

## The Western Sahara Fisheries Case in CJEU: An Extended Right to Self Determination for the People of the Western Sahara

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*In 2018, the Court of Justice of the European Union (CJEU) gave a landmark judgement involving EU's action on a foreign territory, Western Sahara. CJEU held that the Saharawi people have to be among the beneficiaries of the money earned through fishing from the coastal water of the Western Sahara. The judgment is believed to be substantiating and complementary to the prior International Court of Justice's 1975 advisory opinion on the legal status of the territory of Western Sahara. This Article aims at analyzing the stand of EU's top international court as to whether the decision can be vital to revive the principle of Permanent Sovereignty over Natural Resources (PSNR) and be used as an extension to the right to self determination of the people of Western Sahara.*

### Keywords:

**Sovereignty, Natural Resources, Right to Self Determination, People's Rights, International Court of Justice, Court of Justice of the European Union.**

### Introduction

On 27 February, 2018, the Court of Justice of the European Union (hereinafter CJEU) rendered its judgment in a preliminary reference<sup>3</sup> from the *High Court of England and Wales* in the *Western Sahara Campaign UK v. His Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*.<sup>4</sup> In this case, the Grand Chamber closely followed the analysis it has made in *Council v. Front Polisario*<sup>5</sup> case adjudged at the General Court of the CJEU. The Western Sahara Campaign UK is a voluntary organization supporting the right of the people of Western Sahara to their self-determination, as the Western Sahara, a non-self governing territory situated by the North-Western Africa along the coast of Atlantic Ocean, has been a disputed territory since its liberation from colonial rule of Spain in 1963, and subsequently claimed and governed partly by neighboring states Morocco and Mauritania. The Western Sahara Campaign brought two actions in the High Court of Justice of England and Wales, the first claim challenged the importation of goods certified as originating from Western Sahara; and the second claim challenges UK fisheries policy, as the treaty includes or does not

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<sup>3</sup>. EWHC 2898 (Admin) Blake J, 19 October 2015

<sup>4</sup>. See also: "A fishery deal between EU and Morocco can not include the disputed territory of the Western Sahara annexed by Morocco, the Luxemburg-based CJEU ruled on 27 February." <euobserver.com> accessed 25 May 2018

<sup>5</sup>. *Council v. Frente Polisario, C-104/16, General Court, CJEU*

exclude the water adjacent to the territory of Western Sahara.<sup>6</sup> One of the points of consideration here is the appearance of a North-West African problem at an administrative court in London. Given the matter at issue are purported to be exclusively European Union's measures, the UK court cannot determine their legality, as the competent court to adjudge EU matters is CJEU seated in Luxemburg. Hence, the London Court had two choices, i.e. either to refer this case to CJEU, or to dismiss the case on merit. From different aspects of current international legal context, this case appears important, as it not only answers some very pertinent questions of international law, and at the same time gives rise to a few more.

In broader sense, principle and right of self determination can be described as for the doctrine of the legitimacy of institutions, which asserts a process in which nations and people by their free will attain, maintain, and enhance their self-realization by the organization and practice of their institutions.<sup>7</sup> There are different dimensions and magnitudes of self determination of peoples, such as, self determination can be inherent or remedial, it can also be looked upon from internal and external points of view.<sup>8</sup> The Western Sahara Fisheries case can also viewed from the point of view of decolonization, where people of a former colony has asserted their right to the natural resources, which had been under the occupation of colonial powers in the last century. ICJ's 1975 advisory opinion on Western Sahara considerably involves the narrative of decolonization (which is discussed in this paper in a later part).

## **Historical Background in the light of Legal Facts**

### ***The Geo-political Status of Western Sahara***

Western Sahara is a territory of approximately 266,000 square kilometers bordering Morocco to the North, Algeria to the North-East and Mauritania to the South, with a coastline of nearly 1000 kilometers along the Atlantic Ocean. The territory is home to about 270,000 people consisting of Arab and other local ethnicity, known as Saharawis. Being a sparsely populated territory consisting of desert flatland, Western Sahara has substantial natural resources such as offshore fisheries, oil, gas and phosphate. Historically and geo-politically, the area involves a long running dispute. It was colonized by Spain in 1884. In 1960, the UN General Assembly adopted its famous resolution no. 1514, titled *'The Declaration on the Granting of Independence to Colonial Countries and Peoples'*<sup>9</sup> which called for the immediate liberation of the erstwhile colonized countries from the rules of foreign sovereigns. Pursuant to the provisions of the resolution, colonizing states of Europe liberated most of their colonies in Africa. The Spanish colonizing power started winding up their rule from Morocco in 1963. Since then Western Sahara has been in UN's list of Non-self Governing Territory. This is the largest non-self governing territory both in area and population. But right from the departure of the Spanish rulers, Morocco has been claiming Western Sahara as its integral part. In 1965, UN General Assembly passed its first resolution urging Spain on complete decolonization from Western Saharan territory.<sup>10</sup> One year later, a new resolution was passed by the General

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<sup>6</sup>. 'Court of Justice of the European Union further clarifies the application of the EU-Morocco Fisheries Partnership Agreement to Western Sahara'

<sup>7</sup>. James Summers, 'People and International Law', in Martti Koskeniemi (ed) 'The Eric Castren Institute monographs on International Law and Human Rights' Vol 17 (2014) Brill Nijhoffp. 34

<sup>8</sup>. Ibid.

<sup>9</sup>. UNFA Resolution 1514 (XV), 1960

<sup>10</sup>. UNGA Resolution no. 2072 (XX), 'Question of Western Sahara', adopted on 16 December, 1965.

Assembly requesting that a referendum be held by Spain on self-determination, which would include three options of self-government for Saharawi people.<sup>11</sup> In 1975, Spain relinquished the administrative control of the territory to a joint administration by Morocco and Mauritania. A war erupted between those countries and a Sahrawi nationalist movement, the Polisario Front<sup>12</sup> or *Frente Polisario*, which proclaimed the Sahrawi Arab Democratic Republic (SADR) with a government in exile in Tindouf, Algeria. Mauritania withdrew its claims in 1979, and Morocco eventually secured *de facto* control of most of the territory, including all the major cities and natural resources. The United Nations considers the *Polisario Front* to be the legitimate representative of the Sahrawi people, and maintains that the Sahrawis have a right to self-determination.<sup>13</sup> The UN had initiated the settlement of the dispute. The General Assembly sought for an advisory opinion to International Court of Justice (ICJ), relating to the status of sovereignty of Western Sahara. ICJ acknowledged that Western Sahara had historical links with Morocco and Mauritania, but not sufficient to prove the sovereignty of either state over the territory at the time of the Spanish colonization<sup>14</sup>. The population of the territory thus possessed the right of self-determination.

### **ICJ's Advisory Opinion on Western Sahara: Right to Self-Determination for Saharawi People**

#### ***Brief History of the Proceeding***

On 16 October, 1975, ICJ gave its advisory opinion on the legal status of Western Sahara. Under Article 96 of the UN Charter and UN General Assembly resolution no 3292 (XXXIX), the UNGA sought for the advisory opinion and pursuant to Article 65 of the Statute of the ICJ, it dispensed its advisory opinion, which is non-binding, but relevant in terms of legal interpretation.

As Spain requested the Court in between to decline exercise its competence to give an advisory opinion, ICJ affirmed that only 'compelling reasons' should be a ground of such refusal. Since the controversy which had arisen in the proceeding is not a bilateral issue. Furthermore, the decision would not affect the right of Spain but assist the UN General Assembly in its *decolonization policy*. And for the same reason, it does not prejudice to the object and purpose of the UN Charter.

#### ***Legal Questions ICJ Attempted to Answer***

The UNGA-sought advisory opinion consisted of two following questions:

1. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?
2. If the question 1 has a negative answer, what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

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11\_ United Nations General Assembly Resolution no. 1541, adopted in 1960

12\_ Frente Popular para la Liberacion de Saguira El Hamra y Rio del Oro

13\_ United Nations General Assembly Resolution 34/37, 'The Question of Western Sahara', 21 Nov, 1979.

14\_ Spain annexed the Western Saharan territory in 1883, in a treaty with Germany.

The Court, with a majority by 13 to 3 decided to comply with the request of the advisory opinion, since the request complied with the precondition of the existence of a legal question.

### ***Summary of the Advisory Opinion***

With regard to question 1, the Court was unanimously of opinion that Western Sahara at the time of colonization by Spain was not a territory belonging to no one (*terra nullius*).

With regard to question 2, the Court decided by 14 votes to 2 that there was legal tie between Western Sahara and the Kingdom of Morocco of the kind indicated in the penultimate paragraph of the advisory opinion.

The Court by 15 votes to 1 also decided that there were legal ties between Western Sahara and the Mauritanian entity of the kind indicated in the penultimate paragraph of the opinion. Hence the penultimate paragraph of the Advisory Opinion reads:

*"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 within the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constitutes legal ties between Western Sahara and 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 Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found a legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the decolonization of Western Sahara, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory."<sup>15</sup>*

In the proceeding, Morocco was allowed to choose and appoint an *ad hoc* judge under Articles 31 and 68 of the Statute of ICJ and Article 89 of the Rule of ICJ, whereas Mauritania was barred from appointing an *ad hoc* judge. The reason was, the term 'Mauritanian entity' was used in the question to address the geographic, cultural and social entities within which the Islamic Republic of Mauritania was to be created, and 'emirates' or 'tribes' cannot denote all the properties required to be considered as a state.

### ***Findings and Reasoning by the Court (ICJ)***

The Court interpreted the term *terra nullius* referring to the law in force at that time. It held that, state practice of the relevant time showed that the territory inhabited by tribes or people having a social and political organization is not regarded as a *terra nullius*.

In relation to the reasoning of the second legal question, in view of the decolonization context of the question, the Court opined that the term 'legal ties' may affect the policy to be followed in the question of decolonization of Western Sahara.<sup>16</sup> The Court also held that,

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<sup>15</sup> ICJ Reports, 1975 at 12

<sup>16</sup> Advisory Opinion on Western Sahara, ICJ Reports, 1975, at 41

in Western Sahara there had been nomadic tribes with Islamic faith who have been governed by their own customary law. The court denied the existence of a legal tie that had been claimed by Morocco, purported to be a tie of territorial integrity and sovereignty. Referring to *Eastern Greenland Case* adjudged by PCIJ, ICJ held that, a claim of sovereignty based upon continued display of authority basically has two elements, i.e. (i) intention and will to act as sovereign, and (ii) some actual exercise or display of such authority. Morocco, as per the opinion of the Court failed to display evidence of such exercise of its authority to substantial degree. Morocco's alleged acts of internal sovereignty such as imposition of taxes etc did not necessarily prove her sovereign, authority over Western Sahara. In the earlier treaties between Morocco and Spain or Britain, Morocco's tie with Western Sahara was confined to the tie of allegiance or of personal influence of the Sultan on particular nomadic tribe, rather than recognition of existing sovereignty.

The Court has also dismissed similar claim by Mauritania because Mauritania did not exist as a State during Western Sahara's colonization. The Court examined the legal ties other than claims of sovereignty between Mauritanian entity (identical with so-called Shinguitti country) and Western Sahara. In spite of the nomadic people in the region had right over grazing pastures, cultivated land, well etc, it did not establish the evidence of sovereign right of Mauritania over the territory of Western Sahara.

### ***Significance of ICJ's Advisory Opinion and a Critical Appraisal***

In the advisory opinion, Judge Dillard has made clear that 'automatic retrocession cannot take precedence over inhabitants' rights to self-determination'<sup>17</sup>, which is purported to have an *erga omnes* character. Principles, derived from cases occasioned by decolonization and its immediate aftermath have played a significant role in shaping international law and help its progress.

The Court, in its own word, was not 'unmindful of the purpose for which its opinion is sought'.<sup>18</sup> The Court recognized the existence of ties between Western Sahara and Mauritania or Morocco. But as a result of the special nature of the ties, the Court thought it expedient to qualify them.<sup>19</sup> The subsequent event of the advisory opinion shows that the ambiguity the Court kept in it, by neither conferring the charge of decolonization of the Saharawi people to UNGA, nor to express any direct operative, has given rise to chaos rather than solving the dispute.<sup>20</sup> In the context of protection of indigenous people's rights the decision was criticized to be biased towards the European notion of acquisition of title, instead of taking into account the legal force of indigenous form of political organization.

### **Subsequent Development Regarding the Dispute**

ICJ's advisory opinion could not resolve the dispute. Soon after the delivery of the advisory opinion, Morocco launched the 'Green March' consisting of about 350,000 people into Western Sahara, to avoid UN's call for referendum of the Saharawi people. In 1976, *Frente*

<sup>17</sup>. The Right of people to self determination was held later in *East Timar Case*, 1995 [ICJ Reports, as having an *Erga Omnes* character.

<sup>18</sup>. [1975] ICJ Reports, 86, para 90

<sup>19</sup>. B. O. Okere, 'The Western Sahara Case', *International and Comparative Law Quarterly*, vol. 28, p. 311

<sup>20</sup>. *Ibid.*

*Polisario*, a rebel movement for the liberation of Western Sahara, claimed the administration over whole Western Sahara territory. Mauritania concluded a peace agreement with *Frente Polisario* and renounced the claim over Western Saharan territory in 1979.

In 1988, UN Secretary General Perez de Cuellar presented a settlement proposal for the dispute. In 1991 UN Security Council adopted a resolution<sup>21</sup> on sending a UN mission (MINURSO) to Western Sahara, with a view to facilitating the proposed referendum.

In 2003, UN Secretary General's personal envoy James Baker was sent to detail a peace plan and self determination. The Baker commission attempted to negotiate with both the conflicting parties, but Morocco did not comply. Besides, Mr. Baker's resignation in a couple of years resulted to untimely demise of the peace-plan. Later on, Morocco declared Western Sahara as an autonomous region and promised to leave some of the authorities to the autonomous Government representing Saharawi People.

### **ICJ's Role in Establishing Peoples' Right to Self Determination:**

ICJ, on a number of occasions has given its opinion or judgment on people's right to self-determination. Apart from *Western Sahara*, a number of cases such as *South West Africa (Namibia) Advisory Opinion*<sup>22</sup>, *East Timar Case (Australia/Portugal)*<sup>23</sup>, *Advisory Opinion of the Legal Consequence of Construction of a Wall by Israel*<sup>24</sup>, *Advisory Opinion on Unilateral Declaration of Independence of Kosovo*<sup>25</sup> the resonance of the right to self-determination came up time and again. The work of the Court in the field of decolonization and self-determination has not merely been an occasion of international law; rather this has been a positive source of law itself.<sup>26</sup>

After 1966 adoption of the two human rights charters ICCPR and ICESCR, where peoples' right to self-determination was proclaimed in their common Article 1, ICJ exhibited a different dimension of approach in administering its justice relating to self-determination of people. ICJ located itself between strong affirmative approach to decolonization and the doctrine of *uti possidetis juris*<sup>27</sup>, which is to some extent blamed as the anti-dote to self-determination. Likewise, in *South-West Africa* and *Northern Cameroon Case*, ICJ had reflected its adherent to the UNGA resolution on liberation of colonies<sup>28</sup>.

The UN Charter establishes the International Court of Justice as the principle judicial organ of the UN, and confers to ICJ the authority to give advisory opinions, which are purported to be of non-binding in nature, under Article 96 (2) of the Charter. As long as the advisory

<sup>21</sup>. United Nation Security Council Resolution No. 690, on 29 April, 1991

<sup>22</sup>. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* ICJ Reports, 1971

<sup>23</sup>. ICJ Reports, 1995

<sup>24</sup>. ICJ Reports, 2004

<sup>25</sup>. ICJ Reports, 2008

<sup>26</sup>. James Crawford, 'The general Assembly, The International Court and Self-determination', in V. Lowe and Fitzmaurice (eds) *Fifty Years of ICJ.*, 1995, Cambridge University Press.pp. 585-596

<sup>27</sup>. Note: Doctrine of *Uti Possidelis Juris* purports to allocate territory to one State or another by reference to the pre-independence status quo.

<sup>28</sup>. UN General Assembly Resolution no. 1514 of 1960.

opinion has given rise to recurrent range of problems, ICJ had to struggle with two themes, firstly, the nature of advisory jurisdiction, along with the uncertain legal effect of advisory opinion, as the ICJ Statute states advisory opinion as non-binding in nature; secondly, distinction between legal and political question.<sup>29</sup> In *Western Sahara, Certain Expenses*(1962)<sup>30</sup>, *South West Africa/ Namibia*(1971), *Mazilu Case*(1989)<sup>31</sup> and few other cases, the Court had to examine whether it is the competent organ to answer the question put up to it for passing an advisory opinion, whereas the parties to the dispute had not sought for such opinion. In spite of the lack of binding enforceability, advisory opinions have their own interpretative value. Perhaps it is also due to the reason that ICJ is the only authorized 'in-house counsel' to the UN.<sup>32</sup>

Antonio Cassese, in his Article<sup>33</sup> has opined that, so far ICJ has dealt with self-determination only in its anti-colonial dimension. Though it was not merely out of the choice of the Court, but because of most of the cases relating to self-determination involved colonial countries. Rest of the cases like *Israeli occupation on Palestine (1967)* and *Soviet occupation in Afghanistan (1979)* were so heavily politically loaded that judicial settlements to those were unthinkable. According to Cassese, in the advisory opinion of *Western Sahara*, the Court had greater opportunity to dwell with the question of self-determination of Saharawi people.

In *Western Sahara Advisory Opinion*, the two legal questions were not directly related to Western Saharan people's right to self-determination, but the circumstance was such that basing on ICJ's opinion, the UNGA could take further steps to decolonize Western Sahara.

ICJ had tussled to answer the question whether Western Sahara was a *terra nullius* during the colonization period by Spain. In the opinion, the court held that any land which has its indigenous inhabitants governed by their own rules, even though not strictly following a State in proper definition, shall not be considered as a *terra nullius*.

### ***EU-Morocco Fisheries case in the Court of Justice for the European Union***

The ongoing Western Sahara struggling for independence from Morocco has taken place in the field of exploitation of natural resources. Hence, the EU - Morocco fisheries agreement launched a heated debate. The Fisheries Partnership Agreement, 2006 (hereinafter FPA) between EU and Morocco added an EU dimension within the ongoing dispute regarding self-determination of the people of Western Sahara, because it entitled EU fishermen to fish in the water falling within the sovereignty or jurisdiction of the kingdom of Morocco including Western Sahara and its adjacent water bodies.

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<sup>29</sup>. Rosalyn Higgins, 'The Current Health of Advisory Opinion', M. Fitzmaurice and V. Lowe (eds), *Fifty Years of ICJ*, 1996, Cambridge University Press.

<sup>30</sup>. *Certain Expenses of the United Nations (Article 17, paragraph 2, of the UN Charter)*, ICJ Reports 1962

<sup>31</sup>. *Applicability of Article VI Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ Reports, 1989

<sup>32</sup>. *Supra* 27

<sup>33</sup>. Antonio Cassese, 'The International Court of Justice and the Right of Peoples to Self-Determination', M. Fitzmaurice and V. Lowe (eds), *Fifty Years of ICJ*, 1996, Cambridge University Press.

***EU-Morocco Agreements***

After the adoption of the General Agreement on Trade and Tariff (GATT) in 1994 and subsequent institution of World Trade Organization (WTO) in 1995, the world experienced a proliferation of trade or trade-based agreements, such as preferential or free trade agreements and bilateral investment treaties (BITs). On this account, not much later than the establishment of WTO, the European Union entered into bilateral Agreements with many countries of the World. EU got into those agreements as an integrated forum of European states in the capacity of a single legal entity. The object of such act was to facilitate evenly beneficial trade activities among all EU member States.

EU had the following three agreements signed with Morocco:

1. EU - Morocco Association Agreement, 1996
11. EU - Morocco Fisheries Partnership Agreement, 2006
111. Protocol to EU - Morocco Fisheries Agreement, 2012 (which is due for expiry in 2018)
- iv. Liberalization Agreement with Respect to Agricultural and Fisheries Protocol, 2012

The Agreements gave rise to debate because of the agreements failed to exclude the territory of Western Sahara whose people were entitled to the right to self-determination. Political attempts to resolve the problem remained unsuccessful.

The FPA in its Article 2 provides, "for the purpose of the Agreement, Protocol and Annex: (a) 'Moroccan fishing zone' means the water falling within the sovereignty or jurisdiction of the Kingdom of Morocco". The preamble and Article 1 and 3 of the FPA established a partnership designed to contribute to the sustainable preservation and exploitation of living sea resources.<sup>34</sup>

**The EU - Morocco Fisheries Case<sup>35</sup> before High Court of Justice of England and Wales**

The Western Sahara Campaign UK brought two actions before the *High Court of Justice of England and Wales*, which are as follows:

- i. Regarding the importation of goods certified as originating from Western Sahara.
- ii. Regarding UK fisheries policy as it includes waters adjacent to Western Sahara.

It has been mentioned before that the 2007 Fisheries Partnership Agreement and the 2013 Protocol between EU and the Kingdom of Morocco do not define the exact geographical scope, which led the campaign group to launch their High Court action.

After the leading judgment of *Council v Front Polisario* was given, the referring UK high court withdrew its 1<sup>st</sup> question concerning goods originating in Western Sahara. But the matter of the second of the abovementioned actions, which relates to EU, the High Court's jurisdiction exhausts. Since a member State's court cannot determine the legality of an EU action, the UK court is left with two options. It could either dismiss the case or it could refer the case to CJEU.

<sup>34</sup>. Opinion of Advocate General Wathelet, C-266/16, 10 January 2018, CJEU

<sup>35</sup>. *Western Sahara Campaign UK v. His Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, High Court of England and Wales. **EWHC 2898 (Admin)** Blake J, Judgment on 19 October 2015

If the challenged actions were a common law one, involving the assessment of action by a foreign sovereign, the argument would have been a strong one. But the governing law of the treaty in issue was EU law, and Treaty of the European Union (TEU) obliges EU to respect the principles of EU Charter, and CJEU case laws further suggests that the EU has to respect international law generally.

Thus, a case heard in a London court brought within its scope the rights and wrongs of Morocco's annexation of Western Sahara in the 1970s and the EU's attempts to do business with Morocco - spiced with EU and International Court of Justice learning.<sup>36</sup> The UK court's referral entailed following two legal questions<sup>37</sup>:

- i. Is the Fisheries Partnership Agreement valid in the light of self-determination, and to what extent was it concluded to benefit the Saharawi people?
11. Does it challenge the validity of EU acts based on breaches of international law allegedly committed by EU when Morocco is not a part of the proceeding?

With a view to reaching the answers to the questions, the UK Court found that, it is not eligible to answer these questions, as it exclusively has jurisdiction over the action of that is internal to the territory, citizen or government of England and Wales. The High Court of England and Wales found itself incompetent to give a ruling on the validity of an agreement entered to by the EU. As a result, the English Court made its reference of the second action to the CJEU.

### **The *Front Polisario Case* Before CJEU**

For many years, UN has been recognizing Western Sahara as a non-self governing territory that is entitled to exercise its right to self-determination. The underlying complaint by the NGO named Western Sahara Initiative UK was preceded by the *Front Polisario*<sup>38</sup> or *Frente Polisario Case*<sup>39</sup> admitted to CJEU's General Court<sup>40</sup>. At first, the reference jurisdiction was administered by the General Court (GC) and afterwards GC's decision was appealed<sup>41</sup> to the Grand Chamber of CJEU. In the case, CJEU accepted Front Polisario's entitlement to plead as a 'moral person' not as a 'legal person', without referring to the sui generis character of 'front polisario' or the unique situation of Western Sahara. In the same token the Court fell short of recognizing Frente's legal personality under international law.

In the General Court's judgment<sup>42</sup>, we find several remarkable aspects. Firstly, for the first time of the history of EU proceedings, a national liberalization movement, despite being a non-state actor successfully challenged an EU trade agreement. In the judgment the GC considered that,

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<sup>36</sup> David Hart QC, 'Western Sahara Goes to Europe', *UK Human Rights Blog*, 23 October, 2015.

<sup>37</sup> Ibid

<sup>38</sup> Front Populaire Pour la liberation de la Saguia-el-Hamra et du Rio de Oro

<sup>39</sup> *Council v. Frente Polisario*, C-104/16, *General Court, CJEU*

<sup>40</sup> CJEU has three divisions: The Court of Justice, The General Court and Administrative Tribunal.

<sup>41</sup> *Council v. Front Polisario*, C-104/16

<sup>42</sup> *Council v. Front Polisario*, T-512/12

the Charter of Fundamental Rights of the European Union, 2000 (hereinafter CFREU) is applicable to non-EU citizens as a human rights standard entailing EU activities.

Secondly, a revolutionary aspect of the merit of the case was the confirmation of a duty of care by the Council, especially in case of foreign trade policy. Thirdly, CFREU provisions should be part of necessary agreements. The GC criticized the Council for not having a human rights impact assessment of the FPA. A previous decision by EU Ombudsman in the *FTA Vietnam Case* and its interpretation of extra-territorial human rights obligation by UN special rapporteur was cited. The reasoning of *Front Polisario case* may be used to challenge other trade agreements. Para 244 of the judgment suggests that, the Council should have conducted an assessment of the situation in Western Sahara. The manifest error of appreciation justifying the annulment was its failure to examine the elements of the case.<sup>43</sup>

The Council appealed to the Court of Justice against the decision of the General Court.<sup>44</sup> In its appellate jurisdiction, CJEU<sup>45</sup> held that the Association Agreement and the Partnership Agreements signed between EU and Morocco has to be interpreted in accordance with international law, as meaning that they were not applicable to the territory of Western Sahara. The case did not concern the Fisheries Agreement (FPA) in its judgment.

By its fourth plea, the Front Polisario claims that the contested decision should be annulled because it is contrary to the principle of consistency between EU policies laid down in Article 7 TFEU, which states 'the Union shall ensure consistency between its policies and activities, taking all of its objectives into account'.<sup>46</sup>

### **Admissibility of EU-Morocco Fisheries Agreement dispute to CJEU**

Like the ICJ, CJEU could not decide its jurisdiction over the case merely because of the act of economic annexation of Western Sahara by Morocco. The admissibility of the case to CJEU was supported by the Article 3(5) of the Treaty of the European Union (hereinafter TEU) and Article 263 of the TFEU.

Article 263 of TFEU provides, "The Court of Justice of the European Union shall review the legality of the legislative acts, acts of the *Council*, of the *Commission*, and of the *European Central Bank*, other than recommendations and opinion. It shall, for the purpose have jurisdiction in actions brought by a member State. The European Parliament, the Council or the Commission, on the grounds of lack of competence, infringement of an essential procedural requirements. Infringement of an essential procedural requirement, infringement of the treaties or of any rule of law relating to their application or misuse of powers."

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<sup>43</sup>. Para 225, 247 of *Council v. Front Polisario*, T-512/12, General Court, CJEU.

<sup>44</sup>. CJEU comprises of three divisions, i.e. Court of Justice, General Court and an Administrative Tribunal. the former have appellate jurisdiction over the latter two.

<sup>45</sup>. *Council v. Front Polisario*, C-104/16, Court of Justice, CJEU

<sup>46</sup>. *Council V Front Polisario*, T-512/12, Judgment of the General Court of CJEU, para. 149.

TFEU also provides that, any natural or legal person may, under the condition laid down in abovementioned Article, institute proceeding or action of annulment if an act of the mentioned organization/ bodies is of direct and individual concern to him.<sup>47</sup>

This Article allows the European Court to re-examine EU acts and thus ensure EU or any of its subsidiary organ is not doing anything subversive to the EU Charter in particular and international law in general. Armin Steinbach, in his 2012 Article<sup>48</sup> has delved into the issues relating to the possibility of admission of an ex-EU case in CJEU. In his Article, he has discussed the general grounds and special grounds for the admissibility of a non-EU case to CJEU. General grounds may include the following:

- a. Wrongful act or omission by the European Union, or any of its subsidiary organ or any of its member States that prejudice the performance of a treaty provision.
- b. Violation or breach of a superior rule of law for the protection of individuals.

The special grounds for admissibility comprise the following aspects:

- a. Requirement under EU law to qualify for a rule intended to confer rights on individuals. The case qualifies the admissibility test because such individual rights were conferred in EU's Charter of Fundamental Rights (CFREU).
- b. Inconsistency with peoples' right to self determination.
- c. Inconsistency with provision of Article 73 of the UN Charter that urged to promote self-government, due account of the political aspiration of people, progressive development of their free political institution.

In the opinion of the Author, EU breached the provision of Article 73 of the UN Charter by its following acts/ omission<sup>49</sup>:

- i. EU's failure to install a mechanism in the FPA guaranteeing benefit to Western Sahara people.
- ii. EU's failure to engage in exploitation in Western Saharan waters in collaboration with indigenous people.

It can be inferred that, if the violation of the abovementioned provisions is sufficiently serious, where there is a proof of monetary damage, wherever there is a causal link between the unlawful act by EU and damage suffered by extraterritorial people, and if the deprivation of entitled people gives unjust enrichment to EU, the case may be admissible in CJEU.

On the other hand, the Council questioned the admissibility of the case because it considered that the Court has no jurisdiction to consider validity of international agreements. In cases like *Brita*, *Racke* international agreements concluded by EU counts as acts of the institutions of the EU. The agreements must comply with procedural rules. The Court also clarified that a preliminary reference, though not capable of challenging an international agreement

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<sup>47</sup>. Article 263, para. 4, TFEU

<sup>48</sup>. Armin Steinbach, 'Western Sahara Dispute: A Case Before CJEU?', *Columbian Journal of European Law*, (2012) vol. 18 pp.415-440

<sup>49</sup>. *Ibid.*

directly, must be understood to be challenging the EU act approving the conclusions of this international agreement.<sup>50</sup>

Finally, the General Court ruled that, the Agreements on reciprocal trade liberalization measures between Morocco and EU on agricultural products, processed agricultural products, fish and fisheries product, the protocols thereto and amendments are annulled in so far as they approve the application of the agreement to Western Sahara.<sup>51</sup>

### **Argument on the Case and Critical Appraisal**

Reproaching the Council and Commission, the Court noted, "EU's omission on the point demonstrates that they accept, at least implicitly, the interpretation of the association agreements approved by the challenged decision, according to which these agreements also apply to the part of Western Sahara controlled by Morocco." The Court prima facie found that there is no absolute prohibition for the EU institutions to conclude treaties applied to the dispute areas.<sup>52</sup> This would seem logical since the mere opposition to sovereignty of a State over an area cannot serve to preclude this State from entering into agreements concerning this area.

Article 73 of the UN Charter requires UN members administering territories to 'promote the utmost wellbeing of the inhabitants of non-self governing territories'. The EU had special reason to ensure compliance with the obligations. Because the UN Charter states that in case of conflict of the Charter with any other treaty, the provision of the Charter will prevail.<sup>53</sup>

In the obligation to compliance, EU cannot defy a number of elementary considerations. First, the EU was under an obligation to ensure respect for the fundamental rights of non-EU nationals in non-EU territories. Secondly, 'entirely neutral' agreement, which do not require the violation of fundamental rights, may still fail to comply with the obligation, if that favors the occurrence of such violation. Thirdly, the violation of fundamental rights if 'indirectly occurred, where such a violation was not indeed or aimed at the agreement, such violation may be its consequence or a collateral effect.

On the contrary, Morocco does not distinguish between products originated in Moroccan territory and products originated in Western Sahara. EU has recently taken a decision to separately mark Israeli goods originating from the occupied Palestinian territory. In response Israel resolved to take the dispute to **WTO**, which Morocco could also do.

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<sup>50</sup>. Markus G. Goehring, 'Court of Justice further clarifies the application of the EU-Morocco Fisheries Partnership Agreement to Western Sahara' < <http://eulawanalysis.blogspot.com> > 1 March, 2018, accessed 22 May, 2018

<sup>51</sup>. T-512/12, GC Judgment, para. 251

<sup>52</sup>. para. 146,205 of the judgment, Case ref: C-166/16, CJEU

<sup>53</sup>. Article 103 of the UN Charter, 1945

## CJEU's Judgment and its Bearing on Western Sahara's Legal Status

### *Advocate General Wathelet's Opinion*

Advocate General Wathelet in his opinion<sup>54</sup> concluded that both the fisheries agreement (FPA) and the Protocol were invalid. The Advocate General (hereinafter AG) rejected the submission by the Council, Commission and three other member-States, saying that their argument would mean that no individual could ever rely on the rule of customary international law, or *jus cogens*, to challenge the validity of EU acts. The AG concluded that both of the EU-Morocco agreements were invalid because they constituted a 'breach of EU's obligation to respect the right to self-determination' of the people of a territory outside the EU. Furthermore, as regards the exploitation of natural resources of Western Sahara, the contested acts do not put the necessary safeguards in place. It must be ensured that the exploitation is carried out for the benefit of the people of that territory.<sup>55</sup>

The AG's opinion deals with the question of self-determination and principle of permanent sovereignty over natural resources (PSNR).<sup>56</sup> AG argued that the FPA between Morocco and EU is in violation of right to self-determination, as the agreement applied to the territory and adjacent water of Western Sahara. This is the first time that the request was made under the preliminary ruling procedure for the review of validity of an international agreement concluded by EU. The AG also held that, it was possible to rely on such proceeding on the rules of international law, which are binding on EU, whether their consent is unconditional and substantially precise. Besides, the broad logic of the nature of EU does not preclude a judicial review of the contested act.

In addition to self-determination, the AG also examines the principle of PSNR, and the law of occupation, including the capacity of the occupying power to enter into treaty for the occupied territory. Critically speaking, AG Wathelet's opinion is rich and he rigorously argued. Apart from this, one could look at the validity question from the viewpoint of general international law, or the rule set out in Article 53 of the Vienna Convention on the Law of Treaties (VCLT), 1969. In that case the the necessary implication was void *ab initio* and *in toto*, as it conflicted with a preemptory norm of international law, i.e. the right to self-determination.

### *Summary of CJEU's Judgment*

In its Judgment, the Grand Chamber of CJEU heavily relied upon the judgment of the *Front Polisario* Judgment. Two important legal questions were tested. Was the Fisheries Agreement made with an object to violate the human rights standard confirmed by general international law through various treaties, custom and judicial decisions? If the question gives a negative answer, was the violation is resulted from a subsequent implementation of the treaty provision? Obviously, the first question affirmatively would imply the responsibility of the breach of international law to a higher degree.

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<sup>54</sup>. OPINION OF ADVOCATE GENERAL WATHELET delivered on 10 January 2018, Case C-266/16

<sup>55</sup>. Ibid at para. 239

<sup>56</sup>. see UN General Assembly resolution 1803(XIX), on 14 December, 1962

The Grand Chamber did not find that EU had violated international law on the ground of the first question. Thus, none of the relevant EU agreement and protocol was invalid through the application of Art 3(5) of TEU. The Grand Chamber finally held, "the fisheries agreement concluded between EU and Morocco is valid in so far as it is not applicable to Western Sahara and its adjacent waters."<sup>57</sup>

The Grand Chamber finally ruled that, since neither FPA between the EU and the Kingdom of Morocco nor the Protocol thereto is setting out the fishing opportunities and financial contribution provided for in the FPA are affecting the rights of the people of Western Sahara and thus the agreement is prejudicial to Article 3(5) of the TEU, the FPA and its protocol is not invalid.<sup>58</sup>

### **The CJEU Judgment: Whether Complementary or Derogative to the ICJ Advisory Opinion 1975**

The CJEU issue dealt with the legality from a different paradigm than the ICJ advisory opinion did. Since the question put to CJEU only related to its legal guardianship on EU affairs, it prima facie did not have much to do with redefining the legal status of Western Sahara and its people.

But the other side of the coin shows that, EU had complied with ICJ's 1975 advisory opinion on Western Sahara and UN General Assembly's resolutions, and other UN legal instruments on decolonization, self-determination and sovereignty over natural resources.

Thus, the role played by CJEU has been supplementary and complementary to ICJ's Advisory Opinion. The ambiguity on the right to extraction and exploitation ICJ had left, CJEU judgment further clarified that extended to people's sovereignty over their natural resources.

Had CJEU's judgment been derogative from ICJ's advisory opinion, which is non-binding, the conflict between laws would definitely rise, since there is no express hierarchy among international treaties and agreement, and there is no hierarchy among international courts' decisions and their enforceability.

### **Re-affirmation of Western Saharan People's Sovereignty over their Natural Resources**

The Judgment of CJEU has expanded Western Saharan people's right to permanent sovereignty over natural resources, which goes hand in hand with right to self determination, promotion of self-government under Article 73 of the UN Charter.

The European Court by its judgment, offered compliance to the provision of self-determination and right over natural resources proclaimed in common Article 1 of ICCPR and ICESCR, 1966. Court's decision has honored the Charter of Fundamental Rights of the European Union, 2009. Simultaneously, the Judgment has remarkably respected an outstanding human rights treaty what people of Western Sahara may be

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<sup>57</sup>. Press Release no. 21/18, 27 February, 2018, Court of Justice of the European Union

<sup>58</sup>. C-266/16, Judgment, para. 88, CJEU

subject to, that is, the African Convention on Human and Peoples' Rights<sup>59</sup>. As a feature of third generation human rights instrument, this Convention in its Article 20, "All people shall have the right to existence. They shall have they shall have the unquestionable inalienable right to self-determination.

Article 21 of the Convention provides, "All people shall have the right to freely dispose their natural resources, this right shall be exercised in the exclusive economic interest of the people." And Article 22 states, "All people shall have the right to their economic, social and cultural development with due regard to their identity and the equal enjoyment of the common heritage of mankind."

The Western Sahara Fisheries case reveal some important aspects of international law. One is the role of natural resources in self determination of people, another is the role of international communities' consideration of the self determination of Saharawi people, and the third one is the function of the European Union institutions. Nonetheless, through this case, the role of European Union, which is a regional international organization, disposes its commitment in establishing international justice. An agreement with EU to an extra-territorial entity may also violate the people's right to self determination, and upholding such commitment to control the behaviour of EU members to such externals actors becomes the obligation of the Court of Justice, the European Union. The judgement also conveys a clear message to the EU members that there shall be no deviation from their performance of international obligations in upholding any principle of international law such as right to self determination and permanent sovereignty over the natural resources. The EU Common Fisheries policy, which was adopted decades before the *Rome Treaty*, was upheld at the cost of substantial critical assault to the later concluded *Fisheries Partnership Agreement*.<sup>60</sup>

The CJEU decision is a success to the international law in a sense that, it pointed out that the *Fisheries Partnership Agreement* did not give adequate right to the sovereignty over natural resources of the Western Saharawi people.

## Conclusion

It is certain that the judgment of the CJEU in the Western Sahara case has re-affirmed the human rights of the natives of Western Sahara, as well as the *sui generis* status of the territory, including its right to self-determination, which is considered to be an *erga omnes* obligation under customary international law today.

Therefore, the judgment has facilitated the attainment of extended right to self determination and sovereignty over natural resources of the people of Western Sahara. That appears to be a symbiotic process. In one hand, CJEU has checked EU's Council to inflict a breach of human rights to people living outside the territory of EU's direct area of responsibility. Besides, the European Court conferred Western Saharan people their righteous entitlement to their natural resources.

<sup>59</sup>. Adopted in Banjoul Conference in 1981

<sup>60</sup>. Jeffrey Smith, 'Fishing for Self-determination: European Fisheries and Western Sahara - The Case of Ocean Resources of Africa's Lost Colony' in Aldo Chircop and others (eds), *Ocean Yearbook*, Vol 27 (2013) Martinus Nijhoffp. 289

If we contemplate to the merit of the judgment of CJEU, we notice a shift of customary international law taken place in recent years. Earlier, in the question of peoples' right to their natural resources, the stand-point of international law was more State-centric. To further clarify the statement, it is common that many nations living in a territory do not have a defined State under the definition of the Montevideo Convention, 1933, yet they occupy a significant part of a State's territory, where there might be considerable amount of natural resources as well. If only the State mechanism is authorized to explore, extract or exploit, it may deprive the people living in the territory their right over natural resources. That is why, in terms of equitable distribution of resource. For establishing social justice, the people-centric or ethno-centric approach to disbursement of right over natural resources should be more welcome than the long-practiced state-centric approach.