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THE EUROPEAN UNION AND THE VIOLATION OF THE RIGHT TO SELF-DETERMINATION. THE CASES OF WESTERN SAHARA AND THE OCCUPIED PALESTINIAN TERRITORY

Abstract: This document analyzes the violation of the right to self-determination in the cases of Western Sahara and the Occupied Palestinian Territory, and the role of the EU in these situations. Thus, since the right to self-determination is one of the fundamental principles of international law having the EU the obligation to respect it, it is analyzed how the actions and measures taken by the EU in these conflicts have been contradictory, which could lead to a violation of international law. The lack of consistency in the application of international law by the EU erodes its credibility as a normative actor and affects its relationship with the countries of the Global South.

Keywords: Self-Determination, European Union, Palestine, Western Sahara

1. Violation of the Right to Self-determination in Western Sahara and in the Occupied Palestinian Territory

Self-determination today constitutes one of the basic principles of international law.[1] It is enshrined in the UN Charter and is part of the list of principles proclaimed last century in UNGA (UNGA) Resolution 2625 (XXV),[2] without a vote. The Resolution consecrated what were believed to be the essential principles to guarantee peace among states. It was adopted

1 Kohen, "Self-Determination', 133.

2 UNGA, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV).

at specific historical time, when new states had access to the international community. These states were seeking to find their place in a world divided by an east-west confrontation which would mark international relations in the years to come.

Given the powerful message of the decolonisation process and the extensive number of new states acceding to independence, the principle and right to self-determination became a motive in international law and international relations. The right to self-determination was recognised not only by states which did not participate in the colonisation race and which criticised it,[3] but also by the colonial states themselves, most of which were European and eventually accepted the end of colonialism.

In this context, given its importance in that precise moment in history, Resolution 2625 (XXV) included the principle of self-determination together with equal rights, stating that

> all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

This right was later developed in subsequent UNGA resolutions, among which particularly significant was Resolution 1514 (XV) on the Declaration on the granting of independence to colonial countries and peoples.[4]

The right to self-determination is a customary law.[5] It has also been recognised as a *jus cogens*[6] and an *erga omnes*[7] norm, and the legal basis

3 Fatourus, "International Law and the Third World", 784.

4 UNGA, Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, A/RES/1514(XV).

5 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, I.C.J. Advisory Opinion of 19 July 2024, para 95.

6 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, para 233; *Bernard Anbataayela Mornah v Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and Tunisia*, African Court of Human and People's Right, Application Nº 028/2018, Judgment 22 September 2022, para 298; Kohen, "Sur quelques vicissitudes du droit des peuples', 964; Sparks, *Self-Determination in the International,* 215-219; Orakhelashvili, "Legal Consequences of the Construction", 133-134; Hilpold, "'Humanizing' the Law", 204. See Conclusion 23. Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens). Yearbook of the International Law Commission, 2022, vol. II, Part Two.

7 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, p. 136, para. 156; *East Timor (Portugal v. Australia)*, Merits, ICJ judgment of 30 June 1995, I.C.J. Reports 1995, p. 90, para 29.

for the independence of colonial people. Therefore, it is important to highlight its significance and the duty of all states to respect it.

In this context, the right to self-determination played an essential role in the independence of colonial countries, but not all of them achieved it. A total of 17 territories still remain on the agenda of the Decolonization Committee of the UN,[8] including Western Sahara, a territory which has given rise to much controversy in the European Union (EU).

Western Sahara's right to self-determination was not only recognised with its inclusion in the above-mentioned list,[9] but also by the International Court of Justice (ICJ) in its 1975 Advisory Opinion on *Western Sahara*,[10] in which the Court affirmed the 'application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory'.[11]

Western Sahara, however, has not only become a case of a people waiting for self-determination, but also one of occupation, in which the Occupying Power is now the major actor preventing the Saharawi people from exercising self-determination. The occupation began in October 1975 with the Green March, an unarmed civilian march launched by the King of Morocco, which penetrated Western Sahara land and ultimately forced Spain to abandon the territory.[12] At the same time, Mauritania occupied part of the territory, though it withdrew in 1979, that part of the territory being occupied by Morocco.[13] Morocco has since been the sole Occupying Power to this day.

Morocco's occupation seems unquestionable today. On the very day of the march, that is, on 6 November, the UN Security Council (UNSC) called 'upon Morocco immediately to withdraw from the Territory of Western Sahara all the participants in the march'.[14] Morocco proceeded to withdraw

8 See https://www.un.org/dppa/decolonization/en/nsgt

9 UNGA, 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, Document A/5446/REV.l*.

10 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding UNSC Resolution 276 (1970)*, ICJ Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16.

11 Ibidem, para. 162.

12 Weiner, "The Green March", 1; Saul, "The status of Western Sahara as occupied", 305-307.

13 UNGA, Resolution 34/37, Question of Western Sahara, para. 5; Soroeta, "The Conflict in Western Sahara", 195.

14 SC Resolution 380 (1975).

its civilians in November 1975 following the Madrid Agreement,[15] yet the Moroccan forces had begun to take over posts in the territory some days before at the end of October.[16] Later, on 21 November 1979, the UNGA adopted its resolution 34/37 in which it established that it '(d)eeply deplores the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco and the extension of that occupation to the territory recently evacuated by Mauritania' and '(u)rges Morocco to join in the peace process and to terminate the occupation of the Territory of Western Sahara'. This call was repeated a year later in resolution 35/19, also confirming the 'inalienable right of the people of Western Sahara to self-determination and independence'.

In addition, the occupation has been confirmed by the African Commission on Human and Peoples' Rights,[17] and recently by the African Court of Human and People's Rights. In its judgement of September 2022,[18] despite considering that Morocco's conduct in the Sahrawi Arab Democratic Republic (SADR) was not subject to the Court's determination, the Court recognised that 'the people of the SADR have been deprived of their right to self-determination as a result of the continued occupation of part of its territory by Morocco',[19] thus confirming the link between the violation of the right to self-determination and Morocco's occupation.

Territorial occupation by foreign forces represents one of the situations in which the people have a right to self-determination, and it is not necessary to be a non-self-governing territory or colony, as in the case of Western Sahara. This is confirmed by Resolution 2625 (XXV), according to which the 'subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle'.

This statement has also led the Palestinian people to be regarded as holder of the right to self-determination, as recognised by the UNGA in numerous resolutions[20] and confirmed twice by the ICJ. In the first case, in its

15 Declaration of principles on Western Sahara. Made in Madrid on 14 November 1975, UNTS Vol. 988, 1-14450, p. 258.

16 Saul, "The status of Western Sahara as occupied", 306.

17 Resolution on the situation in the Sahrawi Arab Democratic Republic - ACHPR/Res.282(LV)2014.

18 Bernard Anbataayela Mornah v Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and Tunisia, African Court of Human Rights and People, Judgment 22 September 2022.

19 Ibidem, para. 300.

20 UNGA Resolution 3236 (XXIX), Question of Palestine, 22 November 1974; UNGA Resolution 66/146, The right of the Palestinian people to self-determination, 19 December 2012.

2004 Advisory Opinion on the Wall, the Court considered that the existence of the 'Palestinian people' was not an issue anymore, and that those people held the right to self-determination.[21] This was confirmed by the 2024 Advisory Opinion on Legal Consequences,[22] in which the Court developed its arguments on the right to self-determination of the Palestinian people.[23]

As mentioned above, the Palestinian people's right to self-determination arises from the occupation of the territory, in this case, by Israel. Israel has been designated as Occupying Power even more clearly than in the case of Morocco, since references and declarations can be found to this effect in multiple documents. The UN SC resolutions have referred to Israel as an Occupying Power on numerous occasions.[24] So has the UNGA.[25] It has also been confirmed by the ICJ in both Advisory Opinions referred to above. In the *Wall* case, the Court referred to the territories situated between the Green Line (the armistice demarcation lines agreed between Israel and Jordan in 1949) and Palestine's former eastern boundary under the British Mandate, as territories occupied by Israel in 1967, declaring that Israel has the status of Occupying Power.[26]

The question of Israel as Occupying Power was the thread that ran through the 2024 Advisory Opinion, since such a qualification allowed establishing Israel's obligations towards the Palestinian people. In this case, the Court referred to its previous Advisory Opinion on the Wall to confirm Israel as an Occupying Power in the territories mentioned in that Opinion. It also analysed the Occupying Power status in the Gaza strip, which as the Court recognised, was occupied in 1967, placing the Gaza strip under the effective control of Israel.[27] However, questions were raised regarding the withdrawal of Israeli forces from the Gaza Strip in 2005, leading the Court to specify the concept of occupation.

21 ICJ Advisory Opinion of 19 July 2024, para 118.

22 ICJ Advisory Opinion of 9 July 2004, para 230.

23 Ibidem, paras. 230-243.

24 Among others UN SC Resolution 446 (1979); UN SC Resolution 468 (1980); UN SC Resolution 605 (1978); UN SC Resolution 672 (1990); UN SC Resolution 904 (1994); UN SC Resolution 1322 (2000); UN SC Resolution 1544 (2004); UN SC Resolution 2334 (2016).

25 Among others UN UNGA Resolution ES-10/14 (2003); UN UNGA Resolution 59/124 (2004); UN UNGA Resolution ES-10/16 (2004); UN UNGA Resolution ES-10/19 (2017); UN UNGA Resolution 77/247 (2022).

26 ICJ Advisory Opinion of 9 July 2004, para 78.

27 ICJ Advisory Opinion of 19 July 2024, para 88.

According to the Court, a state has effective control over a territory when it 'might be in a position to maintain that control and to continue exercising its authority despite the absence of a physical military presence on the ground'.[28] Therefore, the decisive element to determine the occupation of the territory is not military presence, 'but rather whether its authority 'has been established and can be exercised'.[29] In this regard, the Court concluded that Israel still had authority over the Gaza Strip given its control over 'the land, sea and air borders, restrictions on movement of people and goods, collection of import and export taxes, and military control over the buffer zone'.[30] The Court clarified that this control had even intensified since 7 October 2023.

Given this situation, the next step would be to determine whether Israel's confirmed occupation of the territory impeded the Palestinian people from exercising their right to self-determination.

One could refer to many works conducted by a range of scholars[31] to unravel how Israel's occupation and policies in the occupied territories prevents the Palestinian people from exercising their right to self-determination. However, the Court's two Advisory Opinions offer perhaps the most authoritative analyses.

In the *Wall* case, the Court confirmed that the construction of the Wall and the measures previously taken for that construction impeded the Palestinian people from exercising their right to self-determination.[32] In this regard, the Court considers that the route of the Wall tends to alter the occupied territories' demographic composition: indeed, because the population is restricted in their movements, they are deprived of the freedom to choose their place of residence as well as of the right to work, and to an adequate standard of living, health, and education.[33]

However, the clearest statement regarding the Occupying Power's practices in the territories and how they prevent the exercise of self-determination was provided by the 2024 Advisory Opinion. The Court analysed Israel's different policies in the Occupied Palestinian Territory,

28 Ibidem, para. 91

29 Ibidem, para. 92.

30 Ibidem, para 93.

31 Farsakh, "The Struggle for –Self-Determination"; Imseis, "Negotiating illegal"; Kassoti, "Between Völkerrechtsfreundlichkeit and Realpolitik"; Scobbie, "Unchart(er)ed Waters?"; Waelbroeck, "Israel's occupation of Palestine and EU reaction".

32 ICJ Advisory Opinion of 9 July 2004, para. 122.

33 Ibidem, paras. 133-134.

and concluded that the settlement policies led to the territory's annexation, which violates the territorial integrity of the Occupied Palestinian Territory, affecting the exercise of self-determination.[34] In addition, the Court refers to the Israeli policies that led to the departure of people, such as the settlement policy, as well as the legislation and to the measures that discriminate against Palestinians. According to the Court, the latter also affects their integrity as a people, impeding the right to self-determination.[35] The next element analysed by the Court is natural resource exploitation, a significant right of the people,[36] which in this case was breached by Israel through the exploitation of the natural resources to its own benefit and to that of the settlers. Finally, the Court analyses the Palestinian people's right to determine its political status and to pursue its economic, social, and cultural development[37] included in Resolutions 1514 (XV) and 2625 (XXV). According to the Court, this right has been violated due to the Palestinian people's dependence on Israel for the provision of basic goods and services, affecting essential human rights and therefore amounting to a violation of the right to self-determination.

In summary, following the 2024 advisory opinion, there is no doubt that as an Occupying Power, Israel has prevented the Palestinian people from exercising their right to self-determination, violating its obligations under international law. Indeed, as the Court stated, 'Israel as the occupying Power, has the obligation not to impede the Palestinian people from exercising its right to self-determination, including its right to an independent and sovereign State, over the entirety of the Occupied Palestinian Territory'.[38]

It can therefore be concluded that in both cases, whether in Western Sahara or in the Occupied Palestine Territory, the Occupying Powers have breached their obligation to respect the right to self-determination, which is an *erga omnes* obligation.[39] This right has also created obligations for third states, among them, the European Union member states, but also obligations for the EU itself, as analysed in the next section.

34 ICJ Advisory Opinion of 19 July 2024, para 238 and 243. See also Waelbroeck, "Israel's occupation of Palestine an EU reaction", 190-199.

35 ICJ Advisory Opinion of 19 July 2024, para 239.

36 UNGA Resolution 1803 (XVII), Permanent sovereignty over natural resources, 14 December 1962.

37 ICJ Advisory Opinion of 19 July 2024, paras 241-242.

38 ICJ Advisory Opinion of 19 July 2024, para. 237.

39 ICJ Advisory Opinion of 9 July 2004, para 155.

2. The European Union and the Duty to Respect International Law

The European Union's relationship with international law has been the object of extensive analyses and case-law by the Court of Justice of the European Union (CJEU) – despite the fact that the duty to respect international law should, at first sight, be clear. The following major questions, however, can be advanced: By which norms is the European Union bound? How are these norms incorporated into the European Union legal system? And what are their effects?

The European treaties refer to international law, and the basis from which to infer the EU obligation to respect international law is found in Articles 3 and 21 TEU. Article 3 TEU establishes that in its relationship with the world, the EU 'shall contribute the strict observance and the development of international law, including respect for the principles of the UN Charter'. Therefore, one can infer that if the EU must contribute to the observance of international law, the EU itself is bound to observe international law.[40]

However, further references to international law can be found in Article 21 TEU: the first is a recognition of the respect of the principles of the UN Charter and international law, as it is among the principles 'which have inspired its own creation, development and enlargement'. The TEU thus seems to be establishing the respect of international law as a constitutional principle of the EU.[41] In addition, following the path of Article 3(5) TEU, Article 21(2) (b) TEU establishes the EU's external action to 'consolidate and support' international law principles as a goal. These references end with a full recognition of the duty to respect international law in Article 21(3), when it declares that the 'Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2', among which we find the principles of the UN Charter and international law.

The fact that the EU is bound by international law has been recognised by the European Court of Justice ever since the issue arose. In one of the first judgements on the matter in 1992, the Poulsen and Diva Navigation Corp.,[42] the Court declared that the European Community must respect international law without referring in any way to treaties. Therefore, we can infer that

40 C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, EU:C:2011:864, para. 101.

41 Van Vooren and Wessel, *EU External Relations Law*, 232.

42 C-286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, ECLI:EU:C:1992:453.

the Court understood that the respect of international law was an obligation for the organisation as a subject of internal law[43] and as a member of the international community: the Court did not need any specific treaty article to reach this conclusion, it was considered a matter of fact. The same process was followed by the Court in the Opel Austria case,[44] as it declared that the Community was bound by international law without any reference to the treaties. The situation changed in Racke: the Court referred to its previous case law to substantiate the Community's obligation to respect international law. This obligation was finally linked with the treaties in the Air Transport case, where it relied in Article 3(5) TEU to establish that the EU was bound by international law.[45]

It is worth noting in this regard that the right to self-determination is a customary norm, therefore, when the EU treaties and the Court refer to international law, it also includes customary international law – and needless to say, the same applies to *jus cogens* norms.

The issue of the EU being bound by customary law has been the object of some of the above-mentioned case-law. In Racke, the Court concluded that since the EU must respect international law, it is required to comply with the 'rules of customary international law when adopting a regulation',[46] and also, that customary law is 'binding upon the Community institutions and form part of the Community legal order'.[47] The CJEU clearly considers that international law not only includes international agreements as a source of obligation but also customary law. In the same vein, in the Air Transport case, the Court confirmed that customary law is part of the international law to which the EU is bound according to Article 3(5) TEU.[48]

The references to international law in the treaties and in case-law, together with the concept of the EU as a normative power have led to speaking

43 Gianelli, "Customary international law", 94.

44 T-115/94 (92), *Opel Austria GmbH v Council of the European Union*, ECLI:EU:T:1997:3.

45 C-366/10, *Air Transport*, para. 101. Recently the Court has again confirmed that 'the European Union is bound, in accordance with settled case-law, when exercising its powers, to observe international law in its entirety, including the rules and principles of general and customary international law, as well as the provisions of international conventions that are binding on it'. C-779/21 P and C-799/21 P, *Comisión/Front Polisario*, ECLI:EU:C:2024:833, para 173.

46 C-162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz*, ECLI:EU:C:1998:293, para 45.

47 Ibidem, para 46. In any case according to Van Vooren and Wessel, not all international norms can be an integral part of the EU legal order. Van Vooren and Wessel, *EU External Relations Law*, 221.

48 C-366/10, *Air Transport*, para 101.

of an 'open attitude towards rules of international law'.[49] However, it is necessary to note that the incorporation of international law into the EU legal system and its effects present some particularities, which can sometimes engender an opposition between EU law and international law.

In this regard, the Court has affirmed that customary law must be respected when adopting secondary law: not only in cases in which the EU is required to implement that customary law, but also regarding the adoption of any EU normative act.[50] In addition, the respect of customary law also entails interpreting EU law in the light of customary law.[51] In Poulsen and Diva Navigation Corp., the Court confirmed this consistent interpretation regarding customary law when it stated that the regulation at stake must be interpreted according to the relevant rules of international law of the sea, which also included customary international maritime law.[52]

Once this obligation has been determined, the question arises as to its effects, that is: Can a secondary legislation be annulled for not being in conformity with customary law? The Court has confirmed such a possibility, but given that customary law does not present the same degree of precision as treaties, the Court opted to declare that in those cases, the EU made a manifest error of assessment in applying those principles.[53] As Van Vooren and Wessel specified: 'because customary law is often less precise, it is more difficult to apply it in detail'.[54] The CJEU's difficulties in applying customary law can also be observed in how the Court has finally chosen to apply enforceable treaty rights, rather than customary law, whose invocation by individuals before the CJEU has been the object of uncertainty.[55] This aligns with the 'Court's reluctance/hesitation to grant direct effect to rules of customary international law'.[56]

However, the most controversial situation regarding the relationship between international law and EU law arose in the Kadi case,[57] when

49 Kassoti, "Between Völkerrechtsfreundlichkeit and Realpolitik", 139.

50 Gianelli, "Customary international law", 101.

51 Beaucillon, "Setting the Multiple Functions", 232.

52 C-286/90, *Poulsen and Diva Navigation Corp*, paras 9-10.

53 C-366/10, *Air Transport*, para 110; C-162/96, *Racke*, para 56.

54 Van Vooren and Wessel, *EU External Relations Law*, 228.

55 Kuijper, "Customary International Law", 94. Kuijper refers to the Opel Austria case in which the Court shifted 'from the good faith of the Community in the period between signature and the entry into force to the principle of legitimate expectations of the economic operators'.

56 Ibidem, 104.

57 C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461.

the Court refused to apply international law contrary to the EU's fundamental principles. This saga generated a vigorous debate. The connection made by Gianelli between the EU's constitutional principle to respect international law and other EU constitutional principles is of particular relevance here. According to Gianelli, in case of conflict between different EU constitutional principles, the most essential principle, or that underlying EU's very foundations should be applied.[58]

This conclusion is of special interest in our case given the fundamental nature of the principle of self-determination, also considered a *jus cogens* norm and an international human right.[59] Therefore, if the respect of international law is part of the EU law constitutional principles, and international law is part of the EU legal system, the specific nature of the right to self-determination may suggest that it is one of the most fundamental EU principles. The consequence would be that the EU is bound by the obligation to respect the right to self-determination when adopting EU legislation, when interpreting EU law, as well as in its relations with third parties. It must also give it precedence over other secondary law.

3. The European Union's Violation of its Obligations Regarding the Principle of Self-determination Based on its Relationship with the Occupying Powers

The right of people to self-determination has an *erga omnes* and *jus cogens* character, as mentioned previously. Therefore, it concerns all states, all of them having an interest in its protection, and all having the obligation to respect it. In addition, Resolution 2625 (XXV) established the duty of the states to promote self-determination and to render assistance to the UN to implement it.

The states' obligation regarding the right to self-determination was clarified and confirmed by the ICJ in the *Wall* case referred to, in which the Court declared the obligation to respect the right of people to self-determination and not to provide aid or assistance in maintaining a situation of violation of the right to self-determination. The Court used the same wording as Article 41 of the Articles of Responsibility of States for International

58 Gianelli, "Customary international law", 106. In any case, this did not solve the issue of the possible international responsibility of the EU.

59 Maccorquodale, "Self-Determination: A Human Rights"; See also Hofbauer, "Sovereignty in the Exercise"; Raic, "Statehood and the Law".

Wrongful Acts (ARSIWA)[60] referring to the violation of peremptory norms. However, the Court employed even stronger terms than the ARSIWA and stated that 'it is also for all States (...) to see to it that any impediment, (...) to the exercise by the Palestinian people of its right to self-determination is brought to an end'.[61]

As laid out in the previous section, the EU has the duty to respect international law, including customary law. In this regard, even though Resolution 2625 (XXV) and the Court refer to the states' obligation, there is no doubt that the right to self-determination and the obligations derived from it constitute fundamental norms of international law to which the EU is also bound.[62] However, the EU's practice regarding the respect of the right to self-determination, and the obligation to abstain from rendering aid or assistance in case of violation, seems to be inconsistent in the case of Western Sahara and the Occupied Palestinian Territory.

3.1. Western Sahara and the European Union's 'Close' Relationship with Morocco

The EU's approach to the Western Sahara question can be described as heeling one of the parties, in this case, the Occupying Power. The EU's position in relation to the Sahrawi people's right to self-determination has evolved from supporting a referendum in 1999[63], to backing a 'political process with the aim to achieve a just, lasting and mutually acceptable political solution, which will provide for self-determination'[64], without any reference to a referendum and following the path of the SC resolutions.[65] In this regard, it is necessary to remember that UNGA Resolution 1541 (XV)[66]

60 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1, November 2001.

61 ICJ Advisory Opinion of 19 July 2024, para. 159.

62 As the CJEU stated regarding the EU-Morocco relations: 'the right to self-determination constituted a legally enforceable right *erga omnes* and one of the essential principles of international law and that, as such, it formed part of the rules of international law applicable to relations between the European Union and the Kingdom of Morocco, which the EU Courts were required to take into account'. C-779/21 P and C-799/21 P, *Front Polisario*, para 170.

63 Declaration by the Presidency on behalf of the European Union on Western Sahara. Council Press Release 63/99 (9402/99, Presse 199), 21 June 1999.

64 EEAS, UNGA 77-Fourth Committee: EU explanation on position of Western Sahara Resolution, 04 October 2022.

65 The latest UN SC Resolution 2703 (2023).

66 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 73 e

established that among the self-government exercise options of non-self-governing territories, free association and integration should be preceded by an express will of the people based on an informed and democratic process.

This EU's elusive position regarding how the Saharawi people should exercise the right to self-determination, together with its heeling position towards Morocco, could also be observed after the Spanish Government sent a letter to the King of Morocco in March 2022. In that letter, the Government of Spain declared that 'Spain considers the Moroccan proposal for autonomy presented in 2007 as the most serious, credible and realistic basis for the resolution of this difference'.[67] When asking the EU spokesperson for Foreign Affairs and Security Policy about the Spanish Government's position shift, she stated that 'the European Union welcomes any positive development... between its member states and Morocco in their bilateral relations, which can only be beneficial for the implementation of the Euro-Moroccan partnership'.[68] Therefore, the EU supports the strategies that may entail a rapprochement with Morocco without taking into consideration the opinion and position of the other party in the conflict, or international law. In this regard, the CJEU recently referred to a specific EU obligation regarding the non-self-governing territories when it stated that the EU must

> ensure that such an agreement is compatible with the principle, derived from Article 73 of the Charter of the UN and enshrined in customary international law, that the interests of the peoples of non-self-governing territories are paramount. It thus contributes 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 UN and of international law.[69]

The issue of this practice of ignoring the Saharawi people's position and interests was finally addressed to the CJEU through different cases. In the first, in 2012,[70] the General Court upheld one of the Front Polisario's allegations regarding the possible application of the Liberalisation and Association

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of the Charter, 15 December 1960.

67 González , La carta de Pedro Sánchez a Mohamed VI: "Debemos construir una nueva relación que evite futuras crisis".

68 Reuters, "EU welcomes Spain's shift on Western Sahara, backs UN efforts".

69 C-779/21 P and C-799/21 P, *Front Polisario*, para 154.

70 T-512/12, *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union*, ECLI:EU:T:2015:953.

agreements in Western Sahara as an international law violation. However, it was later dismissed by the Grand Chamber on the basis of a lack of standing of the Front Polisario because according to international law, the agreements could not be applied in Western Sahara territory,[71] and therefore, the Front Polisario had no direct and individual concern to institute proceedings.

Later, in 2018, after the General Court confirmed that the implementation of the Association Agreement in the Western Sahara territory had to receive the consent of the Western Sahara people,[72] the Commission released two proposals based on the Council's decision to modify the Association Agreement, in an attempt to extend the agreement to the 'products originating in Western Sahara and subject to controls by the Moroccan customs authorities'.[73] In these proposals, the Commission included a report on the benefits of the agreement for the people of Western Sahara, as well as a consultation process for the 'people concerned' by the agreement, this consultation being rejected by the Front Polisario.[74] The Council decision on the Association agreement[75] and the Council Regulation of Fisheries Partnership Agreement[76] were again challenged by the Front Polisario, the General Court upheld the allegations.[77] In the same vein, on 4 October

71 C-104/16P, *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, ECLI:EU:C:2016:973, paras.130-133. This decision has been object of many critics due to the Court's particular interpretation and application of international law. See. Soroeta, "The Conflict in Western Sahara", 213-214; Kassoti, "Between *Sollen* and *Sein*", 377-383; Kassoti, "The EU and Western Sahara", 757-768; Hilpold, "Self-Determination at the European Courts".

72 C-104/16P, *Front Polisario*, para. 106.

73 Arazova and Berkes, "The Commission's Proposals to Correct EU-Morocco Relations".

74 Commission Staff Working Document Report on benefits for the people of Western Sahara and public consultation on extending tariff preferences to products from Western Sahara Accompanying the document Proposal for a Council decision on the conclusion of an agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco on amending Protocols 1 and 4 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, SWD/2018/346 final/2, p. 31.

75 Council Decision (EU) 2019/441 of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement (OJ 2019 L 77, p. 4),

76 Council Regulation (EU) 2019/440 of 29 November 2018 on the allocation of fishing opportunities under the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco and the Implementation Protocol thereto, OJ L 77, 20/03/2019.

77 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*, ECLI:EU:T:2021:639; T 344/19 y T 356/19, *Front populaire*

2024, the Grand Chamber[78] also upheld the Front Polisario's allegations. In this case, the CJEU stated that the consultation of the 'people concerned' could not be considered as a consultation of the Western Sahara people allowing to determine the validity of the agreement according to international law.[79] In addition, the Court recognised that the consent could be granted implicitly, but in the case of peoples of non-self-governing territories, the Court links that possibility with some requirements closely related to the principle of self-determination and the rights of these peoples to their natural resources:

> 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. 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 that 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 in question under that agreement is in fact received by that people.[80]

It is in the analysis of these requirements that the Court makes it clear that the agreements with Morocco do not contain any benefit for the Western Sahara people, and therefore consent cannot be presumed.[81] From this

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pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario) v Council of the European Union, ECLI:EU:T:2021:640.

78 C-779/21 P and C-799/21 P, *Front Polisario*; C-778/21 P, C-798/21 P, *Commission v Front Polisario*, ECLI:EU:C:2024:833.

79 C-779/21 P and C-799/21 P, *Front Polisario*, para 130.

80 C-778/21 P, C-798/21 P, *Commission v Front Polisario*, ECLI:EU:C:2024:833, para 181-182; C-779/21 P and C-799/21 P, *Front Polisario*, para 153-154. These requirements can be linked with the Hans Corell Report on the legality of exploiting natural resources in Western Sahara, which confirmed the 'inalienable rights of the peoples of Non-Self- Governing Territories to the natural resources in their territories' and referred to the UNGA's condemnation of 'the exploitation and plundering of natural resources and any economic activities which are detrimental to the interests of the peoples of those Territories and deprive them of their legitimate rights over their natural resources'. Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the SC. S/2002/161.

81 C-779/21 P and C-799/21 P, *Front Polisario*, para 158-160; C-778/21 P, C-798/21 P, *Commission v Front Polisario*, para 186-192.

finding of the Court it could be also possible to infer the requirements that any agreement between the EU and Morocco should meet in order to respect the principle of self-determination, since it must be noted that the Court and its case law 'did not entirely rule out the possibility that an agreement between the EU and the Kingdom of Morocco might lawfully apply to Western Sahara'.[82]

The 2024 judgement was rendered together with the Grand Chamber judgement on Confédération paysanne,[83] in which the Court ruled that according to the Labelling Regulation,[84] products originating in Western Sahara must be labelled as originating in that territory. The Court followed its own case law with regards to the Western Sahara territory as a separate territory from the Kingdom of Morocco.

Both judgements dealt a huge blow to the EU's commercial relationships with Morocco and the products originating in Western Sahara. They also demonstrated how the Council and the Commission disregarded their mandate of fulfilling international law.

In the Front Polisario's later proceeding before the General Court, the Commission seemed to refer in its statement of intervention to the necessity of maintaining a neutral position between the two parties, since there was a 'conflict of legitimacy' between the Kingdom of Morocco and the applicant as regards the right to represent that territory and its population'.[85] They were clearly referring to the application of the agreement on Western Sahara and on the territory occupied by Morocco, so the Commission was maintaining a neutral position between the Occupying Power and those suffering occupation, which, according to international law, could be contrary to its

82 T-279/19, *Front Polisario v Council of the European Union*, para 305.

83 C-399/22, *Confédération paysanne (and tomates du Sahara occidental)*, ECLI:EU:C:2024:839.

84 Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 Text with EEA relevance, OJ L 304, 22.11.2011.

85 T-279/19, *Front Polisario*, para 203. Front Polisario has been recognised as representative of the Saharawi People by UNGA Resolution 34/37 (1979) and UNGA Resolution 35/19 (1980). In addition, Front Polisario represents the SADR at the Organization of the African Union. See *Bernard Anbataayela Mornah v Benin*, Judgment 22 September 2022, para. 312. The CJEU has also established that Front Polisario 'is therefore recognised internationally as a representative of the people of Western Sahara'. T344/19 y T356/19, *Front Polisario v Council of the European Union*.

obligations. In this regard, according to Resolution 2625 (XXV), the states have 'the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter'. Therefore, it is necessary to take the side of those who have the right to self-determination.

However, this violation of its international obligations can be considered to be further supported by the Court's Advisory Opinion in the Wall case, and Article 42(2) of the Draft Articles on the Responsibility of International Organizations (DARIO)[86] regarding the obligation of not rendering aid or assistance to those breaching a peremptory norm, in this case, to those impeding the right to self-determination. In this regard, the European Union's ongoing attempts to negotiate an agreement applicable to Western Sahara, as well as the application of former agreements in the territory[87] can be understood as providing support and assistance to Morocco to maintain the situation.[88]

To start with, regarding the Fisheries Agreement, Morocco had received and was planning to receive an important financial contribution from the EU, which could not only be used to establish its presence in the territory, but also as an important incentive to perpetuate the illegal situation. In the case of the Association Agreement and the tariff preferences attributed to products originating in Western Sahara, the report of the European External Action Service (EEAS) and the Commission stated that it could benefit the Western Sahara population,[89] without specifying whether they were referring to the Sahrawi people. In fact, it has been stated that most of the companies in charge of exploiting the natural resources are in the hands of Moroccan settlers.[90] Therefore, the benefits of that agreement would contribute to maintaining the presence of settlers to the detriment of the Saharawi people. As the Grand Chamber confirmed, 'it is the Kingdom of Morocco, as a party

86 International Law Commission, Draft articles on the responsibility of international organizations. Yearbook of the International Law Commission, 2011, vol. II, Part Two.

87 T-279/19, *Front Polisario*, para. 178. Van Elsuwege, "The EU and non-Recognized", 123; Villani, "La Cour de justice de l'Unione européene", 1017; Kassoti, "Between Völkerrechtsfreundlichkeit and Realpolitik", 157-158.

88 Kassoti, "Between Völkerrechtsfreundlichkeit and Realpolitik", 164; Van Elsuwege, "The EU and non-Recognized", 123; Lavati refers to the legitimation of the occupation. Lavati, "Western Sahara, Morocco, and the EU".

89 Commission Staff Working Document Report, 2018, p. 32.

90 Smith, "The taking of the Sahara"; Shelley, "Natural resources and the Western Sahara"; Allan, "Natural resources and intifada".

to the agreement at issue, which is the beneficiary of the tariff preferences granted by the European Union to products originating in Western Sahara under that agreement'.[91] This would also contribute to supporting the presence of Morocco in the territory, as well as continuing to hinder a referendum which would allow the Saharawi people to correctly exercise their right to self-determination.

Though the EU has always stated that it does not recognise Morocco's sovereignty over the territory,[92] it is aware of Morocco's position with regard to Western Sahara, considering it as part of its territory.[93] This is relevant because the EU has negotiated agreements to implement in a territory, Western Sahara, which the Occupying Power regards as part of its territory, and which do not contain an express reference to its exclusion. This situation may bring the EU closer to a recognition of a '*fait accompli*', and therefore an indirect recognition of the situation as legal, contrary to Article 42(2) DARIO and the ICJ's Advisory Opinion. In addition, the EU has recognised the false legal status of '*de facto*' administrative power,[94] in order to give some sort of legitimacy and legality to its negotiation with Morocco over Western Sahara's natural resources.

3.2. European Union Trade with the Occupied Palestinian Territory

If we compare the EU's approaches to Western Sahara and to the Occupied Palestinian Territory, differences and double standards become plain to see, starting with the recognition of the occupation. Indeed, the EU does not refer

91 C-779/21 P and C-799/21 P, *Front Polisario*, para. 159.

92 Van Elsuwege, "The EU and non-Recognized", 117.

93 Kassoti, "Between Völkerrechtsfreundlichkeit and Realpolitik", 164-165.

94 European Parliament, Legal Service, Protocol of the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the partnership agreement in force between two parties (2013/0315 (NLE). 4 November 2013. C-779/21 P and C-799/21 P, Opinion of Advocate General Capeta, paras 179-185; Commission Staff Working Document Report, 2018, p. 6. Spain withdrew from Sahara in 1976 and communicated to UN that: 'Spain considers itself henceforth exempt from any responsibility of an international nature in connection with the administration of the said Territory, in view of the cessation of its participation in the temporary administration established for the Territory'. Letter dated 26 February 1976 from the Representative of Spain to the Secretary-General, A/31/56. UN has never recognised Morocco as administrating power. In addition, the concept of 'de facto' administering power has no legal grounds or recognition, and the legal position of Morocco in the territory would be that of occupying power.

to Western Sahara as occupied territories as it does in the case of the Palestine territories.

Yet a major difference stems from that recognition, that is, the treatment of products originating in the Occupied Palestinian Territory. The Brita case, regarding the application of the EU-Israel Association Agreement[95] to products from Israeli settlements in the Occupied Palestinian Territory, can be regarded as the beginning[96] of a true EU policy control over those products. In the said judgment, the Court concluded that since the EU already had an Association Agreement with the Palestine Liberation Organization, accepting those products as Israeli would imply imposing on the Palestinian authorities 'an obligation to refrain from exercising the competence conferred upon them'.[97] In fact, the recognition of the Palestine Liberation Organization as representative of the Palestinian people, and the mentioned Association Agreement with that Organization, would allow us to infer a clear support to the Palestinian people's right to self-determination, but without any practical effect.

As has been stated, the Brita case led to a series of EU acts, mainly notices and reports,[98] which eventually led to the labelling system applicable today to products from the Occupied Palestinian Territory, and which concluded with the *Organisation Juive* case.[99]

This case refers to the application of the Labelling Regulation[100] to the products originating in the Golan Heights, East Jerusalem, and the West Bank since, according to Article 3 of the Regulation, consumers must be allowed 'to make informed choices and to make safe use of food, with particular regard to health, economic, environmental, social and ethical considerations'. The Court concluded that since Israel is present in those territories as an Occupying Power, the products originating in those territories

95 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, signed in Brussels on 20 November 1995 (OJ 2000 L 147).

96 In 2005 the EU and Israel adopted a technical arrangement on certificate of origin, and the Commission issued a notice to importers stating that the certificate must include: city, village or industry zone. In practice, however, they merely included 'originate in Israel'. Kassoti, "Between Völkerrechtsfreundlichkeit and Realpolitik", 154.

97 C-386/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, ECLI:EU:C:2010:91, para. 52. Cardweel, "The application of EU International Agreements", 611.

98 Kassoti, "Between Völkerrechtsfreundlichkeit and Realpolitik", 154-156.

99 C-363/18, *Organisation juive européenne and Vignoble Psagot*, ECLI:EU:C:2019:954.

100 Regulation (EU) No 1169/2011.

must have a label indicating their geographic origin.[101] In addition, it must be indicated that those products came from Israeli settlements[102] because, otherwise, 'consumers could be led to believe that it comes, in the case of the West Bank, from a Palestinian producer or, in the case of the Golan Heights, from a Syrian producer'.[103] In this regard,

> the fact that a foodstuff 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, particularly since some of those rules constitute fundamental rules of international law.[104]

The difference in treatment given to products originating in the Occupied Palestinian Territory and those in Western Sahara is clear,[105] even though the situation may change regarding Western Sahara products in application of the 2024 CJEU judgement. However, the labelling of products from the Occupied Palestinian Territory does not mean those products are banned, and the question is whether importing products from those territories and trading with settlers would entail a violation of the principle of self-determination.

In its 2024 Advisory Opinion mentioned above, the ICJ elaborates on the Israelis' various practices in the Occupied Palestinian Territory and East Jerusalem. It focuses on the prolonged occupation, the settlement policy, the annexation of territory, as well as discriminatory legislation and measures. The Court concluded that those policies affect the elements of the right to self-determination, namely: territorial integrity; the 'protection against acts aimed at dispersing the population and undermining its integrity as a people'; the sovereignty over natural resources; and the 'right to freely

101 C-363/18, *Organisation juive*, paras. 37-38
102 Ibidem, paras. 57-58.
103 Ibidem, para. 49.
104 Ibidem, para. 56.
105 'Trade preferences for agricultural goods originating in Morocco have been extended to those originating in Western Sahara in accordance with Council Decision (EU) 2019/217 on the conclusion of the Agreement in the form of an Exchange of Letters between the EU and Morocco. Products originating in Western Sahara are granted the same preferential tariff treatment as those under the EU-Morocco Association Agreement.' Parliamentary question – E-003151/2021(ASW), Answer given by Mr Wojciechowski on behalf of the European Commission, 13.09.2021.

determine its political status and to pursue its economic, social and cultural development'.[106]

The settlement policy plays a special role across all practices referred to by the Court, as can be observed in the Court's attention to different measures related to that policy, such as the transfer of the civilian population, land confiscation, the exploitation of natural resources, the extension of Israel law, the forced displacement of Palestinians, and the violence against Palestinians. In addition, the settlement policy not only directly affects the exercise of self-determination, because it contributes to the annexation of the territory,[107] but also serves to justify the implementation of other practices, i.e., the illegal exploitation of natural resources, prioritising the settlements' water supply[108] because of that population's needs.[109]

The Court concluded that the settlement policy together with the other practices and policies violate international law, and 'are in breach of Israel's obligation to respect the right of Palestinian people to self-determination'.[110] However, the essential role the settlement policy plays in the violation of international law and the right to self-determination is highlighted when the Court establishes the states' obligations to guarantee the respect of international law.

According to the Court, the states have the obligation to distinguish between Israel and the Occupied Territories, which the EU is already doing[111] – but the Court goes further. To guarantee that distinction, the Court establishes the obligation to abstain from treaty relations with Israel in cases in which the State purports to act on behalf of the Occupied Palestinian territory. However, the most important obligation affecting the European Union is that of abstaining '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 'prevent trade or investment relations to assist in the maintenance of the illegal situation'.[112] Thus, the states' obligation does not entail merely the general

106 ICJ Advisory Opinion of 19 July 2024, paras. 237-243.
107 Ibidem, para. 173.
108 Ibidem, para. 128.
109 Ibidem, para. 133.
110 Ibidem, para. 243.
111 Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967, OJ C 374/4, 12.11.2015.
112 ICJ Advisory Opinion of 19 July 2024, para. 76. On trading with occupied territories, see Moerenhout, "The Obligation to Withhold".

obligation to not recognise or render assistance: the Court addresses the question of avoiding trade relations with the Occupied Territories, and therefore, with the settlers.

The 2024 Report of the Directorate for Trade of the European Commission confirms the trade relations with the Occupied Palestinian Territories. Even though imports from previous years have slightly declined and account for 23 million euros, exports amount to 402 million euros, so the total amount of trade between the EU and the Occupied Palestinian Territories represents 425 million euros.[113]

The ICJ confirmed how the 'incentives for the relocation of Israeli individuals and businesses into the West Bank, as well as for its industrial and agricultural development by settlers' contribute to the settlement policy.[114] Therefore, trading with those settlers contributes to the economic development of settlements and therefore, to the feasibility and maintenance of those businesses and settlements.[115] In addition, in 2014, the Special Rapporteur on the situation of human rights in the Palestinian territories also called for the ceasing of trade relations with settlements, since those illegal settlements were supported through trade.[116]

The last step regarding the states' obligations in relation to the Palestinian people's right to self-determination took place last September when the UNGA adopted Resolution ES-10/2 on the 'Advisory opinion of the International Court of Justice on the legal consequences arising from Israel's policies and practices in the Occupied Palestinian Territory, including East Jerusalem, and from the illegality of Israel's continued presence

113 European Commission, Directorate-General for Trade, European Union, Trade in goods with Occupied Palestinian Territory. 16.05.2024. https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_occupied-palestinian-territory_en.pdf.

114 ICJ Advisory Opinion of 19 July 2024, para. 115. Trade with Occupied Palestinian Territory has also been considered "to amount to an implicit recognition of Israeli settlement policy in the occupied territories". Van Elsuwege, "The EU and non-Recognized", 117.

115 Kassoti refers to how the local municipalities used taxes paid by those business for the development of the settlements. Kassoti, "Between Völkerrechtsfreundlichkeit and Realpolitik", 156. See Human Rights Watch, Occupation, Inc.: How Settlement Businesses Contribute to Israel's Violations of Palestinian Rights, https://www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations; See also, Moerenhout, "The Obligation to Withhold from Trading".

116 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, A/HRC/25/67, 2014, p. 13.

in the Occupied Palestinian Territory'.[117] In this Resolution, the UNGA, while referring to the states' obligations established in the ICJ Advisory Opinion, also included other specific obligations for states and regional organisations. In this regard, the Resolution calls upon States '(t)o take steps towards ceasing the importation of any products originating in the Israeli settlements'; and calls upon international and regional organisations

> not to recognize, or cooperate with or assist in any manner in any measures undertaken by Israel to exploit the natural resources of the Occupied Palestinian Territory or to effect any changes in the demographic composition or geographic character or institutional structure of the Territory.

Pressures to ban trade with Israeli settlements have therefore mounted to a degree that make the issue difficult to ignore, and it should lead the EU to review its trade policy. In any case, the EU's banning of trade with Israeli settlements seems difficult to achieve if we take into account the EU countries' direction of vote regarding the UNGA Resolution: only 13 States voted in favour, 12 opted for abstention, and the Czech Republic cast a negative vote.[118]

4. Final Remarks

Different obligations have been referred to in this work regarding the European Union and the right to self-determination. Even though the European Union is not directly violating the right to self-determination of the Saharawi and Palestinian peoples, the EU has obligations regarding the protection and implementation of this right.

Based on treaties and CJEU case law, the EU is bound by international law, including customary law. Therefore, the EU and its member states have the obligation to respect the right to self-determination, to collaborate with the UN on the implementation of the right to self-determination, to refrain from recognising the illegal situation arising from the violation of the right to self-determination, and to abstain from activities that may impair

117 UNGA Resolution1803 ES-10/24, Advisory opinion of the ICJ on the legal consequences arising from Israel's policies and practices in the Occupied Palestinian Territory, including East Jerusalem, and from the illegality of Israel's continued presence in the Occupied Palestinian Territory, 18 September 2024.

118 Meeting Record, A/ES-10/PV.55, https://digitallibrary.un.org/record/4061432?ln=en.

the exercise of the right to self-determination, including economic or trade relations which may support the illegal situation.

In the case of Western Sahara and the Occupied Palestinian Territory, the EU seems to have adopted the strategy of circumventing its obligations through the implementation of trade and economic cooperation with the Occupying Powers. This approach has been supported by a series of acts and agreements which have finally been overturned by the CJEU, making this institution the very advocate of international law.

The position of the European Commission and the Council has been based on political, strategic, and economic interests. In the case of Western Sahara, both institutions have pushed the limits to include the natural resource exploitation of the occupied Western Sahara territory in the agreements between the Occupation Power, Morocco, and the EU. The neutral position claimed by the EU must be called into question, not only because its obligation is not to be neutral, but because it must support those possessing the right to self-determination. Moreover, this kind of neutrality is non-existent when the decisions made are aligned with the Occupying Power's interests.

Regarding the Occupied Palestinian Territory, despite the EU's recognition of the occupation, the only measure to have been adopted has been to exclude products originating in that territory from the tariff preferences of the Association Agreement with Israel. Trade with those territories and with Israeli settlers has otherwise continued without any measures being adopted to ensure that Israel complies with international law. Therefore, the EU's position regarding this recognised international law violation is all the more shocking in an organisation directed towards contributing to the 'strict observance and the development of international law, including respect for the principles of the UN Charter'.

The situation seems to have reached a turning point with the latest decisions of the CJEU and of the ICJ. The CJEU, for its part, has finally ruled out any possibility of an agreement between the EU and Morocco to exploit Western Sahara's natural resources, since it would need the agreement of the Saharawi people, not the population of Western Sahara, which would probably be difficult to obtain. Businesses ran by Moroccan settlers and by international companies are still operating in the territory under Morocco's control and management. As for the Occupied Palestinian Territory, the ICJ Advisory Opinion has clearly demanded the cessation of trade and economic relations with the occupied territories, as long as these relations contribute to maintaining the illegal situation. Whether the EU finally complies with this

obligation or justifies its approach by cynically affirming that such economic relations do not contribute to maintaining the occupation remains to be seen.

To finish, these EU positions regarding the violation of the right to self-determination have an impact on how the EU is perceived by third countries, especially by those of the Global South. The EU's image of normative actor is eroding due its inconsistent application of its own principles. Gaining the Global South's trust and becoming a reliable actor also depends on how the EU honours its obligations under international law.

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