



## DIALOGUES

### A DIALOGUE ON *FRONT POLISARIO*

# “SELF-DETERMINATION AT THE EUROPEAN COURTS: THE *FRONT POLISARIO* CASE” OR “THE UNINTENDED AWAKENING OF A GIANT”

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ABSTRACT: The judgment delivered by the Court of Justice on 21st December 2016 in *Front Polisario* (case C-104/16 P, *Council of the European Union v. Front Polisario* [GC]), has all the ingredients to become a leading case of EU jurisprudence. While formally overturning the judgment by the General Court in case T-512/12 (judgment of 10 December 2015) which annulled the liberalization agreement concluded by EU with Morocco in 2012 as it violated the rights of the people of Western Sahara (occupied by Morocco), in substance the Court’s judgment even goes beyond the judgment of the General Court in defence of self-determination. The *jus cogens* and *erga omnes* character of self-determination is reiterated and emphasized by the Court of Justice. This is no small thing in a time when calls for self-determination seem to disrupt long-established states worldwide and also in Europe.

KEYWORDS: self-determination – *erga omnes* norms – *jus cogens* – Western Sahara – Association Agreement EU-Morocco – colonialism – Front Polisario.

## I. INTRODUCTION

The “rallying cry” for self-determination is again to be heard all over Europe and far beyond. At the moment, “Catalonia” stands at the middle of the self-determination row and there is much uncertainty about the extent to which this concept applies to this factual situation.<sup>1</sup> There is broad agreement on the view that self-determination has many facets, it knows many perspectives and many forms of implementation. As far as self-determination is not retained to be co-extensive to sovereignty (or, only be considered, so

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<sup>1</sup> See E. LÓPEZ-JACOISTE, *Autonomy and Self-determination in Spain: Catalonia’s Claims for Independence from the Perspective of International Law*, in P. HILPOLD (ed.), *Autonomie und Selbstbestimmung*, Baden-Baden: Nomos, 2016, p. 218 *et seq.*, and X. ARZOZ, *Autonomie und Selbstbestimmung in Spanien aus verfassungsrechtlicher Sicht*, *ibidem*, p. 242 *et seq.*

to say, as the other face of the coin of national sovereignty, a view, however, that diminishes the actual importance of this concept), this right is generally accepted only with regard to the “colonial” context, i.e. in respect to non-self-governing territories (NSGT)<sup>2</sup> and for peoples subjected to foreign domination or occupation.<sup>3</sup> According to the prevailing view in international law academia, the colonial right to self-determination has widely lost its relevance, the right to self-determination of peoples under foreign domination or occupation is mostly undisputed and so primary attention is devoted to the right to self-determination in its internal expression, i.e. in regard to peoples seeking more effective participation in political decisions affecting their situation as well as to the issue of secession, i.e. to the strive of peoples (usually defined along ethnic or linguistic lines) for independence. So it could grossly be stated that there are manifestations of self-determination that go widely uncontested (the “colonial” right to self-determination and the fight against foreign domination or occupation) and other forms of self-determination (the “internal” right to self-determination<sup>4</sup> and the purported right to secession) that are of particular interest for academic discussion, exactly because there is so much uncertainty in these fields. Recent developments evidence, however, that this distinction is not so clear as is usually portrayed. The *Front Polisario* case recently decided in an appeal judgment by the Court of Justice<sup>5</sup> demonstrates that that colonial and post-colonial self-determination still remain topical and that these fields display many uncertainties, the clarification of which could be of great value for the self-determination discussion as a whole. In particular, however, it is interesting to note that the EU is now assuming a leading role in the attempt to bring clarity in this field. Though purportedly relying on international law these findings by the EU Courts are, however, not always really convincing from the viewpoint of the international legal order.

<sup>2</sup> This right is based on the general reference to self-determination in the Arts 1, para. 2, and 55 of the UN Charter and is referred to in more specific indications in Chapter XI of the UN Charter that addresses the “territories whose peoples have not yet attained a full measure of self-government”, in General Assembly, Resolution 1514 (XV) of 14 December 1960, Declaration on the granting of independence to colonial countries and peoples, UN Doc. A/RES/1514.

<sup>3</sup> This specific connotation of the right to self-determination has outgrown from state practice and UN resolutions. See A. CASSESE, *Self-determination of Peoples*, Cambridge: Cambridge University Press, 1995, p. 90 *et seq.*

<sup>4</sup> On this issue see S. OETER, *Selbstbestimmungsrecht im Wandel – Überlegungen zur Debatte um Selbstbestimmung, Sezessionsrecht und “Declaration on Granting Independence to Colonial Countries and Peoples Vorzeitige” Anerkennung*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1992, p. 741 *et seq.*, as well as P. HILPOLD, *Self-determination and Autonomy: Between Secession and Internal Self-determination*, in *International Journal on Minority and Group Rights*, 2017, p. 1 *et seq.*

<sup>5</sup> Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario* [GC].

## II. SOME FACTUAL ELEMENTS OF THE WESTERN SAHARA DISPUTE

The Western Sahara dispute came into being as a textbook case of colonial self-determination only to develop afterwards into an issue demonstrating different traits of an array of categories of self-determination. The Western Sahara was declared a Spanish colony by a Royal decree of 1884, although at that time factual control of this territory was mainly limited to the coastal area and guaranteed by the conclusion of agreements with the chiefs of local tribes.<sup>6</sup> When after 1945 colonialism was set to come to an end, Spain, one of the first colonial powers, first tried to oppose this trend. When Spain became a UN Member in 1955 first this country, like Portugal, neglected her reporting obligations as to her non self-governing territories but eventually, and this time unlike Portugal, resistance was given up after the anti-colonialism resolutions mentioned above were adopted by the UN General Assembly.<sup>7</sup> The following years the remaining colonial powers came under mounting pressure by the UN, and in particular by the UN General Assembly where a growing number of newly independent states gathered in their fight against colonialism. In the longer run, Spain had little to halt this movement. The strategy to declare the remaining colonies as “overseas provinces” of metropolitan Spain and therefore as a natural, genuine part of Spain territory soon proved to be in vane and the statement of 11 November 1960 of the representative of Spain at the 1048<sup>th</sup> meeting of the Special Political and Decolonization Committee (Fourth Committee) that its government had agreed to transmit information to the UN Secretary-General in accordance with the provisions of Chapter XI UN Charter preceded the two anticolonialism resolutions of 14 and 15 December 1960 only by a few weeks.<sup>8</sup>

Four years earlier, in 1956, the Spanish and French protectorate of Morocco had gained independence and this newly independent state soon became a strong competitor with regard to sovereignty claims over Western Sahara territory as the Moroccan king opined that ancient Moroccan territorial title extended far south to areas of the Western Sahara. Therefore, the Western Sahara decolonization process had all the ingredients for an enormous, unprecedented complicity as different claims overlapped and the Sahrawi people’s claim for self-determination was interpreted by Morocco, albeit in a patently false way, as a violation of their own claim for a full realization of self-determination. This dispute offered a platform for further geopolitical interests to materialize and to influence the legal debate: From the beginning Morocco could count on the strong support by the previous Protector power France and subsequently, during

<sup>6</sup> See A. CASSESE, *Self-determination*, cit., p. 214.

<sup>7</sup> See J. CRAWFORD, *The Creation of States in International Law*, Oxford: Oxford University Press, 2006, p. 608 *et seq.*

<sup>8</sup> General Assembly (Fourth Committee), 1047<sup>th</sup> Meeting of 11 November 1960, UN Doc. A/C.4/SR.1047. As this author has exposed elsewhere Portugal was more adamant in this approach when it declared its colonies to make part of the metropolitan state and stuck to this approach until the “Carnation Revolution” of 24 April 1974. See P. HILPOLD, *Der Osttimor-Fall*, Frankfurt: Peter Lang, 1995.

the Cold War, Morocco's political allegiance with the West made sure that Western states, although mostly sympathetic to the lot of the Sahrawi people, endorsed their claim for self-determination only half-heartedly as this might have emboldened the Sahrawi people's most important ally, Algeria, a country then tied to the socialist area.

Starting with the year 1963 discussions of growing intensity about Western Sahara's right to self-determination took place in the UN General Assembly, in the Special Committee on the Granting of Independence and in the UN Security Council,<sup>9</sup> although in the later institution Morocco could count (and still can count) on France's allegiance at least in the sense that any attempt to discuss the human rights situation in this region, let alone the provision of active support by the Security Council for self-determination would be vetoed by France.<sup>10</sup> In 1964 the first UN General Assembly resolutions were issued demanding Spain to implement the right to self-determination and, in UN General Assembly resolution 2290 (XXI) of 20 December 1966, Spain was specifically requested to determine the procedures for a referendum under the auspices of the UN and in consultation with Morocco and Mauritania.<sup>11</sup>

In the following years the General Assembly continued with these pleas towards Spain, with growing clarity and insistence, calling also upon all States to provide help to colonial peoples struggling for self-determination with all necessary means.<sup>12</sup> Already at that time, therefore, the *erga omnes* nature of the Sahrawis' struggle for self-determination, that should become so important in the proceedings before the European Courts, had been clearly recognized. In 1973, a liberation movement for Western Sahara, the *Front Popular para la Liberacion de Saguia al Hamra y Rio de Oro* (Front Polisario), was formed and it soon got broad popular support.

Finally, towards the end of President Franco's dictatorship, in 1974, Spain agreed to hold a referendum under the auspices of and supervised by the UN, during the first six months of 1975.<sup>13</sup>

As is well known this referendum has never taken place. It has been convincingly shown in literature that Morocco has ably circumvented all relative obligations: promises were half-heartedly given and eventually not maintained. The Sahrawi people demonstrated enormous patience, putting all their confidence in the UN, only to be dis-

<sup>9</sup> See P. MARIA VERNET, *Decolonization: Spanish Territories*, in R. WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, 2010, opil.ouplaw.com, para. 52 *et seq.*

<sup>10</sup> See P. BOLOPION, *France against Human Rights*, in *Le Monde*, 22 December 2010, www.hrw.org.

<sup>11</sup> General Assembly, Resolution 2229 (XXI) of 20 December 1966, Question of Ifni and Spanish Sahara, UN Doc. A/RES/2229. See P. MARIA VERNET, *Decolonization*, cit., para. 53.

<sup>12</sup> See General Assembly: Resolution 2711 of 14 December 1970, Question of Spanish Sahara, UN Doc. A/RES/2711; Resolution 2983 of 14 December 1972, Question of Spanish Sahara, UN Doc. A/RES/2983.

<sup>13</sup> See General Assembly, Letter dated 20 August 1974 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, 21 August 1974, UN Doc. A/9714, as cited by J. SOROETA, *The Conflict in Western Sahara After Forty Years of Occupation: International Law versus Realpolitik*, in *German Yearbook of International Law*, 2016, p. 190.

appointed in the end when it had to take notice of the fact that Morocco, in the meantime, had created *faits accomplis* while successive UN General Secretaries became ever more indulgent towards Moroccan intransigence, eventually being prepared to accept an agreement according to which the Sahrawi people should renounce (external) self-determination and settle for an autonomy within Morocco.<sup>14</sup>

At the insistence of Morocco, hoping both for a legal affirmation of her territorial claims and a postponement *sine die* of the referendum which otherwise was due to be held, the UN General Assembly asked the International Court of Justice to give an advisory opinion on the Western Sahara issue.<sup>15</sup> This opinion, issued a year later, on 16 October 1975, notwithstanding its prudent tone, was a disappointment for Morocco (as well as Mauritania) as it denied the alleged existence of pre-colonial sovereign titles by Morocco (and Mauritania) on Western Sahara territory<sup>16</sup> and it confirmed the right to self-determination by the Sahrawi people through the free and genuine expression of their will as the territory of the Western Sahara was not *terra nullius* at the time of Spanish occupation.<sup>17</sup>

Morocco de facto ignored this opinion and orchestrated instead the so-called "Green March", a population transfer from Morocco to the Western Sahara in order to occupy this territory not only militarily but also with the clear intent to change the population structure in case a referendum should nonetheless take place.

An ambiguous role, both on the political level as on the legal one, was played in this context by Spain. As the colonial power, Spain had specific duties towards this NSGT and it was constantly reminded of these duties by the UN. By the Madrid Declaration of principles signed by the governments of Spain, Morocco and Mauritania on 14 November 1975, Spain seemed to put its administering powers at the service of the self-determination process as it is required by UN decolonization law. When it became clear, however, that Morocco was not interested in awarding a real self-determination opportunity to the Sahrawi people, Spain, in 1976, took this as a facile excuse and left the scene, leaving the Sahrawi people, toward whom Spain had generated a clear liability by colonizing them, to their appalling lot. There can be no doubt that this way Spain had not come up to her obligations. The developments in 1976 might have come unforeseen and it might also be true that the ensuing turmoil was beyond immediate control by Spain. On the other hand, Spanish disinterest in this question was palpable to all parties involved and has surely emboldened Moroccan resolve to impose her will. It can hardly be argued that the administering power of a NSGT has to oversee and favour

<sup>14</sup> For a good description of these events see J. SOROETA, *The Conflict in Western Sahara*, cit.

<sup>15</sup> General Assembly, Resolution 3292 of 13 December 1974, Question of Western Sahara, UN Doc. A/RES/3290.

<sup>16</sup> The existence of pre-colonial feudal links by Morocco and Mauritania towards the territory of what is now the Western Sahara (or, more precisely to the respective population) was not denied but these links were not strong enough to exclude an autonomous right to self-determination of the Sahrawis.

<sup>17</sup> International Court of Justice, *Western Sahara*, advisory opinion of 16 October 1975, para. 85.

the self-determination process only if no major resistance arises. On the contrary, it can be argued that the administrating power has to shoulder extensive burdens in such situations as this is only commensurate to the liabilities created through the colonization process. Spain has done very little to come up to these obligations. If at all, Spain has paid lip service to the obligations resulting from her former status as a colonial power. An awkward situation has arisen:

Still in 2017, Spain is listed by the UN among the states that have reporting obligations under Art. 73, let. e), of the UN Charter, in this specific case as to Western Sahara. A look at the UN Report on the "Information from Non-Self-Governing Territories transmitted under Article 73e of the Charter of the United Nations" of 2017 reveals that information about Western Sahara is conspicuous by its absence.<sup>18</sup>

As an explanation, the following note is added:

"On 26 February 1976, the Permanent Representative of Spain to the United Nations informed the Secretary-General that 'the Spanish Government, as of today, definitely terminates its presence in the Territory of the Sahara and deems it necessary to place the following on record: ... (a) Spain considers itself henceforth exempt from any responsibility of an international nature in connection with the administration of the said Territory, in view of the cessation of its participation in the temporary administration established for the Territory'".<sup>19</sup>

As evidenced, this justification does not withstand closer scrutiny.

This problem has even been compounded by the fact that Spain (as a state and through private Spanish economic actors) has participated in the economic exploitation of this region. In the late 1960s, by accident, rich phosphate stocks were discovered and by 1975 Western Sahara had become the sixth largest phosphate exporter in the world.<sup>20</sup> Spain continues to import phosphate and other natural resources (in particular oil and fish) from the Western Sahara and to exercise broader economic interests in this region.<sup>21</sup>

Economic Association between the EU and the Member States and Morocco further exacerbates this problem as this agreement opens the EU's borders for products originating from Moroccan territory of which, according to the Moroccan government interpretation, the Western Sahara makes part. This is, of course, not the position taken by the EU

<sup>18</sup> General Assembly, Report of the Secretary General on information from non-self-governing territories transmitted under article 73e of the Charter of the United Nations of 3 February 2017, UN Doc. A/72/62.

<sup>19</sup> General Assembly, Letter dated 26 February 1976 from the Permanent Representative of Spain to the United Nations Addressed to the Secretary General of 26 February 1976, UN Doc. A/31/56 S/11997.

<sup>20</sup> See M. BEARDSWORTH, M. KREDLOW, *The Last African Colony: A Look at the History and Modern Day Conflict of Morocco and Western Sahara*, 2005, web.stanford.edu.

<sup>21</sup> See V. TRASOSMONTES, *El Territorio del Sáhara Occidental y sus Económicos: Reflexiones para España*, in *Documento Marco del Instituto Español de Estudios Estratégicos*, no. 17/2014, 30 October 2014, www.ieee.es.

but the Union has, at least so far, no instrument at hand to give effective substance to this position, i.e. to control which products are originating from the Western Sahara.

### III. THE ASSOCIATION AGREEMENT AND THE PROCEEDING BEFORE THE GENERAL COURT IN THE CASE T-512/12

On 26 February 1996 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. It was approved on behalf of the Communities by Council and Commission Decision 2000/204/EC.<sup>22</sup> In furtherance to this agreement the parties concluded on 13 December 2010 a Liberalisation agreement (“Liberalisation Agreement 2010”).<sup>23</sup> This agreement was approved by the Council Decision 2012/497/EU of 8 March 2012<sup>24</sup> and entered into force on 1 October 2012. The Council Decision 2012/497 offered a basis for attacking the Liberalisation Agreement 2010 through the Union’s judicial system.

The plaintiff was the Front Polisario which requested the annulment of the Council Decision of 2012 before the General Court. This was an unprecedented action that required the General Court not only to decide upon highly delicate questions of international law and international politics but also to solve unprecedented dogmatic issues of EU law. As the judgment by the General Court of 10 December 2015 has already been broadly commented in literature<sup>25</sup> a few considerations as to this regard should suffice.

<sup>22</sup> Decision 2000/204/EC, ECSC of the Council and Commission of 24 January 2000 on the conclusion of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

<sup>23</sup> Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols No 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 Kingdom of Morocco of 13 December 2010.

<sup>24</sup> Decision 2012/497/EU of the Council 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 liberalisation 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.

<sup>25</sup> See inter alia F. DUBUISSON, *La Question du Sahara Occidental Devant le Tribunal de l'Union Européenne: une Application Approximative du Droit International Relatif aux Territoires non Autonomes*, in *Journal de Droit International*, 2016, p. 503 *et seq.*; O. PEIFFERT, *Le Recours d'un Mouvement de Liberation Nationale á l'Encontre d'un Acte d'Appropriation d'un Accord International de l'Union: Aspects Contentieux*, in *Revue Trimestrelle de Droit Européen*, 2016, p. 319 *et seq.*; T.F. GRAFF, *Accords de Libre-échange et Territoires Occupés: a Propos de l'Arrêt TPIUE, 10 décembre 2015, Front Polisario c. Conseil*, in *Revue Générale de Droit International Public*, 2016, p. 263 *et seq.*; S. HUMMELBRUNNER, A.C. PRICKARTZ, *It's Not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union*, in *Utrecht Journal of International and European Law*, 2016, p. 19 *et seq.* and E. KASSOTI, *The Front Polisario v. Council*

In this action of pivotal importance was the question of the standing of the Front Polisario. According to the General Court the Front Polisario, though not having legal personality according to any national law, could be considered to have acquired legal personality through international law, the Front Polisario by its crucial role played in the Western Sahara status process, which is also recognized by the EU, has to be recognized legal personality within EU law according to Article 263 TFEU. This is an absolutely innovative approach, a thoroughly international-law-friendly position. The strong standing accorded to the Front Polisario by international law (and subsequently also by the EU) should convey legal personality to this entity also in EU law. There is no obvious legal basis for this reasoning in EU law but this is rather an expression of deference towards international law and in particular towards specific branches of international law of eminent status, like the law of colonial self-determination. It is interesting to note that the Court of Justice, though turning the judgment of first instance up-side down, did not touch upon this issue, reaching its conclusions via another approach, i.e. by sustaining that the Liberation Agreement 2010 did not apply to the Western Sahara and could therefore not affect the Front Polisario. Therefore it can be sustained that this innovative approach has been kept intact, at least in principle.<sup>26</sup>

Once cleared, the *locus standi* by Front Polisario it had to be assessed whether the Union was really prohibited from concluding the Liberalisation Agreement of 2010, as the plaintiff maintained, in which case the Council Decision 2012/497 had to be annulled. After a detailed examination of the case the General Court found a reason for a (partial) annulment of the Decision which was both of a procedural and a substantive nature. In fact, the General Court rightly found that there was no absolute prohibition in force to conclude an international agreement on the use of resources of a disputed territory but the wide discretion the Union had in this field was limited by the need to ensure that the production of the goods originating from this territory was not carried out in a manner detrimental to the population of that territory and did not entail infringements of fundamental rights of this population. According to the General Court, the Council did not carry out this assessment in an appropriate way and therefore the Council Decision 2012/497 was annulled as far as it applied to the Western Sahara.

*Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)*, in *European Papers*, 2017, Vol. 2, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 339 *et seq.*

<sup>26</sup> Much criticism been voiced against the General Court's reasoning as to this point. It was sustained that the Liberalisation agreement, as an economic agreement, could hardly affect a national liberalisation movement such as Front Polisario which acts mainly by political and military measures (see in this sense Á. DE ELERA, *The Frente Polisario Judgments: an Assessment in the Light of the Court of Justice's Case Law on Territorial Disputes*, in J. CZUCZAI, F. NAERT (eds), *The EU as a Global Actor – Bridging Legal Theory and Practice, Liber Amicorum in honour of Ricardo Gosalbo Bono*, Leiden: Brill Nijhoff, 2017, p. 280. In reality, however, there are good arguments to sustain that Front Polisario, while using military measures for its struggle, is a representative of the Sahrawi people in the broader sense and therefore is also directly affected by economic measures impinging on the right to self-determination.



There can be no doubt that these findings posed enormous challenges for the present case as in general for the future management of EU external economic relations. As to the basis of this rule in international law, usually reference is made to an opinion delivered by the former Under-Secretary-General for legal affairs and legal counsel of the UN, Dr. Hans Corell. In his ground-breaking study on "The legality of exploring and exploiting natural resource in Western Sahara",<sup>27</sup> Corell examined what International Law and practice says about the use of resources of colonial territories, a specific expression of the concept of permanent sovereignty on natural resources. The judgment of the General Court does not exactly reflect the position taken by Hans Corell. In fact, according to Corell: "if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories".<sup>28</sup>

Corell, therefore, gives much relevance to consultation<sup>29</sup> while the General Court seemed to emphasize an autonomous right (and duty) by the Council to assess the consequences of an international agreement on the colonial territory. But how should the Council act in this regard and to what extent is it dependent from previous consultation with the concerned population?

The partial annulment could hardly be implemented exactly because for Morocco the Western Sahara was an integral part of their territory and in many cases it would have been next to impossible to ascertain the origin of specific products. The most decisive challenge was posed, however, by the requirement introduced by the General Court to carry out a human rights assessment of the agreement's consequences, presently in the Western Sahara and potentially in all future relations. Fearsome scenarios could be depicted on the wall on this basis: what was left of the EU's discretionary power in the conclusion of international agreements if there was an obligation of previous "impact assessment" of uncertain nature and extend? At which point a critical result of such an assessment would translate in a prohibition to conclude the agreement? Would minor points of criticism imply an obligation to set other actions short of an abortion of treaty negotiations? What were the values whose respect the EU should in any case impose? Of course, there are norms and catalogues of norms (see, for example, Art. 2 TEU or the Charter of Fundamental Rights of the European Union) but many of these norms are fairly imprecise and open up new space for discretionary valuation. Of course, in an *effet utile* interpretation of this new approach it would not have been so difficult to translate it into a useful instrument. In fact, human rights violations in the Western Sa-

<sup>27</sup> H. CORELL, *The Legality of Exploring and Exploiting Natural Resources in Western Sahara*, 2002, hlrm.org.

<sup>28</sup> Security Council, Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council of 12 February 2002, UN Doc. S/2002/161.

<sup>29</sup> See also A. ANNONI, *C'è un giudice per il Sahara Occidentale?*, in *Rivista di diritto internazionale*, 2016, p. 873.

hara are so extreme, the violation of the right to self-determination by Morocco is so evident that the criterion developed by the General Court in this case and applicable to this case could be interpreted as an instrument designed to apply only to the most outrageous cases. Applied in this sense, this criterion could become sort of a “tie-break-rule” for isolated situations of manifest disregard of the human rights implications of the EU’s external action. Nonetheless, a considerable amount of uncertainty would remain and so there is small wonder that the Court in the appeal proceeding attempted to bring clarity into this area.

As will be shown, the Court of Justice, although formally turning upside down the judicial findings by the General Court, managed not only to confirm their main content but to go even further and to be more pronounced as to the defence of the Sahrawi people’s right to self-determination. It is, however, not really sure whether the position taken by the Court is technically more convincing.

#### IV. THE COURT OF JUSTICE JUDGMENT OF 21 DECEMBER 2016

The judgment of 21 December 2016 was delivered after an expedited procedure. The potentially far-reaching (and disruptive) consequences of the General Court’s judgment should thereby be contained as far as possible or not materialize at all.

The finding by the Court of Justice, following the lines of the opinion delivered by AG Wathelet, was formally negative for the Front Polisario as the Council’s appeal was upheld and the General Court’s judgment (favourable to Front Polisario) was set aside. In substance, however, this finding did not worsen the Front Polisario’s position (and in fact, it was hailed by this organization as a success) as it ruled that what was contested by Front Polisario (the application of the Liberalization Agreement 2010 to an occupied territory, thereby disregarding the rights of the Sahrawi people when resources of this territory are exploited potentially against the will of the local people and in detriment of their rights) could legally not happen as this agreement did not apply to the Western Sahara.<sup>30</sup> By this ruling the Court substituted the empirical approach adopted by the General Court by a normative one<sup>31</sup> according to which there could not be what there must not be. For the Court there were various legal grounds for which such an exten-

<sup>30</sup> It is perhaps interesting to note that the Court of Justice took this bold stance despite the, as it was called, “unacceptable and arrogant ‘warning’ given to the Court by France regarding the serious consequences for the EU that would follow from a confirmation of the judgment of 15 December 2015”. See J. SORETA, *The Conflict*, cit., p. 220, referring to the Statement in Intervention of France of 31 May 2016, in *Council v. Front Polisario* [GC], cit.

<sup>31</sup> See in this sense J. GUNDEL, *Der EuGH als Wächter über die Völkerrechtlichen Grenzen von Abkommen der Union mit Besatzungsmächten. – Anmerkung zum Urteil des EuGH (GK) vom 21.12.2016 RS C-104/16 P (Rat/Front Polisario)*, in *Europarecht*, 2017, p. 4474. As Enzo Cannizzaro puts it, “[t]he effect of the interpretative decision enacted by the Court of Justice presents striking analogies with a declaration of invalidity”. See E. CANNIZZARO, *In Defence of Front Polisario: The ECJ as a Global Jus Cogens Maker*, in *Common Market Law Review*, 2018, in course of publication, p. 10 of the manuscript.

sion of the Integrations agreement’s territorial reach would be illegal. Several of these grounds were hardly convincing in factual and in legal terms.

For example, the Court rejects the argument of tacit acceptance of Morocco’s extension of the Liberalization Agreement to Western Sahara.<sup>32</sup> In reality, however, Morocco, in the last decades never has permitted doubts that it considers the Western Sahara to be part of her sovereign territory and the Council not only did not protest against this attitude but actively contributed to implement the Liberalization Agreement. No measure was perceptible which would have been suited to limit the application of the Liberalization Agreement only to Moroccan territory. As has been shown very clearly in literature, Morocco does consider itself as an administrative power but behaves rather as an occupying power and the EU is fully aware of this fact.<sup>33</sup>

The Court also makes reference to the 1969 Vienna Convention on the Law of Treaties (VCLT) in its intention to limit the territorial application of the Liberalization treaty to Morocco. The Court draws, however, assumptions from the VCLT that are not warranted. For example, for the Court, an extension of the Liberalization Agreement 2010 to the Western Sahara would run counter to the principle of relativity of international treaties set out in Art. 34 VCLT (as the Sahrawi people have not been involved in treaty negotiations).<sup>34</sup> As has been correctly remarked, however, the Court errs when it attributes substantive character to the principle of relativity: the violation of this principle does not render the treaty invalid but makes it rather unopposable against the third party affected.<sup>35</sup>

At the end, the whole controversy boils down to the question whether the right to self-determination can really be attributed the enormous relevance as the judgment by the Court in *Front Polisario* suggests.

## V. THE RIGHT TO SELF-DETERMINATION AND THE *FRONT POLISARIO* CASE

There can be no doubt that the Court of Justice judgment in *Front Polisario* has opened up a new chapter in the discussion about self-determination even though if it seems that few have yet realized the enormous potential reach of this new jurisprudence. The

<sup>32</sup> *Council v. Front Polisario* [GC], cit., para. 99.

<sup>33</sup> See F. DUBUISSON, G. POISSONNIER, *La Cour de Justice de l’Union Européenne et la Question du Sahara Occidental: Cachez Cette Pratique (Illégale) que je ne Saurais Voir*, in *Revue Belge de Droit International*, 2016, p. 607. Alan Hervé has aptly remarked the following in this context: “L’approche du Tribunal avait pour avantage de metre le droit en adéquation avec le fait et de prendre acte d’une certaine hypocrisie des institutions de l’Union et des États membres de l’Union qui ne peuvent ignorer, par exemple, les activités poursuivies par les entreprises européennes sur ce territoire en coopération avec les autorités du Maroc”. See A. HERVÉ, *Le Cour de Justice de l’Union Européenne Comme juge de Droit Commun du Droit International Public?*, in *Revue Trimestrelle de Droit Européen*, 2017, p. 28.

<sup>34</sup> *Council v. Front Polisario* [GC], cit., para. 106.

<sup>35</sup> See F. DUBUISSON, G. POISSONNIER, *La Cour de Justice*, cit., p. 612. For a good analysis of this topic see also E. KASSOTI, *The Council v. Front Polisario Case: The Selective Reliance on International Rules on Treaty Interpretation (Second Part)*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 23 et seq.

practice by Morocco (factually sustained by the EU) to treat the Western Sahara like her own territory and therefore to apply also the Liberalization Agreement 2010 to this area could only be disregarded by the Court of Justice if this Court had identified a superior norm that could render all these measures illegal from the outset. In other words, the Court did not have to deal with these illegal measures, so the underlying reasoning goes, as they are devoid of any legal basis, they are set aside by the respective superior norm. And this superior norm is clearly the right to self-determination. What the Court states in the first sentence of para. 88 of its judgment is not really ground-breaking:

“[...] it should be noted, first of all, that the customary principle of self-determination referred to in particular in Article 1 of the Charter of the United Nations is, as the International Court of Justice stated in paragraphs 54 to 56 of its Advisory Opinion on Western Sahara, a principle of international law applicable to all non-self-governing territories and to all peoples who have not yet achieved independence”.

In fact, hereby, the Court only reiterated what is commonly recognized and accepted. The real innovation is to be found in the second sentence of the same paragraph: “[i]t is, moreover, a legally enforceable right *erga omnes* and one of the essential principles of international law (East Timor, (*Portugal v Australia*), judgment, *ICJ Reports 1995*, p. 90, paragraph 29 and the case-law cited)”.

It is true that the International Court of Justice qualified the right to self-determination as an *erga omnes* principle also before, but in applying this principle to the *Front Polisario* case, the Court of Justice goes far beyond what was said by the International Court of Justice in 1995 (in the *East Timor* case)<sup>36</sup> and in 2004 (in the *Wall Opinion*).<sup>37</sup> In fact, the statement of 1995 was nothing more than an *obiter dictum* of unclear consequences. It was audacious at that time, it was even revolutionary, but it left the legal interpreters puzzled as to its effective substance and meaning. This author has dealt extensively with the *East Timor* case immediately after the judgment was issued.<sup>38</sup> The conclusions drawn, more than 20 years ago, do not seem to need much changes today.<sup>39</sup>

<sup>36</sup> International Court of Justice, *Case Concerning East Timor* (Portugal v. Australia), judgment of 30 June 1995.

<sup>37</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004.

<sup>38</sup> See P. HILPOLD, *Der Osttimor-Fall*, cit., p. 51 *et seq.*, where this author pointed out that the concept of *erga omnes* obligations poses a formidable challenge to the very nature of International Law, a normative system that is still very much of a coordinative nature. To say that this case is different as we are confronted here with the obligatory jurisdiction by the CJEU means to overlook the decisive factor that the question whether the Western Sahara can be part of a Liberalization agreement with Morocco is first of all a question of international law and only as a reflex touches also upon EU law. On the *erga omnes* nature of the right to self-determination see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, cit.

<sup>39</sup> For a comprehensive, and periodically updated, monograph on *erga omnes* obligations see P. PICONE, *Comunità internazionale e obblighi “erga omnes”*, Napoli: Jovene Editore, 2013.

The Court of Justice appears to take a different view and seems to attribute to the right to self-determination also *jus cogens* nature in all of this right's legally recognized applications, and in particular also in a post-colonial context as it is here at issue.<sup>40</sup> The *jus cogens* and the *erga omnes* character of self-determination seems to merge.<sup>41</sup> This is no small thing as the right to self-determination would be enormously strengthened. The right to self-determination would impose itself on all conflicting rules and situations and go parallel to a general *erga omnes* obligation not to recognize, not even indirectly, a situation in violation to this right. No diverging agreement could withstand this powerful rule. And this seems exactly to be what the Court of Justice had in mind when it qualified the principle of self-determination as an "essential principle of international law" and went on in para. 89 of its judgment, to state the following: "[a]s such, that principle [the principle of self-determination] forms part of the rules of international law applicable to relations between the European Union and the Kingdom of Morocco, which the General Court was obliged to take into account".

As is well-known, also in the past there have been authors who have attributed *jus cogens* nature to the right to self-determination,<sup>42</sup> but it cannot be overlooked that this qualification is by far not generally recognized and if at all it should apply to colonial self-determination in the stricter sense. Colonialism is now universally condemned and colonial self-determination is only the flip-side of the same coin. Here we are confronted, however, much like in the *East Timor* case, with a situation of post-colonial self-determination as the occupying state has been a colony itself in the past. To qualify such a right to self-determination as *jus cogens* would mean to give a dominant role to self-determination claims in many other constellations. As the present case shows this would not only affect inter-state legal relations but international relations as a whole, in particular also in the economic field. Due to the uncertain reach and justification of many of these claims far-reaching disruption in international relations could ensue.

<sup>40</sup> See extensively on this subject E. CANNIZZARO, *In defence of Front Polisario*, cit.

<sup>41</sup> Traditionally, however, it has always been held that these two qualifications, while having a common core meaning, have to be distinguished. See *inter alia* S. KADELBACH, *Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms*, in C. TOMUSCHAT, J.M. THOUVENIN (eds), *The Fundamental Rules of the International Legal Order*, Leiden: Brill Nijhoff, 2006, p. 38.

<sup>42</sup> See, most prominently, A. CRISTESCU, UN. Sub-Commission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur on the Right to Self-determination, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, UN Doc. E/CN.4/Sub.2/404/Rev.1(1981); H. GROS ESPIELL, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur on the Right to Self-determination, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc. E/CN.4/Sub.2/405/Rev.1(1980); Economic and Social Council, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 31st Session of 20 September 1978, UN Doc. E/CN.4/1296, E/CN.4/Sub.2/417, paras 163-182.

## VI. CONCLUSIONS

As shown, the path taken by the Court of Justice was most probably intended to mitigate the effects of the pronouncement by the General Court in the *Front Polisario* case associated with the intent to uphold the human rights-friendly approach adopted in the first instance. In so far it can be said that the Court has succeeded in his intent. This was also the reason why the Court's judgment, while dismissing the claims by Front Polisario, was greeted by this liberation organization.<sup>43</sup> The Liberalization Agreement 2010 has not been invalidated but its reach has been limited, even in absence of a specific limitation clause. While it was thereby possible for the EU to avoid a major diplomatic row with Morocco, at least in the short term, two major threats are associated with this decision in the longer term: at a first glance, as no pronouncement of illegality is to be found in this judgment, both the EU and Morocco could return to "business as usual" and content that nothing happened, everything was legal, no reprimand was uttered. There are signs that exactly this will happen, at least in a first moment.<sup>44</sup> On a longer run, however, it is hardly conceivable that such an attitude can be upheld.

It is rather far more likely – and this development would pose a far greater challenge – that the statement on self-determination contained in the Court of Justice judgment will be applied also to other international crisis regions with which the EU stands in contact. As nearly every region of the world is in some way or the other connected with the EU this could mean that the EU will have to apply a new understanding on self-determination that could radically influence the leeway in its external action. If applied coherently, this new rule would mean that the EU is prohibited from extending the territorial application of trade agreements to occupied regions whose population is denied

<sup>43</sup> It was reported that Front Polisario's representative to Europe, Mohamed Sidati, greeted the ruling with the following statement: "The ruling confirms the long-established legal status of Western Sahara as a non-self-governing territory, and upholds existing international law [...] We call on EU member states and institutions to now comply with the ruling and immediately cease all agreements, funding and projects reinforcing Morocco's illegal occupation of Western Sahara". See D. DUDLEY, *European Court Dismisses Morocco's Claim to Western Sahara, Throwing EU Trade Deal Into Doubt*, in *Forbes*, 21 December 2016, [www.forbes.com](http://www.forbes.com).

<sup>44</sup> As is well-known, also the Fisheries Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco has been challenged by the Front Polisario (see case C-266/16, pending) and has furthermore come under strict scrutiny by the European Parliament as it offers fishing rights to the EU also in the Western Sahara waters. For the European Commission, answering to a written question by the EU Parliament, E-007185-13, no problems were given in this field: "The Western Sahara waters are included in the new Protocol, which contains provisions ensuring that it fully complies with international law and serves the interests of all the populations concerned. In particular, Morocco should regularly report on the economic and social impact of the sectoral support provided for by the Protocol, including its geographical distribution". See also F. DUBUISSON, G. POISSONNIER, *La Court*, cit., p. 635 *et seq.* On the Fisheries Partnership see E. MILANO, *The New Fisheries Partnership Agreement Between the European Community and the Kingdom of Morocco: Fishing too South?*, in M. BALBONI, G. LASCHI (eds), *The European Union Approach Towards Western Sahara*, Frankfurt: Peter Lang, 2017, p. 151 *et seq.*

their right to self-determination. Thereby, EU external relations would be further politicized, much more than this is already the case at present. It is difficult to grasp how the EU could manage such a challenge in a structured and convincing way. The approach developed by the General Court, as demanding as it might have been when it imposed an obligation on the Council to examine on a case-by-case basis whether the economic interests of the population in an occupied (“disputed”) area have been sufficiently taken into consideration, eventually might have been easier to implement than the idealistic solution developed by the CJEU.<sup>45</sup>

<sup>45</sup> For a critical perspective in this regard see J. ODERMATT, *Council of the European Union v. Front Populaire pour la Libération de la Saguia-Elhamra et du Rio Deoro (Front Polisario)*. Case C-104/16 P, in *American Journal of International Law*, 2017, p. 731 *et seq.*, stating the following: “The CJEU integrates elements of international law into its legal reasoning, but does so only as a subsidiary means of interpreting EU law, further illustrating how the CJEU applies principles of public international law, including the law of treaties, through an EU law lens” (p. 738).

