Furthering the Right to Self-Determination by EU Courts: The Western Sahara Decisions of 4 October 2024 and the Völkerrechtsfreundlichkeit of the European Court of Justice

ECJ 4 October 2024, Joined Cases C-779/21 P & C-799/21 P, *European Commission and Council of the European Union v Front Polisario*, ECLI:EU:C:2024:835 etc.

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INTRODUCTION

On 4 October 2024, the European Court of Justice handed down three judgments[1] that have been widely hailed as groundbreaking.[2] In them, the Court

[1]ECJ 4 October 2024, Joined Cases C-779/21 P & C-799/21 P, *European Commission and Council of the European Union* v *Front Polisario*, ECLI:EU:C:2024:835; Joined Cases C-778/21 P & C-798/21 P, *Commission and Council* v *Front Polisario*, ECLI:EU:C:2024:833 and Case C-399/22, *Confédération paysanne* v *Ministère de l'Agriculture et de la Souveraineté alimentaire, Ministère de l'Économie, des Finances et de la Souveraineté industrielle et numérique*, ECLI:EU:C:2024:839.

[2]*See*, *inter alia*, J. Odermatt, 'Whose Consent?: On the Joined Cases C-779/21 P, *Commission v Front Polisario* and C-799/21 P, *Council v Front Polisario*', *Verfassungsblog*, 5 October 2024, https://verfassungsblog.de/commission-v-front-polisario/, visited 11 September 2025; P. Cebulak and K. Istrefi, 'The *Polisario II* Judgment: Tensions with International Law and with the EU Political Institutions', *EU Law Live*, 4 December 2024, https://eulawlive.com/op-ed-the-polisario-ii-judgme

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took a bold stance on self-determination – a pivotal but also highly contested, both disruptive and transformative concept of international law – in a way that no international court has done before. Of course, the European Court of Justice has no immediate competence to interpret international law with binding force beyond its member states but, as we will see in the following, this Court is nonetheless an important interlocutor in the decentralised, multipolar interpretation process of international law. In the Western Sahara question here at issue, the Court has attributed a pervasive force to the right to self-determination – a force which also permeates the EU legal order, so that inconsistent acts of secondary law are invalidated.

These judgments, concerning trade[3] and fisheries[4] agreements between the EU and Morocco, but also affecting the territory of the Western Sahara and fishing grounds along its coast as well as labelling requirements for products (melons and tomatoes) originating from the Western Sahara,[5] are the final result of a set of judicial controversies in Luxembourg dating back more than a decade.

While it is fully justified to assume that the findings of 4 October 2024 have all the ingredients to become leading cases of European Court of Justice jurisprudence, to be fully able to understand their reach it will be necessary to consider the preceding jurisprudence as well as to take notice of the Advocate Generals' Opinions, as all these documents together give expression to a contentious narrative of great complexity and divisiveness. Eventually, the Court emerges from this process as an uncompromising advocate for the right to self-determination, showing resolve notwithstanding the fact that political opposition to such a taking-of-sides in favour of international law is palpable within the EU's institutional system.

It will further be shown that the judgments of 4 October 2024 are greatly influenced by the European Court of Justice jurisprudence on the Israeli occupied territories on the West Bank and in Gaza (see, in particular, the judgments in *Brita*[6] and *Psagot*[7]). It is to be expected that the most recent jurisprudence on the Western Sahara situation will again extend its effects beyond this specific territory.

In the following, particular attention will be given to the judgment in Joined Cases C-779/21 P and C-799/21 P (widely overlapping with the judgement in

nt-tensions-with-international-law-and-with-the-eu-political-institutions/, visited 11 September 2025 and K. Szepelak, 'Taking Locus Standi of International Actors Seriously: Joined Cases C-779/21 P and C-799/21 P (*Front Polisario II*)', *Verfassungsblog*, 15 October 2024, https://verfassungsblog.de/locus-standing-in-the-eu/, visited 11 September 2025.

[3]Joined Cases C-779/21 P & C-799/21 P, *supra* n. 1.

[4]Joined Cases C-778/21 P & C-798/21 P, *supra* n. 1.

[5]*Confédération paysanne*, *supra* n. 1.

[6]ECJ 25 February 2010, Case C-386/08, *Brita*, ECLI:EU:C:2010:91.

[7]ECJ 12 November 2019, Case C-363/18, *Psagot*, ECLI:EU:C:2019:954.

Joined Cases C-778/21 P and C-98/21 P). The note will start with a short historical portrait of the Western Sahara case and evidence the importance of the concept of the permanent sovereignty of non-autonomous territories over their national wealth and resources, including also for the understanding of the dispute before the European Court of Justice. The note continues with a brief summary of the Western Sahara cases before the Court in the years 2012 to 2018. In this period, the European Court of Justice laid the foundations for a broad recognition of the right to self-determination pertaining to the people of Western Sahara, the Sahrawis, especially in the light of their right to permanent sovereignty over their natural resources. When the European Court of Justice was again seised with the Western Sahara issue – the EU and Morocco had only half-heartedly heeded the previous findings by the European Court of Justice when they concluded new cooperation agreements in 2018 and in 2021 – the Court clarified further the meaning of the right to self-determination in this context, with several pivotal statements in contrast to the suggestions made by Advocate General Ćapeta. By the immediate comparison of the perspectives of the Advocate General on the one hand and that of the Court on the other, the radically different consequences of these approaches will be further highlighted in this case note.

It is argued here that this Western Sahara saga has further bolstered the EU's role as a champion of basic international law principles, especially in the field of human rights and in line with the *Kadi* jurisprudence.[8]

The emergence of the *Western Sahara* self-determination case

The Western Sahara case was in many senses a latecomer when seen within the international colonial context as a whole.[9] It was only in 1884, as an immediate consequence of the decisions taken at the Berlin Conference of 1884–1885, that Spain started to conquer the Western Sahara in a longer-lasting struggle against the resistance of local groups. When the worldwide decolonisation process started after 1945, Spain, like Portugal, tried to resist this process much longer than most other colonial powers. Over the years, however, this opposition against the ever-growing anti-colonialism movement proved in vain, as did the attempt to disguise

[8]As will be shown below, this contribution in the field of human rights protection was epitomised by the *Kadi* judgment. *See* ECJ Joined Cases C-402 & C-415/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, ECLI:EU:C:2008:461.

[9]For an account of the historical development of the Western Sahara's colonisation *see* the judgments and the Advisory Opinions handed down by the ECJ and the A.Gs. in the cases before the ECJ between 2015 and 2024. *See also* the present author's article, P. Hilpold, '"Self-Determination at the European Courts: The Front Polisario Case" or "The Unintended Awakening of a Giant"', 2(3) *European Papers* (2017) p. 907 at p. 921, on which this case note draws for the presentation of the judicial developments up to the present cases decided on 4 October 2024.

colonial domination by formally upgrading their status to 'overseas provinces' of metropolitan Spain. If the year 1960, with the adoption of the two anti-colonialism resolutions of 14 and 15 December 1960,[10] is often seen as a turning point for the UN in favour of a clear and unconditional commitment to decolonisation, the same year saw also the adherence in principle by Spain to this new development. At the 1048th meeting of the UN Special Political and Decolonization Committee (Fourth Committee) of 11 November 1960 the Spanish Representative declared that its government had agreed to transmit information to the UN Secretary-General in accordance with the provisions of Chapter XI of the United Nations Charter.[11]

Decolonisation of the Western Sahara was further compounded not only by the fact that this territory's colonial master, Spain, was at that time a dictatorship under Francisco Franco, who was not in the least willing to end Spain's colonial rule, but also by the circumstance that the Western Sahara's quest for independence was opposed by Morocco. Morocco, a territory which had gained independence in 1956 and was now presenting claims to territories south of its borders, in clear breach of the principle of *uti possidetis* that was governing the whole decolonisation process, especially in Africa.[12] Untypically for colonial self-determination claims, this case had therefore also the characteristics of a South-South conflict with divided sympathies for both sides. With Morocco becoming a staunch ally of the West, while the national liberation army for Western Sahara, Polisario, founded in 1973, was primarily supported by Algeria, a long- time socialist country and in the political hemisphere of the East, this conflict was also seen from the perspective of an East-West controversy. If the Western Sahara's right to self-determination in the aftermath turned out to be so controversial despite being, at its heart, a colonial and therefore a 'privileged' one,[13] this is mainly due to these additional qualifications to which this claim has been subjected.

At least in the first years after Spain had, in 1963, accepted its reporting obligation in accordance with Chapter XI of the UN Charter,[14] the competent UN institutions attributed continuously more weight to the Western Sahara's claim to self-determination. In 1964, the UN General Assembly issued

[10]UNGA Resolution 1514 (XV) and UNGA Resolution 1541 (XV).

[11]General Assembly (Fourth Committee), 1047th Meeting of 11 November 1960, UN Doc. A/C.4/SR.1047.

[12]*Cf* G. Nesi, *L'uti possidetis nel diritto internazionale* (CEDAM 1996).

[13]*See* R. Higgins, *Problems & Process, International Law and How We Use It* (Oxford University Press 1994) p. 116.

[14]*See also* UNGA Resolution 1541 (XV), Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter of 15 December 1960, A/RES/1541(XV).

resolutions demanding that Spain implement the right to self-determination for the Western Sahara. Two years later, by Resolution 2290 (XXI) of 20 December 1966, Spain was specifically requested to determine the procedures for a referendum, under the auspices of the UN and in consultation with Morocco and Mauritania. A series of resolutions in the same vein followed. In 1974, Spain agreed to hold a referendum under the auspices of and supervised by the UN, during the first six months of 1975.[15] This referendum, however, was opposed by Morocco and never took place. Morocco, in the meantime, had gathered support within the UN General Assembly for that body to request an Advisory Opinion on the Western Sahara issue. However, the hopes of Morocco (and Mauritania), that the International Court of Justice would confirm the existence of pre-colonial ties of these neighbouring countries with the territory of the Western Sahara, so as to provide a legal confirmation of their territorial claims, were disappointed by the Opinion delivered on 16 October 1975. While some historical relations could not be denied, these ancient ties were not deemed sufficient to call into question the applicability of Resolution 1514 (XV) in the decolonisation of Western Sahara. On the same day that this Opinion was delivered, King Hassan II of Morocco gave the starting signal for the 'Green March', by which eventually over 350,000 Moroccans should be transferred from Morocco to Western Sahara, an act then strongly condemned by the UN Security Council.[16] As the majority of Western Sahara's people, the Sahrawis, had to flee, mostly to Algeria, this forceful occupation of Western Sahara, first by Morocco and Mauritania and then, after the retreat of the Mauritanian forces in 1979, by Morocco alone, ended up in a far-reaching population transfer orchestrated by the Moroccan government. Thereby, not only was the basis for a lasting occupation of this territory created but also the plan became evident to render any future referendum, upon which the United Nations had long insisted, meaningless, as the votes would be cast not by the people of Western Sahara but by the newly transferred settlers.

In the decolonisation process, Spain, as the colonial power, had clear international obligations, resulting from Chapter XI of the UN Charter as well as from UNGA Resolution 1541 (XV): first, the 'sacred trust' to promote the well-being of the inhabitants of these territories; and, to this end, 'self-government'. The colonial powers have to transmit information under paragraph e of Article 73

[15] *See* General Assembly, Letter dated 20 August 1974 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, 21 August 1974, UN Doc. A/9714, as cited by J. Soroeta, 'The Conflict in Western Sahara after Forty Years of Occupation: International Law versus Realpolitik', 59 *German Yearbook of International Law* (2016) p. 187 at p. 190.

[16] *See* UN SC Resolution 380 (1975) of 6 November 1975, calling 'upon Morocco immediately to withdraw from the territory of Western Sahara all the participants in the march'.

of the Charter. The obligations of the colonial power cease as soon as the colonial territory and its peoples have attained a 'full measure of self-government'.[17]

Spain has lived up to these obligations only belatedly, half-heartedly and by no means to the degree to which it was obliged. True, Spain faced stiff opposition from Morocco while trying, from 1974 to 1975, to fulfil its obligations, at least formally. In the following years, however, two major steps in clear violation of its duties from UN decolonisation law were taken by Spain: first, in the 'Madrid Accords' between Morocco, Mauritania and Spain of 14 November 1975,[18] Spain agreed to transfer power over the territory of Western Sahara to a temporary administration formed by Morocco and Mauritania, wrongly equating its obligations to decolonise this territory with simply 'terminating the responsibilities and powers which it possesses over that Territory as administering Power'.[19] As a next step, on 26 February 1976, Spain informed the UN Secretary-General that it had terminated its presence in Western Sahara and renounced its position as the administering power under Article 73 of the UN Charter. No such 'renunciation' is foreseen by the international law of decolonisation, as the colonial power is foremost the addressee of obligations and not the owner of potestative rights, i.e. rights whose exercise depend on the mere will of the right-owner.[20] Since 1976, Spain has not attended to its obligation to transmit information under Article 73 of the UN Charter. As will be shown below, no other country has taken over Spain's role as a colonial power having to fulfil the obligations resulting from Article 73 of the Charter as well as UNGA Resolution 1541 (XV). If these provisions are to be taken seriously, Spain is still to be considered the administrating power of Western Sahara.[21]

[17] *See* Art. II of the Annex to UNGA Resolution 1541 (XV).

[18] 'Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania', UNTS, vol. 988, p. 259.

[19] Ibid.

[20] The 'Madrid Accords' were *de facto* rejected by the UN General Assembly by two resolutions of 10 December 1975: Resolution 3485(A) continued to design Spain as 'administrative power', while Resolution 3458(B) requested the interim administration to consult 'all the Saharan population originating in the territory ' and 'to take all steps to ensure that all the Saharan population in the territory will be able to exercise their inalienable right to self-determination through free consultations organized with the assistance of a representative of the United Nations appointed by the Secretary-General'. *See* C. Ruiz Miguel, 'Spain's Legal Obligations as Administering Power of Western Sahara', in N. Botha et al. (eds.), *International Law with Western Sahara as a Case Study* (Verloren van Themaat Centre 2010) p. 222 at p. 238 ff.

[21] *See* in this sense also, *inter alia*, J. Soroeta Liceras, 'Legal Consequences of the Construction of a Wall in the Occupied Sahrawi Territories', 23 *Spanish Yearbook of International Law* (2019) p. 362 at p. 372: '[e]ven if successive governments have insisted on claiming the contrary, Spain continues to be the administering power of the territory'.

Self-determination and permanent sovereignty of non-autonomous territories over their national wealth and resources

As has been shown, Western Sahara's self-determination process was started relatively late. Nonetheless, in the mid-1970s a tangible window of opportunity opened up, during which it might have succeeded. However, this process dragged on for so long, with the main antagonist to Western Sahara's sovereignty, Morocco, having been so emboldened that many see the realisation of self-determination in the form of Western Sahara obtaining independent statehood only as a remote, rather improbable alternative. The right to self-determination seems to lose power and weight if it is not implemented in due time. If the reasons for the enormous opposition to Western Sahara gaining independence are sought, they can surely be found at the economic level, as the territory is endowed with huge deposits of phosphate as well as rich fishing grounds off its coast. The continuous and systematic exploitation of these resources by Morocco and its trading partners undermines the present and future right to self-determination of the people of Western Sahara.[22]

The intimate relationship between the right to self-determination of a people under colonial dominance and its sovereignty over its 'natural wealth and resources' was recognised at an early stage in the development of UN law – with reference to Article 1 of the two Covenants on Human Rights and long before their eventual adaption by UN General Assembly in 1966.[23]

That the right to permanent sovereignty over their natural wealth and resources pertains also to non-autonomous territories and to their peoples was explicitly confirmed by the UN General Assembly in 1989 and 1994 respectively.[24]

When the Western Sahara case unexpectedly ended up before the European Court of Justice, it was mainly the economic element of the right to self-determination that provided standing to the Sahrawis (represented by Polisario) and guidance for the resolution of the case. For the future interpretation of the right to self-determination this could be a most significant development.

[22]As is well known, similar questions stood at the core of two proceedings before the International Court of Justice, *Certain Phosphate Lands in Nauru*, International Court of Justice 1992 and *East Timor*, International Court of Justice 1995. In both cases, however, procedural aspects prevented a detailed examination of these issues.

[23]*See* UNGA Resolution 1314 (XIII), Recommendations concerning international respect for the right of peoples and nations to self-determination, 12 December 1958.

[24]*See* UNGA Resolution 44/84 (1989) as well as UNGA Resolution 48/46 (1994). *See* Ruiz Miguel, *supra* n. 20, p. 235 ff.

Litiating on the Western Sahara case at the Kirchberg from 2012 to 2018

As will be shown in this section, the basis for the *Front Polisario* judgments of 2024 was already laid in 2015, although at that time the European Court of Justice still seemed hesitatant to squarely address the legal consequences of self-determination on the relations with a country blatantly violating this right in areas where it exercises territorial jurisdiction.

With Morocco's economic ties with EU becoming ever stronger, the Union was drawn also into Western Sahara's unsolved self-determination problems. The framework for this cooperation had been created by the Euro-Mediterranean Agreement of 26 February 1996, establishing an association between the European Community and its Member States on the one part and the Kingdom of Morocco on the other. Detailed substance was given to this agreement by a 'Liberalisation Agreement' of 13 December 2010.[25] These events prompted the Front Polisario to take legal action.

In November 2010 it filed an action of annulment against the Council Decision of 8 March 2012, which had allowed for the conclusion of the Liberalisation Agreement. In the following the General Court and, on appeals, the European Court of Justice, had to rule on unprecedented procedural and substantive issues – in particular on the standing of the Front Polisario as an applicant in an annulment procedure and, at the substantive level, whether applicable law had been violated. In this latter context, it was of decisive importance to clarify whether international law had been violated and if it had, what – if any – were the consequences at the level of EU law.

In its judgment of 10 December 2015, the General Court found that the prerequisites of Article 263 paragraph 4 TFEU for the Front Polisario to have legal standing were satisfied: the Front Polisario was to be considered as directly and individually concerned by the contested Decision as it was the 'only other participant in the UN-led negotiations between it and the Kingdom of Morocco with a view to determining the definitive international status of Western Sahara'.[26] Thereby, for this Court, the otherwise strictly interpreted criteria of the '*Plaumann* formula'[27] were fulfilled. While not explicitly stated by the Court, such a finding would not have been possible without the Court attributing paramount importance to the right to self-determination, which had

[25]Approved by Council Decision 2012/497/EU of 8 March 2012, which came into force on 1 October 2012.

[26]*See* General Court 10 December 2015, Case T-512/12, *Front Polisario* v *Council*, para. 113.

[27]Ibid., para. 112.

repercussions also on the procedural level, on the *jus standi*.[28] At the substantive level, again the right to self-determination, in its specification in the form of the 'permanent sovereignty over natural resources' became of overarching importance: resource exploitation activities in non-self-governing territories have to be conducted for the benefit of the peoples of those territories.[29] According to the General Court, the allegations by Front Polisario that the exploitation of the natural resources of Western Sahara happened with no regard for the interests and wishes of the people of that territory were not sufficiently examined by the Council before the adoption of the contested decision.[30]

In the appeals procedure the European Court of Justice, in its judgment of 21 December 2016,[31] seemed to retreat from this bold position when it set aside the judgment of the General Court of the previous year (favourable for Polisario) and dismissed the action brought by Front Polisario. On closer inspection, however, the substance of its earlier jurisprudence was confirmed: for the European Court of Justice, the agreements concluded by the Court with Morocco and contested by Front Polisario were simply not applicable to Western Sahara as they were retained to be a 'third party' according to Article 34 of the Vienna Convention on the Law of Treaties.[32]

[28]Interestingly, on the level of international law, only three years earlier, the International Court of Justice, in its judgment of 3 February 2012 (Jurisdictional Immunities of the State, *Germany* v *Italy*, International Court of Justice Reports 2012) had not allowed for substantive issues, even assuming they were of a *jus cogens* nature (the rules of the law of armed conflict which prohibited murder, deportation and slave labour),to override the procedural guarantees implicit in the rules on State immunity.

[29]*See* Case T-512/12, *supra* n. 26, para. 208 with reference to the letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel (Hans Corell), addressed to the President of the Security Council, S/2002/161.

[30]Ibid., para. 307. Subsequently, the ECJ had to deal with question of validity of the EU-Morocco Fisheries Partnership Agreement (FPA) and its 2013 Fisheries Protocol. In ECJ 27 February 2018, Case C-266/16, *Western Sahara Campaign UK*, ECLI:EU:C:2018:18, the ECJ followed the same line of reasoning as before in *Front Polisario I* of 2016 and found that neither the FPA nor the 2013 Protocol were applicable to Western Sahara (and, more specifically, to the waters adjacent to this territory). *See* on this judgment A. Mensi, 'The Case Western Sahara Campaign UK and the International and Institutional Coherence of European Union External Action. Opening Pandora's Box?', 23 *European Foreign Affairs Review* (2018) p. 549.

[31]ECJ 21 December 2016, Case C-104/16 P, *Council of the European Union* v *Front Polisario*, ECLI:EU:C:2016:973.

[32]*See* para. 106 of the judgment. As shown elsewhere, the legal reasoning for these findings, based on Art. 34 of the Vienna Convention on the Law of Treaties, was highly problematic. Treaties concluded in violation of Art. 34 Vienna Convention on the Law of Treaties are not invalid but unopposable against the third party affected. *See*, *inter alia*, Hilpold, *supra* n. 9, p. 917 and E. Kassoti, 'The ECJ and the Art of Ttreaty Interpretation: Western Sahara Campaign UK', 56 *Common Market Law Review* (2019) p. 209 at p. 236.

Amending the association agreement and the *Front Polisario II* case

The agreement of 25 October 2018 and the General Court judgment of 29 September 2021

While face-saving for the EU (and Morocco) as to the past events (the exploitation of the resources of the Western Sahara to the detriment of the people of Western Sahara), the approach taken by the European Court of Justice created an intricate challenge for both sides as how to proceed in their economic and political cooperation, which they wanted to continue and deepen. New agreements became necessary that would both explicitly address their applicability to Western Sahara (and the waters adjacent to this territory) and overcome the objections by the Court expressed in *Front Polisario I* in 2016 and in the subsequent, related jurisprudence,[33] primarily the lack of consent by the 'third party' (Western Sahara) affected by these treaties.

In the following, the focus will be on the (reformed) Liberalisation Agreement (the Fishery Agreement is discussed further below), but reference must also be made to the Council Decision of 29 May 2017.[34] Thereby the Council authorised the Commission to open negotiations with the Kingdom of Morocco for a new agreement amending Protocols 1 and 4 of the Euro-Mediterranean agreement, under the condition that such an agreement would 'adequately involve the people concerned in order to obtain their consent'.[35]

Furthermore, a prior assessment of the potential impact of such an agreement on the sustainable development of Western Sahara was required.[36] The agreement was signed on 25 October 2018, after the Commission – in a report of 11 June 2018 – had referred, rather generally, to overall benefits for the 'population of Western Sahara', to their consultation and to consent to this agreement by this population in their majority. For the Commission, therefore, the conditions set by the European Court of Justice in 2016 for the conclusion of such an agreement had been fulfilled.

On 27 April 2019, Front Polisario brought an action for annulment against the decision of 29 May 2017. The General Court, by its judgment of 29 September 2021,[37] not only confirmed, on the procedural level, Front Polisario's capacity to act in this annulment procedure as well as its locus standi with regard

[33] *See*, in particular, *Western Sahara Campaign UK*, *supra* n. 30.
[34] As to the FPA and the 2013 Protocol, the relevant decision was of 16 April 2018.
[35] *See* indent 10 of Council Decision (EU) 2019/217 of 28 January 2019.
[36] Joined Cases C-779/21 P & C-799/21 P, *supra* n. 1, para. 37.
[37] General Court, Case T-279/19, *Front Polisario* v *Council*, ECLI:EU:T:2021:639.

to the decision at issue, but it also confirmed, on the merits, that the Council had insufficiently taken regard of the right to self-determination of the Sahrawis.

In this, the General Court paid particular attention to the fact that the Sahrawis, contrary to the declarations by the Council and the Commission, were not effectively consulted. To this end, the General Court made reference to Hans Corell's letter to the President of the Security Council of 29 January 2002,[38] which was pivotal. In this letter, the UN Legal Counsel left no doubt that the exploitation of natural resources of non-self-governing territories 'must be consistent not only with the interests of the people of that territory but also with their will'.[39] Hence, it followed for the General Court that:

> the Council did not take sufficient account of all the relevant factors concerning the situation in Western Sahara and wrongly took the view that it had a margin of appreciation to decide whether it was necessary to comply with the requirement that the people of that territory must express their consent to the application of the agreement at issue, as a third party to that agreement, in accordance with the Court's interpretation of the principle of the relative effect of treaties in relation to the principle of self-determination.[40]

The approach by Advocate General Ćapeta in her Opinion of 21 March 2024

Advocate General Ćapeta tried to look for a new approach to the Western Sahara issue that, while not being indifferent to the lot of the Sahrawis, would have scaled down the relevance of self-determination in this context to a considerable extent. At the beginning of her Opinion she clearly set out her overall assessment of the situation on the basis of a perspective that might have motivated her subsequent recommendations to the Court. For her, no solution of the Western Sahara question was within reach and such a solution would be surely not be brought about by the EU:

> [A]lmost 50 years since the start of process of self-determination of the people of Western Sahara, those people are no closer to deciding the future status of their territory.
>
> While that represents a clear failure of the UN-led political process, this does not mean that the resolution of the Western Sahara question can be entrusted to the EU Courts. Those courts will not decide the future of Western Sahara.[41]

[38]Letter dated 29 January 2002, S/2002/161, *supra* n. 29.
[39]*Front Polisario* v *Council*, *supra* n. 37, para. 389.
[40]Ibid., para. 391.
[41]Opinion of A.G. Capeta, 21 March 2024, in Joined Cases C-779/21 P and C-799/21 P, *Front Polisario*, para. 6 ff.

While it is obvious that the European Court of Justice is not the competent court to provide a definite solution for the Western Sahara issue on the international law level, the Advocate General nonetheless seemed to understate the contribution that this court, as one – important – interlocutor in the international dialogue of courts can make to addressing this question effectively. The (implicit) consequences of this stance soon became evident in the following considerations by the Advocate General: the situation in Western Sahara, as unjust as it might appear, was not only accepted as a fact that the EU could not change, but the Advocate General argued in a sense that might contribute to the further consolidation of this factual situation in a legal perspective as well. What might appear to be an agnostic attitude seems, on closer examination, not to be neutral as to the eventual outcome. In clear contrast to overall developments in international law opposing in an ever stronger form the consolidation of unjust acquisition of territory and all the more of the maintenance of colonial domination,[42] the Advocate General seemed to propound an anachronistic position of effectiveness when she referred to a (purported) changing attitude of scholars and of UN institutions in the Western Sahara case.[43]

A pivotal aspect, with which the Advocate General had to deal, was standing, i.e. whether Front Polisario was a legitimate party to bring this case before the court. It is here that elements of EU law and of international law interact in the most intensive way. As is well known, Article 263 paragraph 4 sets rather high barriers for 'non-privileged' applicants in bringing an annulment action – barriers that are raised further by a restrictive jurisprudence.[44] If this jurisprudence were the measure to be applied, it would in fact have been difficult to concede standing to Front Polisario in this case. Nonetheless, both the Advocate General and subsequently the European Court of Justice recognised that Front Polisario had standing. In this, however, no real departure from the jurisprudence on Article 263 paragraph 4 should be seen, but rather an exceptional situation characterised

[42] *See* the clear stance taken by the International Court of Justice in the Chagos Islands Advisory Opinion 2019. As Christakis warns, 'L'appel à l'effecitivité est … inévitablement un appel aux rapports de force: la force diplomatique, que vise à convaincre adroitement … la force médiatique, qui vise á ganger la sympathie de la communauté international; et, surtout, sinon exclusivement, la force armée. Cette dernière est le veritable pole magnétique de l'effecitivité': S.T. Christakis, 'The State as a "Primary Fact": Some Thoughts on the Principle of Effectiveness', in M. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge University Press 2006) p. 138 at p. 156 ff.

[43] Scholarship suggests that, since 2018, support for the 2007 autonomy plan by the Kingdom of Morocco appears to be growing. Likewise, the rhetoric in the UN Security Council resolution appears to have changed. Thus, starting in 2018, the text of the UN Security Council's resolutions on Western Sahara stresses the need to 'achieve a realistic, practicable, enduring and mutually acceptable political solution to the Western Sahara question based on compromise': ibid., para. 27.

[44] *See*, in particular, as to requirement of the 'individual concern', ECJ 15 July 1963, Case 25/62, *Plaumann & Co* v *Commission*, ECLI:EU:C:1963:17.

by the need to have regard to an international law concept of enormous power and reach: the right to self-determination. The findings in this field are therefore probably more important in an international law perspective than for EU law. Advocate General Ćapeta looked for a cautious approach when she confirmed the relevance of self-determination in this case while, at the same time, heavily qualifying the Front Polisario's position in this regard. For the Advocate General, Front Polisario should not be recognised as holding the title of 'the' representative of the people of Western Sahara[45] and the EU should remain neutral as to the outcome of the self-determination process.[46]

The arguments brought forward by Advocate General Ćapeta in this regard must cause some perplexity when she casts doubt upon how far Front Polisario can be considered to be representative of the people of Western Sahara if this liberation movement fights exclusively for an independent state (while the self-determination process, according to UNGA Resolution 1541 (XV) has three possible outcomes: the formation of an independent State, free association with an independent State or integration with an independent State).[47] With this argument the Advocate General fails to see that most liberation movements during the decolonisation process fought exclusively for independence, while their representative role as to the people for whom they claimed to fight was never questioned.[48]

Eventually, however, the Advocate General could not help but recognise Front Polisario as holding 'at least a partial representative status of [the people of Western Sahara]'.[49]

By creating this concept, unknown in international law, the Advocate General ventured into new realms without, however, seeing the broader legal implications of this approach. More problematic is the Advocate General's affirmation that

[45]*See* Opinion, *supra* n. 41, para. 84.

[46]Ibid., para. 87.

[47]Ibid., paras. 9 and 84.

[48]*See* in this sense also S. von Massow, 'Advocate General Capeta's Western Sahara Opinions: Undermining the Law of Decolonization', who rightly also remarks that 'Resolution 1541 is skewed structurally towards independence. While free association and integration are subject to additional requirements in Principles VII und VIII, independence is not', *EJIL Talk!*, 23 October 2024, https://www.ejiltalk.org/joined-cases-c-779-21-p-commission-v-front-polisario-and-c-799-21-p-council-v-front-polisario-the-unresolved-contest-between-benefits-and-consent/, visited 11 September 2025. It is generally recognised that opting for the first alternative set out in Resolution 1541 (XV) does not require ascertaining the wishes of the people concerned. *See* A. Cassese, *Self-determination of Peoples* (Cambridge University Press 1995) p. 73. Furthermore, to doubt Front Polisario's representative function on this basis would probably have required proof that part of the people of Western Sahara pursue other self-determination outcomes. Such proofs are evidently lacking and requiring them would be totally unrealistic.

[49]*See* Opinion, *supra* n. 41, para. 88.

Morocco would be the administering power of Western Sahara. Such a qualification is overwhelmingly rejected in academic literature[50] – it is not shared by European Court of Justice[51] and not even Morocco itself has ever presented such a claim.

Advocate General Ćapeta qualified this situation as a *de facto* administration, thereby ignoring the fact that Article 73 of the UN Charter has introduced the concept of the 'administrative power' to oblige colonial powers to sustain an ordered decolonisation process. If a colonial power could simply unilaterally relinquish this function without any further obligation and an occupying country could assume this role while also denying any related obligation, this whole concept of the 'administrative power' – crafted by the UN as a fundamental tool for smoothly managing the decolonisation process – would be largely deprived of content and meaning.

The highly problematic consequences which such a perspective can have immediately become apparent from the further reasoning by the Advocate General in this Opinion. In fact, if Morocco were considered to be the (legitimate) administering power, it would also be competent to conclude agreements in relation to the territory of Western Sahara and, as a further consequence, the European Court of Justice would have had to overturn the General Court judgment under appeal.[52]

Advocate General Ćapeta was evidently conscious of the disruptive consequences that such an interpretative approach would have had without further qualification. In a last 'Section E' of the Opinion, the Advocate General tried to develop a system of additional requirements which the EU would have had to fulfil in order to respond to the obligations resulting from the right to self-determination, notwithstanding Morocco being attributed the role of an administering power. According to the Advocate General – and essentially taking guidance from Hans Correll's considerations of 2002[53] – the European Court of Justice should have referred the case back to the General Court, which would then have had to examine whether the agreement at issue was really beneficial to the 'inhabitants of the territory'.[54]

[50]A.G. Capeta herself stated that '[t]here is scholarship opposing that possibility' (para. 153) without citing any author sustaining her view.

[51]*See Front Polisario* v *Council*, *supra* n. 37, para. 203. A.G. Wathelet in his Opinion in Case C-104/16 P, *Council* v *Front Polisario*, ECLI:EU:C:2016:677, paras. 188-191 expressed his doubts that Spain could not even legally relinquish its status as administering power (cited also by A.G. Ćapeta in Opinion, *supra* n. 41, note 120).

[52]*See* Opinion, *supra* n. 41, paras. 159 and 176.

[53]*See supra* n. 42.

[54]*See* Opinion, *supra* n. 41, paras. 187 and 199.

In essence, the approach proposed by the Advocate General amounted to the following:

- utmost deference should be paid to the political assessments by the Council (and the Commission);
- Morocco was to be considered the (*de facto*) administering power of the territory of Western Sahara, notwithstanding the fact that such a concept was unknown to international law;
- therefore, the consent given to the agreement between the EU and Morocco should be seen as valid;
- specific obligations for the European institutions should result from the 'micromanagement' of this agreement's consequences on the internal side. The Advocate General opined that it was up to the General Court to specify the resulting obligations.

As a consequence, it can be stated that the Advocate General, notwithstanding all her deference towards the political decisions taken by the EU organs, was not indifferent to the plight of the Sahrawis and was aware of the need for the EU institutions to consider the consequences of the right to self-determination for the EU. For the Advocate General, it was up to the General Court to deliver a detailed analysis as to what form of consent was required for the exploitation of the natural resources of a non-self-governing territory[55] – an analysis never carried out so far by a court. Subsequently, the findings of the General Court would again have been subject to control by the European Court of Justice (with a previous advisory opinion by an Advocate General).

As will be seen, the European Court of Justice took a different approach, which avoided compromising established international law principles and proved to be very international law friendly. The other side of the coin consists in the fact that the approach by the European Court of Justice is far less deferential, both internally (towards the Council) and externally (towards Morocco's sovereignty claims) – with all the possible potential for conflict, on the EU institutional level and internationally, that this implies.

The European Court of Justice's judgment of 4 October 2024 in the Front Polisario II case

As to the capacity of Front Polisario to be a party in this annulment procedure, the European Court of Justice followed the proposals by the Advocate General, albeit in a more vigorous tone. Front Polisario was qualified as a self-proclaimed liberation movement whose legal personality and its legal standing resulted, *inter*

[55]Ibid., para. 190 ff.

alia, from having been accepted, in its quest for self-determination for the Sahrawi people, by many institutions as a (privileged) interlocutor.[56] No qualification was added in the sense of a partial representative status the Advocate General had done.

Neither was the European Court of Justice prepared to attribute to Morocco the status of a '*de facto* administering power', as the Advocate General had done before.

The contested agreement was to be implemented by Moroccan authorities in Western Sahara and therefore directly affected the situation of this territory's people in its capacity as a holder of the right to self-determination with regard to its permanent sovereignty over natural resources.[57] As a consequence, the European Court of Justice had to examine whether this agreement infringed the right of the people of Western Sahara to self-determination.

In this context, the European Court of Justice made reference to the distinction between a 'people' and the 'population', introduced by the Advocate General but not further developed by her as she had followed a different approach to the solution to the problem. As the Court sets out, the concept of the 'people' refers to 'to a political unit which holds the right to self-determination, whereas the concept of "population" refers to the inhabitants of a territory'.[58] While for the Advocate General, the assumption that Morocco was the legitimate administering power of Western Sahara could remove the need for any further investigation as to the consequences of this distinction, for the Court this question became crucial.

Correctly, the European Court of Justice found that the people of Western Sahara, having the right to self-determination over Western Sahara, could be affected by an agreement regulating also the exploitation of this territory's resources, even though they could not oppose the agreement.[59]

Referring to and further developing the 'favor tertiis' rule set out in Article 32 of the Vienna Convention on the Law of Treaties, the European Court of Justice affirms – contrary to the General Court – that the consent by a third party[60] to a treaty conferring rights on that party can be presumed, provided that two conditions are satisfied:

[56]*See* Joined Cases C-779/21 P & C-799/21 P, *supra* n. 1, paras. 69 and 89.

[57]Ibid., paras. 95 and 93.

[58]Ibid., para. 129.

[59]Ibid., para. 132.

[60]As shown, as early as 2016, in the *Front Polisario I* judgment, *supra* n. 31, this group was qualified as a 'third party' pursuant to Art. 34 of the Vienna Convention on the Law of Treaties, in line with a jurisprudence first developed in *Brita*, *supra* n. 6, referring to products deriving from Israeli-occupied Palestine territories.

– first, the agreement in question must not give rise to an obligation for that people. The EU – Morocco agreement of 2019 surely fulfils this condition;
– the second condition is spelled out by the European Court of Justice in the following way:

> [T]he agreement must provide that the people itself, which cannot be adequately represented by the population of the territory to which the right of that people to self-determination relates, receives a specific, tangible, substantial and verifiable benefit from the exploitation of that territory's natural resource which is proportional to the degree of that exploitation. That benefit must be accompanied by guarantees that that exploitation will be carried out under conditions consistent with the principle of sustainable development so as to ensure that non-renewable natural resources remain abundantly available and renewable natural resources, such as fish stocks, are continuously replenished. 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 under that agreement is in fact received by that people.[61]

For the Court, the agreement of 2019 manifestly does not provide for the fulfilment of these conditions.[62]

The specific legal basis for this second condition remains unclear.[63] As far as can be seen, there is no specific customary international law basis for this formula. It is rather the case that the European Court of Justice, when devising this condition, has been inspired by a set of norms, rules and principles that were reformulated and adapted to present needs. One source of inspiration was surely Hans Correll's letter of 2002,[64] but the elements here brought together by the Court go far beyond the – still important – Correll formula of two decades ago.

The findings of the Under-Secretary-General for Legal Affairs were surely fundamental, if not revolutionary at the time of their publication in 2002 as they summarised and crystallised many ideas and suggestions directed at providing life to the concept of the 'permanent sovereignty over natural resources' in the colonial context.

Pivotal specifics as to the content of these guarantees and their mode of implementation remained, however, open at that time and no control mechanism was provided for. Now the European Court of Justice offers a comprehensive fully-fledged conceptual tool, so far unmatched by other institutions, for filling 'permanent sovereignty over natural resources' with real life. No longer will token compensation for the exploitation of these resources, often by foreign companies

[61]Joined Cases C-779/21 P & C-799/21 P, *supra* n. 1, para. 153.
[62]Ibid., para. 158.
[63]*See also* Odermatt, *supra* n. 2.
[64]Letter dated 29 January 2002, S/2002/161, *supra* n. 29.

with the participation of corrupt national elites, suffice: the benefit for the people, owner of the right to self-determination, must be 'specific, tangible, substantial and verifiable' and in particular proportional to the degree of exploitation of their national resources. Of special importance is also the prescription that a control mechanism has to be introduced that should make sure that the benefit promised to the people is real. Such a control mechanism will furthermore provide an essential guarantee that the benefits promised will be lasting in time.

Nor does the Court ignore the needs of the present 'population', the new inhabitants. This is an issue of no small importance in resettlement situations, when a people has been driven from its ancient home or when the government has tried artificially to change the population structure. Often, the new inhabitants are not aware of the fact that they are part of a discriminatory plan and the next generation is in any case without guilt as to the preceding acts, involving their ancestors.

In paragraph 161 of its judgment of 4 October 2024, the European Court of Justice also took notice of the needs and the rights of the inhabitants of Western Sahara in a more general sense, i.e. in substance, also the needs of the Moroccan settlers. Hesitant and contorted as the respective considerations may appear, they essentially convey the message that the interests of these two groups (the 'people' of Western Sahara on the one side and the 'new inhabitants', the 'Moroccan settlers' on the other) do not necessarily remain in conflict with each other. Quite the contrary: It would be desirable to find a solution that has regard to the interests of both groups, of course with the necessary differentiations.

According to the Advocate General it would have been the task of the General Court to investigate all the relevant questions in this regard.[65] For the European Court of Justice the right to self-determination of the people of Western Sahara is paramount and needs no further clarification in this context. It is up to the involved parties to have regard to this imperative right, not losing sight, however, of the rights of the population of this territory as a whole.

If properly understood, this judgment can therefore be seen as seminal also for the solution of minority issues in territories with mixed populations and overlapping settlement structures.

The judgments in Joined Cases C-778/21 P and C-798/21 P (Fisheries Agreement) and C-399/22 (*Confédération Paysanne*)

Two judgments by the European Court of Justice, handed down on the same day, confirmed the findings in *Front Polisario II* and shed further light on the Western Sahara issue from the viewpoint of EU law.

[65] *See* Opinion, *supra* n. 41, para. 187 ff. The reasoning in this Opinion largely follows that in Joined Cases C-779/21 P and C-799/21 P and therefore will not be considered here specifically.

In Joined Cases C-778/21 P and C- 798/21 P the Fisheries Agreement between the European Union and Morocco was at issue and in particular the Decision of 16 April 2018 authorising the Commission to open negotiations with Morocco with a view to amending the 2006 Fisheries Agreement, including in the scope of that agreement the waters adjacent to the territory of Western Sahara. These negotiations led to the adoption, on 24 July 2018, of a new Sustainable Fisheries Partnership.

In this judgment, the European Court of Justice confirmed the high requirements for the permissibility of exploitation of the resources of a non-self-governing territory, as set out in the judgment discussed above, adding some further specifications. Thus, the Court spelled out that 'the interests of the peoples of non-self-governing territories are paramount'. This was interpreted as a contribution 'to the Union's action on the international scene being based, as provided for in Article 21(1) TEU, on the principles of the Charter of the United Nations and on international law'.[66] The European Court of Justice expresses here not only its full commitment to international law but also emphasises the importance to be attributed to (colonial) self-determination.

The European Court of Justice is also very clear when it states that the Fisheries Agreement should have provided for a financial contribution to be granted, for the benefit, specifically, of the people of Western Sahara.[67]

At the basis of the preliminary ruling in *Conféderation paysanne*[68] stood an action of a French agricultural association seeking to defend their national market from (cheap) imports of melons and tomatoes from Western Sahara labelled as Moroccan products. Article 60 of the Union Customs Code distinguishes between 'countries' and 'territories' and, since *Psagot*[69] – which referred to agricultural products coming from Israeli-occupied territories – it is clear that agricultural products harvested in territories other than countries (i.e. states), having a separate and distinct status,[70] have to be labelled, as to their origin, accordingly. The Court explained this obligation by emphasising the need that the indication of a country or territory of origin must not be deceptive.

In *Psagot* the European Court of Justice was more specific, stating that 'a foodstuff [that] comes from a settlement established in breach of the rules of international humanitarian law may be the subject of ethical assessments capable of influencing consumers' purchasing decisions'.[71] At the core of the present case, characterised by

[66]Joined Cases C-778/21 P & C-798/21 P, *supra* n. 1, para. 182.

[67]Ibid., para. 191.

[68]*Conféderation paysanne*, *supra* n. 1. This judgment contains also important statements as to the reach of the common commercial policy, which, however, go beyond the purview of this case note.

[69]*Psagot*, *supra* n. 7, para. 28.

[70]*Conféderation paysanne*, *supra* n. 1, para. 85.

[71]*Psagot*, *supra* n. 7, para. 56.

the violation of (colonial) self-determination and therefore of *jus cogens*, lie similar considerations. While European consumers would probably, as a rule, be indifferent as to the provenance of agricultural products from one region of an exporting country in comparison to another, the explanation that consumers should not be 'deceived'[72] is an understatement given that agricultural products from Western Sahara stand in close relation to a massive violation of international law that is expected to influence consumer choices in the EU to a considerable extent.

The strong commitment of the EU to the principles of international law on the basis of Article 3(5) and Article 21 TEU is not repeated in this context, but nonetheless this commitment shines through the sober language used in this judgment.[73]

Conclusions

The three judgments here under review have, as far as they refer to issues of self-determination, all the prerequisites to become leading cases in the array of Court of Justice pronouncements dealing with the relationship between EU law and international law.[74] As is well known, this relationship has not always been a harmonious one, beginning with an emancipation process that started with *Van Gend & Loos* in 1963 and perhaps calling to a mind a family situation where an unruly child dissociates itself from its parents.[75] In *Kadi*[76] the championing of autonomy seemed to reach its apex.[77] Serious doubts arose in the literature about whether the European Court of Justice had gone too far in defending the EU's

[72] *Confédération paysanne*, *supra* n. 1, para. 73 and 88.

[73] The underlying motive giving rise to this proceeding may have been less altruistic (obviously, *Confédération paysanne* was primarily intended to limit competition for French peasants: *see* A. Pau, 'I consumatori come veicoli per il rispetto del diritto internazionale', *Quaderni AISDUE* (2/2024) p. 1 at p. 3) but this circumstance could not deter the ECJ from developing a principle of high ethical standing.

[74] Of course, in this context the judgment in the *Front Polisario II* case is of pivotal relevance and accordingly, primary attention has been dedicated here to the respective document.

[75] Or, as Molnár and Wessel fittingly stated: a '"declaration of independence" for the newly established legal system under EU founding Treaties': *see* T. Molnár and R.A. Wessel, *Interactions between EU Law and International Law* (Edgar Elgar 2024) p. 4.

[76] *See Kadi and Al Barakaat International Foundation* v *Council and Commission*, *supra* n. 8.

[77] Regard has to be given to the fact, explained by Bruno De Witte, that 'autonomy' has meant different things to the ECJ at different times: *see* B. De Witte, 'The Relative Autonomy of the European Union's Fundamental Rights Regime', 88 *Nordic Journal of International Law* (2019) p. 68 at p. 69. *See also* K. Lenaerts et al., 'Exploring the Autonomy of the European Union Legal Order', 81 *ZaöRV* (2021) p. 47 at p. 87 and G. Grattarola, 'Does one size fit all? Ancora sull'autonomia dell'ordinamento giuridico dell'Unione europea rispetto al diritto internazionale', XVII *Studi sull'integrazione europea* (2022) p. 515 at p. 541.

special nature among international organisations based on international law and applying international law.[78]

As is well known, the Court of First Instance, prior to the European Court of Justice judgment, had tried to devise a solution for the *Kadi* conflict along a very traditional line of reasoning, attempting to mediate between the Union's aspiration for autonomy and the need to uphold the lifeline of EU law to international law.[79] The Court of First Instance essentially deferred to international law in general and to UN law in particular[80] while, at the same time, upholding human rights protection in Europe, at least on a theoretical, formal level. This was achieved again by the following distinction: UN law should prevail over traditional international law, while *jus cogens* should be binding also upon the UN. Human rights provisions contained in EU/European Community law should prevail over UN law only insofar as they are the expression of *jus cogens*.

This whole construct was overthrown by the European Court of Justice, which – following Advocate General Poiares Maduros' bold and ingenious Opinion[81] – attributed to the EU institution the role of an uncompromising guardian of human rights even if thereby a conflict with international law in general and with UN law in particular would be provoked. Interestingly enough, while the *Kadi* judgment first seemed prone to create a rupture between EU law and international law, eventually it exercised a 'civilising role' on UN law, turning conflict into dialogue.[82]

Since *Kadi*, EU primary law with its now strong commitment to international law in Articles 3(5) and 21 TEU has changed considerably. The first sentence in Article 3(5) TEU seems to evoke *Kadi:* 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the

[78]*See* P. Hilpold, 'EU Law and UN Law in Conflict: The *Kadi* Case', 13 *Max Planck Yearbook of United Nations Law* (2009) p. 141 at p. 182. *See also* G. De Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*', *51 Harvard International Law Journal* (2010) p. 1 at p. 23, who qualified this judgment as giving further proof of the EU's attempt to 'profess … a distinctive allegiance to international law and institutions', seeking 'to carve out a global role for itself as a normative power'.

[79]*See* Case T-315/01 *Kadi*, Court of First Instance, 21 September 2005, [2005] ECR II- 3649. *See* on this case and for the following considerations, P. Hilpold, 'UN Sanctions before the ECJ: the *Kadi* Case', in A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (Oxford University Press 2010) p. 18 at p. 53.

[80]*See* the ironic title of the contribution by D. Simon and F. Mariatte, 'Le Tribunal de premiere instance des Communautes: Professeur de droit international?', 12 *Europe* (2005) p. 6.

[81]Opinion of A.G. Poiares Maduro of 16 January 2008 in Case C-402/05 P, *Yassin Abdullah Kadi*, ECLI:EU:C:2008:11.

[82]As is well known, in the following the UN regime for individual sanctions was adapted and became more respectful of individual judicial rights. Of course, this might seem to be a narrative in an *ex post* perspective but nonetheless the results of these processes are compelling.

protection of its citizens', but the second sentence unmistakably expresses unconditional deference to international law ('strict observance and the development of international law, including respect for the principles of the United Nations Charter'). Article 21 TEU again confirms the 'respect for the principles of the United Nations Charter and international law'.

Human rights are a body of highly segmented norms with considerable regional differentiation – notwithstanding their universal applicability in principle. In this field, Europe can pride itself on being a trailblazer in the continuous process of further elaborating on new and more effective protective norms.[83] Also for the future it cannot be excluded that the EU will see itself, as in *Kadi*, as an advocate of the highest protective standards that have to be defended even against (weaker) UN standards. As to the right to self-determination, the situation is somewhat different: Especially in the area of colonial self-determination the UN has a long tradition of defending the highest standards. While the relationship between human rights and the right to self-determination is rather murky,[84] the International Court of Justice has continuously added strength to this right.[85] The International Law Commission has explicitly added self-determination to its non-exclusive list of peremptory norms.[86]

By the three judgments of 4 October 2024, the European Court of Justice sided resolutely with the people of Western Sahara and threw all its weight in on their behalf. It showed much more courage than the Advocate General and saw no need to refer the decisive questions as to the exact meaning of this right with regard to the exploitation of non-self-governing territory back to the General Court. The European Court of Justice considered itself competent to define the respective criteria on the basis of international law (albeit of unclear source),

[83] *See* B. Cali, 'Regional Protection', in D. Moeckli et al. (eds.), *International Human Rights Law*, 4th edn. (Oxford University Press 2022) p. 429 at p. 462.

[84] *See* S. Moyn and U. Özsu, 'The Historical Origins and Setting of the Friendly Relations Declaration', in J.E. Vinuales (ed.), *The UN Friendly Relations Declaration at 50* (Cambridge University Press 2020) p. 23 at p. 42 ff.

[85] For a recent account of this development *see* M.G. Kohen, 'Self-Determination: The Major Contributions of the International Court of Justice in Understanding and Applying a Fundamental Principle', in Chia-Jui Chang (ed.), *New Trends in International Law – Festschrift in Honour of Judge Hisashi Owada* (Brill/Martinus Nijhoff 2024) p. 242 at p. 264.

[86] *See* Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens) 2022, Conclusion 23, Yearbook of the International Law Commission, 2022, vol. II, Part Two. For a critical stance in this regard *see*, however, Ki-Gab Park, 'The Right to Self-Determination and Peremptory Norms', in D. Tladi (ed.), *Peremptory Norms of General International Law (Jus Cogens)* (Brill/Martinus Nijhoff 2021) p. 689 at p. 712. As to the role of the ECJ in developing the *jus cogens* theory exercised in the Western Sahara cases *see* E. Cannizzaro, 'In Defence of *Front Polisario*: The ECJ as a Global jus cogens Maker', 55 *Common Market Law Review* (2018) p. 569 at p. 588.

thereby giving expression to principles that have not been spelled out so far by any other international institution. Morocco was not authorised to conclude agreements on the use of their natural resources without clearly demonstrating that the rewards of these agreements would be proportionally attributed to the people of Western Sahara.

The European Court of Justice did not share the agnostic approach taken by the Advocate General – according to which the EU would not solve the decades-long struggle for Western Sahara – but rather continued and further developed its jurisprudence decisively, in a manner which is friendly towards the claims for self-determination of Western Sahara's people. The clarifications provided by the European Court of Justice as to what constitutes a people, the admonition that the people must be distinguished from the other inhabitants, while the latter may also be considered if resources of the respective territory are used and the extremely demanding criteria formulated for the exploitation of resources of a non-self-governing territory and the proportional participation of this territory's people as to the returns of these exploitation processes set new standards when dealing with non-self-governing territories.

The first reactions to these judgments by the EU Commission, the EU Council and some EU Member States cooperating particularly closely with Morocco had an irritated undertone and evidenced the will not to change policy.[87] Nonetheless, the intent expressed by the European Court of Justice to take the right to self-determination seriously will have unavoidable consequence that the other EU institutions cannot ignore – to the benefit of the people of Western Sahara and, in a more general setting, for international law being taken seriously.[88]

While in the past, reference to Articles 3(5) and 21 TEU have often been a mere 'rhetorical tool',[89] now the European Court of Justice seems to be prepared to add flesh to the bones of these provisions and in particular to provide substance to the affirmation that the EU also contributes to the 'development of international law'.[90]

[87] *See* European Commission, Joint Statement by President von der Leyen and High Representative/Vice-President Borrell on the European Court of Justice judgements relating to Morocco, 4 October 2024, https://neighbourhood-enlargement.ec.europa.eu/news/joint-statement-president-von-der-leyen-and-high-representativevice-president-borrell-european-court-2024-10-04_en, visited 11 September 2025.

[88] *See also* 'Editorial Comments – Taking International Law Seriously', 61 *Common Market Law Review* (2024) p. 1181 at p. 1190.

[89] *See* for this effective expression E. Cannizzaro, 'The Value of International Values', in W.T: Douma et al. (eds.), *The Evolving Nature of EU External Relations Law* (T.M.C. Asser Press 2021) p. 3 at p. 7.

[90] *See* on this issue E. Kassoti and R.A. Wessel, 'The Normative Effect of Article 3.5: The Observance and Development of International Law by the European Union', in P. García Andrade (ed.), *Interacciones entre el derecho de la Unión Europea y el derecho internacional público (Homenajes y*

By these three judgments, which have to interpreted in a broader perspective of pronouncements on the right to self-determination, the European Court of Justice has proven to be extremely '*völkerrechtsfreundlich*' (open to international law)[91] – much more so than other EU institutions and perhaps much more than '*Völkerrecht*' (international law) as interpreted by many states, itself.

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congresos) (Tirant lo Blanch 2023), p. 19 https://www.torrossa.com/en/resources/an/5453165, visited 11 September 2025.

[91] *See* Molnár and Wessel, *supra* n. 75, p. 1. On the issue of *Völkerrechtsfreundlichkeit* in the Western Sahara context *see also* E. Kassoti, 'Between *Völkerrechtsfreundlichkeit* and Realpolitik: The EU and Trade Agreements Covering Occupied Territories', 26 *Italian Yearbook of International Law* (2016) p. 139 at p. 157-166. On the issue of the ECJ's *Völkerrechtsfreundlichkeit* in general *see* J.F. Delile, 'La Cour de Justice, Promotrice de la Völkerrechtsfreundlichkeit', 57(2) *Cahiers de droit européen* (2021) p. 529 at p. 581.