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Principles of International Law and Jurisdictional Review of Agreements concluded by the European Union: the *Front Polisario* Cases of 29 September 2021

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Abstract: *This study has the purpose to examine the judgments rendered on 29 September 2021 by the General Court of the European Union Front Polisario/Council (T-279/19 and T-344/19, T-356/19), from the wider perspective of the European Union case law concerning the territorial scope of agreements concluded between the Union and the Kingdom of Morocco. Thus, the judgments represent a continuation of previous cases Council/Front Polisario (C-104/16P) of 2016 and Western Sahara Campaign (C-266/16) of 2018. In those cases, the Court of Justice of the European Union interpreted "neutral" territorial clause of two agreements between the EU and the Kingdom of Morocco as excluding the application of those agreements from the territory of Western Sahara. The Court of Justice relied essentially on interpretation in accordance with any other relevant rule of international law in force between the parties (rule reflected in article 31 (3) c) of the 1969 Vienna Convention on the Law of Treaties between States) and invoked the principles of self-determination and relative effect of treaties. Subsequent to these judgments, the EU and the Kingdom of Morocco modified the respective agreements (the" liberalisation agreement" and the" fisheries agreement") in order to*

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provide explicitly for their application to Western Sahara and its adjacent waters. Thus, the judgment of the General Court of 29 September 2021 were rendered following the action for annulment filed by the Front Polisario, against the decisions of the Council for the conclusion of those agreements.

The study explores the legal questions that were necessarily examined by the General Court, including the locus standi of the Front Polisario, the concept of „people" as subject of international law, the rule „land dominates the sea" and the legal effect of the principles of self-determination and legal effect of treaties. Even if the General Court did not mention it, the study attempts to examine, also, the consequences of the fact that doctrine (including the International Law Commission) and a significant number of States consider the right to self- determination to represent a jus cogens norm.

Key words: *self-determination, consent, territorial application of treaties, national liberation movements, locus standi*

1. Introduction

The question of the territorial application of agreements concluded by the European Union with third countries, which are involved in outstanding territorial issues, is not new. In particular, in the case of Israel, institutions and Member States regarded the question of territorial application of treaties "in the negative way": their concern was for agreements concluded by the European Union *not* to apply to the disputed territories. For example, in the case of Israel, the European Court of Justice ruled in the *Brita* case of 2010 that the interpretation of the EC-Israel Association Agreement must lead to the conclusion that products originating in the West Bank do not fall within the territorial scope of the agreement.[1] The case had originated in the refusal of German customs authorities to grant the tariff treatment provided by the said agreement to products originating in the West Bank. Moreover, the European Union institutions paid great attention to indicating the origin of products from Israel and the occupied territories, in order to ensure that "in

[1] Judgment of 25 February 2010, C-386/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, ECR [2010] I-1319, para. 53.

line with international law, [the European Union] does not recognize Israel's sovereignty over territories occupied by Israel since June 1967".[1]

Nevertheless, in the case of Western Sahara, the approach of the EU institutions was rather different. Based on initially "neutral" clauses concerning the territorial scope of the agreements between the European Union and the Kingdom of Morocco, the practice developed in the sense that trade and fisheries agreements covered *de facto* products originating from Western Sahara and fishing in waters adjacent to this territory. In 2012, the Front Polisario ("*Frente Popular de Liberación de Saguía el Hamra y Río de Oro"*) challenged before the General Court of the European Union Decision of the Council for the conclusion of the "2012 Liberalisation Agreement".[2] The Front Polisario argued that, despite the fact that its territorial scope was the "territory of the Kingdom of Morocco", the agreement had as a practical effect the importation within the EU of agricultural products originating from Western Sahara, as well as the exploitation of fishery resources of waters adjacent to this territory. We have analysed the case before the General Court[3] and the judgment in appeal of the European Court of Justice[4] in a previous study published in 2017.[5] The solution reached by the Court of Justice relied essentially on the interpretation of the 2012 liberalisation agreement: when the territorial application clause was "neutral", the Court found that the agreement must be interpreted as not applying to the territory of Western Sahara. Practically, the European Court of Justice "saved" the agreement by way of interpretation, deciding that its meaning cannot be other than in the sense of

[1] Interpretative Notice on indication of origin of goods from the territories occupied by Israel since 1967, 2015/C 375/05, Official Journal of the European Union C 375/4, 12.11.2015; also referred to in the judgment of 12 November 2019, C-363/18, *Organisation juive europenne, Vignoble Psagot Ldt v. Ministère de l'Economie et des Finances,* ECLI:EU:C:2019:954, para. 12.

[2] Agreement, in the form of an Exchange of Letters, between the European Union and the Kingdom of Morocco, concerning the reciprocal liberalisation measures on liberalisation products, processed agricultural products, fish and fishery products, approved by Council Decision no. 2012/497/EU of 8 March 2012, Official Journal L 241, p. 2.

[3] Judgment of 10 December 2015, T-512/12, *Front populaire pour la liberation de la saguia-el-hamra et du rio de oro v Council of the European Union*, ECR [2015] ECLI:EU:T:2015:953 (hereinafter "T-512/12").

[4] Judgment of 21 December 2016, C-104/16P, *Council of the European Union v Front populaire pour la liberation de la saguia-el-hamra et du rio de oro*, ECR [2016] ECLI:EU:C:2016:973 (hereinafter "C-104/16P")

[5] Ion Gâlea, *The Law of Treaties in the Recent Case-Law of the European Court of Justice: the Frente Polisario Case, Interpretation and Territorial Application of Treaties*, Analele Universității din București, Seria Drept, nr. I/2017, p. 139-155.

not applying to Western Sahara.[1] Subsequent jurisprudence confirmed this approach in 2018 and 2019.[2]

Following the above-mentioned case law, the institutions of the European Union adopted a different avenue. In 2017 and 2018, the Council authorized negotiations on extending the territorial scope of the liberalisation agreement and of a fisheries agreement between EU and Morocco, in order to include the territory of Western Sahara.[3] The agreements (hereinafter referred to as the ”2018 liberalisation agreement” and the ”2019 fisheries agreement”) were signed in 2018[4] and the decisions of the Council for concluding those agreements were adopted in 2019.[5] It is

[1] C-104/16P, para. 126.

[2] Judgment of 27 February 2018, C-266/16, *Western Sahara Campaign UK,* EU:C:2018:118 (“hereinafter “*Western Sahara Campaign*”), para. 85; T-180/14, Order of 19 July 2018, *Front Polisario v. Council,* EU: T:2018:496; Order of 8 February 2019, T-376/18, *Front Polisario v. Council,* EU: T:2019:77.

[3] Opening of negotiations related to the Agreement between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part were authorized on 29 May 2017 (“liberalisation agreement”). Opening of negotiations on negotiations with the Kingdom of Morocco with a view to amending the Agreement and agreeing on a new Implementation Protocol. Following those negotiations, a new Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco was authorized on 16 April 2018 (“fisheries agreement”).

[4] The Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, was signed on 25 October 2018 (hereinafter referred to as the ”2018 liberalisation agreement”). Signature was approved by Council Decision (EU) 2018/1893 of 16 July 2018 relating to the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ L 310, 6.12.2018, p. 1). The Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement was signed in Brussels, on 14 January 2019 (hereinafter referred to as ”the 2019 fisheries agreement”). Signature was approved by Council Decision (EU) 2018/2068 of 29 November 2018 on the signing, on behalf of the Union, of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the exchange of letters accompanying the Agreement (OJ L 331, 28.12.2018, p. 1).

[5] Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement

against the decisions on the conclusion of these agreements that the Front Polisario filed actions for annulment before the General Court of the EU, based on article 263 of the Treaty Establishing the European Union ("TFEU") that gave rise to the two judgments of the General Court of 29 September 2021.[1]

The purpose of this study is to examine the elements of novelty brought by the judgments of 29 September 2021, as these judgments occurred on the background of a context, which was, on its turn, new. Thus, a first section will try to examine the background of the dispute, which would include the main conclusion derived from the interpretation given by the Court of Justice in 2016 and 2018, and the provisions of the contested agreements concerning the territorial scope. A second section will analyse aspects related to the subjects of international law – the national liberation movements and the "peoples" – including from the perspective of their relation to the *locus standi* criteria under article 263 (4) TFEU. A third section will attempt to examine the manner in which the General Court assessed the conformity of the contested decisions (and of the contested agreements) with two principles applicable in international law: the right of peoples to self-determination and the relative effect of treaties.

2. Background of the dispute

2.1. Consequences of the previous case law of the European Court of Justice

The contested agreements and the contested decisions had as a purpose to extend the scope applicable liberalisation and fisheries agreement to the territory of Western Sahara, but also to achieve this territorial extension in conformity with the previous case law of the European Court of

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establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2019 L 34, p. 1) – hereinafter "Council Decision (EU) 2019/217"; Council Decision (EU) 2019/441 of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement (OJ 2019, L 195, p. 1), hereinafter "Council Decision (EU) 2019/441".

[1] Judgment of the General Court of 29 September 2019, T-279/19, *Front populaire pour la liberation de la saguia-el-hamra et du rio de oro v. Council,* ECLI:EU:T:2021:639 (hereinafter "T-279/19"); Judgment of the General Court of 29 September 2021, T-344/19 and T-356/19, *Front populaire pour la liberation de la saguia-el-hamra et du rio de oro v. Council,* ECLI :EU :T :2021 :640 (hereinafter "T-345/19, T-356/19").

Justice.[1] Thus, it would be useful to recall the main reasoning of these cases, as it served as an important starting point for the judgements of the General Court of 29 September 2021.[2]

First, in the case T-512/12, the General Court interpreted the liberalisation agreement" to apply to the territory of Western Sahara.[3] The provisions concerning territorial scope of the agreement scope were "neutral": the agreement did not contain a territorial clause. Moreover, the agreement was subject to the Association Agreement between EU and Morocco, which stipulated that it applied to "the territory of the Kingdom of Morocco".[4] The General Court relied on the practice of the parties to apply *de facto* the agreement to Western Sahara, as being part of the "context" according to which the treaty should be interpreted.[5] Moreover, the General Court held that if the EU institutions wished to make clear that the agreement did not apply to Western Sahara, a specific clause excluding such application should have been included.[6]

Based on this interpretation, the General Court annulled the Council decision on the conclusion of the agreement. It held that the Council failed to exercise its obligation to examine all the relevant facts, in order to satisfy itself that "there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights".[7]

Second, the European Court of Justice did not embrace, upon appeal, the interpretation of the General Court concerning the territorial scope of the liberalisation agreement. The Court of Justice found that the General Court erred in law when it decided that the agreement applied to Western Sahara.

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[1] Council Decision (EU) 2019/441 of 4 March 2019, paragraph 5 of the preamble; Council Decision (EU) 2019/441 of 4 March 2019, paragraph 3 of the preamble.

[2] See, for a general outline, Alvaro de Elera, "The Frente Polisario judgments: an assessment in the light of the Court of Justice's case law on territorial disputes", in *The EU as a Global Actor – Bridging Legal Theory and Practice*, *Liber Amicorum in honour of Ricardo Gosalbo Bono,* Brill/Nijhoff, 2017, pp. 266-290; S. Hummelbrunner, S., A. Pickartz, A, *It's Not the Fish That Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union*, Utrecht Journal of International and European Law, vol. 32 (2016), pp 19-40; Olivier Peiffert, *Le recours d'un mouvement de libération nationale à l'encontre d'un acte d'approbation d'un accord international de l'Union: aspects contentieux,* Revue trimestrielle de droit européen, no. 2, 2016, pp. 319-336.

[3] T-512/12*,* para. 103.

[4] *Ibid.* para. 74.

[5] *Ibid.*, para. 99.

[6] *Ibid.,* para. 102.

[7] *Ibid.,* para. 241.

In particular, the Court of Justice relied on the customary rule reflected in article 31 paragraph (3) letter c) of the Vienna Convention on the Law of Treaties between States, according to which interpretation must take into account any relevant rules of international law applicable between the parties.[1] The relevant rules of international law, as identified by the Court, were: i) the principle of self-determination, "a legally enforceable right *erga omnes* and one of the essential principles of international law"[2], whose consequence entails that a Non-Self-Governing Territory has a "separate and distinct status";[3] this "distinct status" entails the fact that the formula "territory of the Kingdom of Morocco" cannot be interpreted as including the Western Sahara;[4] ii) the customary rule enshrined in article 29 of the Vienna Convention on the Law of Treaties between States, according to which "unless a different intention appears from the treaty or is otherwise established, that treaty is binding upon each party in respect of its entire 'territory'";[5] iii) the principle of the relative effect of treaties, reflected in article 34 of the Vienna Convention on the Law of Treaties;[6] the Court of Justice held that the people of Western Sahara, as a "third party", would have been affected by the liberalisation agreement. We consider the paragraphs below as being of particular relevance, since they might form the basis for the reasoning of the General Court in its 2021 cases:

> "*More specifically, in that regard, the International Court of Justice noted, in its Advisory Opinion on Western Sahara, that the population of that territory enjoyed the right to self-determination under general international law [...], it being understood that the General Assembly of the UN, in paragraph 7 of its Resolution 34/37 on the question of Western Sahara, […], recommended that the Front Polisario, 'the representative of the people of Western Sahara, should participate fully in any search for a just, lasting and definitive political solution of the question of Western Sahara', […].*
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> *In the light of that information, the people of Western Sahara must be regarded as a 'third party' within the meaning of the principle of the*

[1] C-104/16P, para. 86; for a criticism related to reliance on interpretation, "in particular" on article 31(3) c) of the Vienna Convention: Jed Odermatt, *Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario),* American Journal of International Law, Vol. 111, Issue 3, pp. 731-738, at p. 737.
[2] *Ibid.*, para. 88.
[3] *Ibid.,* para. 90.
[4] *Ibid.*, para. 92.
[5] *Ibid.*, para. 94.
[6] *Ibid.,* para. 100.

relative effect of treaties, […]. As such, that third party may be affected by the implementation of the Association Agreement in the event that the territory of Western Sahara comes within the scope of that agreement, without it being necessary to determine whether such implementation is likely to harm it or, on the contrary, to benefit it. It is sufficient to point out that, in either case, that implementation must receive the consent of such a third party. In the present case, however, the judgment under appeal does not show that the people of Western Sahara have expressed any such consent."[1]

The European Court of Justice also relied on the general rule enshrined in article 30 (2) of the Vienna Convention on the Law of Treaties. As the liberalisation agreement was "subject" or subordinated to the Association Agreement between EU and Morocco, the Court held that its territorial scope coincided with that of the Association agreement, without a special clause being necessary.[2] Moreover, the Court of Justice underlined that the interpretation based on the subsequent practice of the parties (article 31 (3) letter b) of the Vienna Convention on the Law of Treaties) could not be retained, since

"the purported intention of the European Union, reflected in subsequent practice and consisting in considering the Association and Liberalisation Agreements to be legally applicable to the territory of Western Sahara, would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties, even though the European Union repeatedly reiterated the need to comply with those principles, as the Commission points out".[3]

Third, the above interpretation, that an agreement between the EU and the Kingdom of Morocco cannot be read as being applicable to the Western Sahara, was also retained in the *Western Sahara Campaign* case. Nevertheless, this case related to fishery activities in the adjacent waters to the territory of Western Sahara, allegedly conducted on the basis of two fisheries agreements concluded in 2006 and 2013 between the European Union and Morocco.[4] Relying on the C-104/16P case, the Court held that the words "territory of Morocco" cannot be interpreted as including the

[1] C-104/16P, para. 105-106.
[2] *Ibid.*, para. 115-116.
[3] *Ibid.*, para. 123.
[4] C-266/16, Western Sahara Campaign, para. 41.

Western Sahara,[1] and that the formula "'waters falling within the sovereignty or jurisdiction' of Morocco cannot, on its turn, be interpreted as including the waters adjacent to the territory of Western Sahara.[2] Moreover, it is important to underline that the Court of Justice referred to the principles of self-determination and relative effect of treaties, as rules of general international law. Thus, it held that:

> *"it would be contrary to the rules of international law [the principles of self determination and relative effect of treaties], which the European Union must observe and which are applicable mutatis mutandis in this case, if it were agreed that the waters directly adjacent to the coast of the territory of Western Sahara were to be included within the scope of that agreement."*
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> *3*

2.2. The explicit extension of the territorial scope of the liberalisation agreement and of the fisheries agreement

On the background of the case law presented above, it might be appropriate to present certain provisions related to the territorial scope of the 2018 liberalisation agreement, of the 2019 fisheries agreement, as well as of the contested decisions concerning the conclusion of those agreements, that gave rise to the General Court judgments of 29 September 2021.

First, it may be pointed out that the 2018 liberalisation agreement contained a "Joint Declaration concerning the application of Protocols 1 and 4 of the [Association Agreement]". It provided expressly that "*Products originating in Western Sahara subject to the controls by customs authorities of the Kingdom of Morocco shall benefit from the same trade preferences as those granted by the European Union to products covered by the Association Agreement".* The same Joint Declaration stipulated also that Protocol 4 to the Association Agreement "*shall apply mutatis mutandis for defining the originating status of the products*" [referred to above] and that the "*customs authorities of the Member States and of the Kingdom of Morocco shall be responsible*" for applying the rules of origin to those products.[4]

Moreover, the third paragraph of the agreement provided that it is "without prejudice to the respective positions of the European Union with

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[1] *Ibid,* para. 64.
[2] C-266/16, Western Sahara Campaign, para. 69.
[3] *Ibid.*, para. 71.
[4] T-279/19, para. 53.

regard to the status of Western Sahara and of the Kingdom of Morocco with regard to that region". At the same time, the fourth paragraph stipulated that the parties to the agreement "*reaffirm their support for the United Nations process and back the efforts made by the Secretary General to reach a definitive political settlement in line with the principles and objectives of the Charter of the United Nations and based on the Resolutions of the UN Security Council".*[1]

In the same vein, the Council Decision (EU) 2019/217, by which the conclusion of the 2018 liberalisation agreement was approved, contains ample provisions regarding the following elements: a) "since the Association Agreement came into force, products from Western Sahara certified to be of Moroccan origin have been imported to the Union";[2] b) it was admitted that in case C-104/16P, the Court of Justice "specified that the agreement covered the territory of the Kingdom of Morocco alone and not Western Sahara";[3] c) "it should be ensured that the trade flows developed over the years are not disrupted, while establishing appropriate guarantees for the protection of international law"[4]; d) it is noted that the Commission assessed the consequences of the agreement, "particularly with regard to the advantages and disadvantages for the people concerned",[5] and concluded that, essentially, the tariff preferences "will have a positive overall effect for the people concerned"[6]; e) it is also noted that the Commission and the EEAS have "has taken all reasonable and feasible steps in the current context to adequately involve the people concerned in order to ascertain their consent to the agreement". Thus, reference is made to the "wide-ranging consultations", leading to the conclusion that "the majority of social, economic and political stakeholders who participated […] were in favour of [the agreement]".[7]

Second, with respect to the 2019 fisheries agreement, the following features can be outlined: a) it defined a "fishery zone", as "the waters of the Center-Eastern Atlantic situated between the parallels 35°47'18'' North and 20°46'13'' North, including the waters adjacent to Western Sahara". It also mentioned that this definition shall not affect potential negotiations concerning maritime delimitations with coast States;[8] b) the agreement

[1] T-279/19, para. 53.
[2] Council Decision (EU) 2019/217, preambular paragraph 4.
[3] *Ibid.,* preambular paragraph 5.
[4] *Ibid.*, preambular paragraph 6.
[5] *Ibid.*, preambular paragraph 7.
[6] *Ibid.*, preambular paragraph 9.
[7] *Ibid.*, preambular paragraph 10.
[8] T-344/19, T-356/19, para. 61.

provided that the EU ships active in the fishery zone "comply with the laws and regulations of Morocco";[1] c) the agreement stipulated a "financial counterpart" to be paid by the EU annually, managed by an EU-Morocco joint commission, whose purpose was to create benefits for the "populations concerned", proportionally with the fishing activities;[2] d) the territorial scope of the agreement was drafted in a peculiar way, in the sense that it applied to "the territories where [… the laws and regulations of the Kingdom of Morocco applied]";[3] e) the parties reaffirmed their support for the UN process towards a political solution and the agreement provided that it is without prejudice to the position of the EU towards the statute of the non-autonomous territory of Western Sahara (and to the position of Morocco that Western Sahara is an integral part of its national territory).[4]

The Council Decision (EU) 2019/441 on the conclusion of the 2019 fisheries agreement contained comparable provisions to the above-described Council Decision (EU) 2019/217. The most important elements can be summarized as follows: a) it admitted that in case C-266/16 Western Sahara Campaign, the Court of Justice held that the previous fisheries agreement does not apply to the waters adjacent to Western Sahara;[5] b) "*It should be possible for Union fleets to continue the fishing activities they had pursued since the entry into force of the Agreement, and the scope of application of the Agreement should be defined so as to include the waters adjacent to the territory of Western Sahara*";[6] c) it is noted – similar to Decision (EU) 2019/217 - that the Commission assessed the potential impact of the agreement, "in particular as regards the benefits of the people concerned and the exploitation of the natural resources of the territory concerned",[7] and concluded that, essentially, the agreement "should be highly beneficial to the people concerned"[8]; e) it is also noted that the Commission and the EEAS have "took all reasonable and feasible measures in the current context to properly involve the people concerned in order to ascertain their consent".[9] Thus, reference is made to the "extensive consultations", leading to the conclusion that "socioeconomic and political actors who participated […] were clearly in favour of [the agreement]".[10] However, it is noted the

[1] *Ibid.*, para. 62.
[2] T-344/19, T-356/19, para. 63.
[3] *Ibid.*, para. 65.
[4] *Ibid.*, para. 70.
[5] Council Decision (EU) 2019/441, preambular paragraph 3.
[6] *Ibid.*, preambular paragraph 5.
[7] *Ibid.*, preambular paragraph 8.
[8] *Ibid.*, preambular paragraph 9.
[9] *Ibid.*, preambular paragraph 11.
[10] *Ibid.*, preambular paragraph 12.

Front Polisario and other actors refused to participate in the consultation process.[1]

The above mention features of the two agreements and of the contested decisions reveal some preliminary concluding elements.

First, the Council expressly confirmed that, after the entry into force of the Association Agreement, a practice existed in the sense that goods were imported from the Western Sahara based on the liberalisation agreement, and "the Union fleets" carried fishing activities in Western Sahara waters. This acknowledgement occurs on the background that in case T-512/12, the General Court used such practice as "interpretative practice", in accordance to the general rule reflected in article 31 (3) b) of the Vienna Convention on the Law of Treaties.[2] Nevertheless, as outlined above, the Court of Justice held, in case C-104/16P, that such "subsequent practice "*would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties".*[3]

Second, it appears, in an express manner, that the territorial scope of the 2018 liberalisation agreement and of the 2019 fisheries agreement was to include the territory of Western Sahara and, respectively, the waters adjacent to the Western Sahara.

Third, the EU institutions attempted to respond to the considerations resulting from the case law of the Court of justice concerning the "consent of the people of Western Sahara", as a third party to the agreements. As it appears from the preamble of the contested decisions, the Commission and the EEAS conducted "wide-ranging" or "extensive" consultation, in order to ascertain consent of the "people concerned". Such consultations included a variety of "actors" or "stakeholders", the majority of whom expressed themselves "in favour". However, the institutions acknowledge that a number of actors, including the Front Polisario, refused to take part in the consultations.

Fourth, both agreements contained "without prejudice" clauses, by which the parties confirm that the agreements do not affect the EU position with respect to the status of Western Sahara (as well as the position of Morocco according to which it is an integral part of the "national territory"). At the same time, the parties reaffirm their support for the UN process, aiming to a political solution for Western Sahara. We note that it results,

[1] *Ibid.,* preambular paragraph 12.
[2] T-512/12, para. 99.
[3] C-104/16P, para. 123.

indirectly, that the parties "felt the need" to mention that their positions are not affected (as if they might have been in the absence of such clauses).

3. Subjects of international law

In the cases which led to the two judgments (T-279/19 and T-345/19, T-356/19) rendered on 29 September 2021, the General Court was confronted with the legal challenge brought by the Polisario Front to the decisions on the conclusion of the two agreements presented in the sub-section I.2. The agreements contained explicit clauses leading to their application to the territory/adjacent waters of Western Sahara. Nevertheless, the first issue that the General Court was confronted with was the admissibility of the action, which involved the analysis over the legal personality and the *locus standi* of the Front Polisario. Moreover, the requirement of "consent" established by the Court of Justice in case C-104/16P involved the notion of "people of Western Sahara". Thus, this section proposes to analyse aspects related to subjects of international law: the national liberation movements and the "peoples".

3.1. National Liberation Movements. The legal personality of Front Polisario

The General Court had to rule on the admissibility of the actions for annulment. Thus, the conditions that had to be fulfilled by the appellant, in accordance with article 263 (4) TFEU, were the following: the applicant must be a "legal person" and the action must be of "direct and individual concern to it". Thus, the first question that had to be analysed was whether the Polisario Front meets the criteria to be considered a "legal person", in the sense of article 263 (4) TFEU.

It is true, this question had been addressed in 2015 in the case T-512/12. The General Court underlined that the concept of "legal person" does not coincide to the same notion in the domestic legal systems.[1] Thus, an entity might be a "legal person" in the sense of article 263 (4) TFEU, even if it does not have legal personality within a Member State or a Third State.[2] Without mentioning in an explicit way whether the Front Polisario had legal personality in international law, the General Court found that Front Polisario "must be regarded as a legal person", especially because it

[1] T-512/12, para. 48; the General Court quoted also the judgment of 28 October 1982, 135/81, *Groupement des Agences de voyages* v *Commission* ECR, EU:C:1982:371, para. 10.
[2] T-512/12, para. 51.

was accepted as taking part in the UN lead peace-process concerning Western Sahara and was considered the by the UN as an "essential participant" in this process. [1] In 2015, General Court relied, indeed, on the "actorship possessed by Front Polisario under international law",[2] but without expressing a decisive point on its "legal personality" in international law. The Court of Justice annulled, indeed, the 2015 judgment of the General Court. Nevertheless, the error of law identified by the Court of Justice concerned the interpretation of the liberalisation agreement in respect of its territorial scope: the Court did not question the findings concerning the qualification of the appellant as a "legal person".

In all cases before the General Court (both in 2015 and in 2021), the Front Polisario argued that it is a "national liberation movement" deriving its rights and obligations directly from international law.[3] The 2021 cases offered, in our opinion, a "slight step forward", with respect to reliance on international law with respect to evaluating the concept of a "legal person".

First, the General Court took into account the case law subsequent to the year 2015, which acknowledged explicitly that subjects of international law, such as non-member States, are legal persons within the meaning of EU law (the quoted cases related to Cambodia and Venezuela).[4]

Second, the General Court examined the arguments put forward by the Council, Commission and the French Republic in the sense that the international legal personality of Front Polisario did not confer any capacity to act outside the UN process.[5] The General Court did not expressly rule on the "legal personality" of the Front Polisario, but followed a line of reasoning which can be summarized as follows: i) international law recognizes to the "people of Western Sahara" the right to self-determination; ii) the UN General Assembly recognized the applicant as "the representative of the people of Western Sahara" and recommended that it would take part "fully" in negotiations with the Kingdom of Morocco in search for a political solution to the question of Western Sahara.[6] Thus, the General

[1] *Ibid.,* para. 56-60.
[2] Enzo Cannizzaro, *In defence of Front Polisario: The ECJ as a global jus congens maker,* Common Market Law Review, vol. 55, 2018, pp. 569-588, p. 571.
[3] T-512/12, para. 37; T-279/19, para. 81; T-344/19, T-356/19, para. 134.
[4] T-279/19, para. 87; the General Court quoted, judgment of 22 June 2021, C-872/19P, *Venezuela v. Council,* EU:C:2021: 507, para. 44, order of 10 September 2020*,* T-246/19, *Cambodia and CRF v. Commission*, EU:T:2020:415, paras. 47, 49, 50.
[5] T-279/19, para. 89.
[6] *Ibid.*, paras. 90-93.

Court expressly relied on UN General Assembly Resolutions 34/37[1] and 35/19[2] in order to derive the quality of the Front Polisario as the "representative of the people of Western Sahara".

Third, the General Court offered examples of certain "features" of the legal personality of the Front Polisario: i) the capacity to be a party to a peace agreement concluded with the Islamic Republic of Mauritania; ii) the capacity to "reach agreement on a number of matters" with the Kingdom of Morocco (as the Security Council noted, the Front Polisario and Morocco "gave their agreement in principle" to a set of "settlement proposals" of the Secretary General);[3] and iii) the obligation to comply with international humanitarian law, which is reflected in the four Geneva Conventions of 1949, as well as in the First Protocol of 1977, to which it acceded in 2015[4]

Fourth, we feel the need to underline that both the General Court and the UN bodies identified the "representativeness" of the people of Western Sahara, as being circumscribed to the self-determination process. Thus, the General Court mentioned expressly "the applicant seeks to defend the self-determination of the people of Western Sahara"[5] and was recognized as representative of the people "in the context of the self-determination process".[6] Indeed, these statements coincide with the statements of the UN General Assembly (which, *inter alia,* reaffirmed that the solution to the question of Western Sahara "lies in the exercise by the people of that Territory of their inalienable right, including their right to self-determination and independence").[7]

As a very short conclusion to this sub-section, the General Court recognized that the Front Polisario is a "legal person" within EU law without expressly stating that it has "legal personality" under international law, but deriving its status from the rights and obligations, which international law attributes to it. This approach appears wise, as international doctrine acknowledges that national liberation movements have a certain status in international law: without being "subjects" in the proper sense, they enjoy rights and obligations in close connection to the

[1] UN General Assembly Resolution 34/37 of 21 November 1979, "Question of Western Sahara".
[2] UN General Assembly Resolution 35/19 of 11 November 1980, "Question of Western Sahara".
[3] UN Security Council Resolution 658 (1990), preambular para. 2 and operative para. 3.
[4] T-279/19, para. 94; on the accession of the Front Polisario to Protocol I.
[5] *Ibid.*, para. 100.
[6] *Ibid.*, para. 103.
[7] UN General Assembly Resolution 34/37 of 21 November 1979, para. 1; UN General Assembly Resolution 35/19 of 11 November 1980, para. 4.

regime of non-self-governing territories or to the trusteeship system within the UN.[1] National liberation movements have been a more "common presence" in international relations in the 1970s and 1980s, and the practice of the UN General Assembly to acknowledge a liberation movement as "representative" or "authentic representative" of peoples of non-self-governing territories was not unique.[2] Nevertheless, it is important also that the General Court "pointed out" certain "features" of what is recognized within the doctrine as the "limited" international personality of national liberation movements: capacity to conclude treaties and the rights and obligations deriving from international humanitarian law.[3]

3.2. The "people of Western Sahara"

As it was recalled above, in 2016 the Court of Justice ruled in case C-104/16P that "*the people of Western Sahara must be regarded as a 'third party' within the meaning of the principle of the relative effect of treaties"* and that "*that implementation must receive the consent of such a third party".*[4] Thus, having in mind that the 2018 liberalisation agreement and the 2019 fisheries agreement expressly provided for their application over the territory of Western Sahara, certain questions appeared before the General Court related to the notion of "people". This sub-section proposes to examine: first, the scope of the notion of "people" and, second, the scope of the rights of a "people" concerning a territory having the status of a non-self-governing territory.

First, the question that appeared before the General Court was whether the notion of "people of Western Sahara" (in French "peuple du Sahara occidental") is equivalent to "people concerned" (in French "populations concernées"). The latter have been subject to "wide-ranging" or "extensive" consultations conducted by the Commission and the EEAS. In practice, two aspects were relevant: the territorial one (as the "populations concerned" were located on the territory effectively occupied by Morocco) and the question whether the identification of the members of such "people" is needed.

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[1] Malcom N. Shaw, *The international status of national liberation movements,* Liverpool Law Review, vol. 5 (1983), pp. 19-34.

[2] Antonio Cassese, *International Law in a Divided World,* Oxford University Press, 1994, p. 90-91; UN General Assembly Resolution 2918 (XXVII) of 14 November 1972, para. 2, referring to national liberation movements in Angola, Guinea Bissau and Mozambique.

[3] Aantonio Cassese, *International Law in a Divided World, op. cit.*, p. 97; H. A. Wilson, *International Law and the Use of Force by National Liberation Movements,* Oxford Clarendon Press, 1988, pp. 1-209.

[4] C-104/16P, para. 105-106.

International law does not define the concept of "people". It is clear that the people is a subject of law, as self-determination is "a right of peoples".[1] It is clear that self-determination is not a right enjoyed by other groups, such as "national minorities".[2] Nevertheless, international law provides little clue about what is a "people". The Venice Commission attempted to offer a definition in 2014:

> *"Although current international law lacks a treaty definition of "peoples", it is usually accepted that this concept refers to a separate, specific group of individuals sharing the same history, language, culture and the will to live together."*[3]

With respect to the relation between "people" and "territory", the definition provided by the Venice Commission reinforces the idea that the "human factor" is more important than the "territorial one", when analysing the "people of a territory". Doctrine supports this approach: "*it is about giving proeminence to people. The people come first; territory, thereafter"*.[4] It has also emphasized that a certain group is not a "people" in a "objective" sense, but "aspires to be a people through self-determination", requiring two factors: the will of the people and its "recognition" as such by the international community.[5] Indeed, in the case of the "people of Western Sahara", recognition is beyond doubt, as in was emphasized in the ICJ advisory opinion of 1975,[6] as well as in UN General Assembly Resolutions.[7]

The General Court seemed to have captured the importance of the essential link between the concept of "people" and the "recognized" right to self-determination. Thus, the General Court held that:

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[1] Kalana Senaratne, *Internal Self-Determination in International Law,* Cambridge University Press, 2021, p. 51.

[2] *Western Sahara,* Advisory Opinion, I.C.J. Reports 1975, p. 12, p. 59; Bogdan Aurescu, Elena Lazăr, *Dreptul international al protecției minorităților naționale,* Ed. Hamangiu, Bucharest, 2019, p 43-44.

[3] European Commission for Democracy through Law (Venice Commission), Opinion no. 763/2014, 21 March 2014, CDL-AD (2014)004, para. 25.

[4] Kalana Senaratne, *Internal Self-Determination in International Law,* p. 53.

[5] Frédéric Mégret, "The Right to Self-Determination. Earned, Not Inherent" in Fernando Teson (ed.), *The Theory of Self-Determination,* Cambridge University Press, 2016, pp. 45-69, pp. 56, 60-62.

[6] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12., para. 70 – "the right of that population to self-determination constitutes therefore a basic assumption of the questions put to the Court", also para 161, 162.

[7] UN General Assembly Resolution 34/37 of 21 November 1979, UN General Assembly Resolution 35/19 of 11 November 1980.

> *"it may be inferred that the concept of 'people concerned' referred to by the institutions encompasses, in essence, the inhabitants who are currently present in the territory of Western Sahara, irrespective of whether or not they belong to the people of that territory, […]. This concept therefore differs from that of the 'people of Western Sahara' in that, on the one hand, it can encompass all the local people who are affected, beneficially or adversely, by the application of the agreement at issue in that territory, while on the other hand it does not possess the political import of the second concept, which stems in particular from that people's recognised right to self-determination."*[1]

Second, it is important to mention that the General Court held that the "identification of the members" of the "people of Western Sahara is not a prerequisite (or an "obstacle") to the requirement of expressing the "consent" of the people. Thus, the General Court characterized the right to self-determination as a "*collective right*" and stated that the people of Western Sahara "*have been recognized by the UN bodies as having that right, and hence as existing, irrespective of the individuals of which they are composed and their number*".[2] Moreover, the General Court underlined this argument by mentioning that the people is "*an autonomous subject of the law, capable of expressing their consent to an international agreement, irrespective of the identification of their members*".[3]

The relevance of the consultations conducted by the Commission and the EEAS will be examined in the next section. Nevertheless, we consider that it is important to mention that, in the context of analysing these consultations, the General Court held that the following entities do not constitute "representative bodies" for the people of Western Sahara: i) local elected authorities, established under the constitutional order of Morocco;[4] ii) non-governmental organizations and various economic operators.[5] In the opinion of the Court, these represent only "a sample of entities engaged in activities in the respective territory".[6]

As a very short concluding remark to this section, it would be appropriate to say that, on one hand, the identification of the "people of Western Sahara" as a relevant subject of international law was not a new

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[1] T-279/19, para. 337; T-344/19, T-3567/19, para. 329.
[2] T-279/19, para. 357; T-344/19, T-3567/19, para. 342.
[3] *Ibid.,* T-279/19, para. 357; T-344/19, T-3567/19, para. 342.
[4] T-279/19, para. 375.
[5] T-279/19, para. 377; T-344/19, T-3567/19, para. 354.
[6] T-279/19, para. 378.

element. It was already established in case C-104/16P. On the other hand, the judgments of the General Court of 29 September 2021 brought forward certain new elements: the characterization of the people as a "collective" and „autonomous" subject of law; the element of "recognition" as such by the UN bodies, in the context of the "will" to exercise the right of self-determination; the conclusion that the exercise of this right is independent of the identification of the individuals composing the people".

4. The relevance of principles of international law

4.1. Self-determination and relative effect of treaties

In the essential part of its judgments of 29 September 2021, the General Court had to assess whether the conclusion of the contested agreements (the 2018 liberalisation agreement and the 2019 fisheries agreement) was incompatible with the principles of self-determination and of the relative effect of treaties. As emphasized above, previous case law of the Court of justice has already identified these principles as being relevant.[1]

It is our suggestion not to treat these two principles of international law separately. Thus, this sub-section would attempt to answer the following questions, that might appear relevant from the analysis of the General Court: a) are the two principles interlinked?; b) does self-determination confer a people rights over maritime areas?; c) what is the relevant international law concerning the exploitation of natural resources of a non-self-governing territory?; d) can consent be presumed or established in an implicit manner and how should it be expressed? A second sub-section will attempt to examine the wider consequences, on the international level, of a finding that the contested agreements violate the relevant principles of international law.

a) *Are the principles of self-determination and the relative effect of treaties interlinked*?

As a preliminary remark, it has to be pointed out that the two principles do not enjoy the same "status" in international law. On one hand, self-determination is one of the principles of the UN Charter[2] and forms part of the corpus of seven principles identified in the 1970 "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".[3] Thus, it can be affirmed that it is part of the fundamental

[1] C-104/16P, para. 123, C-266/16, para. 71.
[2] Article 1 (2) of the UN Charter.
[3] UN General Assembly Resolution no. 2625 (XXV) of 24 October 1970, Annex, (e).

principles of international law. In the context of decolonization, the principles of self-determination, the right to self-determination has been detailed in the 1960 "Declaration on the Granting of Independence to Colonial Countries and Peoples".[1] As the International Court of Justice has emphasized in its Chagos advisory opinion of 2019, the 1960 Declaration "*has a declaratory character with regard to the right to self-determination as a customary norm*".[2] On the other hand, the relative effect of treaties is not a fundamental principle of international law: it is, indeed, one of the most important rules of the 1969 Vienna Convention on the Law of Treaties[3] and might be regarded as a principle within the sub-branch of the law of treaties. It has the origin in Roman law, in the form of the maxim *pacta tertiis nec nocent nec prosunt*[4] and has been widely accepted by State practice and case-law.[5]

Notwithstanding the way in which the two principles are characterized, it is important to underline that, when they are likely to apply to the case of an agreement susceptible of applying to non-self-governing territory, these principles are interlinked. On one hand, the "freely expressed will and desire" concerning the transfer of "all powers" to the non-self-governing territories, with a view to "enable them to enjoy complete independence and freedom" is an essential component of the right to self-determination.[6] In particular, in the case of the people of Western Sahara, the International Court of Justice itself referred to "principle of self-determination through the free and genuine expression of the will of the peoples of the territory".[7]

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[1] UN General Assembly Resolution no. 1514 (XV) of 14 December 1960.

[2] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, para. 152; see also S. Allen, *Self-determination, the Chagos Advisory Opinion and the Chagossians,* International and Comparative Law Quarterly, 2020, vol. 69 (1), pp. 203-220.

[3] Articles 34-36 of the Vienna Convention on the Law of Treaties; for a commentary see Mark E. Villiger, *Commentary on the Vienna Convention on the Law of Treaties,* Martinus Nijhoff, 2009, pp. 481-485.

[4] International Law Commission, Draft Articles on the Law of Treaties, with commentaries (1966), Yearbook of the International Law Commission, 1966, vol. II, p. 226, para. 1.

[5] *Ibid.,* para. 2.; the ILC quotes *Free Zones of Upper Savoy and the District of Gex,* P.C.I.J. (1932), Series A/B, no. 46, p. 141; *Territorial Jurisdiction of the International Commission of the River Oder*, P.C.I.J. (1929), Series A, no. 23, pp. 19-22; *Status of Eastern Carelia,* P.C.I.J. (1923), Series B, no. 5, pp. 27, 28.

[6] UN General Assembly Resolution no. 1514 (XV) of 14 December 1960, para. 5; UN General Assembly Resolution no. 2625 (XXV) of 24 October 1970, Annex, "The principle of equal rights and self-determination of peoples", para. 2 b).

[7] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12., para. 162 ; Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana Oltean, *Drept International Public, Scurta culegere de jurisprudenta pentru seminar*, Editura Hamangiu 2018, p. 53.

On the other hand, the requirement of the consent of the people of Western Sahara for the implementation of an agreement concluded between other two parties on this non-self-governing territory is derived from this "will of the people", which is an element of the right to self-determination.

In this sense, the Court of Justice found in case C-104/16P that the people of Western Sahara "*must be regarded as a 'third party' within the meaning of the principle of the relative effect of treaties"* and, as a consequence, "*implementation [of the agreement] must receive the consent of such a third party".* [1] Nevertheless, the General Court substantiated this element in its judgments of 29 September 2021. First, it acknowledged that the Front Polisario sought "*to defend the right to self-determination of the people of Western Sahara on the ground, in essence, that the contested decision fails to respect that right in that it approves the conclusion of an agreement [...] without its consent".*[2] Second, the General Court developed the above quoted statement of paragraph 106 of the judgment of the Court of Justice in case C-104/16P. It concluded, in this sense, that the Court "*inferred from the principle of self-determination and from the principle of the relative effect of treaties clear, precise and unconditional obligations [...] namely an obligation to respect the separate status [of Western Sahara] and an obligation to ensure that its people consented".*[3] Third, the General Court confirmed that the requirement of consent of the people of Western Sahara is "inferred" from the principle of self-determination[4] or "from the principle of the relative effect of treaties, which is applicable to that people by virtue of their right to self-determination".[5]

These elements confirm the assumption that the requirement of consent is *a consequence* of the right of peoples to self-determination. Thus, hypothetically, if an agreement between State A and State B would be likely to apply on the territory of State C, the consent of the latter would be required. Nevertheless, if State C is "replaced" by a non-self-governing territory, it is the principle of self-determination that provided the "link" between that territory and its people.

b) Does self-determination confer to a people rights over maritime areas?

As presented above, the concept of "people of a territory", as the holder of the right to self-determination, has to be regarded from the point of view

[1] C-104/16P, para. 106.
[2] T-279/19, para. 100; T-344/19, T-356/19, para. 152.
[3] T-279/19, para. 281, T-344/19, T-356/19, para. 289.
[4] T-279/19, para. 348; T-344/19, T-356/19, para. 335.
[5] T-279/19, para. 366; T-344/19, T-356/19, para. 347.

that the human factor is more important than the territorial one.[1] This does not mean that territory is not important. As the International Court of Justice recognized, "*the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory*".[2] Moreover, the International Court of Justice confirmed the "*right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination*".[3]

In the cases T-344/19 and T-356/19, the General Court was confronted with the argument of the Commission according to which international law did not establish the "clear" legal relation between a non-self-governing territory and adjacent waters.[4] On the contrary, the Front Polisario argued that the rights of a people extended to the maritime areas governed by customary international law, reflected in the United Nations Convention on the Law of the Sea ("UNCLOS").[5]

The solution identified by the General Court was that non-self-governing territories are likely to enjoy rights, in particular concerning the exploitation of natural resources, on the area defined by the UNCLOS as the territorial sea, as well as beyond this zone, within the limits of the rights recognized to States within the exclusive economic zone.[6] The General Court relied on several arguments. First, the General Court quoted Resolution no. III contained by the Final Act of the Third United Nations Conference on the Law of the Sea. This Resolution provided that in case of a non-self-governing territory, the relevant rights under UNCLOS "*shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development".*[7] The General Court inferred from this text that rights of peoples of non-self-governing territories should be regarded as "analogous" to the rights of States.[8] Second, it is very important to note that the General Court relied on the principle "*land dominates the sea*". In this sense, it quoted the case concerning *Maritime*

[1] *Supra,* subsection I.2.
[2] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, para. 160.
[3] *Ibid.*
[4] T-344/19, T-356/19, para. 220.
[5] United Nations Treaty Series, vol. 1833, p. 3; T-344/19, T-356/19, para. 221.
[6] T-344/19, T-356/19, para. 225.
[7] *Ibid.*, para. 222; Resolution III of the Third United Nations Conference on the Law of the Sea, para. 1, a), Final Act of the Third United Nations Conference on the Law of the Sea, 1982, p. 183.
[8] T-344/19, T-356/19, para. 222.

delimitation in the Black Sea (Romania v. Ukraine) of 2009.[1] Third, the General Court relied on the "international practice of the Union" in relation with the Palestine Liberation Organization ("PLO"). Thus, it invoked an agreement concluded between European Community and the PLO, acting on behalf of the Palestinian Authority of the West Bank and Gaza Strip which referred to the relevant "territories, including territorial waters".[2]

c) What is the relevant international law concerning the exploitation of natural resources of a non-self-governing territory?

The Council of the European Union argued before the General Court that the relevant "objective" criterion in international law related to the exploitation of resources of non-self-governing territories is that such exploitation would be "beneficial" to its peoples. The question that appears is whether the established "beneficial" character of the conduct of States is sufficient to allow such exploitation, regardless of the "consent" of the people of that territory. In support of its argument, the Council invoked the letter of the UN Legal Counsel addressed to the President of the Security Council on 29 January 2002.[3]

This letter concerned a request for an opinion addressed by the Security Council to the Under-Secretary General for Legal Affairs, the UN Legal Counsel, on the following matter: *"the legality in the context of international law, [...] of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara*".[4] The opinion of the UN Legal Counsel takes into account the fact that the Moroccan authorities provided information on two contracts concerning

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1 *Ibid.*, para. 227; *Maritime delimitation in the Black Sea (Romania v. Ukraine),* I.C.J. Reports, 2009, p. 61, para. 77; the General Court also quoted *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment,* I.C.J. Reports 2007, p. 659, para. 126 and the *Grisbådarna Case* (Norway/Sweden), Award of 23 October 1909, R.I.A.A., vol. XI, p. 159.

[2] T-344/19, T-356/19, para. 229 ; Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, signed in Brussels, on 27 February 1997, OJ L 187 of 16 July 1997, p. 3, article 1 para. m) and Protocol 3.

[3] T-279/19, para. 369; T-344/19, T-356/19, para. 351; Letter dated 2002/01/29 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN doc. S/2002/161, hereinafter "S/2002/161".

[4] S/2002/161, para. 1.

"oil-reconnaissance and exploration activities" concerning areas offshore Western Sahara, which indeed provided option for "future oil contracts". [1]

The legal opinion addresses two legal issues: the status of the Western Sahara (section A) and the law applicable to the exploitation of resources of a non-self-governing territory (sections B, C and D). Section A contains very important considerations related to the fact that the Madrid Agreement of 1975[2] could not have transferred to Morocco (or Mauritania) the status of "administering Power", in accordance with article 73 (e) of the UN Charter, status enjoyed by Spain since 1962. Thus, Spain could not have "unilaterally transferred" this status. Moreover, the transfer of authority in 1975 "*did not affect the international status of Western Sahara as a Non-Self-Governing Territory*".[3] Despite this statement, the legal opinion find appropriate to examine the "principles applicable to the powers and responsibilities of an administering Power in matters of mineral resource activities".[4] Thus, Section B examines the law applicable to the role of such "administering Power". It examines the provisions of the UN Charter and of relevant UN General Assembly resolutions and establishes that the obligation of the administering Power is to "promote to the utmost the well-being of the inhabitants of these Territories".[5] The developments brought by UN General Assembly resolution underline the distinction between activities that are "detrimental" to the peoples of those territories and those activities that are "beneficial" to them.[6] Moreover, the UN Legal Counsel

[1] *Ibid.*, para. 2.
[2] Declaration of Principles on Western Sahara, concluded in Madrid between Spain, Morocco and Mauritania, 14 November 1975.
[3] S/2002/161, para. 6.
[4] *Ibid.*, para. 8.
[5] Article 73 of the UN Charter.
[6] S/2002/161, para. 10-12. The UN Legal Counsel quotes the following UN General Assembly Resolutions: 35/118 of 11 December 1980, 52/78 of 10 December 1997, 54/91 of 6 December 1999, 55/147 of 8 December 2000, 56/74 of 10 December 2001, 48/46 of 10 December 1992, 49/40 of 9 December 1994, 50/33 of 6 December 1995, 52/72 of 10 December 1997, 53/61 of 3 December 1998, 54/84 of 6 December 1999, 55/138 of 8 December 2000 and 56/66 of 10 December 2001.

examines the "principle of permanent sovereignty over natural resources".[1] The opinion concludes that while the "core" of this principle is customary, its scope is still uncertain: the main question is whether this principle "prohibits any activities related to natural resources undertaken by an administering Power […] in a Non-Self-Governing Territory, or only those which are undertaken in disregard of the needs, interests and benefits of the people of that Territory".[2] After examining the case law and the relevant state practice, the opinion concludes that:

> "*recent State practice, though limited, is illustrative of an opinio juris on the part of both administering Powers and third States: where resource exploitation activities are conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf or in consultation with their representatives, they are considered compatible with the Charter obligations of the administering Power and in conformity with the General Assembly resolutions and the principle of "permanent sovereignty over natural resources" enshrined therein*".[3]

With respect to Western Sahara, the UN Legal Counsel found that, having in mind that the respective contracts concerning merely "reconnaissance and evaluation", these contracts are not illegal *per se*. Nevertheless, if exploitation activities would continue "in in disregard of the interests and wishes of the people of Western Sahara", they would be in violation of the UN Charter.[4] The conclusion is very carefully drafted, as it avoids mentioning that exploitation would be "legal" if conducted to the benefit of the people of that territory.

The General Court rejected the argument of the Council. It held that the Council could not "avoid to comply" with the interpretation given by the Court of Justice to the relevant principles of international law, by

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[1] S/2002/161, para. 14. The principle is referred to in UN General Assembly Resolutions, such as: 1803 (XVII) of 14 December 1962, 3201 (S-VI) of 1 May 1974, entitled "Declaration on the Establishment of a New International Economic Order" and 3281 (XXIX) of 12 December 1974, containing the Charter of Economic Rights and Duties of States; for a contemporary debate on the scope of the principle, see Y. Tyagi, *Permanent Sovereignty over Natural Resources,* Cambridge Journal of International and Comparative Law (2015), vol. 4, Issue 3, pp. 588-615; R. Pereira, O. Gough, *Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law*, Melbourne Journal of International Law, Vol. 14, no. 2 (2013), pp. 451-495.

[2] *Ibid.,* para. 14.

[3] *Ibid.* para. 24.

[4] *Ibid.*, para. 25.

"substituting" to the criteria derived thereto [consent] a different criterion derived from the opinion of the UN Legal Counsel, which is "non-binding".[1]

The General Court offered four counter-arguments in this sense. First, it mentioned the role of opinions of the UN Legal Counsel, issued in accordance with the functions of the UN Secretariat and noted that such opinions are not equivalent to the advisory opinions of the International Court of Justice.[2] Second, it stated that the legal opinion did not concern an international agreement applicable to Western Sahara, but that of contracts for prospecting and assessing oil resources.[3] Third, the General Court underlined that the opinion of the UN Legal Counsel examined the question on the basis of analogies with the rights and obligations of the "administering Power".[4] Nevertheless, Morocco does not enjoy such a status under the UN Charter (it claims sovereignty over Western Sahara). Fourth, the General Court referred to the words "in disregard of interests and *wishes*" (emphasis added) of the people of Western Sahara and stated that the conclusions of the UN Legal Counsel opinion support the assumption that exploitation activities must be consistent "not only with the interests of the people of that territory, but also with their will".[5]

Therefore, it has to be underlined that the General Court did not found the opinion of the UN Legal Counsel to be invalid or that the conclusions in that opinion are not correct.[6] Moreover, the General Court did not take a position on the question of international law raised by the opinion of the UN Legal Counsel: whether the principle of "permanent sovereignty over natural resources" prohibits any activities in a non-self-governing territory or allows those conducted in the benefit of its people. Nevertheless, we find interesting to note that the General Court relied on the word "wishes" [of the people of a non-self-governing territory] in order to reinforce the argument based on the requirement that the exploitation

[1] T-279/19, para. 385.
[2] T-279/19, para. 385-386; only general reference to the four arguments is made in T-344/19, T-356/19, para. 362.
[3] T-279/19, para. 387.
[4] *Ibid.*, para. 388.
[5] *Ibid.*, para. 389.
[6] It can be noted that the press release related to the judgments of the General Court of 29 September 2021 quoted "*Lastly, the Court notes that the institutions cannot validly rely on the letter of 29 January 2002 from the UN Legal Counsel to substitute the criterion of the benefits of the agreements at issue for the populations concerned for the requirement of the expression of such consent*" - General Court of the European Union PRESS RELEASE No 166/21 Luxembourg, 29 September 2021 Judgments in Case T-279/19 and in Joined Cases T-344/19 and T-356/19 Front Polisario v Council.

activities be conducted in accordance with that people's "will". Indeed, the criterion of the people's "will" is found in UN General Assembly resolutions,[1] considered to reflect customary law[2] and has also been recognized by the International Court of Justice.[3] Finally, the General Court could not have avoided the criterion of "consent", as it was derived from the case law of its superior court, the Court of Justice of the European Union.

d) *Can consent be presumed? How should consent be expressed?*

A first element analysed by the General Court was whether consent of the people of Western Sahara could be presumed or whether such consent must be explicit. The answer is to be found in articles 35 and 36 (1) of the 1969 Vienna Convention on the law of treaties between States. These articles bring supplementary details to the principle of relative effect of treaties,[4] by providing the rules concerning the establishment of an obligation or the creation of a right to a third State. As these rules are considered to reflect customary international law,[5] they also apply to "third parties", even if these third parties are not necessarily "States". Article 35 of the Vienna Convention governs the creation of an obligation for a third party and stipulates that the conditions to that end are: i) the parties intend to establish an obligation; ii) the third party "accepts that obligation in writing".[6] Thus, it is beyond doubt that acceptance of an obligation, according to customary law, must be explicit. Article 36 (1) governs the creation of a right for a third party. In these situations, the conditions are: i) the parties intend to accord that right; ii) the third party "assents thereto". The second phrase of article 36 (1) provides that „its assent shall be presumed so long as the contrary is not indicated, unless the treaty provides

[1] UN General Assembly Resolution no. 1514 (XV) of 14 December 1960, para. 5; UN General Assembly Resolution no. 2625 (XXV) of 24 October 1970, Annex, "The principle of equal rights and self-determination of peoples", para. 2 b).

[2] For considerations linked to Resolution 1514 (XV), see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, para. 152; for Resolution 2625 (XXV), *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, p. 14, para. 188.

[3] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12., para. 162

[4] The general rule is expressed article 34 of the Vienna Convention of the Law of Treaties; see, for commentaries Robert Kolb, *The Law of Treaties. An Introduction,* Edward Elgar Publishing, 2016, pp. 115-116.

[5] International Law Commission, Draft Articles on the Law of Treaties, with commentaries (1966), Yearbook of the International Law Commission, 1966, vol. II, p. 227, para. 1 – especially with respect to creating an obligation for a third State.

[6] For international case-law, *Free Zones of Upper Savoy and the District of Gex,* P.C.I.J, Ser. A, no. 22 (1929), Order of 19 August 1929, p. 17.

otherwise". Although these conditions reflect a "compromise" formula between two "doctrines" that were expressed within the International Law Commission,[1] it is clear that consent for the creation of a right must not be express.[2]

On the basis of these provisions, the General Court inferred that the consent of the people of Western Sahara "may be presumed" only if the parties intended to confer a right, but it must be "explicit" with regard to obligations, which the parties intended to impose.[3] By examining the text of the contested agreements, the General Court came to the conclusion that, because they grant to one of the parties (the Kingdom of Morocco) the certain competences over the territory of Western Sahara, which that party "is not entitle to exercise itself or, as the case may be, delegate", those agreements impose an obligation. Thus, expression of consent must be explicit.[4]

It is also interesting to note, not only that the General Court applied the rules contained by articles 35 and 36 (1) of the Vienna Convention, but that it provided explanations to the concept of "consent". Thus, it noted that the "principle of free consent" is recognized by the preamble of the Vienna Convention as "universally recognized".[5] Moreover, it quoted international case law (the *Gulf of Maine* case and the *Chagos* advisory opinion) to underline that consent must be "free and authentic", as a condition of validity of the instrument to which it is required.[6]

The second element related to consent was the modality of expressing such consent by the people of Western Sahara. Thus, the Council and the Commission argued that "the particular situation of Western Sahara did not allow them, in practice, to obtain the consent of the people of that territory", and, in particular, that "it was not possible to consult the people directly or through a single representative, namely the [Front Polisario]".[7] For this reason, the institutions argued that the most appropriate way was to

[1] International Law Commission, Draft Articles on the Law of Treaties, with commentaries (1966), Yearbook of the International Law Commission, 1966, vol. II, pp. 228-229, para. 1-8.
[2] Robert Kolb, *The Law of Treaties. An Introduction, op. cit.*, p. 119.
[3] T-279/19, para. 316; T-344/19, T-356/19, para. 311.
[4] T-279/19, para. 322, 323; T-344/19, T-356/19, para. 318.
[5] T-279/19, para. 324; T-344/19, T-356/19, para. 319.
[6] T-279/19, para. 325; the General Court quoted *Delimitation of the maritime border in the Gulf of Maine,* I.C.J. Reports, 1984, p. 246, para. 127-130; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, para. 160, 172, 174.
[7] T-279/19, para. 352; T-344/19, T-356/19, para. 338.

conduct "the most inclusive possible consultations." The General Court rejected this argument, offering several grounds.[1] Some grounds have already been examined: consent cannot be presumed; identifying the members of the "people" cannot be invoked, [2] the Kingdom of Morocco cannot be considered as a *"de facto* administering Power".[3] Nevertheless, two of the grounds retained by the General Court are worth pointing out.

On one hand, the General Court held that the argument according to which the people of Western Sahara was not in the position to conclude a treaty was not decisive. Thus, the General Court pointed out that "it does not follow from the principle of relative effect of treaties […] *that consent […] should necessarily be obtained itself by means of a treaty".*[4] This statement is in line with the reality that international law is certainly not characterized by formalism.[5]

Second – and maybe mostly important – the General Court rejected in an express manner the argument that the Front Polisario could not represent the people of Western Sahara for expressing the consent. It rejected the statement of the Council and the Commission that the Front Polisario would be assign "a right of veto". The Court held:

> *"[…] it should be recalled that [… the applicant's] participation in the self-determination process does not mean that it cannot represent that people in the context of an agreement between the European Union and the Kingdom of Morocco, and it is not apparent from the case materials that the UN bodies have recognised organisations other than the applicant as being authorised to represent that people […]. Consequently, it was not impossible to obtain the people's consent through the applicant."*[6]

This element is relevant because it confirms that a national liberation movement – in this case recognized by the UN bodies as "representative" for a people – is able to represent that people for the purposes of expressing consent. Cases in international practice confirm this statement. For example

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[1] T-279/19, para. 355-364; T-344/19, T-356/19, para. 340-346.
[2] *Supra,* subsection II.2.
[3] *Supra,* subsection III.1., point c).
[4] T-279/19, para. 361; T-344/19, T-356/19, para. 344.
[5] In this sense, as an analogy to consent of States, it can be pointed out that, according to article 11 of the 1969 Vienna Convention on the Law of Treaties, consent can be expressed "by any other means". See, in this sense, Vassilis Pergantis, *The Paradigm of State Consent in the Law of Treaties. Challenges and Perspectives,* Edward Elgar Publishing, 2017, pp. 107-108; Mathias Forteau, *Les sources du droit international face au formalisme juridique,* L'Observateur des Nations Unies, vol. 30, 2011, pp. 61-71.
[6] T-279/19, para. 364; T-344/19, T-356/19, para. 346.

the Oslo Accords of 1993 and 1995 were concluded by Israel and the Palestine Liberation Organization, "representing" the Palestinian People.[1] Moreover, as recalled by the General Court itself,[2] the Front Polisario concluded the "Mauritano-Sahraoui Agreement", signed in Algiers, on 10 August 1979, and the text provides "on behalf of the Sahraoui people".[3]

In any case, it was clear from the General Court's judgment that "consultations", however "extensive" or "wide-ranging", could not substitute "consent". In essence, consultations were not conducted with the proper "subjects" ("people of Western Sahara" versus "population concerned"), as emphasized above.[4] Moreover, their purpose was to obtain "majority opinion" of the relevant actors, and not "consent", as required by the relevant principles of international law, as interpreted by the Court of Justice of the EU.[5]

As a short conclusion to this section, it is important to underline that the main line of arguments of the General Court was based on the interpretation of the principles of self-determination and relative effects of the treaties given by the Court of Justice in the previous cases C-104/16P and C-266/16. The General Court developed this interpretation and determined that the two interconnected principles imposed the "requirement of consent" of the people of Western Sahara. It appeared that the EU institutions did not observe this requirement, as "consultations" could not substitute "consent".

4.2. The consequences of not observing the principles of self-determination and relative effect of treaties

It is true, the two judgments of the General Court of 29 September 2021 had as an object the annulment of the decisions on the conclusion of the two contested agreements. The decisions have been adopted on the basis of article 218 paragraph 6 of the TFEU and represent the act by which the

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[1] "Oslo I" – Declaration of Principles on Interim Self-Government Arrangements, was signed on 13 September 1993 and stipulated in the preamble, as a party, the "PLO team […] representing the Palestinian People"; "Oslo II" – Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip was signed on 28 September 1995 and provided, as a party, "the Palestine Liberation Organization, the representative of the Palestinian people"; for an overview, Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements,* Oxford University Press, 2000, pp. 41-53.

[2] T-279/19, para. 94.

[3] Mauritano-Sahraoui Agreement signed in Algiers, on 10 August 1979, annexed to the letter dated 18 August 1979 of the Permanent Representative of Mauritania to the United Nations to the Secretary General, UN Doc. A/34/427.

[4] *Supra,* subsection II.2.

[5] See, in this sense, T-279/19, para. 341, T-344/19, T-356/19, para. 333.

EU expresses its consent to be bound by a treaty.[1] It can be noted that the General Court used its powers under article 264 TFEU and maintained the effect of the annulled decisions for a period of two months or, if an appeal is lodged, until the rendering of the judgment of the Court of Justice on appeal.[2]

What is more important, in our view, is the fact that the General Court underlined the "inseparable nature of the international agreement and the decision to conclude it on behalf of the EU.[3] Thus, an action for annulment of the decision for the conclusion of the agreement involves "to review its legality in the light of the content of the agreement approved by that decision". An opposite interpretation would "exempt the contested decision from the review of its substantive legality".[4]

Thus, even if the General Court annulled the decisions for the conclusion of the agreements, the reality is that the judgment relied on the fact that the agreements, though their territorial scope, violated the requirement of the consent of people of Western Sahara. As expressed in the sections above, this requirement was derived by the case law of the Court of Justice from the principles of self-determination and relative effect of treaties. Of course, the General Court could not have annulled the agreements themselves.[5] Nevertheless, although the judgments produce effects only in the EU legal order, the main line of reasoning was based on the content of the agreements, which were producing effects on a third party without its consent. This consent was required by the principles of self-determination and relative effect of treaties. Shortly, the agreements were concluded in violation of the above two principles of international law.

Even if such statement is derived in an indirect manner from the text of the judgments, it might be regarded, within a certain degree, as an

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[1] Opinion 2/00 (Cartagena Protocol), 6 December 2001, EU:C:2001:664, para. 5; for general comments: Joni Heliskoski, *The procedural law of international agreements: A thematic journey through article 218 TFEU,* Common Market Law Review, vol. 57, Issue, 1 (2020), pp. 79-118; Anne Pieter van der Mei, *EU External Relations and Internal Inter-Institutional Conflicts. The Battlefield of Article 218 TFEU,* Maastricht Journal of European and Comparative Law, vol. 23, no. 6, (2016), pp. 1051-1076.

[2] Appeals have been lodged and are pending at the date of the finalization of this study: C-779/21P, C-799/21P, C-778/21P, C-798/21P.

[3] T-279/19, para. 152, T-344/19, T-356/19, para. 183.

[4] T-279/19, para. 157, T-344/19, T-356/19, para. 189.

[5] The General Court underlined that the case does not concern the "international dispute" to which the applicant is a party, and rejected the arguments of the institutions that accepting the *locus standi* of the Front Polisario the General Court would transform itself into a "quasi-international" jurisdiction, T-279/19, para. 109, T-344/19, T-356/19, para. 158.

element of novelty in international law. This is mainly because of the legal nature of the principle of self-determination as a *jus cogens* norm.

A peremptory norm of international law (*jus cogens*) represents a "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 general international law having the same character".[1] The most important legal consequence of a peremptory norm of international law is nullity of treaties in conflict with it – either if such conflict appears *ab initio* or if the peremptory norm emerges after a treaty enters into force.[2]

It is not necessary to analyse in detail the conditions for a *jus cogens* norm to be recognized as such. It is sufficient to point out that the right to self-determination has been included in the illustrative list drawn by the International Law Commission. Thus, in its draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading in 2019, the International Law Commission retains eight *jus cogens* norms, among which the "right to self-determination".[3] Nevertheless, members International Law Commission referred to the right to self-determination as *jus cogens* even since 1963, in the context of the law of treaties.[4] Moreover, in the context of the *Chagos* advisory opinion of the International Court of Justice, three judges expressed views that the Court should have addressed and confirmed the *jus cogens* nature of the right to self-determination.[5] Judge Cançado Trinidade noted that 18 delegations expressed views during

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[1] Article 53 of the 1969 Vienna Convention on the Law of Treaties; International Law Commission, Peremptory norms of general international law (jus cogens), Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, doc. A/CN/L.936, 29 May 2019, Draft Conclusion 2 [3 (1)].

[2] Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties; Alexander Orakhelashvili, *Peremptory Norms in International Law,* Oxford University Press, 2006, p. 134; on the concept of "international public order", linked to *jus cogens,* Robert Kolb, *Théorie du jus cogens international. Essai de relecture du concept,* PUF, Paris, 2001, pp. 72-73, 77.

[3] International Law Commission, Peremptory norms of general international law (jus cogens), Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, doc. A/CN/L.936, 29 May 2019, Draft Conclusion 23 [24] and Annex.

[4] Yearbook of the International Law Commission, vol. I, 1963, topic „Law of treaties", p. 155, para. 56.

[5] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, Separate Opinion of Judge Cançado Trinidade, para. 119, 120-128; Separate Opinion of Judge Sebutinde, para. 13, Separate Opinion of Judge Robinson, para. 48-89, Joint Declaration of Judges Cançado Trinidade and Robinson, para. 8.

the procedure that the right to self-determination is *jus cogens* and recalled that, in 1975, Spain issued a similar statement in the oral procedures concerning the *Western Sahara* advisory opinion.[1]

The above preliminary considerations are important in order to assess the wider consequences of the General Court judgments. As Enzo Cannizzaro pointed out with respect to the judgment of the Court of Justice in case 104/16P, "the interpretative decision enacted by the ECJ presents striking analogies with a declaration of invalidity".[2] What the General Court did was exactly to put in practice the judgment in case 104/16P in order to "declare the invalidity". Even if formally, invalidity touched the decisions on the conclusion of the agreements, substantially it touched the agreements themselves.[3] Moreover, as emphasized by Enzo Cannizzaro, a declaration of invalidity, for reasons of inconsistency with a norm, which is generally accepted to represent *jus cogens*, cannot avoid touching the entire agreement. The "separability" rules of article 44 (5) of the 1969 Vienna Convention on the Law of Treaties do not apply in such case.[4]

It is true, the General Court addressed the issue of "separability" of treaty provisions only in the context of the 2019 fisheries agreement. In course of the hearing, the Front Polisario indicated that, principally, it sought the annulment of the decision on the conclusion of the agreement in what concerns its application to Western Sahara and its adjacent waters and, in a subsidiary manner, the annulment of the whole decision.[5] The General Court analysed whether the "elements for which the annulment is sought" are "detachable from the rest of the act"[6] and concluded that the consent expressed by the Union for the 2019 fisheries agreement to apply to the territory of Western Sahara and its adjacent waters "could not be detached" from the consent expressed to the entire agreement.[7] The result was the same: the treaty provisions were not separable. Nevertheless, the General Court did not refer to *jus cogens*. The analysis was centred on the EU act, the decision for the conclusion of the agreement.

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[1] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, Separate Opinion of Judge Cançado Trinidade, para. 165; Western Sahara, Advisory Opinion,I.C.J. Reports 1975, p. 12, Oral Statement of Spain, 26 March 1975, Pleadings, vol. I., pp. 206-207.

[2] Enzo Cannizzaro, *In defence of Front Polisario: The ECJ as a global jus congens maker, loc. cit.*, p. 583.

[3] *Ibid.*, p. 585.

[4] *Ibid.*, p. 584.

[5] T-344/19, T-356/19, para. 126.

[6] *Ibid.*, para. 127; the General Court quoted the judgment of 9 November 2017, *SolarWorld/Council*, C-204/16 P, EU:C:2017:838, para. 36, 37.

[7] *Ibid.*, para. 129.

Another element which can be derived from the analysis conducted by Enzo Cannizzaro on the case C-104/16P is ”the conflict between two international rules”.[1] Formally, the General Court analysed the conformity of the decisions on the conclusion of the contested agreements by reference to the ”clear, precise and unconditional obligations” imposed by the principles of self-determination and relative effect of treaties, as interpreted by the Court of Justice.[2] The words ”clear, precise and unconditional” merely supported the direct effect.[3] Substantially, the analysis was between two norms of international law: on one side, the contested agreements and, on the other side, the two principles of international law, self-determination and the relative effect of treaties. Such analysis could rely only on the “superior” character of the latter principles. As international law contains no “hierarchy”, the valid argument for the „superior” character is their nature of *jus cogens*. Indeed, the international community as a whole widely confirmed such character for the right to self-determination.

Thus, without saying it, the General Court applied, in substance, *jus cogens*.[4] It is true, the judgment is not binding on the other party to the agreement, the Kingdom of Morocco. Moreover, the General Court itself admitted (when it applied article 264 TFEU in order to maintain the effects of the contested decision) that the annulment of these decisions would have ”*serious consequences for the European Union’s external action and call into question the legal certainty of the international commitments to which it has consented and which are binding on the institutions and the Member States*”.[5] Despite these elements, the judgments of 29 September 2021, if confirmed by the Court of Justice, would remain a (rare) example of international practice, when the court of one of the parties finds that an agreement concluded by that party violates a principle of international law, the self determination. In other circumstances, international practice was

[1] Enzo Cannizzaro, *In defence of Front Polisario: The ECJ as a global jus congens maker, loc. cit.*, p. 585; Carmen Achimescu, *Le contrôle des actes des organisations internationales devant le juge de Strasbourg*, NRDO 2/2014.
[2] T-279/19, para. 281, T-344/19, T-356/19, para. 289.
[3] See also to this end Enzo Cannizzaro, *In defence of Front Polisario: The ECJ as a global jus congens maker, loc. cit.*, p. 585.
[4] It would have not been the first time when General Court would refer to *jus cogens* – see judgment of 21 September 2005, T-315/01, *Yassin Abdullah Kadi/Council*, ECLI:EU:T:2005:332, para. 226, 227; it is true, the judgment was annulled under appeal, and the *jus cogens* issue was not retained by the Court of Justice – judgment of 3 September 2008, C-402/05P, C-415/05P, Yassin Abdullah Kadi and Al Barakaat International Foundation/Council and Commission, ECLI:EU:C:2008:461.
[5] T-279/19, para. 395, T-344/19, T-356/19, para. 368.

more „tolerant" and attempted to reconcile different interests. Thus, even if, throughout the recent history, certain agreements „might" have been regarded as affecting the right to self-determination, no formal declaration of "invalidity" has been issued.[1]

5. Conclusion

The two judgments rendered on 29 September 2021 appear to be courageous and far-reaching, but one should not regard these judgments „alone" or in an independent manner". From the substantial point of view, they represent the continuation of the jurisprudence of the Court of Justice in the cases 104/16P and 226/16. It was the Court of Justice who has set the interpretation to be given to the principles of self-determination and relative effect of the treaties, in the sense that these principles required the "consent" of the people of Western Sahara for the implementation of the contested agreements on that territory or its adjacent waters.

Indeed, it appears also that in its judgments of 29 September 2021 the General Court has manifested greater "availability" to apply international law, in comparison with the „first" Front Polisario case, T-

[1] The first example relates merely to Western Sahara: the "Madrid Agreement" signed on 14 November 1975 ("Declaration of Principles on Western Sahara was concluded in Madrid between Spain, Morocco and Mauritania"), by which, practically, Morocco and Mauritania agreed the partition of Western Sahara. As recalled above *Supra, subsection III.1., point c),* the Letter dated 2002/01/29 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council underlined that the Madrid Agreement does not affect the status of Western Sahara - S/2002/161, para 6. The second example is represented by the Camp David Agreements of 1978, concluded between Israel, Egypt and the United States. Even if UN General Assembly Resolution no. A/RES/34/65/B of 29 November 1979 "rejected" those provisions which, *inter alia,* violate the right to self-determination of the Palestinian people, the Camp David Agreements were confirmed by the later peace agreement between Israel and Egypt, signed on 26 March 1979. The third example is represented by the delimitation agreement concluded between Australia and Indonesia in 1989, covering also the waters adjacent to East Timor. This agreement was the purported object of the *East Timor* case before the International Court of Justice – *East Timor (Portugal v. Australia), Judgment,* I.C.J. Reports, 1995, p. 90. Although one of the arguments of Portugal was the breach of the right to self-determination (p. 92, para. 1), the Court decided it is not competent to rule on the case. In practice after Timor Leste became independent in 2002, it concluded "Comprehensive Package Agreement" on 30 August 2017, in parallel with a conciliation procedure under UNCLOS – PCA Case no. 2016/19, *In the Matter of the Maritime Boundary between Timor Leste and Australia (the „Timor Sea Conciliation"),* Report and Recommendations of the Compulsory Conciliation Commission between Timor Leste and Australia on the Timor Sea, Registry PCA, 9 May 2018. See, for the first two examples, see, in this sense, pp. 135-136.

512/12.[1] Again, the same statement is valid: the General Court relied on the interpretation already given by the Court of Justice to the principles of self-determination and relative effect of treaties.

The novelty of the judgment stems from the mere facts with which the General Court was confronted. After the two judgments of Court of Justice in the cases 104/16P and 226/16P, the Council and the Commission took concrete steps in order to extend in an explicit manner the territorial scope of the liberalisation agreement and of the fisheries agreement, in order to apply to Western Sahara. At first glance, this might seem surprising, but we might "suspect" that the political relations with the Kingdom of Morocco, in the wider sense, and the demarches of this State, played an important role.

As a first element of conclusion, the judgments of 29 September 2021 raised multiple and interesting issues of international law and EU law. It is true, some were not new: the elements related to subjects of international law appeared in the previous cases T-512/12 and C-104/16P. Nevertheless, the General Court developed several elements. The concept of "people", as a subject of international law, was detailed, especially with respect to its „composition" and with respect to the way in which its consent can be expressed. Even if the Front Polisario was not labelled expressly as a „national liberation movement" (the General Court quoted only how the appellant qualified itself), the reasoning that led to the acceptance of *locus standi* for the Front Polisario relies on the elements of its personality derived from international law. Moreover, the General Court developed the reasoning on *locus standi* it adopted in the earlier case T-512/12, including the concepts of "direct and individual concern". Other important developments include: the interpretation of the customary rules contained in articles 35 and 36 (1) of the Vienna Convention on the Law of Treaties and the application of the principle „land dominates the sea" with respect to the rights over the waters adjacent to a non-self-governing territory. In the latter sense, the General Court relied on international case law, including the case concerning *Maritime delimitation in the Black Sea.*

The second element of conclusion is linked to the substantial analysis made by the General Court that led to the solution of annulment. Even if the judgments targeted the decisions of the Council on the conclusion of the contested agreements, these decisions are inseparable from the text of the agreements themselves. Thus, even if formally, the General

[1] See, with respect to T-512/12, Sandra Hummelbrunner, Anne-Carlijin Pickartz, A, *It's Not the Fish That Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union*, *loc. cit.*, p. 35.

Court found that the decisions did not comply with the requirement of „consent" of the people of Western Sahara inferred by the Court of Justice from the principles of self-determination and relative effect of treaties, in substance, it was the agreements that breached this requirement. Moreover, in essence, the requirement of "consent" of the people is a consequence of its right to self-determination. In short, the essential part of the reasoning lead to the conclusion that the contested agreements breached the right to self-determination. The General Court did not refer to the *jus cogens* nature of this right (or principle), but doctrine (including the International Law Commission) and opinion of States is rather convergent that the right to self-determination enjoys this status. The qualification of an international rule as *jus cogens* is not necessary in order to rely upon it in order to contest an EU law act. The criteria for direct effect ("clear, precise and unconditional") are sufficient in this sense. Nevertheless, if one regards the larger picture of the relation between the contested agreements and other international law principles, *jus cogens* is a necessary element to rely upon.

It remains to be seen if the Court of Justice confirms the judgments, following the appeal. In our view, the most important challenge will not necessarily be the "substantial part" of the reasoning, but the questions regarding the admissibility. In particular, it is known that, along the time, the approach of the Court of Justice towards the criteria of „direct concern" or „individual concern" has been restrictive.[1] Thus, it remains to be seen whether, for example, the individual concern derived from the fact that the UN bodies did not recognize any other subject as "representative" of the people of Western Sahara is sufficient to uphold the reasoning of the General Court on individual concern.

Thus, if the judgments of the General Court are be confirmed by the Court of Justice under appeal, they might represent, together with the previous case law on which they rely, useful international practice related to the effects of the right to self-determination (which is widely accepted as representing a *jus cogens* norm). It is true that the judgments have effect only within the EU legal order and are not binding on the other party to the agreement. Nevertheless, the relevance of the reasoning as "international practice" may not be ignored.

[1] Concerning the „direct concern", a recent example is the Judgment of 13 January 2022 *Federal Republic of Germany and Others v Ville de Paris and Others*, C-177/19P, C-179/19P, ECLI:EU:C:2022:10; however, an example where the Court of Justice found that direct concern existed in a situation where the General Court ruled to the opposite is the Judgment of 22 June 2021, *Venezuela v. Council,* C-872/19P, ECLI:EU:C:2021:507.

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