to recognise an illegal situation established by the International Court of Justice in paragraph 125 of its Advisory Opinion on Namibia in order not to deprive the people of Namibia of any advantages derived from international cooperation could not justify the conclusion of international trade agreements. The conclusion of such agreements was covered by the obligation not to recognise illegal situations. [273] Furthermore, the examples of the advantages from which the people of Namibia should be able to continue to benefit do not by any means include international trade agreements. In fact, the examples given by the International Court of Justice refer to the registration of births, marriages and deaths, 'the effects of which can be ignored only to the detriment of the inhabitants of the Territory'. [274]

4. Summary

293. It follows from the foregoing that the contested acts, which are applicable to the territory of Western Sahara and the waters adjacent thereto in that they come within the sovereignty or jurisdiction of the Kingdom of Morocco, breach the European Union's obligation to respect the right to self-determination of the

[270] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (ICJ Reports 1971, p. 16).

[271] See judgment of 5 July 1994, *Anastasiou and Others* (C-432/92, EU:C:1994:277, paragraph 35).

[272] See judgment of 5 July 1994, *Anastasiou and Others* (C-432/92, EU:C:1994:277, paragraph 49).

[273] See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (ICJ Reports 1971, p. 16, paragraph 125).

[274] See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (ICJ Reports 1971, p. 16, paragraph 124).

people of that territory and its obligation not to recognise an illegal situation resulting from a breach of that right and not to render aid or assistance in maintaining that situation. Furthermore, as regards the exploitation of natural resources of Western Sahara, the contested acts do not put in place the necessary safeguards in order to ensure that that exploitation is carried out for the benefit of the people of that territory.

VI. The Council's request to limit in time the effects of the declaration of invalidity

294. The Council has asked the Court to 'temporarily limit the effects of the declaration of invalidity [of Regulation No 764/2006, Decision 2013/785 and Regulation No 1270/2013], so as to enable the Union to take such steps as may be required in accordance with its obligations under international law'. [275]

295. Without stating more detailed reasons for its request, the Council thereby asks that the effects of the contested acts be maintained for a limited period, as was done, for example, in the judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461). [276] It should be pointed out, however, that the 2013 Protocol, which forms part of the Fisheries Agreement [277] and is indispensable for its implementation, will expire on 14 July 2018. [278] As the period between delivery of the judgment in 2018 and the expiry of that protocol will be particularly short, I am not convinced that it would make sense for the effects of the contested acts to be maintained. In any event, the reasons why the effects of the contested act were maintained for a period of three months in the case that gave rise to the judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461) [279] are not present in this case.

VII. Conclusion

296. In the light of the foregoing considerations, I propose that the Court should first of all answer the fourth question, and then the third question, referred by the

[275] See paragraph 59 of its written observations.

[276] See paragraphs 373 to 376 of that judgment.

[277] See Article 16 of the Fisheries Agreement and the first paragraph of Article 1 of the 2013 Protocol.

[278] See the first paragraph of Article 2 of the 2013 Protocol.

[279] See paragraphs 373 and 374 of that judgment. The Court referred to the risk that persons subject to restrictive measures might take steps to prevent fund-freezing measures being applied to them again and to the possibility that, in spite of the procedural irregularities established in its judgment, the imposition of restrictive measures on the appellants might prove to be justified.

High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), United Kingdom, as follows:

(1) (a) In the context of the judicial review of international agreements concluded by the European Union and the European Union acts approving or implementing such agreements, the possibility of relying on the rules of international law is subject to the following conditions, independently of whether those rules belong to one or to several sources of international law: the Union must be bound by the rule relied on, its content must be unconditional and sufficiently precise and, last, its nature and its broad logic must not preclude judicial review of the contested act.

(b) The principle stated by the International Court of Justice in the Case of the Monetary Gold Removed from Rome in 1943 that the International Court of Justice may not exercise its jurisdiction with respect to a State that is not before the Court without that State's consent is not applicable to judicial review of international agreements concluded by the European Union and of acts of the European Union which approve or implement such agreements.

(2) (a) The Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco and the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in that agreement are incompatible with Article 3(5) TEU, the first subparagraph of Article 21(1) TEU, Article 21(2)(b) and (c) TEU and Articles 23 TEU and 205 TFEU in that they apply to the territory of Western Sahara and to the waters adjacent thereto.

(b) Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, Council Decision 2013/785/EU of 16 December 2013 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 between the European Union and the Kingdom of Morocco and Council Regulation (EU) No 1270/2013 of 15 November 2013 on the allocation of fishing opportunities under 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 are invalid.