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Morocco, occupying power of Western Sahara: some notes about Spain's foreign legal policy, the role of the Spanish doctrine and the rule of law in international relations

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Abstract: There is no doubt that, for the past 47 years, Morocco has been the occupying power over most of the territory of Western Sahara. However, a brief analysis of institutional and relational practice shows that, on the one hand, both the main international organisations concerned the United Nations and the European Union and the Western powers the United States, France, etc. maintain a certain degree of indeterminacy regarding the legal regime that should be applied to Morocco, in accordance with the rules of international law in force, particularly with respect to international humanitarian law. On the other hand, an analysis of the practice shows the lack of response or reaction from the United Nations, the European Union and Western powers to the North African state's flagrant and prolonged non-compliance with these norms. More specifically, Spain, the former administering power of Western Sahara, takes little interest in Morocco's compliance with these norms. The Spanish government has even recently stated that it supports the annexationist theses defended by the Moroccan monarchy. Given this situation, Spain's international law doctrine could adopt a more active and organised role in defending compliance with international law in relation to the Western Sahara conflict, and in general in the development of Spain's foreign policy as a whole. In short, in defending the validity of rule of law in international relations.

Keywords: Western Sahara- Morocco -Occupying power Prohibition of the use of force- Principle of self-determination of peoples- Human rights- International humanitarian law- Spain's foreign legal policy- International legal doctrine- Rule of law

(A) INTRODUCTION

As it is well known, at the end of 1975, the Kingdom of Morocco hereafter referred to as Morocco after organising the so-called "Green March", militarily occupied the northern part of the territory of Western Sahara, in alliance with Mauritania, whose army occupied the southern part. Both states had the consent of the then administering power, Spain, which withdrew from Western Sahara in February 1976. As a result, an armed conflict began between the Polisario Front, the national liberation movement representing the Sahrawi people, on the one hand, and Morocco and Mauritania, on the other. In 1979, Mauritania renounced any claim to Western Sahara and withdrew from the southern part of the territory, which in turn was occupied by Morocco. From

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then until today, Morocco occupies about 70 percent of the 266,000 square kilometres of Western Sahara's land territory. Thanks to the more than 150,000 troops of its armed forces deployed in the former Spanish colony and the construction of successive, military fortified sand walls. The Polisario Front controls the rest of the territory, which is on the other side of these sand walls, inside the former Spanish colony, a rather deserted area with a very small population spread over several small villages (Bir Lehlu, Tifariti...).[1]

As it is also well known, in the early 1990s, Morocco and the Polisario Front agreed to cease hostilities and accepted the United Nations (UN) peace plan for a referendum on self-determination, in which the Saharawi people were to decide between the independence of Western Sahara as a new state, or integration into Morocco. But despite the deployment of the United Nations Mission for the Referendum in Western Sahara (MINURSO), this referendum has not taken place, due to Morocco's opposition. Indeed, for the past 15 years, the Moroccan government has maintained that a solution to the conflict can only be found through the implementation of its proposal of autonomy for Western Sahara, which ultimately means the annexation of this territory, without the previous holding of a referendum.

It should be added that during those 47 years of military occupation of Western Sahara, Morocco, among other actions, has moved hundreds of thousands of Moroccan settlers to the occupied territory, and has exploited its natural resources (fishing, phosphates, intensive agriculture, oil exploration, etc.), and has committed serious and massive violations of international humanitarian law and human rights against the Sahrawi people living in the occupied territories. All this while a large part of the Sahrawi people is in exile in Tindouf refugee camps in Algeria, as a result of the exodus caused by the indiscriminate violence suffered by the Sahrawi population at the hands of the Moroccan army

These acts, which can be attributed to Morocco, must be legally assessed by reference to the so-called "Law of Occupation", which has received the attention of the doctrine, especially in relation to the conflict in Palestine[2] and also in other cases (Northern Cyprus,

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[1] According to G.N. Bachir, *El muro marroquí en el Sáhara Occidental. Historia, estructura y efectos* (Eki Aldea, Bilbao, 2017), at 121; the wall, some 2,700 kilometres long, divides the 177,332 square kilometres of Western Sahara occupied by Morocco (66.6% of the total 266,000 square kilometres of the former Spanish colony), from the 88,668 that remain under the control of the Polisario Front. In addition, Morocco is also the occupying power of the marine spaces adjacent to the coast that form part of the territory of Western Sahara (internal waters, the territorial sea), or exercises its rights and jurisdiction over them (exclusive economic zone and continental platform). The principle of self-determination of peoples and its corollary, the principle of permanent sovereignty of the Saharawi people over their natural resources, as well as international humanitarian law, also apply to these marine areas. As it will be emphasised again later, an integrated and non-exclusive interpretation and application of these two areas of regulations to the Western Sahara conflict must be defended: cf. M. Longobardo, "The Occupation of Maritime Territory under International Humanitarian Law", 95 *International Law Studies* (2019), 322-361, at 350 and ff.

[2] With regard to the bibliography on the conflict in Palestine, we can consult the selection offered in two recent publications; on the one hand, and focusing on the Anglo-Saxon world: R. Sabel, *International Law and the Arab-Israeli Conflict* (Cambridge University Press, Cambridge, 2022), at 295 and ff. on Israel's legal status as an occupying power. On the other hand, in the Spanish doctrine, I. Vázquez Serrano, "El último capítulo del conflicto israelí-palestino: el Acuerdo del Siglo y la reciente cooperación árabe-israelí con los acuerdos de Abraham", 38 *Anuario Español de Derecho Internacional* (2022), 387-422, (DOI: https://doi.org/10.15581/010.38.387-422) at 408-409, in which the author explains that the signing on 10 December

Iraq,...).[3] The purpose of this contribution is to offer some notes on the legal problems presented by the application of the "Law of Occupation" to the Western Sahara conflict, particularly with regard to international humanitarian law. This is a subject that would certainly merit a more detailed and lengthy study, even a doctoral thesis (section B). Always, of course, in the light of the study of international practice, both institutional and relational, to which brief reference will be made in section C. In particular, will take into account the most recent practice of United Nation (UN), European Union (EU) and Spain, the former administering power of Western Sahara. In this regard, it will make some proposals on the role that the Spanish doctrine can play in defending compliance with international law in relation to this conflict (section D). Finally, it offers a general assessment of the difficulties presented by the application of international law to the Western Sahara conflict (section E).

(B) THE INTERNATIONAL LAW OF OCCUPATION AND THE WESTERN SAHARA CONFLICT

(1) The confluence of at least four normative sectors of international law

As international jurisprudence has recognized,[4] in the framework of contemporary international law, in the"Law of Occupation" four areas of norms converge, overlap, and are applied in an interrelated manner, above all -although not exclusively--[5] which regulate material aspects of fundamental importance for this legal system, to the extent that a good part of these norms can be classified as *jus cogens* norms.[6] From all these

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2020 of the agreement between Israel and Morocco for the re-establishment of diplomatic relations was conditional on the United States recognising Morocco's sovereignty over Western Sahara.

3 Among others, in general, you can consult the works of: Y. Arai-Takahashi, *The Law of Occupation. Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff Publishers, Leiden/Boston, 2009); E. Benvenisti, The International Law of Occupation (Cambridge University Press, Cambridge, 2nd edition, 2012); H. Cuyckens, *Revisiting the Law of Occupation* (Brill, Leiden/Boston, 2018); Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, Cambridge, 2009); A. Gross, *The Writing on the Wall. Rethinking the International Law of Occupation*, (Cambridge University Press, Cambridge, 2017); M. Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge University Press, Cambridge, 2019); P. Wrange, *Occupation/annexion d'un territoire: Respect du droit humanitaire international et des droits de l'homme et politique coherente de l'Union européenne dans ce domaine*, (Parlement Européen, Direction Géneral des Politiques Externes, Brussels, 2015) [doi:10.2861/745449(PDF)].

4 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004, ICJ Reports (2004), 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment of 19 December 2005, ICJ Reports (2005), 168.

5 Indeed, as it will be shown later, particularly with regard to the case law of the courts of the European Union (EU), other areas of international law are also applicable to the Western Sahara conflict: law of the treaties, law of the sea...

6 J. Saura Estapá, "Western Sahara: a Solution for the Conflict on the Basis of Full Respect for International Law", in K. Arts and P. Pinto Leite (eds.), *International Law and the Question of Sahara Occidental* (International Platform of Jurists for East Timor, Leiden, 2007), 319-327, at 321-326. At its 2022 session, the International Law Commission (ILC) has adopted on second reading the "Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)" (all internet addresses cited hereafter were last consulted on 15 december 2022). According to the ILC, these norms "… reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law". As the ILC explains, "The univer-

norms, three related prongs are derived: 1) non-acquisition of sovereignty; 2) management of the territory for the benefit of the local population; and 3) temporariness rather than indefinite prolongation. Its compliance prevents the occupation from becoming "a guise for regimes akin to conquest, colonialism, and apartheid".[7] As will be highlighted again later, all these regulations must be interpreted and applied to the Western Sahara conflict in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts.[8]

Very briefly, first, *the general prohibition on the use or threat of force* applies to the Western Sahara conflict. Morocco has failed to comply with this prohibition by invading some 70% of the territory of Western Sahara with its army. As stated in General Assembly (GA) Resolution 2625 (XXV), States have the duty to refrain from resorting to any measure of force that impedes the exercise of the principle of self-determination of peoples. Furthermore, as also stipulated in the same Resolution, no territorial acquisition resulting from the threat or use of force shall be recognised as lawful. It should be added that according to Resolution 3103 (XXVIII), "… the struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination is legitimate". Thus, any armed action by the Polisario Front aimed at ending Morocco's armed occupation of Western Sahara is in accordance with contemporary international law.[9]

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sal applicability of peremptory norms of general international law (*jus cogens*) means that they are binding on all subjects of international law that they address, including states and international organizations. The idea that peremptory norms of general international law (*jus cogens*) are universally applicable, like that of their hierarchical superiority, flows from non-derogability. The fact that a norm is non-derogable, by extension, means that it is applicable to all, since states cannot derogate from it by creating their own special rules that conflict with it. The universal application of peremptory norms of general international law (*jus cogens*) is both a characteristic and a consequence of peremptory norms of general international law (*jus cogens*)". The ILC proposes the following *non-exhaustive list:* a) the prohibition of aggression; b) the prohibition of genocide; c) the prohibition of crimes against humanity; d) the basic rules of international humanitarian law; e) the prohibition of racial discrimination and apartheid; f) the prohibition of slavery; g) the prohibition of torture; and h) the right of self-determination.

7 A. Gross, *supra* n. 3, at 35. More specifically, in Art. 47 of the Fourth Geneva Convention of 1949, which will be quoted next, the annexation of territory by the occupying power is prohibited, stipulating that "protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory…, nor by any annexation by the latter of the whole or part of the occupied territory".

8 *Mutatis mutandis*, as provided in Guideline 9, "Interrelationship among relevant rules", of the Draft guidelines on the protection of the atmosphere, approved by the ILC in 2021, A/76/10, at 12: "The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, inter alia, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law".

9 See M. Longobardo, *The Use…*, supra n. 3, at 134 and ff. In recent years, there have been some armed incidents between Moroccan forces and the Polisario Front. In particular, following the one in November 2020 in the Guerguerat region, the Polisario Front declared that the ceasefire in force since 6 September 1991 had been broken and declared its intention to resume the armed conflict with Morocco: I. Barreñada, *Breve historia del Sahara Occidental* (Los libros de la Catarata, Madrid, 2022), at 55 and ff.

Second, *the principle of self-determination of peoples and its corollaries*, such as the principle of permanent sovereignty over natural resources and the principle of territorial integrity of a Non-Self-Governing Territory.[10] This structural principle of international law is also reflected in Resolution 2625 (XXV), and before that in Resolutions 1514(XV) and 1541(XV) dealing with this principle. The latter provides for the exercise of this right to be carried out by holding a referendum in which the population of the territory decides whether it wishes to achieve independence as a new state, to enter into free association with another independent state, or to be integrated into an existing state. This has been recognised by the International Court of Justice (ICJ) in its jurisprudence, specifically in relation to Western Sahara in its Advisory Opinion of 16 October 1975.[11]

Third, *the international human rights law*. Morocco is bound by customary international human rights law, which constitutes the standard of treatment that protects life, physical integrity, personal liberty, and personal security. In addition, it should be noted that Morocco has ratified a number of international treaties. Among them, it ratified on 3 May 1979 the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, both of 1966, whose art. 1, common to both conventions, includes the right to self-determination. Furthermore, Morocco has recently accepted the procedure that allows the presentation of individual communications before the Human Rights Committee provided for in the International Covenant on Civil and Political Rights of 1966.[12] In ratifying all these treaties, the North African state has not made any reference to Western Sahara. This is a territory in which Morocco must guarantee compliance to all the people who are there, since they are subject to its "jurisdiction", as occupying power of around 70 percent of the former Spanish colony, as will be emphasised again later.[13]

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10 On the validity of the principle of self-determination as customary international law and its corollaries, in particular the second of the above-mentioned, please consult the Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ Reports (2019), par. 144-161. About the doctrine, see A. Pigrau Solé, "La descolonización de Mauricio y el asunto de las Islas Chagos ante la Corte Internacional de Justicia", XXI *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián* (2021), 233-285.

11 *Western Sahara*, ICJ Reports (1975), 12.

12 Specifically, on 22 April 2022. It has also accepted the same procedure in relation to the Convention against Torture; the Convention on the Elimination of all Forms of Discrimination against Women; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Rights of Persons with Disabilities. The list of human rights treaties with universal vocation in force for Morocco can be consulted at UN Treaty Body Database.

13 In this respect, the Moroccan authorities have not communicated to the Secretary General the derogation of some of the obligations provided for in the 1966 Covenant with regard to Western Sahara, considering that the situation provided for in art. 4 of this treaty applies: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation…,". Not even during the 1980s, while the armed conflict between Moroccan troops and the Polisario Front continued. Therefore, from 1979 until today, the Moroccan authorities are responsible, as the occupying power of about 70% of Western Sahara, for the fulfilment of all the obligations contained in the 1966 Covenant, as well as in other international human rights conventions that Morocco has ratified.

And, fourth, *international humanitarian law*. Specifically, as will be explained later, the following are applicable to Morocco's occupation of Western Sahara: a) the Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (IV), 1907, to which Morocco is not a State party;[14] b) the Fourth Geneva Convention of 1949, relative to the protection of civilian persons in time of war, in force for Morocco since 26 July 1956;[15] and c) el First Additional Protocol of 1977 to the Geneva Conventions of 1949, relating to the protection of victims of international armed conflicts, in force for Morocco since 3 June 2011, without the Moroccan State having entered a reservation.[16]

(2) The application of international humanitarian law to the Western Sahara conflict

As it has already been pointed out, the application of international humanitarian law in the Western Sahara conflict is a subject that would deserve a much broader and more detailed study focused on: a) firstly, determining all applicable norms and specifying their content; b) assessing Morocco's (non-)compliance with them; and c) analysing the consequences of Morocco's non-compliance with international law, both in terms of its relational or decentralised structure, and its institutional structure, especially within the framework of the United Nations (UN).

In fact, of the four aforementioned areas of international law, the one that is most likely to raise doubts as to its specific content and scope in its application to the Western Sahara conflict is the latter, which refers to norms on international humanitarian law.[17] Above all, because the provisions of the first two conventional instruments mentioned above were agreed by the States Parties no less than in 1907 and 1949, to be applied in the case in which a State Party militarily occupies all or part of the territory of another State Party. They were not intended to apply to a non-self-governing territory, whose population has the right to self-determination, following the abandonment of the administering power, Spain, and the armed invasion of the territory by a third state, Morocco, which has been occupying it militarily for the past 47 years.

It is also the case that, as it will be emphasised later, in the referendum to be held for the exercise of the right to self-determination, the Saharawi people could opt for the constitution of an independent state, or for integration into Morocco. This was agreed upon by the Polisario Front and Morocco in the early 1990s in the framework of the UN Peace Plan. Today, it is highly unlikely that the Sahrawi people, in an internationally supervised referendum with all the guarantees, would vote by a majority in favour of

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

15 BOE no. 246, 2 september 1952. You can consult the text of these treaties at the database of the International Committee of the Red Cross.

16 BOE no. 177, 26 july 1989. For the list of international humanitarian law treaties ratified by Morocco, you can consult the database of the International Committee of the Red Cross.

17 As A. Gross, supra n. 3, at 116, points out, as in the East Timor case, "…, although Western Sahara was and still is generally considered occupied territory, most of the debate in this case too seems to focus on questions of self-determination and human rights rather than on the relevant norms of the law of occupation".

the integration of Western Sahara into Morocco; as is well known, the Polisario Front advocates the constitution of an independent state in Western Sahara. But, it should be stressed that either of the two options provided for in the referendum is in accordance with the exercise of the principle of self-determination. If the Saharawi people were to opt for integration into Morocco, Morocco would cease to be the occupying power of Western Sahara and would exercise its sovereignty over the former Spanish colony, in accordance with current international law. In any case, as long as this referendum is not held, Morocco is the occupying power of Western Sahara and must therefore comply with the four areas of law mentioned above, and in particular with international humanitarian law.

In this respect, in its *Construction of a Wall Advisory Opinion*, the ICJ maintains that the provisions of the aforementioned *Hague Regulations of 1907* are binding on Israel and are therefore applicable to the occupied territories of Palestine, as an expression of customary international law.[18] The same conclusion must be reached in relation to Morocco's occupation of Western Sahara. According to art. 42 of Hague Regulations of 1907, "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised". This definition is applicable to about 70% of the territory of Western Sahara under military occupation by Morocco.

Regarding the application of the *Fourth Geneva Convention of 1949*, its art. 2 establishes that this agreement "shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance". If the first sentence of this provision is taken into account, it could be considered that the Fourth Geneva Convention does not apply to the Western Sahara conflict, since no armed conflict broke out between Spain and Morocco. As is well known, at the end of 1975, the Spanish government, faced with the threat of the so-called "Green March", decided to abandon Western Sahara and allowed the Moroccan and Mauritanian armies to invade it. However, if one looks at the second sentence of the same provision, it can be considered that the Fourth Geneva Convention 1949 applies to Morocco as the occupying power of Western Sahara, despite the fact that it carried out the invasion of this territory without armed resistance from the Spanish authorities.

But, furthermore, if this second interpretation is rejected, as the Moroccan representative argued in his intervention before the ICJ in the proceedings that concluded with the aforementioned *Construction of a Wall Advisory Opinion*, the provisions of the Fourth Geneva Convention are binding on Israel and are applicable to the occupied territories of Palestine. Because in his opinion, "Since such a large number of States have ratified de Geneva Conventions (191 at present) …", the provisions of this

[18] "The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court": par. 89.

convention can be considered as an expression of customary international law in force.[19] Of course, in legal consistency, the same position can be maintained with regard to the application of the Fourth Geneva Convention[20] to about 70% of the territory of Western Sahara, which has been militarily occupied by Morocco for 47 years.[21]

The application of the *First Additional Protocol of 1977* to the Western Sahara conflict is not in doubt. Its art. 1(4) provides for its application to the "armed conflicts which peoples are fighting against colonial domination and alien ocupation and against racist regimes in the exercise of their right of self-determination…". It seems very clear that

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19 It is available on the ICJ's website: Legal consequences of the construction of a wall in the occupied Palestinian Territory. In its argumentation on this issue, the ICJ disregarded the normative interaction between treaty and custom, arguing that since Israel is a state party to the Fourth Geneva Convention and that there was an armed conflict between Jordan and Israel, which resulted in the former state occupying the Palestinian territories of the West Bank, Gaza and East Jerusalem, "…the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict to lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories": par. 101.

20 Since the 1991 agreement for the cessation of hostilities between Morocco and the Polisario Front, art. 6, paragraph 3 of the Fourth Geneva Convention of 1949, would apply, which provides that: "In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143".

21 In the same intervention before the ICJ, the Moroccan representative, showing a very obvious lack of legal coherence, insisted on the prohibition of the acquisition of territories by the use of force, and on the obligations of non-recognition and non-assistance in relation to the occupation of the Palestinian territories by Israel. Among other provisions of international humanitarian law, with all impudence he dared to quote art. 49 of the Fourth Geneva Convention of 1949, which stipulates that "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive". In addition, after citing other provisions, it concludes that: "Under International Law, the serious violations of Humanitarian Law perpetrated in the Palestinian territory should give rise to Israel's criminal liability, which is an issue that the Court should assess in its review of the legal implications of the building of the Wall". He also insists on Israel's violation of the human rights of Palestinians; more particularly, he claims that "…, the construction of the Wall has the legal consequence of depriving thousands of Palestinians of their fundamental rights, inter alia, the right to freedom of movement and the establishment of their residence in all areas of the occupied territories": see Legal consequences of the construction of a wall in the occupied Palestinian Territory. Moreover, the lack of legal coherence was also very evident in December 2020. As already mentioned, on that date the restoration of diplomatic relations between Morocco and Israel was announced, on the condition that the US recognises Morocco's sovereignty over Western Sahara. This, among other consequences, has allowed Morocco to purchase military equipment from Israel. In particular, advanced technology drones, which give Morocco military superiority in the Western Sahara conflict, and which have already caused several civilian victims in the liberated territories (in November 2021 and April 2022), in flagrant violation of international humanitarian law. According to the latest report of the Secretary General, MINURSO has documented 18 reported strikes conducted by Royal Moroccan Army unmanned aerial vehicles east of the berm since 1 September 2021, including one on 26 July 2022 reportedly leading to the death of the Chief of Staff of the Front POLISARIO Fourth Military Region: see S/2022/733, 3 october 2022, at 7. In other words, in recent years Morocco has been buying military equipment from a state, Israel, which in 2004 it considered responsible for serious violations of imperative norms of international law in relation to the Palestinian people: "Marruecos estrecha lazos militares con Israel, suministrador de los 'drones suicidas' en pleno conflicto del Sáhara Occidental", *El País*, 19-7-2022.

the second scenario, the "alien occupation", has been carried out by Morocco in Western Sahara for the past 47 years. As the International Committee of the Red Cross explains in its comments to the First Additional Protocol, "The expression "alien occupation" in the sense of this paragraph -- as distinct from belligerent occupation in the traditional sense of all or part of the territory of one State being occupied by another State -- covers cases of partial or total occupation of a territory which has not yet been fully formed as a State".[22]

However, it should be noted that this First Additional Protocol was adopted two years after Morocco invaded Western Sahara, and that the North African state did not ratify it until 2011. Therefore, the retroactive application of its provisions to events that occurred prior to the entry into force of this treaty norm for the state party, in 2011, would only be possible if, once again, such provisions were considered to be, from the date of adoption of this international treaty in 1977, an expression of customary international law in force, in accordance with international practice. The fact that the First Additional Protocol of 1977 has now been ratified by no less than 174 states can be considered as conclusive proof that its provisions are an expression of current customary law. More particularly, it can be argued that Morocco's armed occupation of Western Sahara constitutes a continuing wrongful act, which began in late 1975 and is obviously still continuing today, so that the First Additional Protocol would at the very least apply to the Western Sahara conflict since 2011.[23]

For its part, Morocco rejects the application of all these regulations. Morocco is opposed to being considered the occupying power of Western Sahara. The Moroccan government is adamant that Western Sahara is part of its territory as a sovereign state. For example, on 23 June 2015, the Polisario Front made a unilateral declaration pursuant to art. 96.3 of the First Additional Protocol of 1977, stating that "…, le Front POLISARIO, en tant qu'autorité représentant le peuple du Western Sahara luttant pour son droit à disposer de lui-même, déclare s'engager à appliquer les Conventions de Genève de 1949 et le Protocole I dans le conflit l'opposant au Royaume du Maroc" [the POLISARIO Front, as the authority representing the people of Western Sahara fighting for their right to self-determination, declares its commitment to apply the Geneva Conventions of 1949 and Protocol I in the conflict between it and the Kingdom of Morocco].[24] A few days later, on 3 July 2015, the Moroccan government responded in a detailed and forceful manner, although lacking any foundation in current international law, with the

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[22] Commentary of 1987

[23] In this sense, in its *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 Advisory Opinion*, of 25 February 2019, the ICJ concludes that: "The Court having found that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State… It is a wrongful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius": ICJ Reports (2019), par. 177.

[24] It should be added that, since the beginning of the conflict with Morocco at the end of 1975, the Polisario Front has been careful to fulfil its obligations under international humanitarian law. Proof of this was the release of all Moroccan prisoners of war held by the Polisario Front after 16 years of armed conflict with Morocco (1975-1991); in 2005, the Polisario Front released the last Moroccan prisoners of war. Despite the fact that Morocco has still not clarified the fate of hundreds of disappeared Saharawis, as will be emphasised again later on.

aim of denying any validity or legal effect to the statement made by the Polisario Front. Morocco, among other claims, argues that the "Polisario" is a "mouvement séparatiste constitué en Algérie et agissant contre la stabilité et l'integrité territoriale du Maroc" [separatist movement formed in Algeria and acting against the stability and territorial integrity of Morocco]. Morocco also insists on the silence maintained by the two main UN bodies on its legal status as the occupying power of Western Sahara: "rien dans les 66 résolutions adoptées par le Conseil de Sécurité sur la question du Sahara depuis 1975, dans les dizaines de résolutions adoptées par l'Assemblée Générale durant les 35 dernières années, ni dans les plus de 120 rapports du Secrétaire Général, ne qualifie le Sahara de "*colonie*", ni ne considère le Maroc comme un "*colonisateur*" une "*puissance occupante*" ou, encore moins, un "*régime raciste*"" [nothing in the 66 resolutions adopted by the Security Council on the Sahara issue since 1975, in the dozens of resolutions adopted by the General Assembly over the last 35 years, nor in the more than 120 reports of the Secretary General, describes the Sahara as a "*colony*", nor considers Morocco as a "*coloniser*", an "*occupying power*" or, even less, a "*racist regime*"].[25]

More recently, in the Exchange of Letters which is attached to the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, 2019, the following can be read: "for the Kingdom of Morocco, the Sahara region is an integral part of the national territory over which it exercises full sovereignty in the same manner as for the rest of the national territory. Morocco considers that any solution to this regional dispute should be based on its autonomy initiative".[26]

But Morocco's position[27] does not stand up under the rules of the current international law, as the ICJ had occasion to establish in its Advisory Opinion of 1975: Western Sahara

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[25] Among other assessments obviously aimed at denying that the Polisario Front is a national liberation movement, the Moroccan Government, after harshly criticising the publication by the Swiss Government of the declaration made by the Polisario Front in accordance with art. 96.3, affirms that "avec un précédent aussi dangereux, l'on ne peut que se demander ce que serait la position de l'Etat dépositaire face à des déclarations qui lui seraient communiquées par *des acteurs armés non-Etatiques d'obédience terroriste*, dont certains se réclament d'un conception de "l'autodetermination" asussi singulière que celle du "polisario"" (italics added) [with such a dangerous precedent, one can only wonder what the position of the depositary state would be with regard to statements communicated to it by *non-state armed actors of terrorist allegiance*, some of whom claim to be a conception of "self-determination" "as peculiar as that of the "Polisario"]. Declarations issued by the Government of Switzerland as depositary of this Treaty, available at: Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I). On the doctrine, see J.A. González Vega, "El derecho del pueblo saharaui a la libre determinación y el 'derecho de resistencia' frente a la ocupación marroquí", in *Sahara Occidental. Cuarenta años construyendo resistencia* (Pregunta Ediciones, Zaragoza, 2016), 323, at 345-355.

[26] OJ, 2019, L 77. For its part, "For the European Union, references in the 2019 Fisheries Agreement to Moroccan laws and regulations are without prejudice to its position concerning the status of the non-self-governing territory of Western Sahara, whose adjacent waters are part of the fishing zone defined in point (h) of Article 1 of the Fisheries Agreement, and its right to self-determination". Cited in the Judgment of the General Court (GC), of September 29, 2021, *Front Polisario v. Counsell*, T-344/19 and T-356/19, ECLI:EU:T:2021:640, par. 70.

[27] It may also be recalled that in 2016 the then UN Secretary General, Ban Ki-Moon, visited Bir Lehlu, a town in Western Sahara located in the area controlled by the Polisario Front, and stated that "Morocco was an occupying force in Western Sahara", and that the final status of Western Sahara should guarantee the self-determination of the Sahrawi people. The Secretary-General's spokesman tried to play down the significance of these statements, pointing out that they were opinions expressed in a personal capacity,

is not part of Morocco. It is a non-self-governing territory to which Resolution 1514 (XV) must be applied.[28] Therefore, following the invasion of Western Sahara with its army at the end of 1975, *there is no doubt that Morocco has been the occupying power of this territory for the last 47 years and has prevented the Saharawi people from exercising the right to self-*determination in the application of the aforementioned Resolution 1514 (XXV).[29] *Just as South Africa was once an occupying power in relation to Namibia and Indonesia in relation to East Timor; and Israel is still today an occupying power with regard to the occupied territories of Palestine*.[30] In the end,

> "The ICJ's determination that neither the ties between some tribes living in Western Sahara and the Sultan of Morocco nor the existence of land rights that constituted ties between Western Sahara and Mauritania amounted to ties that established legal-territorial sovereignty over the territory of Western Sahara, be it by Morocco o by the Mauritanian entity, was critical to the determination that the people of Western Sahara should be able to exercise their right to self-determination, but also for a understanding of Western Sahara as occupied territory".[31]

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which did not commit the UN. Morocco protested angrily and, among other actions, forced the withdrawal of most of MINURSO's civilian personnel, namely 84 members. The SC took no action in response to the pressure exerted by Morocco on MINURSO, mainly due to the position maintained by the United States and France, as seen in the debate that led to Resolution 2285 (2016) of 29 April. In this debate, the representative of the United States stated that: "We consider Morocco's autonomy plan serious, realistic and credible. It represents a potential approach that could satisfy the self-determination aspirations of the people of Western Sahara": S/PV.7684, of 29 April 2016: J.D. Torrejón Rodríguez, "The crisis at Guerguerat and the escalation of the Sahara Occidental Conflict", 22 *Spanish Yearbook of International Law* (2018), 415-426 (DOI: IO.17103/sybil.22.21).

28 The ICJ, in its responses to the questions posed by the General Assembly (GA), concluded that "The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus, the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory": par. 162.

29 Morocco's foreign policy is certainly not consistent in its defense of sovereignty over Western Sahara. It should be recalled, firstly, that in 1975 it agreed to divide Western Sahara with Mauritania, which is very clear proof that Morocco had and has no sovereignty rights over the southern part of the former Spanish colony that corresponded to Mauritania according to the aforementioned agreement. Furthermore, Morocco's acceptance of the UN Peace Plan in the late 1980s, which provided for the holding of a referendum on self-determination in Western Sahara, is another very clear proof that Morocco's legal position is not in accordance with international law in force...

30 A.M. Badia Martí, "La cuestión del Sahara Occidental a la luz de la dimensión económica del principio de Autodeterminación de los pueblos coloniales", in F. Palacios Romeo (coord.), *El Derecho a la libre determinación del pueblo del Sahara Occidental* (Aranzadi, Navarra, 2013), 51-78, at 68-71; S. Simon, "Sahara Occidental", in C. Walter, A. Von Ungern-Sternberg and K. Abushov (eds.), *Self-Determination and Secession in International Law* (Oxford University Press, Oxford, 2014), 255-272, at 260-262; J. Soroeta Liceras, "Legal Consequences of the Construction of a Wall in the Occupied Sahrawi Territories", 23 *Spanish Yearbook of International Law* (2019), 362-375, at 364-366 [DOI: 10.17103/sybil.23.24].

31 A Gross, *supra* n. 3, at 117.

In conclusion, under current international law, it can be maintained that the provisions of the Hague Regulations of 1907, the Fourth Geneva Convention of 1949 and the First Additional Protocol of 1977 are binding on Morocco as the occupying power of Western Sahara. All these regulations represent a set of legal obligations for this State with significant content and scope. For example, arts. 72 and ff. of the Protocol of 1977 regulate in considerable detail the treatment of persons in the power of a party to the conflict.[32]

Furthemore, *the application of these provisions of international humanitarian law in the Western Sahara conflict overlaps with and complements the other three areas of law referred to above: the principle of the prohibition of the use of force; the principle of self-determination of peoples; and international human rights law. A harmonic and sistemactic interpretation and application of these four areas of norms to the Western Sahara conflict should therefore be advocated*, notwithstanding the complexity that this may entail, as will be emphasised again later.[33]

As it has already been said, the analysis of the implementation of all these norms, and in particular those referring to international humanitarian law, in relation to the Western Sahara conflict, would deserve a much more extensive study. The following are brief considerations on some of these international obligations, as examples of the problems posed by Morocco's legal status as an occupying power.

(3) The prohibition of deportation of the population of the territory and of the transfer of the occupying power's own population into the territory

Firstly, Morocco has failed to comply with art. 49 of the Fourth Geneva Convention of 1949, which, on the one hand, provides that "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive". Furthermore, art. 85.4a) of the First Additional Protocol classifies this conduct and also the transfer of the occupying power's own population as a serious infringement, provided it is committed intentionally.[34] There is no doubt

[32] For example, according to art. 75.3 of the First Additional Protocol of 1977, "Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event, as soon as the circumstances justifying the arrest, detention or internment have ceased to exist". And the following paragraph sets out the substantive and procedural guarantees that must be complied with in order to impose a criminal sanction on a person who has committed a criminal offence in the context of the armed conflict.

[33] Cf. P. Wrange, "Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara", 52 *Israel Law Review* (2019), 3-29, at 7-11 and 19-26.

[34] It should be added that Article 8(2)(b)(viii) of the Statute of the International Criminal Court defines the following as war crimes: "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory". But to date, Morocco has not ratified the Statute of the International Criminal Court: The States Parties to the Rome Statute.

that Morocco has violated this prohibition.[35] In fact, during the first months of the invasion of Western Sahara by Moroccan troops, the ferocious repression carried out by the Moroccan authorities against the Sahrawi population, including the bombing with napalm and white phosphorus, provoked the exodus of tens of thousands of Sahrawis to the refugee camps in Tindouf, where they have remained ever since. Furthermore, the Moroccan authorities have subsequently forced several thousand Sahrawis to reside in Moroccan territory, carrying out these deportations against a good number of human rights activists, some of them imprisoned in Moroccan prisons hundreds of kilometres away from the Western Sahara, where their relatives reside, as it will be emphasised later.

On the other hand, the aforementioned art. 49 of the IV Convention also prohibits the occupying power from transferring its own civilian population into the territory it occupies. In its commentary on this provision, the International Committee of the Red Cross explains that with this provision: "It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race".[36]

With regard to the transfer of the Moroccan population, of Moroccan settlers, there is no exact data available on the percentage of the population currently living in the approximately 70% of the Moroccan-occupied Western Sahara that is part of the Saharawi people. Estimates have been given based on the censuses carried out by the Spanish colonial administration and later by MINURSO, as well as on the languages spoken and the construction of houses in this territory.[37] According to these estimates, out of a population in the occupied territories of some 600,000 people,[38] the Sahrawi population could be around 20% of this total. In other words, it is likely that around 80% of the population of the part of Western Sahara militarily occupied by Morocco are Moroccan settlers or their descendants transferred by the Moroccan authorities to this

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35 Exceptions to this prohibition are provided for, but Morocco has certainly not fulfilled the conditions required for such exceptions to apply; the wording of art. 49 makes this clear: "Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased".

36 Treaties, States Parties and Commentaries.

37 P. Revert Calabuig, "El delito de guerra: traslado de colonos de origen marroquí al Sahara Occidental, y deportación de población saharaui fuera del mismo", in *Sahara Occidental. Cuarenta años construyendo resistencia, supra* n. 25, 275-321.

38 According to UN figures, Western Sahara has a population of 612,000 inhabitants: The United Nations and Decolonization. According to data provided by the European Commission, in the two regions into which Morocco mainly divides Western Sahara for administrative purposes, as if they were two other Moroccan regions (which will be discussed later), the population could be around 597,339 inhabitants: COMMISSION STAFF WORKING DOCUMENT, *Implementation of the agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco on amending Protocols 1 and 4 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. 2021 Report on the benefits for the people of Western Sahara on extending tariff preferences to products from Western Sahara*, SWD (2021) 431 final, of 22 December 2021, at 13.

occupied territory in contravention of the aforementioned international humanitarian law.

It is obvious that both the policy of transferring Moroccan settlers to Western Sahara and the deportation of the Sahrawi population from this occupied territory are being carried out with a very clear objective: to consolidate the occupation of this territory with a Moroccan population, in order to try to justify the annexation of a territory that is inhabited by a majority of Moroccan people. Some comparisons can be drawn with the Israeli government's policy of settling Jewish settlers in the occupied territories of Palestine. With the difference or aggravating factor that it is much easier for the Moroccan government to turn the Western Sahara into a territory inhabited by a large majority of Moroccans, given that the Sahrawi population remaining in the occupied territories is estimated at around a hundred thousand.[39]

(4) The application of Moroccan law to Western Sahara and the jurisdiction of Moroccan courts over this territory

Both art. 43 of the Hague Regulations of 1907 [40], and art. 64 of the Fourth Geneva Convention of 1949 provide as a general rule that the laws in force at the time of occupation by the third state shall continue to apply in the occupied territory. However, it is foreseen, in a number of very general cases, that the occupying power will apply its legislation to the occupied territory.[41] Specifically, the aforementioned art. 64 provides for the occupying power to apply its legislation to the occupied territory in three cases: a) to fulfil its obligations under this Convention; b) to maintain the orderly government of the territory; and c) 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.

Moreover, lacking their own courts in Western Sahara at the time of the armed invasion of the territory which would have continued to exercise their functions after Spain's withdrawal, the Moroccan courts, the courts of the occupying power, must exercise jurisdiction over events occurring in the territory in all areas criminal, civil... .

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[39] It should be noted that these are estimates, as there is no known census of the Sahrawi population in the territories occupied by Morocco. However, it may be recalled that, according to the census carried out by the Spanish administration in 1974, the Sahrawi population then numbered 73,497, including minors. According to the provisional census of voters in the referendum of self-determination elaborated by MINURSO and made public at the beginning of 2000, the Saharawi population of legal age to vote was 86,386, including tens of thousands of Saharawis in the refugee camps in Tindouf: *Report of the Secretary-General on the situation in Western Sahara*, S/2000/131, of 17 February 2000. At present, according to the most optimistic estimates, there are around 150,000 Sahrawis in the Tindouf refugee camps. In addition to a few thousand Sahrawis who, on the one hand, live in the "liberated territories" and, on the other, are part of the Sahrawi "diaspora" in various countries, including Spain.

[40] "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".

[41] As just cited, art. 43 of the Hague Regulations of 1907 includes, as a general exception, the clause "unless absolutely prevented".

However, Morocco's legislative, judicial and also administrative practice must be in accordance with the obligations that bind Morocco as occupying power of Western Sahara, which derive from the four areas of law briefly discussed above; obligations that must be interpreted and applied to the Western Sahara conflict in line with the principles of harmonization and systemic integration. Above all, with regard to the protection of the Sahrawi population living in the occupied territories, international human rights law, in close interrelation with international humanitarian law, as has already been emphasised.[42] This is provided for in the criminal field, with certain conditions and substantive and procedural guarantees, in arts. 64 and ff. of the Fourth Geneva Convention of 1949.[43]

It is a well-known fact that Morocco fails to comply with these obligations. During the last 47 years, Morocco's legislative, judicial and administrative actions as occupying power of Western Sahara have resulted in the serious and massive violation of the rights of the Saharawi population as recognised in international human rights and humanitarian law. [44] Among other actions, for example by holding trials against Saharawi activists, lacking the minimum substantive and procedural guarantees, with which they are sentenced to long prison sentences, which they must serve in prisons located in Morocco, several hundred kilometres away from the cities of Western Sahara where their families live.[45]

More generally, according to information from UN human rights monitoring bodies and non-governmental organisations, during the 47 years of Morocco's armed occupation of Western Sahara, several hundred people have disappeared at the hands of the Moroccan security forces, in a context of repression against any demonstration

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42 Ch. Chinkin, "Laws of Occupation", in *Conference on Multilateralism and International Law with Western Sahara as a case study hosted by the South African Department of Foreign Affairs and the University of Pretoria* (UNISA Press, Pretoria, 2008), 196-221.

43 For example, in art. 72 of the Fourth Geneva Convention of 1949, titled "right of defence", it is established that "Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence". For its part, art. 73, titled "right of appeal", it is established that "A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so".

44 More specifically, as far as international humanitarian law is concerned, articles 1 to 22, 27, 29 to 34, 47, 49, 51, 52, 53, 61 to 77 of the Fourth Geneva Convention of 1949, regulate in some detail the rights of the population under military occupation; among them, the prohibition of homicide, torture, ...The international human rights conventions ratified by Morocco have already been cited supra n. 12.

45 For example, in 2015, the Spanish authorities denied asylum to a Sahrawi activist, Hassanna Aalia, aged 26, who had been residing in Spain since 2011, despite alleging that he had been subjected to years of detention, ill-treatment and torture by the Moroccan authorities and, more specifically, that he had been sentenced to life imprisonment [*sic*] by a Moroccan military court in a sham trial held in absentia, for participating in the Gdeim Izik camp protests in 2010. However, after an appeal against the Spanish government's decision, the Audiencia Nacional prevented his expulsion to Morocco: *El País*, 22 january 2015. According to the latest report of the Secretary General, "The Gdeim Izik group of prisoners continued several hunger strikes, demanding transfers to Western Sahara prisons and protesting lengthy prison sentences and harsh prison conditions, including prolonged solitary confinement, ill-treatment and torture and denial of medical care. Some family members were reportedly subjected to reprisals for having contacted United Nations human rights mechanisms": S/2022/733, 3 october 2022, at 13.

in favour of the self-determination of the Sahrawi people, including arbitrary arrests, torture, violations of the freedoms of expression, assembly and demonstration…[46]

In this regard, it is remarkable that the human rights monitoring mechanisms avoid describing Morocco as the occupying power of Western Sahara. The international human rights conventions ratified by Morocco have already been cited above and are applicable to Western Sahara, since this territory is subject, according to art. 2(1) of the International Covenant on Civil and Political Rights, to the "jurisdiction" of Morocco, as stated by the Human Rights Committee. For that reason, in its Concluding Observations, it maintains that the Moroccan authorities are internationally responsible for the implementation of the human rights provisions of the 1966 Covenant, both in Morocco and in Western Sahara. Yet, it offers no explanation or legal assessment as to why Morocco should comply with these norms in Western Sahara.[47] Under current international law, the Human Rights Committee should have stated that Morocco's responsibility for the human rights violations committed in the approximately 70% of Western Sahara is due to the fact that, as occupying power of this territory, it exercises jurisdiction over it. *Mutatis mutandis*, in the same way, that, following the 2003 invasion, for some years the United Kingdom was responsible for the human rights violations committed in the part of Iraq of which it was the occupying power, as recognised by the European Court of Human Rights, in application of art. 1 of the European Convention on Human Rights.[48]

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46 It should be highlighted the work of denouncing human rights violations in Western Sahara carried out, among other non-governmental organisations, by the Observatorio Asturiano de Derechos Humanos para el Sahara Occidental (OAPSO), through visits to the occupied territories and interviews with the victims, and by attending the trials in which Saharawi activists are tried.... This work is described in the publication *Sahara Occidental y Derechos Humanos: perspectiva del OAPSO* (OAPSO, Oviedo, 2014), at 127 and ff. On the legal doctrine, see C. Faleh Pérez y C. Villán Durán, "La situación de los derechos humanos en el Sahara ocupado", in *Sahara Occidental. Cuarenta años construyendo resistencia*, *supra* n. 25, 147-234, at 233 which concludes, after an analysis of the application of the UN human rights monitoring mechanisms to Western Sahara, that: "… Marruecos es responsable de violaciones sistemáticas de los derechos humanos y libertades fundamentales en el Sahara Occidental ocupado. Tales violaciones son flagrantes, graves, masivas y sistemáticas" [Morocco is responsible for systematic violations of human rights and fundamental freedoms in occupied Western Sahara. Such violations are flagrant, serious, massive and systematic]; J.A. González Vega, "Pasado, presente… ¿Y futuro? del respeto de los derechos humanos en el Sahara Occidental: apuntes desde España", *Ordine internazionale e diritti umani* (2015), 250-272; J.A. Yturriaga Barberán, *El Sáhara español: un conflicto aún por resolver* (Sial/Casa África, Madrid, 2020), at 396 and ff.

47 *Concluding Observations on the sixth periodic report of Morocco*, CCPR/C/MAR/CO/6, 1 december 2016, par. 9, 23, 27, 37 and 41. In this sense, in the *Compilation on Morocco, Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/WG.6/27/MAR/2, 20 february 2017, par. 103 and ff., the last section of this Compilation is dedicated to a general summary of human rights violations committed by Morocco in "specific regions or territories", focusing on Western Sahara. Again, however, there is no explicit legal explanation or assessment of why Morocco is obliged to comply with international human rights law in Western Sahara. That is to say, at no point is it mentioned that Morocco is the occupying power of Western Sahara, despite the fact that this is the premise that explains this obligation. For its part, the Moroccan government, consistent with its annexationist thesis, according to which Western Sahara is just another region of southern Morocco, in 2017 defended before the Human Rights Council its commitment "…to promote rights and freedoms in the Moroccan Sahara as there is no distinction in the Kingdom between the Sahara region and the other regions": Human Rights Council, *Report of the working group on the universal periodic review. Morocco*, A/HRC/36/6, 13 july 2017, par. 31.

48 Judgments of 7 July 2011, *Al-Skeini and others v. the United Kingdom*, 55721/07, [ECLI:CE:ECHR:2011:0707JUD005572107], par. 89 and ff., and 143 and ff.; and *Al-Jedda v. United Kingdom*, 27021/08, [ECLI:CE:ECHR:2011:0707JUD002702108], par. 42 and ff., and 74 and ff.

In addition, and more specifically, Morocco must respect the right to property. According to art. 46 Hague Regulations of 1907, "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.". According to art. 53 of the Fourth Geneva Convention of 1949, "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations". For the past 47 years, Morocco has certainly ignored all these regulations. As already mentioned, in the first months of the invasion of the territory, the Moroccan army indiscriminately attacked Saharawi populations, including bombing them with napalm and white phosphorus, which, in addition to the destruction it caused, drove a large part of the Saharawi population into a forced exodus to settle in Algerian territory, abandoning their property and goods. Moreover, for several decades Morocco has exploited the natural resources of Western Sahara for its own benefit (fishing, phosphates, intensive agriculture, oil exploration, etc.). And not for the benefit of and in consultation with the Saharawi people, as required by the application of the principle of self-determination of peoples and its corollary, the principle of permanent sovereignty over their natural resources.[49] As recently recognised by the General Court (GC) of the European Union (EU) in its Judgments of 29 September 2021, which will be cited below.

In the same sense, it has been denounced that the six fortified sand walls that Morocco has built in Western Sahara (they constitute the most extensive barrier in the world, with some 2,700 kilometres, 300 kilometres more than the Great Wall of China), and more specifically the more than three million mines scattered around these walls, constitute a violation of the international obligations that bind this State as occupying power. If one applies the same reasoning as the ICJ maintains in the aforementioned Construction of a Wall Advisory Opinion, such military actions by Morocco as occupying power in Western Sahara may have entailed confiscation of private property, forced displacement of persons, restrictions on the free movement of persons and on the development of traditional activities such as pastoralism…[50]

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[49] In this respect, the economic, social and work discrimination suffered in all areas by the Saharawis in the occupied territories at the hands of the Moroccan authorities has been denounced: "For example, Sahara Occidental Resource Watch maintains that there were 1600 Sahrawis employed in the phosphate industry in 1968, in what is now Western Sahara. Today, most of those workers have been replaced by Moroccan settlers. The industry, it is said, now employs only 200 Sahrawis, out of a total workforce of 1900. Sahrawi workers are said to suffer discrimination compared to their Moroccan colleagues. Also, very few Sahrawis are said to have been promoted since 1975; most are said to have been dismissed": COMMISSION STAFF WORKING DOCUMENT, *Accompanying the document Proposal for a Council decisión on the conclusion of an agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco on amending Protocols 1 and 4 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*, SWD(2018) 346 final, 11 juny 2018, at 25.

[50] As denounced by the Human Rights Committee, when assessing Morocco's compliance with art. 1 of the International Covenant on Civil and Political Human Rights, which includes the principle of self-determination: "the presence of the sand wall, also known as the "berm", which limits the freedom of movement of the people of Western Sahara given the very few crossing points that are open to civilians and the presence of landmines and other explosive remnants of war along the berm that endanger the lives and safety of the communities located in the vicinity (arts. 1, 6 and 12)": *Concluding Observations on the sixth*

More particularly, it must also be denounced that Morocco, through its internal legislation, has divided the territory of Western Sahara into three regions, as if they were three more regions of this state: a) Guelmim-Oued Nou, which includes almost all of Morocco's territory and a small portion of the northern interior of Western Sahara; b) Laâyoune-Sakia el Hamra, which includes the northern half of the territory and a piece of territory in southern Morocco; and c) Dakhla-Oued Ed-Dahab, which comprises the southern half of Western Sahara.[51] In this way, the Moroccan authorities seek to blur the internationally recognised frontiers of the Western Sahara, in accordance with the treaties concluded between Spain and France at the beginning of the 20th century specifically in 1900, 1904 and 1912 by which they agreed to delimit the borders of their colonies in North Africa. In short, it is a question of non-compliance with the principle of *uti possidetis iuris*, despite the fact that, as the ICJ has recognized, respect for this principle has been of fundamental importance in the decolonization processes that have been followed throughout Africa and also in other geographical areas.[52]

Moreover, it should be noted that this delimitation of regions into which the Western Sahara is divided also includes the so-called liberated territories, which are on the other side of the sand walls built by Morocco, and under the control of the Polisario Front. Moroccan legislation is thus intended to be applied with extraterritorial scope to territories over which the Moroccan authorities exercise no effective control. This is obviously in violation of international law, as such effective control is exercised by a national liberation movement, the Polisario Front. It is true that, as already mentioned, the so-called liberated territories have a very small population and very little economic activity. However, this does not mean that, from the point of view of international law,

periodic report of Morocco, CCPR/C/MAR/CO/6, 1 december 2016, par. 3. See G.N. Bachir, *supra* n. 1; J.A. González Vega and I. de la Rasilla y del Moral, "Líneas en la arena…: el muro marroquí sobre el Sáhara Occidental a la luz de la legalidad internacional", in R. Medina Martín and L. Soriano Díaz (eds.), *Activismo Académico en la Causa Saharaui. Nuevas perspectivas críticas en Derecho, Política y Arte* (Aconcagua Libros, Sevilla, 2015), 73-100, at 93-94.

51 As it is explained in a somewhat aseptic way in the COMMISSION STAFF WORKING DOCUMENT, *Implementation… 2021, supra* n. 38, at 7-8.

52 "… the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples": *Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Reports (1986), par. 25. More recently in its Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* the ICJ concludes that "Both State practice and opinio juris at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination. No example has been brought to the attention of the Court in which, following the adoption of resolution 1514 (XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule. States have consistently emphasized that respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law. The Court considers that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination": ICJ Reports (2019), par. 160.

international responsibility for what is happening in these territories corresponds to the Polisario Front, as a national liberation movement, within the framework of the international subjectivity — limited and generally transitory — that characterises these very particular subjects of the international order, as will be emphasised in section D).

(5) The legal consequences of infringement of these regulations

The non-compliance by Morocco, as occupying power of Western Sahara, with this whole set of primary rules, either those that form part of international humanitarian law or those of the other three normative areas mentioned, leads to a number of legal consequences that derive from the wrongful act committed by the North African state, and which are regulated by the secondary and tertiary rules of the international legal order.[53] Briefly, Western Sahara constitutes a people (in the geographical or territorial sense delimited by the principle of *uti possidetis iuris* in its application to the colonial fact), which has not yet exercised the principle of self-determination, because of the invasion by force of its territory by a foreign power, Morocco. Morocco is therefore the occupying power of this former Spanish colony, over which it exercises effective control of some 70% of its territory, and which it intends to annex illegally, by the use of force, in contravention of international law. *For the past 47 years, Morocco has been internationally responsible for violating the structural principles of the prohibition of the use or threat of force and the self-determination of peoples, as well as committing serious and massive violations of human rights and international humanitarian law in relation to the Sahrawi people.*

In accordance with international jurisprudence, the provisions of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC in 2001, can be considered as an expression of the existing international law in force.[54] Under these provisions, *Morocco must, first of all, cease those violations of international law*; therefore *it must withdraw from Western Sahara*.[55] This would make possible the international administration of the territory by the UN and the organisation of a

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53 J. Ferrer Lloret, *Las consecuencias del hecho ilícito internacional* (Publicaciones de la Universidad de Alicante, Alicante, 1998), at 14 and ff.

54 Report of the Secretary-General, *Responsibility of States for internationally wrongful acts. Compilation of decisions of international courts, tribunals and other bodies*, A/77/74, of 29 April 2022; and prior to that their Reports A/74/83; A/62/62 and A/62/62/Add.1; A/65/76; A/68/72; and A/71/80 and A/71/80/Add.1.

55 In *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), at 16, the ICJ finds that "…, the continued presence of South Africa in Namibia being ilegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory". Moreover, all States are obliged to recognise that South Africa's presence in Namibia is illegal: par. 133. In this regard, in its *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 Advisory Opinion*, of 25 February 2019, the ICJ concluded that the United Kingdom is internationally responsible for a continuing wrongful act by preventing the decolonisation of Mauritius from being carried out in accordance with the principle of self-determination of peoples. It has maintained the administration of the Chagos Archipelago and separated this territory from Mauritius in contravention of the right to territorial integrity of a Non-Self-Governing Territory as a corollary of the right to self-determination. The ICJ thus offers the following response to the GA: "In response to Question (b) of the General Assembly, relating to the consequences under international law that arise from the continued administration by the United Kingdom of the Chagos Archipelago, the Court concludes that the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as

referendum on self-determination, with reference to the UN Peace Plan of the early 1990s, which will be referred to below. Furthermore, *Morocco must make full reparation for all the damage caused during these 47 years of illegal occupation of Western Sahara, through restitution, compensation and satisfaction.*[56]

Therefore, although it may be considered highly unlikely from a political point of view that Morocco will fulfil its obligations to cease and repair the violations of international law for which it is responsible in relation to Western Sahara, it cannot be denied that such obligations are imposed by current international law. As it is interpreted and applied by international jurisprudence and is also recognised in the framework of the aforementioned ILC work. In this regard, it may be recalled that in the mid-1990s it also seemed highly unlikely that Indonesia, which had been occupying East Timor since 1975, would allow a referendum on self-determination to be held in this former Portuguese colony and accept the withdrawal of its troops from the territory. But it did happen, as will be emphasised again later; a referendum on self-determination was held in 1999 and Indonesian troops withdrew from East Timor. This allowed international administration by UNTAET and the constitution of a new state, Timor Leste, a UN member since 2002.[57]

Furthermore, in view of the fact that Morocco is responsible for the serious violation of peremptory norms (*jus cogens*), according to art. 41 of the aforementioned 2001 Draft, the following "obligations of solidarity" must also be added as consequences arising from the wrongful acts committed by this North African state:[58] a) *all states must cooperate to bring to an end to Morocco's serious breaches of peremptory norms by lawful means*;

possible, and that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius": ICJ Reports (2019), par. 182.

56 Not long ago, the ICJ applied the provisions of the 2001 Draft concerning reparation for the wrongful act as an expression of existing customary international law. In a case in which Uganda had been held internationally responsible for having violated, among other rules, *those binding it as occupying power over part of the territory of the Democratic Republic of Congo, specifically Ituri*. In its Judgment of 9 February 2022, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Reparations)*, the ICJ decides the reparation for the violations of international law attributable to Uganda established in its previous Judgment in this same case of 19 December 2005. In its 2005 Judgment, the ICJ found that, by the actions carried out on the territory of the former State by its armed forces, Uganda was responsible for violating the principles of the prohibition of the use of force and non-intervention, as well as for violations of human rights and international humanitarian law, and for having illegally exploited the natural resources of that same State. According to the 2022 Judgment, the latter State must compensate the DRC with a total of: a) 225 million dollars for damage to persons; b) 40 million dollars for damage to property; and c) 60 million dollars for damage to the environment and natural resources. To be paid in 5 annual instalments of $65 million each, starting on 1 September 2022, and with an annual interest of 6 per cent, in the event that these deadlines are not met. Among other issues, it is worth noting that in the case of violations committed by Uganda as occupying power of Ituri, the ICJ places the burden of proof on Uganda, in the sense that this State has to prove that the damage caused in that region of the Democratic Republic of Congo during the time it was under occupation by a foreign power was not Uganda's responsibility: paras. 78-79 and 118 in which it concludes: "As regards the damage that occurred in the district of Ituri, which was under Ugandan occupation…, it is for Uganda to establish that a particular injury suffered by the DRC in Ituri was not caused by its failure to meet its obligations as an occupying Power".

57 See J. Ferrer Lloret, *La aplicación del principio de autodeterminación de los pueblos: Sahara Occidental y Timor Oriental* (Servicio de Publicaciones de la Universidad de Alicante, Alicante, 2002), at 140 and ff.

58 The terminology proposed nearly 40 years ago by the then ILC Rapporteur is used, W. Riphagen, "Fourth report on the content, forms and degrees of international responsibility (Part 2 of the draft articles)", A/CN.4/366 and Add.1 & Add.1/Corr.1, par. 62: "A legal consequence of an international crime is that it creates duties of solidarity for and between all other States".

among other actions, through the application of retorsion measures, decentralised countermeasures or even sanctions agreed under Chapter VII of the UN Charter; b) *all states have an obligation not to recognise Morocco's annexation of the Sahara as lawful*; and c) *all states are forbidden to give aid or assistance to Morocco to maintain the armed occupation of Western Sahara*; e.g. military or financial aid to equip the army deployed in the former Spanish colony, or for the construction and maintenance of the fortified sand walls mentioned above.[59]

However, the study of international practice shows that the main international organisations concerned, such as the UN and the European Union with the exception of the African Union [60], and a good number of states including major Western powers such as the United States and France, as well as Spain as the former administering power have not been concerned over the past 47 years to enforce

[59] The ICJ, in its above-mentioned *Construction of a Wall Advisory Opinion*, in relation to the consequences of Israel's breach of its obligations as occupying power in the Palestinian territories by building a wall in those territories, maintains that: "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. 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 construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention": par. 159. On the consequences of serious breaches of peremptory norms under the 2001 Draft ILC, see J. Ferrer Lloret, "El Derecho de la responsabilidad internacional ante la celebración de una conferencia codificadora", LVI *Revista Española de Derecho Internacional* (2004), 705-739, at 716-729. It has already been mentioned that at its 2022 session the ILC has adopted on second reading the "Draft conclusions on identification and legal consequences of peremptory norms of general international law *(jus cogens)*". Conclusion 19 reiterates the "obligations of solidarity" that the codifying body proposed with art. 41 of the 2001 Draft, and states that *are an expression of current customary international law*. On the one hand, "Although at the time of the adoption of its articles on responsibility of States for internationally wrongful acts, the Commission expressed some doubt as to whether the obligation expressed in paragraph 1 of article 41 constituted customary international law, the obligation to cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (jus cogens) is now recognized under international law": par. 2 of the comments to this draft conclusion. On the other hand, "Already in 2001, the Commission had recognized that the duties of non-recognition and non-assistance were part of customary international law": par. 13. More specifically, with regard to the obligation to cooperate to bring to an end, by lawful means, any serious breach of a peremptory norm, the ILC explains, on the basis of the ICJ's advisory opinions of 2004 and 2019, that such cooperation may be carried out both within the framework of institutional cooperation mechanisms, such as the UN and especially its SC; and also through non-institutional cooperation, by a group of States acting together to bring to an end the breach of a peremptory norm, and also by any State acting individually: par. 10: "Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)".

[60] One needs only to recall that in 1982, the then Organisation of African Unity admitted the Saharan Arab Democratic Republic (SARD) as a new member of this organisation, which led to Morocco's withdrawal from this international organisation in 1984. The SARD has since then maintained its status as a member state; and since 2002 in the successor organisation, the African Union. Despite political pressure from Morocco, which has been conducting a very active campaign of international diplomacy to make SARD's supporters in the African Union a minority. Although Morocco joined the African Union in 2017, it has not yet achieved the latter goal: see the list of Member States in the African Union.

Morocco's international responsibility for the breach of its international obligations as occupying power of Western Sahara.

(C) INSTITUTIONAL AND RELATIONAL PRACTICE

(1) United Nations

Although a comprehensive study of the practice of the principal organs of the United Nations (UN) is not possible within the framework of this contribution, the conclusion that can be drawn is quite clear. For the past 47 years, both the Security Council (SC) and the General Assembly (GA) have not bothered to demand that Morocco complies with the international norms that bind it as the occupying power of Western Sahara, in particular those referring to international humanitarian law. Above all, it should be noted that the SC has not applied against Morocco the sanctions provided for in Articles 41 and 42 of the Charter, as a response to the flagrant breaches of international law by the North African state in the former Spanish colony.

It is true that in some of the resolutions passed after the invasion of Western Sahara in the late 1970s and early 1980s, the GA describes Morocco as an occupying power and demands its withdrawal from the territory. In addition to recognising the Polisario Front as the legitimate representative of the Saharawi people and the legitimacy of its armed struggle in order to exercise the right to self-determination, the GA also recognises the Saharawi people's right to self-determination.[61] But in recent years, there has been no agreement in the GA to strongly condemn Morocco's invasion of Western Sahara, nor to demand Morocco's withdrawal from the territory and compliance with international humanitarian law, always as the occupying power of Western Sahara. For example, the GA is completely silent on the transfer of several hundred thousand Moroccan settlers to Western Sahara. In this regard, in the Resolution 76/89 of 9 December 2021, the UN plenary body merely reiterates that the principle of self-determination must be made effective in Western Sahara, through negotiations between the parties it does not even dare to mention the Polisario Front which would make it possible to achieve a "just, lasting and mutually acceptable political solution, which will provide for the self determination of the people of Western Sahara and commends the efforts undertaken by the Secretary-General and his Personal Envoy for Western Sahara in this respect".[62]

For its part, in its first Resolutions concerning the armed invasion of Western Sahara by Morocco and Mauritania at the end of 1975, the UN's main body for the maintenance of international peace and security took an indolent and somewhat ambiguous stance, with documents full of good intentions and very diplomatic language.[63] As an exception,

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61 Resolution 34/37 of 21 November 1979, by which the GA "Deeply deplores the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco and the extensión of that occupation to the territory recently evacuated by Mauritania"; and "Urgess Morocco to join in the peace process and to terminate the occupation of the territory of western Sahara". The following GA resolutions will underline the right to self-determination of the Saharawi people: Resolutions 35/19, 36/46, 37/28, 38/40, 39/40, 40/50, 41/16, 42/78 and 43/33.

62 Text that is repeated in the last Resolution: 77/133, 12 December 2022.

63 These are Resolutions 377 (1975) y 379 (1975)

in Resolution 380 of 6 November 1975, the SC " calls upon" Morocco to immediately withdraw all participants in the "Green March" from the territory of Western Sahara. This last request has not been heeded over the past 47 years and has not been reiterated by the SC. The following Resolutions adopted by the SC date back to the late 1980s and early 1990s, approving the Peace Plan for the holding of a referendum on self-determination in Western Sahara and the deployment of MINURSO.[64] Resolutions whose content, to date, no less than 30 years after their adoption, has remained an empty promise, without the SC being concerned about Morocco's compliance with its obligations as occupying power of the Western Sahara, in particular those deriving from international humanitarian law and human rights norms.

In the same sense, pressure from the Moroccan government has led France and also Spain to prevent consensus in the SC on extending MINURSO's competences. In particular, to monitor human rights compliance in the Western Sahara by the occupying power, Morocco and also by the Polisario Front in the so-called liberated territories. Although MINURSO's work would be restricted to producing an annual report on such compliance, which would be submitted to the SC.[65]

In particular, the SC has not condemned the transfer of settlers to Western Sahara by the Moroccan authorities, nor has it adopted any sanctioning measures in this regard. Moreover, the SC has even endorsed that all Moroccan settlers residing in the territory may participate in the referendum on self-determination.[66]

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64 Resolutions 621 of 20 September 1988, 658 of 27 June 1990 and 690 of 29 April 1991.

65 See J.A. González Vega, "Pasado…", *supra* n. 46, at 270-272; J.A. Yturriaga Barberán, *supra* n. 46, at 359-360.

66 Everything indicates that in drawing up the provisional census of voters in the referendum to be held in Western Sahara (made public at the beginning of 2000, with a total of 86,386 people, including the tens of thousands of Saharawis in the refugee camps in Tindouf), MINURSO does not include the settlers transferred by Morocco to the territory as possible voters. However, in the so-called Baker Plan II, proposed in 2003 by the Secretary General's personal envoy, James Baker, with the aim of unblocking the solution to the conflict in Western Sahara in view of the Moroccan authorities' rejection of the provisional census, it is accepted that Moroccan settlers should participate in the referendum on self-determination, under certain conditions. In fact, the Baker Plan II envisages, firstly, a transitional period of no less than 4 and no more than 5 years in which the "Governmental Authority", elected by the voters registered in the provisional census drawn up by MINURSO (this authority would, therefore, in all probability, be made up of representatives of the Polisario Front), will be in charge of the government and administration of the territory. Morocco will be responsible for foreign relations and national security and external defence of the territory, among other competences. At the end of this transitional period, a referendum on self-determination shall be held in which the persons who voted in the elections to elect the said Authority, and also all persons whose "continous residence in Western Sahara since 30 December 1999 is supported by testimony from at least three credible persons or credible documentary evidence", which obviously includes all Moroccan settlers, may participate: Report of the Secretary-General of 23 May 2003, S/2003/565. The SC supported the Baker Plan II, through its Resolution 1495 (2003), despite the fact that the referendum could involve not only the native population of the territory, but also the population brought in by the occupying power of the territory itself, in contravention of the principle of self-determination of peoples and, more specifically, of art. 49 of the Fourth Geneva Convention of 1949. The Baker Plan II was accepted, with some reservations, by the Polisario Front; but it was rejected by Morocco, whose authorities, as has already been pointed out, have for the last two decades opposed the holding of any self-determination referendum and defended their proposal for autonomy for Western Sahara, always as a territory that is part of Morocco: J. Ferrer Lloret, "El conflicto del Sahara Occidental durante 2003: la Resolución 1495 (2003) del Consejo de Seguridad de las Naciones Unidas", LV *Revista Española de Derecho Internacional* (2003), 1083-1089.

It should also be noted that in several of its Resolutions the SC calls on the Polisario Front to release the Moroccan prisoners of war, "in compliance with international humanitarian law". This is, however, an acknowledgment by the SC that the rules of international humanitarian law are applicable in the Western Sahara conflict. For example, in paragraph 4 of Resolution 1495 (2003), the SC "Reaffirms its call upon the Polisario Front to release without further delay all remaining prisoners of war in compliance with international humanitarian law, and its call upon Morocco and the Polisario Front to continue to cooperate with the International Committee of the Red Cross to resolve the fate of persons who are unaccounted for since the beginning of the conflict". As mentioned above, in 2005 the Polisario Front released the last Moroccan prisoners of war held by them. Despite the fact that Morocco still does not clarify the fate of hundreds of disappeared Saharawis. But the SC has not concerned itself with demanding Morocco's compliance with international humanitarian law.[67]

The latest Resolution adopted by the SC on Western Sahara, Resolution 2654 of 27 October 2022, in addition to extending the deployment of a diminished (with a total of 238 personnel) and inoperative MINURSO (which is not even assigned the task of monitoring respect for human rights), limits itself to entrusting the solution of the conflict affecting the former Spanish colony to negotiations between the parties, "with a view to achieving a just, lasting, and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations".[68] Despite the excessively diplomatic and somewhat indeterminate language used in this Resolution, it can only be interpreted that the SC affirms that the solution to the conflict does not involve the annexation of the Sahara by Morocco, in contravention of the principle prohibiting the use of force and the principle of the self-determination of peoples. But nothing is said or done by the SC about the breaches of international humanitarian and human rights law attributable to Morocco as occupying power in Western Sahara.

Thus, over the past decades, this position of the SC, formally committed to respecting the principles of the UN Charter, has not been accompanied by the application of any sanctioning measures against Morocco under Chapter VII of the Charter, despite flagrant breaches of its obligations as occupying power of Western Sahara.[69] The SC's

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67 It can also be brought up that in the Resolutions of the GA made "Calls upon the parties to cooperate with the International Committee of the Red Cross, and calls upon them to abide by their obligations under international humanitarian law" but without any further specification of the scope of these obligations: Resolution 76/89 of 9 December 2021, par. 5.

68 This Resolution is approved by 13 votes in favour, and two abstentions, from Kenya and the Russian Federation. Kenya's abstention is due, according to its representative, to the fact that this resolution does not substantively reflect the Security Council's commitment as reflected in the seventh preambular paragraph of resolution 2602 (2021) and in previous resolutions to "provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations, and noting the role and responsibilities of the parties in this respect": S/PV.9168, at 3.

69 Ch. Chinkin, "Western Sahara and the UN Second Decade of Decolonisation", in K. Arts and P. Pinto Leite, *supra* n. 6, 329-344, at 334: "…, despite the involvement of so many UN bodies, there has in fact been a light institutional footprint. The UN, and in particular the Security Council adopted the 1991

inaction, allegedly justified by the need for the parties to negotiate a solution to the conflict, means having a complacent or at least omissive attitude towards the breaches of international law committed by Morocco, the occupying power of Western Sahara, for no less than 47 years. *Mutatis mutandis,* with regard to the Western Sahara conflict, one can subscribe to the legal assessment made not long ago of the UN's action in the Palestinian conflict:[70]

> "here is more than enough in the UN record to demonstrate that Israel's occupation has become illegal over time for being in violation of three *jus cogens* norms of international law: the prohibition on the acquisition of territory through force, the obligation to respect the right of peoples to self-determination and the obligation to refrain from imposing regimes of alien subjugation, domination and exploitation inimical to humankind, including racial discrimination. As an internationally wrongful act, the international law of state responsibility does not allow for negotiation as the means of ending Israel's occupation, but rather requires that it be ended forthwith and unconditionally. This is affirmed by UN practice in other cases of illegal occupation. What is more, by making the end of the occupation contingent on the chimera of negotiation between what the UN record demonstrates is a bad faith and immensely more powerful occupant and an enfeebled population held captive by it, the UN has in effect undermined its own position. It has thereby made the realization of Palestinian legal rights repeatedly affirmed by it impossible to achieve while facilitating the consolidation of the illegal actions of the occupying power that operate to violate those rights under a cloak of legitimacy provided by the Organization". [71]

Settlement Plan, it did not do so under UN Charter Chapter VII, it did not designate the situation as a threat to international peace and security and established no enforcement mechanism. It did not impose any duty of non-recognition and made no mention of Morocco's obligations under international humanitarian law"; N. Navarro Batista, "El conflicto del Sahára Occidental: la libre determinación en retirada", in C. Villán Durán and C. Faleh Pérez (eds.), *Paz, migraciones y libre determinación de los pueblos* (Asociación Española para el Derecho Internacional de los Derechos Humanos, España, 2012), 84-118, at 104-106 and 116-117.

70 Although the conflicts in Palestine and Western Sahara allow for many comparisons, there is at least one fundamental difference between the two. At present, Palestine's existence as an independent state is not conditional on the holding of any referendum on self-determination. It is sufficient to note that in 2012 Palestine was recognised as a non-member observer state by the GA. In the case of Western Sahara, according to the doctrine maintained by the UN in accordance with the aforementioned resolutions 1514 (XV), 1541 (XV) and 2625 (XXV), a referendum on self-determination must be held in which the Sahrawi population can decide between two alternatives: the creation of a new independent state or integration into an existing state. Just as a referendum on self-determination was held in East Timor in 1999, as will be emphasised. As noted above, it is highly unlikely that the Sahrawi population, in an internationally supervised referendum with due guarantees, would vote overwhelmingly in favour of the integration of Western Sahara into Morocco. But it must be recognised that the exercise of the principle of self-determination by the Saharawi people is still pending the organisation of such a referendum, which could result in either of the two options mentioned. As it will be stressed in section (D), in relation to the debate on the recognition of the Saharan Arab Democratic Republic (SADR).

71 A. Imseis, "Negotiating the Illegal: on the United Nations and the Illegal Occupation of Palestine, 1967-2020", 31 *The European Journal of International Law* (2020), 1055-1085, at 1085 [doi:10.1093/ejil/chaa055]. Recently, it has been argued that in the occupied territories of Palestine, Israel is maintaining "an institutionalized regime of systematic racial oppression and discrimination, established with the intent to maintain the domination of one racial group over another"; so that "whith the eyes of the international community wide open, Israel has imposed upon Palestine an apartheid reality in a post-apartheid world": *Report of the Special Rapporteur on the situation of Human Rights in the Palestinian territories occupied since 1967*, A/HRC/49/87, 21 March 2022, at 18.

It is extremely questionable that the two main political organs of the UN, the GA and the SC, maintain this position, which ultimately favours or at least *de facto* accepts Morocco's annexationist theses, in contravention of the very principles of the UN Charter. This is all done in a somewhat disguised or concealed manner under the appearance of a certain legal indeterminacy, which leaves aside the analysis of Morocco's legal status as occupying power in Western Sahara and the legal consequences that derive from it.[72]

This inaction, under the cloak of the alleged legal indeterminacy of the norms to be applied, can also be seen in other cases, such as East Timor. Here, too, for nearly 25 years, the UN maintained a tolerant or indolent attitude towards the armed occupation of this former Portuguese colony by Indonesia in 1975, at a time very close to the occupation of Western Sahara by Morocco. From a legal institutional point of view, until 1999, the actions of the main UN bodies in these two cases show many parallels: in general, the ineffective actions of these bodies focused on the application of the principle of self-determination of peoples and the respect for human rights, leaving aside any concern for compliance with international humanitarian law, in the context of the armed occupation by Morocco and Indonesia of Western Sahara and East Timor, respectively.[73]

But as is well known, in 1999, after an agreement was reached between Portugal and Indonesia, the referendum on self-determination was held in East Timor, supervised by UNAMET, with a result in favour of independence. Afterwards, and despite the terrible acts of violence committed by pro-Indonesian militias, Indonesian troops were withdrawn from this territory, which became internationally administered by the UN through UNTAET. Despite all the difficulties that arose after the self-determination referendum was held, a new independent state was created, Timor Leste, a member of the UN since 2002. All this confirms, without any doubt, that *Indonesia has been the occupying power of East Timor for almost a quarter of a century, in flagrant violation of the aforementioned structural principles of the prohibition of the use of force and the self-determination of peoples, in addition to being responsible for serious and massive violations of*

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[72] To some extent, this legal indeterminacy is also apparent in the 2002 Report of the Under-Secretary-General for Legal Affairs, Legal Adviser Hans Corell, concerning the legality of Morocco's tendering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara. This report concludes that Western Sahara is a Non-Self-Governing Territory. Therefore, the exploitation of its natural resources can only be carried out by the administering Powers and by third States, if such exploitation is for the benefit of the people of that Non-Self-Governing Territory and is carried out on their behalf or in consultation with their representatives. With regard to Morocco, its status as an administering power is denied, although it is acknowledged that, following the withdrawal of Mauritania in 1979, "Morocco has administered the Territory of Western Sahara alone" [*sic*]. At no point does it state that it is the occupying power of Western Sahara, having invaded this territory with its army, nor does it explain what its obligations are as occupying power, in particular as regards the application of international humanitarian law: S/2002/161 of 12 February 2002, at 2. As explained above, a harmonic and sistematic interpretation and application of the four areas of norms mentioned in B) must be advocated for Western Sahara. Therefore, as already reiterated, the status of occupying power and the resulting application of international humanitarian law should not prevent the principle of self-determination of peoples, and its corollary the principle of permanent sovereignty of the Saharawi people over natural resources, from being applied at the same time. The consequence of the latter is that the exploitation of Western Sahara's natural resources can only be carried out in consultation with and with the prior consent of the Saharawi people, represented by the Polisario Front. This has been defended by the General Court (GC) in its judgments of September 2021, which are cited below.

[73] A. Gross, *supra* n. 3, at 117-123.

human rights and humanitarian law in relation to the Timorese population. Just as Morocco is the occupying power of Western Sahara for the past 47 years, and is also responsible for these same violations of international law. [74]

(2) European Union

Over the past decades, both the Council and the Commission have tried, unsuccessfully, to legally justify the foreign policy that the European Union (EU) has been pursuing in relation to the Western Sahara conflict. A foreign policy based essentially on formal support for the UN peace plan and non-recognition of Morocco's annexation of Western Sahara. At the same time, however, the EU *de facto* helps Morocco to consolidate its annexation of Western Sahara, primarily by concluding trade and fisheries agreements with the North African state that entail the exploitation of the natural resources of the territory it illegally occupies fisheries, intensive agriculture, phosphates...-.[75] Certainly, the EU has not been concerned to demand that Morocco fulfil its international obligations as occupying power of Western Sahara. Without prejudice to the European Commission's humanitarian aid to the refugee camps in Tindouf and some of the European Parliament's initiatives in the field of human rights protection, especially for the Sahrawis living in the Moroccan-occupied territories.[76]

Over the last five years, this legal and political contradiction that characterises the EU's foreign policy on Western Sahara has become evident through the decisions of the General Court (GC) and the Court of Justice (CJ). Although Morocco's legal status as occupying power in Western Sahara has largely gone unnoticed in the "saga" of jurisprudence that these two courts have been involved in over the past few years.[77] It is true that the EU courts have a jurisdiction that is limited by the system of appeals provided for in the founding treaties, and it is thus not their task to offer a legal assessment of all the issues that affect the Western Sahara conflict. Even so, it is worth noting the caution, or rather the erroneous legal classification, with which they refer to Morocco in their jurisprudence on Western Sahara.

In effect, although this is not the place for an analysis of all this jurisprudence [78], it should be noted that the EU courts avoid referring to Morocco as the occupying

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74 For a comparative study of the Western Sahara and East Timor cases, see J. Ferrer Lloret, *La aplicación del principio de autodeterminación de los pueblos…*, *supra* n. 57.

75 As has been denounced by the doctrine; see *per omnium*, N. Fernández Sola, "El reconocimiento de Estados por la Unión Europea. Análisis de la discrecionalidad del no-reconocimiento", *Cursos de Derecho Internacional de Vitoria-Gasteiz* (2019), 331-369, at 350-357.

76 J.D. Torrejón Rodríguez, *La Unión Europea y la cuestión del Sáhara Occidental. La posición del Parlamento Europeo* (Editorial Reus, Madrid, 2014), at 191 and ff.

77 In the expression used by J.A. González Vega, "¿Retorno a la historia? El Tribunal General de la UE ante el Acuerdo de Pesca UE-Marruecos de 2019. Consideraciones en torno a la Sentencia TG (Sala 9ª) de 29 de septiembre de 2021, *Frente Polisario C. Consejo de la Unión Europea*, asuntos acumulados T-344/19 y T-356/19", 38 *Anuario Español de Derecho Internacional* (2022), 9-61, at 13-14 (DOI: https://doi.org/10.15581/010.38.9-61).

78 Namely, it is the GC Judgment, 10 december 2015, *Front Polisario v. Council*, T-512/12, ECLI:EU:T:2015:953; CJ Judgment, 21 december 2016, *Council v. Front Polisario*, C-104/16 P, ECLI:EU:T:2016:973; CJ Judgment, 27 february 2018, C-266/16, *Sahara Occidental Campaign UK v. Commissioners for Her Majesty's Revenue and Customs*, ECLI:EU:C:2018:118; as well as the two judgments of the GC of September 2021 which will be cited below. For an overall commentary on this jurisprudence, see C. Ruiz Miguel, "El Derecho a la Au-

power of Western Sahara.[79] And, above all, they leave out any consideration of the legal consequences of that legal status which is not strictly necessary to respond to the appeals lodged in each of the cases concerning the former Spanish colony. In particular, they omit any legal assessment of Morocco's international responsibility as the occupying power of Western Sahara. No reference is made to Morocco's compliance with its obligations to cease and repair the continuing wrongful act for which it has been responsible for the past 47 years. Nor is there any mention of "obligations of solidarity" that arise in respect of a serious breach of a peremptory norm of general international law: the obligations to cooperate to bring to an end to such breaches, not recognition, and not aid or assistance.[80]

These judgments correctly apply important normative areas of international law, such as the principle of self-determination of peoples and the law of treaties. But it would also have been highly desirable, when assessing the conformity of EU treaty practice with international law, to have provided an analysis of Morocco's legal status as occupying power in Western Sahara, in particular with regard to international humanitarian law, an analysis which is conspicuous by its absence.[81]

It is positive that the Luxembourg courts hold that, under current international law, Western Sahara is a non-self-governing territory that is not part of Morocco; and that the EU cannot conclude international treaties that apply to Western Sahara without the consent of the people of Western Sahara, represented by the Polisario Front. It should be stressed that according to the latest judgments issued at the end of September 2021 by the GC, the Polisario Front has standing to bring an action for annulment, as it is considered to be directly and individually affected by the conclusion of international agreements between the EU and Morocco that are intended to be applicable to Western Sahara.[82]

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todeterminación en serio: el Sahara Occidental, piedra de toque de la Unión Europea como 'comunidad de derecho' y como Actor Internacional", 38 *Anuario Español de Derecho Internacional* (2022), 63-107 (DOI: https://doi.org/10.15581/010.38.63-107).

79 Cf. J.A. González Vega, "¿Retorno a la historia? …", *supra* n. 77, at 22-24; B. Kahombo, "Western Sahara cases before the European Court", 18 *Chinese Journal of International Law* (2019, at 10-13 and 35-42; P. Wrange, "Self-Determination, Occupation…", *supra* n. 33, at 19-26.

80 As already made clear following the aforementioned CJ Judgment of 21 December 2016, *Council v. Front Polisario*, C-104/16 P: Ferrer Lloret, "El conflicto del Sahara Occidental ante los Tribunales de la Unión Europea", 42 *Revista General de Derecho Europeo* (2017), 15-64, at 47-50; E. Kassoti, "The CJEU's Judgments in Joined Cases T-344/19 and in Case T-272/19-Front Polisario v. Council", *The Long Road Home*, 6 October 2021, 1-4, at 4: "All in all, the GC here tried to strike a balance between ensurring EU compliance with international law and avoiding pronouncing on the 'hot potato' of Morocco's occupation of Western Sahara. The result is a mixed bag. While the judgments are certainly a step towards the right direction, the Court could have been bolder in ensuring that the EU institutions do not have any room for disregarding international law".

81 M. Longobardo, "The Occupation of Maritime…", *supra* n. 1, at 360-361.

82 GC Judgments of 29 September 2021, *Front Polisario v. Council*, T-344/19 y T-356/19, ECLI:EU:T:2021:640; and *Front Polisario v. Council*, T-279/19, ECLI:EU:T:2021:639. Both judgments have been the subject of appeals lodged by the European Commission and the Council, respectively, before the CJ. In these appeals, among other grounds, it is contested that the Polisario Front is directly and individually affected by the agreements concluded between the EU and Morocco applicable to Western Sahara, and, thus, can bring an action for annulment against the decision to conclude such agreements, as the GC has held in its aforementioned judgments: C-778/21 P y C-798 P (fisheries agreement), and C-779/21 P and 799/21 P (trade agreement).

Nevertheless, it should be stressed that the GC and the CJ should have been clearer, more explicit and more comprehensive in their legal assessments of the Western Sahara conflict. Above all, as regards the central issue: *Western Sahara is not part of Morocco, because Morocco has illegally occupied it since the end of 1975, in violation of the principle of the prohibition of use or threat of force and the principle of the self-determination of peoples*. In fact, the excessive prudence with which the Luxembourg courts rule, could lead anyone who reads this jurisprudence without any knowledge of the Western Sahara conflict, to wonder why the EU is concluding trade and fisheries agreements with Morocco that apply to Western Sahara. It would certainly not be out of place for this jurisprudence to recognise in no uncertain terms that Morocco is the occupying power in Western Sahara.[83] As the CJ has clearly stated in relation to the Israeli-occupied territories in Palestine and in the Golan Heights.[84]

In this regard, it has been said, in relation to the rules on international humanitarian law that Morocco should apply to Western Sahara, and in particular art. 55 of the 1907 Hague Regulations,[85] that "the difference with the legal regime of non-self governing territories is that consultation or consent of the people of the occupied territory prior

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83 In the last of the Luxembourg judgments concerning the Western Sahara conflict, the GC states the following facts: "On 14 April 1976, the Kingdom of Morocco concluded a treaty with the Islamic Republic of Mauritania on the partition of the territory of Western Sahara and annexed the part of that territory that had been allocated to it by that treaty. 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. The Kingdom of Morocco took control of the territory evacuated by Mauritanian forces and proceeded to annex it": GC Judgement of 29 September 2021, *Front Polisario v. Council*, T-344/19 y T-356/19, ECLI:EU: T:2021:640, par. 15. Throughout the Judgment, the GC always refers to Morocco "controlling" the greater part of Western Sahara, without any other legal assessment: par. 20 and 118; in the first one we can read that "to date, despite the exchanges and consultations organised under the auspices of the UN, the parties have not reached a settlement on the situation in Western Sahara. The Kingdom of Morocco controls the greater part of the territory of Western Sahara, while the Front Polisario controls the other part, the two areas being separated by a wall of sand built and guarded by the Moroccan army. A significant number of refugees from that territory still live in camps administered by the Front Polisario on Algerian territory".

84 CJ Judgment, 12 november 2019, *Organisation juive européenne, Ministre de l'Économie et des Finances*, C-363/18, ECLI:EU:C:2019:954, par. 60, in which it concludes that, in accordance with EU legislation, "… foodstuffs originating in a territory occupied by the State of Israel must bear not only the indication of that territory but also, where those foodstuffs come from a locality or a group of localities constituting an Israeli settlement within that territory, the indication of that provenance". Furthemore, it states that "… the settlements established in some of the territories occupied by the State of Israel are characterised by the fact that they give concrete expression to a policy of population transfer conducted by that State outside its territory, in violation of the rules of general international humanitarian law, as codified in the sixth paragraph of Article 49 of the Convention relative to the Protection of Civilian Persons in Time of War, signed in Geneva on 12 August 1949 (*United Nations Treaty Series*, vol. 75, No 973, p. 287), as noted by the International CJ, with respect to the Occupied Palestinian Territory, in its Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ Reports 2004, p. 136, paragraph 120). Moreover, that policy has been repeatedly condemned by the United Nations Security Council, as the Advocate General noted in points 53 and 54 of his Opinion, and by the European Union itself. In that context, it should be underlined that, in accordance with Article 3(5) TEU, the European Union is to contribute to the strict observance of international law, including the principles of the United Nations Charter": par. 48.

85 "The occupying State shall only be regarded as administrator and usufructuary of the public buildings, real property, forests and agricultural works belonging to the hostile State, and situated in the occupied country. It must protect the capital of these properties, and administer it according to the rules of usufruct".

to the conclusión of agreements by the occupying power is not required, even though the said agreements must be concluded for the benefit of that people".[86] But, as already emphasised, a harmonic and systematic interpretation and application of the four areas of norms mentioned in section B) to the Western Sahara conflict should be advocated. Thus, *Morocco is obliged to comply with its obligations under international humanitarian law, as well as those deriving from the principle of self-determination of peoples and its corollary, the principle of permanent sovereignty over its natural resources, principles which the Saharawi people are entitled to, as recognised by the GC*. It can therefore be argued that, in compliance with both areas of law, the conclusion of international agreements by the EU which are intended to be applied to Western Sahara, under military occupation by Morocco, can only take place with the consent of the Saharawi people.

The GC could have reached the same conclusion, also taking into account the obligations of international humanitarian law that bind Morocco as the occupying power of Western Sahara. These obligations must be interpreted and applied in a harmonic and sistemic manner with other areas of international law in force, such as the principle of self-determination of peoples. As already argued above in B), in the Law of Occupation the above-mentioned four areas of rules come together, overlap, complement each other; and must be interpreted to the Western Sahara conflict in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts.[87]

In the same sense, this jurisprudence should have explained clearly and unambiguously that the people of Western Sahara do not ecompasses the hundreds of thousands of settlers that Morocco, the occupying power, has transferred to a territory that does not belong to it. Settlers whom the Council and the Commission consulted in an attempt to legitimise the conclusion of trade and fisheries agreements with Morocco. On this issue, in its aforementioned 2021 Judgments the GC reiterated, in a correct application of current international law, that the conclusion of such agreements must be in accordance with the principle of self-determination, the principle of the relative effect of treaties and the principle of free consent. Therefore, such agreements cannot be concluded without the consent of the representative of the people of Western Sahara, the Polisario Front. However, the GC can be criticised for the excessive prudence with which it offers a series

86 B. Kahombo, *supra* n. 79, par. 12.

87 As has already been said, "one might conclude that until a people can (again) exercise their right of external self-determination, the power in force has to let them exercise internal self-determination by taking part in the governance of the territory. If that is correct, the legal situation appears to be rather harmonious: two bodies of law (occupation and self-determination) may apply, and they now both exhort the controlling power to take into account the will of people": P. Wrange, "Self-Determination…", *supra* n. 33, at 23-24, and 19-26. Previously, it had already been held in general that "…, le droit du peuple occupé à disposer de lui-même doit être respecté et appliqué par la puissance occupante à la lumière de la *lex spécialis* du droit de l'occupation, c'est-à-dire, en respectant l'équilibre entre la nécessité militaire, et les droits du peuple occupé (droit à disposer de lui-même, à la souveraineté permanente sur les ressources naturelles, à l'exercise des droits de l'homme et au développement)" [the right of the occupied people to self-determination must be respected and applied by the occupying power in the light of the lex specialis of the law of occupation, i.e., by respecting the balance between military necessity and the rights of the occupied people (right to self-determination, to permanent sovereignty over natural resources, to the exercise of human rights and to development)]: see J. Cardona Llorens, "Le príncipe du droit des peuples à disposer d'eux-mêmes et l'occupation étrangère", in *Droit du Pouvoir, Pouvoir du Droit. Mélanges offerts à Jean Salmon* (Bruylant, Bruxelles, 2007), 855-873, at 868 and 863 and ff.

of explanations as to why the consultations carried out by the European External Action Service and the Commission with the population according to these two institutions, the "people concerned" who live in this former Spanish colony, are not sufficient for the EU to comply with the aforementioned principles in the conclusion of these agreements.[88] The GC merely points out that this population is not part of the people of Western Sahara. Without adding that, as is well known, they are settlers that Morocco has transferred to Western Sahara, a territory it has occupied militarily since the end of 1975, in flagrant breach of its obligations as occupying power under international humanitarian law.[89]

Despite this jurisprudence, in their legal assessments of the Western Sahara conflict, both the Council and the Commission continue to maintain a somewhat ambiguous stance towards Moroccan annexationist theses. Two recent documents illustrate this point. First, the 2021 Annual Report on Human Rights and Democracy offers the following legal assessment of the Western Sahara conflict:

> "Western Sahara is listed by the United Nations as a non-self-governing territory, whose status remains the object of a negotiation process conducted under the auspices of the UN. This dedicated UN-led process assists the relevant parties in achieving a just, lasting, and mutually acceptable political solution, based on compromise, in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations".[90]

It is objectionable that at no point is Morocco described as the occupying power of Western Sahara, nor is there a single mention of the Polisario Front as the national liberation movement representing the Sahrawi people.[91] Furthermore, the section of the Report immediately above entitled "The Kingdom of Morocco" also omits any reference to Morocco being the occupying power of Western Sahara and to the serious and massive breaches of human rights and international humanitarian law for which it has been responsible for the past 47 years. Again, if these two sections of the report are read by someone who is completely unfamiliar with what is happening in the Western Sahara conflict, the conclusion that can be drawn is that Morocco has nothing to do with

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88 GC Judgment of 29 September 2021, *Front Polisario v. Council*, T-344/19 y T-356/19, ECLI:EU:T:2021:640, par. 329: "Secondly, it may be inferred from this that the concept of 'people concerned' to which the institutions refer essentially encompasses the inhabitants who are currently present in the territory of Western Sahara, irrespective of whether or not they belong to the people of that territory, without prejudice to the 'consultation of the opinion of the Sahrawi people living abroad as refugees' which, according to the Commission, allowed 'the applicant to be included among the parties consulted'. Thus, that concept differs from that of the 'people of Western Sahara', on one hand, in that it can encompass all the local people who are affected, beneficially or adversely, by the application of the agreement at issue in that territory while, on the other hand, it does not possess the political import of the second concept which stems, inter alia, from that people's recognised right to self-determination…".

89 In this connection, when analysing Morocco's legal status as occupying power in Western Sahara, the Luxembourg courts could have referred to the aforementioned report by the European Parliament's Subcommittee on Human Rights, of P. Wrange, *Occupation…*, *supra* n. 3, which takes as its reference points three cases of militarily occupied territories: Palestine, Western Sahara and Crimea.

90 Eu Annual Report On Human Rights And Democracy In The World 2021 Country Updates, at 54.

91 The only mention of both is worded as follows: "After the escalation of tensions between Morocco and the Frente Polisario in mid-October 2020, the security situation across the Sahara Occidental remained fragile, with repeated low intensity incidents": at 54.

what is happening in this former Spanish colony, despite the fact that it has occupied it militarily for the past 47 years.

Second, this same 'policy' can be seen in another document recently made public by the European Commission, which, while defending "the European Union's position on the status of Western Sahara as a separate territory that is not part of Morocco", at the same time states that "large parts of the territory are currently administered by the Kingdom of Morocco". It then refers to the peace process being conducted within the UN, after stressing the humanitarian aid to the refugee camps in Tindouf and expressing some concern about the human rights situation in that territory "administered by the Kingdom of Morrocco".[92]

This document is prepared a few months after the abovementioned GC Judgments of September 2021. With the aim of demonstrating that the application of the agreements that allow Morocco to export to the EU agricultural products produced in Western Sahara (tomatoes and melons), and fishing in the waters adjacent to the Saharawi coast by EU Member States' vessels, is of great benefit to the population of this territory. But the EU ignores Morocco's flagrant breach of its obligations as occupying power in Western Sahara, having moved hundreds of thousands of settlers into the territory and expelled tens of thousands of Sahrawis from it, as discussed in the previous section. To justify these benefits, the EU is conducting a consultation process with a number of organisations present in Western Sahara, in which, according to the European Commission, the Polisario Front has not wanted to participate. On the basis of these consultations, it is stated that "These organisatons explained that there are no census or records of the population on ethnic grounds, and highlighted that diverse origins also included the nomadic tradition of parts of that the population in Western Sahara" [*sic*].[93] The EU is thus accepting the Moroccan government's *fait accompli* policy of consolidating the armed occupation of Western Sahara by transferring hundreds of

[92] In the COMMISSION STAFF WORKING DOCUMENT, *Implementation 2021…*, *supra* n. 38, you can read, in its footnote number 6, the following: "This report includes among others information provided by Morocco, and therefore introduces references to Morocco that in no case represent any recognition of Morocco's territorial claims over Western Sahara. These references are rather a result of the fact that large parts of the territory are currently administered by the Kingdom of Morocco, and therefore only the Moroccan authorities are able to ensure compliance with the rules necessary for the granting of such preferences and possess first hand information about the territory. As such, references to Morocco, including in particular those contained in section 4 of this report, are to be understood in this context and are therefore without prejudice to the position of the European Union with regard to the status of Western Sahara as a separate territory which is not part of Morocco (see CJ's case law in C-104/16P and C-266/16)". And at 7-8 the Commission refers to Morocco's division of Western Sahara into three regions, as discussed above, and provides a map, for which no official source is given, in which this division includes both the territories occupied by Morocco and the liberated territories under the control of the Polisario Front [*sic*]. Previously, in the COMMISSION STAFF WORKING DOCUMENT, *Accompanying 2018…*, *supra* n. 49, at 6, the following can be read: "Ever since Spain ended its presence and Mauritania withdrew, the Kingdom of Morocco has exercised sole *de facto* administration over the part of Western Sahara under its control. The Kingdom of Morocco regards Western Sahara as part of its territory. The EU regards Morocco as administering the non-self-governing territory. This report uses the term 'Western Sahara' to refer to the part of the territory administered *de facto* by Morocco".

[93] COMMISSION STAFF WORKING DOCUMENT, *Implementation 2021…*, *supra* n. 38, at 12.

thousands of settlers. In fact, the only reference to the Tindouf refugee camps is to insist that the EU continues to provide humanitarian assistance.[94]

It is certainly consistent with current international law that the EU does not recognise Morocco's annexation of Western Sahara, one of the three "solidarity obligations" arising from Morocco's grave breach of peremptory norms. But it would also be for the EU to give effect to its commitment in its founding treaties to respect international law (art. 3.5 TEU…), and to comply with the other two obligations arising from Morocco's armed occupation of Western Sahara over the past 47 years, which have been discussed above and which should be recalled again[95]: a) *all states must cooperate to bring to an end, by lawful means, Morocco's grave breaches of peremptory norms*, for example through the application of retorsion measures or decentralised countermeasures; b) *all states have an obligation not to recognise Morocco's annexation of the Sahara as lawful*; and c) *all states are prohibited from giving aid or assistance to Morocco to maintain its armed occupation of Western Sahara*, for example through military or financial aid to equip the army it has deployed in the former Spanish colony.[96] Obviously, these three obligations can be fulfilled by each EU member state on its own. But they can also be implemented in a coordinated manner by the 27 member states through the institutional system and through the EU

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94 Ibid. at 27.

95 In the Advocate General's Opinion, M. Wathelet, 10 january 2018, C-266/16, Western *Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs*, ECLI:EU:C:2018:1, par. 211-212, it is stated that: "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…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. 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".

96 If it is estimated that Morocco maintains around 80 percent of its army deployed in the territory of the former Spanish colony, it can be concluded that over the last decades most of the arms exports purchased by the Moroccan authorities have violated the above-mentioned obligations not to render aid or assistance in maintaining a situation resulting from a serious breach of a peremptory norm of general international law. From the point of view of EU law, it is open to criticism that states such as Spain or France have considered that arms exports to Morocco meet the eight "criteria" detailed in the "Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment" (OJ L 335, 2008). Among them, "criteria" number 2 ("Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law"), 4 ("Preservation of regional peace, security and stability") and 6 ("Behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law."). With regard to the latter criterion, the above-mentioned regulation explains that the following must be taken into account in relation to the purchasing state: "its compliance with its international commitments, in particular on the non-use of force, and with international humanitarian law". In the doctrine, see L.-A. Mangrané Cuevas and E. Melero Alonso, "Exportaciones de material de defensa español a Marruecos: Acciones legales de denuncia", in F. Palacios Romeo (coord.), *El Derecho…*, *supra* n. 30, 291-33.

legal system; for example, by applying against Morocco the restrictive measures provided for in Article 215 of the Treaty on the Functioning of the European Union.[97]

The European Union's external action in relation to the Western Sahara conflict contrasts with its action in other situations that have many points in common. For example, the aforementioned annual report on Democracy and Human Rights in 2021, states that Israel is the occupying power in the Palestinian territories, and denounces the serious and massive violations of human rights and international humanitarian law that can be attributed to the latter state.[98]

Likewise, the EU's passivity in the face of Morocco's armed occupation of Western Sahara contrasts with the battery of restrictive measures adopted against Russia for occupying Crimea in 2014 and, above all, those adopted against the same state for invading other parts of Ukraine throughout 2022. Restrictive measures that the EU does not apply, not a single one of them, against Morocco nor against Israel -, to call upon Morocco to cease and repair the serious breaches of peremptory norms attributable to it in relation to western Sahara over the past 47 years, nor to give effect to the "solidarity obligations" just mentioned.[99]

(3) The validity of the obligation of non-recognition

As stated a few years ago, "Aucun État n'a reconnu la souveraineté du Maroc sur le Western Sahara, mais le degré de non-reconnaissance active est plus faible que dans les autres conflits (Palestine et Crimée)" [No state has recognised Morocco's sovereignty over Western Sahara, but the degree of active non-recognition is lower than in other conflicts (Palestine and Crimea)].[100] Such weakness has been reflected, as has been seen in the EU's external action with respect to Western Sahara, in a series of actions that in one way or another support the *fait accompli* policy that Morocco has been applying to the former Spanish colony with the aim of illegally annexing the territory. Although until very recently no state formally recognised Morocco's sovereignty over Western Sahara, as far as a number of states are concerned, this non-recognition has had few legal consequences.[101]

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97 But so far there has been no agreement in the Council to implement such measures, nor does it seem at all likely that Morocco will cease to have the traditional almost unconditional support of some of the member states, such as France: J. Ferrer Lloret, "Las medidas restrictivas de la Unión Europea contra las violaciones graves de los derechos humanos en el Mediterráneo", 42 *Revista Electrónica de Estudios Internacionales* (2021), 1-39, at 12 and ff.

98 "In the occupied Palestinian territory, the situation remained very challenging, with continues settlement expansion, an increase in settler-related violence against Palestinians, evictions of Palestinian families and continued demolitions of Palestinian residential properties. Concerns persist over the increasing use of arbitrary administrative detention and the detention of Palestinian minors even though the number of detentions declined by 8%. An armed conflict between Israel and Hamas took place between 11 and 21 May 2021, leading to 253 Palestinian and 13 Israeli casualties": at 41.

99 P. Wrange, *Occupation…*, *supra* n. 3, at 54.

100 P. Wrange, *Occupation…*, *supra* n. 3, at 44.

101 As noted by A. Sánchez Legido, "Los enigmas del reconocimiento en la práctica contemporánea", 43 *Revista Electrónica de Estudios Internacionales* (2022), 1-46 [DOI: 10.17103/reei.43.11], at 41-42, "independientemente de que en ocasiones es posible traducir en pretensiones jurídicas, es decir, en derechos o privilegios, las violaciones de tales normas (en forma no solo de anexiones territoriales sino también, por

As has been mentioned in relation to institutional practice, in the sphere of the relational or decentralised structure, a number of European states France, Spain... -- and from other geographical latitudes, such as the United States, have not accompanied this non-recognition by any other consequence. They have not demanded the cessation of and reparation for the continuing wrongful act that Morocco has been carrying out for the past 47 years. Despite the breach of peremptory norms (*jus cogens*), they have also failed to comply with the two other "solidarity obligations" already referred to: on the one hand, the obligation *to cooperate to bring to an end, by lawful means, the serious breaches of peremptory norms by Morocco*; for example, through the application of retorsion measures and decentralised countermeasures; and on the other hand, the prohibition of *rendering aid or assistance to Morocco to maintain the armed occupation of Western Sahara*; for example by prohibiting the financing and sale of arms to consolidate its armed occupation of this territory.[102]

Moreover, there are already a number of states that do not comply with the obligation of non-recognition.[103] By far the main exception is the United States, a world power with some influence over the Western Sahara conflict (permanent member of the SC; maintains close military cooperation relations with the Moroccan government...). In effect, on 10 December 2020, the outgoing President of the United States, Donald Trump, recognised Morocco's sovereignty over Western Sahara and considered "Morrocco's serious, credible, and realistic autonomy proposal as the only basis for a just and lasting solution to the dispute over the Western Sahara territory". Furthermore, the recognition of Morocco's sovereignty takes place "over the entire Western Sahara territory", which can be understood to include the territories of Western Sahara currently under Polisario Front control. This statement was follow two days later by a tripartite declaration by Morocco, the United States and Israel, reiterating US recognition of Morocco's sovereignty over Western Sahara, announcing the opening of a US consulate in the Sahrawi city of Dakhla, and laying the foundations for the development of good relations between Morocco and Israel. As said,

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ejemplo, de acceso al gobierno o de garantía de la impunidad), el problema quizá no sea tanto la identificación de las situaciones cuyo reconocimiento está prohibido, como la concreción de las consecuencias jurídicas que derivan del deber de no reconocimiento" [regardless of the fact that it is sometimes possible to translate breaches of such norms (in the form not only of territorial annexations but also, for example, of access to government or guarantees of impunity) into legal claims, i.e. rights or privileges, the problem is perhaps not so much the identification of situations whose recognition is prohibited, but rather the specification of the legal consequences that derive from the duty of non-recognition].

102 On decentralised practice in relation to the conflicts in Western Sahara and East Timor, you can consult J. Ferrer Lloret, *La aplicación…*, *supra* n. 57, at 87 and ff.

103 Among others, United Arab Emirates. In his speech before the Security Council, on the occasion of the approval of the aforementioned Resolution 2654 on October 27, 2022, the representative of this state stated that "In conclusion, the United Arab Emirates reiterates its full support for the Kingdom of Morocco and its sovereignty over the entire Moroccan Sahara. We also reiterate our support for the Autonomy Initiative presented by Morocco in 2007, which the Security Council has considered in its resolutions to be both serious and credible, and which also constitutes an important solution that is in line with the Charter of the United Nations and the Organization's resolutions and preserves Morocco's territorial integrity": S/PV.9168, at 3. Likewise, during 2022 the Organisation of Eastern Caribbean States, Suriname, Togo and Cabo Verde inaugurated "Consulates General" in Dakhla. The Polisario Front called these diplomatic representations a "violation of international law and ... breach of the international legal status of Western Sahara as a Non-Self-Governing Territory": S/2022/733, at 3.

> "…, parece obvio que el reconocimiento estadounidense se plantea respecto de una situación que se inscribe en el contexto de una violación grave de una obligación derivada de la norma imperativa de Derecho internacional cual es el derecho a la libre determinación de los pueblos, dado que la anexión marroquí del territorio del Sáhara occidental constituye inequívocamente una violación del derecho del pueblo de ese territorio a ejercer su derecho a la libre determinación al impedir de plano la realización de una consulta que permita expresar a éste su libre voluntad en relación con su futuro estatuto político" ["…it seems clear that the US recognition concerns a situation that falls within the context of a serious breach of an obligation arising from the peremptory norm of international law, namely the right to self-determination of peoples, since the Moroccan annexation of the territory of Western Sahara unequivocally constitutes a violation of the right of the people of that territory to exercise their right to self-determination by preventing flatly the holding of a consultation that would allow them to express their free will regarding their future political status"].[104]

Although as this same author admits, the legal consequences of this recognition contrary to international law are non-existent to date. In his opinion, this is evidence of the inherent weakness of the rules governing the content of the obligation of non-recognition set out in art. 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts approved by the ILC in 2001.[105]

More recently, the President of the Government of the Kingdom of Spain has addressed a letter to the King of Morocco in which, among other issues, it is stated that the autonomy proposal advocated by Morocco to try to annex Western Sahara without holding a referendum of self-determination, constitutes "the most serious, credible and realistic basis" for the solution of the conflict affecting the former Spanish colony.[106] With this recognition, more or less explicitly, the Spanish government denies that Morocco is the occupying power of Western Sahara and offers its support to the annexationist theses that the Moroccan government defends in relation to this territory.

With this change of position on the Western Sahara conflict, Spain is also in breach of the second of the "solidarity obligations", the obligation of non-recognition, the *only* one remaining to be breached.[107] As concluded in the Statement issued by the Spanish

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104 J.A. González Vega, "El reconocimiento por EEUU de la anexión por Marruecos del Sahara Occidental en perspectiva: aspectos jurídicos y políticos", 41 *Revista Electrónica de Estudios Internacionales* (2021), 1-33, at 26 (DOI: 10.17103/reei.41.07).

105 At 23 and ff.

106 The letter is available at *El País*, 23 March 2022. See J. A. González Vega, "¡Triste España!: Los aspectos formales y contextuales del cambio de posición español", 74 *Revista Española de Derecho Internacional* (2022), 431-446 (DOI: 10.17103/REDI.74.2.2022.2b.02).

107 In 2016, he following assessment of Spain's foreign policy in relation to Western Sahara was made: "The Spanish role, progressively self-conceived as a 'constructive neutrality' has revealed a lot of contradictions, that has been solved through a patient but constant approach to the Moroccan thesis --expressed mainly in its passive role inside the Group of Friends of Western Sahara--, its muteness concerning the successive incidents related to the territory specially concerning human rights situation--, its sympathies towards the Moroccan Autonomy Plan or its constants support --sometimes hidden, sometimes unveiled to the measures related to the exploitation of Western Sahara natural resources due to the Spanish interests at stake": J.A. González Vega, "A Bridge over Troubled Waters (and Sands)? A Critical Sight on Spain's Role in Sahara Occidental Issue 40 Years Later", 20 *Spanish Yearbook of International Law* (2016), 255-278, at 277.

Association of Professors of International Law and International Relations (AEPDIRI), adopted a few days after the aforementioned letter was made public, "General international law establishes the obligation of all States not to recognize situations arising from the use of force and the imposition of an occupation regime on colonial peoples after an invasion takes place. It also obliges all States not to contribute to the consolidation and legitimisation of such an invasión".[108]

In this regard, not long ago the Spanish Government submitted its comments on conclusion 19 of the aforementioned "Draft conclusiones on identification and legal consequences of peremptory norms of general international law (*jus cogens*)". With this conclusion, the ILC reiterates the "obligations of solidarity" contained in art. 41 of the mentioned 2001 Draft. Although the Spanish Government expresses a very aseptic opinion on this conclusion, it does not state its opposition to it; it even recognises that the said provision has been applied in several judgements by the ICJ. This means an acceptance on its part that such "solidarity obligations", and in particular the obligation of non-recognition, are part of the current international law.[109] It is therefore unfortunate that the Spanish authorities, at the head of a democratic state governed by the rule of law, do not demonstrate legal consistency between, on the one hand, the formal position they maintain in the codification processes taking place within the UN and, on the other, the actions they take in the framework of their legal foreign policy in relation to the Western Sahara conflict. As will be emphasised below, with this type of action, the Spanish government does not contribute, far from it, to the rule of law in international relations.

(D) SOME PROPOSALS ABOUT THE ROLE OF DOCTRINE

As has just been shown, the legal assessment of the Western Sahara conflict allows us to reach quite clear conclusions on the action, committed to respecting international law, that the Spanish authorities should take in the development of Spain's foreign policy. The doctrine has already forcefully denounced that Spain should not support in any way, either actively or passively, the annexationist theses maintained by Morocco, in flagrant contradiction with the norms of *jus cogens* of international law. [110] The events of the past year confirm, once again, that the Spanish government is ignoring the claims in defense of compliance with international law, which the doctrine repeatedly addresses to it in relation to Western Sahara. However, these are claims that the doctrine often carries out in a somewhat uncoordinated manner, as if it were a Taifa Kingdom.

Moreover, there are even disagreements in the doctrine, resulting from different points of view on issues that ultimately do not affect the legal assessment of the central

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[108] See Declaración sobre el Sahara occidental y el derecho internacional (AEPDIRI).

[109] *Comments and observations of the Kingdom of Spain on the draft conclusions on peremptory norms of general international law (jus cogens) adopted by the International Law Commission*, 7 july 2021: pár. 77: "Spain recognizes that draft conclusion 19 closely tracks the wording of articles 40 and 41 of the Commission's 2001 articles on international responsibility of States for internationally wrongful acts, which the International CJ had interpreted and applied in some of its recent judgments": Spain Jus cogens (un.org).

[110] *Per omniun*, see J.A. González Vega, "A Bridge…", *supra* n. 107.

question that is truly decisive for the solution of the Western Sahara conflict: *Morocco illegally occupies most of this territory and prevents the Saharawi people from exercising their right to self-determination. Both the UN -its SC- and the major powers with influence over Morocco (United States, France...) and the EU itself, should make effective the often mentioned "obligations of solidarity" in relation to the Western Sahara conflict, with the aim of making Morocco bring to an end and repair the continuous international wrongful act for which it is responsible and which has been going on for the last 47 year.*[111]

In this sense, at the end of 2022, after almost 47 years have passed since Spain abandoned Western Sahara, *it does not seem that the academic debate on the possible consideration of Spain as the administering power of Western Sahara will make a relevant contribution to the solution of the conflict affecting the former Spanish colony*.[112] It is true that at the end of 1975 Spain abandoned its obligations as the administering power of Western Sahara, in contravention of Articles 1.2 and 73 of the UN Charter, and of the aforementioned resolutions 1514 (XV), 1541 (XV) and 2625 (XXV), which develop and give substance to the principle of the self-determination of peoples. Spain withdrew from the territory and allowed the armed invasion by Morocco and Mauritania, without the Saharawi people being able to exercise their right to self-determination. This breach of its obligations as an administering power was even certified in writing in the so-called Madrid Agreements, concluded with Morocco and Mauritania on 14 November 1975. These agreements are null and void, among other reasons, because they contravene *jus cogens* norms, as has already been stressed. The UN, its main political bodies, the GA, and above all the SC, could have demanded international responsibility from Spain for the breaches of its obligations as the administering power of Western Sahara; but they did not do so. Nor did any third state, in the framework of the relational structure of the international order.

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111 It is clear that the primary responsibility for compliance with international law in relation to the Western Sahara conflict lies with the Moroccan authorities, the occupying power of the former Spanish colony. Just as the evolution of Indonesia's internal political situation was decisive for the resolution of the East Timor conflict, the future of what happens in relation to the Western Sahara conflict may to some extent be conditioned by Morocco's internal political situation. But right now, there is no expectation of changes in the Moroccan political regime, which in turn could have an impact on the annexationist stance on Western Sahara that the North African state has been staunchly defending for the past half-century. As noted twenty years ago, after a comparative study of the conflicts in Western Sahara and East Timor: J. Ferrer Lloret, *La aplicación del Principio…*, *supra* n. 57, at 226-227.

112 As advocated, among others, by, J. Soroeta Liceras, "Legal Consequences…", *supra* n. 30, at 372: "Even if successive governments have insisted on claiming the contrary, Spain continues to be the administering power of the territory"; J. Soroeta Liceras, "Current validity of the external dimensión of the self-determinatin of peoples. Pending cases of decolonization", 22 *Spanish Yearbook of International Law* (2018), 131-164 [DOI: 10.17103/sybil.22.8], at 140-141; y C. Ruiz Miguel, "Las obligaciones legales de España como potencia administradora del Sahara Occidental", 26 *Anuario Español de Derecho Internacional* (2010), 303-331. The latter author proposes that the GA "demands" an advisory opinion from the ICJ to answer three questions regarding: whether Spain is the administering power of Western Sahara; whether Spain has the responsibility to hold a referendum in Western Sahara; and if Spain cannot fulfil the latter obligation, whether the UN should take over Spain's responsibilities as administering power in relation to the holding of a referendum in Western Sahara: at 330. As will be argued below, if the AG is successful in getting the ICJ to request an advisory opinion from the ICJ on the Western Sahara conflict, it should deal with the legal consequences of Morocco's armed occupation of the territory for the past 47 years.

Subsequently and for the last 47 years, all Spanish governments have maintained that Spain ceased its responsibilities as administering power of Western Sahara on 26 February 1976. Neither the GA, nor the SC, nor third States, consider that Spain continues to be the administering power. Nor *de facto*, because, as is obvious, around 70% of Western Sahara is under armed occupation by Morocco, and the rest of the territory is under the control of the Polisario Front.[113]

Nor *de iure*, as defended by a certain section of Spanish doctrine which has just been quoted[114]. In this respect, the Order of the Plenary of the Criminal Chamber of the National High Court (Audiencia Nacional) 40/2014, dated 4 July 2014, is often referred to. This order affirms the competence of the Spanish criminal courts, in accordance with the principle of territorial criminal jurisdiction, to investigate the violent death of a Spanish citizen of Sahrawi origin, Baby Liamday Buyema, caused by Moroccan police officers during the dismantling of the Gdeim Izik settlement, outside El Aaiún, which brought together some 20,000 Sahrawis at the end of 2010. The National High Court considers that Spain continues to be the *de iure* administering power of Western Sahara; and therefore, such acts have been committed in Spanish territory [*sic*][115]. This

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[113] In this regard, it is alleged that Spain continues to exercise control of the airspace over Western Sahara, by the public business entity ENAIRE, attached to the Ministry of Transport, Mobility and the Urban Agenda, responsible of the management of the air navigation in Spain: J. Soroeta Liceras, "The Conflict in Western Sahara after Forty Years of Occupation: International Law versus Realpolitik", 59 *German Yearbook of International Law* (2016), 187-222, at 209-210. On its website you can read that "From ENAIRE's Area Control Centre in Gran Canaria (Canary Islands), we operate air navigation services in a geographical area of 1,370,000 square kilometers. Especially over ocean areas where the Canarian Archipelago and part of Western Sahara are located", this explanation is accompanied by a map which includes the overlying airspace corresponding to a large part of Western Sahara: see ENAIRE Network map. In response to a parliamentary question, the then President of the Spanish Government explained in 2017 that "Spain is responsible for the management of the airspace over Western Sahara by decision of the ICAO (International Civil Aviation Organisation) as the international authority on the matter": available at Respuesta del Gobierno 21/02/2017. However, it does not appear that these air traffic control tasks carried out by the aforementioned Spanish agency have much effect on the effective control of a large part of Western Sahara by the more than 150,000 soldiers that the Moroccan government has deployed in the territory as occupying power. Rather, such air traffic control work can be seen as an altruistic contribution by Spain to the safety of air traffic in the region, which certainly does not prevent Morocco from remaining the occupying power in Western Sahara.

[114] Among the authors who argue that Spain continues to be the administering power of Western Sahara, it is highlighted that in the reports presented every year by the UN Secretary General concerning the information on the Non-Self-Governing Territories provided under Article 73e) of the Charter, Spain continues to be considered as the administering power (*inter alia*, C. Ruiz Miguel., "Las obligaciones…", *supra* n. 112, at 323 and ff.). This is true; but it is also true that these reports always include in a footnote the Declaration made by the Spanish Government in 1976, according to which, since 26 February of that year, Spain has ceased all its obligations as administering power of Western Sahara; and that for the last 47 years Spain has not transmitted any information on Western Sahara in compliance of the Charter, without any reaction from the SC and/or the AG: see the Secretary-General's report in A/77/63 of 18 February 2022, at 3, footnote d]. Moreover, in the general information that UN provides on this non-self-governing territory, the section on Administering Power is left blank and the aforementioned position maintained by Spain is included in a footnote: see The United Nations and Decolonization: Western Sahara.

[115] According to the Public Prosecutor: "En definitiva España *de iure*, aunque no *de facto*, sigue siendo la Potencia Administradora, y como tal, hasta que finalice el periodo de la descolonización, tiene las obligaciones recogidas en los artículos 73 y 74 de la Carta de Naciones Unidas"[In short, Spain *de jure*, but not *de facto*, continues to be the Administering Power, and as such, until the end of the period of decolonisation, has the obligations set out in Articles 73 and 74 of the United Nations Charter]. The Plenary of the National High Court adopts the stance of the Public Prosecutor: "Este Pleno muestra conformidad con el

assessment can be very controversial; as has already been pointed out, over the last 47 years, for successive Spanish governments, Western Sahara does not form part of Spanish territory. It would be another matter if the Spanish courts had jurisdiction under other areas of our criminal procedural legislation, which provide for their jurisdiction in relation to acts committed outside Spanish territory; but this is another issue.[116]

Western Sahara is not a non-self-governing territory administered by Spain. For 47 years, neither the Spanish authorities nor Spanish domestic law have recognised it as such. It is obvious that Western Sahara, about 70% of its territory, is under the armed occupation of Morocco, and the rest under the actual control of the Polisario Front. Morocco is not the administering power of the territory, neither de iure, of course, nor de facto, as has been claimed on occasion in an attempt to legitimise Morocco's invasion of this non-self-governing territory. As already reiterated, it is the occupying power of this territory. And as noted in the previous section B), in the absence of their own courts existing in Western Sahara at the time of the armed invasion of the territory which would have continued to exercise their jurisdictional functions after the invasion, it is the Moroccan courts, the courts of the occupying power, which must exercise their jurisdiction over events occurring in the territory in all areas criminal, civil... .

Always, obviously, in accordance with the obligations that bind Morocco as occupying power of Western Sahara, both in the sphere of international human rights law and international humanitarian law, as has already been emphasised. This is provided for, with certain caveats and conditions, in Articles 64 et ff. of the Fourth Geneva Convention of 1949. As mentioned above, Morocco breaches these obligations, including actions such as conducting trials against Saharawi activists without the minimum procedural and substantive guarantees, where they are sentenced to long prison sentences, to be served in prisons in Morocco, several hundred kilometres away from the Western Saharan towns where they live.

The lack of knowledge and the relative legal indeterminacy surrounding Morocco's legal status as occupying power in Western Sahara explain why even the Criminal Chamber of the

criterio del Ministerio Fiscal respecto de que España *de iure*, aunque no *de facto*, sigue siendo la Potencia Administradora del territorio, y como tal, hasta que finalice el periodo de la descolonización, tiene las obligaciones recogidas en los artículos 73 y 74 de la Carta de Naciones Unidas, entre ellas dar protección, incluso jurisdiccional, a sus ciudadanos contra todo abuso, para lo cual debe extender su jurisdicción territorial para hechos como los que se refieren en la querella a que se contrae el presente procedimiento" [This Plenary agrees with the opinion of the Public Prosecutor that Spain *de jure*, but not *de facto*, is still the Administering Power of the territory, and as such, until the end of the period of decolonisation, has the obligations set out in Articles 73 and 74 of the United Nations Charter, among them to provide protection, even jurisdictional, to its citizens against any abuse, for which it must extend its territorial jurisdiction for facts such as those referred to in the complaint to which the present proceedings relate]. To date, the investigation of this case has not resulted in a criminal judgement by the Spanish courts: see Audiencia Nacional-Sala de lo Penal. AUTO Nº 40/2014.

[116] A large number of works have been published on the principle of universal criminal jurisdiction over the last two decades, generally criticising the legislative reforms approved in Spain, which are clearly aimed at restricting the application of this principle by Spanish courts; in this respect, two of the most recent monographs can be consulted: J. Hellman Moreno, *El principio de justicia universal en la persecución e investigación de crímenes internacionales. Un análisis jurídico comparado* (Editorial Bosch, Barcelona, 2022), at 89 and ff.; I. Vázquez Serrano, *El principio de jurisdicción universal y su encrucijada. ¿Utopía o el mundo real?* (Aranzadi, Navarra, 2019), at 455 and ff.

Audiencia Nacional opts for legal assessments that have no basis in current international law. These assessments may contribute to raising doubts about Morocco's legal status as the occupying power of Western Sahara in political bodies in Spain and other states, as well as in international organisations such as the UN and the EU.

In this regard, it suffices to note that in its aforementioned judgments of September 2021 the AG has acknowledged, more or less explicitly, that Spain is not the administering power of Western Sahara.[117] This is entirely consistent with the stance taken by the Luxembourg courts, which has very briefly been noted above: the EU can only conclude international agreements that apply to Western Sahara if it has the approval of the Polisario Front, the legitimate representative of the Sahrawi people. If it were to be accepted that Spain is the administering power of Western Sahara[118], the question that immediately arises is whether the EU should -¿also?- have the Spanish government as an interlocutor in order to be able to conclude international agreements that apply to Western Sahara. In this regard, it should be recalled that in 1991 the Portuguese government argued that Australia could not enter into treaties for the exploitation of the resources of the East Timor gap with the occupying power, Indonesia. It unsuccessfully brought an action against Australia before the ICJ, claiming that the conclusion of such a treaty was, among other things, a violation of its rights as the administering power of East Timor under Article 73 of the UN Charter. This action was rejected in application of the so-called doctrine of the "indispensable third party".[119]

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[117] "In that regard, first of all, the specific situation of Western Sahara, resulting from the evolution of the international context set out in paragraphs 2 to 20 above, must be borne in mind. Although the process of self-determination of that non-self-governing territory is still ongoing, its administrating power, for the purposes of Article 73 of the United Nations Charter, namely the Kingdom of Spain, has, since 26 February 1976, ceased to exercise any responsibility of an international nature in connection with the administration of that territory, which has been noted by the UN bodies (see paragraph 13 above). Consequently, the parties to that process, conducted under the aegis of that organisation, are, on the one hand, the Kingdom of Morocco, which claims to exercise sovereign rights over that territory and, on the other, the applicant, as the representative of the people of that territory. Thus, as the Commission states, in essence, in its statement in intervention, there is a 'conflict of legitimacy' between the Kingdom of Morocco and the applicant with regard to the 'representativeness' of that territory and its people (judgment delivered today, *Front Polisario* v *Council*, T-279/19, paragraph 203)". However, then the GC, in order to be on the safe side and again with the aim of not entering into questions about the Western Sahara conflict that are not strictly necessary to respond to the appeal lodged, notes that "the status as the administering power, for the purposes of Article 73 of the United Nations Charter, of Western Sahara which may have been retained by the Kingdom of Spain, notwithstanding its declaration of 26 February 1976, cannot, in any event, preclude the applicant from expressing the consent of the people of that territory…": T-344/19 y T-356/19, par. 238 and 243.

[118] As J. Soroeta Liceras maintains in his comments to the aforementioned 2021 AG ruling, "El Tribunal General pone fin a la sinrazón del Consejo y la Comisión (Sentencias de 29 de septiembre de 2021): no habrá más acuerdos para explotar los recursos naturales del Sahara Occidental sin el consentimiento del Frente Polisario", 56 *Revista General de Derecho Europeo* (2022), 34-80, at 58-60; although this author does not specify what obligations are incumbent on Spain as the administering power of Western Sahara or what legal consequences derive from this alleged legal status.

[119] *East Timor (Portugal v. Australia), Judgment*, ICJ Report 1995, at. 90. In its claim, Portugal requests the ICJ: "To adjudge and declare that Australia, inasmuch as in the first place it has negotiated, concluded and initiated performance of the Agreement of 11 December 1989, has taken internal legislative measures for the application thereof, and is continuing to negotiate, with the State party to that Agreement, the delimitation of the continental shelf in the area of the Timor Gap; and inasmuch as it has furthermore excluded any negotiation with the administering Power with respect to the exploration and exploitation of the continental shelf in that same area; and, finally, inasmuch as it contemplates exploring and exploiting

But in contrast to the Spanish authorities' stance on Western Sahara, during Indonesia's 24-year armed occupation of East Timor, Portugal always defended the validity of its legal status as East Timor's administering power, and this was recognised by UN bodies. In particular, the SC decided, through Resolution 1246 (1999), to deploy UNAMET to supervise the referendum on self-determination held in East Timor in 1999, thanks to the agreement reached between Portugal and Indonesia on 5 May 1999.

De lege ferenda, it can be argued that Spain should have emulated Portugal in defending the interests of the Sahrawi people. But unfortunately for the Sahrawi people, Spain's legal foreign policy over the past 47 years in relation to Western Sahara has been very different from that of Portugal in relation to East Timor. Suffice it to point out that, for example, Spain participated in the proceedings, as an intervener, which took place before the GC and which resulted in the aforementioned judgments of September 2021. Spain intervened in support of the Council, to defend the legality of the agreements concluded between the EU and Morocco for the exploitation of the natural resources of Western Sahara, without the consent of the Polisario Front.[120]

In any case, it seems highly unlikely that the Spanish government would be willing to (re)assume its rights and obligations as the administering power of Western Sahara. If the Spanish authorities are unwilling to play the role that Portugal played in relation to East Timor, it is very difficult to impose this role on them. To argue otherwise would be to ignore the nature of rule-making procedures in international law and, ultimately, to maintain a conception of this legal system that is not in line with its main characteristics as an essentially inter-state and decentralised system. Except for a resolution by the GA, with which a majority of the member states of the United Nations demanded that Spain comply with its obligations as administering power; *among them, that Spain transmits information in accordance with art. 73 e) of the Charter, a request that has not been produced for the last 47 years.* Or, above all, a decision by the SC under Chapter VII of the Charter, and thus subject to Article 25 of the Charter, which would oblige Spain to assume the status of administering power of Western Sahara. But that the GA or the SC would be willing to adopt such a resolution or decision is also highly improbable at the present time.

Likewise, *the discussion on the recognition by Spain and other states of the Saharan Arab Democratic Republic (SADR) as an independent state, despite the fact that the Polisario Front only controls around 30 percent of the territory of Western Sahara, does not seem to contribute decisively to a legal assessment of the above-mentioned core aspects of the Western Sahara conflict*. In fact, Spain, like all other EU member states, does not even formally recognise the Polisario Front as a national liberation movement, despite the fact that the GC has

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the subsoil of the sea in the Timor Gap on the basis of a plurilateral title to which Portugal is not a party (each of these facts sufficing on its own):…; (b) has infringed and is infringing the powers of Portugal as the administering Power of the Territory of East Timor, is impeding the fulfilment of its duties to the people of East Timor and to the international community, is infringing the right of Portugal to fulfil its responsibilities and is in breach of the obligation not to disregard but to respect those powers and duties and that right;…".

120 The European Commission, France and various fisheries organisations based in Morocco and Western Sahara, also participated as interveners and in support of the Council: T-344/19 y T-356. See J. Soroeta Liceras, "Por qué la integración en Marruecos (la autonomía) no es la forma de resolver el conflicto (la descolonización) del Sahara Occidental", 74 *Revista Española de Derecho Internacional* (2022), 463-471, at 466 (DOI: 10.17103/REDI.74.2.2022.2b.04).

accepted its legitimacy to lodge an application for annulment.[121] Nor have they given their support so that the Polisario Front could be granted observer status within the framework of the UN, despite the fact that this status has been given to other national liberation movements. Paradoxically, GA Resolution 3280 (XXIX) granted observer status to national liberation movements recognised by the then Organisation of African Unity[122]; but the Polisario Front has not been recognised as such by the African organisation, as it is one of its member states, the SARD.[123]

On the one hand, the recognition of the SADR as an independent state by the African Union and by dozens of states, especially in Africa, Latin America and, in a few cases, Asia, represents international support of some importance for the Polisario Front. This recognition obviously implies a complete rejection of Morocco's annexationist thesis, and shows that the African Union and those states also recognise that the Saharawi people have the right to self-determination of the peoples. But on the other hand, the defense of the existence, at least formally, of the SADR, sharing a leading role at the international level with the Polisario Front itself, has caused some political and legal confusion. This confusion has been used by the governments of European and North American states, and also by United Nations bodies, to deny recognition of the Polisario Front as a national liberation movement.

In accordance with the jurisprudence of the Luxembourg courts cited above, *it should be proposed that Spain, the EU and its member states recognise the Polisario Front as the legitimate representative of the Saharawi people. Therefore, that it be recognised as a national liberation movement* with the capacity to participate, albeit in a limited and presumably transitory way, in the processes of making and applying the norms of international law, with all the consequences that derive from this: the right of active and passive legation; the possibility of concluding international agreements; the right to use force to bring an end to Morocco's armed occupation of Western Sahara; the application of international humanitarian law; observer status before UN bodies; procedural capacity before domestic and EU courts...

Once again, the persistence of a part of the doctrine in defending the recognition of the SADR as an independent state raises many doubts.[124] Not only because this so-called new state does not effectively control most of its alleged territory, but also and above all because the Saharawi people have not yet been able to exercise their right

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121 GC Judgement of 29 September 2021, *Front Polisario v. Council*, T-344 y T-356, ECLI:EU:T:2021:640, par. 132 and ff.

122 Par. 6 of this Resolution, in which the GA "Decides to invite as observers, on a regular basis and in accordance with earlier practice, representatives of the national liberation movements recognised by the organization of African Unity to participate in the relevant work of the main committees of the General Assembly and its subsidiary organs concerned…".

123 The only national liberation movements that have been recognised as permanent observers in the GA have been the Palestine Liberation Organisation and the now extinct South West Africa People's Organisation (SWAPO): on the international subjectivity of the Polisario Front, see C. Jiménez Sánchez, *El conflicto del Sahara Occidental: el papel del Frente Polisario* (Tirant Lo Blanch, Valencia, 2021), at 96 and ff.

124 In the opinion of J. Soroeta Liceras, *International Law and the Sahara Occidental Conflict* (Wolf Legal Publishers, Netherlands, 2014), at 53: "Although no State has recognized the annexation of Western Sahara by Marrocco, the non-recognition of the SADR with the excuse that its Government does not effectively control the totality of the territory has a clear consequence: to implicitly promote this annexation"; and at 49-77.

to self-determination through a referendum on self-determination, as provided for in Resolution 1541(XV and as accepted at the time by Morocco and the Polisario Front, with the Peace Plan approved by the SC, which allowed MINURSO to be deployed. As is well known, in this proposed referendum on self-determination, the Saharawi people must decide between the constitution of an independent state or integration into Morocco. Consequently, *until the referendum on self-determination is hold and the Saharawi people decide to form an independent state, there is no a new state in Western Sahara*.[125]

For all these reasons, *the doctrinal positions that favour the recognition of SADR as a new state, can once again be exploited by some political bodies to allege a certain legal indeterminacy, or even confusion, regarding the response that Morocco's failure to comply with its obligations as occupying power of Western Sahara should receive in accordance with international law.* Ultimately, these debates on somewhat collateral issues may serve as an excuse for our political authorities to neglect the technical and expert opinion that should be offered by university professors engaged in teaching and research on international law.

In this regard, it should be noted that the Spanish Association of Professors of International Law and International Relations (AEPDIRI) has more than 700 members. The vast majority of them are university professors in the three disciplines (Public International Law, Private International Law and International Relations), who carry out their teaching and research work in more than 60 university centres; in addition to diplomats, national and international civil servants, judges, lawyers… For this reason, the AEPDIRI can be an ideal forum for public debate, always from a technical perspective based on current international law, on the main issues affecting Spain's foreign policy, including, for example, the legal assessment that should be applied to the Western Sahara conflict.

In fact, over the last few years, the AEPDIRI has approved a number of Statements on issues of clear importance and topicality. The latest of these, on Western Sahara, was proposed by a group of AEPDIRI members, although its signature was endorsed by several hundred AEPDIRI members. This Statement, adopted a few days after the aforementioned Letter sent by the Spanish Government to the King of Morocco in March 2022, flatly rejects the Spanish Government's acceptance of the annexationist theses defended by Morocco in its autonomy proposal, and schematically offers a legal assessment of some of the main issues relating to the Western Sahara conflict. As a rapid response mechanism to the Spanish government's sudden "change of position" on Western Sahara, this statement deserves a positive assessment.[126] However, in addition to making use of these somewhat accelerated response mechanisms, which in certain circumstances may be very necessary, the AEPDIRI should assume the responsibility of

125 Cf. C. Jiménez Sánchez, *El conflicto del Sahara Occidental…*, *supra* n. 123, at 148 and at 156 and ff.

126 Above all, and as already cited, this statement affirms that: "General international law establishes the obligation of all States not to recognize situations arising from the use of force and the imposition of an occupation regime on colonial peoples after an invasion takes place. It also obliges all States not to contribute to the consolidation and legitimisation of such an invasión". It can be consulted at Declaración sobre el Sahara occidental y el derecho internacional (AEPDIRI).

offering the most exhaustive and balanced analysis possible of the main issues affecting Spanish legal foreign policy.[127]

The AEPDIRI could adopt a regulation establishing the procedure so that studies on current issues can be carried out within the AEPDIRI in the form of an expert opinion or report.[128] They should also be accompanied by a "resolution", proposing to the Spanish authorities the lines of action that should govern Spain's foreign legal policy, always in accordance with the international law in force. Without prejudice to also formulating proposals de *lege ferenda*, and recommending that Spain defend them in the context of the nomogenetic processes that may take place in the international order. After the debate on the report and the resolution, and the approval of the latter, either in the commission to be constituted or in the AEPDIRI Assembly, both should be published on the AEPDIRI website, and also in its three journals (*the Revista Española de Derecho Internacional, the Revista Electrónica de Estudios Internacionales and the Spanish Yearbook of International Law*).[129] And they should be sent not only to the Spanish government, but also to all national, regional or local, European or international public administrations that may be concerned.

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[127] *This paper studies the Western Sahara conflict from a legal perspective*. From the point of view of current international law, as has already been stressed, the solution to this conflict must be based on the holding of a referendum on self-determination, in which the Sahrawi people decide whether to create a new state or to integrate into Morocco. Just as a referendum on self-determination was held in East Timor in 1999. However, *from the perspective of international relations*, it would also be worth analysing whether Spain's interests as a middle power and EU member state would be served by the existence of an independent Sahrawi state off the coast of the Canary Islands. Certainly, it would be desirable for this new state to have a democratic political structure, respectful of human rights, which would ensure its stability. An independent Sahrawi state could develop historical, linguistic and cultural links with Spain, and would have great potential for economic growth (phosphates, fishing, agriculture, oil, tourism, etc.). Furthermore, a new independent state in Western Sahara could serve as a political counterweight in the North African region with respect to Morocco, in areas such as cooperation in the fight against irregular immigration or Islamic fundamentalist terrorism or, more specifically, in relation to Moroccan claims to the Spanish territories in North Africa (Ceuta, Melilla and...). Or, on the contrary, whether Spain's interests are better protected by defending or at least neglecting the pro-Moroccan thesis aimed at the integration of Western Sahara into a state like Morocco. A state whose political and economic system and, more particularly, whose foreign policy towards Spain, both at present and in the future, raises a number of uncertainties. However, this second stance is the one that, more or less explicitly, has guided Spain's foreign policy over the last few decades. This doctrine is supported by some authors, who argue in particular that an independent Sahrawi state is unviable (with a small population, highly subject to the influence of jihadist terrorist groups...), and that Morocco will never accept the existence of such a state. As maintained, among others, by J.A. Yturriaga Barberán, supra n. 46, at 517 and ff.; more recently, J.A. Yturriaga Barberán, "Giro copernicano de Sánchez en el conflicto sahariano", 74 *Revista Española de Derecho Internacional* (2022), 447-461, at 456 and ff. (DOI: 10.17103/REDI.74.2.2022.2b.03); in which he argues that the Polisario Front, in the exercise of its right to self-determination, should accept the Moroccan Government's proposal for autonomy, provided that this autonomy is really effective, something that the author himself considers very difficult to achieve, in the framework of a state that lacks democratic government structures; therefore, his proposal is somewhat contradictory and leads to a dead end. The author of this contribution considers that, in the medium and long term, the existence of a new independent state in Western Sahara would benefit Spain's interests in the region, even with all the risks and questions that are currently being raised. In any case, it is an issue that deserves attention that, to date, has not been given within AEPDIR.

[128] An example is the cited Report prepared for the European Parliament by P. Wrange, *Occupation…*, *supra* n. 3

[129] AEPDIRI: Publicaciones.

For example, among other proposals, *the AEPDIRI could campaign for the EU and its member states to lead a majority of states that would allow the GA to request an Advisory Opinion from the ICJ on Western Sahara*. An Advisory Opinion on the legal consequences of the armed occupation of the territory by Morocco over the last 47 years, and more specifically, the refusal of the Moroccan authorities to hold a referendum on self-determination, as provided for in the Peace Plan agreed by the parties more than 30 years ago.[130] A new ICJ Advisory Opinion on the Western Sahara conflict could provide legal arguments for the UN and/or third states including Spain to enforce the oft-mentioned "solidarity obligations", in order to make Morocco cease and repair the breaches of international law for which it is responsible. The ICJ could reaffirm, with regard to the Western Sahara conflict, that these are true "obligations of solidarity" -not powers or rights, as practice seems to show (Section C)-, which must be complied with by all states and international organisations concerned. It is worth recalling the precedents set in this field by the cited *Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion; Construction of a Wall Advisory Opinion*; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 Advisory Opinion*.

The author of these lines is aware that after all this effort, the public authorities may ignore the legal position defended by the AEPDIRI.[131] But at least the AEPDIRI will have fulfilled the function that should correspond to an association of its characteristics: to promote the study and progress of Public and Private International Law, European Community Law and International Relations (art. 1 of its Statutes). A progress, which, of course, involves respect for the rules of international law. In short, by defending the rule of law in international relations, despite the essentially decentralised and inter-state nature of the international legal system (section E). To this end, the AEPDIRI can bring together and organise the Spanish doctrine so that, in an active and coordinated manner, it can offer technical and expert analysis of the main issues affecting Spain's legal foreign policy, and also formulate specific proposals for action aimed at better defending Spain's interests in its international relations, always in accordance with the international law in force. In view of some of the legal "disasters" that the Spanish government has been involved in its foreign policy over the last two decades (support for the US invasion of Iraq in 2003; support, including arms sales, to totalitarian regimes in some Mediterranean countries until the outbreak of the so-called "Arab Spring" in 2011 -Syria, Libya...--; support for Morocco's annexationist theses on Western Sahara in 2022...); the AEPDIRI and its members may have a lot of work ahead of them.

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130 J. Ferrer Lloret, "El conflicto…", *supra* n. 80, at 63.

131 It should be remembered, in this regard, that Spain abstained from voting on Resolution ES-10/14, 8 December 2003, with which the GA requested the aforementioned advisory opinion of 2004 (90 votes to 8, with 74 abstentions); and also abstained in the vote on Resolution 71/292, 22 June 2017, with which the GA requested the also cited advisory opinion of 2019 (94 votes to 15, with 65 abstentions). In the brief submitted by Spain to the ICJ on the occasion of the 2004 advisory opinion, the representative of Spain stated that "... the request for an Advisory Opinion from the ICJ is inappropriate" [*sic*]: Spain brief CIJ Advisory Opinion 2004.

(E) FINAL CONSIDERATIONS: ON THE VALIDITY OF THE RULE OF LAW IN THE INTERNATIONAL LEGAL ORDER

As has just been seen, Morocco's legal status as the occupying power of Western Sahara is not open to much doubt. It can thus be said that Morocco is obliged to comply with the four areas of law mentioned above, and in particular with international humanitarian law. For 47 years, however, Morocco has failed to comply with many of the norms included in these four areas of norms, some of which are norms of *jus cogens*.

As already mentioned, such breaches have had little impact on the secondary and tertiary rules of international law, those establishing the content of Morocco's international responsibility, and the ways in which this responsibility can be enforced. As in other situations in international life (the Palestine conflict, the Turkish invasion of Northern Cyprus, etc.), the essentially decentralised and inter-state nature of the international legal system generally explains the weakness of the mechanisms for applying international law to the Western Sahara conflict. A conflict that has lasted for almost half a century, to the point that it has been described as intractable.[132]

In fact, the demand for the cessation and reparation of the wrongful act for which Morocco is responsible, and the fulfilment of the "solidarity obligations", are in the hands, within the institutional structure, of bodies of a political nature, mainly the SC. This body, or rather the states that make it up and above all its permanent members, enjoy an enormous sphere of discretion, greatly influenced and conditioned by considerations of all kinds that on many occasions have little to do with respect for international law. Certainly, the SC must be called upon to take up its obligations in the maintenance of international peace and security, and to implement its competences under Chapter VII of the Charter, in order to ensure compliance with international law in relation to the Western Sahara conflict.[133] But as long as the governments of certain permanent member states, especially those of the United States and France, continue to support, expressly, tacitly or *de facto*, the annexationist thesis advocated by Morocco outside international law, the SC cannot be expected to comply with this demand.

Given the SC's inaction, the only option left is that the demand for cessation and reparation of the international wrongful act for which Morocco is responsible, and the application of the so-called "solidarity obligations", be carried out by each state or group of states. For example, acting in this second case in a coordinated manner within the EU,

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132 C. Jiménez Sánchez, "El arreglo pacífico de controversias en el Sahara Occidental, ¿*Intractable conflict* o es aún posible una solución?", 35 *Anuario Español de Derecho Internacional* (2019), 451-486.

133 As concluded the former Legal Counsel of the United Nations, "The failure to respect and defend the rule of law at the international level simply has to com to an end. The authority of the United Nations must be upheld, and the Council must be in the lead. It is therefore imperative that the Council in dealing with the question of Western Sahara now acts with authority, determination and consequence in accordance with the law": H. Corell, "The responsibility of the UN Security Council in the Case of Sahara Occidental", *International Judicial Monitor*, Winter 2015. This demand can also be transferred to other conflicts, in which the breach of the structural principles of the international order has not received any response from the SC, as has recently been demonstrated by the war in Ukraine, in which this breach is the responsibility of one of its permanent members, the Russian Federation: X. Pons Ràfols, "La guerra de Ucrania, las Naciones Unidas y el Derecho Internacional: algunas certezas sistémicas insostenibles", 43 *Revista Electrónica de Estudios Internacionales* (2022), 1-33 [doi: 10.17103/reei.43.08], at 14 and ff.

as has already been pointed out. But in terms of relational structure, the major powers (the United States, France, etc.) also have a wide margin of discretion when it comes to enforcing "solidarity obligations", to the extent that they have been largely ignored in relation to the Western Sahara conflict.

For this reason, in view of the practice in relation to the Western Sahara conflict, one could rather speak of "powers or rights of solidarity", since their application is subject to the will of the authorities of each State or group of States; or in the case of SC, to the will of its 15 Member States; or in the case of the EU, to the will of the 27 Member States gathered in the Council. This discretion has manifested itself particularly in relation to the non-compliance with the duty to cooperate to end serious breaches of peremptory norms for which Morocco is responsible, and the prohibition on rendering aid or assistance to Morocco to maintain its armed occupation of Western Sahara.[134] Moreover, even the obligation of non-recognition has been called into question by the United States and, more or less explicitly, by Spain. But if international practice over the past 47 years is anything to go by, there is every indication that this obligation of non-recognition of the annexation of Western Sahara is in force in contemporary international law, and that both states have failed to comply with this obligation of non-

[134] In this sense, as can be seen in the document, *Peremptory norms of general international law (jus cogens) Comments and observations received from Government*, A/CN.4/748, 9 march 2022, recently, some states have opposed the above-mentioned draft conclusion 19 (Israel and the United States), and others have expressed doubts about the scope and validity of this proposal for consequences of a serious breach of a peremptory norm of general international law, in accordance with current customary international law (Japan, the Netherlands, the United Kingdom). But a good number of other States agreed with draft conclusion 19, among them Spain, as quoted above in n. 109. Accordingly, in its Fifth report on peremptory norms of general international law (*jus cogens*), A/CN.4/747, 24 january 2022, pars. 174 and ff., the Special Rapporteur, D. Tladi proposes that conclusion 19, which is contained in the draft adopted at the first reading, be included with the same wording in the draft adopted at the second reading, as decided by the ILC at its session in 2022, see Texts of the draft conclusions and Annex adopted by the Drafting Committee on second reading. It should be noted, however, that in the said Fifth report, D. Tladi, "believes that countermeasures are a controversial part of those articles and that their status in law is not settled. In that context, and without prejudice to the position in law of countermeasures, draft conclusion 19, by qualifying the duty to cooperate by the phrase "through any lawful means", has left this question open. It is not, in the view of the Special Rapporteur, for the Commission in its work on this topic to resolve outstanding issues of the law of State responsibility that did not concern, in particular, peremptory norms. In this connection, it should be recalled that article 54 of the articles on responsibility of States for internationally wrongful acts…, does not specify a rule but is merely a without prejudice clause. The Commission should be reluctant to turn without prejudice clauses into statements of rights": par. 181. In its 2022 comments, the ILC is very cautious in this respect, although it leaves the door open for decentralised countermeasures to be applied: "The obligation to cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*) is to be carried out "through lawful means". This means that the breach of a peremptory norm of general international law (*jus cogens*) may not serve as a justification for the breach of other rules of international law. Although international law does not prohibit unilateral measures to bring to an end a serious breach of a peremptory norm of general international law (*jus cogens*) if such unilateral measures are consistent with international law, the emphasis in paragraph 1 of draft conclusion 19 is on collective measures. This is the essence of "cooperation"": par. 7 of the comments to the draft conclusion 19. It should be added that despite the precautions expressed by the codifying body in the text of its comments, in a footnote it "dares" to cite, although without explaining its content, art. 215 of the Treaty on the Functioning of the European Union, which provides for the application of "restrictive measures": par. 8, n. 249.

recognition. Although the consequences of such non-compliance are still very much up in the air for the moment.[135]

In this regard, it should be noted that in recent years there have been interesting legal developments in relation to the Western Sahara conflict, particularly within the institutional structure, in the regional subsystem of international law that is the EU. Although with some limitations or omissions, the jurisprudence of EU courts has reiterated that, as the ICJ ruled in 1975, *Western Sahara is a non-self-governing territory pending decolonisation, which does not belong to Morocco, and that furthermore the Saharawi people are represented by the Polisario Front and the latter has the legitimacy to bring an action for annulment before EU courts.* The GC has thus denied that the EU can conclude international agreements with Morocco that apply to Western Sahara.

This jurisprudence confirms, albeit rather implicitly or indirectly since it neglects any specific reference to the law of international State responsibility the validity of the "solidarity obligations" already mentioned, in relation to serious breaches of peremptory norms by Morocco. At least the obligation of non-recognition and the obligation of not giving aid or assistance to Morocco to consolidate its annexation of Western Sahara; through the conclusion by the EU of international agreements with Morocco, the occupying power, that facilitate the exploitation of Western Sahara's natural resources without the consent of the Saharawi people. Consequently, it must be stressed that, despite Morocco's staunch defense of the annexationist thesis, disguised as a proposal for autonomy for the territory, the legal classification of this conflict is far from being as indeterminate as it is often presented by some governments and even in UN and EU bodies.

But, despite the decisions of the EU courts, it must also be recognised that, given the very particular characteristics of international law as a fundamentally decentralised and essentially inter-state system, compliance with its rules is sometimes far from satisfactory. In other words, the effective enforcement of the rule of law in international relations sometimes leaves much to be desired[136], as a consequence of the shortcomings of international law in the field of its enforcement processes, in the area of the so-called secondary and tertiary norms of this legal order.[137]

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135 A Sánchez Legido, *supra* n. 101, at 37-43. With the exception of the retorsion measures and/or decentralised countermeasures announced by Algeria, whose authorities have suspended the application of the Treaty of Friendship, Good-Neighbourliness and Cooperation, signed with Spain in 2002, and have threatened to cease trade relations and not to supply gas to Spain, in response to the Spanish government's change of position on Western Sahara: *El País*, 8 june 2022.

136 According to D. Wohlwend, *The International Rule of Law: Scope, Subjects, Requirements* (Edwar Elgar Publishing, Cheltenham, 2021), at 147, the rule of law "… comprises two basic elements: that the government should rule by and be ruled by the law, and that the law must be capable of being obeyed and applied"; and 149 and ff. in which he applies these two elements to the characteristics of international law as a basically decentralised and inter-state system.

137 A few years ago, J.A. Pastor Ridruejo, "Le droit international à la veille du vingt et unième siècle: normes, faits et valeurs", 274 *Recueil des Cours* (1998), 9-308, at 32-33, doubted the validity of the "rule of law" in the international order: on the one hand, because of the legal indeterminacy that affects some of its normative areas; and on the other hand, because the judicial settlement of disputes is conditional on the agreement between the parties to the dispute, who often prefer other political means, more flexible and respectful of their sovereignty. For its part, R. Kolb, *Théorie du Droit International*, (Bruylant, Bruxelles, 2022), at 265 and ff., notes that in international law the processes of rule making and implementation are

Even in the event, as in the Western Sahara conflict, of the violation of structural principles of contemporary international law, such as the prohibition of the use of force and the self-determination of peoples, as recognised in the GA Resolution 2625 (XXV). It could be said, that the political circumstances surrounding the Western Sahara conflict do not allow for much optimism about the effective implementation of these principles. But states and international organisations with the capacity to influence or act with respect to the solution of this conflict should not allow Morocco to continue to violate these two principles (in addition to human rights and international humanitarian law) after 47 years of armed occupation of Western Sahara. *The states and international organisations concerned should do everything possible to ensure that the consensus that allowed the adoption of Resolution 2625 (XXV) is not called into question as a result of the annexationist theses defended by the Moroccan Government, in clear breach of these principles. Because these are principles that seek to underpin and give content to the basic values on which contemporary international law is based. And compliance with these principles also constitutes the basis on which the rule of law is built in this legal system*. In this sense, as the GA maintained in the preamble to Resolution 2625 (XXV),

> "… the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations on the occasion of the twenty-fifth anniversary of the United Nations would contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter".

strongly conditioned or influenced by the political and power relations between states, as a consequence of the essentially decentralised and inter-state structure of the international order and the absence of a universal higher authority exercising world government functions over the 193 UN Member States.