

Policy Paper

The 2021 EU General Court Decision on Polisario v Council: Some Legal Considerations on the Status of the Moroccan Sahara

By Mohamed Loulichki & Shoji Matsumoto

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The 2021 judgment of the EU General Court holds that 'Western Sahara' is separate from Morocco, imposing on Morocco a responsibility to secure Polisario's consent to its exploitation of natural resources in 'Western Sahara' and its adjacent waters, allegedly based on the UN Friendly Relations Declaration, which states that a non-self-governing territory has "a status separate and distinct from the territory of the State administering it." The phrase is originated in the General Assembly resolution 1541 (XV) in 1960, referring to "a territory which is geographically separate and is distinct ethnically and/or culturally" from the administering State. This resolution is in turn based on the previous resolution 742 (VIII) in 1953, elaborating the meaning of 'a status separate' as "separation by land, sea or other natural obstacles." While 'Western Sahara' is actually separate from its former administering State Spain, it is not separate from the rest of Morocco. Besides, the Polisario is not the only representative of "the people of Western Sahara." And that, Polisario's status as the people's representative is opposable only in the UN-led peace process, from which the Polisario has declared to withdraw in 2020. Based on the universally accepted principles of democracy, moreover, a political will on Morocco's exploitation of Saharan natural resources should be determined by the majority of different representatives of "the people of Western Sahara," not undemocratically by substantially granting a veto power to the Polisario, discriminating against other peoples, in violation of a jus cogens norm which absolutely prohibits discrimination. In consequence, contrary to the 2021 EU General Court decision, there is no responsibility for Morocco to obtain Polisario's consent to the exploitation of Saharan natural resources, under the existing international law.

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1. Introduction

The Council of European Union (EU) and the European Commission separately appealed in December 2021 against the judgments of the EU General Court in the case of Polisario v Council,¹ which will be considered in this paper. Among the grounds for appeals are: errors in law based on Polisario's lack of capacity to be a party to legal proceedings; errors regarding Polisario's identification as the entity responsible for giving consent to Morocco's exploitation of natural resources in 'Western Sahara,'² given its limited status and representativeness; and errors concerning the conclusion that the people of Western Sahara did not consent to the agreements between Morocco and the EU.³ In addition, Polisario's declaration of withdrawal from ceasefire should have been taken account in considering those issues. The Polisario deplored the appeals against the judgments of the EU Court, which annulled the new EU-Moroccan agreements applicable to the Saharan provinces.⁴

One of the newly emerging obstacles to the United Nations (UN)-led peace process to find a political solution to the Sahara Issue, on compromise, is the judgment of the EU Court,⁵ in the face of Polisario's 'lawfare.'⁶ For the Polisario, judicial courts anywhere, including the EU Courts, are not merely peaceful means for pacific settlement of the Sahara Issue but battlefields for its separatist 'lawfare,'⁷ along with recent warfare in Guerguerat for example⁸ in breach of ceasefire agreements.⁹ In such a lawfare, law is abused as a weapon of war.¹⁰ Such abuse should be prevented or avoided,¹¹ so as not to go against the social role of the judicial court. Nevertheless, the EU General Court accepted for the first time that the Polisario had the locus standi to bring proceedings before the

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1. The judgment of the General Court (Ninth Chamber, Extended Composition) delivered on 29 September 2021 in Case T-279/19, Front Polisario v Council (Case C-779/21 P), and the judgment of the General Court (Ninth Chamber, Extended Composition) delivered on 29 September 2021 in Joined Cases T-344/19 and T-356/19, Front Polisario v Council (Case C-778/21 P). In this paper, paragraphs in the Joined Cases will be referenced, and hereinafter, the judgment will be cited as 'present judgment.'
 2. Hereinafter, natural resources in the Saharan provinces, or 'Western Sahara,' and the adjacent waters will be cited as 'Saharan natural resources.'
 3. Appeal brought on 14 December 2021 by the European Commission against the judgment of the General Court (Ninth Chamber, Extended Composition) delivered on 29 September 2021 in Joined Cases T-344/19 and T-356/19, Front Polisario v Council (Case C-778/21 P); Appeal brought on 14 December 2021 by the European Commission against the judgment of the General Court (Ninth Chamber, Extended Composition) delivered on 29 September 2021 in Case T-279/19, Front Polisario v Council (Case C-779/21 P); Appeal brought on 16 December 2021 by the Council of the EU against the judgment of the General Court (Ninth Chamber, Extended Composition) delivered on 29 September 2021 in Joined Cases T-344/19 and T-356/19, Front Polisario v Council (Case C-798/21 P); and Appeal brought on 16 December 2021 by the Council of the EU against the judgment of the General Court (Ninth Chamber, Extended Composition) delivered on 29 September 2021 in Case T-279/19, Front Polisario v Council (Case C-799/21 P).
 4. "EU-Morocco Agreements: Polisario Front Deplores EU Council's Appeal against Court's Rulings," Sahara Press Service, 5 December 2021, <https://www.spsrasd.info/news/en/articles/2021/12/05/36749.html>.
 5. Council v Front Polisario, C-104/16 P, Judgment of the Court (Grand Chamber) of 21 December 2016 and Western Sahara Campaign UK, C-266/16, Judgment of the Court (Grand Chamber) of 27 February 2018.
 6. Orde F. Kittrie, *Lawfare: Law as a Weapon of War*, 1st edition, Oxford Scholarship Online, 2016.
 7. "The Polisario Opens a Front in the Battle for the Resources of Western Sahara," OrientXXI, 23 December 2019, <https://orientxxi.info/magazine/the-polisario-opens-a-front-in-the-battle-for-the-resources-of-western-sahara,3507>.
 8. "Western Sahara's Polisario Front Attacks Guerguerat Border Area," The New Arab, 24 January 2021, <https://english.alaraby.co.uk/news/western-saharas-polisario-front-attacks-guerguerat-border-area>. Moreover, "[l]ike ISIS and Al Qaeda, the Polisario has resorted to the threat of 'waking up' its dormant cells within Moroccan lands to revive its longstanding war with the North African nation," according to an article "Polisario Threatens Morocco's Economic Initiatives in Western Sahara," The African Exponent, 27 September 2022, <https://www.africanexponent.com/post/8244-polisario-threatens-moroccos-economic-initiatives-in-western-sahara>.
 9. Morgan Hekking, "How Polisario's Provocations in Guerguerat Play in Morocco's Favor," Morocco World News, 11 October, 2020, <https://www.moroccoworldnews.com/2020/10/322312/how-polisarios-provocations-in-guerguerat-play-in-moroccos-favor>.
 10. O. Kittrie, op. cit., supra n. 6, pp. 4-7.
 11. "After Panama, Uruguay dismisses Polisario's Complaint about Moroccan Phosphates," The North Africa Post, 6 August 2017, <https://northafricapost.com/19193-panama-uruguay-dismisses-polisarios-complaint-moroccan-phosphates.html>.

EU Courts, in accordance with EU law, not international law.¹² Thus, Jasmina Saric denounces the present judgment as less “international law friendly.”¹³ Moreover, in the Sahara Issue, political bias or prejudice of the part of any judicial court would stand in the way of achieving a political solution to the Sahara Issue in the UN-led peace process. The present judgment in favor of Polisario, as the representative of ‘the people of Western Sahara,’ or the Saharan provinces, is criticized as politically motivated,¹⁴ and will increase the EU’s involvement in the conflict between Morocco and the Polisario.¹⁵

On the other hand, the 6th EU-Africa Union (AU) Summit in February 2022 determined not to invite the self-declared SADR/Polisario, stating that any EU Member State does not recognize it as a State and its position on the Sahara Issue remains unchanged.¹⁶ Then, in December, the Administrative Court in London rejected a pro-Polisario legal action filed by a British NGO Western Sahara Campaign UK,¹⁷ which is working on behalf of the Polisario in the UK, against the Morocco-UK Association Agreement.¹⁸ The British government subsequently expressed its satisfaction with the judicial decision.¹⁹

At the same time, it should not be overlooked that the Nordic Council,²⁰ involving EU Member States such as Denmark, Finland and Sweden, rejected in November a pro-Polisario draft recommendation that aimed at imposing restrictions against imports of products from the Saharan

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12. Present judgment, paras. 227-234, 252, 260-265. See Alina Carrozzini, “Working Its Way Back to International Law? The General Court’s Judgments in Joined Cases T-344/19 and T-356/19 and T-279/19 *Front Polisario v Council*,” *European Papers*, Vol. 7, No. 1, April 2022, pp. 38-41. However, the General Court has differentiated a non-State ‘country’ from a ‘State.’ Peter Van Elsuwege, “The EU and Non-Recognized Territories: Lessons from the Case Law of the Court of Justice of the European Union,” in Benedikt C. Harzl and Roman Petrov (eds.), *Unrecognized Entities: Perspectives in International, European and Constitutional Law*, Vol. 69, 2022, pp. 107-108. On the relationship between the EU law and international law, see Sabine Elleswijk, “The EU Court’s Use of International Law in the Engagement with Disputed Territories: A Consistent Approach?,” *Groningen Journal of European Law*, Vol. 1, 2022, pp. 18-37. Cf. Case T-512/12, *Polisario v Council*, Judgment of the General Court (Eighth Chamber) of 10 December, 2015, para. 115.
13. Jasmina Saric, “*Front Polisario v. Council Case: the Uneasy Relationship between EU and International Law*,” *Luiss*, 14 December 2021, <https://croie.luiss.it/2021/12/14/front-polisario-v-council-case-the-uneasy-relationship-between-eu-and-international-law/>. See also Jed Odermatt, “The Court of Justice of the European Union: International or Domestic Court?,” *Cambridge Journal of International and Comparative Law*, Vol. 3, No. 3, 2014, pp. 698-699.
14. Lahcen Haddad, “The EU Court’s Ruling on EU-Morocco Agreements: When Politics Carry the Day over Legality and Justice,” *Morocco World News*, 3 October 2021, <https://www.morocoworldnews.com/2021/10/344728/the-general-court-of-the-eu-ruling-on-eu-agreements-with-morocco-when-politics-carry-the-day-over-legality-and-justice>.
15. Hugh Lovatt, “Western Sahara, Morocco, and the EU: How Good Law Makes Good Politics,” *European Council on Foreign Relations*, 30 September 2021, <https://ecfr.eu/article/western-sahara-morocco-and-the-eu-how-good-law-makes-good-politics/>.
16. James Wilson, “EU Position on Western Sahara Unchanged,” *EU Political Report*, 16 February 2022, <https://www.eupoliticalreport.eu/eu-position-on-western-sahara-unchanged/>.
17. Erin Alcock, “Western Sahara Campaign UK Has Judicial Review Hearing over Lawfulness of UK-Morocco Trade Agreement,” 3 October 2022, Leigh Day, <https://www.leighday.co.uk/latest-updates/news/2022-news/western-sahara-campaign-uk-has-judicial-review-hearing-over-lawfulness-of-uk-morocco-trade-agreement/>.
18. *Western Sahara Campaign UK v Secretary of State for International Trade & Anor*, Case No: CO/971/2021, [2022] EWHC 3108 (Admin) (05 December 2022). See Safaa Kasraoui, “London Court Rejects Pro-Polisario Legal Action against Morocco-UK Agreement,” *Morocco World News*, 5 December 2022, <https://www.morocoworldnews.com/2022/12/352820/london-court-rejects-pro-polisario-legal-action-against-morocco-uk-agreement>. This British Court held that there was no scope for challenging the domestic implementation of the trade agreement by reference to international law where the domestic instruments mirrored the agreement’s language, in accordance with the British conventional manner to domestically implement treaties. Sir James Eadie KC and Paul Luckhurst, “Western Sahara Campaign UK v Secretary of State for International Trade & Others,” *Blackstone Chambers*, 5 December 2022, <https://www.blackstonechambers.com/news/western-sahara-campaign-uk-v-secretary-of-state-for-international-trade-others/>.
19. Raúl Redondo, “British Court Rejects Lawsuit against Morocco-Britain Association Agreement,” *Atalayar*, 6 December 2022, <https://atalayar.com/index.php/en/content/british-court-rejects-lawsuit-against-morocco-britain-association-agreement>.
20. The Nordic Council is the official body for formal inter-parliamentary co-operation, with 87 members from Denmark, Finland, Iceland, Norway, Sweden, the Faroe Islands, Greenland and Åland. Jenny Rood and Juliette Victor, “Nordic Council and Nordic Council of Ministers,” *Nordics Info*, Aarhus University, 25 February 2019, <https://nordics.info/show/artikel/nordic-council-and-nordic-council-of-ministers/>.

provinces, because the Sahara Issue was not within its competence.²¹

2. Polisario v Council

Back to the 2021 EU Judgment on the case Polisario v Council. According to the Polisario, by concluding an agreement with Morocco that expressly applies to the Saharan provinces and the adjacent waters without the consent of ‘the people of Western Sahara,’ the EU Council has infringed the obligation to comply with the judgments of the EU Court arising from Article 266 of the Treaty on the Functioning of the European Union, stating that the EU Court held that the explicit inclusion of the Saharan provinces, as ‘Western Sahara,’ in the scope of agreements concluded between the EU and Morocco is legally impossible, by virtue of the principle of self-determination and the principle of the relative effect of treaties. Then, the Polisario submitted, *“the conclusion of the agreement at issue is contrary to the case-law in that it does not respect the separate and distinct status of Western Sahara and it was adopted without the consent of the people of that territory to that agreement.”*²²

In response to Polisario’s allegation, the EU Council submitted, *“by concluding an agreement which expressly includes within its scope the waters adjacent to Western Sahara, after having obtained the consent of the people of that territory, it has complied with the judgments in Council v Front Polisario and Western Sahara Campaign UK.”*²³ In particular, the Council submitted that:

- Firstly, the consultations conducted by the European Commission and by the European External Action Service (EEAS)²⁴ made it possible to obtain the consent of the peoples concerned;
- Secondly, the current situation in the Saharan provinces does not allow for direct consultation of the people concerned or for consultation through an institutional representative of the people;
- Thirdly, the institutions were able to make use of their discretion to carry out consultations based on an objective criterion, derived from the benefits for the people; and,
- Fourthly, only Morocco, which is the *“de facto administrative authority”* in the Saharan provinces (a controversial concept used by Hans Corell, former legal Counsel of the United Nations, in his 2002 legal opinion), had the legal capacity and administrative and customs resources to conclude agreements with the EU.²⁵

We focus in particular on the first and last submissions on the people’s consent and *“de facto administrative authority,”* respectively. This is because these submissions are fundamentally related to an issue under Morocco’s responsibilities as an administering State of the Saharan non-self-governing territory, alleged by the Polisario, under Article 73 e of the UN Charter, although Morocco has never accepted such responsibilities or acted accordingly. And, that is one of the main issues of the present judgment.

21. Safaa Kasraoui, “Western Sahara: Nordic Council Rejects Pro-Polisario Draft Recommendation,” Morocco World News, 15 November 2022, <https://www.morocoworldnews.com/2022/11/352403/western-sahara-nordic-council-rejects-pro-polisario-draft-recommendation>.

22. Present judgment, para. 276.

23. Ibid., para. 277.

24. The purpose of EEAS is to ensure the widest possible participation of the representative bodies and organizations of the peoples concerned, without prejudice to the outcome of the process of self-determination. Ibid., para. 278.

25. Ibid.

In respect of the first issue on the people's consent, the Polisario challenges the validity of the consultations conducted by the Commission and the EEAS. Those consultations are said to focus on the benefits of the agreement at issue, whereas the only relevant criterion, set out by the EU Court, is the consent of "*the people of Western Sahara*." Moreover, those consultations, in respect of which the institutions and Morocco were not competent, in Polisario's view, could not have had the objective or effect of obtaining that consent, in particular since, on the one hand, such consent cannot emerge from an informal consultation process and, on the other hand, that consultation process concerned entities established under Moroccan law and did not include the part of those people living outside the zone controlled by Morocco.²⁶

If based on the present judgment, Morocco's exploitation of Saharan natural resources may be discouraged for now. Then, the benefit and well-being of inhabitants in the Saharan non-self-governing territory may not be promoted to the utmost, and they may be reduced to poverty in contravention with the objective of the 'UN Declaration regarding non-self-governing territories' set out in the UN Charter.²⁷

A fundamental problem in the 2021 EU Court judgment in Polisario v EU Council is related to Morocco's international responsibilities, although without any well-established legal ground, as will be seen in this paper. The alleged responsibilities are those imposed on an administering State of Saharan non-self-governing territory, under Article 73 e of the UN Charter.

The Saharan judgments handed down so far by the EU Court, regardless of whether the judgments have been handed down reluctantly or not,²⁸ make the Court look as if it were a conflicting party to the Saharan Issue, in support of Polisario. To speak of extremes, it is metaphorically suggested, this hypothetical new party may participate in the UN-led peace process for finding a political solution to the Sahara Issue.²⁹

In the previous judgment in the case of Council v Front Polisario, the Court inferred from the principle of self-determination two obligations towards 'Western Sahara' in the context of its relations with Morocco: to respect its separate and distinct status, and to secure the consent of "the people of Western Sahara" in the event of the implementation in the Western Sahara of the Association Agreement. In the present case, the Court takes the view that, in so far as the agreements at issue apply expressly to the territory of 'Western Sahara' and, as regards the decision concerning the Sustainable Fisheries Partnership Agreement, to the waters adjacent to that territory, they concern "the people of Western Sahara" and require the consent of those people. Consequently, the present judgment concludes that the contested decisions directly concern the legal situation of the applicant as a representative of 'the people of Western Sahara' and as one of the parties to the self-determination process of that territory. Finally, the Court notes that the implementation of the agreements at issue, as regards their territorial application, is purely automatic and leaves no

26. In view of the considerations set out in the present judgment, the EU Commission, together with the EEAS, took "all reasonable and feasible measures in the current context to properly involve the people concerned in order to ascertain their consent." And, extensive consultations were carried out in Morocco, including the Saharan provinces, and "the socioeconomic and political actors who participated in the consultations were clearly in favour of concluding the Fisheries Agreement," although the Polisario and some other parties did not accept to take part in the consultation process. *Ibid.*, para. 11. See also *ibid.*, para. 304.

27. Principles which Should Guide Members in Determining Whether or not An Obligation Exists to Transmit the Information Called for in Article 73 e of the Charter of the United Nations, UN GA Res 1541 (XV), 15 December 1960, Annex. Hereinafter this resolution will be cited as 'Principles on Information Transmitting Guide.'

28. Momchil Milanov, "Reluctant Storyteller: ECJ, Treaty Interpretation and the 'Never-Ending Story' of Western Sahara: Commentary on Judgments in Cases Council v Front Polisario (C-104/16 P) and Western Sahara Campaign UK (C-266/16)," *Европейски правен преглед*, 2018, <https://evropeiskipravenpregled.eu/22-4/>.

29. Salvatore Caserta and Pola Cebulak, "Territorial Disputes by Proxy: The Indirect Involvement of International Courts in the Mega-Politics of Territory," Danish National Research Foundation's Centre of Excellence for International Courts, iCourts Working Paper Series, No. 269, November 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3959804.

degree of discretion to the addressees of those agreements.

In this paper, the following three interrelated points, which are among main issues involved in the present judgment, will be specifically considered from the perspectives of international law:

- Is the non-self-governing territory of Western Sahara geographically separate from the rest of Morocco? In other words, what does the phrase “geographically separate” mean?
- What does ‘consent’ mean, when there are different opinions among representatives of the people of Western Sahara, particularly concerning Morocco’s exploitation of natural resources in the Sahara provinces?
- Who are “*the people of Western Sahara*” in the Sahara Issue?

A blatant inaccuracy in the 2021 EU Court judgment concerns the first point, which is in turn related to the other two points. Although the General Court holds that ‘Western Sahara’ is separate from Morocco, this is inaccurate. From any angle, the Sahara provinces, or ‘Western Sahara,’ are not geographically separate from the rest of Morocco. If it were not for this inaccuracy, the conclusion of the Court’s judgment would have been quite different. This inaccurate conclusion brings us to the second point on the meaning of ‘consent’ in collective decisions. In collective decision-making on giving consent to Morocco’s development of the Saharan natural resources, privilege, like a veto power, should not be granted to any representatives of different groups of “the people of Western Sahara,” such as the Polisario. Then, the question arises of who are such representatives.

3. ‘Western Sahara’ Not Separate from Morocco

Geographically, the Saharan non-self-governing territory, or ‘Western Sahara,’ is not separate from the rest of Morocco, setting aside their ethnic and cultural similarities. Nevertheless, the present judgment states that ‘Western Sahara’ is separate from Morocco, and holds that Morocco assumes responsibilities for the Saharan non-self-governing territory, as if Morocco was its administering State under Article 73 e of the UN Charter. What does ‘separate’ mean? In this case, there is no reason to conceive the meaning of the term very unusually, because no agreement is made between Morocco and the EU defining the term ‘separate,’ and the means to ascertain its meaning.³⁰

The meaning of ‘separate’ shall be elucidated in good faith in accordance with the ordinary meaning given to the term, in conformity with Article 31 (1) of the Vienna Treaty Convention. This Article specifically stipulates how to interpret a treaty. The ordinary meaning of ‘separate’ is described as “*not touching or adjoined, detached.*”³¹ Therefore, in international law it is admittedly inaccurate to assert that the Saharan non-self-governing territory is separate from Morocco. What is more, no special meaning is given to the term by the parties. As a result, it must be a common sense that the Saharan non-self-governing territory, unlike the other territories under European domination is not geographically separate from Morocco.³² Spain was really separate from Western Sahara. Spain actually assumed responsibilities as an administering State of the Saharan non-self-governing

30. Vienna Convention on the Law of Treaties, Art. 31 (4). Hereinafter, the Convention will be cited as ‘Vienna Treaty Convention.’

31. “Separate,” The Free Dictionary, n. d., <https://www.thefreedictionary.com/separate#:~:text=1.%20to%20keep%20apart%3B%20divide.%20%20to%20bring,5.%20to%20sort%20or%20disperse%20into%20individual%20components>.

32. In this way, a possibility may be apprehended that the judgment would constitute ‘a manifestly unjust judgment,’ resulting in the ‘denial of justice’ in a wider sense. Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 6th ed., 2003, pp. 506-507

territory until the conclusion of the Madrid Accords in 1975.³³

If based on this common conception on a word 'separate', Morocco would not be obliged to assume responsibilities of the same nature to obtain the consent of the people of Western Sahara for the purpose of exploiting natural resources in Western Sahara and its adjacent waters, as if it were "an administering State" of the Saharan non-self-governing territory prescribed in Article 73 e of the UN Charter.

The phrase "an administering State" is profoundly different from another similar phrase, "a de-facto administrative authority". While the former is a normative concept that is referred to in Article 73 of the UN Charter, the latter is a descriptive concept, particularly designating Morocco's presence in the Saharan provinces in exercise of its sovereignty. In this way, these concepts are different in the State responsibility. Thus, under the concept of "a de-facto administrative authority," a UN Member State does not assume responsibilities as an administering State. Alternatively, a third similar concept, "a de-facto administering State," which was advocated by Hans Corell, in his 2002 legal opinion to the president of the UN Security Council, as an emerging customary international legal concept arguably in defiance of the Charter, has further increased confusion.³⁴ These three different concepts, namely, a *lex lata* concept, a descriptive concept, and a *lex ferenda* concept, should not be confused.

The people in the Saharan non-self-governing territory are not entitled to any territory and its natural resources, even under the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which was adopted by the General Assembly in 1970, and which states: "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination."³⁵ So, the people of a non-self-governing territory are entitled to a status separate and distinct from an administering State, as long as their right to self-determination is affected. The meaning of "separate and distinct" may be further revealed by another General Assembly resolution in 1960.

Ten years before the adoption of the Friendly Relations Declaration, the General Assembly adopted the Principles to Guide the Member States in Determining Whether or not an Obligation Exists to Assume Responsibilities as an Administering State, stating that "[p]rima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it."³⁶ Furthermore, in the Kosovo Advisory Opinion, the ICJ declared that international law does not regulate the right to unilaterally declare independence from a parent State.³⁷ Such a declaration of independence may be justified only by the consent of the parent State. Instead, the people of Western Sahara are entitled to a

33. Letter dated 26 February 1976 from the Permanent Representative of Spain to the UN addressed to the Secretary-General, UN Doc A/31/56, 26 February 1976. See Declaration of Principles on Western Sahara, which was agreed between Spain, Morocco, and Mauritania, ended the Spanish presence in the territory of Spanish Sahara, now called 'Western Sahara' or Saharan provinces, stating that "Spain confirms its resolve, repeatedly stated in the United Nations, to decolonize the Territory of Western Sahara by terminating the responsibilities and powers which it possesses over that Territory as administering Power," para. 1, UN Treaty Series, Vol. 988, 1975, p. 259.

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

35. UN Doc A/RES/2625 (XXV), 1970.

36. UN Doc A/RES/1541, 1960, Annex.

37. In this advisory opinion, the ICJ concludes that "general international law contains no applicable prohibition of declarations of independence," ICJ Rep. 2010, para. 84. Therefore, it follows that legality of such unilateral declaration is to be regulated by the domestic law on the one hand, and on the other, the parent State's consent is indispensable for Statehood.

legal status in order to participate in the UN-led peace process with Morocco, with a view to finding a political solution to the Sahara dispute, in accordance with the Friendly Relations Declaration. Territory would be referenced in determining who the people are who would be entitled to a legal status.

As James Crawford submitted, under the UN Charter and the Friendly Relations Declaration, inhabitants of a non-self-governing territory enjoy an international legal status, not a territorial status.³⁸ This legal status is not related to any form of territorial sovereignty. The phrase “*a status distinct and separate*” should not be construed as granting a separate territorial status to the inhabitants. If a territorial status were granted to them, the right to self-determination would become superfluous. Instead, the phrase addresses an international legal personality. In this vein, Alejandro Schwed aptly noted, “[n]on-self-governing territories now have international legal personalities distinct from those of the administering states.”³⁹

Malcom N. Shaw reaffirmed that “*self-determination fits in with the concept of territorial integrity*” of a State.⁴⁰ Shaw’s interpretation may be in compliance with an original objective of the Friendly Relations Declaration to live together in peace with one another as good neighboring States, and to prevent in their territory any activities that might undermine the territorial integrity of the neighboring States. That is why the Declaration adds: “*Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.*” This provision is a confirmation of paragraph 7 of the 1960 Declaration on Granting of Independence to Colonial Countries and Peoples, which states that, “*Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the objectives and the principles of the Charter of the United Nations.*”⁴¹

James Crawford concluded that the people of a non-self-governing territory enjoy a separate legal status, “*and with it a measure of legal personality.*”⁴² Then, it was noted by Eva Kassoti that, “*neither Chapter XI of the UN Charter (dealing with non-self-governing territories), nor the Friendly Relations Declaration address matters of territorial title as such.*”⁴³ Similarly, Geoff Gilbert emphasized that, “[t]he focus of self-determination should be people, not territory,”⁴⁴ and Gidon Gottlieb reaffirms that the right to self-determination does not address territory.⁴⁵

Thus, on the basis of the Friendly Relations Declaration, the General Assembly recognized the Polisario, in 1979 and 1980, as one of the representatives of the people of Western Sahara, for the purpose and only for the purpose of conducting the UN process that aimed at finding a final

38. James Crawford, *The Creation of States in International Law*, 2nd edition, Oxford University Press, 2006, p. 617-618.

39. Alejandro Schwed, “Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute,” *Fordham International Law Journal*, Vol. 6, Issue 3, 1983, p. 452.

40. Malcom N. Shaw, *International Law*, 4th edition, Cambridge University Press, 1997, p. 355.

41. UN GA Res 1514 (XV), 14 December 1960.

42. J. Crawford, *op. cit.*, supra n. 40, p. 618.

43. Eva Kassoti, “The Council v. Front Polisario Case: The Court of Justice’s Selective Reliance on International Rules on Treaty Interpretation (Second Part),” *European Papers*, Vol. 2, 2017, pp. 32-33.

44. Geoff Gilbert, “Autonomy and Minority Groups: A Right in International Law?,” *Cornell International Law Journal*, Vol. 35, 2002, p. 336. See also, Hurst Hannum, “The Specter of Secession,” *Foreign Affairs*, Vol. 77, 1998, p. 15.

45. Gidon Gottlieb, *Nation against State: A New Approach to Ethnic Conflicts and the Decline of Sovereignty*, Council of Foreign Relations Press, 1993, p. 15.

solution to the dispute.⁴⁶ Furthermore, neither the Liberation Committee of the Organization of African Unity (OAU) nor the Non-Aligned Movement have granted the Polisario the status of “*unique representative of the Sahrawi population.*” The General Assembly continues to consider this Group as petitioners in the proceedings of the Fourth Committee, and as “*interlocutors*” in the UN-led peace process. The legal status of people and their territorial title should be strictly distinguished. In terms of the right of people to self-determination in a non-self-governing territory, territory matters only in determining on which people a measure of legal status is conferred. The Polisario’s possible power is thus not over the territory, but over the people.

The UN is entitled to confer upon a group of persons the status of legal person, although the status is effective only within the UN framework. Thus, the UN may confer on the Polisario such status, as long as the UN-led peace process with Morocco is concerned, although the UN is not empowered to impose obligations to transfer the territory of its Member State. As such, Morocco’s sovereignty over the Saharan provinces and the natural resources cannot be affected by the legal status of Polisario. That is true of other representatives of ‘Western Sahara’.

Not only the Polisario, but all representatives of “*the people of Western Sahara*” are eligible to be invited to participate in the consultations with the Moroccan government in relation to the exploitation of Saharan natural resources, in exercise of their right to self-determination. So, a veto power to prevent Morocco’s exploitation of the natural resources cannot be granted to any representative. In addition, the legitimate power of representatives to participate in the consultations should be granted only when their leaders are democratically elected by “*the people of Western Sahara.*”

Even if Polisario’s leaders were elected as its representatives by inhabitants in the Tindouf camps, Algeria, however, it would not follow that they would represent other inhabitants in Morocco’s Saharan provinces. For the leaders to legitimately represent the people of Saharan provinces, they must be elected by the people themselves, and the voters need to be identified by the UN High Commissioner for Refugees as Sahrawis. Of course, for the implementation of such a fictive election in the Saharan provinces, Morocco’s agreement to the election should be ensured in advance, so as not to infringe Morocco’s sovereignty. So long as Polisario’s leaders are not elected as representatives of the Saharan provinces, which is the current case, they cannot claim to be representing “*the people of Western Sahara*” as a whole.

In this regard, it should be noted that the General Assembly is not entitled to compel “*the people of Western Sahara*” to recognize the Polisario as their representative, in respect of its activities outside the UN, including the EU Court. All what the General Assembly is entitled to do is to recognize the Polisario for the activities of the UN itself, such as the UN-led peace process, as part of finding a political solution to the Sahara Issue. Needless to say, neither the UN nor the EU Court is entitled to oblige “*the people of Western Sahara*” to accept the Polisario as their representative outside each organization.

Next, it will be demonstrated that discrimination against inhabitants in the process of identifying eligible voters or participants in the consultations would constitute a violation of a peremptory norm of general international law, or *jus cogens*.

46. The 1979 General Assembly resolution urged Morocco “to join in the peace process,” and recommends to that end that the Polisario should participate fully in any search for a just, lasting and definitive political solution of the question of Western Sahara (UN Doc A/RES/34/37, 1979, paras. 6, 7). These phrases were reiterated in 1980 (UN Doc A/RES/35/18). In 1981, the Sahara Issue was entrusted to the OAU.

4. Who are 'the People of Western Sahara'?

As a matter of historical fact, in 1981, the UN entrusted the solution of the Saharan Issue to the OAU. Then, the OAU Ad-Hoc Implementation Committee decided in August 1981 to carry out a referendum in the Saharan provinces.⁴⁷ In this way, the effectiveness of the General Assembly's recognition of the Polisario as "*the representative of the people of Western Sahara*" was lost by OAU's launching of the referendum process, although the process was not successful. In fact, the relevant OAU resolutions adopted in and around 1981 referred neither to "*the representative of the people of Western Sahara*" nor the Polisario.⁴⁸ As such, it was decided that the future of Western Sahara should be determined by all the eligible voters on the basis of a universally recognized standard of democratic representation, not only by the Polisario.⁴⁹ Therefore, it follows that at the time when the implementation of a referendum in the Saharan provinces was accepted, Polisario's status as representing "the people of Western Sahara" would be canceled.

The people with the right of people to self-determination should be identified as those who inhabited the non-self-governing territory at that moment in time, while in 1975 "*the people of Western Sahara*" were those actually inhabited according to universally recognized standard of democratic representation. Thus, while in 1975 "*the people of Western Sahara*" were those actually inhabited in the territory, in 2023 the people should be identified as those actually inhabit there, without any relation to their descent, or national or ethnic origin, in conformity with the international human rights law.⁵⁰ Since everyone has the right to liberty of movement and freedom to choose his or her residence, those inhabitants of 'Western Sahara' who moved from elsewhere should not suffer disadvantage, by being excluded from participation in the UN-led peace process and the consultations on Morocco's exploitation of Saharan natural resources, for example, on the grounds of their legitimate exercise of international human rights, which are enshrined in the ICCPR.⁵¹

In practice, there have been different representatives of "*the people of Western Sahara.*" Other than the Polisario, representatives democratically elected by inhabitants in the Saharan provinces participated in the UN-led roundtables of Geneva I and II in 2018 and 2019, respectively. Thus, the Moroccan delegation to the UN-led roundtable meeting in 2018⁵² included the president of the Laayoune-Sakia El Hamra region, the president of the Dakhla-Oued Eddahab region, and a community actor and member of Smara's municipal council.⁵³ Also, there is a Moroccan comprehensive organization which represents all the inhabitants of the Saharan provinces. It is the Royal Advisory Council for Saharan Affairs (CORCAS), which is a consultative body for proposals

47. The Nairobi II Decision of the OAU Implementation Committee on Western Sahara, OAU Doc AHG/IMP-C/WS/DEC.1(I), Rev. 1, 1981.

48. See Nairobi II Decision of the OAU Implementation Committee on Western Sahara, OAU Doc AHG/IMP-C/WS/DEC.1 (I), Rev. 1, 1981; Nairobi III Decisions of the OAU Implementation Committee on Western Sahara, OAU Doc AHG/IMP.C/WS/DEC. 1 (II), Rev. 2, 1982; the decision of the Implementation Committee on the Modalities and Organizational Framework for the Referendum in Western Sahara, OAU Doc AHG/IMP.C/DEC. 2 (II), Rev. 2, 1982; and the OAU Summit Resolution on Western Sahara, OAU Doc AHG/Res. 104 (XIX), 1983.

49. That explains the reason why the UN General Assembly did not once more adopt in 1981 a resolution to the same effect, recognizing the Polisario as "*the representative of the people of Western Sahara*", different from its adoption of the previous resolutions in 1979 and 1980.

50. European Charter of Human rights and Fundamental Freedoms, Art. 21; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Art. 1 (1); and International Covenant on Civil and Political Rights (ICCPR), Arts. 4, 26.

51. Mohamed Cherkaoui, *Morocco and the Sahara: Social Bonds and Geopolitical Issues*, Bardwell Press, 2007, pp. 137-152.

52. Shoji Matsumoto, "2019 Secretary-General Report on Sahara: What's New: 'Neighbouring States as Parties' in Roundtable," Policy Center for the New South, Policy Brief, PB-19/22, 2019, pp. 1-2.

53. "Geneva Round-Table Talks, Important Step Towards Renewed Political Process for Future of Sahara, Kohler," Sahara Development, 12 July 2018, <http://www.sahara-developpement.com/Western-Sahara/Geneva-Round-table-Talks,-Important-Step-Towards-Renewed-Political-Process-for-Future-of-Sahara,-Kohler-91-483-10496.aspx>.

relating to the Saharan provinces.⁵⁴ In fact, the CORCAS has taken part, within the official delegation of Morocco, in the Manhasset rounds of negotiations under the auspices of the personal Envoy of the UN Secretary-General, and also in sessions of the UN Human Rights Council.⁵⁵ Also, the vice-chairperson of CORCAS went to the regional seminar of the UN Special Committee on Decolonization, which is also called as the Committee of 24, in 2019[55]. Furthermore, in the Committee of 24, “[s]everal Member States of the Committee of 24 welcomed the participation in the meeting of two representatives of the Moroccan Sahara, who were democratically elected during the regional and legislative elections of September 2015 and October 2016.”⁵⁶

Representatives of “the people of Western Sahara” should be elected by universal and equal suffrage without any distinction of any kind, such as race, language, political, or other opinion, national or social origin and birth, in conformity with Article 25 of the ICCPR. However, no suffrage has ever been implemented in the combined territory of Saharan provinces and Tindouf camps. Instead, elections may be implemented in each territory, separately. While in the Tindouf camps, the Polisario is the only political party under its single party system, in the Saharan provinces the population is represented by the large spectrum of political parties. Thus, it was reported by the UN Secretary-General, “[l]egislative, regional-level and commune-level elections were held in Morocco and in the part of Western Sahara under Moroccan control on 8 September 2021,” and the Permanent Representative of Morocco referred to the reported rates of participation by voters in Western Sahara as “a new confirmation, through the ballot box, of the unwavering commitment of citizens of the southern provinces to their Moroccanness.”⁵⁷ Through members of Moroccan parliaments and local councils, the inhabitants are represented.

Moreover, since the Polisario’s declaration of withdrawal from the ceasefire and the UN-led peace process at the outbreak of the Guerguerat Crisis in 2020,⁵⁸ the status of Polisario as “the representative of the people of Western Sahara” has been further challenged. In terms of declaring its withdrawal from the UN-led peace process[61], the Polisario unintentionally reconfirmed its loss of status as the representative of the people of Western Sahara. Nevertheless, the Polisario continues to reiterate that there will be no new ceasefire.⁵⁹

In consequence, the legitimate representative of the people of the Saharan provinces is the Kingdom of Morocco, while the Polisario actually can only claim to represent a part of the people who live in the Tindouf camps, provided that both Algeria and the Polisario accept the organization by the UN of the registration of the population of the Tindouf camps, as called for by the UN Security Council since 2010. One could go as far as asking if, for the purpose of exploiting the natural resources in the Tindouf area, the government of Algeria would deem it necessary to ask for the consent of the inhabitants of the camps. On the other hand, if Morocco is contemplating natural resource exploitation in the Saharan provinces, the consent of the representatives of inhabitants in the Tindouf camps would not be necessary, because Polisario’s leaders have never been elected by

54. CORCAS, “King Mohammed VI, Founding Speech for the Royal Advisory Council for Saharan Affairs, March 25, 2006,” Royal Advisory Council for Saharan Affairs, 25 March 2006, <http://www.corcas.com/SearchResults/FoundingSpeech/tabid/734/Default.aspx>.

55. Idem., “Corcas Takes Part in 51st Session of UN Human Rights Council in Geneva,” Sahara Development, 9 December 2022, <http://www.sahara-developpement.com/Western-Sahara/Corcas-Takes-Part-in-51st-Session-of-UN-Human-Rights-Council-in-Geneva-142-551-17249.aspx>.

56. Idem., “CORCAS Participates in Pacific Regional Seminar of the Committee of 24 in Castries Saint Lucia,” Sahara Development, 5 December 2022, www.sahara-developpement.com/Western-Sahara/CORCAS-Participates-in-Pacific-Regional-Seminar-of-the-Committee-of-24-in-Castries-Saint-Lucia-142-551-16740.aspx.

57. UN Doc S/2022/733, 2022, para. 10.

58. UN Doc S/RES/2548, 2020, Preamble.

59. While the Polisario asserts that the Sahrawi people are left with “no choice but to continue and intensify their legitimate armed struggle,” several Polisario interlocutors expressed “hope for a renewed process and confidence-building measures.” UN Doc S/2022/733, 2022, paras. 11, 23.

inhabitants in the Saharan provinces. Indeed, the people should be conceived as current inhabitants of a non-self-governing territory, without taking account of each inhabitant's descent or national or ethnic origin, in conformity with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Thus, Polisario's consent is not necessary for Morocco's exploitation of Saharan natural resources.

Based on a peremptory norm of general international law, or *jus cogens*, on non-discrimination,⁶⁰ any people in the Saharan provinces should not be discriminated against, regardless of whether discrimination was intentional or not, on the grounds of race, color, descent, or national or ethnic origin,⁶¹ in building their political will to give consent to Morocco's exploitation of Saharan natural resources. Privileges, such as veto power, should not be granted to any representative of the people of Western Sahara, including the Polisario.

Before the explicit stipulation of an absolute norm against discrimination in the ICCPR, which was adopted in 1966 in the UN General Assembly and entered into force in 1976, 'people' in "*the right of people to self-determination*" was largely conceived as a specified ethnic group that has historically inhabited the territory concerned. However, under the ICCPR, any discrimination "*on the ground of race, colour, sex, language, religion or social origin*" is absolutely prohibited.⁶² In the Sahara Issue, the discriminatory approach reached its nadir in the aborted process of identifying eligible voters for a referendum which was envisaged to be implemented in Western Sahara.⁶³

According to the UN International Law Commission (ILC), such discrimination is not only absolutely prohibited, but may constitute crimes against humanity, if persecution against any identifiable group on political, racial, national, ethnic, cultural, or religious ground is involved, under the Rome Statute of the International Criminal Court (ICC).⁶⁴ Therefore, the granting of a veto power to any representative of the people of Western Sahara would constitute a breach of the absolute norm. Thus, on the basis of the ICCPR, even those who actually inhabited the Saharan provinces when decolonized, including Polisario members, should not be exceptionally granted a veto. Such veto granting would substantially transform the decision-making process from consent to consensus. Consensus is not identical with consent in collective decision-making. Moreover, if based on the principle of unanimity, usually there would be full agreement or no decision.⁶⁵

Therefore, all inhabitants of the Saharan provinces should be equally represented in forming their will to give consent to Morocco's exploitation of the Saharan natural resources, not privileging the Polisario, which represents at best only those people who inhabit the Tindouf camps, Algeria. On the other hand, according to Aylin Zafer, politics based on the concept of consensus would turn a blind eye towards conflictual positions, leading to promotion of "*depolitisation and de-democratisation*."⁶⁶ Based on the principles of democracy, the majority of different representatives of "*the people of Western Sahara*," or the people of the Saharan provinces, would definitely build consent to Morocco's exploitation of Saharan natural resources, especially when we consider the

60. ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), Annex (e), UN Doc A/77/10, 2022.

61. ICERD, Art. 1 (1).

62. UN Human Rights Committee, CCPR General Comment No. 18: Non-Discrimination, 1989, para. 13.

63. Andreu Solá-Martin, *The United Nations Mission for the Referendum in Western Sahara*, Edwin Mellen Press, 2006, pp. 54-85.

64. Rome Statute of the ICC, Art. 7 (h).

65. Stéphanie Novak, "Majority Rule," *Philosophy Compass*, Vol. 9, Issue 10, October 2014, p. 682.

66. Aylin Zafer, "Consensus and Dissensus: Two Sides of the Same Coin?," European consortium for Political Research, 2015 General Conference Montreal, 26-29 August 2015, <https://ecpr.eu/Events/Event/PaperDetails/26212>.

size of Moroccan investments in the southern provinces since 1976.⁶⁷

Then, how can the consent of “*the people of Western Sahara*” be properly obtained? To answer this question, the meaning of consent in collective decisions, i.e. the consent of many representatives of different groups of the people of Western Sahara, should be considered.

5. Consent Versus Consensus

While the meaning of consent may be largely shared in the case of a single person or group, it is not self-evident in collective decision-making, such as in the case of the ‘consent’ of representatives of the different groups of “*the people of Western Sahara*,” to be given to Morocco’s exploitation of Saharan natural resources. In collective decisions by different groups, consent should be differentiated from consensus or unanimity.⁶⁸

In a fragmented modern society, the interests and opinions of its members often conflict, so that consensus seems illusory.⁶⁹ In such societies, consensus is possible only within a specific smaller group sharing common interests, such as a political party. “*The people of Western Sahara*” would not be an exception. Indeed, the meaning of consent is not without problems. While Andrew Guzman points to the excessive commitment of the international community to consent in international law,⁷⁰ Christopher Allen argues that there is a range of levels of consent required for various deliberative processes, calling the wide range “*a spectrum of consent*.”⁷¹

On the other hand, consensus generally requires all parties to a proposed agreement to accept the commitments in the agreement.⁷² In collective decision-making in particular, majority decisions are more responsive to the relevant needs, and more democratic than unanimous decisions.⁷³

In fact, there are many different representatives of the people of Western Sahara, as described above. The consent of “*the people of Western Sahara*” should be given democratically by the majority of their different representatives. According to Moses O. Aderibigbe, “*Hobbes asserted that once the majority of the people have consented to submit their rights to the common power—the Leviathan, the minority of the people cannot have a right to dissent.*”⁷⁴ In the present case, however, the minority of representatives of the people of Western Sahara—i.e. the Polisario—did not give consent, and the majority—different representatives of “*the people of Western Sahara*” other than the Polisario—could not have a right to consent. When the concept of consent is

67. Oumaima Latrech, “Morocco’s Southern Provinces: A Promising Investment Hub,” Morocco World News, 15 May 2022, <https://www.morocoworldnews.com/2022/05/349064/moroccos-southern-provinces-a-promising-investment-hub>.

68. Sami R Yousif, Rosie Aboody and Franh C. Keil, “The Illusion of Consensus: A Failure to Distinguish between True and False Consensus,” *Psychol Sci.*, Vol. 30, No. 8, August 2019, pp. 1195-1204, <https://pubmed.ncbi.nlm.nih.gov/31291546/>.

69. *Ibid.*

70. Andrew Guzman, “The Case against Consent in International Law,” UC Berkeley Program in Law and Economics, Working Paper Series, February 28, 2012, <https://escholarship.org/content/qt11p1v5fw/qt11p1v5fw.pdf?t=m0scfc>.

71. Alan Scott Rau, “The Spectrum of ‘Consent’: Third Parties, ‘Preconditions,’ and Remedies,” in *idem.*, *The Allocation of Power between Arbitral Tribunals and State Courts*, Hague Academy of International Law, 2018, pp. 252-379.

72. Nik Mahmod et al., “An Analysis of Consensus Ad Idem: The Malaysian Contract Law and Shari’ah Perspective,” *Pertanika Journal of Social Science and Humanities*, Vol. 25, October 2017, pp. 73-84.

73. On the relations between democracy and the right to self-determination in the context of the Sahara Issue, see Abdelhamid El Ouali, *Sahara Conflict: Towards Territorial Autonomy as a Right to Democratic Self-determination*, Stacey International, 2008.

74. Moses O. Aderibigbe, “Consent, Consensus and the Leviathan: A Critical Study of Hobbes Political Theory for the Contemporary Society,” *Open Journal of Philosophy*, Vol. 5, August 2015, p. 387, <https://pdfs.semanticscholar.org/b8f7/12701ed06e197399dd9d6ee15dcef7fe717d.pdf>.

conceived as the people's majority opinion on the basis of democracy, instead of consensus, the consent of "*the people of Western Sahara*" should not imply Polisario's veto power in terms of preventing Morocco's exploitation of Saharan natural resources.

Because "*the people of Western Sahara*" should not be discriminated against in breach of a peremptory norm of general international law on non-discrimination, the Polisario should not be granted a veto power to prevent Morocco's exploitation of the Saharan natural resources for the people's benefit and welfare, in conformity with Article 73 of the UN Charter. The discriminatory approach reached its nadir in the aborted process of identifying eligible voters for a referendum envisaged to be implemented in Western Sahara.

Inhabitants of Western Sahara should not be discriminated against in terms of the right to participate in the consultations with the Moroccan government to determine whether or not consent should be given for the exploitation of Saharan natural resources. Discriminatory identification of the eligible participants would constitute not only internationally wrongful acts under the ICCPR and the ICERD, but crimes against humanity in the Rome Statute of International Criminal Court, as described above.

In this way, preferential treatment in favor of Polisario, which is implied in the present judgment, would constitute a breach of international law. Instead, all the people of Western Sahara, or all the inhabitants of the Saharan provinces, should be ensured an equal right to speak concerning the exploitation of Saharan natural resources, in accordance with international law on non-discrimination.

If based on the principle of unanimity, moreover, usually there would be full agreement or no decision. In this regard, it is evinced that "*the power to veto collective decisions under consensus rule is severely limited by various social mechanisms and norms, that it is furthermore asymmetrically distributed amongst decision-makers and additionally de-activated in a large share of empirical cases by an effective 'shadow of majority voting.'*"⁷⁵

If the EU Court continues to insist on Polisario's veto power, the Court also would be held responsible for providing compensation for the loss of benefits of "*the people of Western Sahara*,"⁷⁶ if any, under Article 73 of the UN Charter and the Draft Articles on the Responsibility of International Organizations adopted by the ILC in 2011[84], caused by the non-exploitation of Saharan natural resources.

75. Eva Krick, "The Myth of Effective Veto Power under the Rule of Consensus: Dynamics and Democratic Legitimacy of Collective Decision-Making by 'Tacit Consent,'" Arena Centre for European Studies, University of Oslo, *Négociations*, Vol. 27, No. 1, March 2017, pp. 1, 3.

76. See European Commission, "2021 Report on the Benefits for the People of Western Sahara on Extending Tariff Preferences to Products from Western Sahara," Commission Staff Working Document: Implementation of the 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 (2021) 431 final, 22 December, 2021, https://taxation-customs.ec.europa.eu/system/files/2022-05/SWD_2021_431_1_EN_document_travail_service_part1_v4%20FINAL_updated.pdf.

6. Conclusions

For illuminating the political position of EU as a whole, not only the EU Court, on the Sahara Issue, a statement by the EEAS spokesperson should be quoted. The statement was made in response to the US Presidential Declaration recognizing Morocco's sovereignty over the Saharan provinces.⁷⁷ The EEAS spokesperson made a definitive statement that the EEAS political position on the Sahara Issue remains fully in conformity with the Security Council and its relevant resolutions.⁷⁸ Thus, it is obviously groundless to allege that *"European governments and the European Union are bound by their duty in international law not to recognise Moroccan sovereignty over Western Sahara."*⁷⁹ In practice, the Security Council invites all the UN Member States, including the EU Member States, to lend appropriate assistance to the UN-led negotiations for achieving a just, lasting, and mutually acceptable political solution to the Sahara Issue, based on compromise.⁸⁰ Also, the Personal Envoy of the UN Secretary-General undertook consultations on the Sahara Issue, from November 2021 to May 2022, with officials of the High Representative of the EU for Foreign Affairs and Security Policy, and government officials of Italy, Spain, France, Sweden, Germany, and so on.⁸¹ Here, the Secretary-General's belief should be quoted: *"I urge all concerned to approach the facilitation of the process by my Personal Envoy with an open mind and to desist from preconditions for the political process."*⁸²

In addition, in 2021, a member of the European Parliament, Tomáš Zdechovský, sent the European Commission a question, asking the view of the EEAS in the face of US recognition of Morocco's sovereignty over the Saharan provinces. His question was: *"The USA and Israel have recognised Western Sahara as part of Morocco. Morocco's claims to Western Sahara are also supported by some EU Member States, including Hungary, Bulgaria, Romania and Poland. How does the EEAS view these developments? Is the EEAS considering moving in a similar direction?"*⁸³ In its answer, the European Commission reiterated that the EU fully supports the UN-led process to find a political solution to the Sahara Issue, in compliance with the relevant Security Council resolutions.⁸⁴ Nevertheless, the inaccuracy of the EU Court—in that it holds Western Sahara as separate from Morocco—was repeated in 2021,⁸⁵ in spite of the honorable description of EU as *"a 'Normative Power,' deriving its global power from its status as a global leader in defining and promoting norms*

77. US Presidential Document, Executive Office of the President, "Recognizing the Sovereignty of the Kingdom of Morocco over the Western Sahara," Proclamation 10126 of December 4, 2020, 85 FR 81329, Document No: 2020-27738.

78. Remarks by Peter Stano, quoted in Jacopo Barigazzi, "EU Stresses UN Peace Process after US U-Turn on Western Sahara," Politico, 10 December 2020, <https://www.politico.eu/article/eu-stresses-un-peace-process-after-us-u-turn-on-western-sahara/>.

79. Hugh Lovatt, "From Trade to International Law: Why the EU Should Untangle its Relationships with Morocco and Western Sahara," European Council on Foreign Relations, 2020, <https://ecfr.eu/article/from-trade-to-international-law-why-the-eu-should-untangle-its-relationships-with-morocco-and-western-sahara/>.

80. UN Doc S/RES/2548, 2020, para. 5.

81. UN Doc S/2022/733, 2022, para. 31.

82. *Ibid.*, para. 91.

83. European Parliament, Parliamentary Questions, Question for Written Answer to the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy, E-000981/2021, 2021.

84. *Idem.*, Parliamentary Questions, Answer given by High Representative/Vice-President Borrell on behalf of the European Commission, E-000981/2021 (ANS), 2021.

85. Reportedly, the EU Court announced that it will maintain the agreements for a certain period to preserve the external action for the EU and legal certainty of its international commitments, because their cancellation is likely to have serious consequences on its external action, and their immediate nullification will call into question the legal certainty of international obligations to which the EU is committed. S. Kasraoui, "In First Appeal, EU Court Rules Against Fisheries Agreement 'With No Immediate Effects,'" Morocco World News, 29 September 2021, <https://www.morocccoworldnews.com/2021/09/344660/in-first-appeal-eu-court-rules-against-fisheries-agreement-with-no-immediate-effects>.

relating to peace, liberty, democracy, human rights, and the rule of law.”⁸⁶ What measures may be taken by Morocco in response to the inaccuracy, in addition to the appeals made by the Council and the Commission?

Soon after publicizing the present judgment, Morocco and the EU issued a joint statement, to the effect that they would act to ensure continuity of bilateral trade. According to the statement, they would “take necessary measures to ensure the legal framework guaranteeing the continuation and stability of trade between the EU and Morocco.”⁸⁷ Then, it is reported that recent meetings of the EU-Moroccan Association Council, which frames political dialogue and cooperation priorities, have given renewed impetus to the relationship, and negotiations continue for the creation of a Deep and Comprehensive Free Trade Area with Morocco, in addition to other agreements.⁸⁸

One of the possible measures to get out of ‘the never-ending story’⁸⁹ may be counterclaims filed by different representatives of “the people of Western Sahara,” of course other than the Polisario, before the EU Court, that their rights to self-determination, under Morocco’s sovereignty, were affected by the Court’s granting of a veto power to the Polisario, so as to obstruct the promotion of their interest and welfare enshrined in Article 73 of the UN Charter,⁹⁰ on the basis of the Draft Articles on the Responsibility of International Organizations.⁹¹ The counterclaims could be filed by domestic NGOs in the EU Member States, on behalf of different representatives in the Saharan provinces.

Possible solutions may be found not only the interpretation of international law but also in the question of fact. Thus, for example, the Polisario’s declaration on withdrawing from ceasefire and the UN-led peace process may be cited as one of the facts that show Polisario’s loss of status as a representative of “the people of Western Sahara,” and Polisario’s lack of political will to achieve a political solution to the Sahara Issue. Additionally, under international law, the following questions may be asked:

- What are the prerequisites for the Polisario to assert that it represents inhabitants in the Saharan provinces? Are the census and registration of the population of the refugee camps in Algeria not prerequisites for granting any representative status to the Polisario?
- Under the ICERD, doesn’t the present judgment discriminate against the people in the Saharan provinces, who are not represented by the Polisario?⁹²
- Is not the EU Court’s ruling that ‘Western Sahara’ is separate from Morocco detrimental to the interests of “the people of Western Sahara,” in breach of Article 73 of the UN Charter?

86. Malcolm Cavanagh, “The EU’s Confused Western Sahara Position – A Foreign Policy Failure or an Opportunity?,” LSE, 4 May 2021, <https://blogs.lse.ac.uk/internationalrelations/2021/05/04/eu-western-sahara/>.

87. Philip Blenkinsop and Ahmed Eljechtmi, “EU Court Annuls EU-Morocco Trade Deals over Western Sahara Consent,” Reuters, 29 September 2021, <https://www.reuters.com/world/europe/eu-court-annuls-eu-morocco-trade-deals-over-western-sahara-consent-2021-09-29/>.

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