INSIGHT

The *Front Polisario v. Council* Case: The General Court, *Völkerrechtsfreundlichkeit* and the External Aspect of European Integration (First Part)

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ABSTRACT: Over the last few years, the CJEU's approach to international law has sparked a fierce debate in the literature. More recent case-law has challenged the narrative of the CJEU's *Völkerrechtsfreundlichkeit* and it has called into question the EU's carefully cultivated self-image as a global actor with an attitude of respect and fidelity to international law. The judgment of the General Court in *Front Polisario* (judgment of 10 December 2015, case T-512/12) is especially relevant since it involved a number of complex international law questions and thus, it provides important insights into how the CJEU treats international law in its practice, thereby feeding directly into the debate over the CJEU's *Völkerrechtsfreundlichkeit.* The case-note argues that the Court's approach to international law leaves much to be desired and sits uncomfortably with the traditional self-portrayal of the EU as an internationally engaged actor committed to the observance of international law, thereby confirming the view that, in its more recent case-law, the CJEU has abandoned the "international law friendly" tone of its earlier judgments. This *Insight* only takes into account the judgment of the General Court in the *Front Polisario* case, while the decision of the Court of Justice (judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC]) will be the object of a subsequent *Insight* forthcoming on this *European Forum*.

KEYWORDS: relationship between international and EU law – *Völkerrechtsfreundlichkeit* – national liberation movement – right to self-determination – obligation of non-recognition – permanent sovereignty over natural resources.

I. Introduction

While initially the idea of European integration had a distinct internal dimension, since the early 1990s its external dimension has been steadily gaining prominence.[1] As the

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[1] G. DE BÚRCA, *Europe's raison d'être*, in *SSRN*, March 2013, papers.ssrn.com, p. 10.

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focus of the EU gradually shifted towards forging its identity as a global actor, there has been a growing realization that the internal and external aspects of integration are closely intertwined.[2] The EU presents itself as an actor whose modes of governance at the international level closely resemble those developed internally.[3] Art. 21, para. 1, TEU expressly provides that the Union's action on the international plane "shall be guided by the principles which have inspired its own creation, development and enlargement". In this sense, the EU's aspirations as a normative power are grounded, both internally and externally, in the ethos of human rights, international law and multilateralism, as reflected in the Lisbon Treaty.[4] The EU's external projection of itself as an entity firmly committed to the strict observance and development of international law generates the expectation that its Courts also espouse something of this internationalist approach.[5]

However the question of the CJEU's *Völkerrechtsfreundlichkeit*, namely its open attitude towards international law, is fiercely debated in the literature.[6] According to the dominant view the CJEU is generally open to international law, while it retains the authority to decide the manner of its reception in the EU legal order.[7] Cannizzaro writes that "the European legal order is amongst the *völkerrechtsfreundlichsten* contemporary legal orders".[8] In a similar vein, Skordas stresses that: *"Völkerrechtsfreundlichkeit* [...] functions as an ersatz meta-principle that enables the Court of Justice to recognize, interpret and implement international law and, at the same time, develop and preserve the Union's separate identity".[9] However, more recent literature has challenged this assumption. It has

[2] *Ibid.*

[3] G. de Búrca, *EU External Relations: The Governance Mode of Foreign Policy*, in B. van Vooren, S. Blockmans, J. Wouters (eds), *The EU's Role in Global Governance*, Oxford: Oxford University Press, 2013, p. 39.

[4] See for example Art. 3, para. 5, and Art. 21, para. 1, TEU. For the EU's ambitions as a global rule-maker, see R. Wessel, *The Meso Level: Means of Interaction between EU and International Law. Flipping the Question: The Reception of EU Law in the International Legal Order*, in *UTpublications*, April 2016, doc.utwente.nl, pp. 4-6.

[5] G. de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 183.

[6] For an overview of the relevant debate, see J. Odermatt, *The Court of Justice of the European Union: International or Domestic Court?*, in *Cambridge Journal of International and Comparative Law*, 2014, pp. 698-699.

[7] J.P. Kuijper, *Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law*, in J. Wouters, A. Nollkaemper, E. de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, Den Haag: T.M.C. Asser Press, 2008, p. 29.

[8] E. Cannizzaro, *The Neo-Monism of the European Legal Order*, in E. Cannizzaro, P. Palchetti, R. Wessel (eds), *International Law as Law of the European Union*, Leiden: Martinus Nijhoff, 2012, p. 57.

[9] A. Skordas, *Völkerrechtsfreundlichkeit as Comity and the Disquiet of Neoformalism: A Response to Jan Klabbers,* in P. Koutrakos (ed), *European Foreign Policy*, Cheltenham: Edward Elgar Publishing, 2011, p. 142.

been asserted that, in its more recent case-law and particularly since the *Kadi* judgment,[10] the CJEU has adopted a much less open attitude towards international law. According to de Búrca*,* the *Kadi* judgment served as an opportunity for the CJEU "to send out a strong and clear message about the relationship of EC law to international law, and, most fundamentally, about the autonomy of the international legal order".[11] Similarly, Klabbers argues that "the story of the EU and international law as a happy family, is a seductive story, but it does have a few holes in its plot [...]. [C]loser scrutiny reveals that the openness narrative is not supported by practice, in particular the practice of the courts".[12] The practice of the CJEU, Klabbers contends, evidences that it is not interested in being *völkerrechtsfreundlich* at all, "but rather in guarding its own identity. If and when possible it will happily do so in harmony with international law, but when if and when impossible to do so harmoniously, international law will take the backseat".[13]

In this light, the judgment rendered by the General Court in *Front Polisario*[14] merits special attention since the case involved a number of complex international law questions and thus, it provides important insights into how the CJEU treats international law in its practice, thereby feeding directly into the debate over the CJEU's *Völkerrechtsfreundlichkeit*. In this case, Front Polisario, a national liberation movement representing the Sahrawi people, brought an action for annulment against a Council decision concluding a trade agreement between the EU and Morocco that is *de facto* applicable to the territory of Western Sahara, a non-self-governing territory under Morocco's occupation. As it will be explained in more detail below, the applicant relied heavily on international law in support of its action. Its claim to legal personality under Art. 263 TFEU was substantiated with reference to its international legal personality as a national liberation movement. The EU's international law obligations to observe the right to self-determination and the principle of permanent sovereignty over natural resources featured prominently in its pleas. The case-note argues that the Court's approach to international law leaves much to be desired and sits uncomfortably with the traditional self-portrayal of the EU as an internationally engaged actor committed to the observance of international law, thereby confirming the view that, in its more recent case-law, the CJEU has abandoned the "international law friendly" tone of its earlier judgments. This *Insight* only takes into account the judgment of the General Court in the *Front Polisario*

[10] Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*.

[11] G. DE BÚRCA*, The European Court of Justice and the International Legal Order After Kadi,* in *Harvard International Law Journal*, 2010, p. 5.

[12] J. KLABBERS, *Völkerrechtsfreundlichkeit? International Law and the EU Legal Order*, cit., pp. 95-97.

[13] *Ibid*., p. 97.

[14] General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*.

case, while the decision of the Court of Justice (judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC]) will be the object of a subsequent *Insight* forthcoming on this *European Forum*.

II. Background to the dispute

In 1963, the UN added Western Sahara, formerly a Spanish colony,[15] to its list of non-self-governing territories.[16] Three years later, the UN General Assembly urged Spain, as the administering power, to hold a referendum in order to enable the indigenous people of the territory to "exercise freely its right to self-determination"[17] Front Polisario, the main Sahrawi liberation movement, was formed in 1973 with a view to gaining independence for Western Sahara.[18] Competing claims between Morocco and Mauritania over the territory prompted the UN General Assembly to request an advisory opinion from the International Court of Justice.[19] The Court opined that no legal ties existed between Western Sahara and Morocco and Mauritania of such a nature that could affect the application of the principle of self-determination of the peoples of the territory.[20] A few days after the ICJ rendered its opinion Moroccan armed forces entered the disputed territory and soon thereafter an armed conflict broke out between Front Polisario, on the one hand, and Morocco and Mauritania on the other.[21] In February 1976 Spain officially declared its withdrawal from Western Sahara.[22] Three years later, in 1979, Mauritania and Front Polisario signed a peace agreement under which Mauritania agreed to withdraw its armed forces and relinquished its claim over Western Sahara.[23] Upon Mauritania's withdrawal, Moroccan armed forces annexed the remainder of the territory. The UN General Assembly swiftly condemned the annexation and character-

[15] See generally T.M. Franck, *The Stealing of the Sahara*, in *American Journal of International Law*, 1976, p. 694.

[16] On Western Sahara's inclusion in the list of non-self-governing-territories, see Under-Secretary-General for Legal Affairs, the Legal Counsel, letter of 29 January 2002 addressed to the President of the Security Council, UN Doc. S/2002/161, para. 5.

[17] General Assembly, Resolution 2229 (XXI) of 20 December 1966, Question of Ifniand Spanish Sahara, UN Doc. A/RES/2229 (XXI).

[18] The UN has recognized Polisario Front as the representative of the people of Western Sahara since 1979. See General Assembly, Resolution 34/37 of 21 November 1979, Question of Western Sahara, UN Doc. A/RES/34/37, para. 7.

[19] International Court of Justice, *Western Sahara*, advisory opinion of 16 October 1975, p. 12.

[20] *Front Polisario v. Council of the European Union*, cit., para. 162.

[21] Human Rights Watch, *Keeping It Secret: The United Nations Operation in the Western Sahara*, October 1995, www.hrw.org.

[22] Letter dated 26 February 1976 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, UN Doc. A/31/56 – S/11997.

[23] Mauritano-Saharoui Agreement, concluded on 10/08/1979, annexed to Letter dated 18 August 1979 from the Permanent Representative of Mauritania to the United Nations addressed to the Secretary-General, UN Doc. A/34/427 – S/13503.

ized the presence of Moroccan army in the territory as “occupation”.[24] Since then, several UN-brokered efforts have been made to resolve the dispute - which have however proved thus far futile.[25] As a result, the UN still recognizes Spain as the *de jure* administering power of Western Sahara, which remains on the UN’s list of non-self-governing territories.[26] A series of resolutions by the UN Security Council and General Assembly have repeatedly affirmed the right of Sahrawi people to self-determination.[27]

In 1996 the Euro-Mediterranean Agreement establishing an association between the EU and its Member States on the one hand and Morocco on the other (hereinafter referred to as the ‘Association Agreement’) was concluded.[28] The Agreement, which entered into force in 2000, provides, *inter alia*, for the gradual implementation of greater liberalization of reciprocal trade in agricultural and fishery products.[29] In this context, an agreement concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products (hereinafter referred to as the ‘Liberalization Agreement’) was concluded in 2010 between the EU and Morocco and entered into force in 2012.[30] On 19 November 2012, Front Polisario filed an action for annulment of the Council Decision adopting the Liberalization Agreement,[31] insofar as it approved its application to Western Sahara, on the grounds that it was incompati-

[24] General Assembly, Resolution 34/37, cit., para. 5. See also General Assembly, Resolution 35/19 of 11 November 1980, Question of Western Sahara, UN Doc. A/RES/35/19, para. 3.

[25] For an overview, see M. Dawidowicz, *Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement*, in D. French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, Cambridge: Cambridge University Press, 2013, pp. 260-261.

[26] Secretary General, Report of 1 February 2016, Information from Non-Self-Governing-Territories transmitted under Art. 73, let. e), of the Charter of the United Nations, UN Doc. A/71/68.

[27] For the most recent, see Security Council, Resolution 2285/2016 of 29 April 2016, UN Doc. S/RES/2285.

[28] Euro-Mediterranean Agreement of 18 March 2000 establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

[29] *Ibid.*, Art. 16.

[30] Agreement of 13 December 2010 in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 of and their Annexes and amendments 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.

[31] Council Decision of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments 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.

ble to EU law and international law binding on the EU, including the right to self-determination and the principle of permanent sovereignty over natural resources.[32]

III. The proceedings before the General Court and the Court's Judgment

III.1. Admissibility

The General Court first dealt with the question of Front Polisario's legal personality for the purpose of bringing an action for annulment under Art. 263 TFEU. Front Polisario argued that, as a national liberation movement, it possesses legal personality under international law.[33] As evidence thereof, it invoked the fact that it has been recognized by the UN as the representative of the people of Western Sahara since 1979[34] and that it has been a party to the relevant UN-sponsored peace process.[35] The Council cast doubt on the status of Front Polisario as a national liberation movement[36] and further questioned whether that status, even if it were accepted, also entailed procedural capacity.[37] In a similar vein, the Commission also called into question Front Polisario's international legal personality. In its view, Front Polisario, as the representative of the people of Western Sahara enjoyed merely "a functional and transitional legal personality".[38]

The General Court refused to deal with the question of the existence and scope of the applicant's international legal personality and made it abundantly clear that it would confine itself to assessing whether Front Polisario could be considered as a 'legal person' within the meaning of Art. 263, para. 4, TFEU.[39] Following its well-established case-law, the General Court stressed that actions for annulment can be brought not only by entities that have acquired legal personality under the law governing their constitution, but also by entities that have been treated as distinct persons by the EU and its institutions.[40] The General Court concluded that the latter scenario was applicable to the case at hand on the basis of a twofold consideration. First, it observed that the EU and its institutions have expressly acknowledged that the law applicable to the status of Western Sahara is to be determined in the context of the UN-led peace process.[41] Secondly, it pointed out that it is precisely the UN that considers the applicant as an essential partic-

[32] *Front Polisario v. Council of the European Union*, cit., para. 115
[33] *Ibid.*, para. 37.
[34] *Ibid.*, paras 37-41.
[35] *Ibid.*, para. 37.
[36] *Ibid.*, para. 42.
[37] *Ibid.*, para. 43.
[38] *Ibid.*, para.44.
[39] *Ibid.*, para.46.
[40] *Ibid.*, paras 52-53.
[41] *Ibid.,* paras 56 and 59.

ipant in that very process.[42] Thus, according to the Court, Front Polisario is a "*legal person*" within the meaning of Art. 263 TFEU.[43]

In the light of the status of the applicant as a party involved in the process of deciding the fate of Western Sahara, the question as to whether the agreement at hand applied to the contested territory was considered crucial for the purpose of ascertaining whether the act was of direct and individual concern to Front Polisario.[44]

Thus, the General Court went on to determine the territorial scope of the Liberalization Agreement. Since the text of the Liberalization Agreement did not clarify whether it covered the territory of Western Sahara,[45] the General Court opined that recourse must be had to the rules of interpretation enshrined in Art. 31 of the 1969 Vienna Convention on the Law of Treaties and more particularly to the context in which the Agreement was concluded and subsequently applied.[46] In examining the context of the Liberalization Agreement, the Court paid special attention to the following: first, to the response given on behalf of the Commission by the High Representative of the Union for Foreign Affairs and Security Policy, and Vice-President of the Commission, to Parliamentary questions to the effect that the agreement in question allows Morocco to "register as geographical indications products originating in Western Sahara";[47] second, to the visits made by the Commission's Food and Veterinary Office to Western Sahara to check compliance of Moroccan authorities with EU health standards;[48] third, to the fact that 140 of the Moroccan exporters approved by the Commission are established in Western Sahara;[49] and lastly, that both the Council and the Commission expressly acknowledged during the oral proceedings that the Agreement applied *de facto* to the territory of Western Sahara.[50] On the basis of these contextual factors, the General Court concluded that the Liberalization Agreement's territorial scope extended to Western Sahara.[51]

Against this background, the General Court concluded that Front Polisario was directly and individually concerned by the contested decision since the latter did not re-

[42] *Ibid.*, para. 59.

[43] *Ibid.*, paras 59-60.

[44] *Ibid.*, paras 73 and 103.

[45] It needs to be noted that Art. 94 of the Association Agreement merely refers to "the *territory* of the Kingdom of Morocco" without further defining the term (emphasis added).

[46] *Front Polisario v. Council of the European Union*, cit., paras 98-99.

[47] High Representative/Vice-President Ashton, joint Answer on behalf of the Commission of 14 June 2011, written questions E-0001004/11, P-001023/11, E-002315/11. See also *Front Polisario v. Council of the European Union*, cit., para. 78.

[48] *Front Polisario v. Council of the European Union*, cit., para. 79.

[49] *Ibid.*, para. 80.

[50] *Ibid.*, para. 87.

[51] *Ibid.*, para. 103.

quire any further implementing measures and the applicant is the sole other interlocutor in the UN-sponsored negotiations over the international status of Western Sahara.[52]

III.2. The substance of the action

In total, Front Polisario raised eleven pleas in law attacking the lawfulness of the contested decision under EU and international law.[53] The General Court observed that, in essence, the substance of the action concerned the question as to whether there is an *absolute* prohibition against concluding an international agreement on behalf of the EU applicable to a territory under the *de facto* control of a third State and in the absence of international recognition of that State's claim over that territory, or whether the EU institutions enjoy discretion in that regard and, if so, what the limits of that discretion are.[54]

Having articulated its framework of enquiry, the General Court proceeded to examine first the pleas alleging infringement of EU law. These included infringement of fundamental rights; breach of the principle of consistency between EU policies; breach of the fundamental values of the EU and of the principles governing its external action; failure to achieve the objective of sustainable development; and breach of the principle of protection of legitimate expectations.[55] The General Court dismissed all these pleas on the grounds that none of the EU law provisions cited by the applicant provides for an *absolute* prohibition of the conclusion of an international agreement with a third State that may be applied to a disputed territory.[56]

The General Court turned next to the last three pleas relating to alleged infringements of international law. In its ninth plea, Front Polisario claimed that the contested decision was vitiated by illegality, as it was "incompatible with several international agreements binding upon the European Union".[57] In support thereof, the claimant relied on the Association Agreement, which refers to observance of the principles enshrined in the UN Charter.[58] Front Polisario argued that the contested decision is contrary to those principles since it infringes the right to self-determination and the corollary principle of sovereignty over natural resources.[59] In support of the latter proposition, the applicant also relied on the 1982 UN Convention on the Law of the Sea (UNCLOS).[60]

[52] *Ibid.*, paras 109-113.
[53] *Ibid.*, para. 115.
[54] *Ibid.*, para. 117.
[55] *Ibid.*, para. 115.
[56] *Ibid.*, paras 140-178.
[57] *Ibid.*, para. 187.
[58] *Ibid.*, para. 188.
[59] *Ibid.*, para. 189. See the preamble and Art. 2 of the Association Agreement, cit.
[60] *Front Polisario v. Council of the European Union*, cit., para. 190. United Nations Convention on the Law of the Sea, concluded on 10 December 1982.

Surprisingly enough, while the General Court dealt at some length with Front Polisario's argument based on UNCLOS, it devoted much less attention to the claim relating to the right to self-determination. In line with the *Intertanko* ruling,[61] the Court reiterated that "the nature and broad logic" of UNCLOS prevents EU courts from assessing the validity of a Union measure in the light of that convention.[62] By way of contrast, as far as the claim on the basis of the right to self-determination is concerned, the General Court confined itself to noting that "nothing in the arguments put forward by the applicant [...] establish that the conclusion by the Council of an agreement with a non-member State concerning a disputed territory is prohibited in all cases".[63]

The right to self-determination, this time as a peremptory norm of international law, resurfaced in the applicant's tenth plea. However, the General Court was not willing to depart from its parsimonious approach and deal more extensively therewith. Without commenting on the *jus cogens* status of the right, it merely observed that no absolute prohibition against the conclusion of an international agreement that may be applied to a disputed territory exists under customary international law.[64] Front Polisario's final plea, based on the 2011 draft articles on the responsibility of international organizations for internationally wrongful acts,[65] was dismissed as irrelevant.[66] According to the General Court, the action at hand was not an action for damages, but an action for annulment, and therefore, there was no need to discuss the applicant's last plea as it did not add anything new to its previous line of argumentation.[67]

Having discussed all eleven pleas adduced by the applicant, the General Court came to the overall conclusion that no absolute prohibition against entering into an agreement that may be applied to a disputed territory exists under either EU law or international law and that, therefore, the EU institutions enjoy a wide discretion in concluding such agreements.[68]

On this basis, the General Court continued by assessing whether the Council made any manifest errors of assessment by approving the Liberalization Agreement and, more particularly, whether the Council examined all the relevant facts before adopting

[61] Court of Justice, judgment of 3 June 2008, case C-308/06, *The Queen, on Application of International Association of Independent Tanker Owners (Intertanko) and Others, v. Secretary of State for Transport*, para. 65.

[62] *Front Polisario v. Council of the European Union*, cit., para. 195.

[63] *Ibid.*, para. 198.

[64] *Ibid.*, paras 205 and 211.

[65] International Law Commission, Draft articles on the Responsibility of International Organizations, with commentaries, adopted by the at its 63rd session, in *Yearbook of the International Law Commission*, 2011, Vol. II, p. 2.

[66] *Front Polisario v. Council of the European Union*, cit., para. 212.

[67] *Ibid.*, para. 213.

[68] *Ibid.*, paras 215 and 223.

the contested decision.[69] It was stressed that, in the context of agreements facilitating the import of goods originating from a disputed territory, the Council must examine whether the production of these goods entails infringements of fundamental human rights and whether it is conducted to the detriment of the local population.[70]

The General Court rejected the Council's attempt to eschew any form of liability by pointing at Morocco as the only authority responsible to guarantee respect for the fundamental rights of the inhabitants of Western Sahara.[71] In this respect, it was observed that importing products obtained in conditions that do not respect fundamental rights places the EU at risk of indirectly encouraging human rights violations.[72] The General Court added that the unique situation of Western Sahara accentuates the risk; Morocco does not have an international mandate to administer the territory, nor does it transmit to the UN any information relating to that territory in accordance with the obligations incumbent upon administering States.[73] Similarly, the General Court reproached the Council for having failed to examine whether the exploitation of the natural resources of Western Sahara is carried out to the detriment of its inhabitants.[74] In the General Court's view, that failure meant that the EU could be indirectly encouraging an exploitation of natural resources that would be contrary to the interests of the Sahrawi people.[75]

The Council's failure to ascertain that there was no evidence of an exploitation of the natural resources of the disputed territory likely to be to the detriment of its inhabitants and to infringe their fundamental rights meant that the institution did not fulfill its obligation to carefully examine the facts of the case before adopting the decision approving the Liberalization Agreement.[76] On this basis, the General Court upheld the action for annulment insofar as it approved the application of the agreement to Western Sahara.[77]

IV. Analysis and comment

In this case the General Court was faced with a number of complex international law questions and, to a certain extent, adopting a cautious approach is understandable. At the same time, the judgment is permeated by a distinct reluctance to engage directly with international law. The case-note identifies three main problems arising from the General Court's hesitation to engage with the broader international law context in

[69] *Ibid.*, para. 224.

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

[71] *Ibid.*, para. 230.

[72] *Ibid.*, para. 231.

[73] *Ibid.*, para. 233. For the obligation of States to transmit information regarding non-self-governing territories under their administration, see Art. 73, let. e), of the UN Charter.

[74] *Front Polisario v. Council of the European Union*, cit., para. 238.

[75] *Ibid.*

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

[77] *Ibid.*, para. 248.

which the dispute arose: the failure to address the question of the applicant's international legal personality; the failure to establish the international legal status of Western Sahara; and the failure to take into account the right to self-determination and the corollary obligation of non-recognition. These omissions not only resulted in a number of flaws in the General Court's reasoning, but they are also difficult to square with the EU's ambition to put its own mark on the further development of international law.[78]

IV.1. The failure to address the question of Front Polisario's international legal personality

The General Court's hesitation to delve into deep international law waters is evident from its stance towards the applicant's legal personality for the purpose of establishing its legal standing. The General Court made clear that the question of Polisario Front's legal personality was to be settled solely with reference to EU law, thereby refusing to enter the discussion of whether the applicant could be considered as a national liberation movement with some measure of international legal personality. Although technically correct, the General Court's inward-looking approach, resembles the judicial strategy employed in *Kadi*, to the extent that it manifests the CJEU's tendency to eschew engagement with international law, thereby undermining the conventional narrative of the EU as a global actor that maintains particular fidelity to international law.[79]

The General Court's approach also led it to stretch the limits of interpretation of its own case-law to a breaking point. In order to justify the applicant's legal personality, the General Court relied on previous case-law where the EU courts considered as 'legal persons' entities that, although lacking legal personality on the basis of national law, had been treated as distinct persons by the EU or its institutions. However, the present case does not strictly come under that case-law, since the EU has not actually *treated* Front Polisario as a distinct person in its practice. By way of contrast to *Groupement des Agences de Voyages v. Commission*,[80] one of the cases mentioned in the judgment,[81] Front Polisario did not participate in the negotiation of the Liberalization Agreement.

[78] See Art. 3, para. 5, TEU. More recently, the EU's ambition to contribute to the further development of international law in different contexts in accordance with its founding Treaties was reiterated by the EU's delegation to the UN. See the statement of 2 November 2014 made on behalf of the European Union by Eglantine Cujo, Legal Adviser, Delegation of the European Union at the Sixth Committee on Agenda Item 78 on Identification of customary international law.

[79] G. de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, cit., p. 41.

[80] Court of Justice, judgment of 28 October 1982, case C-135/81, *Groupement des Agences de Voyages, Asbl, v. Commission of the European Communities*.

[81] *Front Polisario v. Council of the European Union*, cit., paras 52 and 55.

Similarly, by way of contrast to *PKK and KNK v. Council*,[82] Front Polisario has never been the subject of restrictive measures adopted by the EU.

More fundamentally, the General Court's approach is problematic to the extent that existing case-law, which plainly does not cover the situation at hand, was used as an artificial link to the UN framework in order to avoid pronouncing on the politically sensitive question of the applicant's international legal personality. The General Court concluded that since the UN considers Front Polisario as an "*essential participant*" in the process for determining the status of Western Sahara, the entity should be considered as a legal person for the purposes of bringing an action for annulment. However, this conclusion simply begs the question: the Court did not explain the legal considerations underpinning the UN's inclusion of Front Polisario in the relevant process. Front Polisario is considered as an essential participant in the UN-led peace process *because* of its status as a national liberation movement representing the people of Western Sahara in their struggle for self-determination. There is much evidence to support this proposition: Front Polisario has been recognized as the representative of the people of Western Sahara by the UN General Assembly;[83] as a national liberation movement by a number of States;[84] it has treaty-making capacity as it has concluded agreements both with Mauritania and with Morocco;[85] and, more recently, it undertook[86] to apply the 1949 Geneva Conventions[87] to the conflict between it and Morocco under Art. 96, para. 3, of Additional Protocol I of the 1949 Geneva Conventions.[88] Art. 96, para. 3, of Additional Protocol I gives national liberation movements the opportunity to make unilateral declarations whereby they undertake to apply the Geneva Conventions and since Polisario Front's declaration was accepted by

[82] Court of Justice, judgment of 18 January 2007, case C-229/05 P, *PKK and KNK v. Council of the European Union*.

[83] General Assembly, Resolution 34/37, cit. See also General Assembly, Resolution 35/19, cit., para. 10.

[84] K. Mastrodimos, *National Liberation Movements: Still a Valid Concept (with Special Reference to International Humanitarian Law)?*, in *Oregon Review of International Law*, 2015, footnote n. 149.

[85] See the Mauritano-Saharoui Agreement, cit. See also the Houston Agreement of 28 September 2009 between Morocco and Polisario Front. Mention of the Houston Agreement is also made in the Report of the Secretary General on the Situation concerning Western Sahara of 13 November 1997, UN Doc. S/1997/882.

[86] The text of the declaration is available at theirwords.org. For commentary, see K. Fortin, *Unilateral Declaration by Polisario under API accepted by Swiss Federal Council*, 2 September 2015, armedgroups-internationallaw.org.

[87] See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), adopted on 12 August 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), adopted on 12 August 1949; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), adopted on 12 August 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), adopted on 12 August 1949.

[88] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted on 8 June 1977.

Switzerland,[89] as the depository of the Conventions, it is safe to assume that its status as a national liberation movement is widely accepted in practice.

In the light of the above, the General Court could have resolved the question of legal personality of Front Polisario with reference to its legal status as a national liberation movement without at the same time compromising the neutral stance[90] that the EU has so far maintained in relation to the Western Sahara dispute. Although the question as to whether and to what extent non-State actors enjoy international legal personality is still clouded by uncertainty,[91] it is fairly uncontested that national liberation movements have legal personality conferred upon them by general international law on the basis of the right of the peoples which they represent to self-determination.[92] The Italian Court of Cassation confirmed that national liberation movements enjoy "*objective legal personality*" under international law, *i.e.* not contingent upon recognition, in *Arafat and Salah*.[93] In that case it was held that national liberation movements

> "enjoy a limited international personality. They are granted *locus standi* in the international community for the limited purpose of discussing, on a perfectly equal footing with States, the means and terms for the self-determination of the peoples they politically control, pursuant to the principle of self-determination of peoples, to be considered a customary rule of a peremptory character [...] Reference to the recognition, whether *de jure* or *de facto*, [...] granted by some Governments is irrelevant. Indeed, recognition does not constitute the legal personality, for it belongs to the political domain and consequently is devoid of effects from the legal viewpoint".[94]

Here, the General Court clearly missed an opportunity to build upon the existing practice on the international legal personality of national liberation movements and their capacity to bring claims. Thus, it failed to influence the important doctrinal debate

[89] Switzerland has notified Polisario Front's declaration to the States Parties, thereby confirming that the 1949 Geneva Conventions and Additional Protocol I are applicable to the conflict. See www.eda.admin.ch.

[90] For an overview, see M. BALBONI, *The EU's approach to Western Sahara*, in *Arso.org*, 4 December 2008, www.arso.org.

[91] See generally J. D'ASPREMONT (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, London: Routledge, 2011; M. NOORTMANN, A. REINISCH, C. RYNGAERT (eds), *Non-State Actors in International Law*, Oxford: Hart Publishing, 2015.

[92] R. KOLB, *Theory of International Law*, Oxford: Hart Publishing, 2016, p. 190; V.D. DEGAN, *Sources of International Law*, Den Haag: Martinus Nijhoff, 1997, p. 392; A. CASSESE, *International Law*, Oxford: Oxford University Press, 2005, pp. 140-142.

[93] Italian Court of Cassation, judgment of 28 June 1985, no. 1981. It is noteworthy that, according to Art. 38, para. 1, let. d), of the Statute of the ICJ, decisions by municipal courts constitute subsidiary sources of international law. Art. 38 is widely recognised as the most authoritative statement as to the sources of international law. See H. THIRLWAY, *The Sources of International Law*, Oxford: Oxford University Press, 2014, pp. 5-6. On judgments of municipal courts as subsidiary means for the determination of international law, see *ibid.*, pp. 124-126.

[94] Italian Court of Cassation, judgment no. 1981/1985, cit., paras 884-889.

on the question of subjecthood of non-State actors and, ultimately, to contribute to the progressive development of international law – without running the danger of undermining the EU's position of non-recognition of Front Polisario.

IV.2. The failure to establish the international legal status of Western Sahara

From an international law point of view, another problematic aspect of the judgment is the examination of the substance of the action on the basis of the assumption that Western Sahara constitutes a "disputed territory"[95] whose "international status is currently undetermined".[96] In fact, the status of the territory is far from being undetermined as it has been the object of an Advisory Opinion by the ICJ. Western Sahara constitutes a non-self-governing territory, having been included on the UN list of non-self-governing territories since 1963,[97] whose peoples are entitled to the right to self-determination as confirmed by the ICJ in its Advisory Opinion[98] and as the EU itself has recognized on numerous occasions.[99] As a non-self-governing territory Western Sahara enjoys under the UN Charter "a status separate and distinct from the territory administering it [...] until the people of the [...] Non-Self-Governing Territory have exercised their right of self-determination".[100]

At the same time, Western Sahara is an occupied territory since Morocco's presence therein meets the objective threshold of occupation under international humanitarian law, *i.e.* the demonstration of effective authority and control over a territory to which the occupying State holds no sovereign title.[101] The UN General Assembly has twice characterized the presence of Morocco in Western Sahara as "*belligerent occupation*"[102] and many EU Member States describe Western Sahara as "*occupied*".[103] These two legal statuses are not mutually exclusive. Indeed, as Kontorovich observes "there is no

[95] *Front Polisario v. Council of the European Union*, cit., paras 117, 141 and 211.

[96] *Ibid.*, para. 56.

[97] Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, cit.

[98] *Western Sahara,* Advisory Opinion, cit., para. 162.

[99] See for example the statement of 14 October 2014 by the EU and its Member States at the UN General Assembly Fourth Committee on Agenda item 54, Question of Western Sahara; the statement of 15 October 2015 by the EU and its Member States by Mr Carl Hallergard, Minister Counsellor, Delegation of the EU to the UN, Fourth Committee, agenda item 63, Question of Western Sahara, available at eu-un.europa.eu.

[100] General Assembly, Resolution 25/2625 of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625.

[101] See Art. 42 of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War (The Hague Regulations), adopted on 18 October 1907.

[102] General Assembly, Resolution 34/37, cit., para. 5; General Assembly, Resolution 35/19, cit., para. 3.

[103] For the position of Denmark, Sweden, Finland see the statements cited in E. Kontorovich, *Economic Dealings with Occupied Territories*, in *Columbia Journal of Transnational Law*, 2015, p. 612.

reason a territory cannot be both non self-governing and occupied".[104] This is so because a state of occupation does not affect the legal status of the territory in question.[105] Thus, from a legal point of view, the General Court's qualification of Western Sahara as a "*disputed territory*" is erroneous. It is submitted that this is not merely an error that casts doubt as to whether the judgment is well-grounded in law. On the contrary, it seems that the General Court's failure to define the legal status of Western Sahara also prevented it from fully taking into account the international law obligations incumbent upon the EU towards Western Sahara *because* of this very status – something that the next section endeavors to explore.

[104] *Ibid.*

[105] See Additional Protocol I, Art. 4, para. 1.

IV.3. The failure to take into account the right to self-determination and the corollary obligation of non-recognition

One of the most striking aspects of the judgment is that the General Court paid virtually no attention to the question of whether any international law obligations may be placed upon the EU, as a third party, as a result of Morocco's violation of the right of the peoples of Western Sahara to self-determination. The right to self-determination is clearly accepted and widely recognized as a peremptory norm of international law.[106] According to Art. 42, para. 2, of the draft articles on the responsibility of international organizations, in cases of a serious breach of a *jus cogens* norm, international organizations have duties corresponding to those applying to States under Art. 41, para. 2, of the draft articles on the responsibility of States for internationally wrongful acts.[107] Thus, States and international organizations alike are under an obligation not to recognize as lawful a situation created by a serious breach of a peremptory norm of international law.

The principle that legal rights cannot derive from an illegal act (*ex injuria jus non oritur*) provides the rationale underpinning the obligation of non-recognition.[108] The obligation of non-recognition serves as a mechanism to ensure that a *fait accompli* on the ground resulting from an illegal act does not "crystallize over time into situations recognized by the international legal order".[109] In the *Namibia* case,[110] the ICJ elaborated on the scope and content of the obligation of non-recognition. The duty of non-recognition entails, *inter alia*, that States are under an obligation to abstain: a) from entering into treaty relations with the non-recognized regime in respect of the unlawfully acquired territory; and b) from entering into economic and other forms of relationship concerning the unlawfully acquired territory which might entrench the non-recognized regime's authority over the territory.[111] In their practice, international courts and tribunals have confirmed that forcible territorial acquisitions are the prime examples of unlawful situations giving rise to the obligation of non-recognition.[112]

[106] Commentary to Art. 26 of the Draft articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its 53rd session, in *Yearbook of the International Law Commission* 2001, Vol. II, p. 85, para. 5.

[107] Commentary to Art. 42 of the Draft articles on the Responsibility of International Organizations, cit., p. 66, para. 1.

[108] J. Crawford, *Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories*, opinion of 24 January 2012, www.tuc.org.uk, p. 18, para. 46.

[109] M. Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation*, in J. Crawford, A. Pellet, S. Olleson (eds), *The Law of International Responsibility*, Oxford: Oxford University Press 2010, p. 678.

[110] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* advisory opinion of 21 June 1971.

[111] *Ibid.*, paras 122 and 124.

[112] Commentary to Art. 41 of the Draft articles on the Responsibility of States for Internationally Wrongful Acts, cit., paras 6-8.

In this light, it is difficult to escape the conclusion that by entering into an agreement with Morocco that *de facto* applied to the territory of Western Sahara, the EU acted in breach of its international law duty of non-recognition to the extent that it recognized Morocco's treaty-making capacity with respect to Western Sahara and thus, implicitly, the Moroccan claim to sovereignty over the territory. There is much evidence to substantiate this conclusion. First, although the EU institutions were well aware of the fact that Morocco considered Western Sahara as part of its territory, something that the text of the judgment confirms,[113] no interpretation clause was inserted in either the Association or the Liberalization Agreements indicating that their territorial scope excluded the territory in question. It is noteworthy that a number of other third-party States have publicly declared that their free trade agreements with Morocco do not extend to Western Sahara *exactly because* Morocco does not exercise internationally recognized sovereignty over the territory.[114] Secondly, both the Council and the Commission expressly acknowledged during the proceedings that they were aware of the fact that the Liberalization Agreement applied *de facto* to Western Sahara – and that they failed to oppose that application.[115]

The capacity of States to enter into agreements that apply within their territory is "an attribute of State sovereignty".[116] In this sense, any claim by Morocco to treaty-making capacity in relation to Western Sahara needs to be construed as a legal claim to sovereignty over the territory – which third parties are under an obligation not to recognize.[117] By failing to insert a clause delimiting the territorial scope of the Liberalization Agreement and by failing to object to the *de facto* application of the Agreement to the territory of Western Sahara, the EU is arguably in breach of its international law obligation of non-recognition of an unlawful situation brought about through the denial of the right of self-determination of peoples.[118] The General Court's failure to include the duty of non-recognition to the list of factors that the Council should have taken into ac-

[113] *Front Polisario v. Council of the European Union*, cit., paras 101 and 235.

[114] For the position of the U.S. in relation to the U.S.-Morocco Free Trade Agreement see the U.S. Trade Representative R. Zoellick, letter of 22 July 2004 to Rep. J. Pitts, 150 Cong. Rec. H667, www.gpo.gov. For the position of Norway in relation to the EFTA-Morocco Free Trade Agreement, see Norwegian Minister for Foreign Affairs, reply to a parliamentary question of 11 May 2010, www.wsrw.org. As the position of Switzerland in relation to the same Agreement, see the Swiss Federal Council, opinion of 15 May 2013, www.parlament.ch.

[115] *Front Polisario v. Council of the European Union*, cit., para. 99.

[116] Permanent Court of International Justice, *Case of the S.S. "Wimbledon*", judgment of 17 August 1923, p. 25.

[117] M. DAWIDOWICZ, *Trading Fish or Human Rights in Western Sahara?*, cit., p. 268.

[118] S. KOURY, *The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law*, in K. ARTS, P.P. LEITE (eds), *International Law and the Question of Western Sahara*, Leiden: International Platform of Jurists for East Timor, 2007, pp. 187-195.

count before concluding the contested decision constitutes a serious omission – especially in the light of the *jus cogens* status of the right to self-determination.

V. Conclusion

The General Court's treatment of international law in *Front Polisario* leaves much to be desired. The failure to address the question of the applicant's international legal personality, to establish the international legal status of Western Sahara and to take into account the EU's international law obligation of non-recognition not only casts doubt on the General Court's findings, but is also hard to reconcile with the image of a court that shares an internationalist approach. By eschewing engagement with international law, the General Court lost an opportunity to contribute to the important debate on the international legal personality of non-State actors and on the right to self-determination as part of customary international law. Thus, the *Front Polisario* judgment seems to vindicate the view that, in spite of the EU rhetoric to the contrary, the CJEU in its practice often shows a great deal of judicial recalcitrance towards international law.[119]

Given the close interconnectedness between the internal and external dimensions of the EU's integration project, the General Court's reluctance to engage with international law is not in keeping with the EU's image as an internationally engaged polity founded on the idea of international legal and political co-operation.[120] In the author's opinion, the Court of Justice's judgment, which was delivered on December 21st, 2016, did little to alleviate the concerns about the growing gap between EU rhetoric and the CJEU's treatment of international law in its practice. In a forthcoming contribution analyzing the Court of Justice's judgment in this journal, it will be argued that, in an obvious attempt to evade a politically sensitive issue, the Court essentially used international rules on treaty interpretation to limit the legal applicability of the EU-Morocco agreements to the Western Sahara territory, while stopping short of addressing the issue of the *de facto* application of the agreements to that territory. Overall, the *Front Polisario* saga serves as a powerful reminder that, despite claims to the contrary,[121] the relationship between EU and international law still remains an uneasy one.

[119] J. Klabbers, *The Validity of EU Norms Conflicting with International Obligations*, in E. Cannizzaro, P. Palchetti, R. Wessel (eds), *International Law as Law of the European Union*, cit., p. 112.

[120] G. de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, cit., pp. 40-45.

[121] C. Timmermans, *The EU and Public International Law*, in *European Affairs Review*, 1999, p. 181.