REVUE BELGE DE DROIT INTERNATIONAL
2025/1 – Éditions BRUYLANT, Louvain-la-Neuve

THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE WESTERN SAHARA CASE: A LONG-AWAITED JUSTICE OR A COMPROMISE WITH EUROPEAN UNION TRADE POLICIES?

Par

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Résumé

Le 4 octobre 2024, dans les affaires jointes C-778/21 P, C-798/21 P, C-779/21 P et C-799/21 P, la Cour de justice de l'Union européenne a confirmé l'annulation des décisions qui approuvent les accords internationaux entre l'Union européenne (« UE ») et le Royaume du Maroc, appliqués au territoire non-autonome du Sahara occidental. Bien que ces décisions puissent être perçues comme une victoire pour le peuple sahraoui, elles représentent en fin de compte une victoire éphémère avec des implications profondes pour cette population exilée. Dans ces arrêts, le « consentement explicite du peuple Sahraoui » — précédemment prescrit par le Tribunal en 2021 — a été remplacé par « consentement présumé ». Ou, pour le dire autrement, la volonté du peuple sahraoui est supplantée par celle du Maroc, qui a le droit d'exploiter les ressources du Sahara occidental si cela bénéficie au peuple sahraoui. La Grande Chambre a estimé que ces critères étaient fondamentaux pour respecter l'article 73 de la Charte des Nations Unies. En agissant de la sorte, ces jugements ne reflètent pas la complexité de l'affaire du Sahara occidental puisqu'ils n'examinent pas la présence du Maroc dans ces territoires du point de vue du régime applicable à « une occupation étrangère » et ignorent complètement les obligations de non-reconnaissance qui incombent à l'UE. Le résultat est que « le droit à l'autodétermination des peuples » est privé de son essence et que l'article 73 de la Charte des Nations Unies devient central dans ce contentieux et ce, dans l'unique but de trouver un compromis avec les politiques commerciales de l'UE.

Abstract

On 4 October 2024, in joined cases C-778/21 P, C-798/21 P and C-779/21 P, C-799/21 P, the Court of Justice of the European Union confirmed the annulment of the decisions approving the international agreements between the European Union ("EU") and the Kingdom of Morocco applied to the non-self-governing territory ("NSGT") of Western Sahara. Although these decisions may be perceived as a victory for the Sahrawi people, they ultimately represent a tenuous

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one with profound implications for this exiled population. In these rulings, "the explicit consent of the Sahrawi people" — previously demanded by the General Court in 2021 — has been replaced by "presumed consent". In other words, the will of the Sahrawi people has been substituted by that of Morocco, which has the right to exploit the resources of Western Sahara as long as it benefits the Sahrawi people. The Grand Chamber found that these criteria were fundamental to compliance with Article 73 of the UN Charter. In doing so, the Grand Chamber's decisions fail to reflect the complexity of the case of *Western Sahara* by avoiding to address Morocco's presence in this territory as "a foreign occupation" and ignoring the obligations of non-recognition, which are incumbent on the EU. The result is that "the right to self-determination of peoples" has been deprived of its substance and that the Article 73 of the UN Charter has become central to this dispute as to find a compromise with the EU trade policies.

Introduction

On 4 October 2024, the Court of Justice of the European Union ("CJEU") finally decided on the Polisario saga. In the joined cases C-778/21 P, C-798/21 P(1) and C-779/21 P, C-799/21 P(2), the Grand Chamber annulled the decisions approving(3) the international agreements between the EU and the Kingdom of Morocco applied to the NSGT of Western Sahara: the Preferential Liberalisation Agreement, the Sustainable Fisheries Partnership Agreement ("SFPA") and its Implementing Protocol. The Preferential Liberalisation Agreement aimed to extend tariff preferences to goods originating from Western Sahara and imported into the EU common market.(4) Meanwhile, the SFPA and its Implementing Protocol entitled EU fleets to undertake fishing activities in the water adjacent to the territory of Western Sahara in exchange for financial compensation.(5) Although these rulings may, at first glance, appear to be a victory for international justice and a leap forward for the liberation of peoples subjected to colonial domination and foreign occupation, significant problems remain from an international law perspective.

(1) C.J.E.U., Judgment of the Court (Grand Chamber) of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the European Union v Front populaire pour la libération de la Saguia-el-Hamra et du Rio de oro (Front Polisario)*.

(2) C.J.E.U., Judgment of the Court (Grand Chamber) of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the European Union v Front populaire pour la libération de la Saguia-el-Hamra et du Rio de oro (Front Polisario)*.

(3) Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, *OJ*, L 34, 6 February 2019; Council Decision (EU) 2019/441 of 4 March 2019 on the conclusion of the agreement on a partnership in the field of sustainable fisheries between the European Union and the Kingdom of Morocco, its implementation protocol, as well as the exchange of letters accompanying the agreement, *OJ*, L 77/4, 20 March 2019.

(4) Council Decision (EU) 2019/217, *op. cit.*

(5) Council Decision (EU) 2019/441, *op. cit.*

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The conclusions reached by the Grand Chamber through these rulings diverge significantly from the legal reasoning outlined by the General Court on 29 September 2021 in joined cases T-344/19 – T-356/19 and in case T-279/19. In those earlier cases, the General Court recognized the *Frente Popular de Liberación de Saguía el Hamra y Río de Oro* ("Polisario Front") as the "Legitimate Representative" of the Sahrawi people. (6) Furthermore, it determined — in conformity with the "principle of the relative effect of treaties" and the "principle of the right to self-determination of peoples" — that any EU-Morocco trade agreement concerning Western Sahara, should be concluded with "the explicit consent" of the Sahrawi people. (7) Consequently, the General Court annulled the contested decisions, emphasizing that the European Commission and the European External Action Service ("EEAS") could not replace the "free and authentic consent" (8) of the Sahrawi people "with the criterion of benefits from the agreement [...] for the people concerned". (9) This latter includes the inhabitants of Western Sahara "irrespective of whether or not they belong to the people of that territory". (10)

In the current rulings, the Grand Chamber has chosen a different path, which appears to represent a step backwards in protecting the Sahrawi people's right to self-determination. To demonstrate how these rulings affect this right, the present analysis will be guided by the legal techniques, employing an objectivist approach in the interpretation of the right to self-determination and of the principle of *ex injuria non oritur*, both central to this case. (11)

(6) C.J.E.U., Judgment of the General Court (Ninth Chamber, Extended Composition), 29 September 2021, Case T-279/19, *Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario) v Council of the European Union*, *op. cit.*, § 206; C.J.E.U., Judgment of the General Court (Ninth Chamber, Extended Composition), 29 September 2021, Joined Cases T-344/19 and T-356/19, *Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario) v Council of the European Union*, *op. cit.*, § 144.

(7) General Court, judgment of 29 September 2021, Case T-279/19, *Front Polisario v Council of the EU*, *op. cit.*, §§ 307-392; General Court, judgment of 29 September 2021, Joined Case T-344/19 and T-356/19, *Front Polisario v Council of the EU*, *op. cit.*, §§ 304-365.

(8) General Court, judgment of 29 September 2021, case T-279/19, *Front Polisario v Council of the EU*, *op. cit.*, §§ 324-325; General Court, judgment of 29 September 2021, Joined Cases T-344/19 and T-356/19, *Front Polisario v Council of the EU*, §§ 319-320.

(9) General Court, judgment of 29 September 2021, case T-279/19, *Front Polisario v Council of the EU*, *op. cit.*, § 384 and § 390; General Court, judgment of 9 September 2021, Joined Cases T-344/19 and T-356/19, *Front Polisario v Council of the EU*, *op. cit.*, § 354 and § 363.

(10) General Court, judgment of 29 September 2021, T-279/19, *Front Polisario v Council of the EU*, *op. cit.*, § 337; General Court, judgment of 29 September 2021, Joined Cases T-344/19 and T-356/19, *Front Polisario v Council of the EU*, *op. cit.*, § 329.

(11) For an objective approach to the right to self-determination of peoples, see: I.C.J, *Western Sahara* Case, Oral Pleading, Mohammed Bedjaoui, Counsel for Algeria, vingtième audience publique (16 VII 75, 10 h), 1975, §§ 499-500; H. Gross Espiell, "Right of peoples to self-determination" — Special Rapporteur study, Implementation of United Nations Resolutions relating to the right of people under colonial and alien domination to self-determination, November, 2000, E/CH.4/Sub.2/405/Rev, p. 12, § 78.

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The present article will be divided into four sections. The research will first explore the functions and role assumed by the Polisario Front within this dispute. This part will be significant as we will demonstrate the contradiction between the Grand Chamber's reasoning and the UN's stance on this subject. This analysis, which will not deal with procedural aspects, will show how the Polisario Front's representativeness has been significantly undermined within this dispute (I). These restrictions on the Polisario Front's role directly impact the core of this dispute: "*the requirement of consent*". The Grand Chamber has retained that the contested decisions should not be annulled for the lack of "explicit consent from the Sahrawi people", but rather due to the absence of "presumed consent" (12) under Art. 36 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). According to this provision, the consent can be "presumed" if a treaty between States creates only rights and not obligations for a third party. Within these judgements, "the concept of rights" has been replaced with "the concept of benefits". On these grounds, the Grand Chamber concluded that the present agreements did not produce any benefits for the Sahrawi people. (13) In its view, applying these criteria is fundamental to ensuring respect for Art. 73 of the UN Charter. In this section, we will highlight how the choice to replace "the explicit consent of the Sahrawi people" with "the concept of benefits" undermines the right to self-determination of the Sahrawi people (II). Subsequently, we will critically examine the Grand Chamber's choice to refer to Art. 73 of the UN Charter. The application of the regime of an administering power of NSGT in relation to the Kingdom of Morocco will be subject to critical analysis, as will the way in which these judgments apply this regime (III).

Ultimately, the research will define, once and for all, the relation between the Kingdom of Morocco and the territory of Western Sahara, identifying the presence of Moroccan authorities there as "a foreign occupation". On this ground, the focus will shift to the observance of the obligation of non-recognition incumbent on the EU while entertaining economic relations with the Kingdom of Morocco in relation to the territory of Western Sahara (IV).

(12) Grand Chamber, judgment of 4 October, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, §§ 170-183; Grand Chamber, 4 October 2024, Joined Cases C-779/21 P and C-799/21, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, §§ 141-155.

(13) Grand Chamber, judgment of 4 October, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 186; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 158.

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I. — The role of the polisario front: the CJEU's opinions and the UN perspective

The involvement of the Polisario Front in this saga has always been a contentious issue. Since the beginning of this dispute before the CJEU, the European Commission and the Council of the EU have *"politicized"* the role of the Polisario Front, consistently portraying its functions in a manner that does not reflect the authority granted to it by the UN. From their perspective, this movement is merely an interlocutor within the "*Mission des Nations Unies pour l'Organisation d'un Référendum au Sahara Occidental*" ("MINURSO") for the peaceful resolution of the ongoing conflict in Western Sahara. In their views, the powers of the Polisario Front are confined within the UN process of decolonisation, with no authority beyond this context:

> "The European Union has never recognised Front Polisario as anything other than one of the 'parties' to a peace process conducted at United Nations level […]". (14)

This narrative serves one primary goal: to exclude the Polisario Front from any EU-Morocco trade partnership concerning Western Sahara and invalidate its rights and actions before the CJEU.

Based on these premises, the goal of this section is not to examine the opinions of the EU institutions, but to explore whether the representation of the Polisario Front, as presented by the Grand Chamber in the current rulings, aligns with the role attributed to it by the United Nations. This point is crucial because it will demonstrate how the responsibilities and functions of the Polisario Front have been undermined by the current decisions (A). In addition, we will compare the Grand Chamber's conclusions with the UN General Assembly's Resolutions on the role assigned to the Polisario Front in relation to the right to self-determination of the Sahrawi people (B).

(14) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 86; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 61.

Since the beginning of this saga before the CJEU, the EU institution's opinion on the role exercised by the Polisario Front within this dispute has always been the same, see: General Court, judgment of 10 December 2015, case T-512/12, *Polisario Front vs Council*, § 43; General Court, judgment of 29 September 2021, case T-279/19, *Polisario Front v Council*, 29 September 2021, § 89; General Court, judgment of 29 September, Joined Cases T-344/19 and T-356/19, *Polisario Front vs Council*, *op. cit.*, § 236; General Court, judgment of 29 September 2021, Case T-279/19, *Polisario Front vs Council*, *op. cit.*, § 89.

To explore further this subject, see: F. Dubuisson, "Les positions juridiques des autorités de l'Union européenne justifiant l'application au Sahara occidental des accords économiques conclus avec le Maroc : la remise en cause des acquis du droit de la décolonisation ?", *Revue belge de droit international*, 2020, pp. 467-471.

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A. — *The point of view of the Grand Chamber: Is the Polisario Front the Representative of the people of Western Sahara or not?*

The Grand Chamber, in both rulings, decided to formally reject(15) the claims of the EU institutions, recognizing the Legal Capacity of the Polisario Front according to Art. 263, § 4 TFEU, as well as its direct and individual interest to act before it.(16) According to this latter, even though the Polisario Front is "a self-proclaimed liberation movement" and "has not been officially recognized as the exclusive representative of the people of Western Sahara", it is regarded by the UN Security Council as "a privileged interlocutor" within the UN peace process.(17) On these grounds, the Court has retained that it can act to defend the interests of the Sahrawi people in these proceedings:

> "Although it has not been officially recognised as being the exclusive representative of the people of Western Sahara, Front Polisario is, according to the resolutions of the highest bodies of the United Nations, including those of the United Nations Security Council referred to in § 35 of the present judgment, a privileged interlocutor in the process conducted under the auspices of the United Nations with a view to determining the future status of Western Sahara". […] "Those particular circumstances allow the finding that Front Polisario is entitled to contest, before the EU judicature, the legality of an act of the Union which directly affects the legal situation of the people of Western Sahara […]".(18)

The Grand Chamber, in relation to the General Court's rulings of 2021, appears to have taken a step back. On September 29 2021, the General Court recognized the Polisario Front as the sole legitimate representative of the Sahrawi people – in accordance with the General Assembly's Resolutions

(15) The word "formally" takes on a specific meaning in this context. The Grand Chamber recognizes the Polisario Front's ability to act before it, but its role in representing the Sahrawi people is nonetheless limited. As we will show in this Section and in Section II, the Polisario's will in the conclusion of the "Preferential Liberalisation Agreement" and the "Sustainable Fisheries Partnership Agreement" is not taken into account. Its representativeness is confined to seeking an annulment for acts that concern it individually and directly. In practice, therefore, the recognition is merely formal since the powers of the Polisario Front, as the Legitimate Representative of the Saharawi people, are emptied.

(16) Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, §§ 86-100 and §§ 107-110; Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, §§ 89-100, §§ 112-128 and §§ 136-139.

(17) Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 89; Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 115.

(18) Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 90; Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 116.

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No. 34/37 and No. 35/19 — and on these grounds acknowledged its legal capacity to defend the interests of the Sahrawi people. (19)

The current decisions follow another path: the Polisario Front's legitimacy to act before the CJEU stems directly from its role as an interlocutor in the MINURSO, rather than from being the official representative of the Sahrawi people. For these reasons, it is essential to clarify the United Nations' stance on the role of the Polisario Front in light of the right to self-determination of peoples and the General Assembly resolutions.

B. — *The Polisario Front's role according to the United Nations: back to reality*

From the Grand Chamber's perspective, the Polisario Front gained legitimacy to act before the CJEU due to its function as a "legitimate interlocutor" within MINURSO. (20) This conclusion raises a critical question: Why has the Security Council, since 1991, recognised the Polisario Front the right to participate in any process concerning the future status of Western Sahara?

There is only one answer to this, and it is closely tied to the right to self-determination of the Sahrawi people, as well as to the prerogatives and functions granted to the Polisario Front by the General Assembly's Resolutions in relation to this principle. The General Assembly Resolution No. 34/37 — adopted in November 1979 before the creation of the MINURSO in 1991 through Security Council Resolution No. 690 (21) — gives us details on this point. First, it expressly acknowledges:

> "the inalienable right of the people of Western Sahara to self-determination and independence, in accordance with the Charter of the United Nations, the Charter of the Organization of African Unity, and the objectives of General Assembly resolution 1514 (XV)". (22)

Then, in § 7, the General Assembly holds that the Polisario Front:

> "as representative of the Sahrawi people, should fully participate in any search for a just, lasting, and definitive political solution to the question of Western Sahara, in accordance with the resolutions and declarations of the United Nations". (23)

(19) General Court, judgment of 29 September 2021, case T-279/19, 29 September 2021, *Polisario Front v Council*, *op. cit.*, § 208; General Court, 29 September 2021, Joined Cases T-344/19 and T-356/19, *Polisario Front v Council*, *op. cit.*, § 243.

(20) Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 89; Grand Chamber, judgment 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 115.

(21) S/RES/690, 29 April 1991.

(22) A/RES/34/37, 21 November 1979, § 1.

(23) *Ibid.*, § 7.

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The General Assembly reaffirmed the content of this resolution in Resolution No. 35/19. (24) Based on the legitimacy and on the representation power conferred upon it by the General Assembly in realising the Sahrawi people's right to self-determination (25), the Polisario Front has been actively included in UN-led negotiations (26) — such as the Special Committee on Decolonization ("C-24") (27) — and it has been regarded as a key party in the MINURSO. (28) With that in mind, it is mandatory to deal with another issue raised by the Grand Chamber: Does the fact that the General Assembly did not use the term "National Liberation Movement" ("NML") to describe the functions of the Polisario Front undermines its prerogatives in relation to the right to self-determination of peoples?

The answer to be given is negative, as the role of the Polisario Front has gained strength and legitimacy within this process precisely by virtue of the right to self-determination of the Sahrawi people, whom it rightfully represents. Although the General Assembly has used the word "representative" to define the role of the Polisario Front, the latter possesses, in principle, the same prerogatives as an "NML" because of its legitimate struggle and of the powers conferred upon it by the UN. (29) In a nutshell, adopting a literal reading of the GA resolution No. 34/37 and comparing it with other GA resolutions where the latter has recognised other "NMLs" is an inappropriate exercise. This approach risks losing sight of the objective of this dispute, which is the decolonization process and the expression of the will of the people of such territories. Moreover, no reason has led the General Assembly to recognize the function of the Polisario Front in this controversy other than the right to self-determination of the Sahrawi people.

(24) A/RES/35/19, 11 November 1980.

(25) The General Court also adopts this approach in its rulings of 2021, see: General Court, judgment of 29September 2021, Case T-279/19, *Front Polisario v Council*, *op. cit.*, § 206; General Court, judgment of 29 September 2021, Joined Cases T-344/19 and T-356/19, *Front Polisario v Council*, *op. cit.*, § 241:"The recognition by the UN bodies of the applicant's role as a representative of that people thus logically precedes the recognition of its right to be a party to the process relating to the self-determination of that territory".

(26) E. Kassoti, "*The Front Polisario v. Council Case*: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)", *European Papers*, 2499-8249, vol. 2, doi: 10.15166/2499-8249/122, 2017, p. 350.

(27) See, *e.g.*, the Polisario Front's participation in the Special Committee on Decolonization (C-24) in these documents: A/AC.109/2013/SR.4, 12 June 2013; (A/AC.109/2014/SR.3), 16 June 2014; (A/AC.109/2016/SR.5), 17 June 2016, etc.

(28) See Security Council's Resolutions on MINURSO: https://minurso.unmissions.org/security-council-resolutions-and-statements (accessed on 23 January 2025).

(29) F. Dubuisson, "Les trois avis de l'avocate générale devant la CJUE dans les affaires relatives au Sahara occidental : une conception problématique du droit à l'autodétermination", *Centre de droit international de l'Université libre de Bruxelles*, p. 4 : "De ce point de vue, l'Assemblée générale des Nations Unies a développé une pratique reconnaissant certaines organisations comme 'représentant' les peuples bénéficiant du droit à l'autodétermination. À cet égard, l'Assemblée a qualifié le Front Polisario de 'représentant' du peuple du Sahara occidental".

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In addition, contrary to the position held by the Grand Chamber, the Polisario Front is not "a self-proclaimed liberation movement" (30), but the embodiment of the will and the interests of the majority of the people of Western Sahara. "The Report of the Special Committee regarding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in the Spanish Sahara" — which details a UN Visiting Mission organized in 1975 to assess the political situation in Western Sahara before the Moroccan occupation — provides specific information on this matter. (31) The data collected by the Special Committee indicate that, in 1975, the Sahrawi people had long expressed their wishes for "a free Western Sahara" and their willingness to be represented by the Polisario Front:

> "[…] there was an overwhelming consensus among Saharans within the Territory in favor of independence and opposing integration with any neighbouring country". (32) "The Frente Polisario […] appeared as a dominant political force in the Territory. The Mission witnessed mass demonstrations in support of the movement in all parts of the Territory". (33)

Furthermore, it is important to recall that a big part of the Sahrawi people — composed of 250.000 refugees, according to information reported by the Polisario Front during the hearing (34) — are currently living in Tindouf, in refugee camps under the administration of the Polisario Front and the Sahrawi Arab Democratic Republic ("SADR"). The SADR, founded in 1976 (35), fights for a sovereign and independent Western Sahara in accordance with Principle VI of General Assembly Resolution No. 1541. (36)

Through its findings, the Grand Chamber undermines the authority of the Polisario Front in this dispute. As we will demonstrate in Section II, its willingness will not be considered relevant for the legality of the contested decisions. The power granted by the Court to the Polisario Front is merely a reactive one (*a posteriori*), allowing it to bring actions before the CJEU on

(30) See footnote No. 17.

(31) T. Katlyn, "Comments on the Opinion of Advocate General Wathelet on Case C-104/16 P, *Council v Front Polisario*", *Centre de droit international de l'Université libre de Bruxelles*, 2016, § 6.

(32) UN General Assembly, "Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples", vol. III, Official Records of the Thirtieth Session, Supplement No. 23 (A/10023/Rev.1), United Nations, New York, 1977, p. 59, § 202.

(33) *Ibid.*, p. 7, § 21 and p. 59, § 203.

(34) Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 127; Grand Chamber, judgment of October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 156.

(35) Proclamation of Independence of the Sahrawi Arab Democratic Republic, Bir Lahlou, 27 February 1976. Available at: https://mjp.univ-perp.fr/constit/eh1976.html, (accessed on 22 January 2025).

(36) A/RES/1541 (XV), 15 December 1960, Principle VI.

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behalf of the Sahrawi people under Art. 263(4) TFEU if the EU and Morocco fail in the future to comply with the requirements of the current rulings. (37)

II. — The transition from "explicit consent" to "presumed consent": a real consent or an escamotage?

The Grand Chamber confirmed the annulment of the Council's decisions regarding the Preferential Liberalisation Agreement and the SFPA (38), basing its rulings on the infringement of "the right to self-determination" and "the principle of the relative effect of treaties" due to the lack of "consent [by] the Sahrawi people". (39) At first glance, the Grand Chamber's reasoning may mislead readers, as it seems to align with the legal position established earlier by the General Court. However, the Grand Chamber decided to adopt a different motivation, rejecting the requirement of "explicit consent" — which was previously retained by the General Court (40) — and by relying on the concept of "presumed consent". (41) This shift will have significant consequences for the future of the Sahrawi people and their ability to determine the political and economic fate of Western Sahara, raising the question of whether it constitutes a means to circumvent the will of the Sahrawi people.

This section will be structured into two parts. First, we will examine "the requirement of presumed consent" and its characteristics as articulated by the Grand Chamber's reasoning (A). Subsequently, we will show how this form of consent undermines the core principle of "the right to self-determination of peoples" (B).

(37) Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisarioo*, *op. cit.*, §§ 155-156; Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, §§ 183-184.

(38) See footnote No. 3.

(39) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, §§ 170-195; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, §§ 141-163.

(40) General Court, judgment of 29 September 2021, case T-279/19, *Front Polisario v Council*, *op. cit.*, § 323.

(41) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, §§ 177-180; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, §§ 149-152.

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A. — *The notion of "presumed consent": its content and its implications*

The Grand Chamber concurred with the General Court's reasoning by affirming that the consent of the Sahrawi people is:

> "[…] a condition for the validity of the contested decisions and that the consultation process conducted by the Commission and by the EEAS was not capable of establishing such consent on the part of that people". (42)

Nevertheless, the Grand Chamber held that the General Court had committed "an error of law" in considering "the explicit consent of the Sahrawi people" a mandatory requirement for the legality of these agreements. (43) More precisely, the Court stated that the conditions for applying "the explicit consent" according to Art. 35 of the Vienna Convention were absent. According to this provision, when a treaty between States imposes obligations on a third party, the latter must expressly consent in writing whether or not to accept those obligations. (44) The Grand Chamber noted that the General Court's decisions to apply this form of consent were based on its erroneous conclusion that the contested decisions generated obligations towards the people of Western Sahara:

> "(….) the fact that that agreement recognises those authorities ("Kingdom of Morocco") as having certain administrative powers which are exercised in that territory does not however allow the finding that agreement creates legal obligations for that people as a subject of international law". (45)

Considering that the EU-Morocco trade partnership does not create any obligation for the Sahrawi people, the Grand Chamber decided to take a different approach to define the consent requirement. The Court referred to Art. 36 of the Vienna Convention, which provides that "the consent of a third party" can be "presumed" when the parties to an agreement intend to confer rights, not obligations, upon it. (46) In order to support its legal argument, the Grand Chamber relied on the ruling of the Permanent Court of

(42) Grand Chamber, 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 145.

(43) Grand Chamber, judgment of 4 October, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 177; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 149.

(44) Vienna Convention on the Law of Treaties, Art. 35, adopted in Vienna on 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Thereafter: Vienna Convention on the Law of Treaties.

(45) Grand Chamber, judgment of 4 October, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 175; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P e C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 147.

(46) Vienna Convention on the Law of Treaties, Art. 36 (1).

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International Justice in "the *Zones Franches de la Haute-Savoie et du Pays de Gex*", which reached the following conclusion (47):

> "Customary international law does not require any specific form for the expression of consent by a third party to an agreement that grants them a right". (48)

Starting from the application of the "presumed consent", the Grand Chamber concluded that the consent of the Sahrawi people could be implicitly presumed in the presence of the following conditions:

> "First, the agreement in question must not give rise to an obligation for that people. Second, the agreement must provide that the people itself, receives a specific, tangible, substantial and verifiable benefit from the exploitation of that territory's natural resources which is proportional to the degree of that exploitation. [...] Lastly, the agreement in question must also provide for a regular control mechanism enabling it to be verified whether the benefit granted to the people in question under that agreement is in fact received by that people". (49)

As we can discern from the Grand Chamber's conclusions, the term "right" — provided by Art. 36 of the Vienna Convention — has been translated into the concept of "benefit" within these rulings. The Grand Chamber has considered the respect of these criteria essential to comply with Art. 73 of the UN Charter. (50) Following this rationale, it has decided to annul the Council Decisions due to the lack of one condition. Under the current framework of the EU-Morocco trade partnership concerning Western Sahara, no "benefits", and thus "rights", were conferred upon the Sahrawi people:

> " [...] it must be pointed out that any benefit for the people of Western Sahara [...] is manifestly absent from the agreement at issue". (51) [...] "It

(47) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 180; Grand Chamber, judgement of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 152.

(48) Permanent Court of International Justice, "Free Zones of Upper Savoy and the District of Gex", 7 June 1932, Series A/B, No. 46, p. 148.

(49) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 181; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P e C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 153.

(50) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 182; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 154.

(51) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 186; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 158.

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follows that the people of Western Sahara cannot be presumed to have given its consent to the application of the agreement at issue in that territory". (52)

The Grand Chamber held that "the benefit requirement" was absent in both agreements. First, with regard to the Preferential Liberalisation Agreement, the Grand Chamber retained that: "it is the Kingdom of Morocco (...) the beneficiary of the tariff preferences granted by the European Union to products originating in Western Sahara under that agreement". (53) Second, as for the SFPA, the Grand Chamber determined that this agreement: "does not provide for any financial contribution to be granted for the benefit, specifically, of the people of Western Sahara". (54) In addition, the Court confirmed that the fishing agreement did not fulfil the requirement to treat the territory of Western Sahara as separate and distinct from Morocco. By establishing "a single fishing zone", it failed to differentiate: "the waters adjacent to the territory of the Kingdom of Morocco and the waters adjacent to the territory of Western Sahara". (55)

The decision to replace "the explicit consent people of the Sahrawi" with "the presumed consent", referred to by the Grand Chamber as "the economic benefit requirement", appears to constitute an escamotage to ensure the continuity of the EU-Morocco partnership regarding Western Sahara. Following the motivation of the Grand Chamber, the consent of the Sahrawi people and its legitimate representative, the Polisario Front, has been substituted with the will of the Kingdom of Morocco. The latter is entitled to grant benefits, *i.e.*, rights to this people under Art. 73 of the UN Charter.

Based on the arguments presented so far, it is necessary to explain why the requirement of presumed consent undermines the right of peoples to self-determination. To do so, the following paragraph will focus on the content of the right to self-determination of peoples and its legal implications in light of the General Assembly Resolutions and the Advisory Opinion of the International Court of Justice ("ICJ") in the *Western Sahara* case.

(52) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 192; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 160.

(53) Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 159.

(54) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 191.

(55) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 188.

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B. — *The respect of the right to self-determination of peoples*

As previously highlighted, the choice to replace the explicit will of the Sahrawi people with the presumed consent has a serious impact on the respect of the right to self-determination of people. The aforementioned form of consent was, in fact, already rejected by the General Court in its decisions of 2021.(56) On that occasion, the General Court found that the contested decisions imposed obligations on the Sahrawi people by unlawfully granting specific competencies to Morocco over Western Sahara.(57) Moreover, the General Court stated that these agreements could not confer "rights" to the Sahrawi people, considering Morocco's territorial claims over Western Sahara and its clear intentions to not act on behalf of the Sahrawi people:

> "The Kingdom of Morocco, moreover, cannot be regarded as exercising those rights on behalf of the people of Western Sahara, since [...] it does not intend to grant them such rights".(58)

Furthermore, the requirement of "presumed consent" applied by the Grand Chamber stems directly from "the principle of the relative effect of treaties", which, however, should not be applied in this case. This principle is not necessary to analyse the legality of these agreements applied to the territory of Western Sahara. This occurs because — as argued by the authors François Dubuisson, Ghislain Poissonnier(59) and Eric David(60) — the CJEU has interpreted this principle by vesting it with a substantive character that it does not possess.(61) This provision does not preclude the conclusion of a treaty that establishes obligations or rights for a third party, it merely limits the treaty's effect in the absence of that party's consent.(62) The requirement of the consent of the Sahrawi people should be grounded not in "the principle of the relative effect of treaties", but in the two fundamental principles that govern this case: "the right to self-determination of peoples"

(56) General Court, judgment of 29 September 2021, case T-279/19, *Polisario Front v Council*, *op. cit.*, §§ 315-323; General Court, judgment of 29 September 2021, joined cases T-344/19 and T-356/19, *Polisario Front v Council*, *op. cit.*, § 312.

(57) General Court, judgment of 29 September 2021, case T-279/19, *Polisario Front v Council*, *op. cit.*, § 322.

(58) General Court, judgment of 29 September 2021, case T-279/19, *Polisario Front v Council*, *op. cit.*, § 320.

(59) F. Dubuisson and 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", *RBDI*, 2016/2, p. 610.

(60) E. David, "Article 34, General rule regarding third States", in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, United States, Oxford University Press, 2011, vol. II, p. 892: "The rule sometimes led to unexpected results". Eric David criticizes the application of the "principle of relative effect of the treaties" in the *Brita* case, concluding that:"It would be probably have been simpler to refuse the preferential treatment on the basis of '*ex injuria jus non oritur*' rather than on the basis of '*pacta tertiis*'".

(61) F. Dubuisson and G. Poissonnier, "La Cour de Justice de l'Union européenne et la question du Sahara Occidental : cachez cette pratique illégale) que ne saurais voir", *op. cit.*, p. 610.

(62) *Idem*.

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and "the principle of *ex injuria non oritur*". (63) Let us begin by analysing the nature and content of the right to self-determination, which is crucial for clarifying why "the requirement of consent" should be rooted in it. The application of the principle "*ex injuria non oritur*" will be explored further in Section (IV), where we will challenge Morocco's role in Western Sahara and examine its presence there as "a foreign occupation".

The right to self-determination of peoples (64) constitutes a fundamental principle of international law (65) and it is recognised as a *jus cogens* norm that imposes *erga omnes* obligations on all states within the international community. (66) Initially rooted in Art. 1(2) and in Art. 55 of the United Nations Charter as a "*principe à caractère programmatoire*" (67), the right to self-determination of people has acquired its full-blown expression in GA's Resolutions No. 1514 (XV) and No. 1541 (XV). According to the General Assembly's Resolution No. 1514 (XV) § 2, the peoples have the right to: "freely determine their political status and freely pursue their economic, social, and cultural development". (68) Based on this principle, the peoples have the right to "*disposer [d'eux]-même[s]*" (69), *i.e.*, determine their political future and pursue economic development. This arises from the fact that one of the essential components of the right to self-determination of peoples — as recognised by the ICJ in its advisory opinion of 19 July 2024 on "the Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem" (hereafter: "Policies and Practices of Israel in Palestine") (70) — is the "principle

(63) *Ibid.*, p. 610; E. David, "Article 34, General rule regarding third States", *op. cit.*, p. 892.

(64) For the scope of the right to self-determination of people and its implications, see: A. Cassese, *Self-determination of people, A Legal Reappraisal*, Cambridge, Cambridge University Press, 1995, pp. 71-74 and pp. 133-140; S. Verhoeven, "Norms of Jus Cogens in International Law: A Positivist and Constitutionalist Approach. Doctoral dissertation", Katholieke Universiteit Leuven, Faculteit Rechtsgeleerdheid, supervised by Prof. Dr. J. Wouters and Prof. Dr. R. Foqué, 2011, pp. 358-359; O. Corten, F. Dubuisson, V. Koutrolis and A. Lagerwall, *A Critical Introduction to International law*, Bruxelles, Éditions de l'Université libre de Bruxelles, 2024, pp. 70-78.

(65) A/RES/2625 (XXV), 24 October 1970; ICJ, Judgment of 30 June 1995, *East Timor (Portugal v. Australia)*, § 29.

(66) ICJ, Judgment of 30 June 1995, *East Timor (Portugal v. Australia)*, *op. cit.*, § 29; ICJ, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, §§ 155-156; ICJ, Advisory Opinion of 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, § 180; ICJ, Advisory Opinion of 19 July 2024, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, § 274.

(67) L.A. Sicilianos, "L'ONU et la démocratisation de l'État. Systèmes régionaux et ordre juridique universel, Publications et la Fondation Marangopoulos pour les droits de l'homme", cited in V. Heur, *Le principe d'autodétermination des peuples: Concept et applications concrètes* , Paris, L'Harmattan, 2013, p. 18.

(68) A/RES/1514 (XV), 14 December 1960, § 2.

(69) For a definition of "droit des peuples à disposer d'eux-même" see : J. Salmon, *Dictionnaire de Droit International Public*, Bruxelles, Bruylant, 2001, pp. 379-380.

(70) ICJ, Advisory Opinion of 19 July 2024, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *op. cit.*, § 240.

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of permanent sovereignty of people over natural resources". (71) In brief, the process of self-determination of peoples concerns not only the people's decisions regarding the political status of a territory – in conformity of Principle VI of Res. No. 1541 (72) – but also their right to freely dispose of the natural resources of that territory. (73) Its recognition and value are crystallised in GA's Resolutions No. 1514 (XV) and No. 1803 (XVII) (74), in Art. 21(1) of the African Charter on Human and People's Rights (75) and in Art. 1 § 2 of the ICCPR and ICESCR which state that: "All peoples may, for their own ends, freely dispose of their natural wealth and resources [...]". (76) Recognizing that the process of decolonization also includes an economic aspect is hugely significant in enabling people to exercise their right to self-determination. This aspect must be promoted over time and should serve to empower the people to achieve independence from the colonial yoke. Given the determining importance of the will of the people in this process, the consent of the Sahrawi people cannot be inferred or substituted by the will of Morocco. (77) Instead of presuming this consent, the Grand Chamber was supposed to refer to the ICJ in its 1975 Advisory Opinion on the *Western Sahara* case. In that case, the ICJ recognised that the right to self-determination of people must be realised while respecting two imperative conditions. (78) Here are the words of the International Court of Justice on

(71) For the content and implications of "the principle of permanent sovereignty over natural resources" see: N. Schrijver, *Sovereignty over Natural Resources, Balancing rights and duties*, Cambridge, Cambridge University Press, 1997, pp. 49-81 and pp. 260-266; R. Pereira, "Permanent Sovereignty Over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples Under International Law", *Melbourne Journal of International Law*, vol. 14, No. 2, 2013, available at SSRN: https://ssrn.com/abstract=3656492, pp. 9-10; F. Dubuisson and 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", *op. cit.*, pp. 626-630.

(72) A/RES/1541 (XV), 15 December 1960, Principle VI: "A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State".

(73) African Charter on Human and Peoples' Rights, June 1981, Art. 21(1): "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it".

(74) A/RES/1803 (XVII), 14 December 1962.

(75) Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), adopted on 27 June 1981, Art. 21(1).

(76) International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), A/RES/2200A (XXI), 16 December 1966, Art. 1, § 2.

(77) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, §§ 180-185; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, §§ 152-155.

(78) F. Dubuisson, "Les trois avis de l'avocate générale devant la CJUE dans les affaires relatives au Sahara occidental : une conception problématique du droit à l'autodétermination", *Centre de droit international de l'Université libre de Bruxelles*, 2024, p. 3.

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this point: "the application of the right of self-determination requires a free and genuine expression of the will of the peoples". (79)

In the light of this, the Sahrawi people, as holders of the right to self-determination, are the only ones who have the right to decide over the natural resources of Western Sahara through an explicit, genuine and, free will.

III. — The exploitation of natural resources in a non-self-governing territory

The Grand Chamber considers the criteria of the lack of obligations imposed on the Sahrawi people and the requirement of benefit — as outlined in § 153 and § 181 of these judgments — as fundamental to ensure compliance with Art. 73 of the Charter of the United Nations. Contrary to the European institutions (80) and Advocate General Capeta's opinions (81), the Grand Chamber does not clearly define the Kingdom of Morocco as "a de facto administering power of Western Sahara". However, the Grand Chamber implicitly considers Morocco as such, failing to address its presence in Western Sahara as illegal, authorising it to exercise "certain administrative powers" in this territory and invoking Art. 73 of the UN Charter in relation to it. This is evident when the Grand Chamber states that Morocco's exercise of administrative powers in Western Sahara does not create obligations towards the Sahrawi people:

> "[…] although the implementation of the agreement at issue means that the acts of the Moroccan authorities carried out in the territory of Western Sahara have legal effects as described in paragraphs 94 to 96 of the present judgment, changing the legal situation of the people of that territory, the fact that that agreement recognises those authorities as having certain administrative powers which are exercised in that territory does not however allow the finding that that agreement creates legal obligations for that people as a subject of international law". (82)

(79) ICJ, Advisory Opinion of 16 October 1975, *Western Sahara*, *op. cit.*, §§ 55 and 71; ICJ, Advisory Opinion of 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *op. cit.*, § 157.

(80) At the outset of the dispute, the institutions referred to Morocco as "a *de facto* administering power" of Western Sahara: General Court, judgment of 10 December 2015, case T-512/12, *Polisario Front vs Council*, *op. cit.*, § 56; General Court, judgment of 29 September 2021, T-344/19 and T-356/19, *Front Polisario v Council*, *op. cit.*, § 272; General Court, judgment of 29 September 2021, case T-279/19, *Front Polisario v Council*, *op. cit.*, § 253.

(81) Opinion of Advocate General Ms. Tamara Ćapeta delivered on 21 March 2024, Joined Cases C-779/21 P and C-799/21 P, § 156 and §§ 165-166; Opinion of Advocate General Ms. Tamara Ćapeta delivered on 21 March 2024, Joined Cases C-778/21 P and C-798/21 P, §§ 150-151.

(82) Grand Chamber, Judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 175; Grand Chamber, Judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 147.

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The Grand Chamber's reliance on the framework envisaged for the administration of an NSGT raises significant concerns on the following grounds. First and foremost, the target of this provision is "the administering power of a NSGT" and not "an occupying power" such as the Kingdom of Morocco (A). Even if the Grand Chamber sought to enforce the framework provided by Art. 73 of the UN Charter, this article should not be interpreted narrowly, but rather in light of "the right to self-determination of peoples" and within the framework established by General Assembly resolutions, as suggested in 2002 by the Legal Counsel Hans Corell (B).

A. — *The Administration of a NSGT is not a question of fact*

The Art. 73 of the UN Charter — which addresses "the promotion of the interests of the inhabitants of territories whose peoples have not yet attained a full measure of self-government" (83) — refers to the administering power of a NSGT. This provision, formulated in 1945, expresses a compromise reached by the Western powers on the issue (84) and has been considered a blank slate (85) due to its hesitant and vague wording. (86) The core of this provision and of its meaning was developed through the practice of the General Assembly's Resolutions, in particular, Resolutions No. 1514 (XV) and No. 1541 (XV). (87) The GA resolution No. 1541 (XV) establishes the "principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73, e) of the Charter". According to Principle IV of this instrument:

> "there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it". (88)

(83) Art. 73, United Nations Charter, San Francisco, 16 June 1945.

(84) J. Crawford, *The Creation of States in International Law*, Oxford, Oxford University Press, 2006, ed. II, pp. 606-608.

(85) M. Bedjaoui, "Chapitre XI, Déclaration relative aux territoires non autonomes, article 73" J. Cot, A. Pellet and M. Forteau (eds), *La Charte des Nation Unies, commentaire article par article*, Paris, Economica, ed. III, 2005, p. 1752: "L'article 73 constitue, en ce domaine, comme une charte passive des intentions pieuses pendant que la Déclaration 1514 apparaît comme la charte offensive des actions concrètes".

(86) B. Fastenrath, "Chapter XI, Declaration Regarding Non-self-governing Territories, Article 73" B. Simma, D.E Khan, G. Nolte, A. Paulus and N. Wessendorf (Eds), *The Charter of the United Nations: A Commentary*, United Kingdom, Oxford University, Ed. III, vol. II, 1994, p. 1832.

(87) M. Bedjaoui, "Chapitre XI, Déclaration relative aux territoires non autonomes, article 73", *op. cit.*, pp. 1752-1767; ICJ, Advisory Opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *op. cit.*, § 52. Reference to this Advisory Opinion found in: J. Crawford, *The Creation of States in International Law*, *op. cit.*, p. 122, footnote No. 91.

(88) A/RES/1541 (XV), 15 December 1960, *op. cit.*, Principle IV.

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Following this criteria, the territory of Western Sahara, as an ex-Spanish protectorate, *i.e.*, a former Spanish colony, was included by the General Assembly, in 1963, in the UN list of NSGTs. (89) Then, in 1966, the Government of Spain was clearly recognized as "the Administering power" of Western Sahara by the General Assembly's Resolutions. (90) Despite this, in 1975 the fate of Western Sahara was disrupted. The Kingdom of Spain, under Moroccan pressure and in violation of its duties as an administering power, decided to conclude the Madrid Agreement with Morocco and Mauritania on 14 November 1975. (91) This agreement, which was never recognised by the General Assembly (92), provided for the illegal transfer of the administration of Western Sahara to these latter States. Spain's presence in Western Sahara thus ended on 28 February 1976 with the relinquishment of its powers. (93) In spite of this, until recently, Spain was still considered the administering power of Western Sahara by the UN. Nowadays, if we look at the UN list of non-self-governing territories, Spain is no longer listed as the administering power of Western Sahara. Western Sahara is now considered a territory without administering power. (94)

From what has been outlined so far, we may conclude that: Morocco's presence in the territory of Western Sahara does not make it "a de facto administering power", for the simple fact that such concept does not exist in international law. (95) This terminology, often misused to describe Morocco's role in relation to Western Sahara, was for the first time improperly used by Legal Counsel Hans Corell in his opinion of 2002 on "the signing of contracts by Morocco with foreign

(89) UNGA, Report of the Committee on Information from Non-Self-Governing Territories General Assembly. Official Records. Supplement (XVIII) (1963), UN A/5514, Annex III, 34. As mentioned in: S. Allen and J. Trinidad, *The Western Sahara Question and Internationa Law, Recognition Doctrine and Self-Determination*, New York, Routledge, 2024, p. 6, footnote No. 9.

(90) A/RES/2229, 20 December 1966, preamble; A/RES/2354, 19 December 1967, preamble; A/RES/2428, 27 December 1968. preamble; A/RES/2591, 16 December 1969, preamble; A/RES/2711, 14 December 1970, preamble; A/RES/2983,14 December 1972, preamble; A/RES/3162, 14 December 1973, preamble. As mentioned in: C. Ruiz Miguel, "Spain's Legal Obligations as Administering Power of Western Sahara", N Botha, M. Olivier and D.V. Tonder (eds), *Multilateralism with Western Sahara as Case Study*, South Africa, VerLoren van Themaat Centre, University of South Africa, 2010, p. 201.

(91) Declaration of Principles on Western Sahara (Madrid Accords), Spain, Morocco, Mauritania, 14 November 1975, https://peacemaker.un.org/en/node/9104, (accessed on 23 January 2024).

(92) C. Ruiz Miguel, "Spain's Legal Obligations as Administering Power of Western Sahara", *op. cit.*, pp. 202-203.

(93) Letter dated 26 February 1976 from the Representative of Spain to the Secretary-General, A/31/56-S/11997. Found in: E. Kassoti, "The Legality Under International Law of the EU's Trade Agreements Covering Occupied Territories: A Comparative Study of Palestine and Western Sahara", *CLEER Paper Series*, 2017, available at SSRN: https://ssrn.com/abstract = 3118936, p. 34, footnote No. 195.

(94) UN List of Non-Self-Governing Territories, https://www.un.org/dppa/decolonization/en/nsgt (accessed on 23 January 2024).

(95) V. Chapaux, "The Question of the European Community-Morocco Fisheries Agreement", K. Arts and P. Pinto Leite, J. Ignacio, A.Cuervo and T. Shelley (eds), *International Law and the Question of Western Sahara*, Netherland, International Platform of Jurist for East Timor, 2007, pp. 222-223.

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companies for the exploration of mineral resources in Western Sahara". (96) With this opinion, Corell attempted to answer a question made by the Security Council on the legality of the conclusion of a contract by the Moroccan government with "foreign companies for the exploration of mineral resources in Western Sahara". (97) In his analysis, Corell rejected the idea that Morocco could be considered the *de jure* administering power of a NSGT and he labelled it as the *de facto* administering power of Western Sahara (98), avoiding to classify the factual presence of Morocco as an occupation. In doing so, he based his legal reasoning on the status of the territory of Western Sahara as a non-autonomous territory (99), applying the regime governing the exploitation of natural resources in a NSGT. (100) In any case, his conclusion cannot be justified as the difference between an administration *de jure* or *de facto* does not exist in the regime of the NSGT. The sole authority capable of recognising a State as an administering power – according to the criteria established in GA Res. No 1541 and in the light of GA. Res. No 1514 — is the General Assembly. As demonstrated by an established practice, this body possesses the authority to exercise these powers under the mandate granted by Chapter IV of the UN Charter. (101) More precisely, Art. 10 of the UN Charter empowers the General Assembly to discuss: "any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter". (102) This provision confers to this organ a broad competence concerning any question treated by the Charter and in implementing its goals and principles. (103) In this respect, the General Assembly has played a crucial role in the decolonization process, guided by the fundamental purpose it was meant to achieve and set forth in Art. 1(2) of the UN Charter: "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace". (104) This goal — along with the provisions outlined in Chapter XI of the UN Charter regarding NSGTs — provides the General Assembly with significant latitude in

(96) Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, S/2002/161, p. 1. Thereafter: Hans Corell's opinion.

(97) *Ibid.*, pp. 1-6.

(98) *Ibid.*, p. 2, §§ 5-8.

(99) V. Chapaux, "The Question of the European Community-Morocco Fisheries Agreement", *op. cit.*, p. 223.

(100) *Ibid.*, p. 1, § 8: "Notwithstanding the foregoing, and given the status of Western Sahara as a Non-Self-Governing Territory, it would be appropriate for the purposes of the present analysis to have regard to the principles applicable to the powers and responsibilities of an administering Power in matters of mineral resource activities in such a Territory".

(101) United Nations Charter, San Francisco, 1945, Chapter IV: General Assembly, Art. 9-22.

(102) *Ibid.*, Art. 10.

(103) S. Doumbe-Bille, "Fonctions et pouvoirs, article 10", J. Cot, A. Pellet and M. Forteaum (eds)., *La Charte des Nation Unies, commentaire article par article*, Paris, Economica, ed. III, 2005, pp. 641-654.

(104) United Nations Charter, San Francisco, 1945, Chapter I: Purpose and Principle, Art. 1, § 2.

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shaping "the future of dependent territories and their peoples". (105) In the light of the powers conferred to it directly by the UN Charter, the General Assembly, driven by the imperative need to liberate peoples from colonial rule, has explicitly declared its competence in this matter and respectfully extended its authority concerning non-autonomous territories. (106) Understanding the role of the General Assembly in the decolonisation process and its power in relation to the NSGT is crucial as it enables us to demonstrate the following conclusion: the only body with the authority to designate the Kingdom of Morocco as the administering power of Western Sahara is the General Assembly. In accordance with the right to self-determination of peoples, the General Assembly has never appointed Morocco as the administering power of Western Sahara. This is also due to the fact that the Kingdom of Morocco does not claim to be the administering power of Western Sahara (107); rather, it has annexed this territory, asserting its sovereignty over it. (108) Here are the words of King Mohammed VI's speech at the 39th anniversary of the Green March: "Morocco will remain in its Sahara, and the Sahara will remain part of Morocco, until the end of time". (109)

Recognizing Morocco as the administering authority would, in essence, legitimize the annexation of Western Sahara, thereby undermining the Sahrawi people's right to self-determination and their ability to determine their own political and economic future.

Another aspect needs to be explored in relation to the application of Article 73 of the UN Charter. The legal reasoning developed by the Grand Chamber regarding the application of this provision is not consistent with the framework established by the United Nations.

(105) M. Bennani, "Fonctions et pouvoir, Article 10", J. Cot K and A. Pellet (eds)., *La Charte des Nation Unies, commentaire article par article*, Paris, Economica, ed. II, 1991, p. 250.

(106) *Ibid.*, p. 251; M. Bedjaoui, "Chapitre XI, Déclaration relative aux territoires non autonomes, article 73", *op. cit.*, pp. 1072-1073. To understand how the GA's practice has played a crucial role in developing the legal framework of Art. 73 of the UN Charter, see B. Fastenrath, "Chapter XI, Declaration Regarding Non-self-governing Territories, Article 73", *op. cit.*, pp. 1832-1836.

(107) Grand Chamber, judgment of 27 February 2018, case C-266/16, *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, § 72: "(…) the Kingdom of Morocco has categorically denied that it is an occupying power or an administrative power with respect to the territory of Western Sahara". As mentioned in: F. Dubuisson, "La Cour de Justice de l'UE et le Sahara occidental : le droit à l'autodétermination vidé de sa substance ?", *Centre de Droit International*, 2024, p. 3.

(108) ICJ, Advisory Opinion of 16 October 1975, *Western Sahara*, *op. cit.*, § 49: "(…) Morocco points out that decolonization may come about through the reintegration of a province with the mother country from which it was detached in the process of colonization (…)".

(109) Full Text of King Mohammed VI's Speech On 39th Anniversary of Green March, 6 November 2014: https://www.moroccoworldnews.com/2014/11/143369/full-text-of-king-mohammed-vis-speech-on-39th-anniversary-of-green-march (accessed on 23 January 2025). As mentioned in: H. Corell, "Keynote adress on Western Sahara at the 2019 Annual Conference of the Belgian Society of International Law", *RBDI*, 2020/2, p. 427.

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B. — *The interpretation of Article 73 of the UN Charter driven by the principle of self-determination of peoples*

As previously explained, the Grand Chamber relies on Article 73 of the UN Charter to conclude that the exploitation of natural resources in a NSGT respects the right to self-determination of the Sahrawi people, as long as it produces benefits for them. According to the Grand Chamber, this applies even if such exploitation is against the will of the Sahrawi people and their legitimate representative, the Polisario Front:

> "[…] The fact that a movement which presents itself as the legitimate representative of that people objects to that agreement cannot, as such, be sufficient to call in question the existence of such presumed consent". (110)

The Grand Chamber does not appear to fully grasp the implications of "the Sahrawi people's right to self-determination" and of "their permanent sovereignty over the natural resources of the Western Sahara". It refers to Article 73 of the UN Charter and to "the principle of permanent sovereignty over natural resources" without grasping their legal scope or considering its evolution over time in the General Assembly's resolutions. (111) As previously noted in paragraph (A) of Section II, the Article 73 of the UN Charter gained "force and meaning" through Resolution No. 1514 (XV). (112) Guided by the principle to self-determination of people, the General Assembly has established a regulatory framework for the socio-economic development in a NSGT, with the intention of clarifying and concretizing the "concept of interest" provided in Article 73. (113) The purpose is to ensure that the economic activities conducted by an administering power in a NSGT reflect the will and interests of the people. (114) According to the General Assembly's Resolutions, the administration of natural resources by the administering power should not be viewed as "a means or an instrument" to acquire the sovereignty over a NSGT. Rather, it serves as a mechanism to empower the people and progressively transfer the authority hold by administering power to them: facilitating the transition from "dependence to independence". (115) On these grounds, the General Assembly in numerous resolutions has sought to define "the Activities

(110) Grand Chamber, judgment of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 183; Grand Chamber, judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 155.

(111) Doctrine consulted on this subject: Hans Corell's opinion, Section (B): "The law applicable to mineral resource activities in Non-Self Governing Territories", *op. cit.*, §§ 9-14; M. Valenti, *La questione del Sahara Occidentale alla luce del principio di autodeterminazione dei popoli*, Milano, G. Giappichelli Editore, 2017, pp. 80-81.

(112) M. Bedjaoui, "Chapitre XI, Déclaration relative aux territoires non autonomes, article 73", *op. cit.*, p. 1761.

(113) Hans Corell's Opinion, §§ 10-12.

(114) *Ibid.*, §§ 10-12.

(115) A/RES/1534 (XV), 15 December 1960, § 5.

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of foreign economic and other interests which impede the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Territories under colonial domination", recognising:

> "the value of foreign economic investment undertaken in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes in order to make a valid contribution to the socio-economic development of the Territories". (116)

Therefore, foreign economic investments could constitute an asset for the economic development of a non-autonomous territory if these economic activities are carried out in conjunction with "the wishes" of the peoples and "in collaboration" with them. The legal framework governing the exploitation of natural resources in a NSGT does not present "the concept of a people's interest" in an "objective" and "abstract" manner, as interpreted by the Grand Chamber. This latter referred to "specific, tangible, substantial and verifiable benefit" (117) without giving an interpretation of these terms and without referring to any sources of law, except to Article 73 of the UN Charter. (118) As previously suggested, such conclusions violate the right to self-determination of peoples, as the Article 73 does not imply the substitution of the will of the Sahrawi people and their involvement in the economic development of a NSGT with a purely economic benefit. A benefit which paradoxically, according to the Court's reasoning, should be provided by the party that obstructs the self-determination of peoples, namely the Kingdom of Morocco.

In conclusion, as highlighted within this section, the peculiarities of the case of Western Sahara make it impossible to apply the regime envisaged for a NSGT. First, as explained above, Morocco is not de administering power of Western Sahara and it has no intention of implementing the purpose of Article 73 of the UN Charter to enable the Sahrawi people to exercise their right to self-determination. Second, as demonstrated so far, the regime governing the exploitation of the natural resources of NSGTs requires the presence of two criteria: 1) the will of the peoples and 2) their participation in the economic development of a NSGT. The first criterion cannot be substituted with an economic benefit as outlined by the Grand Chamber. As for the second, a significant part of the Sahrawi people lives outside Western Sahara,

(116) A/RES/50/33, 9 February 1996, § 2; A/RES/52/72, 10 December 1997, § 2; A/RES/53/61, 3 December 1998, § 2; A/RES/53/6, 18 February 1999, § 2; A/RES/54/84, 27 January 2000, § 2; A/RES/55/138, 8 December 2000, § 2; A/RES/56/66, 10 December 2001, § 2; Hans Corell's Opinion, *op. cit.*, §§ 10-11.

(117) Grand Chamber, Judgment of 4 October, Joined Cases C-77 8/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 153; Grand Chamber, Judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 181.

(118) F. Dubuisson, "La Cour de Justice de l'UE et le Sahara occidental : le droit à l'autodétermination vidé de sa substance ?", Centre de Droit International, 17 October 2024, p. 2.

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in refugee camps in Tindouf, without access to their natural resources. Even if future EU-Morocco agreements were to include financial compensation for the Sahrawi people, there would be no contribution from the Sahrawi people to the socio-economic development of Western Sahara, no journey toward independence, and no self-determination.

IV. — The illegal presence of the Kingdom of Morocco in Western Sahara and the consequences for the EU

The Grand Chamber considers the EU-Morocco Trade partnership as extended to Western Sahara as legal, not acknowledging the obstacle it creates for the future of Western Sahara and its exiled people. This stems from an inaccurate interpretation of Morocco's role and presence in Western Sahara and of its relation to the Sahrawi people. In this section, the presence of Morocco in Western Sahara will be qualified as a "foreign occupation" (A) and thereafter, the consequences of this occupation for the external action of the European Union in relation to the territory of Western Sahara will be highlighted (B).

A. — *The presence of the Kingdom of Morocco in Western Sahara: "a foreign occupation"*

As one can imagine, the illegal presence of Morocco in Western Sahara, which started in 1975 with the famous "Green March" (119), did not receive any support of the United Nations or of the African Union. Since the beginning, it was condemned by the Security Council, which demanded "Morocco [...] to withdraw [immediately] from the Territory of Western Sahara", as well as by the General Assembly. (120) In this regard, the Resolution of General Assembly No. 34/37 explicitly urged: "Morocco to join in the peace process and to terminate the occupation of the Territory of Western Sahara". (121) The fact that Morocco's presence in the Western Sahara territory constitutes an occupation was, in 2021, reaffirmed by the African Court on Human and Peoples' Rights through the case of *Bernard Anbataayela Mornah*: "*l'ONU et l'UA reconnaissent la situation de la RASD comme une situation d'occupation*". (122)

(119) For a summary of the Moroccan invasion of Western Sahara, see: D. Kingsbury, "The role of resources in the resolution of the Western Sahara Issue" in Global Change, Peace & Security, Special Issue: Westerm Sahara: The Role of Resources in its Continuing Occupation, *Routledge, Taylor & Francis Group*, vol. 27, No. 3, 2015, pp. 255-256.

(120) S/RES/380, 6 November 1975, §§ 1-2;

(121) A/RES/34/37, 21 November 1979, *op. cit.*, § 6.

(122) African Court on Human and Peoples' Rights, Judgement of 22 September 2022, *Bernard Anbataayela Mornah*, Req No. 028/2018, p. 88, § 301. F. Dubuisson, "Les trois avis de l'avocate

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The occupation of Western Sahara by the Kingdom of Morocco can be labelled as "a foreign or alien occupation" under the GA Resolution No. 3103 (XXVIII) (123), as well as Article 1, § 4 of the First Additional Protocol to the Geneva Conventions. (124) This form of occupation, as explained by a broad doctrine (125), obstructs the people's right to self-determination and their ability to pursue independence. Given that Morocco's presence denies the right to self-determination of the Sahrawi people, every act carried out by Morocco in Western Sahara should be considered illegal. This conclusion can be drawn from another case of "foreign occupation" that bears similarities to the scenario at hand (126), *i.e.*, the occupation of the territory of Namibia by South Africa.

From 1920, the territory of Namibia was administered by South Africa under a League of Nations mandate. (127) With the birth of the United Nations, the General Assembly — through Resolution No. 65 (I) — rejected the proposal put forward by South Africa to incorporate the territory of South West Africa (the territory of Namibia was called in this way until 1968) (128) to its national boundaries. (129) In 1946, South Africa's refusal to place Namibia under the control of the UN Trusteeship, or to allow the UN to exercise supervisory power over the mandate, led to a prolonged dispute. (130) At the end, through Resolution 2145 (XXI) (131), the General Assembly terminated South Africa's mandate over South West Africa due to its failure to comply with the obligations of the mandate and respect the right to self-determination of the people of South West Africa. (132) In the same vein, Security Council's resolutions No. 264 and No. 269 decreed

générale devant la CJUE dans les affaires relatives au Sahara occidental : une conception problématique du droit à l'autodétermination", *op. cit.*, p. 4.

(123) A/RES/3103 XVIII, 12 December 1972;

(124) Protocol Additional to the Geneva Conventions of 12August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 1, § 4; E. David, *Principes de droit des conflicts armés*, Bruxelles, Bruylant, 2012, p. 192.

(125) For a definition of "foreign or alien occupation" see: E. David, *Principes de droit des conflicts armés*, *op. cit.*, pp. 190-192; Y. Sandoz, C. Swinarski and B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, International Committee of the Red Cross, Martinus Nijhoff Publishers, 1987, p. 54, § 112; H. Gross Espiell, "The Right to Self-Determination: Implementation of United Nations Resolutions", *op. cit.*, § 45; J. Salmon, *Dictionnaire de Droit International Public*, *op. cit.*, p. 777.

(126) E. David, *Principes de droit des conflicts armés*, *op. cit.*, p. 192.

(127) N. Schrijver, *Sovereignty over Natural Resources, Balancing rights and duties*, *op. cit.*, p. 144.

(128) J. Dugard, *Recognition and the United Nations*, Great Britain, Grotius Publications limited, 1987, p. 117.

(129) E. Klein, "Namibia", in J. Mayen and P. Incident, *Encyclopedia of Public International Law*, Amsterdam, Elsevier, vol. III, 1997, p. 486.

(130) J. Dugard, *Recognition and the United Nations*, *op. cit.*, p. 117.

(131) A/RES/2145 (XXI), 27 October 1966, § 4.

(132) E. Klein, "Namibia", *op. cit.*, p. 487.

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the end of South Africa's mandate and demanded its immediate withdrawal. (133) Nevertheless, this latter continued to occupy Namibia and to obstruct the right to self-determination of the Namibian people, turning its presence into "a foreign occupation". (134) After the termination of the Mandate, the presence of South Africa in Namibia and all acts undertaken by it "on behalf of or concerning Namibia" were considered invalid, including the exploitation of natural resources. (135)

This precedent should be fully applied to the case at hand. If the presence of a regime is illegal and violates the right to self-determination, no authority can be conferred upon it. Morocco's ongoing occupation of Western Sahara hinders the self-determination of the Sahrawi people and therefore, its actions in relation to this territory, as in the Namibia case, cannot be legitimised with the application of Article 73 of the UN Charter.

B. — *The responsability of the EU and the obligation of non-recognition*

According to the Grand Chamber, the Kingdom of Morocco is entitled to conclude future agreements with the European Union, on behalf of the Sahrawi people, as long as these agreements benefit these latter. The Grand Chamber, failing to adress the illegal presence of Mocco in Western Sahara as "a foreign occupation", has completely disregarded the obligations directly incumbent on the EU due to Morocco's serious breach of a peremptory norm, *i.e.*, the right to self-determination of peoples. From this right — as mentioned in Section II — derives obligations *erga omnes* that States of the international community and International organizations — such as the EU — are obliged to respect.

The obligation of non-recognition is crystallized in Art. 41 of the "Articles on Responsibility of States for Internationally Wrongful Acts" ("ARSIWA"), which is an expression of a customary law (136):

> "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40;

(133) S/RES/264, 20 March 1969, § 3; S/RES/269, 4 November 1969, § 5; N. Schrijver, *Sovereignty over Natural Resources, Balancing rights and duties*, *op. cit.*, p. 146.

(134) Report of the United Nations Council for Namibia, 10 November 1967, A/6897: "The Council considers that the continued presence of South African authorities in South West Africa constitutes an illegal act, an usurpation of power, and a foreign occupation of the territory, which seriously threatens international peace and security". M. Dawidowicz, "The Obligation of Non-Recognition of an Unlawful Situation", A. Pellet, S. Olleson and K. Parlett (Eds), *The Law of International Responsibility*, United States, Oxford University Press, 2010, p. 680.

(135) S/RES/276, 30 January 1970, § 2.

(136) O. Corten, F. Dubuisson, V. Koutrolis and A. Lagerwall, *A Critical Introduction to International law*, *op. cit.*, p. 82; F. Dubuisson, "The International Obligations of the European Union and its Member States with Regard to Economic Relations with Israeli Settlements", *Centre de droit international de l'Université libre de Bruxelles*, 2014, p. 20.

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2. No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation;

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law". (137)

Concerning Art. 41, § 1, it is essential to first clarify the meaning of the expression "a serious breach within the meaning of Article 40". This phrase refers to "a gross or systematic violation (138)" by a State of an obligation that arises from a norm of *jus cogens*. (139) The word "gross" relates to the severity of a violation and its impact (140), while the "systematic" criterion indicates that the violation is carried out in an organized and intentional manner. (141) Both requirements are present in situations where a State has acquired a territory in breach of the right to self-determination of peoples. (142) This is precisely the case here, as Morocco has occupied the territory of Western Sahara since 1975, systematically denying the right to self-determination of the Sahrawi people. (143)

Due to Morocco's "gross" and "systematic" violations, the States of the international community and the EU have a "positive duty to collaborate to put an end to the serious violation of" (144) the right to self-determination of the people,

(137) Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, International Law Commission, Yearbook of the International Law Commission, (vol. II, part 2), UN Doc A/56/10. For the responsibility of International Organisation see: Art. 42 of Draft articles on the responsibility of international organizations (A/66/10, § 87), 2011, vol. II, part 2.

(138) S. Koury, "The European Community and Member States, Duty of non-recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law", K. Arts, P. Pinto Leite, J. Ignacio, A. Cuervo and T. Shelley (Eds), *International Law and the Question of Western Sahara*, *op. cit.*, 2007, p. 178.

(139) O.Corten, F. Dubuisson, V. Koutrolis and A. Lagerwall, *A Critical Introduction to International law*, *op. cit.*, p. 478; F. Dubuisson, "The International Obligations of the European Union and its Member States with Regard to Economic Relations with Israeli Settlements", *Centre de droit international de l'Université libre de Bruxelles*, 2014, p. 20.

(140) J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge, Cambridge University Press, 2002, p. 247.

(141) *Ibid.*, p. 247; S. Koury, "The European Community and Member States, Duty of non-recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law", *op. cit.*, p. 179.

(142) J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, *op. cit.*, p. 250.

(143) M. Dawidowicz, "Trading fish or human rights in Western Sahara? Self-determination, non-recognition and the EC-Morocco Fisheries Agreement", D. French, *Statehood and Self-determination, Reconciling Tradition and Modernity in International Law*, Cambridge, Cambridge University Press, 2013, pp. 262-263.

(144) Draft articles on Responsibility of States for Internationally Wrongful Acts, text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10), p. 114.

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in accordance with Article 41(1) of the ARSIWA.(145) The obligation of collaboration, in relation to the right of self-determination of peoples, is recognized in various international instruments, such as in GA's Resolution No. 2625 (XXV) of 1970. This latter requires every State of the international community to promote "through joint and separate action, the realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter".(146) Similarly, this principle is enshrined in the ICCPR and in the ICESCR, in Art. 1, § 3 which demand the States parties to: "promote the realisation of the right of self-determination, and [to] respect that right, in conformity with the provisions of the Charter of the United Nations".(147) Furthermore, the ICJ in its Advisory Opinions — on "the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (hereafter: "The Wall Opinion") and on "the Policies and Practices of Israel in Palestine Opinion" — has made reference to GA's Resolution No. 2625 (XXV) to emphasize the duty of States to undertake collective and individual actions in promoting the right to self-determination of peoples.(148) This duty is completely disregarded by the CJEU, which does not even realise the violation by the EU institutions of the non-recognition requirement.

Article 41(2) of the ARSIWA provides a "duty of abstention", meaning that States must refrain from recognizing as lawful any situation created through "a serious violation of a peremptory norm" and must not "aid or assist [a State] in maintaining" such a situation.(149) This provision can be regarded as an expression of the principle of *ex injuria jus non oritur* (150), which literally means: "No right arises from an act contrary to law".(151) As expressed by the ICJ in the *Wall Opinion*, the obligation of non-recognition aims to prevent an "illegal situation" from becoming a "*fait accompli*" (152) over time.(153) This

(145) Information from Art. 41(1) of ARSIWA as referenced by: F. Dubuisson, "The International Obligations of the European Union and its Member States with Regard to Economic Relations with Israeli Settlements", *Centre de droit international de l'Université libre de Bruxelles*, 2014, p. 28.

(146) A/RES/2625 (XXV), 24 October 1970.

(147) ICCPR and ICESCR, 16 December 1966, General Assembly resolution 2200A (XXI), part. I, Art. 1, § 3.

(148) ICJ, Advisory Opinion, 19 July 2024, *Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *op. cit.*, § 255; ICJ, Advisory opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, § 156.

(149) Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, *op. cit.*, p. 114.

(150) A. Lagerwall and T. Ruys, "Western Sahara on the Edges of International Law", *RBDI*, Bruxelles, 2020, p. 381.

(151) Our translation in english of the sentence : "Aucun droit ne résulte d'un acte contraire au droit": J. Salmon, *Dictionnaire de Droit International Public*, *op. cit.*, p. 482.

(152) ICJ, Advisory opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *op. cit.*, § 121.

(153) M. Dawidowicz, "The Obligation of Non-Recognition of an Unlawful Situation", A. Pellet, S. Olleson and K. Parlett, *The Law of International Responsibility* (eds), United States, Oxford University Press, 2010, p. 678.

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obligation applies in relation: 1) to acts of recognition that explicitly legitimize a situation created by a serious violation of a norm of *jus cogens* (formal or explicit recognition); and 2) to acts that implicitly recognize such illegality (informal or implicit recognition). (154) Both forms of recognition may inevitably lead to an external "aid or assistance". In this regard, there is an extensive practice of the General Assembly and of the Security Council which requires the States not to recognise, explicitly or implicitly, an acquisition of a territory by force in denial of the right to self-determination of peoples. (155)

To better grasp the prohibition of implicit recognition, we can mention the leading case on the matter, the ICJ's Advisory Opinion on "South Africa's continued occupation of Namibia". (156) In this case, the ICJ required the UN States not to recognize South Africa's presence in Namibia and to avoid "any acts, and in particular any dealings" with the Government of South Africa, that could result in an implicit recognition, aid or assistance to this unlawful regime. The ICJ, among a broad range of acts which may imply a recognition, has explicitly included economic relations with an unlawful regime. (157) Recently, on 19 July 2024, the ICJ has reiterated the concept of "implied recognition" — provided by the Namibia Opinion and other cases (158) — in its Advisory Opinion concerning "the Policies and practices of Israel in the occupied Palestinian territories". Before reaching this conclusion, the ICJ, once again, highlighted the importance of "one of the essential principles of contemporary international law", *i.e.*, the right to self-determination of peoples, and "the legal interest" that the States of the international community possess in the protection of this *erga omnes* right. (159) Subsequently, the Court has stated that Israel's prolonged occupation (160) impedes the Palestinian people's right to self-determination — *i.e.*, their

(154) Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). p. 114, § 5.

(155) See the cases of Bantustans in South Africa, Southern Rhodesia, Namibia and Palestine in this doctrine: M. Dawidowixz, "The Obligation of Non-Recognition of an Unlawful Situation", *op. cit.*, pp. 677-681; J. Dugard, *Recognition and the United Nations*, *op. cit.*, pp. 90-122.

(156) E. Kassoti, "The EU's duty of non-recognition and the territorial scope of trade agreements covering unlawfully acquired territories", *Europe and the World: A law review*, DOI: https://doi.org/10.14324/111.444.ewlj.2019.15, 2019, pp. 5-6.

(157) ICJ, Advisory Opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution276 (1970)*, *op. cit.*, §§ 123-124.

(158) ICJ, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *op. cit.*, § 159; ICJ, Advisory Opinion of 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *op. cit.*, §§ 175-182.

(159) ICJ, Advisory Opinion, 19 July 2024, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *op. cit.*, § 232.

(160) *Ibid.*, § 243.

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right to become "an independent and sovereign state" (161) — as well as their permanent sovereignty over natural resources. (162)

On these grounds, the ICJ — because of Israel systematic violations of these principles and other obligations under international humanitarian law ("IHL") and international human rights law ("IHRL") — made an appeal to the international community and expressly requested States (163):

> "to abstain from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory [...] and to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory". (164)

This Advisory Opinion is significant as it reinforces the obligation of non-recognition, be it an implicit one, in relation to economic agreements and because of the similarities between the situations of Palestine and Western Sahara. Both cases involve an occupation that hampers the right to self-determination of peoples and their permanent sovereignty over natural resources. (165)

Therefore, based on the arguments presented so far, we can conclude that the Grand Chamber erroneously ignored the obligation of non-recognition. This obligation, as mentioned above, stems from Morocco's long-standing occupation of Western Sahara and its serious and systematic violation of the Sahrawi people's right to self-determination. The Grand Chamber cannot exonerate the EU from its responsibility on this issue by merely referring to the "separate and distinct status" of Western Sahara, "the EU non-recognition of the Kingdom of Morocco's sovereignty over this territory" and "the discipline provided by Art. 73 of UN Charter". (166) These statements are completely devoid of meaning if the EU continues to confer legitimacy to Morocco's presence in Western Sahara through trade agreements. Otherwise, we would end up with the situation the case law of the ICJ aimed to prevent, that is "the law-creating effects of facts". (167) Conferring to Morocco the authority to act on behalf of the Sahrawi people in the administration of Western Sahara legitimises its presence there, with profound consequences for the future of Western Sahara and its people.

(161) *Ibid.*, § 237.

(162) *Ibid.*, § 240.

(163) *Ibid.*, § 274.

(164) *Ibid.*, § 278.

(165) F. Dubuisson, "La Cour de Justice de l'UE et le Sahara occidental : le droit à l'autodétermination vidé de sa substance ?", *op. cit.*, p. 5.

(166) Grand Chamber, Judgment of 4 October, Joined Cases C-778/21 P and C-798/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 163, § 176 and § 182; Grand Chamber, Judgment of 4 October 2024, Joined Cases C-779/21 P and C-799/21 P, *European Commission and Council of the EU v Front Polisario*, *op. cit.*, § 134, §§ 148 and 154.

(167) This expression is used by H. Lauterpacht, *Recognition in International Law*, Cambridge, Cambridge University Press, 1947, p. 413, as referenced in M. Dawidowixz, "The Obligation of Non-Recognition of an Unlawful Situation", *op. cit.*, p. 678.

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Conclusions

The CJEU's rulings on October 4 2024 should have finally concluded this long dispute initiated in 2015. Although the Grand Chamber annulled these decisions, its motivations are in conflict with the liberation of peoples from colonial rule. The Court annulled the contested decisions as the General Court did, but its motivation differs from the judgments issued by the latter in 2021. The explicit consent of the Sahrawi people or of its Legitimate Representative, the Polisario Front, has been replaced with the "presumed consent". As explained in this paper, this form of consent applies when a treaty creates rights rather than obligations upon a third party.

As regards "the obligations", the Grand Chamber found that the EU-Morocco partnership does not impose obligations on the Sahrawi people. When it comes to "the notion of rights", the latter has been substituted with "the notion of benefits". In order to justify its legal reasoning, the Grand Chamber concluded that these conditions were fundamental for the respect of the Art. 73 of the UN Charter. Based on a misinterpretation of this provision, the Grand Chamber concluded that, at present, the EU-Morocco accords did not create any benefit for the Sahrawi people and, on this basis, confirmed the annulment of the contested decisions. In particular, with regard to the SFPA, the Grand Chamber also confirmed that the EU failed to treat the territories of Western Sahara and Morocco as separate, establishing "a single fishing zone", which does not distinguish: "the waters adjacent to the territory of the Kingdom of Morocco and the waters adjacent to the territory of Western Sahara". (168)

As this paper has demonstrated, the legal framework applied by the Grand Chamber is inconsistent and problematic under international law. First of all, the concept of "presumed consent" should not have applied to this case. Contrary to the conclusions of the Grand Chamber, the contested decisions produce obligations towards the Sahrawi people as an international subject. These obligations arise by virtue of the fact that Morocco occupies the territory of Western Sahara, claiming sovereignty over it and obstructing the self-determination of the Sahrawi people. Even if one were to apply this form of consent, the presumed consent only applies when a treaty gives rise to "a right" for a third party, and not "a purely economic benefit" as outlined through these decisions. In addition, the Grand Chamber reference to Article 73 of the UN Charter is misleading, as this provision is intended for an administering power of a NSGT and not for an occupying power. Moreover, as explained so far, this framework does not allow for the will of a people, entitled to the right of self-determination, to be presumed. On the contrary, the framework governing the exploitation of the natural resources of a NSGT is guided by "the principle of self-determination of peoples". The willingness

(168) See footnote No. 55.

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of the people in contributing to the economic development of a NSGT must always be the driving force and must be genuine and free. Instead of proceeding with the forced application of a regime designed for a non-autonomous territory, the Grand Chamber should have ruled on the illegal presence of Morocco in Western Sahara, as a foreign occupation, and based its decision on the obligations of non-recognition incumbent on the European Union. These obligations do not only entail the prohibition to recognise Moroccan sovereignty over Western Sahara, but they also include the obligation not to trade with an occupying power in relation to the occupied territory.

In the end, these rulings aim to leave a "door open", a margin for manoeuvre to the EU institutions to conclude new agreements with Morocco concerning the natural resources of Western Sahara. The adverse consequences of these rulings are inevitable: the future agreements, signed without taking into account the will of the Sahrawi people, would be an EU legitimisation of Morocco's territorial claims, which would further hinder the organisation of a UN-sponsored referendum for the self-determination of the Sahrawi people. As expressed by Judge Dillard in his separate opinion on the *Western Sahara* case: "It is for the people to determine the destiny of the territory and not the territory the destiny of the people". (169) Fifty years after the start of the Moroccan occupation, the risk is that the wealth of the territory of Western Sahara might determine the fate of the Sahrawi people rather than the opposite.

The truth is that these judgments result from an erroneous understanding of this dispute. Since the beginning of this long saga before the Court of Justice, the case of Western Sahara has been increasingly "politicised". Defining the roles and identifying the responsibilities of the litigants have always been a challenge for the EU institutions and for the CJEU. The latter has played a crucial role in maintaining this delicate balance, aiming, as the author Eva Kassoti argues, to avoid "being drawn into political storms". (170) As demonstrated in this paper, the EU Institutions and the CJEU seem to perceive the MINURSO as a battle between two political actors — the Kingdom of Morocco and the Polisario Front — who are fighting and negotiating with each other to define the future and destiny of Western Sahara. This, while considering the Sahrawi people — the rightful holders of the right to self-determination — external to this battle. Such a view is flawed as it fails to recognise that the Polisario Front's involvement is key to defend the right to self-determination of the Sahrawi people but also that the Polisario Front is itself a rightful holder of such right as their legitimate representative.

(169) ICJ, Separate Opinion of Judge Dillard on the Western Sahara case, p. 122. Found in: J. Dugard, *Recognition and the United Nations, op. cit.*, p. 105.

(170) E. Kassoti, "Between Sollen and Sein: The CJEU's reliance on international law in the interpretation of economic agreements covering occupied territories", *Leiden Journal of International Law*, doi:10.1017/S0922156520000059, 2020, p. 372.

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Furthermore, this perspective fails to acknowledge that the case of Western Sahara is not a struggle on equal footing where two parties need to reach a compromise. Rather, it is a situation with an oppressor and an oppressed: an occupying state advancing sovereignty claims against a territory in denial of the right to self-determination of peoples. By ignoring such complexity, the Grand Chamber's rulings are the reflections of the erroneous narrative which has been presented so far by the EU institutions. To challenge this view, a new interpretation of this dispute based on "the right to self-determination of the Sahrawi people" and on "their struggle against its denial by Morocco" is needed as it can change not only our understanding of this dispute, but also the fate of those who are waiting for justice, the Sahrawi people.

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