

Trading fish or human rights in Western Sahara? Self-determination, non-recognition and the EC–Morocco Fisheries Agreement

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I. Introduction

It is notoriously difficult to cross a desert. This is still so when the final destination is clear. Biblical figures famously experienced many difficulties in the desert during their exodus, even as the vision of the final destination was divinely revealed to them. Likewise, it appears that the international community (albeit absent any divine intervention) has spent almost forty years in the ‘frontierless sea of sand’¹ of Western Sahara without finding its way. And yet the direction of travel has always been clear. International law may not provide for a promised land of milk and honey in any biblical sense, but it does provide for the basic right of peoples to self-determination – a point emphatically reaffirmed by the International Court of Justice (ICJ) in its 1975 Advisory Opinion in *Western Sahara*.²

In *Western Sahara*, the Court denied that Morocco and Mauritania had any ties of territorial sovereignty to Western Sahara and affirmed the right of the people of Western Sahara to self-determination. But this cardinal right has seemingly only manifested itself as a forlorn mirage in the desert. Morocco is still denying this right and purports to exercise territorial sovereignty over Western Sahara. Almost forty years later, the international community is yet to assure the people of Western Sahara of the realization of their own promised land in accordance with the right of self-determination under international law. Worse still, it appears that

¹ *Western Sahara*, ICJ Rep (1975), Dec. Judge Gros, p. 71

² *Western Sahara*, ICJ Rep (1975), p. 12.

important actors in the international community may effectively be forestalling the effective exercise of this basic right.

A recent example in point concerns the controversy surrounding the temporary renewal in February 2011 of the 2006 EC–Morocco Fisheries Partnership Agreement (the FPA). The FPA grants European Community (EC) vessels certain fishing rights off Morocco’s Atlantic coast – one of the richest fishing grounds in the world. The FPA has remained controversial, since its reference to ‘Moroccan waters’ does not explicitly exclude the waters off the coast of Western Sahara. The controversy stems from the concern that the FPA might in practice allow for the exploitation of the natural resources of Western Sahara in a manner contrary to the fundamental right of the people of Western Sahara to self-determination, and as such might serve as an implicit recognition of Morocco’s irredentist claim to territorial sovereignty over Western Sahara. However, in December 2011, the Council of the European Union (EU) with immediate effect terminated the temporary extension of the FPA. While this is a positive development, as we shall see below, it remains uncertain whether a renewed FPA, which the EU remains committed to conclude with Morocco, will fully comply with international law.

The analysis in this chapter will proceed as follows. Section II outlines the content and scope of the right of the people of Western Sahara to self-determination. Section III examines whether Morocco’s actions in relation to Western Sahara are tantamount to denying that basic right; an affirmative answer is provided to this question. Section IV makes some general observations about the obligation of non-recognition and its putative application in relation to the denial of the right of the people of Western Sahara to self-determination. Section V evaluates whether the FPA is consistent with the obligation of EU Member States not to recognize Morocco’s claim to sovereignty over Western Sahara. Finally, section VI offers some concluding observations.

II. The right of the people of Western Sahara to self-determination

On 26 December 1884, during its participation in the Berlin Conference, Spain, by royal decree, proclaimed a protectorate over present-day Western Sahara.³ Although the golden age of so-called ‘salt-water

³ *Ibid.*, p. 38, para. 77; *ibid.*, *Written Pleadings*, vol. I, p. 288 (Spain), available at <http://www.icj-cij.org/docket/files/61/9468.pdf>.

colonialism⁴ may have reached its apex with the 1885 General Act of the Berlin Conference, 'the setting of the sun on the age of colonial imperialism'⁵ soon appeared on the horizon. Nevertheless, it was not until 1960 that the United Nations (UN) General Assembly famously adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples, by which it declared the right of self-determination applicable to all trust and non-self governing territories (NSGT).⁶ In the same year, the General Assembly also adopted Resolution 1541 (XV) by which it provided additional guidance on the decolonization process within the meaning of the UN Charter.

In this resolution, the General Assembly provided a definition of an NSGT as enshrined in Article 73 of the UN Charter; in short, an NSGT was described as a colonial territory whose people had not yet attained a 'full measure of self-government'.⁷ In principle, such self-government would be reached by means of a process which respected the 'freely expressed wishes of the people' in a free and fair referendum providing for three broad modes of implementation: namely, (1) emergence as a sovereign independent State; (2) free association with an independent State; or (3) integration with an independent State.⁸

At least in a traditional sense, the core right of peoples to self-determination can thus be described as a process right aimed at safeguarding the expression of the free and autonomous will of a people to dispose of their destiny as they wish. In short, as Judge Dillard observed in *Western Sahara*, 'self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it'.⁹ Under Article 73 of the UN Charter, the responsibility to ensure the successful completion of this process – a 'sacred trust' no less – falls on the administering power of the NSGT.

⁴ See GA Res. 1541 (XV) of 15 December 1960 (Principle IV).

⁵ *Sovereignty over Pulau Ligitan and Pulau Sipadan, Indonesia/Malaysia (Philippines Intervening)*, ICJ Rep (2001), p. 575, Sep. Op. Judge *ad-hoc* Franck, para. 15.

⁶ GA Res. 1514 (XV) of 14 December 1960. See previously GA Res. 637(A) (VII) of 16 December 1952.

⁷ GA Res. 1541 (XV) of 15 December 1960 (Principle I).

⁸ *Ibid.* (Principles VI–IX). See previously GA Res. 742 (XIII) of 27 November 1953; GA Res. 648 (VII) of 10 December 1952; GA Res. 567 (VI) of 18 January 1952 (all emphasizing the element of free choice – and the corresponding option of independence – as a factor in determining whether an NSGT has attained a 'full measure of self-government' in accordance with Chapter XI of the UN Charter).

⁹ *Western Sahara*, ICJ Rep (1975), Sep. Op. Judge Dillard, p. 123.

In 1965, after some years of Spanish intransigence,¹⁰ the UN General Assembly called on Spain, identified as ‘administrating Power’ under Chapter XI of the UN Charter, to take immediate steps towards the decolonization of Western Sahara in accordance with the right of self-determination.¹¹ In 1966, the General Assembly made more specific demands and requested Spain, in consultation with other parties (Morocco, Mauritania and Algeria), to organize a referendum in Western Sahara under UN auspices in order to enable the people of Western Sahara to exercise freely their right to self-determination.¹² But in the waning years of the Franco regime, notwithstanding repeated calls from the General Assembly,¹³ little progress was made towards the realization of this right. An apparent breakthrough came in August 1974 when Spain finally committed itself to the holding of a referendum in the first half of 1975, and even successfully completed a census to that effect.¹⁴

In theory, Morocco assented to a referendum on the future status of Western Sahara, but subject to a strong caveat. On repeated occasions since at least November 1958, when Spain had reaffirmed its sovereignty over Western Sahara, Morocco vigorously protested that Western Sahara formed an integral part of Moroccan territory.¹⁵ In practice, Morocco therefore felt compelled to publicly express its strong opposition to a free vote in the planned referendum – entailing the *option* of outright independence for Western Sahara – on the grounds that it had historic ties to the territory.¹⁶ In Morocco’s view, the option of full independence was excluded under the UN decolonization law in *statu nascendi* since the right of self-determination was circumscribed by the overriding principle of territorial integrity.¹⁷

¹⁰ In November 1958, less than three years after becoming a UN member, Spain declared that Western Sahara was a Spanish province and that therefore it did not qualify as an NSGT under Chapter XI of the UN Charter. Morocco promptly protested, on the basis that Western Sahara formed an integral part of Moroccan national territory. See *Western Sahara*, ICJ Rep (1975), p. 25, para. 34.

¹¹ GA Res. 2072 (XX) of 16 December 1965.

¹² GA Res. 2229 (XXI) of 20 December 1966.

¹³ See GA Res. 2354 (XXII) of 19 December 1967; 2428 (XXIII) of 27 December 1968; 2591 (XXIV) of 16 December 1969; 2711 (XXV) of 14 December 1970; 2983 (XXVII) of 14 December 1972; and 3162 (XXVIII) of 14 December 1973.

¹⁴ See Letter dated 20 August 1974 from the Permanent Representative of Spain addressed to the Secretary-General, UN Doc. A/9714.

¹⁵ *Western Sahara*, ICJ Rep (1975), pp. 25, 35, paras. 34, 65.

¹⁶ *Ibid.*, p. 35, para. 65; T. Franck, ‘The Stealing of the Sahara’, (1976) 70 *AJIL*, 702, 705.

¹⁷ GA Res. 1514 (XV) of 15 December 1960 (op. para. 6); GA Res. 2625 (XXV) of 24 October 1970, (principle 5, para. 7). See also *Western Sahara*, ICJ Rep (1975), Sep. Op. Judge Petré, p. 110 (for recognition of the intricate interplay between the two principles

In essence, Morocco's position was that its historical ties to Western Sahara justified 'the reintegration or retrocession of the territory without consulting the [Western Saharan] people'.¹⁸ Put bluntly, Morocco presented the issue as essentially one of 'colonial amputation'.¹⁹

With full independence for Western Sahara now a real possibility, Morocco (later assisted by Mauritania) sought, as a minimum, to postpone the planned referendum. It successfully did so by proposing that the General Assembly request an advisory opinion from the ICJ on the status of Western Sahara. On 13 December 1974, the General Assembly adopted Resolution 3292 (XXIX), by which it sought advice from the Court on a rather limited question; namely, Morocco's putative historical claim to Western Sahara at the time of Spain's colonization in 1884.²⁰ However, the General Assembly took special care to ensure that the language of the resolution was without prejudice to the application of the decolonization principles embodied in Resolution 1514 (XV).

In light of this request, Resolution 3292 (XXIX) urged Spain to postpone the planned referendum until the General Assembly was in a position to decide on the policy to be adopted following receipt of the Advisory Opinion from the ICJ. Moreover, in line with established UN practice on decolonization,²¹ the General Assembly requested its Fourth (Decolonization) Committee to send a visiting mission to Western Sahara in order to evaluate the opinion of the population as to the possible change of status they might desire and report back to the Assembly on its findings at its next session. Two parallel UN processes were thus set in motion.

As it happened, while the ICJ in *Western Sahara* recognized that there might be an exception to the general principle of self-determination based on territorial integrity,²² it rejected in categorical terms 'any tie of

enshrined in GA Res. 1514 (XV) forming part of the 'veritable law of decolonization in the course of taking shape').

¹⁸ See *Western Sahara*, ICJ Rep (1975), Dec. Judge Nagendra Singh, p. 79; *ibid.*, Sep. Op. Judge Dillard, p. 120 (i.e. a case of 'automatic retrocession' based on the principle of territorial integrity embodied in op. para. 6 of Resolution 1514 (XV)).

¹⁹ To use the stark terms of Judge Dillard (Sep. Op.) in *Western Sahara*, ICJ Rep (1975), p. 120.

²⁰ GA Res. 3292 (XXIX) of 13 December 1974 (83–0–43). For the debate in the plenary, see UN Doc. A/PV.2318.

²¹ GA Res. 850 (IX) of 22 November 1954 (op. para. 2). For a brief discussion, see R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, vol. I (9th edn, 1992), p. 713.

²² This is clear from the Court's detailed treatment of Morocco's claim that would have been futile in the event that no exception could ever prevail over the right to self-

territorial sovereignty between ... Western Sahara and ... Morocco'.²³ Having unmistakably rejected any Moroccan claims to territorial sovereignty over Western Sahara, the Court turned to the putative right of self-determination and the modes for its implementation.

The ICJ first reiterated its position – espoused four years earlier in *Namibia* – that the principle of self-determination applied to all NSGTs, including Western Sahara.²⁴ The Court went on to refer to General Assembly Resolution 1514 (XV) which 'provided the basis for the process of decolonization' as 'complemented' by General Assembly Resolution 1541 (XV). It noted that the right of self-determination provides the General Assembly with 'a measure of discretion' regarding the manner in which the right is to be realized.²⁵ At the same time, however, the Court recognized the three main different modes of implementation of the right of self-determination embodied in Resolution 1541 (XV) and emphasized that this resolution gave effect to the 'essential feature' of the right of self-determination, namely, 'the basic need to take account of the freely expressed wishes of the territory's people'. The General Assembly's procedural discretion was accordingly circumscribed by the principle of free choice. Thus defined, the Court recognized the right of peoples to self-determination as forming part of customary international law.

In sum, while it is true that the modes of implementation of the right of self-determination may not always be clear, the 'essential feature' of the right nonetheless resides in the principle of free choice, entailing the *option* of a 'right to independence' – a point most recently reaffirmed (though not *per se* endorsed) by the Court in the *Kosovo* opinion.²⁶ It remained for the General Assembly to determine the wishes of the indigenous population. On 7 November 1975, the Fourth Committee of the General Assembly adopted the anticipated report of the UN visiting mission. The report concluded in categorical terms that 'the majority of the population within the Spanish Sahara was manifestly in favour of independence'.²⁷ The guidance provided by UN organs on the

determination. See further, e.g., *Western Sahara*, ICJ Rep (1975), Dec. Judge Gros, pp. 70, 73; *ibid.*, Sep. Op. Judge Dillard, p. 120.

²³ *Western Sahara*, ICJ Rep (1975), pp. 67–8, paras. 161–2. ²⁴ *Ibid.*, p. 31, para. 54.

²⁵ *Ibid.*, p. 36, para. 71.

²⁶ *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 79. See also *East Timor*, ICJ Rep (1995), Sep. Op. Judge Vereschetin, p. 135.

²⁷ See Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial

procedure to be followed by the General Assembly in the decolonization of Western Sahara seemed clear.

As is well known, in spite of this unambiguous advice, the implementation of the right of self-determination in Western Sahara has been fraught with difficulty. In fact, despite the clear opinion provided by the ICJ in *Western Sahara*, Morocco promptly proceeded to take a number of unilateral steps that resulted in the denial of the right of the people of Western Sahara to self-determination – a situation that endures to this day.

III. The denial of the right of self-determination

On 17 October 1975, purportedly basing itself on the legal ties affirmed by the ICJ a day before, Morocco announced its plan for the so-called ‘Green March’ of 350,000 unarmed civilians into Western Sahara ‘in order to gain recognition of its right to national unity and territorial integrity’.²⁸ Morocco declared that its action should be understood as ‘a manifestation of the unanimous will of the Moroccan people to assert its legitimate right over its Sahara’.²⁹ It even boldly proclaimed that ‘a referendum was not necessary [since] the populations of the territory had already exercised *de facto* self-determination and declared themselves in favour of the return of the territory to Morocco’.³⁰ These wishes had allegedly been expressed on 4 November 1975 in a ceremony held in the city of Agadir by means of an ‘oath of allegiance’ to King Hassan II of Morocco taken by the servile President of the Yema’a (an indigenous local assembly established by Spain in 1967) on behalf of the Saharan tribes.³¹

In effect, Morocco appeared determined to create a situation in which the carefully elaborated UN position on the decolonization of Western Sahara would simply be ‘overtaken by events’.³² Spain decried an imminent Moroccan ‘invasion’ and called for an emergency session of the

Countries and Peoples, UN Doc. A/10023/Add.5, p. 55. See further, *UNYB* (1975), pp. 798–801; Franck, ‘The Stealing of the Sahara’, 707–9.

²⁸ Letter dated 18 October 1975 from the Permanent Representative of Morocco to the UN addressed to the President of the Security Council, UN Doc. S/11852.

²⁹ Report by the Secretary-General in Pursuance of Security Council Resolution 379 (1975) Relating to the Situation Concerning Western Sahara, UN Doc. S/11874, para. 16.

³⁰ *Ibid.*, para. 17 (emphasis in original).

³¹ *Ibid.* See also Letter dated 10 December 1975 from the representative of Algeria to the Secretary-General on behalf of the Saharan Provisional National Council, UN Doc. S/11903 (denouncing the spurious petition).

³² *Ibid.*, para. 17.

Security Council.³³ In the next few weeks, the Security Council adopted three resolutions on the matter, *inter alia*, requesting the UN Secretary-General to enter into immediate consultations with the parties.³⁴ But to no avail.

On 6 November 1975, the day before the official adoption of the report of the UN visiting mission, Morocco initiated the Green March. The Security Council deplored the action on the same day and called for Morocco's immediate withdrawal.³⁵ Spain informed the Council that Morocco would not halt the march unless urgent bilateral negotiations 'dealing with the transfer of sovereignty over the Sahara to Morocco' were initiated. It was said that unless Spain acceded to such negotiations, 'a state of belligerency' between the two countries might ensue.³⁶ Morocco categorically denied the existence of such a bellicose ultimatum.³⁷ In fact, two weeks earlier Spain had already expressed publicly that it was confronted with a *fait accompli* and declared that 'in practice the two aspects of the question [i.e. the situation created by the Green March and the decolonization policy concerning Western Sahara] could not be separated'.³⁸

On 14 November 1975, as Morocco had withdrawn the marchers a few days earlier,³⁹ Spain, Morocco and Mauritania signed the so-called Madrid Declaration.⁴⁰ For Western Sahara, to whom Spain owed a sacred duty of trust under international law, this was perhaps the unkindest cut of all. The Madrid Declaration provided that Spain would terminate its presence in Western Sahara by 28 February 1976

³³ Letter dated 18 October 1975 from the Permanent Representative of Spain to the UN addressed to the President of the Security Council, UN Doc. S/11851.

³⁴ SC Res. 377 (22 October 1975); SC Res. 379 (2 November 1975); SC Res. 380 (6 November 1975).

³⁵ *Ibid.*; Letter dated 6 November 1975 from the Permanent Representative of Spain to the UN addressed to the President of the Security Council, UN Doc. S/11867.

³⁶ Letter dated 6 November 1975 from the Permanent Representative of Spain to the UN addressed to the President of the Security Council, UN Doc. S/11871; *UNYB* (1975), p. 182.

³⁷ Letter dated 7 November 1975 from the Permanent Representative of Morocco to the UN addressed to the President of the Security Council, UN Doc. S/11873; *UNYB* (1975), p. 183.

³⁸ Report by the Secretary-General in Pursuance of Security Council Resolution 377 (1975) Relating to the Situation Concerning Western Sahara, UN Doc. S/11863, para. 16(b).

³⁹ Report by the Secretary-General in Pursuance of Security Council Resolution 379 (1975) Relating to the Situation Concerning Western Sahara, UN Doc. S/11880, para. 2.

⁴⁰ Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania (entered into force 19 November 1975), 988 UNTS 259.

and, in the interim, it would transfer its responsibilities as administering power to a temporary tripartite administration composed of the Spanish Governor-General and a Moroccan and Mauritanian Deputy Governor, respectively. The Yema'a, which expressed the views of the Saharan population, would collaborate in this interim administration and its views would be respected. Morocco's interpretation of the Madrid Declaration was clear. It informed the Secretary-General's Special Envoy that:

the main provision of such an agreement had already been determined and stipulated a transfer of sovereignty from the administering Power to Morocco and Mauritania. However, Morocco was prepared to submit such an agreement to the competent organs of the United Nations for approval.⁴¹

As it happened, this incredulous interpretation was not without merit.

A secret pact between the three states reportedly accompanied the Madrid Declaration and was said to provide for the ultimate partition of Western Sahara between Morocco and Mauritania in exchange for Spanish access to important phosphates and fishing resources in the territory.⁴² Some two weeks later, the Yema'a responded to these events by declaring that no further legitimacy would be bestowed on this 'puppet institution . . . of Spanish colonialism' and unanimously decided upon its own final dissolution.⁴³ It was not long before Moroccan and Mauritanian armed forces invaded Western Sahara.

Whatever the actual terms of the secret pact, the Madrid Declaration required, as a minimum, the approval of the General Assembly, since an administering power cannot unilaterally dispose of an NSGT at will; it does not exercise full powers akin to a territorial sovereign under Chapter XI of the UN Charter (*nemo dat quod non habet*).⁴⁴ Without

⁴¹ Report by the Secretary-General in Pursuance of Security Council Resolution 379 (1975) Relating to the Situation Concerning Western Sahara, UN Doc. S/11874, para. 18.

⁴² For a brief discussion (with further references to press reports) see, e.g., Franck, 'The Stealing of the Sahara', 715; T. Hodges, *Western Sahara: The Roots of a Desert War* (1983), p. 224. See also, Letters dated 9 and 10 December 1975 from the representative of Algeria to the Secretary-General on behalf of the Saharan National Council, UN Docs. S/11902, S/11903.

⁴³ Letter dated 9 December 1975 from the representative of Algeria to the Secretary-General on behalf of the Saharan National Council, UN Doc. S/11902.

⁴⁴ See, e.g., *Western Sahara*, ICJ Rep (1975), Dec. Judge Gros, p. 71; *ibid.*, Sep. Op. Judge de Castro, p. 145; Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs addressed to the President of the Security Council, UN Doc. S/2002/161, para. 6; *East Timor*, ICJ Rep (1995), Diss. Op. Judge Skubiszewski, p. 273.

more, it is therefore difficult to disagree with Brownlie's conclusion that the Madrid Declaration 'lacks a legal basis'.⁴⁵ The absence of a legal basis could, however, be cured by an explicit decision of the UN. In fact, no such explicit decision was adopted.⁴⁶ The UN process was soon overtaken by events.

On 27 February 1976, King Hassan II of Morocco reconvened some former members of the defunct Yema'a in Moroccan-occupied Laayoune for a 'special session'⁴⁷ and presented a spurious petition that ended up endorsing the partition and transfer of territorial sovereignty to the joint occupiers of Western Sahara.⁴⁸ For its part, Spain officially announced its withdrawal from Western Sahara in accordance with the Madrid Declaration, and henceforth considered itself 'exempt from any responsibility of an international nature in connection with the administration of the Territory'.⁴⁹ The Frente Polisario (the national liberation movement of the Western Saharans), engaged in heavy fighting against the invading forces from Morocco and Mauritania, responded to these events by proclaiming independence and the establishment of the Sahrawi Arab Democratic Republic.⁵⁰ The invading forces were gradually gaining control of major parts of the territory.

On 14 April 1976, Morocco and Mauritania purported to formalize their annexation of Western Sahara by signing a boundary treaty that partitioned the territory between them.⁵¹ However, Mauritania soon proved unable to defend its part of the territory and, on 10 August 1979, it signed a peace agreement with the Frente Polisario in which it agreed to withdraw totally its armed forces, and renounced any territorial claim to Western

⁴⁵ I. Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopedia* (1979), p. 149.

⁴⁶ For the plainly contradictory UN position, see GA Res. 3458 A (XXX) of 10 December 1975; GA Res. 3458 B (XXX) of 10 December 1975.

⁴⁷ See the preamble to the Convention concerning the State frontier established between the Islamic Republic of Mauritania and the Kingdom of Morocco (signed at Rabat 14 April 1976), 1035 UNTS 120.

⁴⁸ See, e.g., Franck, 'The Stealing of the Sahara', 718; Hodges, *Western Sahara: The Roots of a Desert War*, p. 237.

⁴⁹ Letter dated 26 February 1976 from the Permanent Representative of Spain to the UN Addressed to the Secretary-General, UN Docs. A/31/56-S/11997. For a brief discussion, see UNYB (1976), p. 738.

⁵⁰ The text of the proclamation is reproduced at www.arso.org/03-1.htm (last accessed 19 February 2012). The SADR proclamation has not been considered a valid exercise of the Sahrawi people's right to self-determination. See further, GA Res. 33/31 (A); 34/37; 35/19; 36/46.

⁵¹ See Convention concerning the State frontier established between the Islamic Republic of Mauritania and the Kingdom of Morocco.

Sahara.⁵² Moroccan armed forces soon moved to occupy the southern part of Western Sahara vacated by Mauritania. As a final measure, Morocco consolidated its *de facto* annexation and legal claim to territorial sovereignty over Western Sahara by incorporating it under Moroccan domestic law as forming part of four of its sixteen administrative regions.⁵³ The old Moroccan nationalist aspiration of the ‘reconstitution of Greater Morocco’⁵⁴ seemed partly fulfilled, but no formal recognition has ever been given to Morocco’s territorial claim.

Since the late 1980s, several UN-sponsored solutions have been advanced to address the future status of Western Sahara, but without any tangible results. An important obstacle has been Morocco’s categorical insistence over time that Western Sahara forms an integral part of its territory. In 1990–1, the Security Council approved the so-called ‘Settlement Plan’, which proposed a free and democratic referendum in Western Sahara – supervised by a UN mission (MINURSO) – entailing a choice between independence and integration with Morocco based on the 1974 Spanish census.⁵⁵ This plan did not ultimately meet with Moroccan approval.

In 2001, the Secretary-General’s Personal Envoy, former US Secretary of State Mr. James A. Baker III, introduced an ill-conceived plan that envisaged ‘the preservation of the territorial integrity against secessionist attempts whether from within or without the territory’ and proposed integration of Western Sahara into Morocco with a degree of autonomy.⁵⁶ In 2003, a revised Baker plan was introduced, which contemplated a free choice for Western Saharans between independence, integration and autonomy subject to certain modalities.⁵⁷ The Security Council expressed its support for the plan as the ‘optimal political solution’.⁵⁸ The Frente

⁵² The Mauritano-Sahraoui Agreement (signed at Algiers 10 August 1979) is annexed to Letter dated 18 August 1979 from the Permanent Representative of Mauritania to the UN addressed to the Secretary-General, UN Doc. A/34/427–S/13503.

⁵³ See further, the website of the Moroccan government at www.maroc.ma/NR/exeres/7D7EAE9-FEC7-4B33-806E-9059FE2C749D.htm (last accessed 19 February 2012).

⁵⁴ *Western Sahara*, ICJ Rep (1975), Sep. Op. Judge de Castro, p. 127.

⁵⁵ See SC Res. 690 (1991); SC Res. 658 (1990); SC Res. 621 (1988). See further, Reports of the Secretary-General on the situation concerning Western Sahara, UN Docs. S/21360 (18 June 1990) and S/22464 (19 April 1991).

⁵⁶ Report of the Secretary-General concerning the situation in Western Sahara, UN Doc. S/2001/613 (Baker Plan I), art. 2.

⁵⁷ Report of the Secretary-General concerning the situation in Western Sahara, UN Doc. S/2003/565 (‘Baker Plan II’).

⁵⁸ SC Res. 1495 (2003). See also Report of the Secretary-General concerning the situation in Western Sahara, UN Doc. S/2003/1016.

Polisario cautiously supported the plan, but Morocco rejected it. It explained in categorical terms yet again that it could only accept a solution that recognized the 'colonial hiatus' and 'preserve[d] its sovereignty and territorial integrity'.⁵⁹ It would soon introduce such a proposal.

In April 2007, emphasizing its 'commitment to a final political solution', Morocco formally introduced to the Security Council 'an autonomy proposal for the Sahara, within the [constitutional] framework of the Kingdom's sovereignty and national unity'.⁶⁰ The proposal would be subject to a referendum by the local population.⁶¹ The Frente Polisario rejected the proposal and maintained its commitment to the second Baker plan, subject to a number of guarantees.⁶² The Security Council took note of both proposals and called on the parties 'to enter into negotiations without preconditions'.⁶³ These negotiations are still continuing.

This overview prompts a number of brief observations. Morocco's official position since at least the 1950s (and repeated on numerous occasions since) is clear: Western Sahara forms an integral part of Morocco. Indeed, it has legislated to incorporate Western Sahara, which today forms part of four of its sixteen administrative regions. In short, Morocco is *de jure* claiming the status of territorial sovereign in Western Sahara. It follows that Morocco has categorically ruled out the option of independence in any future status negotiations. While it may be true that the precise modalities of implementation of the right of self-determination remain somewhat unclear, what Judge Petrèn in *Western Sahara* termed its 'guiding principles'⁶⁴ (at least in the traditional decolonization context with which we are concerned here) are nevertheless well established in ICJ jurisprudence and State practice.

The traditional law of self-determination does not guarantee a particular outcome or method of reaching that outcome, but it does ensure the free choice of a people to determine its future territorial status. This is what the ICJ in *Western Sahara* referred to as the 'essential feature' of the right of self-determination. It constitutes the irreducible core of the right.

⁵⁹ See Letter dated 24 September 2004 from the Permanent Representative of Morocco to the UN addressed to the Secretary-General, UN Doc. S/2004/760, paras. 9 and 28.

⁶⁰ See Letter dated 11 April 2007 from the Permanent Representative of Morocco to the UN addressed to the President of the Security Council, UN Doc. S/2004/760 (Annex).

⁶¹ *Ibid.*

⁶² Letter dated 16 April 2007 from the Permanent Representative of South Africa to the UN addressed to the President of the Security Council on behalf of the Frente Polisario, UN Doc. S/2007/210.

⁶³ SC Res. 1754 (2007).

⁶⁴ *Western Sahara*, ICJ Rep (1975), Sep. Op. Judge Petrèn, p. 110.

It therefore seems clear that Morocco's seemingly irreversible position, as a minimum, 'severely impedes'⁶⁵ the exercise of the right of the people of Western Sahara to self-determination as affirmed by the ICJ in *Western Sahara* and is a breach of Morocco's obligation to respect that *erga omnes* right. There is a real risk that the status quo will consolidate and ultimately prevail, through international acquiescence with the inexorable passage of time.

It is in order to prevent such possible erosion – or even complete disintegration – of the right of the people of Western Sahara to self-determination that states are under an obligation not to recognize Morocco's claim to sovereignty over Western Sahara. Nevertheless, the FPA provides a recent illustration of state practice that might potentially confer a degree of recognition on Morocco's irredentist claim to status. Before we turn to an assessment of the FPA, however, a few general observations about the obligation of non-recognition are warranted.

IV. The obligation of non-recognition

The obligation of non-recognition of an unlawful situation is in large part based on the well-established general principle that legal rights cannot derive from an illegal situation (*ex injuria jus non oritur*).⁶⁶ In an 'essentially bilateral minded'⁶⁷ international legal order, however, with relatively weak enforcement mechanisms, this principle is subject to 'considerable strain and to wide exceptions'.⁶⁸ This important qualification delineates the contours of the principle of non-recognition in significant ways. Considerable strain is caused by an apparent antinomy of legality (*ex injuria jus non oritur*) and effectiveness (*ex factis jus oritur*). This is especially relevant where unlawful situations are maintained for extended periods of time, for example, in the case of forcible annexation of territory.⁶⁹ As John Adams once observed, facts are stubborn things. Even Portugal in *East Timor* appears to have partly accepted

⁶⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep (2004), p. 184, para. 122.

⁶⁶ See, e.g., M. Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation', in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010), p. 677 (with further references).

⁶⁷ W. Riphagen, 'Third Report on State Responsibility', (1982) *YbILC*, vol. II/1, p. 38, para. 91.

⁶⁸ H. Lauterpacht, *Recognition in International Law* (1947), pp. 420–30.

⁶⁹ *Ibid.*, pp. 420–7; T. C. Chen, *The International Law of Recognition* (1951), pp. 420–2.

that 'it is what happens over time and the legal qualification of facts-through-time that is legally relevant'.⁷⁰ An unlawful situation may thus be 'cured' or validated over time through a gradual process of waiver, acquiescence and prescription.⁷¹ The Moroccan annexation of Western Sahara is no exception.

In 2006, after four decades of a normative dead-end, the UN Secretary-General finally accepted 'the political reality that no one was going to force Morocco to give up its claim of sovereignty over Western Sahara'; accordingly, 'obliging Morocco to accept a referendum with independence as one of the options was ... unrealistic'.⁷² The Secretary-General specifically pointed to the recently concluded 2006 FPA as evidence that as 'the impasse continues, the international community unavoidably grows more accustomed to Moroccan control over Western Sahara'.⁷³ It was equally clear to the Secretary-General, however, that the UN could not endorse a plan that excluded a referendum with independence as an option while claiming to provide for the self-determination of the people of Western Sahara. A new approach was evidently required.

As a way out of the impasse, the Secretary-General proposed that the UN should be 'taking a step back' and hand over 'responsibility' to Morocco and the Frente Polisario, who should have recourse to direct negotiations without preconditions.⁷⁴ He explained that:

Their objective should be to accomplish what no 'plan' could, namely to work out a *compromise between international legality and political reality* that would produce a just, lasting and mutually acceptable political solution, which would provide for the self-determination of the people of Western Sahara.⁷⁵

More specifically, he observed that:

The Security Council would not be able to invite parties to negotiate about Western Saharan autonomy under Moroccan sovereignty, for such

⁷⁰ *East Timor*, ICJ Rep (1995), p. 90, Verbatim Record, 2 February 1995, CR 95/5, p. 8, para. 3 (Mrs. Higgins on behalf of Portugal).

⁷¹ In practice, such a process may be illustrated by the examples of the Indonesian province of West Irian (now West Papua) and the Indian state of Goa.

⁷² Reports of the Secretary-General on the situation concerning Western Sahara, UN Docs. S/2006/249 and S/2006/817, paras. 32 and 13, respectively.

⁷³ Report of the Secretary-General on the situation concerning Western Sahara, UN Doc. S/2006/817, para. 20.

⁷⁴ Report of the Secretary-General on the situation concerning Western Sahara, UN Doc. S/2006/249, para. 34.

⁷⁵ *Ibid.* (emphasis added).

wording would *imply recognition* of Moroccan sovereignty over Western Sahara, which was out of the question as long as no States Member of the United Nations had recognized that sovereignty.⁷⁶

In 2007, the newly appointed Secretary-General came to the same conclusion.⁷⁷ In the same year, the Security Council endorsed this approach and called on the parties to enter into negotiations without preconditions.⁷⁸

In December 2010, the Security Council adopted Resolution 1920, by which it took note of Morocco's 2007 autonomy proposal and welcomed its 'serious and credible efforts to move the process forward towards resolution'. At the same time, the Security Council also endorsed the Secretary-General's recommendation that 'realism and a spirit of compromise' should guide the status negotiations.⁷⁹ In plain terms, as France stated in the Security Council debate before the adoption of Resolution 1920, this realist formula effectively meant treating the Moroccan autonomy proposal as 'the basis for credible, open and constructive negotiations that respect the principle of self-determination'.⁸⁰ In effect, a position not far removed from implicit recognition. The UN thus appears to have concluded that the answer to the decolonization of Western Sahara should be found in a compromise between international legality and political reality – a position that not only seems to contradict the essential right of the people of Western Sahara to freely determine their own future status, but also constitutes an implicit recognition of Morocco's claim to title.

As a minimum, the rationale of the obligation of non-recognition in so far as possible, is to prevent the validation of an unlawful situation, by seeking to ensure that a *fait accompli* resulting from serious illegalities does not consolidate and crystallize over time into situations recognized by the international legal order – a concern recently expressed by the ICJ in the *Wall* Advisory Opinion.⁸¹ As Lauterpacht has observed, the

⁷⁶ *Ibid.*, para. 37 (emphasis added).

⁷⁷ Report of the Secretary-General on the situation concerning Western Sahara, UN Doc. S/2007/202, para. 47.

⁷⁸ SC Res. 1754 (2007).

⁷⁹ SC Res. 1920 (2010). For more recent support, see SC Res. 1979 (2011) and SC Res. 2044 (2012). See also GA Res. 65/112 of 10 December 2010 and GA Res. 66/86 of 9 December 2011.

⁸⁰ UN Doc. S/PV.6305, p. 5 (statement by France).

⁸¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep (2004), p. 184, para. 121.

function of non-recognition is to vindicate the 'legal character of international law against the 'law-creating effect of facts'.⁸²

The obligation of non-recognition of an unlawful situation is set out in Article 41(2) of the International Law Commission (ILC) Articles on State Responsibility in the following terms:

No State shall recognize as lawful a situation created by a serious breach [by a State of an obligation arising under a peremptory norm of general international law] . . .

The ILC's definition of the principle is based on three interrelated elements. First, all peremptory norms may in principle give rise to an obligation of non-recognition. Second, only a serious breach of a peremptory norm is subject to the obligation of non-recognition. Third, the principle of non-recognition is only applicable where a serious breach of a peremptory norm specifically results in the assertion of a legal claim to status or rights by the wrongdoing state – 'a situation' all states are obligated not to recognize 'as lawful'.⁸³ It finds support in international practice and in decisions of the ICJ and reflects 'a well-established practice' which forms part of customary international law.⁸⁴ In contrast, Article 41(2) does not elaborate the content of the obligation of non-recognition. Let us briefly consider these three elements in the light of Morocco's purported annexation of Western Sahara.

The right to self-determination is 'clearly accepted and recognized' as a peremptory norm under general international law.⁸⁵ It is also well established that states are under an obligation to refrain from any forcible action which deprives peoples of their right to self-determination.⁸⁶ International courts and tribunals have confirmed that forcible territorial acquisitions, including the forcible denial of self-determination, constitute

⁸² Lauterpacht, *Recognition in International Law*, p. 430.

⁸³ See Commentary to article 53 [1996], ILC Report (1996), UN Doc. A/51/10, p. 72, para. 2; compare para. 6 of Commentary to article 41 ARSIWA, ILC Report (2001), UN Doc. A/56/10, p. 114.

⁸⁴ See Commentary to draft article 53, (1996) *YbILC*, vol. II/2, p. 114, para. 2. For a recent assessment, see Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation', in Crawford, Pellet and Olleson (eds), *The Law of International Responsibility*, p. 677.

⁸⁵ See para. 3 of the commentary to what became article 53 VCLT, (1966) *YbILC*, vol. II, p. 248; paras. 4 and 5 of the commentaries to articles 26 and 40 ARSIWA, respectively, ILC Report (2001), UN Doc. A/56/10, pp. 85, 112–13.

⁸⁶ For a recent reaffirmation, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep (2004), pp. 171–172, para. 88 (citing GA Res. 2625 (XXV)).

the unlawful situation *par excellence* proscribed by the obligation of non-recognition under customary international law.⁸⁷ Almost by definition, the forcible denial of self-determination, especially where maintained over an extended period of time, constitutes a serious and systematic breach of a peremptory norm.⁸⁸ However, as Judge Kooijmans rightly observed in the *Wall* Advisory Opinion, the purpose of the obligation of non-recognition is not to deny the existence of facts.⁸⁹ It is not a quixotic principle aimed at fighting windmills. Rather, the principle applies to the extent that an unlawful 'situation' flowing from the breach of a peremptory norm results in a *legal* claim to status or rights by the wrongdoing State. It is this 'situation' that states are under an obligation not to recognize 'as legal'. The conduct proscribed for third states by the obligation of non-recognition is a separate question.

Article 41(2) of the ILC Articles on State Responsibility does not elaborate the content of the obligation of non-recognition, and international courts and tribunals, as well as the political organs of the UN, have been reluctant to develop relevant criteria beyond concrete cases. Hence Spain's observation that the content of the obligation of non-recognition 'remains largely undefined'.⁹⁰ As Spain suggested, it is true that it is difficult to determine with confidence precisely what conduct is proscribed. A few basic points nevertheless seem clear. The ILC commentary notes that the obligation of non-recognition 'not only refers to the formal recognition of [situations created by the relevant breaches], but also prohibits acts which would *imply* such recognition'.⁹¹ This position is explicitly based on the ICJ's advisory opinion in *Namibia*, and was reaffirmed by the Court in the *Wall* Advisory Opinion.⁹² This clarification of the content of the principle is significant, since to date there has been no formal recognition of Morocco's *de jure* claim to sovereignty over Western Sahara.

As is well known, the ICJ in *Namibia* provided several examples of acts which may imply recognition of a state's purported annexation of an

⁸⁷ See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, p. 171, para. 87.

⁸⁸ See, e.g., para. 8 of Commentary to article 40 ARSIWA, p. 113.

⁸⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Sep. Op., Judge Kooijmans, p. 232, para. 44.

⁹⁰ See Comments and Observations from States on State Responsibility (19 March 2001), UN Doc. A/CN.4/515, p. 54 (Spain).

⁹¹ See para. 5 of Commentary to article 41 ARSIWA, p. 114 (emphasis added).

⁹² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, p. 200, para. 159.

NSGT.⁹³ In short, such recognition may result from any act by which a state purports to exercise territorial sovereignty over an NSGT. In *Island of Palmas*, Judge Huber famously emphasized the inextricable link between sovereignty and territory.⁹⁴ In a well-known passage, he observed that:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory.⁹⁵

A prime example of such a function of a state is its capacity to enter into treaties. In relation to that portion of the surface of the globe where the state lawfully exercises territorial sovereignty, its treaty-making competence will normally be exclusive. In *Wimbledon*, the Permanent Court of International Justice (PCIJ) stated that ‘the right of entering into international engagements is an attribute of State sovereignty’.⁹⁶ This classic conception of the relationship between territory and sovereignty remains the basis for two basic principles of treaty law. Indeed, the capacity to enter into treaties remains one of the most emblematic attributes of state sovereignty and finds expression in Article 6 of the Vienna Convention on the Law of Treaties (VCLT).⁹⁷ It is complemented by Article 29 VCLT on the territorial scope of treaties, which contains a presumption in favour of territorial sovereignty. In sum, there is an intimate link between treaty-making capacity and territorial sovereignty.

By parity of reasoning, it follows from the absence of any formal recognition by third states of Morocco’s legal claim to sovereignty over Western Sahara – that is, a claim to status incompatible with the basic right of the people of Western Sahara to self-determination – that Morocco cannot *a priori* claim a *general* treaty-making capacity akin to

⁹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep (1971), pp. 55–6, paras. 122–4.

⁹⁴ *Island of Palmas (Netherlands/United States)*, Award of 4 April 1928, 2 RIIA, p. 829.

⁹⁵ *Ibid.* at p. 838. ⁹⁶ PCIJ, Ser. A, No. 1 (1923), p. 25.

⁹⁷ See, e.g., para. 3 of Commentary to what became article 6 VCLT, (1966) *YbILC*, vol. II, p. 192; H. Waldock, (1965) *YbILC*, vol. I, p. 252, para. 44; A.D. McNair, *The Law of Treaties* 2nd edn. (1961), p. 35; Jennings and Watts (eds), *Oppenheim’s International Law*, vol. I, p. 1217.

a territorial sovereign in matters relating to Western Sahara. This position is reinforced by the observation that an NSGT is a separate legal entity under international law with attendant (albeit limited) legal personality.⁹⁸ Any putative Moroccan claim to general treaty-making capacity should therefore be construed as an implicit *legal* claim to territorial sovereignty over Western Sahara – which third states are obligated not to recognize – unless it can be determined that a specific provision of international law recognizes the existence of some limited Moroccan treaty-making capacity over Western Sahara. As Norway recently observed:

Norway's consistent view is that Morocco does not exercise internationally recognised sovereignty with regard to Western Sahara. As a point of departure, therefore, Morocco does not have the right to exploit the area's resources as if they were its own.⁹⁹

Therefore, let us finally consider in turn (1) whether the 2006/2011 FPA purports to apply to Western Sahara, (2) whether, if in the affirmative, Morocco can exceptionally claim some limited treaty-making capacity for the FPA, or (3) whether the FPA constitutes an implicit legal claim to sovereignty over Western Sahara and the obligation of non-recognition applies.

V. The FPA: Recognition of Morocco's claim to sovereignty over Western Sahara?

On 28 February 2011, the EC and Morocco agreed on a one-year temporary renewal of the protocol to an FPA originally concluded in May 2006 for a period of four years, which entered into force on 28 February 2007.¹⁰⁰ In turn, the 2006 FPA replaced three earlier fisheries agreements between the parties that were similar in geographical scope.¹⁰¹ Under the FPA,

⁹⁸ See GA Res. 2625 (XXV) of 24 October 1970.

⁹⁹ See statement dated 3 March 2011 by Norwegian Minister of Foreign Affairs Gahr Støre, reproduced at www.wsrw.org/index.php?parse_news=single&cat=105&art=1884 (unofficial translation) (last accessed 19 February 2012).

¹⁰⁰ See http://ec.europa.eu/fisheries/news_and_events/press_releases/2011/20110228/index_en.htm; <http://register.consilium.europa.eu/pdf/en/11/st11/st11225.en11.pdf> (last accessed 19 February 2012); FPA between the European Communities and the Kingdom of Morocco, Council Regulation (EC) No. 764/2006 of 22 May 2006, OJ L141/1 (29 May 2006).

¹⁰¹ See 1988 Agreement on relations in the sea fisheries sector between the European Community and the Kingdom of Morocco, OJ L/181 (23 June 1988); 1992 Agreement

Morocco has received EUR 144.4 million in financial compensation in exchange for certain fishing rights granted to EC vessels in 'Moroccan waters'. The geographical scope of the FPA is circumscribed by Article 2(a), which defines the Moroccan fishing zone as 'the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco'. The FPA provides only limited guidance on what this means.

In light of Morocco's formal annexation of Western Sahara, the adoption of the 2006/2011 FPA has been controversial, since – unlike the 2004 United States–Morocco Free Trade Agreement and the 1997 European Free Trade Association (EFTA)–Morocco Free Trade Agreement¹⁰² – it does not explicitly exclude waters off the coast of Western Sahara from its territorial scope. On 21 February 2011, the European Council of Ministers therefore only approved the temporary renewal of the agreement by a qualified majority, with Germany and Finland abstaining and Denmark, Sweden and the United Kingdom voting against it.¹⁰³

The FPA provides complete geographical coordinates of all Moroccan fishing zones off its Atlantic coast, with one notable exception. The southernmost geographical limit of the FPA (which delineates the area of exploitation of demersal and industrial pelagic fishing of up to 60,000 tonnes per year)¹⁰⁴ is defined merely as 'South of 29° 00' N'.¹⁰⁵ This

on relations in the sea fisheries sector between the European Community and the Kingdom of Morocco, OJ L/407 (31 December 1996); 1995 Agreement in the sea fisheries sector between the European Community and the Kingdom of Morocco, OJ L/30 (31 January 1997). See also Legal Service of the European Parliament, 'Proposal for a Council Regulation on the Conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: Compatibility with the Principles of International Law', European Parliament, SJ-0085/06, D(2006)7352, 20 February 2006, p. 8, para. 41 (footnote 19).

¹⁰² See Letter dated 20 July 2004 from the US Trade Representative, Mr. Zoellick, to US Congressman Pitts, available at www.vest-sahara.no/files/pdf/Zoellick_FTA_2004.pdf (last accessed 19 February 2012). For statements by Norway and Switzerland, see *Afrol News*, 'Western Sahara "not part of EFTA-Morocco free trade"', 13 May 2010, available at www.afrol.com/articles/36091 (last accessed 19 February 2012); *Western Sahara Resource Watch*, 'Western Sahara not part of EFTA-Morocco free trade agreement', 12 May 2010, www.wsrw.org/index.php?parse_news=single&cat=105&art=1410 (last accessed 19 February 2012).

¹⁰³ Press release, 3070th meeting, European Council of Ministers, Agriculture and Fisheries, Brussels, 21 February 2011, p. 12, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/agricult/119436.pdf (last accessed 19 February 2012).

¹⁰⁴ FPA between the European Communities and the Kingdom of Morocco, Appendix 2, Council Regulation (EC) No. 764/2006 of 22 May 2006, OJ L141/29 (29 May 2006).

¹⁰⁵ FPA between the European Communities and the Kingdom of Morocco, Appendix 4, Council Regulation (EC) No. 764/2006 of 22 May 2006, OJ L141/33 (29 May 2006).

coordinate is located two degrees north of the internationally recognized maritime boundary between Morocco and Western Sahara fixed at 27° 40' N.¹⁰⁶ This geographical indication could mean either that certain fishing rights of EC vessels under the FPA are limited to a rather narrow strip of water north of Western Sahara – that is, in uncontested Moroccan waters – or that the southernmost geographical limit of the FPA extends to the commencement of Mauritanian waters at around 21° N. The matter has been settled by the subsequent practice of the parties to the 2006 FPA in favour of the latter interpretation. On several occasions the European Commission has recognized that demersal and industrial pelagic fishing by EC vessels is, in fact, taking place in the waters off the coast of Western Sahara.¹⁰⁷ Under the 2006 FPA, such fishing rights have been allocated to vessels from Spain, Portugal, Italy, France, Germany, Lithuania, Latvia, Poland, the Netherlands, Ireland and the United Kingdom.¹⁰⁸

The Commission, purportedly basing itself on a legal opinion by the UN Legal Counsel,¹⁰⁹ has essentially argued that the FPA is consistent with international law, since Morocco must be considered the *de facto* administering power in Western Sahara, and the agreement takes into account the needs and interests of the people of Western Sahara.¹¹⁰ In essence, the Commission is suggesting that Morocco has acted within its limited treaty-making capacity in relation to Western Sahara. The application of the FPA to Western Saharan waters is permissible, and accordingly it does not entail an implicit recognition of Moroccan sovereignty over Western Sahara otherwise proscribed under international law. In

¹⁰⁶ See, e.g., Brownlie, *African Boundaries*, pp. 155–7; Legal Opinion of Legal Service of the European Parliament, 20 February 2006, SJ-0085/06, para. 31. This coordinate is also recognized in recent Food and Agriculture Organization statistics.

¹⁰⁷ See, e.g., Reply from European Commissioner Ferrero-Waldner to Written Question E-4425/08 (12 September 2008), available at www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2008-4425&language=PL (last accessed 19 February 2012); Reply from the European Commission to Oral Question H-0079/09 (12 March 2009), available at www.europarl.europa.eu/sides/getDoc.do?type=QT&reference=H-2009-0079&language=MT (last accessed 19 February 2012).

¹⁰⁸ See Article 2 of Council Regulation (EC) No. 764/2006 of 22 May 2006 on the conclusion of the FPA between the European Community and the Kingdom of Morocco, OJ L141/2 (29 May 2006).

¹⁰⁹ Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs addressed to the President of the Security Council, UN Doc. S/2002/161.

¹¹⁰ Reply from the European Commission to Written Question MARE-B-3/AMF D(2010), 23 June 2010, available at www.wsrw.org/files/dated/2010-06-24/letter_commission-wsrw_23.06.2010.pdf (last accessed 19 February 2012).

theory, it is possible to conceive of at least three possible sources of limited treaty-making capacity that would not imply such recognition.

First, Morocco would have limited treaty-making capacity in relation to Western Sahara in a putative capacity as administering power under Chapter XI of the UN Charter. It is true that Morocco occasionally refers to the Madrid Declaration as the basis for its presence in Western Sahara as the 'sole competent administrative authority' in the territory.¹¹¹ It is equally true that the UN and the EU treat Morocco as *de facto* administering power and that Spain's official position since 2005 has even been to treat Morocco as *de jure* administering power.¹¹² In reality, leaving aside Spain's position that as such is incapable of producing any objective legal effect, this is nothing more than a statement of fact. Morocco has not formally claimed any status as administering power under Chapter XI of the UN Charter; indeed, such a position would plainly contradict its categorical legal claim to sovereignty over Western Sahara. As of March 2011, the UN still recognized Spain as the sole administering power in Western Sahara.¹¹³ The fact that Spain does not perform its obligations under Chapter XI of the UN Charter, including its reporting obligations under Article 73(e), is not decisive.

Second, Morocco could enter into treaties or other international agreements concerning the exploitation of natural resources with third states on behalf of Western Sahara if it did so on the basis of a valid expression of consent by the Frente Polisario, the legitimate representatives of the people of Western Sahara.¹¹⁴ No such consent has been given. In fact, the Frente Polisario on several occasions has vigorously protested that no exploitation of Western Saharan natural resources may take place without its express authorization.¹¹⁵

¹¹¹ See, e.g., Letter dated 26 January 2006 from the Permanent Representative of Morocco to the UN addressed to the Secretary-General, UN Doc. S/2006/52.

¹¹² See, e.g., Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs addressed to the President of the Security Council, UN Doc. S/2002/161; Legal Opinion from the Legal Service of the European Parliament, 20 February 2006, SJ-0086/06, para. 37; C. Ruiz Miguel, 'Spain's legal obligations as administering power of Western Sahara', in N. Botha *et al.* (eds), *Multilateralism and International Law with Western Sahara as a Case-Study* (2010), p. 208 (with further references to Spanish press reports).

¹¹³ See Report of the Secretary-General, Information from Non-Self-Governing Territories transmitted under Article 73(e) of the Charter of the United Nations (8 March 2011), UN Doc. A/66/65.

¹¹⁴ This status was first granted to the Frente Polisario by the UN in 1979. See GA Res. 34/37 of 21 November 1979, op. para. 7.

¹¹⁵ See, e.g., Report of the Secretary-General on the situation concerning Western Sahara, UN Doc. S/2011/249, p. 4, para. 20; Letter dated 9 April 2009 from the Permanent Representative of Namibia to the UN on behalf of the Frente Polisario addressed to the

Third, Morocco could potentially enjoy limited treaty-making capacity in relation to Western Sahara under the law of belligerent occupation. Morocco does not accept the application of the law of belligerent occupation to Western Sahara, since that status would be *prima facie* incompatible with its claim to sovereignty over the territory. For example, in its fifth periodic report submitted to the Human Rights Committee in 2004, Morocco reaffirmed its compliance with the right to self-determination under Article 1 International Covenant on Civil and Political Rights (ICCPR) by stating that it continued to cooperate closely with the United Nations in seeking a solution to the conflict in Moroccan Sahara while guaranteeing national sovereignty over the whole of Moroccan territory.¹¹⁶

But this claim to territorial sovereignty has not been recognized as a matter of international law. In the 1970s, the UN General Assembly twice characterized Morocco's presence in Western Sahara as belligerent occupation.¹¹⁷ The fact that this term has not been repeated in subsequent resolutions from the General Assembly or the Security Council is not decisive. The application of the law of belligerent occupation is largely a matter of fact dependent upon a demonstration of effective authority and control over a territory to which the occupying state holds no sovereign title. This understanding of occupation finds support in Article 42 of the 1907 Hague Regulations Respecting the Laws and Customs of War, which is widely accepted as forming part of general international law.

In the present case, Morocco's effective authority and control over Western Sahara – poignantly expressed by its *de jure* incorporation into Morocco – would appear to be sufficient to trigger the application of the general international law of occupation. As a recent example, Norway explicitly stated that the law of belligerent occupation applies in Western Sahara.¹¹⁸ It is true that this legal regime may provide the occupying state with limited treaty-making capacity in relation to the natural resources

Secretary-General, UN Doc. A/63/871-S/2009/198 (making reference to a 2009 law on maritime spaces adopted by the Sahrawi Arab Democratic Republic).

¹¹⁶ See UN Doc. CCPR/C/MAR/2004/5, p. 8, para. 39.

¹¹⁷ GA Res. 34/37 of 21 November 1979; 35/19 of 11 November 1980; Letter from the President of the Sahrawi Arab Democratic Republic (and Secretary-General of the Frente Polisario) to the editor of *European Voice*, 10 March 2011, 'The (fishy) value that the EU places on democracy', available at www.fishelsewhere.eu/files/dated/2011-03-10/european_voice_10.03.2011.pdf (last accessed 19 February 2012).

¹¹⁸ See statement dated 3 March 2011 by Norwegian Minister of Foreign Affairs Gahr Støre.

of the occupied territory.¹¹⁹ But in the case of Morocco's occupation of Western Sahara this putative treaty-making capacity is more apparent than real.

In the *Wall* Advisory Opinion, the ICJ considered the relationship between international humanitarian law and human rights law. The Court observed that some rights could be exclusively matters of either body of law, or they might concurrently be subject to both.¹²⁰ The Court took into account both bodies of law in that case. In the present case, a similar situation obtains. The *lex specialis* expressed in the limited rights of the occupying state to exploit the natural resources of the occupied territory of an NSGT under international humanitarian law must be interpreted in accordance with peremptory human rights law, that is to say, the right of peoples to self-determination.

In 1962, at the height of the era of decolonization, the General Assembly adopted Resolution 1803 (XVII), by which it affirmed the principle of permanent sovereignty over natural resources as a 'basic constituent of the right to self-determination'.¹²¹ In the *Armed Activities* case, the ICJ recognized that this resolution forms part of general international law.¹²² It follows that under both international humanitarian law and human rights law, Moroccan exploitation of Western Saharan natural resources can only take place in accordance with the peremptory norm of self-determination. It may be recalled that the essential feature of that right is the autonomous will of the indigenous population. In the absence of consent from the people of Western Sahara, Morocco does not have treaty-making capacity and cannot exploit the natural resources of the territory.

Any Moroccan attempt to exploit these resources by international agreement therefore gives rise to an unlawful situation – that is to say, a Moroccan legal claim to sovereignty in denial of the right of the Western Saharans to self-determination – which third states are under an obligation not to recognize as legal. Switzerland's succinct position on

¹¹⁹ See, e.g., Articles 43 and 55 of the 1907 Hague Regulations.

¹²⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, p. 178, para. 106.

¹²¹ GA Res. 1803 (XVII) of 14 December 1962. For a recent reaffirmation, see GA Res. 65/109 of 10 December 2010.

¹²² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Rep (2005), p. 168, at p. 251, para. 244. See also *ibid.*, Dec. Judge Koroma, para. 11; *East Timor*, ICJ Rep (1995), Diss. Op. Judge Weeramantry, p. 197ff.

the territorial scope of application of the 1997 EFTA–Morocco Free Trade Agreement is instructive:

Since Switzerland does not recognise the Moroccan annexation, the free trade agreement between EFTA and Morocco is not applicable for Western Sahara.¹²³

Put differently, Switzerland evidently considers that an extension of the agreement to include Western Sahara would imply recognition of Morocco's legal claim to sovereignty over the territory. This might explain Morocco's account of the less-obvious benefits of the FPA:

The financial aspect [of the Fisheries Agreement] is not necessarily the most important aspect of this agreement. The political aspect is just as important.¹²⁴

In sum, the FPA should be understood as an implicit recognition of Morocco's claim to sovereignty over Western Sahara by at least twenty-two EU Member States, for which they bear several responsibility under international law as expressed in Article 47 of the ILC Articles on State Responsibility. However, it appears that any such wrongful conduct recently ceased.

On 14 December 2011, the European Parliament adopted a resolution by which it decided not to give its consent to the temporary extension of the 2006/2011 FPA. By the same resolution, the European Parliament instead called on the European Commission to negotiate a new FPA with Morocco and to ensure that the new agreement 'fully respects international law and benefits all the local population groups affected'.¹²⁵ On 19

¹²³ Statement dated 6 April 2007 from the Swiss State Secretariat for Economic Affairs, reproduced at www.wsrw.org/index.php?parse_news=single&cat=105&art=1410 (unofficial translation; last accessed 19 February 2012). The EFTA–Morocco Free Trade Agreement is available at www.efta.int/'/media/Documents/legal-texts/free-trade-relations/morocco/EFTA-Morocco%20Free%20Trade%20Agreement%20EN.pdf (last accessed 19 February 2012).

¹²⁴ See statement of Morocco's Minister of Agriculture (Mr. Laenser), *Aujourd'hui Le Maroc*, 24 May 2006, 'Accord de pêche: naufrage polsarien', available at www.aujourd-hui.ma/nation-details46545.html; *Western Sahara Resource Watch*, 28 February 2011, 'EU Commission and Morocco sign extension of controversial fish pact', available at www.wsrw.org/index.php?parse_news=single&cat=105&art=1880 (unofficial translation; last accessed 19 February 2012).

¹²⁵ See European Parliament resolution of 14 December 2011 on the future Protocol setting out the fishing opportunities and financial compensation provided for in the FPA between the European Community and the Kingdom of Morocco, available at: www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0573 (last accessed 19 February 2012).

December 2011, the Council of the EU accordingly informed Morocco of its termination of the provisional application of the 2006/2011 FPA pursuant to Article 25(2) VCLT with immediate effect.¹²⁶

In January 2012, EU Fisheries Commissioner Damanaki stated that the European Commission had tabled a new negotiating mandate for a renewed FPA with Morocco 'in line with the position expressed by the EU Council and the vote in the European Parliament' and that 'the Commission [is] committed to conclude a new protocol on that basis'.¹²⁷ Although this is a positive development, it is noteworthy that the negotiating mandate in the relevant resolution adopted by the European Parliament – i.e. to ensure that the new agreement 'fully respects international law and benefits all the local population groups affected' – is conspicuously silent on the wishes of the Western Saharans, an integral component of the principle of self-determination under international law. In any event, notwithstanding recent positive developments, the compatibility of any future EC–Morocco fisheries agreement with international law remains uncertain at this stage.

VI. Concluding observations

With the efflux of time, even the hardest of rocks will eventually wither and disintegrate into grains of sand. A similar process can be observed in international law. Even the hard-core of fundamental rules in the international legal landscape is capable of disintegration as a result of the inevitable force that ultimately shapes its configuration: state practice. Like the steady stream of water slowly eroding the stone, the efflux of time is having a similar effect on the right of the people of Western Sahara to self-determination – at least, as originally envisaged by the principal UN organs. On the other hand, the purpose of the obligation of non-recognition is to prevent, in so far as possible, the occurrence of

¹²⁶ See <http://register.consilium.europa.eu/pdf/en/11/st18/st18687.en11.pdf> (last accessed 19 February 2012). See also statement dated 14 December 2011 by EU Fisheries Commissioner Damanaki, available at http://ec.europa.eu/commission_2010-2014/damanaki/headlines/press-releases/2011/12/20111214-2_en.htm (last accessed 19 February 2012).

¹²⁷ Statement by EU Fisheries Commissioner Damanaki (10 January 2012), available at: http://ec.europa.eu/commission_2010-2014/damanaki/headlines/press-releases/2012/01/20120110_en.htm (last accessed 19 February 2012). Sweden voted against the new negotiating mandate, while Finland, the United Kingdom and the Netherlands abstained (www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/trans/127982.pdf).

such a gradual process of erosion through waiver, acquiescence and prescription.

Almost forty years after the ICJ rendered its Advisory Opinion in *Western Sahara*, the international community is seeking the answer to the enduring question of the process of decolonization of Western Sahara in a compromise between international legality and political reality. The apparent assumption is that anything must be better than the impasse of the current *status quo*. Whatever the appeal of the siren-song of expediency, the current laissez-faire policy adopted by the UN appears to severely impede – and therefore contradict – the right of the people of Western Sahara to self-determination under international law. The UN policy is, in effect, not far removed from an implicit recognition of Morocco's irredentist claim to sovereignty over Western Sahara.

It is against this background of creeping recognition of Morocco's claim to Western Sahara that the EU position on the FPA should be understood. As we have seen above, the UN Secretary-General made this link in 2006. In his own words, the international community has unavoidably grown more accustomed to Moroccan control over Western Sahara. The recent EU position on the FPA is a welcome exception to this state of affairs, but it remains to be seen to what extent (if any) a future EC–Morocco fisheries agreement will respect international law and affect the gradual process of creeping recognition of Morocco's claim to Western Sahara. It can only be hoped that the future decolonization process will be more firmly guided by the salutary words of Judge Dillard in *Western Sahara*: 'It is for the people to determine the destiny of the territory and not the territory the destiny of the people.'¹²⁸

¹²⁸ *Western Sahara*, Sep. Op. Judge Dillard, p. 122.