CHAPTER IX

SELF-DETERMINATION AS A PEREMPTORY NORM OF INTERNATIONAL LAW AND HUMAN RIGHTS IN NON-SELF-GOVERNING WESTERN SAHARA: A TEST FOR THE EUROPEAN UNION

CARMELO DANIS(

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l. *Introduction*

The Western Sahara case encompasses a long history of occupation and human rights violations that originateci, first and foremost, in the *de facto* denial of the Sahrawi people's right to self-determination. While most of the Sahrawi population is stili obliged to live in refugee camps situateci in the Algerian desert, none of the relevant actors, including the Uniteci Nations (UN), have been able to break the enduring deadlock in the peace process.

Perhaps surprisingly, in this stationary scenario, the most significant legal developments have come from the European Union (EU), due to its external policies in North Africa. The implications of the EU's involvement in this area, both for the Sahrawi people and the EU itself,

* Adjunct Professor of lnternational Law, University of Bologna (Italy) and Visiting Research Fellow, University of Sussex (United Kingdom).

are at the heart of different judgments issued by the Court ofJustice of the European Union (CJEU). This case law is the result of the decision on the part of the Polisario Front (the Popular Front for the Liberation of Saguia el-Hamra and *Rio* de Oro, i.e. the Sahrawi National Libera- tion Movement since 1973) to use the EU's judicial system to assert their rights under international law. While the first actions allowed the CJEU to assess the so-called Liberalisation Agreement', a subsequent prelimi- nary ruling requested by the High Court of Justice (England and Wales) shed light on the validity of the Fisheries Partnership Agreement (FPA) and its Protocol under international law.[2] Other Tribunal's orders con- firming the CJEU's approach followed these decisions.[3]

In light of the significance of the Western Sahara case for EU external relations with regards to Articles 3 and 21 of the Treaty on the Euro- pean Union (TEU), there is a need to explore the rationale behind the EU's and, especially, the CJEU's approach, in order to verify whether the Court misused the international obligations at play. Moreover, despite

[1] CJEU (Grand Chamber), 21 December 2016, *Council v. Front Polisario,* C-104/16 P; General Court, 10 December 2015, *Front Polisario v. Council,* T-512/12. lt may be useful to mention since the beginning that, in relation to the Liberalisation Agreement, the CJEU's General Court and Grand Chamber reached an apposite conclusion. As it will be further explored below, the General Court annulled Council's decision as far as it concerned Western Sahara, while the Grand Chamber set aside the General Court's judgment and dismissed the action by Polisario as inadmissible. We will argue below that a different reasoning on current and future agreements between EU and Marocco might be possible, especially in light of the developments following these EU Courts' judgments. In addition to the literature referred below, A. DE ELERA, *The Frente Polisario Judgments: An Assessment in the Light o/ the Court o/ Justice's Case Law on Territorial Disputes,* in *The EU as a Global Actor - Bridging Legal Theory and Practice,* edited by J. CzuczAI, F. NAERT, Leiden, 2017, 266 ff.; I. GovAERE, S. G ARBEN (edited by), *The Inter/ace Between EU and International Law,* Oxford, 2019, in particular eh. 10 and eh. 12.

[2] CJEU (Grand Chamber) , 27 February 2018, *Western Sahara Campaign UK v. Commissioners /or Her Majesty's Revenue and Customs and Secretary o/ State /or Environment, Food and Rural Affairs,* C-266/16.

[3] See General Court, 19 July 2018, *Front Polisario v. Council,* T-180/14 (O rder), paras. 58-72 (relateci to the Council decision 2013/785/EU, of 16 December 2013 and the Commision decision (EU) 2018/393, of 12 March 2018); General Court, 30 November 2018, *Front Polisario v. Council,* T-275/18 (Order), paras. 36-42 (re lateci to Council decision (EU) 2018/146, of 22 January 2018); General Court, 8 February 2019, *Front Polisario v. Council,* T-376/18 (Order), paras. 22-31 (relateci to the Council decision of 16 April 2018 authorising the opening of negotiations with Marocco to amend the Fisheries Partnership Agreement, thus not addressing its application to Western Sahara but whether that decision, being addressed only to the EU Commission, directly and individually concerned also Front Polisario).

what now looks like a rigid approach, the Court's reasoning is challenged again by Polisario in a range of new actions brought against other rele- vant Council Decisions.[4] Hence, the judicial evaluation of the legitimacy of EU acts related - at least indirectly - to Western Sahara is not entirely settled.

By exploring these developments within the EU, this chapter aims to provide a comprehensive examination of the international law regime applicable to the relations between the EU and Marocco as far as the occupied Western Sahara is concerned. In doing so, this contribution explores self-determination *in conjunction with* the human rights obliga- tions resulting from the EU's internal framework. As a result, this work attempts first to verify whether and how in the Western Sahara case the interactions between EU law and international law have reinforced the EU's promotion of its core values and confirmed international custom- ary obligations as they apply to territories that are "occupied" contra- ry to the principle of self-determination. Second, this chapter seeks to demonstrate that the Sahrawi people are directly affected by EU-Ma- rocco agreements, irrespective of the issue of their *de jure* application to non-self-governing Western Sahara. In this respect, the rules governing the position of Polisario as the legitimate representative of the Sahrawi people's quest for self-determination within the international commu- nity, require further examination.[5] In fact, this leads us to question the right of a National Liberation Movement to stand before a supranational court and, consequently, how the EU's internal framework - i.e. the rules of proceedings before the CJEU - should be read accordingly, if at all. Third, this contribution evaluates the consequences (if any) for both the

[4] As of June 2020, the Front Polisario has brought four different actions before the CJEU: *Front Polisario v. Council,* T-393/20, action brought on 23 June 2020 against Council Decision (EU) 2020/462 of 20 February 2020; *Front Polisario v. Council,* T-279/19, action brought on 27 April 2019 against Council Decision (EU) 2019/217 of 28 January 2019; *Polisario Front v. Council,* T-344/19, action brought on 10 June 2019 against Council Decision (EU) 2019/441 of 4 March 2019; *Polisario Front v. Council,* T-356/19 , action brought on 12 June 2019 against Council Regulation (EU) 2019/440 of 29 November 2018.

; This brings to the fore, at least to a certain extent, also the role of the Sahrawi Arab Democratic Republic (SADR) declared by Polisario in 1976 with a Government-in- exile in Algeria. Since 2016 the President is Brahim Ghali, one of the founding members of the Polisario. The SADR is a founding Member of the African Union and, to this day, it has been recognised by more than 80 States worldwide. See www.arso.org/03-2.htm.

EU and the Sahrawi people in terms of human rights protection, including self-determination, under international and EU human rights law.

It is evident from the EU's involvement that a number of general and specific legal frameworks internet in the Western Sahara case. In this respect, customary international law certainly applies, given that the EU is a member of the international Community bound by the rules that emerged 'as evidence of a general practice' and 'accepted as law' [6], including those that evolved as 'peremptory' norms[7] and those originating in *erga omnes* obligations. [8] In light of its specific situation as a former colonial territory under foreign occupation, the occupied Western Sahara is subject to the rules governing self-determination [9] as well as the law of oc cupation. [10] In addition, as far as human rights ob-

[6] See Art. 38 of the Statute of the International Court ofJustice, annexed to the UN Charter, signed in San Francisco on 26 June 1945.

[7] See Art. 53 of the Vienna Convention on Law of Treaties (VCLT): 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of gene ral in international law havin g the same character.' See also the lnternational Law Commission (ILC)'s activity on this matter: e.g. *Third Report on Peremptory Norms o/ Genera! International Law (Jus Cogens),* 2018, doc. NCN.4/714, where complete references to the previous activity may also be found. On the notion and the effects of *jus cogens,* E. CANNIZZARO (edited by), *The Present and Future o/ Jus Cogens,* Rame, 2015; R. Ko LB, *Peremptory International Law - JusCogens: A Genera! Inventory,* Oxford, 2015; T. WEATHERALL, Jus *Cogens: International Law and Socia! Contract,* Cambridge, 2015.

[8] According to the ICJ's *Barcelona Traction* case, 5 February 1970, para. 33, there are 'o bligations of a State towards the international community as a whole' that are 'the concern of all States' and for the protection of which all States bave a 'legal interest' . Among others, see INSTITUT DE DROIT INTERNATIONAL, *Obligati ons and Rights Erga O mnes in International Law,* resolution adopted in Krakow on 27 August 2005; J.A. FROWEIN, *Erga O mnes Obli gati ons,* in *Max Planck Encyclopedia o/ Public Interna tio nal Law,* 2008; P. PrCONE, *Comunità int ernazi onale e obblighi «erga omnes»,* Napoli, 2013.

[9] See Art. 1 of the UN Charter; UN General Assembly (UNGA), *Declaration on the Granting o/ Independence to Colonia! Countries and Peoples,* 14 December 1960, res. 1514 (XV); UNGA, *Declaration o/ Principles o/ International Law Concerning Friendly R elations and Co-operation Among States,* 24 October 1970, res. 2625 (XXV). See also the International Court ofJustice's (ICJ) relevant case law as recalled throughout this chapter as well as Art. 1 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 1 of the lnt ernational Covenant on Economie, Social and Cultural Rights (ICESCR), both adopted in New York in 1966.

[10] See, more gene rally, the law codified in the Hague Conventions of 1899 and 1907 and the 1949 Geneva Conventions and the related Protocols. Although this aspect is not the focus of this analysis for the reasons explained in the text, it is worth recalling that Marocco is bound by international humanitarian law as part of customary international

ligations are concerned, the Sahrawi people fînd themselves in a very particular situation under international human rights law. First, those people who are under the *de facto* contro! of Morocco, as the occupying power, (should) enjoy protection under the international human rights obligations that Marocco accepted through the ratifîcation of a number of universal human rights treaties. [11] Second, those who live in Western Sahara's liberated territories (should) benefît from the regional human rights obligations binding the Sahrawi Arab Republic (SADR) under the framework of the African Union (AU). Third, and for completeness, it is worth remembering that a large number of Sahrawi people live in refugee camps in Algeria. These people find themselves in a more complex situation in light of the specific agreements reached between the Polisario Front and the Algerian authorities. [12] Bringing the EU to the fore entails a consideration of this complex interaction of genera! and specifîc international law rules alongside the EU's own internal obligations. As further specifîed below, these include the need to respect both international law and the principles enshrined in the UN Charter (e.g. Artide 3.5 TEU) and in human rights, especially when the EU's human rights catalogue issaid to have "extraterritorial" application.

In light of this multi-layered legal framework and overlapping obligations, this analysis focuses on the application of the principle of self-determination to Western Sahara as the overarching legal basis for any long-term solution for its people. This principle is examined in light

law (see ICJ, *Advisory Opinion on the Legality o/ the Threat or Use o/ Nuclear Weapons,* 8 July 1996, para. 79). As a result, Morocco can be held, at least, responsible for the ongoing demographic change in Western Sahara's occupied territory and the exploitation of relevant natural resources. See on this aspect, B. SAUL, *The Status o/ Western Sahara as an Occupied Territory under International Humanitarian Law and the Exploration o/ Natural Resources, Lega! Research Paper 15/81,* Sydney Law School, 2015.

[11] An account of these obligations is provided by the project 'HRsaharawi' launched by the DSPS - University of Bologna and the NGO CISP in cooperation with the Municipality of Forlì in 2015, which aims to monitor ali developments that have occurred within the universal and regional human rights mechanisms in relation to Western Sahara. Forali relevant documents, see www.hrsaharawi .org.

[12] In light of the author's missions in the field, which were carried out between 2015 and 2017 in the framework of a cooperation agreement between the DSPS- University of Bologna and the NGO CISP to conduct training activities for the SADR's judicial sector, it seems that the SADR has jurisdiction over its nationals within the refugee camps, although the same people found themselves under the Algerian *de jure* contro!. Algeria's international human rights obligations therefore apply.

of its peremptory character, the *erga omnes* obligations it involves and, ultimately, as a fondamenta! human right and preliminary condition for the enjoyment of the entire human rights catalogue. Simultaneously, this analysis looks at the EU's internal human rights framework and the possibility of it being "extraterritorially" applied to Western Sahara. In fact, we do not see these "external" and "internal" legal dimensions as mutually exclusive. Instead, these are read bere, and should be applied, jointly. This investigation eventually allows us to understand the genera! implications for the EU from two different, but complementary, perspectives: the Union *as* a member of the international Community in relation to occupied territories and *as* a specific legal order dominated by the respect for fondamenta! rights.

For these reasons, the chapter is structured as follows. Section 2 gives the reader an idea of the historic and politica! context of the EU's involvement in the Western Sahara case. Section 3 identifies the relevant obligations for the international Community under international law, thus providing the legal framework in which the EU is called to act. Sec- tion 4 complements this analysis by examining the role of Polisario under international law, including the possibility of using the EU legal framework to demand respect for the Sahrawi people's human rights, alone or through the right to self-determination. Finally, section 5 sheds light on the human rights implications of the Western Sahara case for the EU, via its international commitments and its internal order, while section 6 concludes by looking at the EU's most recent "new" approach towards Marocco and Western Sahara.

Overall, this chapter argues that, given the peremptory character of the principle of self-determination and its corollary rules, which bave not been genuinely embraced by the CJEU, the EU needs to radically review its relations with Marocco. This may also entail setting up a new framework agreement with the Sahrawi people, who in turn may also rely on the EU's human rights internal obligations being affected, directly or indirectly, by decisions concerning EU-Marocco relations. This would be beneficia! also for the EU's own consistency in its external policy and for the need to act in line with international law towards occupied territories, as well as for its wider trade relations. In fact, it is only in this way that the EU could act in accordance with Artide 3.5 TEU, which clearly identifies core elements of EU relations with the wider world as 'the protection of human rights' as well as 'the strict observance and the development of

international law', especially as far as the UN Charter's principles are concerned.

2. The Western Sahara's impasse

With the exclusion of diplomatic pressure on Marocco - including that arising from the former Secretary Genera! of the UN[13], one of his last appointed Persona! Envoys for Western Saha ra[14] and from a few States in the framework of the Universal Periodic Review[15] -, the situa- tion in occupied Western Sahara has not evolved much since the end of the 1980s.

Since the Polisario and Marocco reached an agreement for a cease-fire, no significant steps have been taken to implement the Sahrawi people's right to self-determination. Despite a specific UN mission - the MINURSO[16] - having been set up to oversee the cease-fire, the core

[13] In 2016, for the first time, the UN Secretary-General Ban-Ki Moon visited the SADR in the Territories liberateci by Polisario and referred to the Moroccan "annexation" as an 'occupation'. Marocco reacted by ordering the expulsion of the civil staff of the MINURSO. See the Statement of the Chairperson of the African Union's Commission, issued on 18 March 2016, available at www.peaceau.org/ uploads/auc. eom.18.03.16- minurso.pdf.

[14] For example, on 16 August 2017, the UN Secretary General appointed Horst Koehler as his Personal Envoy for Western Sahara. Supported by the Security Council (see res. 2414/2018), the Personal Envoy unsuccessfully attempted to relaunch the negotiating process through direct talks in Geneva. Regular updates are available at www. un.org/undpa/en/a frica/western-sahara.

[15] Morocco's human rights situation in the framework of the Human Rights Council's Universal Periodic Review was examined three times (2008, 2012 and 2017). A comparison of the observations and recommendations submitted by other States on these three different occasions shows that the Western Sahara case has grown in visibility within the international community. In fact, in 2017 a high number of States eventually expressed their concern to Marocco on the occupation of Western Sahara and the exploitation of its natural resources. Ali relevant documents are available on the Council's website (www.ohchr.org/EN/HRBodies/UPR/Pages/MAindex.aspx) and in the Council-dedicated section of HRsaharawi project (www.hrsaharawi.com). Additional information on the situation of human rights in Western Sahara can also be found in the reports of the UN Secretary-Gen eral under the resolutions concerning the MINURSO's mandate . See for example UN Security Council, *Report o/ the Secretary-General to the Security Council: Situation concerning Western Sahara,* 2 October 2019, S/2019/787.

[16] The MINURSO - the Mission for the Referendum in Western Sahara - is the UN mission set up by the UN Security Council's res. 690/1991. Ali information on the mission is available at http://minurso.unmissions.org.

measure agreed between all involved parties is far from being implemented. This consists of a referendum on the territory's future, through which the Sahrawi people will exercise their self-determination, thus deciding whether they should be organised as an independent State (or not). After having left the AU in protest at the recognition of the SADR as a full member, Morocco re-entered the AU in 2017 with potential positive effects for this process.[17] Both parties involved in the conflict are now members of the same regional organisation, while the UN Security Council seems to be reconsidering its "passive" position towards the conflict and the MINURSO.[18] Yet, the situation remains unchanged, including the MINURSO's mandate that, stili, does not include any specific competence in monitoring human rights in Western Sahara as a result of lack of agreement within the UN Security Council.

To recall briefly the historical background of this post-colonial occupation, at least three key events can be identified for the purposes of our analysis.[19] First, in 1966 the UN General Assembly called on all members of the international community to cooperate in the implementation of the

[17] This historical move was widely discussed (and criticised). While Morocco accepted the principles on which the AU is based, such as 'the sovereign equality and interdependence among Member States of the Union' and 'respect of borders existing on achievement of independence' (see Art. 4, paragraphs a) and b), of the Constitutive Act of the African Union, adopted on 11July 2000 in Lome, Togo), there are doubts that the situation will evolve in line with relevant international law rules. In fact, Morocco refers to Western Sahara in terms of 'Moroccan Sahara' or 'the South' (for instance, para. 39 of Morocco's fifth periodic report under the ICCPR, submitted on 11 May 2004, doc. CCPR/C/MAR/2004/5) . See D.M. AHMED, *Boundaries and Secession in Africa and International Law*, Cambridge, 2015, 9 ff.; A. ABDERRAHMANE, *Morocco's Admission to the AU: A Pyrrhus Victory /or Rabat*, in *Open Democracy*, 6 February 2017; and for a more peculiar account of Morocco's reasons to re-join the AU, Y. HASNAOUI, *Marocco and the A/rican Union: A New Chapter /or Western Sahara Resolution?*, in *Arab Center /or Researchand Policy Studies' Research Paper*, 2017 .

[18] For example, in 2018 the MINURSO was renewed only on a six-month basis, ideally for speeding up the peace process. See the UN Security Council's res. 2440, adopted on 31 October 2018 to renew the MINURSO until April 2019, which called upon the parties to engage constructively in the new talks. Significantly, the resolution also paid attention to the human rights situation in Western Sahara and in Tindouf refugee camps, although this concern has not meant a change in terms of MINURSO's mandate.

[19] For a detailed historical account of the Western Sahara case, see F. CORREALE, *Les origins de la "question du Sahara Occidental": enjeux historiques, déjìs politiques*, in *The European Union Approach towards Western Sahara*, edited by M. BALBONI, G. LASCHI, Bruxelles, 2017, 33-61; S. BOULAY, F. CORREALE, *Sahara Occidental. Con/lit oublié, population en mouvement*, Tours, 2018.

recognition of the right to self-determination of the Sahrawi people. [20] As the administering power of the non-self-governing territory, Spain was urged to respect the obligations provided for in Artide 73 of the UN Charter.[21] Since then, no other country has succeeded to this role. In fact, under international law the presence of Marocco in Western Sahara is considered an occupation by a foreign power; Marocco is certainly not the "administering power" replacing Spain.[22] Second, in 1974 the International Court ofJustice (ICJ)'s (controversia!) Opinion confirmed Western Sahara as an independent "entity" from Morocco.[23] Third, the subsequent "peaceful" invasion by Marocco of Western Sahara in 1975 contributed to the armed conflict between Polisario and Morocco.[24] The armed conflict ended with a cease-fire agreement in 1991, which is in itself problematic. By accepting the cease-fire, both parties agreed to car- ry out the above-mentioned referendum. Despite independence being the natural outcome for the Sahrawi people, Marocco does not seem to accept Western Sahara's independence as one of the possible results of this consultative process. The discussion around the proposals advanced

[20] UNGA, *Questiono/ I/ni and Spanish Sahara,* 20 December 1966, res. 2229 (.XXI), where the General Assembly invited Spain to determine the procedures for holding a referendum under UN auspices. See also UNGA, 10 August 1979, res. 34/37 , urging Marocco to end 'occupation' .

[21] It may even be argued that any other supranational entity to which Spain has deferred relevant powers should also comply with the same obligations. Art. 73 of the UN Charter provides for a general obligation to administer and to promote the well-being of the inhabitants of the territories under their responsibility. As explained elsewhere , Marocco cannot be considered 'the' administering power of Western Sahara under the UN Charter. See M. BALBONI, *Questioning the Legality o/ Agreements concluded between Marocco and the EU under Int ernational and European Law ,* in *The European Union Approach towards Western Sahara, supra,* 24 ff.

[22] In literature there is wide consensus that Marocco is occupying Western Sahara despite the often ambiguous wording used at international political level or by the EU Courts, which labelled Western Sahara as a 'disputed territory'. See C. RYNGAERT, R. FRANSEN, *EU Extraterritorial Obligations with Respect to Trade with Occupied Territories: Reflections a/ter the case Front Polisario be/ore the EU Courts,* in *Europe and the World: A Law Review,* 2018, 7 ff.

[23] See ICJ, 16 October 1975, *Advisory Opinion on Western Sahara.*

[24] For the international humanitarian law applicable to this case and its consequences, see above B. SAUL , *supra.* As explained above, these rules "coexist" with the regime of self-determination as applied to Western Sahara and on which this analysis is focused in arder to draw the consequences of the EU's involvement in this case.

at UN level to solve this impasse in recent decades are evidence of the parties' different app roaches.[25]

The EU is indirectly involved in the Western Sahara case, in terms of the relations established with Morocco, and also directly, if we take into account the nature of obligations binding the entire international community in the event of the occupation of the territory of people enjoying self-determination. More specifically, after the 2000 Association Agreement[26], the EU and Morocco signed a Fisheries Partnership Agreement in 2006 which, in turn, led to the adoption of a related Protocol in 2013.[27] While these agreements defined the conditions for the exploitation of Moroccan waters by EU ships and the economie support granted to Morocco's fishery industry in return, they have been ambiguous on the question as to what constitutes Moroccan territory. The same is true for the Agreement on reciproca! liberalisation measures on agricultural, processed agricultural and fisheries products concluded in 2012.[28]

All these agreements seemed to lie in a grey area. In fact, the parties did not jointly include or exclude Western Sahara from their territorial scope, thus creating the risk of different interpretations as to what constitutes "Moroccan territory" on the two sides of the Mediterranean Sea.

[25] On the initial contradictions around the cease-fire agreement, W.J. DuRCH, *Building on Sand.· UN Peacekeeping in the Western Sahara,* in *International Security,* 4, 1993, 151 ff. In addition to the studies already referred to, on the severa! attempts made at UN leve! A. THEOFILOPOULOU, *The United Nations and Western Sahara. A Never- ending Affair,* Uniteci States (US) Institute of Peace, 2006, at www.usip.org/sites/default/files/sr166.pdf. Interestingly, the author underlined the conflicting messages sent by the UN Security Council itself to the parties, with the consequent negative impact on the definition of a durable solution.

[26] *Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, o/ the one part, and the Kingdom o/ Marocco, o/ the other part ,* in *O],* 18 March 2000, L 70/2.

[27] Respectively Council, 22 May 2006, *Regulation 764 /2006,* in *OJ,* 29 May 2006, L 144, and Council, *Decision 2013/785 /EU ,* in *O],* 12 July 2013, L 328. The 2006 Agreement was interpreted by the CJEU in *Criminal Proceedings against Ove Ahlstrom and Others,* 9 October 2014, C-565/13, in a way that already set aside the possibility of unilatera! interpretation by Morocco. On the Protocol and other EU-Morocco tracie agreements, see E. MILANO, *Il nuovo Protocollo di pesca tra Unione europea e Marocco e i diritti del popolo sahrawi sulle risorse naturali,* in *Diritti umani e diritto internazionale,* 2, 2014, *505* ff.; Io ., *The 2013 Fisheries Protocol between the EU and Marocco. Fishing 'tao South' Continues...,* in *The EU Approach towards Western Sahara, supra,* 151 ff.; E. Ko NTOROV ICH, *Economie Dealings with Occupied Territories,* in *Columbia Journal o/ Transnational Law,* 2015, 584.

[28] See *Council Decision 2012/496/EU,* in *O],* 7 September 2012, L 241/1.

This lack of clarity has indeed allowed the *de facto* application of these agreements by the Moroccan authorities to Western Sahara's occupied territory, while the EU has denied the same application to Western Sahara's occupied territor y.[29] The interpretation of Artide 94 of the Association Agreement, which was relevant for the application of a11 mentioned agreements because it refers to the 'territory of the Kingdom of Marocco', has been therefore crucial in understanding whether the EU has infringed its obligations under international law. On these grounds, by taking advantage of the prerogatives enjoyed under international law, Polisario has challenged the EU before its own Courts. As the representative of the Sahrawi people, it claimed that the EU's trade agreements with Marocco are in conflict with both the international obligations of the EU and the EU's own human rights internal law. The next section scrutinises the former of these allegations, by critically assessing how these international obligations have been used by the EU Courts to eval- uate compliance of the 2012 Liberalisation Agreement, the FTA and its 2013 Fisheries Protocol with international law.

3. *Selfdetermination and Western Sahara: obligations* O/*the EU towards non-selfgoverning territories*

As anticipated, with Western Sahara being a territory under occupation in violation of the application of the principle of self-determination, a number of obligations arise under customary international law for all other members of the international Community, including the EU. Taking into account the UN Genera! Assembly's resolutions on decolonisation30 and the activity of the ICJ3[1], such obligations are deemed to be

[29] As reported during the 2016 proceedings before the CJEU: see CJEU, *Council v. Front Polisario, supra,* para. 121. lt is worth noting that other States concluded trade agreements with Marocco but expressly excluded Western Sahara from their scope of applicati on. This is the case of the US-Morocco Free Trade Agreement (confirmed by the US Trade Representative in a letter dated 20 July 2004). However, even this more restrictive approach may be questionable under international law, as we explore below.

[30] See UNGA, *Declaration on the Granting* O/ *Independence to Colonia! Countries and Peoples , supra,* and subsequent resolutions, available in the General Assembly's dedicateci portal on decolonisation: www.un.org/en/decolonization/ga_resolutions.shtml.

[31] See ICJ, 21 June 1971, *Legal Consequences /or States* O/*the Continued Presence* O/

enforceable *erga omnes.* lnterestingly, the CJEU relied on these rules to dismiss Polisario's pleas in the proceedings initiated to question the legality of EU-Morocco agreements under international and EU law.

In brief, for the reasons explored below, the CJEU deemed that EU-Morocco agreements, adopted through the impugned EU Deci- sions, cannot apply *de jure* to occupied Western Sahara.[32] In so doing, it found that the previous evaluation of the case by the General Court in 2015 was erroneous because it failed to read appropriately all relevant international obligations in play. The General Court's 2015 judgment was indeed based on the argument that the Liberalisation Agreement was applied *de facto* to occupied Western Sahara.[33] As a result, it annulled the impugned Decision far as the Liberalisation Agreement applied to Western Saha ra.[34] lt is no surprise that, since the examination of the action involving the 2013 Fisheries Protocol in 2018[35], the General Court itself has reviewed its original position to embrace the CJEU's approach. Therefore, also the General Court has eventually found Polisario 's actions to be inadmissible because the Protocol as well as other agreements concluded with Morocco "cannot" apply to Western Sahara's occupied territory and waters.

The potential misuse of self-determination, which the CJEU did not even referto expressly as a peremptory norm of general international law, necessitates an urgent re-examination of the principle of self-determination and the connected principle of non-recognition as they apply to the Western Sahara case before critically assessing the EU Courts' reasoning surrounding these international law obligations.

South Africa in Namibia (South West A frica) notwithstanding Security Council Resolution 276 (1970); I CJ, 30 June 1995, *Portugal v. Aust ralia (East Timo r),* para. 29; ICJ, 9 July 2004, *Lega! Consequences o/ the Construction o/ a W all in the O ccupied Palestinian Territory;* ICJ, 25 February 2019, *Lega! Consequences o/ the Separatio n o/ the Chagos A rchipelago / rom Mauritiu s in 1965,* paras. 180 ff.

[32] See CJEU, *Council v. Front Polisario, supra,* para. 88, where the Court, citing the ICJ's *East Timor* jud gment , argued that the principle of self-determination may be described as 'one of the essential principles of international law' and an *'obligatio erga omnes'*.

[33] Generai Court, *Front Polisariov. Council, supra,* para. 103.

[34] *Ibid.,* para. 251: 'D eclares that Council Decision 2012/497/E U of 8 March 2012 [...] is annulled in so far as it approves the application of that agreement to Western Sahara. '

[35] Generai Court, *Front Polisario v. Council* (O rder), *supra,* paras. 44-47.

3.1. The international law regime

The principle of self-determination is viewed as a core principle of international law. It is also part of the peremptory norms of general international law, i.e. the so-calledjus *cogens.*[36] Suffice it to note that, in the recent context of its ongoing work in this area of international law, the ILC has defined self-determination as a 'norm generally accepted as *beingjus cogens',* and interestingly it did so specifically in relation to Western Sahara.37 The application of this principle to the Sahrawi people entails two important consequences. These may be expressed in terms of the *status* of the territory where the population should enjoy such a self-determina- tion and of its admissible use (or administration).

As far as the first aspect is concerned, as rightly pointed out by the CJEU, the territory of a Non-Self-Governing Territory acquires a 'separate' and 'autonomous' status under international law from the State administering it until its people have exercised their right to self-determination.38 This is connected with the very rationale of the right to self-determination: people who enjoy self-determination are entitled to sovereignty over their territory as well as its natural resources.[39] A situation of occupation or annexation, by the same administering State or

[36] It is true that, originally, the principle of self-determination was not generally viewed as a peremptory norm of general international law. See for example ILC, *Dra/t Articles on the Law o/Treaties with commentaries,* 1966, in *Yearbook o/ the International Law Commission,* 1966, Vol. II, 248. Still some scholars express some doubts in this regard, see for instance WEATHELLAR, *supra.* However, for a clear determination in this regard see para. 5 of the Commentary to Art. 26 of the *Dra/t Articles on Responsibility o/ States /or Internationally Wrongful Acts,* in *Yearbook o/ the International Law Commission,* 2001, Vol. II (Part Two) and corrigendum, paras. 76-77. See also T. *KLEINLEIN , Jus Cogens Re-examined: Value Formalism in International Law,* in *The European Journal o/ International Law ,* 2017, 308.

[37] ILC, *Third Report on Peremptory Norms o/ Genera! International Law (Jus Cogens), supra,* para. 62.

[38] See UNGA, *Declaration o/ Principles o/ International Law Concerning Friendly Relations and Co-operation among States, supra,* under the title 'The Principle of Equal Rights and Self-determination of People'. In line with the analysis carried out in section 2, this status is different from the territory of Spain as the State called to respect obligations towards Western Sahara under Art. 73 of the UN Charter.

[39] In addition to UNGA resolutions referred above, see also ICJ's judgment on *Namibia* and *Advisory Opinions* on *East Timor* and on the *Wall, supra.* The UNGA has reaffirmed the same principles in more recent resolutions: for instance, UNGA, *Economie and other activities which affect the interests o/ the peoples o/ the Non-Self-Governing Territories,* 23 December 2016 , res. 71/103, doc. A/RES/71/103, para. 1.

other States, as in the case of Western Sahara, does not cali into question either this separate and autonomous status or its ancillary principles. lt is instead an evident violation of these rules.[40] Moreover, as the UN Genera! Assembly recalls on a regular basis, the need to avoid any economie or other activities that adversely affect the interests of the peoples of non-self-governing territories binds all members of the international Community.[41]

The second aspect relates to the right of the people concerned to determine their politica! status and their economie, social and cultura! development freely and without external interference. Again, the "administering State" is bound by the achievement of this genera! aim. First, the territory of people enjoying self-determination cannot be used to prevent such a development. Second, any form of domination and exploitation of the natural resources of non-self-governing territories constitutes a serious violation of the principle of self-determination *as well as* a denial of the people's fundamental rights.[42] The related prohibition applies not only to the administering State, but to any State or member of the international Community. In this respect, in the context of Western Sahara, evidence shows that Morocco, as the occupying power, is not only exploiting non-renewable resources in that territory, but its occupation is also preventing the Sahrawi people from accessing their natural resources.[43] As a consequence, members of the international Community cannot conclude agreements related to the use of the territory and its

[40] For the sake of clarity, in light of this self-determination regime, arguments based on the law of occupation that justify the exploitation of (renewable) resources located in an occupied territory *zf* aimed at p rovidin g benefits to th e occupied population cann o t be shared. In this respect, for example, C. RYNG AERT, R. F RANSEN , *supra*, 11. At least two reasons may be put forward: firs tly, it may be argued th at law of occupati on should be read in line with the overarching and more recent principle of self-dete rmination; secondly, as is explained further in the text, it should be reconciled with the duty of non -recognit io n as far as other members of the international Community are directly involved in this exploitation. In any case, in the specific situation of W estern Sahara, there is evidence that Morocco is far from acting in good faith and */or the benefit* of occupied Sahrawi people. In this respect, the conclusion that the CJEU 'may have denied legitimate economie opportuniti es to Sahrawi' advanced by C. RYNGAERT, R. FRANSEN, *supra*, 13, seems a mere legal reasoning out of context.

[41] UNG A, *Economie and other activities, supra*, pa ra. 5.

[42] See UNGA resolutions and ICJ's case law and Opinions referr ed to abov e.

[43] See the evidenc e collected by NGOs for their interventions before the Human Rights Committ ee and the Committee on Economie, Social and Cultural Rights in the context of Morocco's reporting procedures , as available at www.hrsaharawi.com.

natural resources, either with the administering State or an occupying power, without consulting the legitimate representatives of the people enjoying self-determination.

Deeply connected to self-determination is the principle of non-recognition. Accordingly, under international law every member of the international Community is called upon to not recognise any unlawful situation arising from violations of international law, especially in the case of occupation, domination or exploitation. The duty of non-recognition has been codified in clear terms by the ILC in both the Draft Articles on the Responsibility of States and the Draft Articles on the Responsibility of International Organisations (D ARIO)[44], while being regularly recalled by the ICJ.[45] Overall, both Draft Articles affirm that no State or international organisation shall recognize as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law - in our case, the principle of self-determination - or render aid or assistance in maintaining that situation. States or international organisations are instead called upon to cooperate in bringing an end to that breach through lawful means. In turn, in its Advisory Opinion on Namibia[46], the ICJ found that the obligation of non-recognition implies a duty of non-cooperation and non-assistance with the author of those violations, as well as an obligation not to enter into treaty relations with that author if these involve, directly or indirectly, a Non-Self-Governing Territory.

Here we may go even further. In light of its peremptory character, any treaties or acts concluded contrary to the principle of self-determi- nation are void according to customary international law on treaties, as initially provided for in Artide 53 of the Vienna Convention on the Law

[44] See Art. 41 of the ILC's *Dra/t Articles on Responsibility o/ States /or Internationally Wrongful Acts, supra* and the parallel provision, Art. 42, of the *Dra/t Articles on the Responsibility o/ International Organizations* (DARIO), in *Yearbook o/ the International Law Commission,* 2011, Vol. II (Part Two). On a doctrinal level, see M. DAWIDOWICZ, *The Obligation o/ Non-Recognition o/ an Unlaw/ul Situation,* in *The Law o/ International Responsibility,* edited by J. CRAWFORD, A. PELLET and S. OLLESON, Oxford, 2010, 678.

[45] See, for example, ICJ, *Lega! Consequences o/ the Construction o/ a Wall in the Occupied Palestinian Territory, supra,* para. 87. On the latest ICJ's case law, see F. SALERNO, *J; obbligo di non riconoscimento di situazioni territoriali illegittime dopo il parere della Corte internazionale di Giustizia sulle Isole Chagos,* in *Rivista di diritto internazionale,* 2019, 729.

[46] ICJ, *Lega! Consequences /or States o/ the Continued Presence o/ South Africa in Namibia, supra,* pa ras. 119-123.

of Treaties (VCLT) for treaties concluded between States. [47] Of course, as the ILC has also pointed out in its work on *jus cogens,* where it is possible, the invalidation of a treaty for being contrary to a peremptory norm of general international law should be avoided. [48] This is essential to ensure that the principle *pacta sunt servanda* is respected. Consequently, an interpreter should, *where possible* by following the general rules of interpretation (as also codified in Articles 31 and 32 VCLT), read a treaty in such a way that it does not conflict with the principle of self-determination. As it is clear from the analysis below, since 2016 the EU Courts have substantially tried to reach this outcome in their reading of EU-Morocco agreements.

Yet, as this chapter argues after assessing the CJEU's relevant judgments, such a compliant interpretation might not always be possible, especially when the ordinary meaning, the context and the purpose of the treaty, taken together with the intention of the parties, aim to overcome obligations arising from the principle of self-determination itself. This might indeed be the case with the new amended EU-Morocco agreements.

3.2. Assessing the EU Courts' use (or misuse) o/ selfdetermination

Given this international law regime and the related obligations, in 2016 the Grand Chamber of the CJEU was called upon to decide wheth- er or not the Liberalisation Agreement between the EU and Morocco applies to Western Sahara. As anticipated, in *Council v. Front Polisario,* the Grand Chamber made use of the principles just examined in contrast to the previous General Court's positive finding on the application of the same Liberalisation Agreement to Western Sahara for the lack of an explicit exclusionary clause.[49]

In order to reach its decision, the CJEU looked at the framework on which the Liberalisation Agreement was based, i.e. the EU-Morocco As-

[47] Adopted in Vienna on 23 May 1969. As for the effect on treaties already concluded before self-de termination arose as a *jus cogens* norm, see Art. 64 VCLT according to which, ifa new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and termi nat es.

[48] ILC, *Third Report on Peremptory Norms* o/ *Genera! International Law (]us Cogens), supra,* paras. 58 ff.

[49] Genera! Court, *Front Polisario v. Council, supra* , pa ras. 101-104.

sociation Agreement. According to Artide 94 of this Association Agreement, the Liberalisation Agreement should be understood as applying to the 'territory of the Kingdom of *Mo rocco'* .[50] The need to provide an interpretation of this provision in line with the principle of self-determination led the CJEU to make two interesting distinctions. First, it looked at the "legal" interpretation of the Liberalisation Agreement, which brings the analysis far beyond its *de facto* application to Western Sahara's occu- pied territory. Second, it also made a distinction between "sovereignty" and "jurisdiction", confirming that Western Sahara cannot be considered part of Moroccan territory in the sense of the geographical space over which Marocco 'exercises the fullness of the powers granted to sovereign entities by international law'.[51] Interestingly, in so doing, the CJEU also referred to self-determination. It thus correctly found, in line with our above analysis, that Western Sahara has a separate and distinct status as a non-self-governing territor y.[52]

Drawing from these premises, the CJEU concluded that the Liberalisation Agreement cannot apply to Western Sahara. [53] In fact, with Western Sahara being a 'third party' that is *only controlled* by (possibly meant as "under the jurisdiction" of) *Mo rocco*[54], i.e. outside its sovereignty, the genera! rule on the effects of treaties applies. [55] As a result, no treaties may have an effect on Western Sahara *unless* the Sahrawi people or their representatives are consulted and their consent is validly expressed. This is the case for the Association Agreement as well as for the subsequent Liberalisation Agreement.

Relying only on these rules, the CJEU chose to ignore, on the one hand, other obligations ancillary to self-determination, such as the duty of non-recognition, and, on the other hand, the "intent" emerging from the Liberalisation Agreement and the related "subsequent practice" regarding its implementation by Marocco and the EU. In rejecting the Genera! Court's reasoning based precisely on these elements, the CJEU found

[50] In doing so, the CJEU criticised the Generai Court for not paying sufficient attention to the rule laid down in Art. 31.3, e) VCLT: see CJEU, *Council v. Front Polisario, supra* , paras. 86 and 93. See also para. 112 on the relationship between the Association Agreement and the Liberalisation Agreement.

[51] *Ibid.,* paras. 92-97, by recalling Art. 29 VCLT.

[52] *Ibid.,* paras. 88-93.

[53] *Ibid.,* para. 114.

[54] *Ibid.* , para. 116.

[55] See Art. 34 VCLT and CJEU, *Council v. Front Polisario , supra,* paras. 100-107.

that the "unilateral" interpretation by Morocco on the exact extension of its sovereign territory and the *de facto* application to Western Sahara cannot have consequences for the scope of the Liberalisation Agreement. In other words, we may also say that, according to the CJEU, the EU has always acted in good faith or, equally, in the belief that the actions at stake would to be implemented in line with relevant international *erga omnes* obligations. Consequently, the EU cannot be said to have recognised *even implicitly* Morocco's position over Western Sahara. What is striking, however, is that this condusion is not based on the evaluation of the Liberalisation Agreement as a tool that is not aimed to recognise or assist a serious breach of a peremptory norm of general international law, *but* on the *a priori* impossibility of the EU to act *de jure* against the principle of self-determination. [56]

Even more surprisingly, the CJEU applied the same reasoning to the FPA in the context of a preliminary ruling requested by the High Court of Justice (England and Wales) in 2018. In fact, it underlined that the FPA applies to the 'territory of Morocco' (see Artide 11 FPA). Yet, this notion should be construed in the same way as the concept of the 'territory of the Kingdom of Morocco' in Artide 94 of the Association Agreemen t.[57] This means that the territory of Western Sahara cannot be covered by the FPA. While this result is correctly based on the consequences of the application of the principle of self-determination to Western Sahara in terms of international status, it is nonetheless true that, in contrast to the Liberalisation Agreement, the FPA actually referred to 'waters falling within the sovereignty *or jurisdiction'* of Morocco.[58]

lnterestingly, despite the distinction between "sovereignty" and "jurisdiction" being pointed out by the CJEU, in relation to the FPA the Court bypassed once again the EU's and Morocco's (possible) intentions with two set of arguments. On the one hand, the UN Convention on the Law of the Sea[59], which binds the EU in the implementation of the FPA, provides that a coastal State is entitled to exercise sovereignty or jurisdiction exdusively on 'the waters adjacent to *its territory* and forming part of its territorial sea or of its exdusive economie zone' (emphasis added, see Artides 2, *55* and 56). This means that, since the Moroccan territory

[56] *Ibid.*, para. 123.
[57] CJEU, *Western Sahara Campaign UK*, *supra*, para. 61.
[58] See Art. 2, a), of the FPA and point 2 of the Protocol, *supra*, (emphasis added).
[59] Adopted in Montego Bay on 10 December 1982.

is already defined as not covering Western Sahara, the FPA could not expand its application to Western Sahara's waters.[60] On the other hand, despite the possibility that the EU and Marocco intended to give a spe- cial meaning to the notion of 'waters falling within the sovereignty *or jurisdiction'* (emphasis added), the EU could not support any intention on the part of Marocco to include the Western Sahara's waters within the scope of the FPA. Otherwise, it would have acted contrary to its inter- national law obligations[61], as previously identified by the same CJEU in *Council v. Front Polisario.* As such, even the reference to "jurisdiction" in the FPA became irrelevant.

This position was eventually embraced by the Genera! Court in the subsequent action for annulment brought by Polisario against Coun- cil Decision 2013/785/EU of 16 December 2013 on the EU-Marocco Protocol setting out the fishing opportunities and financial contribution provided for in the FPA.[62] In contrast to the agreements examined up to this point, the 2013 Protocol attempted to delimitate its territorial appli- cation by referring in the text to 'Moroccan fishing zones'. Not surpris- ingly, these were identified in the Protocol's annex in a very suspicious way.[63] However, to be consistent with the principles stated in the previous CJEU's *Western Sahara Campaign UK* preliminary ruling, the Genera! Court held that the 'Moroccan fishing zones' need to be read in line with the FPA's reference to waters 'under the jurisdiction' of Marocco. As explained above, these waters "cannot" include Western Sahara. Hence, even the 2013 Protocol's controversia! provisions could not extend the Protocol's territorial scope because they *should be read* in line with rele- vant international law rules.[64] Not surprisingly, when called to ascertain the *de facto* application to Western Sahara's waters as subsequent prac-

[60] CJEU , *Western Sahara Campaign UK, supra,* para. 69.

[61] *Ibid.,* para. 71.

[62] See, General Court, *Front Polisario v. Council* (Order), *supra.* On the accordance of the Protocol with the EU's obligations under international law, see widely M. BALBONI, G. LASCHI (edited by), *supra.*

[63] The Annex to the Protocol does not lay down the latitudes of the fishing zones in the South, while mentioning ali other details. See Appendix 4 on Coordinates of Fishing Zones. On this point see also, H. CORELL, *The Principle o/ Sovereignty o/Natural Resources and its Consequences,* in *The European Union Approach Towards Western Sahara, supra,* 133; R. PASSOS, *Lega! Aspects o/ the European Union's Approach towards Western Sahara,* in *The European Unions's Approach Towards Western Sahara, supra,* 142.

[64] General Court, *Front Polisario v. Council* (Order), *supra,* paras. 44-56.

tice, in line with Artide 31.1, c), VCLT, the Genera! Court rejected this argument finding that, *in any case,* such a practice has not been agreed between the EU and Morocco.[65] The EU cannot *de jure* agree, indeed.

Overall, with their reasoning, the EU Courts have reassessed the notion of jurisdiction to reconcile the FPA and its Protocol with the *erga omnes* obligations binding the EU. The CJEU's firmness on the need to achieve an interpretation of EU agreements in line with the core principles of international law cannot be blamed *per se.* As explored above, *where possible* such an attempt should be made. However, the contradictions between law and practice on the ground, as evidenced by Polisario before the EU Courts, and the firmness of the EU to pursue its trade relations with Morocco with some adjustments after these judgments [66] lead us to argue that the CJEU's approach cannot be but a "temporary" solution. lt ultimately aimed to allow the EU to exercise its discretion in foreign relations, but fell short of considering all the implications of the principle of self-determination when applied to the occupied territory of Western Sahara.

For this reason, the next section scrutinises the implications bypassed by the CJEU, thus advancing possible alternative readings of the effects on occupied Western Sahara and its people generated by the EU's trade relations with Morocco. Indeed, for the arguments advanced here, the application of these agreements to Western Sahara loses the centra! weight given to it by the EU Courts so far.

[65] *Ibid.,* paras. 65-67.

[66] For an example of the EU's approach and the importance attached to the trade relations with Marocco, see the *Joint Statement* of the High Representative for Foreign Affairs of the Union and the Minister of External Affairs and Cooperation of Marocco, which was released on 21 December 2016, where an intent to find a ' joint' solution is expressed in clear terms. The developments in this respect are explored below in section 6. lt may not be irrelevant to consider the implications of this EU's effort for other policies where Morocco's cooperation is deemed fondamenta!, such as in the case of externalisation of irregular migrants' contro!. For an account of this cooperation, see J.R.S. FORREST, *Cooperation with Marocco in the EU's A/rican Border -A Laboratory o/ Externalization, OP-ED ECRE,* 12 January 2018.

4. *Taking selfdetermination and human rights seriously: the right o/ Polisario to stand be/ore the EU Courts as a National Liberation Movement (beyond the application o/ agreements)*

The previous section has analysed the key international obligations related to Western Sahara for members of the international Community, including the EU. It has also assessed how the EU Courts have used the self-determination international law regime, in interaction with general international law of treaties, in the proceedings initiated to question the legality of the EU's agreements with Marocco having *de facto* effects on the Sahrawi people.

Irrespective of the favourable outcome for the Union, the Courts' reasoning cannot be viewed as a victory for the EU. First, this case law summoned the Union to avoid grey areas in fulfilling its duty to act in compliance with international law in its external relations. Second, it makes the development of future relations with Marocco conditional upon the EU's respect for the analysed international law regime, thus preventing the EU from leaving this aspect of compliance to its counter- part when a trade agreement is concluded.

Drawing on the above, the next two sections argue that the CJEU's reasoning left out some important issues that, remarkably, are not dependent on the application of the EU-Marocco agreements to Western Sahara. Instead, these issues clearly emerge when respect for the above self-determination international law regime is taken into account more comprehensively than it was by the CJEU in the *Polisario* judicial saga. These are Polisario's standing before the CJEU in order to represent the Sahrawi people's interests, which is explored in this section, and the Sahrawi people's human rights protection under EU law as a consequence of the involvement of the Union in the area, which is addressed in the following section.

4.1. *An alternative pathway /or Polisario's standing be/ore EU Courts*

Following the application of self-determination to the Sahrawi people, Polisario enjoys the prerogatives granted by international law as their representative in the international arena. This role has been recognised internationally, as the General Court's 2015 evaluation also proves.[67] The

[67] General Court, *Front Polisario v. Council*, *supra*, pa ra. 54, where it states for

CJEU itself confirmed that the Sahrawi National Liberation Movement should take part fully in *'any search /or* a just, lasting and definitive politica! solution to the question of Western Sahara' (emphasis added).[68] These prerogatives may include, among others, the obligation to discuss and receive its consent for treaties implying effects on Western Sahara. Since neither the EU nor its member States recognise and/or bave any relations with the SADR, the duty to involve Polisario in any affair con- cerning Western Sahara acquires a particular importance.

lt may be noted that, for Polisario, the first ever decision reached by the Genera! Court in 2015 was an 'extraordinary victory' because, in the framework of a regional organisation, it was eventually granted standing to bring a case before a supranational Court.[69] By contrast, in the appeal of that decision, the Grand Chamber of the CJEU agreed with the Council and the Commission that, since Polisario is not 'directly and individually concerned'[70] by the Council Decision on the Liberalisa- tion Agreement, it could not stand before it.[71] As a result, the action was dismissed as inadmissible.[72] To put it briefly, in every subsequent pro-

instance: '[...] it has participated in UN-led negotiations and has even signed a peace agreement with an internationally recognised State, namely the Islamic Republic of Mauritania.'

[68] CJEU, *Council v. Front Polisario, supra,* para. 105.

[69] M.W. GEHRING, *EU/Marocco Relations and the Western Sahara: the EC] and International Law,* in *EU Law Analysis,* 23 December 2016.

[70] lt is worth remembering that, according to Art. 263 TFEU, it is possible to challenge a decision before the EU Courts only if the applicant has *lega! personality* and is *directly and individually concerned* by that decision, unless the challenger is an EU institution or a Member State. For the settled case law in this respect, see CJEU , 15 July 1963, *Plaumann v. Commission,* case 25/62; 10 September 2009, *Commission v. Ente per le Ville Vesuviane* and *Ente per le Ville Vesuviane v. Commission,* C-445/07 P and C-455/07 P, para. 45 ff. According to this case law, as regards direct concern, two cumulative criteria must be met: a) the contested measure must directly affect the legai situation of the individuai; 6) it must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules. As regards individuai concern, 'natural or legai persons satisfy the condition of individuai concern only if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from ali other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'

[71] CJEU, *Council v. Front Polisario, supra,* paras. 72-73, 128-134.

[72] On the legai personality instead, no issues seem to arise. As already proved, Polisario derives its legai personality under the international legai arder, given that it controls Western Sahara's liberated territory and the UNGA's and Security Council's

ceeding, both the General Court and the Grand Chamber have always connected the direct and individua! concern requirement with the issue of the application of trade agreements to Western Sahara. This has set an insurmountable obstacle for Polisario to bring a direct action against EU institutions, at least until an agreement concluded by the EU with Marocco *explicitly* applies to Western Sahara. The reality on the ground, including for example the application *de facto* of tariff preferences to products originating from Western Sahara, has been again considered irrelevant for this specific purpose. It may appear even stranger that, after the CJEU's 2016 judgment, the (assumed) respect for the obligations stemming from the self-determination of the Sahrawi people is therefore the easy way to dismiss Polisario's actions.

Despite the EU Courts' conclusions, this issue seems to be actually far from being solved. In light of international practice that emerged dur- ing and after decolonisation, National Liberation Movements must be granted the right to be heard in relation to all matters involving the implementation of self-determination, *as well as* the interests of the people they rep resent. [73] From this perspective, even an action before a Court may be identified as a way for these Movements to be heard under international law. While it is true that the EU Treaties clearly set out which subjects may bring an action before the CJEU and in what circumstances, these provisions cannot be read in a vacuum without taking into account genera! international law, as the CJEU itself argued in the case law relevant to Western Sahara. The criterion of 'being directly concerned'[74] in

resolutions refer to it as the representative of Sahrawi people in a consistent way. See Genera] Court, *Front Polisario v. Council, supra,* para. 113, and G. VIDIGAL, *Trade Agreements, EU Law, and Occupied Territories -A Report on Polisario v Council,* in *EJIL Talk!,* l July 2015.

[73] B. CONFORTI, *Diritto internazionale,* Napoli, 2015. See for domestic jurisdictions, High Court of South Africa, 15 June 2017, case 1487/17, at www.saflii.org/za/cases/ZAECPEHC/2017 /31.pdf.

[74] While the individua] concern seems rather obvious due to the Polisario's position as the counterpart of Marocco as far as Western Sahara's resources are exploited, the subsequent analysis also tries to show that the requirement would also be satisfied if read in light of the principle of self-determination. Although the restrictive approach taken by the CJEU in this respect is known, as other authors have suggested, this analysis brings to the fare the specific situation of National Liberation Movements which, for obvious reasons, has not had the effect of expanding the EU Courts' settled principles on direct and individua] concern. See on this discussion, S. H uMMELBRUNNER, A.C. PRICKARTZ, *It's not the Fish that Stin ks¹ EU Trade Relations with Marocco under the Scrutiny o/ the*

Council v. Front Polisario, as well as in subsequent proceedings, could therefore have been read differently. That is why an alternative line of reasoning is suggested here.

In the proceedings already concluded, Polisario argued that it is directly and individually affected by all controversia! EU Decisions 'as a representative of the Sahrawi people'. [75] In line with the general international approach towards National Liberation Movements, this position is independent from the issue of whether or not the EU agreements with Marocco apply to Western Sahara under international law. The CJEU might not share this view on the basis that there is no need to consult Polisario *because* the EU intended to reach an agreement with Marocco that is *in line with* international *erga omnes* obligations. Yet, even in this scenario, this National Liberation Movement and the people it repre- sents still appear concerned by the "side-effects" of the EU's actions in that area.

To demonstrate this point let us take the example of Council Deci- sion 2013/7 85/ EU of 16 December 2013 on the EU-Marocco Protocol, setting out the fishing opportunities and financial contribution provided for in the FPA, despite the final outcome of the action for annulment initiated by Polisario. [76] This analysis can indeed be relevant for other actions of the same kind, especially where the future EU Decisions would replicate the circumstances around the adoption process of that Proto- col. Some of its provisions appear extremely relevant to holding that the Protocol was, in contrast to what the General Court found, of "direct" concern for the Sahrawi people.

To be precise, the adoption of the 2013 Protocol followed a more consistent approach with the EU's core values when compared with the origin of the Liberalisation Agreement. lndeed, that Protocol was adopt- ed only after the European Parliament was reassured about the human rights implications for the Sahrawi people. The European Parliament put pressure on other EU institutions to modify the origina! version of the agreement with the inclusion of an express 'human rights clause' (see Artide 1).[77] While it is true that this provision is meant to recall the

Genera! Court o/ the European Union, in *Utrecht Journa l o/ International and European Law,* 2016 , 26 and 34.

[75] See CJEU, *Front Polisario v. Council, supra,* para. 105.

[76] See, General Court, *Front Polisario v. Council* (O rder), *supra.*

[77] lt is worth mention ing that, despite this clause, Denmark and Sweden voted

principles already expressed in Artide 2 of the Association Agreement and should be read in line with this framework treaty, the Protocol re- inforced the EU institutions' obligations to verify Morocco's respect for that clause by way of procedura! arrangements. Taking an important step in promoting the EU's core values beyond the Union itself[78], the Protocol provides for Morocco's obligation to report on how the financial contri- butions offered by the Union are used in terms of

> 'social and economie consequences, particularly the impact on employment, investment and any other quantifiable repercussions of the measures taken, together with their geographical distribution' (Artide 6).

As reported elsewhere, the specific reference to 'geographical distribution' was meant, *inter alia*, to include a consideration of the consequences of the EU's financial contribution to the Sahrawi people's well-being. [79]

It would be very difficult to argue that these provisions have no direct impact on Western Sahara's people, for more than one reason. First, consideration of the human rights clause requires a different reasoning than the one followed by the CJEU and the Genera! Court after 2016. In fact, when human rights are concerned, the focus is based on "jurisdiction", meant as contro! of the territory with the consequence that there is no need to establish what "Morocco's territory" means under international law. The CJEU itself seems to abide by this rule in *Council v. Front Polisario*[80] when, referring to the notions of contro! and jurisdiction, it mentioned only hu- man rights treaties. Second, financial contribution is granted to Marocco for the development of a fisheries industry whose location and employees' ethnic profile is evidence of the impact on Western Sahara. The "finan-

against the adoption of the Decision, while the Netherlands and the UK abstained. See the statements issued on 14 November 2013 at the margin of the Council.

[78] On its potential "extraterritorial effects", see C. RYNG AERT, *Whiter Territoriality? The European Union's Use of Territoriality to Set Norms with Universal Effects,* in *What's Wrong with International Law*, edited by C. RYNGAERT, E.J. MOLENAAR, **S.M.H.** NOUWEN, Leiden, 2015, 434 ff.

[79] See R. P Assos, *Legal Aspects of the European Union's Approach towards Western Sahara*, in *The European Unions's Approach Towards Western Sahara, supra,* 137 ff. This position is based on the EU Legal Service's opinions, drawing erroneous conclusions from the 2002 Letter to the President of the Security Council by H. Corell, reported *ibid.*

[80] See CJEU, *Council v. Front Polisario, supra,* paras. 96-97, containing references to the European Convention on Human Rights (ECHR) and the Convention against Torture (CAT).

cial scope" of the Protocol cannot be defined as dearly as the "territorial scope". Even if the General Court has easily conduded that, under the *erga omnes* obligations stemming from self-determination in combination with the relevant notion of the Law of the Sea, the Protocol does not apply to Western Sahara, it is equally hard to argue that the EU's contribution is not used *in* Western Sahara. Put this way, the EU's contribution seems to amount to an activity 'that adversely affects the interests of the peoples of the Non-Self-Governing Territories'[81], in contrast to the requirements set out in international law. This is especially true if we consider that Artide 3 of the same Protocol grants the Moroccan authorities 'full discretion regarding the use to which this financial contribution is put' , despite being subject to the recalled procedural arrangements set forth in Artide 6. In short, this kind of involvement on the part of the EU could trigger Polisario's standing before the EU Courts.

Similar provisions seem to be strengthened in the new wave of agreements between the EU and Marocco in order to overcome international criticism and ensure compliance with the EU's internal framework. This is particularly relevant in light of the EU's internal procedural obligation to carry out human rights impact assessments before a trade agreement is cond uded.[82] That is why a reading of the standing requirements before the EU Courts in light of the principle of self-determination may lead to a positive condusion, thus allowing Polisario to submit its daims to represent the Sahrawi people's interest at international level and have its actions duly evaluated.

4.2. *The (limited) role of international law on responsibility*

Por the sake of completeness, it should be noted that other proposals have been put forward in the literature but, in our view, these appear to have less chance of success than our suggested reasoning.[83]

[81] UNGA, *Economie and other Activities, supra,* para. 5.

[82] In this respect, see EU Commission, *Guidelines on the Analysis o/ Human Rights Im pacts in Im pact Assessments /or Trade-Related Policy Initiatives,* 2015, pointing out the legal basis for this obligation. As is shown below, this procedura] obligation is certainly reinforced by the finding s of the Genera] Court in *Front Polisario v. Council, supra,* in 2015. For the dedicateci section on impact assessments on the EU Commission's website, see http: / /ec.eu ropa.eu/ trade/ policy/ policy-making / analysis/policy-evaluation/impact-assessments.

[83] For other attempts to apply these rules in the Western Sahara case, see E. K ASSOTI,

An alternative way to prove that the Sahrawi people are "directly" concerned by the EU's agreements with Marocco could be in connection with the EU's assistance or aid in maintaining a situation that is in breach of self-determination. In this respect, reference has been made to Artide 14 DARIO .[84] According to this Artide, an international organisation that aids or assists a State in the commission of an internationally wrongful act may be held internationally responsible if specific conditions are met. The central issue here is to verify a complicity of this nature with the commission of wrongful acts by Morocco, already denounced by the international community.[85] Provided that simple cooperation, especially in unrelated fields, cannot be identified as complicity, it seems that the current EU-Marocco relationship is certainly more than simple cooperation, the EU being Morocco's largest trading partner. Moreover, their relationship has a dear impact on the natural resources of Western Sahara, especially if financial contributions are used to exploit these resources, as many actors have already reported.[86] Yet, according to the same ILC's Draft Artides, the main question to be answered is whether the EU has violated the rules underpinning the principle of self-determination with the 'knowledge of the circumstances of the internationally

The Legality under International Law o/ EU's Trade Agreements covering Occupied Territories: A Comparative Study o/ Palestine and Western Sahara, in *CLEER Papers*, 3, 2017, 46 ff.

[84] Although the ILC recognised that there is a lack of available practice with regard to international organisations, it found that there were no reasons for not including a provision on complicity in Art. 14 DARIO (see Commentary at 35). This is framed in the same terms as Art. 16 of the *Dra/t Articles on Responsibility o/ States /or Internationally Wrongful Acts, supra:* an 'international organisation which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that international organisation does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that international organisation.' Among others , M. J ACKS ON, *Complicity in Internatio nal Law,* OUP, 2017.

[85] N. JORGENSEN, *The Obligatio n o/ Non-Assistance to the Responsible Stat e,* in *The Law o/ Inte rnational Responsibility,* edited by J. CRAWFORD, A. PELLET, S. 0 LLESON, Oxford, 2010, 677-678.

[86] Report of the Secretary-General on the situation concerning Western Sahara, doc. S/2016/355, paras. 10 and 103. See also African Union , *Legal Opinion on the Legality in the Context o/ Int ernational Law, including the relevant United Nations Resolutions and Organization o/ A/rican Unity!A/rican Union Decisions, o/ Actions Allegedly Taken by the Moroccan Authorities or any other State, Group o/ States, Foreign Companies or any other Entity engaged in the Exploration andlor Exploitation o/ Renewable and Non-renewable Natural Resources or any other Economie Activity in Western Sahara ,* 14 October 2015.

wrongful act'. lt is true that EU institutions are aware of the Moroccan authorities' implementation activities in Western Sahara.[87] However, in contrast to conclusions reached elsewhere[88], it is very difficult to prove that the EU knew that, for instance, its financial contributions would be used to perpetrate the violation of *erga omnes* obligations. This is especially true if we consider that the EU's action is based on its institutions' belief that it has always acted in accordance with international law, as the CJEU's case law shows[89], and the lack of information provided by the Moroccan authorities in this respect. Hence, the possibility of finding "direct concern" using an argument based on assistance or aid seems unlikely to succeed. [90]

If the rules on international responsibility have to be brought to the fore, it seems to us that it would be more appropriate to find complicity in the *indirect* recognition of Western Sahara's occupation contrary to Artide 42 DARIO. The reason lies in self-determination as a peremptory norm of international law, the violation of which has been made clear by the UN Genera! Assembly. However, this would require that *every* form of cooperation with Morocco should be avoided owing to its potential implications for Western Sahara, which is not only doubtful but far from States' practice. It is true that the EU Commission and the Council are aware that Morocco might be regarded as an "occupying power" of the territory of Western Sahara.[91] However, this recognition could hardly be

[87] This is not evid ent only from the 2016 CJEU's judgment but also from the Opinion of the Advocat e General Wathelet on the same case, delivered in September 2016.

[88] E. KASSOTI, *supra*. To put it briefly, th e general kn owledge of th e situat ion on th e ground in occupied Western Sahara cannot be, in our view, a sufficient argument in this respect. See Art. 14 D ARIO 's commentar y attached to it and the relate ci commentar y on Art . 16 of the *Dra/ t A rti cles on Responsibility* O/ *States / or Internat io nall y W rongful Acts, supra*.

[89] Legal Service of the European Parliament , *Lega! O pini on: Proposal /or a Council Regulatio n on the Conclusion* O/ *th e Fisheries Partner ship A greemen t be tw een the European Commun ity and the Kingdom* O/ *Ma rocco - Compatibility with the Prin ciples* O/ *Inte rnational Law* , 20 February 2006 , doc. SJ-0085/ 06, D(2006)7352. The *Opini o n* is based on the Cor ell's Opinion , *supra*, ex pressed at UN level. Corell himself has often criticised the erroneous use of his Opinion mad e by the EU Legal Service: see his contribution in M. BALBONI and G. LASCHI (edited by), *supra.*

[90] Perha ps aware of such a difficulty, in 2015 th e General Court refer red only to th e 'indirect ' en couragement of human rights violation emerging from the EU relationship with Marocco. See General Court, *Front Polisario v. Council, supra* , para. 229.

[91] See, CJEU, *Western Sahara Campaign UK, supra*, pa ra. 72.

regarded as triggering that responsibility. Significantly, at international level, no States or international organisations have pointed to the international responsibility of the EU on the grounds of those rules. Moreover, as analysed above, this possibility has been substantially excluded by the CJEU in its attempt to grant an interpretation of the EU's actions in compliance *(de jure)* with international law.

Hence, as the previous section has shown, the "human rights link" seems the key for Polisario to be allowed to stand before the CJEU and represent the Sahrawi people's interests and for the Court to evaluate the "Western Sahara case" in the near future. This is further the case after the same Court found that it has jurisdiction to examine the validity of international agreements, such as the FPA, with EU Treaties even in the context of a preliminary ruling procedure.[92] Following the example of the Western Sahara Campaign UK, which is a voluntary organisation that aims to support the recognition of the right of the people of Western Sa- hara to self-determination through legal (as well as other) actions, other entities with standing under national law to impugn the validity of EU acts could initiate relevant domestic proceedings. These may eventually culminate in the CJEU questioning the compliance of the EU's acts in relation to Western Sahara with international and EU law.

This development renders the current position on the right of Polis- ario to stand before the CJEU even more unsustainable. Instead, the suggested reading of the EU's internal framework in light of the prin- ciple of self-determination would allow the Sahrawi people to be heard following positive examples initiated at national level. Suffice it to recall the SADR's and Polisario's action before the South African courts for blocking illegal Moroccan exports of Western Sahara's resources that let *erga omnes* obligations prevail.[93] No less importantly, granting Polisario the right to stand before the CJEU to represent the Sahrawi people's in- terests in every matter involving their territory would possibly allow the EU Courts to evaluate the Union 's obligations towards the protection of their fundamental rights. The next section will therefore be dedicated to exploring the issues around this protection.

[92] *Ibid.*, para. 51.
[93] High Court of South Africa, case 487/17, *supra.*

5. *Human rights protection* O/*the Sahrawi people and the role* O/*the EU*

To conclude the analysis and to draw the necessary implications for the EU's external human rights policy, it is worth exploring the human rights side of the Western Sahara case. Since the CJEU's 2016 judgment, this issue has been constantly bypassed by the EU Courts. This is why there is a need to investigate whether its external action should be read (or not) with reference to the EU own human rights' catalogue or, more simply, in relation to the broader framework based on international hu- man rights law. This section therefore considers why the Sahrawi people may find protection under the EU's human rights obligations.[94]

5.1. *Sel/-determination and human rights in the Sahrawi context*

To begin with, it is worth noting that the right to self-determination is deeply connected with the enjoyment of human rights. For instance, under the UNGA's 1960 resolution, 'the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights'.[95] Moreover, the two 1966 lnternational Covenants open their catalogue with self-determination as a human right.[96] In both cases, self-determination is an essential and preliminary condition for the enjoyment of the **full** range of human rights protected internationally. From these premises, it may even be argued that, under customary international law related to decolonisation, some obligations connected to the enjoyment of human rights for people in Non-Self-Governing Terri- tories arise for every member of the international Community, at least in terms of *not hampering* the emergence of favourable conditions for such enjoyment.

To understand all possible implications for the EU, it is also impor-

[94] The General Court's judgment excited many scholars on the potential implications for the broader EU externa l action in th e field: among others, E. BENVENISTI, *The EU Must Consider Threats to Fundamental Rights o/ Non-E.U. Nationals by its Potential Trading Partners,* in *Global Trust,* 13 December 2015, at http://globaltrust.tau.ac.il/the-e-u-must-consider-threats-to-fundamental-rights-of-non-eu-nationals-by-its-potential-trading-partners .

[95] UNGA, *Resolution on the Declaration on the Granting o/ Independence to Colonia! Countries and Peoples, supra,* 1.

[96] See ICCPR and ICECSR, *supra,* Art. 1.

tant to remember the different situations in which the Sahrawi people find themselves as far as their human rights protection is concerned.[97]

First, considering the SADR's contro! over a portion of Western Sahara's territory, human rights treaties ratified by the Sahrawi Republic within the framework of the African Union apply. These include the African Charter on Human and People's Rights[98] and, since 2014, the Protocol on the establishment of the African Court on Human and People's Rights. [99] lnterestingly, under Artide 3 of the Protocol, the African Court now has jurisdiction to deal with 'ali cases and disputes submitted to it regarding the interpretation and application of the Charter, the Protocol and any other relevant human rights instruments' ratified by the SADR.[100]

Second, people living in Western Sahara's occupied territory enjoy protection under Morocco's human rights obligations. Despite being treaty-based obligations, these specific kind of treaties follow, at least to a certain extent, different rules from the ones on which the CJEU has based its judgments since 2016. In fact, considering the particular nature of human rights[101] and in light of international trends in this field, relevant treaties apply to every situation in which a State party's authority has contro! aver a portion of territory or a person outside its countr y.[102] As

[97] Given the scope of this chapter, the situation of Sahrawi people living in refugee camps in Algeria is not addressed specifically. To be precise, they seem to face a mixed situation where several actors concur to their protection. While human rights obligations binding Algeria apply *de jure,* human rights commitments undertaken by the SADR also find application in light of the contro! of the territory where those camps are situateci. In light of the situation on the ground and the presence of the UNHCR, its role in setting the conditions for this enjoyment and its commitment to act in light of international human rights law is also of relevance.

[98] Adopted by the Organization for the African Union's Assembly in Nairobi on 28 June 1981.

[99] See the Status of ratifications of the African Charter provided by the African Union at https:// au.int/sites/ defau lt/files/treaties/7770-sl-a frican_chart er_on_human_ and_peoples_rights_2.pdf.

[100] lnstead, SADR has not yet accepted the jurisdiction of the Court to receive individua! complaints, according to Art. *5* of the Protocol. lt would be interesting to verify whether Marocco, after its re-accession to the African Union, will ratify the Charter and the Protocol, including submitting the Declaration *ex* Art. *5,* thus allowing individua! complaints to reach the Court. See the African Court's portal: http://en.african-court.org.

[101] See for example A. CASSESE, *Diritto internazionale,* Bologna, 2013.

[102] See, for example, the interpretation of the ECHR by the Grand Chamber of the European Court of Human Rights in *Al -Skeini and Others v. the United Kingdom,* 12 July 2011, 55721/07, and subsequent cases, which is particularly relevant for the Western Sahara case. That case law refers to Uniteci Kingdom as an occupying power in Iraq after

recalled above, it is no coincidence that the CJEU has referred to human rights treaties as examples of international practice where the notions of contro! and jurisdiction are read to include situations beyond a State's territory and the exercise of its sovereign powers. [103] Consequently, the fact that Morocco is the occupying power in Western Sahara, in violation of peremptory norms of genera! international law, does not prevent the Sahrawi people under its jurisdiction from enjoying the protection of- fered by the human rights treaties Morocco has ratified. While Morocco has not yet ratified the African Charter, it has committed to international treaties in the framework of the UN, such as the two International Cove- nants (ICCPR and ICESCR), the Convention against Torture (CAT) and the Convention for the Elimination of All Forms of Racial Discrimination (CERD).[104] Those Sahrawi people who claim to be victims of a violation of a right or a freedom granted under one of these treaties may submit a complaint before the relevant universal bodies, provided that Morocco has accepted their jurisdiction. This was the case for the individua! com- plaint procedures set up by the CAT, the CERD and the CRPD.[105] That is why in 2016, for the first time, the Committee against Torture was able to ascertain the violations of the Convention by Morocco perpetrated against Mr. Ennaama Asfari during the events surrounding the camp of Gdem Izik.[106] The same Committee and other UN treaty-based bodies

the 2003 joint attack with the US, in the same way Morocco is in Western Sahara, leading to the application of the ECHR outside the UK's national territory. As the Court stateci, while an extra-territorial act would fall within the State party's jurisdiction under the Convention only in exceptional circumstances, the circumstance where a State bound by the Convention exercises public powers on the territory of another State is indeed one of such exceptions (see paras. 130-150). On extraterritoriality and human rights, M. MrLANOVIC, *Extraterritorial Application o/ Human Rights Treaties: Law, Principles and Policy,* Oxford, 2011.

[103] See CJEU, *Council v. Front Polisario, supra,* paras. 96-97.

[104] See status of ratifications for Morocco in the dedicateci section of the Office of the Uniteci Nations High Commissioner for Human Rights (OHCHR)'s website at: http ://indicators.ohchr.org/ .

[105] *Ibid.,* see Declarations for the CAT and the CERD. As for the CRPD, Morocco accessed its Protocol in 2009.

[106] Committee against Torture, 12 December 2016, *Ennama As/ari v. Marocco,* doc. CAT/C/59/D/606/2014. lnterestingly, despite finding violations of Articles 1, 12, 13, 14, 15 and 16 of the Convention for the gravity of the facts, the views of the Committee itself shows difficulty in using the correct terminology. For example, it referred to Western Sahara as being 'sous administration marocaine', see para. 2.1 of the decision.

bave also expressed a number of concerns about the situation of the Sahrawi people during the evaluation of Morocco's periodic reports.[107]

However, despite the faint pressure for domestic reforms, the recommendations coming from these human rights mechanisms do not seem to bave been effective in promoting the enjoyment of human rights by the Western Sahara's population living in the occupied territory.[108] Even this author, during his missions in the field, has gathered direct accounts of Sahrawi people claiming to be victims of indiscriminate violence amounting, in some cases, to torture and arbitrary detentions.[109] That is why the EU may prove fundamental in this respect.

52. *The EU role in protecting the Sahrawi people's human rights*

EU human rights obligations in Western Sahara need to be evalu- ated in light of the comprehensive framework just explored. In general terms, it is true that the protection of the Sahrawi people's human rights was not entirely neglected by EU institutions. Most attention in this area has come from the European Parliament, which, on some occasions, ex- pressed its concern through resolutions, while pushing fora more con- sistent trade deal with Marocco." [0] The result does not go much beyond a sort of international politica! pressure from the Union, and even this is questionable. Moreover, although this may fall within its wide discretion, there is no sign that the EU has actively supported the human rights cause at international level, for instance by building an international con- sensus, including among its Member States, for ensuring the extension of

[107] For a first attempt to analyse the human rights bodies' approach, see C. Rurz-MrGUEL , *La responsabilité internationale et les droits de l'homme : le cas du Sahara occidental,* in *Cahiers de la Recherche des Droits Fondamentaux,* 1, 2013, 105 ff. Ali reports of the human rights bodies are available at www.hrsaharawi.com.

[108] See the recommendations provided to Marocco in the context of the Universal Periodic Review, *supra.*

[109] As reported above, these accounts were collected during fieldwork missions in Sahrawi refugees' camps near Tindouf (Algeria). More precisely, data refer to visits carried out in May 2015, January, May and September 2016 and September 2017. In addition to institutional actors, a variety of NGOs bave reported human rights violations by Marocco: for instance, Democracy Now, *Four Days in Occupied Western Sahara. A Rare Look inside A/rica's Last Colony,* 31 August 2018, at www.democracynow.org/2018/8/31/four_days_in_occupied_western_sahara.

[110] A number of resolutions are referred in C. Rurz-MrGUEL, *supra.*

the MINURSO's mandate to cover also the human rights monitoring of the occupied territory.

In contrast with this bland commitment, the EU's role in the Sahrawi people's human rights protection could be much stronger. To analyse this potential role, it is useful to identify at least three different sources from which EU obligations arise: genera! international law, international treaties and the EU's own framework.

First, under customary international law, the respect for self-determination as a norm having *erga omnes* obligations binds the EU to facilitate the implementation of a just and durable solution in Western Sahara. In fact, as already pointed out, only self-determination can create the conditions for the full enjoyment of human rights by the Sahrawi people. In light of Artide 42 DARIO, this certainly entails the duty to cooperate in bringing an end to Morocco's breach through lawful means. These means include a prohibition on exploiting Western Sahara's natural resources, but also a prohibition on providing aid or assistance for such a violation. As explained in section 4, it is not clear what kind of assistance or aid could be identified as having this effect [111], at least until the adoption of the new range of agreements (see section 6). Yet, there is evidence that Marocco is *de facto* implementing agreements with the EU in a way that involves exploitation of Western Sahara's resources or, in other words, in a way that deprives the Sahrawi people of their benefits in terms of human rights enjoyment.

Second, in relation to human rights treaties, the EU must abide by a genera! obligation not to assist or aid Morocco in violating its human rights treaty-based commitments. Again, it may be difficult to prove how the EU provides such aid or assistance, or to prove that the EU has the knowledge that this assistance or aid is aimed at violating human rights treaties binding Marocco in Western Sahara. Nonetheless, in positive terms, the EU may have recourse to an international treaty to promote human rights and the rule of law directly in Western Sahara. This means the condusion of a framework agreement with the Sahrawi people's rep- resentatives concerning ali matters related to Western Sahara in accord- ance with the principle of self-determination. In the best-case scenario, such a move would lead to a "Western Sahara-EU Association Agree- ment", which could include human rights provisions. To be clear, keep-

[111] See for example C. R YNGAERT, R. FRANSEN, *supra.*

ing in mind the example of Palestine" [2], we are not referring here to an international agreement aimed simply at avoiding a preferential import of Western Sahara's goods, as this already happens with products origi- nating from Palestinian occupied territories. Instead, in light of the above general obligation to cooperate and despite the challenges ahead[113], the setting up of a more general framework for fostering cooperation with the Sahrawi people could be a powerful tool to facilitate self-determina- tion as well as the conditions for their human rights enjoyment.

Third, and perhaps most importantly from an internal perspective, human rights obligations towards Western Sahara arise from the Union's own "constitutional arder". It is well known that the obligation to respect human rights derives from the EU's founding Treaties, the general princi- ples of EU law and the EU Charter of Fundamental Rights (CFR). While it is clear that the CFR has a specific scope of application, as stated in its Artide 51, it is also true that all EU actions, both internal and external, are based on the respect and promotion of human rights, as provided for by Articles 2, 3 and 21 TEU. This is why, in the 2015 judgment related to the Liberalisation Agreement, the General Court argued that the Council had an obligation to exercise its discretion in international relations in such a way to ensure that the ensuing action, in whatever form it takes, does not prevent the Sahrawi people from enjoying human rights." [4] Significantly, for the first time these human rights were not indicated in general terms. In light of the consequences of the exploitation of Western Sahara's natu- ral resources, the General Court identified a potential violation of specific CFR protected rights. These include the rights to human dignity, to life and to the integrity of the person (Articles 1 to 3); the prohibition of slavery and forced labour (Artide 5); the freedom to choose an occupation and the right to engage in work (Artide 15); the freedom to conduct a business (Artide 16); the right to property (Artide 17); the right to fair and just working conditions and the prohibition of child labour and protection of young people at work (Articles 31 and 32).[115]

[112] For an analysis of the Palestinian case, E. KAsson, *supra,* 22, and CJEU, *25* February 2010, *Brita,* C-38 6/08.

[113] This possibility might be unrealistic in light of what Art. 21.2 TEU provides for the Union . Moreover, it seems unfeasible if the SADR should be involved because of the lack of recognition by all EU Member States. lt might be easier indeed to consider only Polisario as the legitimate representative.

[114] General Court, *Front Polisario v. Council , supra,* para. 227.

[115] *Ibid.* , para. 228.

To be clear, the Genera! Court did not support an "extraterritorial" application of the Charter.[116] Rather, it framed more simply an internal procedura! obligation to which EU institutions are bound when they act externally. However, in practice, the result is the same. In fact, in relation to Western Sahara, the CFR may have *external* effects by way of *internal* commitments. Put this way, there is no need to verify whether or not agreements apply to Western Sahara as the CJEU's case law analysed in section 3 shows. In fact, the very possibility that an action could have a human rights impact calls on EU institutions to respect this procedura! obligation. To fulfìl this duty, genera! declarations of compliance or forma! legal arrangements, such as those in place in the agreements to which the actions initiated by Polisario refer, do not seem sufficient under EU law.

Remarkably, the reasoning followed by the Grand Chamber of the CJEU in 2016 does not refute this conclusion. In fact, saying that the CFR does not apply to the population of Western Sahara [117] *because* the agreement with Marocco does not apply to that territory does not mean that the CFR is not applicable to EU institutions when they exercise their competences, or discretion, in external relations. In other words, it is true that the Genera! Court's 2015 judgment and the Grand Chamber's 2016 judgment reached different conclusions, but this is due to different preliminary assumptions. In relation to human rights, however, these conclusions are not in contradiction. First, the internal procedura! obligation analysed here was not questioned by the Grand Chamber. Second, going even further if read *a contrario*, the Grand Chamber seems to imply that the CFR applies when an EU action finds application in the case at stake. Of course, this finding goes well beyond the Western Sahara case, it being possible to apply this principle to the wave of cooperation between (some) EU institutions and third countries in the field of migration. [118]

In brief, Western Sahara's people may also be entitled to enjoy human

[116] *Ibid.*, 'the Council must examine, carefully and impartially, ali the relevant facts in arder to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fondamenta! rights, including [...].'

[117] CJEU, *Council v. Front Polisario, sup ra,* para. 272.

[118] See, for example, the cooperation with Libya in relation to which the UN Secretary-Ge neral raised human rights concerns already in its *Report pursuant to Security Council Resolution 2312 (2016),* 7 September 2017, doc. S/20171761. Yet, as explained in Chapter I, the resort to informai agreements prevents the CFR from applying.

rights protection under EU law, at least indirectly by way of procedura! obligations on which the EU is bound. The question is then, again: although the burden of proof seems to lie on the Council, how may this obligation be respected if the Sahrawi people's representative - Polisario - is prevented from standing before the CJEU? The answer to this question calls for genera! reforms. Additional "internal" safeguards should be put in place to ensure the compliance of the Council's acts with core EU values. In this respect, the role of the EU Parliament as a *sui gen- eris* monitoring human rights body cannot be overestimated[119] and the range of human rights clauses in EU agreements with third States do not prove effective either, as the Western Sahara case itself clearly shows. In this context, the possibilities opened up after the *Western Sahara Campaign UK* preliminary reference in terms of the CJEU's jurisdiction may be promising, going well beyond the effects of EU-Marocco relations in Western Sahara.

6. Towards a principled solution /or Western Sahara and beyond?

The analysis of the "Western Sahara case" and of the EU's involvement in the area through agreements with Marocco allows us to draw some conclusions concerning the EU's global role and the duty to act in line with international law and the UN Charter, of which self-determi- nation is a core element. It also provides insights on EU human rights obligations towards people who live in occupied territories in violation of peremptory rules of genera! international law.

On a positive note, Polisario's action led the CJEU to confirm that all EU actions bave to be interpreted in compliance with the principles of the international Community that apply to territories occupied contrary to self-determination. Despite a presumed wide "internal" discretion on how to carry out "external" affairs, the EU's bilatera! relations and its actions worldwide need to be reconciled with these fundamental rules. In this respect, it was surprising to read that the EU is not *absolutely* forbidden 'by its law or by international law' from concluding agreements

[119] The same is true in relation to other EU actions having an external dimension: as in the case of the "EU"-Turkey deal and the approach of the EU Parliament. See CJEU, Orders of 28 February 2017, Cases *NF v. European Council,* T-192/16; *NG v. European Council,* T-193/16; *NM v. European Council,* T-257/16.

applicable to occupied territories, as the General Court pointed out in its 2015 judgment. [120] The CJEU's reasoning overcomes that position giving, even implicit, voice to the Treaties, especially having regard to Articles 3.5 and 21 TEU. While it is noticeable that the CJEU reasoned in terms of international law obligations instead of basing the source of these obligations in the EU Treaties themselves, the clear result is that all future relations, directly or indirectly, connected with occupied territories can no longer take advantage of grey areas.

Conversely, on a negative note, the EU's interests in developing relations with countries that are internationally responsible for serious violations *ofjus cogens* norms bave undermined the role of the EU as a "global normative power" based on respect for the rule of law and human rights. Appropriate actions are thus needed. Relying on the same international law obligations, these EU actions should be rethought with a focus on Western Sahara, on the need for its people to be heard even before its Courts and on the protection of their human rights. Continuing the development of relations with Marocco with some formal adjustments, but without a parallel focus on the Sahrawi people's needs and future, would disregard the key findings of the EU Courts' reasoning towards occupied Western Sahara.

In this new scenario, two fìnal dimensions are worth recalling from the above analysis. The fìrst is directly connected with the removal of those legal and factual obstacles which prevent the Sahrawi people from being heard *in* and *with* the EU. On the one band, this may be achieved by reading the internal framework in light of self-determination, thus allowing the legitimate representative of the Sahrawi people to stand before the EU Courts to defend their interests. On the other band, it calls for new diplomatic relations or a more sustainable cooperation. As a member of the international Community that is autonomous from its own Member States, the Union is indeed called upon to assist the Sahrawi people in implementing their right to self-determination. Fostering the approach adopted in other cases involving the violation of this principle[121], EU institutions bave the power to conclude a general framework

[120] See General Court, *Front Polisario v. Council, supra,* para. 117 ff. To make things worse, the General Court also used the term 'disputed territory' in place of occupied territory as the situation of Western Sahara requires.

[121] See for example the *Euro-Mediterranean Interim Association Agreement on Trade and Cooperation between the European Community, o/ the One Part, and the Palestine*

agreement with Polisario (if not also with the SADR). A positive side-effect would consist of setting more sustainable economie conditions for the Sahrawi people's enjoyment of other basic human rights.

The second dimension is related to the human rights implications of the EU-Marocco relationship. The subsequent practice between the parties and the *de/acta* application ofEU-Morocco agreements to Western Sahara necessarily engages the Union's responsibility. If not at international level, for the implications of trade agreements as potential sources of recognition of the occupation of Marocco in Western Sahara, it certainly calls for internal responses. These include the reinforcement of *internal* procedures to comply with the CFR *externally* and, in egual terms, to avoid any sort of assistance or aid to the Moroccan authorities in the commission of human rights violations in Western Sahara or perpetrated against the Sahrawi people's attempt to exercise their self-determination.

Should these two dimensions set the ground for the EU's wider relations, especially when occupied territories and/or trade agreements are involved, the new attempts of the European Commission and the Coun- cil to justify an extension of the agreements with Marocco to Western Sahara do no leave much room for hope. lnterestingly, these attempts are aimed at avoiding trade disturbance and ensuring the enjoyment of human rights of people living in relevant territories. The proposals even- tually approved by the Council consist of amending the EU-Marocco agreements by including an explicit reference to products originating in Western Sahara 'subject to controls by the Moroccan customs authori- ties'.[122] These products shall benefit from the same trade preferences of

Liberation Organisation (PLO) /or the Benefit of the Palestinian Authority of the West Bank and the Gaza Strip, o/ the Other Part, signed in Brussels on 24 February 1997, in *OJ,* 16July 1997, L 187/3 .

[122] See Annex, para. 1, of relevant Proposals: *Proposal far a Council Decision relating to the Signature, on Behalf* O/ *the European Union,* O/ *the Agreement in the Form* O/ *an Exchange o/ Letters between the European Union and the Kingdom* O/ *Moracea on the Amendment o/ Protocols 1 and 4 to the Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States,* O/*the One Part, and the Kingdom* O/ *Marocco,* O/ *the Other Part* (COM(2018)479 final) and *Proposal /or a Council Decision on the Conclusion* O/ *the Agreement in the Form o/ an Exchange* O/ *Letters between the European Union and the Kingdom o/ Marocco on the Amendment* O/ *Protocols 1 and 4 to the Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States,* O/ *the One Part, and the Kingdom* O/*Marocco, o/ the Other Part* (COM/2018/481 final). The Council authorised

Moroccan products. As for the fisheries sector, the new EU-Morocco partnership includes 'the waters adjacent to the territory of Western Sahara' in its scope of application.[123] According to EU institutions, the ensuing benefits derived from the economie development of Western Sahara prevail over any other consideration, in the underlying belief that this development contributes to self-determination and to the enjoyment of human rights in line with obligations set out in Artide 21 TEU.[124] Yet, if we look at the subsequent practice, many doubts remain as to the genu- ine intentions of the EU. For example, the decision of the EU-Kingdom of Morocco Association Committee establishing, in a spirit of partner- ship, the joint assessment of the impact of the application of the amend- ed Agreement on an annual basis, refers to the exchange of information from 'a sustainable development perspective', thus leaving self-determi- nation and human rights to the margin of this monitoring process.[125] Al- though the decision insists on the transparency and the reliability of this process, it aims to collect only data 'with regard to the advantages [...] for the people concerned and the exploitation of the natural resources of the territories in question', such as statistica!, economie, social and environmental information.[126]

the signature of the Agreement including these amendments on 16 July 2018 through Decision (EU) 2018/1893, in *OJ,* 6 December 2018, L 310. lt eventually approved the conclusion of this amended Agreement on 28January 2019 via Decision (EU) 2019/217, which the action brought on 27 April 2019 by Polisario befare the General Court refers to. See the explanatory documents attached to the Proposals, which also considered the impact of the extension of the tracie preferences on Western Sahara people's human rights protection in positive terms. The amended Agreement entered into farce on 19July 2019.

[123] See the new EU-Ma rocco Suistanable Fisheries Partnership Agreement, which entered into farce on 17 July 2019: Council, *Decision (EU) 2019/441 o/ 4 March 2019 on the conclusion o/ the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom o/Marocco, the Implementation Protocol thereto and the Exchange o/ Letters accompanying the A greement ,* in *O],* 20 March 2019, L 77/4. According to point 5 of the preamble, 'the scope of application of the Agreement should be defined so as to include the waters adjacent to the territory of Western Sahara.'

[124] *Ibid.,* point 7.

[125] EU-Kingdom of Marocco Association Committee , *Decision No. 112020 o/ 16 March* 2020 *concerning the Exchange o/ In/ormation between the European Union and the Kingdom o/ Marocco /or the Purpose o/ Evaluating the Impact o/ the Agreement in the Form o/ an Exchange o/ Letters on the Amendment o/ Protocols 1 and 4 to the Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, o/ the One Part, and the Kingdom o/ Marocco, o/ the Other Part,* in *OJ,* 31 March 2020, L 98/45.

[126] *Ibid .,* Annex .

In short, notwithstanding the continuous reference to the non-recognition of Moroccan sovereignty over Western Sahara and the willingness to support a politica! settlement in line with the UN Charter in the latest Council Decisions, the respect for obligations under peremptory international law is seriously undermined by the initiatives of EU institutions. These indeed aim to achieve a sort of "application without recognition" of the violation of self-determination.

In line with what the EU's internal framework demands, as echoed in the 2015 General Court's judgment, human rights impact assessments were carried out in view of the adoption of the amendments and agreements on which the new EU-Marocco relations are based. Por example, the reports attached to Commission's proposals to amend Protocols 1 and 4 of the Euro-Mediterranean Agreement refer to the consultation carried out among 'a wide range of socio-economie and politica! operators from the Western Saharan pop ulation'.[127] However, attention is not paid to the fact that this "population" includes Moroccan citizens who settled in Western Sahara's occupied territory contrary to the principle of self-determination, but also to international humanitarian law's fundamental rules. Calling into question the *bona fide* of the Commission and the Council, there is no evidence that this consultation genuinely involved Polisario, the SADR and/or Sahrawi civil society organisations.[128]

Hence, the new overall EU-Marocco relationship cannot be a principled solution to the Western Sahara case. Not only should this bring the CJEU to reconsider its position on Polisario's direct concern with the new relevant EU Decisions. In such a scenario, it would also be diffìcult to rely on compliant interpretations of ensuing agreements with the principle of self-determination.[129] lnstead, the CJEU, as well as all authori-

[127] See the proposals advanced by the Commission in 2018, *supra*. See also *Council Decision (EU) 2019I441*, *supra*, points 11-12 of the preamble: 'In view of the considerations set out in the Court of Justice's judgment, the Commission, together with the European External Action Service, took ali reasonable and feasible measures in the current context to properly involve the people concerned in order to ascertain their consent. Extensive consultations were carried out in Western Sahara and in the Kingdom of Morocco, and the socioeconomic and politica! actors who participated in the consultations were clearly in favour of concluding the Fisheries Agreement. However, the Polisario Front and some other parties did not accept to take part in the consultation process.'

[128] In this respect see, for example, the policy brief published by WSRW, *EU-Marocco Trade Proposal regarding Western Sahara*, 2018.

[129] Fora number of examples where such interpretative activity has been carried out, in addition to CJEU, see ILC, *Third Report on Peremptory Norms o/ Generai International*

ties called to implement it, should question the validity of such bilatera! agreements. In this respect, considering self-determination as *ajus cogens* norm, the customary international law rule initially expressed in Artide 53 VCLT would apply. In this hypothetical scenario, the inclusion of an express provision in agreements aimed at expanding their scope to Western Sahara, be it via its products or adjacent waters, would render them (as a whole and *ab initio)* void for being in conflict with a peremptory rule of general international law.[130]

To be certain, this conflict could not be a surmountable one. Considering the genera! rules of interpretation of treaties as codified in Articles 31 VCLT, both the ordinary meaning of the words used, the context and the purpose should guide the interpreter in that direction. In fact, the irreconcilable nature of the new relevant Council Decisions with the self-determination principle as analysed above is clear, given that the latter is not simply egual to the economie development of the territories in question. These Decisions are also contrary to the Association framework as interpreted by the EU Courts, because they are specifically aimed at overcoming a *de jure* application of the EU-Marocco trade agreements and bringing into their scope an occupied territory. Moreover, even under the EU internal human rights framework, the relevant Council Decisions fell short of the procedura! obligations connected with the CFR, as explored above, in relation to impact assessments on the human rights consequences for the Sahrawi people carried out in good faith.

Regardless of the effectiveness of the exchange of information between the EU and Marocco in terms of assessing the impact of their new partnership, no countries involved in perpetrating violations of peremptory norms of general international law should be given discretion in ensuring that no exploitation and/or human rights violations in occupied territories are perpetrated in the context of the implementation of Association agreements with the EU. The Union should bear its share of responsibility in maintaining its trade agreements with these countries

Law (Jus Cogens), supra, paras. 30 ff. See also the Draft conclusion 10 contained therein, at 65: 'To avoid conflict with a peremptory norm of generai international law, a provision in a treaty should, *as far as possible,* be interpreted in a way that renders it consistent with a peremptory norm of general international law (jus cogens)' (emphasis added).

[130] In addition to ILC's work *onjus cogens* and the VCLT's comme ntary, see also D. COSTELLOE, *Lega! Consequences* o/ *Peremptory Norms in International Law,* Cambridge, 2017, 54 ff.

in accordance with its international law obligations and its internal principled framework. This also includes human rights impact assessments based on tailored indicators and through which people who might be adversely affected , and more specifically people enjoying self-determination, are genuinely heard.

Overall, relations with Marocco involving Western Sahara certainly tests the EU's resilience to act in the international arena in line with international law as Articles 3.5 and 21 TEU also demand, as well as the specific meaning attributed to these obligations. If followed, the alternative reading suggested in this chapter would strengthen the EU's internation- al credibility as a global actor whose action is based on international law and human rights protection and would set the stage for more principled EU external actions involving trade relations and / or occupied territories.