



RESEARCH PAPER

International Law as a Political Question

The CJEU's Deference to the Institutions on Questions of International Law

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Abstract

In the field of EU external relations law, judicial deference has been discussed mostly within the context of the political question doctrine debate. The latter has a long pedigree in US law. Its nature, scope and legitimacy as well as its applicability in the EU external relations context are controversial and the topic has been mainly discussed in the context of the CFSP. At the same time, the CJEU's deference to the political institutions on questions relating to international law and international relations has been overlooked in the relevant literature, despite the historic relationship between the political question doctrine and international law and the fact that, there is relevant CJEU practice. Questions of judicial deference in the realm of foreign affairs bring to the fore fundamental constitutional questions regarding the role of the judiciary and the proper division of powers between courts and the political branches. In this light, the contribution focuses on the question of whether and under what circumstances the EU courts follow the lead of the political branches when faced with questions of international law. By doing so, the paper purports to feed into the broader debate on deference to the political institutions in EU external relations law as well as to illuminate the constitutional dimension of the discussion.

Keywords

Political question doctrine, political questions, legal questions, judicial deference, EU external relations law, international law, legal standing of international actors, interpretation of international law, CJEU, non-State territorial entities



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International Law as a Political Question: The CJEU's Deference to the Institutions on Questions of International Law

1. Introduction

In one of its most seminal judgments pertaining to the delimitation of its jurisdiction in CFSP matters, the CJEU ruled in *KS and KD*¹ that it has authority over CFSP acts or omissions that are not directly related to “political or strategic choices” made in the context of the CFSP - without however articulating clear criteria for distinguishing between legal questions amenable to judicial review on the one hand and purely political or strategic choices on the other.² Apart from its significance in the specific context of the interpretation of the Court’s jurisdictional ‘carve-out’ in the field of the CFSP, the judgment also brings into sharp focus the broader question of the (degree of) judicial deference to

the EU’s political institutions in the field of EU external relations law and policy. Judicial deference can be understood as a form of judicial self-restraint which recognises that certain questions are inappropriate for judicial resolution, thereby allowing other branches of government greater decision-making scope.³ Deference in foreign affairs law can mean different things and, as Curtley observes, its meaning can range “from the weight given to an argument based on its persuasive power, to judicial abstention under the political question doctrine.”⁴

In the field of EU external relations law, judicial deference has been discussed mostly within the context of the political question doctrine debate. The latter has a long pedigree in US law.⁵ Its nature, scope and legitimacy

¹ Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others*, ECLI:EU:C:2024:725.

² See for example T. Verellen, *A Political Question Doctrine for the CFSP: The CJEU's Jurisdiction in the KS and KD Case*, *VerfBlog*, 24/09/2024, available at <https://verfassungsblog.de/political-question-doctrine/>. D. Genini, *The Role of the Political Question Doctrine in the EU's CFSP Integration Process*, *Columbia Journal of European Law*, 20 January 2025, available at <https://cjel.law.columbia.edu/preliminary-reference/2025/the-role-of-the-political-question-doctrine-in-the-eus-cfsp-integration-process/>. The Court did not follow the Opinion of the AG who proposed to automatically extend judicial review to CFSP acts or omissions involving fundamental rights violations. Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others*, Opinion of AG Čapeta, ECLI:EU:C:2023:901, paras. 114-115.

³ J. H. Fahner, *Judicial Deference in International Adjudication: A Comparative Analysis*, (Oxford: Hart, 2022) p. 5, E. Shirlow, *Deference*, *Max Planck Encyclopedias of International Law*, para. 3, January 2021, available at <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1436.013.1436/law-mpeipro-e1436?d=%2F10.1093%2Fflaw-mpeipro%2Fe1436.013.1436%2Fflaw-mpeipro-e1436&p=emailAAjfugFDhw0Vo&print>

⁴ C. A. Bradley, *Chevron Deference and Foreign Affairs*, 86 *Va. L. Rev.* 649 (2000), at p. 651.

⁵ The modern incarnation of the doctrine can be traced back to the US Supreme Court’s 1962 judgment in *Baker v Carr*, 369 U.S. 186 (1962), at 217. For a recent overview of the doctrine’s development



as well as its applicability in the EU external relations context are controversial and the topic has been mainly discussed in the context of the CFSP.⁶ At the same time, the CJEU's deference to the political institutions on questions relating to international law and international relations has been overlooked in the relevant literature, despite the historic relationship between the political question doctrine and international law⁷ and the fact that, as it will be shown below, there is relevant CJEU practice.

Questions of judicial deference in the realm of foreign affairs bring to the fore fundamental constitutional questions regarding the role of the judiciary and the proper division of powers between courts and the political branches.⁸ To a certain extent, the discussion on the direct effect of WTO law as well as on the invocability of customary international law in the

CJEU's case-law echoes the concern for judicial self-restraint and deference in order to ensure that political actors have the necessary leeway to act unhindered on the international plane.⁹ In denying the direct effect of GATT/WTO law, the CJEU has been mindful of considerations pertaining to the political room for manoeuvre left to the parties under the WTO system.¹⁰ In a similar vein, the evolving case-law on the invocability of customary international law in the context of judicial review reveals that considerations of judicial self-restraint in order to preserve the institutions' scope of manoeuvre internationally are also at play.¹¹ As AG Jacobs stressed already in *Racke* in the context of justifying the limited review of EU acts on the basis of customary international law norms: "[B]y allowing such limited review an appropriate balance is struck between the rights of the individual and the decision-making

in US law, see C. A. Bradely, E. A. Posner, *The Real Political Question Doctrine*, 75 *Stan. L. Rev.* 1031 (2023).

⁶ G. Butler, *In Search of the Political Question Doctrine in EU Law*, 45 *Legal Issues of Economic Integration* 329, (2018). L. Lonardo, *The Political Question Doctrine as Applied to Common Foreign and Security Policy*, 22 *E.F.A. Rev.* 571 (2017). L. Pantaleo, *A Camouflaged Political Question Doctrine in EU Law?* 10 *EP* 607 (2025). See also J. Odermatt, *Patterns of Avoidance: Political Questions before International Courts*, 14 *Int. J. Law Context* 221 (2018), at pp. 229-231.

⁷ C. A. Bradley, *The Political Question Doctrine and International Law*, 91 *George Wash. Law Rev.* 1555 (2023). Note however that Dodge has criticised Bradley's findings on the degree of deference of US Courts to the political branches in relation to questions of international law. W. S. Dodge, *When Is International Law a Political Question?*, Transnational Litigation Blog, 12 July 2023, available at <https://tlblog.org/when-is-international-law-a-political-question/>.

⁸ J. I. Charney, *Judicial Deference in Foreign Relations*, 83 *AJIL* 805 (1989), at p. 805. See also *Baker v Carr*, *supra* note 5, p. 211.

"[T]here are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature, but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or

controversy which touches foreign relations lies beyond judicial cognizance."

⁹ Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others*, Opinion of AG Ćapeta, *supra* note 2, fn 75. "The Court has so far not stated whether a sort of 'political question doctrine' exists in EU law. Nevertheless, the Court has used the concept of direct effect for a similar purpose." As the Commission noted in Case 270/80 *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited*, ECLI:EU:C:1982:43, pp. 342-343. "[T]he question of direct effect is of fundamental importance for the Community's position in international law, for its autonomy, its identity and its capacity to defend its interests and those of the Member States for which it has accepted responsibility. From another point of view, the problem of direct effect raises the question of the proper division of powers within the Community legal system between the legislature and the executive on the one hand and the judiciary on the other."

¹⁰ Case C-21/72, *International Fruit Company NV v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115, paras. 18, 27. Case C-149/96 *Portugal v Council*, ECLI:EU:C:1999:574, paras. 34-51. For analysis see P. Koutrakos, *EU International relations Law*, 2nd ed., (Oxford: Hart, 2015), pp. 285-290, 295-301.

¹¹ For extensive discussion see A. Th. Müller, *The Direct Effect of Customary International Law*, in F. L. Bordin, A. Th. Müller, F. Pascual-Vives (eds.), *The European Union and Customary International Law*, (Cambridge: Cambridge University Press, 2022), pp. 210-239.



powers of the Community institutions ... There is moreover an important political dimension to the conclusion and termination of international agreements which does not lend itself readily to judicial review.”¹² The issue resurfaced in the latest *Front Polisario* judgment. Here, the Court rejected the argument that judicial review on the basis of a customary rule should be limited to examining whether there are manifest errors of assessment by the institutions concerning the conditions for applying those rules.¹³ It held that such rules may constitute the basis for an intensive review of legality. Importantly, the Court found that considerations pertaining to the wide margin of discretion that the Council enjoys in the conduct of external relations did not affect its conclusion.¹⁴ The CJEU underlined that the margin of discretion is “legally circumscribed” by the international law principles applicable *in casu*.¹⁵ The judgment highlights that margin of discretion considerations permeate a whole range of different topics – including that of intensity of review of EU acts on the grounds of customary international law.

More recent case-law has called attention to the tension between the broad discretion that EU institutions enjoy in the context of external relations to make policy decisions (which necessarily implies policy choices)¹⁶ and the duty of the Court to “ensure that in the interpretation and application of the Treaties the law is observed” (Art. 19(1) TEU) in the context of disputes

involving the *interpretation and application of international law*. As AG Ćapeta stressed in *Front Polisario II*: “The interpretation of international law within the EU legal system also raises the question of the relationship between the EU Courts and the EU political institutions when it comes to interpreting which obligations international law imposes on the European Union.”¹⁷ The AG argued that in cases where there is uncertainty as to the content of a customary rule, the discretion that the institutions enjoy in external relations entails that the Court should “defer to the interpretation chosen by those institutions.”¹⁸ In this light the present contribution focuses on the question of whether and under what circumstances the EU courts follow the lead of the political branches when faced with questions of international law. By doing so, the paper purports to feed into the broader debate on deference to the political institutions in EU external relations law.

The specific focus here will be on cases involving (external) territorial dimensions. This focus is justified as, as it will be shown below, the issue of judicial reference in international law questions arises in practice in cases that have such a territorial dimension. Furthermore, cases that involve such a dimension (including cases involving contested Statehood, territorial disputes, unrecognized territorial entities) are

¹² Case C-162/96 *Racke GmbH & Co. v. Hauptzollamt Mainz*, Opinion of AG Jacobs, ECLI:EU:C:1997:582, para. 90.

¹³ Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, ECLI:EU:C:2024:833, paras. 196-211.

¹⁴ *Ibid.*, paras. 162-163, 209. See also Case T-279/19 *Front Polisario v Council*, ECLI:EU:T:2021:639, para. 349.

¹⁵ These were the right to self-determination and the principle of the relative effect of treaties.

¹⁶ Case C-272/15 *Swiss International Air Lines*, ECLI:EU:C:2016:993, para. 24. Case C-673/20, *Préfet du Gers and Institut national de la statistique et des études économiques*, ECLI:EU:C:2022:449, para. 99.

¹⁷ Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, Opinion of AG Ćapeta, ECLI:EU:C:2024:260, para. 66.

¹⁸ *Ibid.*, para. 71.



often politically charged¹⁹ and as such, they are natural points of departure for exploring questions of judicial deference in international law issues.

The contribution is structured as follows: section (2) examines the question of deference in the context of assessing the legal standing of international actors before EU courts. Section (3) focuses on questions of deference in the context of determining the treaty-making capacity of non-State territorial entities while section (4) focuses on deference in the context of the EU's engagement with effective territorial situations that have been created in violation of international law. Section (5) provides some concluding remarks.

2. Standing of International Actors before EU Courts and Judicial Deference

Arguments pertaining to judicial deference and self-restraint have been made in the context of assessing the legal standing of international actors before EU courts. First, the Court has consistently resisted arguments to the effect that recognition of the capacity of international actors to be party to proceedings before the EU judicature would amount to 'political decisions' interfering with the institutions' latitude in managing the Union's external relations. In *Venezuela v Council*, the Court was faced with the question whether a third State has legal standing to challenge EU acts.²⁰ AG Hogan

expressly rejected the argument of non-justiciability of the question of standing on political expediency grounds. More particularly, the AG underscored that, contrary to the Council's claims, the fact that a third State purports to challenge internal Union acts implementing a political decision of the Council to adopt restrictive measures against it bears no relevance to the *legal question* of whether it is entitled to do so under EU law.²¹ Although the Court did not directly address this issue, it implicitly endorsed the AG's approach by ruling that third States may have legal standing to challenge EU acts provided that the rest of the conditions of Art. 263(4) TFEU are fulfilled – even in the absence of reciprocal access to the courts of the third State.²²

The matter has also arisen in the context of the Western Sahara saga before the Court – a series of cases dealing with the compatibility with international law of several EU-Morocco agreements extending to the territory of Western Sahara. In *Front Polisario I*, AG Wathelet, having argued that Front Polisario, the main Sahrawi liberation movement, has sufficient legal personality for the purposes of Art. 263(4) TFEU, rejected the view that the political nature of the case at bar "would lead the Court to make political rather than legal assessments."²³ Here, the AG essentially drew a distinction between the political connotations of a case and the essentially legal character of the question of determining the capacity of an actor to institute proceedings before the EU courts within the meaning of Art. 263(4) TFEU.²⁴ This aspect

¹⁹ AG Wathelet expressly referred to the "political ramifications" of the Western Sahara cases in Case C-266/16 *Western Sahara Campaign UK*, Opinion of AG Wathelet, ECLI:EU:C:2018:1, para. 3.

²⁰ Case C-872/19 P *Venezuela v Council*, ECLI:EU:C:2021:507.

²¹ Case C-872/19 P *Venezuela v Council*, Opinion of AG Hogan, ECLI:EU:C:2021:37, para. 88.

²² Case C-872/19 P *Venezuela v Council*, *supra* note 20, paras. 51-53.

²³ Case C-104/16 P *Council v Front Polisario*, Opinion of AG Wathelet, ECLI:EU:C: 2016:677, para. 141.

²⁴ The AG quoted the ICJ's dictum in the *Wall* Advisory Opinion: "[T]he fact that a legal question also has political aspects, ... does not suffice to deprive it of its character as a "legal question" ...



was not dealt with by the Court since it found that the agreements at bar did not legally cover the territory of Western Sahara and thus, the applicant had no legal standing to entertain the proceedings.²⁵

The issue resurfaced in later case-law concerning the EU's engagement with Western Sahara. In its 2021 ruling, the General Court (GC) rejected the Commission's argument that recognition of the capacity of Front Polisario to institute proceedings would amount to a political decision interfering with the broad discretion that the institutions of the Union enjoy in external relations.²⁶ It was highlighted in this respect that the exercise of powers of the institutions on the international plane cannot escape judicial review.²⁷ The GC confirmed the legal character of questions of legal standing and refused to give precedence to considerations of "international policy and expedience" over the judicial task of determining the rules on admissibility under Art. 263(4) TFEU.²⁸ On appeal, the Grand Chamber found that Front Polisario has sufficient legal existence to be able to be a party to proceedings before the EU Courts.²⁹

While the justiciability of the question of legal standing of international actors seems to be settled in the case-law, the deference to be afforded to the positions adopted by the executive in *interpreting* the actual conditions for standing remains more difficult to gauge.

In the *Venezuela* judgment, the Court found that subjects of international law can be considered 'legal persons' within the meaning of Art. 263(4) TFEU.³⁰ In the context of that case, the matter of international legal personality was unproblematic since it concerned a sovereign State, the example *par excellence* of an international legal person. Things are however much more complicated in situations involving non-State entities, such as Front Polisario, whose international legal subjecthood has not been recognized by the Union. To what extent does recognition on behalf of the Union play a role in determining what constitutes an international legal person for the purposes of Art. 263(4) TFEU? The issue gained salience in the latest instalment of the Western Sahara saga before the Court.

AG Ćapeta argued that Front Polisario is not recognized as the exclusive representative of the people of Western Sahara either by the UN, or by the EU.³¹ The AG considered the entity to be a self-proclaimed liberation movement fighting for a particular model of governance of that territory, namely the creation of an independent Sahrawi State.³² Taking into account that the self-determination process has three possible outcomes (the creation of an independent State, free association or integration), the AG argued that recognizing Front Polisario as the representative of the Saharawi people would be at odds with the neutrality assumed by the

Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task..." *Ibid.*, para. 142. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reps 2004, p. 136, para. 41.

²⁵ Case C-104/16 P *Council v Front Polisario*, ECLI:EU:C: 2016:973, paras. 131-134.

²⁶ Case T-279/19 *Front Polisario v Council*, *supra* note 14, para.

113.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, *supra* note 13, paras. 63-73.

³⁰ Case C-872/19 P *Venezuela v Council*, *supra* note 20, para. 53.

³¹ Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, Opinion of AG Ćapeta, *supra* note 17, para. 81.

³² *Ibid.*, para. 82.



Union towards the outcome of the self-determination process.³³ The AG highlighted that judicial recognition of Front Polisario as representative of the people of Western Sahara is not an option “as it would run counter to the foreign policy decision of the European Union and its Member States not to recognise Front Polisario as holding any particular status.”³⁴ At the same time, the AG acknowledged that Front Polisario has been recognised as an interlocutor in the UN process of self-determination of the territory and coupled with the fact that it exercises effective control on part of that territory it holds partial representative status of the people of the territory, thereby satisfying the requirements for legal standing under EU law.³⁵

The Court (in Grand Chamber formation) broadly followed the AG’s suggestions and qualified Front Polisario as a self-proclaimed national liberation movement fighting for the independence of Western Sahara that has not been recognised as the exclusive representative of the people of the territory.³⁶ The CJEU ruled that the entity, as one of the (privileged) interlocutors in the UN-led process regarding the future

of the territory and as an actor that maintains legal relations at the international level has sufficient legal existence to be a party to legal proceedings before the EU courts – despite the fact that it has not been recognized as a national liberation movement either by the UN or by the EU.³⁷

While it is widely accepted that national liberation movements enjoy limited legal personality under international law, there are no clear rules determining whether a particular actor is a national liberation movement and the legitimately representative of the people of a territory in the context of self-determination.³⁸ In practice, recognition by the international community plays an important role in this context.³⁹ Thus, the constitutive role afforded to recognition both in the AG’s Opinion and in the judgment comports with the realities on the international stage. However, neither the Court nor the AG adduced evidence to rebut previous findings to the effect that Front Polisario is indeed the UN-recognized representative of the Saharawi.⁴⁰ The AG’s Opinion merely states in a footnote that UN GA Res. 34/37

³³ *Ibid.*, paras. 83-84.

³⁴ *Ibid.*, para. 85.

³⁵ *Ibid.*, paras. 86-91.

³⁶ Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, *supra* note 13, paras. 67, 89.

³⁷ *Ibid.*, paras. 67-73.

³⁸ K. Mastrodimos, National Liberation Movements: Still A Valid Concept (With Special Reference to International Humanitarian Law)? 17 *Or. Rev. Int’l L.* 71 (2015) at p. 88, D. Gattuso, The Polisario Front and the Future of Article 1(4), 99 *Texas L. Rev.* 1201 (2021), at p. 1212

³⁹ K. Mastrodimos, *ibid.* See also C. Greenwood, Terrorism and Humanitarian Law - The Debate over Additional Protocol I, 19 *Isr. Y.B. Hum. Rts.* 187 (1989), at p. 197. Note however that, during negotiations, a proposal that national liberation movements must be recognized by a regional inter-governmental organization in order to either make a unilateral declaration undertaking to abide

by international humanitarian law or to trigger the applicability of Art. 1(4) Protocol I to the Geneva Conventions. Under Art. 1(4) armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination are to be considered international conflicts. See Art. 1(4) and 96(3) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, entered into force 7 December 1978. ICRC, Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 19 August 1949*, (Geneva: Martinus Nijhoff, 1987), p. 1089, para. 3763.

⁴⁰ Case T-279/19 *Front Polisario v Council*, *supra* note 14, para. 96. Case C-104/16 P *Council v Front Polisario*, Opinion of AG Wathelet, *supra* note 23, para. 146.



(1979) constitutes insufficient evidence in that regard – without providing more by way of explanation.⁴¹ This has attracted criticism in the literature.⁴² Indeed, it is unclear why the unequivocal wording of operative para. 7 of UN GA Res. 34/37 as well as operative para. 10 of UN GA Res. 35/19 (1980) which designate Front Polisario as “the representative of the people of Western Sahara” do not pass muster.

Furthermore, neither the AG nor the Court engaged with a significant body of UN practice in which the actor has been treated as having the capacity to enter into binding commitments as the representative of the people of the territory. More particularly, Front Polisario and Morocco have entered into a number of agreements relating to the UN Secretary General's settlement proposals on a ceasefire between them and the organisation of a referendum on self-determination under UN supervision – approved by UN SC Res. 658 (1990).⁴³ As the GC stressed, UN bodies regularly remind Front Polisario of its obligations under international law – thereby attesting to their understanding that the entity can be legally bound by the commitments entered into under

those agreements in relation to matters involving the territory.⁴⁴ Finally, it was uncontested during the proceedings before the GC that Front Polisario participates in the work of the UN Special Committee on Decolonisation relating to the question of Western Sahara.⁴⁵

Beyond the UN context, there is further evidence confirming Front Polisario's representativeness and its status as a national liberation movement. The actor entered into a peace agreement with Mauritania in its capacity as the representative of the Saharawi people⁴⁶ and the Sahrawi Arab Democratic Republic (SADR), which was proclaimed by Polisario in 1976, and claims sovereignty over the territory *has been a member of the African Union (AU), formerly the Organization of African Unity (OAU), since 1984.*⁴⁷ *In the literature, the approach of regional organizations has been considered significant since proximity to local affairs could ensure representativeness and the exclusion of secessionist movements.*⁴⁸ Importantly, in June 2015 Polisario gave a unilateral undertaking to adhere to the Geneva Conventions and Protocol I on the basis of the procedure

⁴¹ Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, Opinion of AG Ćapeta, *supra* note 17, fn. 76.

⁴² S. von Massow, AG Ćapeta's Opinions Undermine the Law of Decolonisation, 14 May 2024, EJIL:Talk!, available at <https://www.ejiltalk.org/ag-capetas-western-sahara-opinions-undermining-the-law-of-decolonization/>. P. Hilpold, *Furthering the Right to Self-Determination by EU Courts: The Western Sahara Decisions of 04 October 2024 and the Völkerrechtsfreundlichkeit of the European Court of Justice*, *EU Const* (2025), pp. 13-15.

⁴³ Case T-279/19 *Front Polisario v Council*, *supra* note 14, para. 94

⁴⁴ *Ibid.* See for instance UN SC Res 690 (1991), UN SC Res. 1084 (1996).

⁴⁵ *Ibid.*, para. 95.

⁴⁶ Mauritania-Sahraoui Agreement signed at Algiers on 10 August 1979, available at

<https://peacemaker.un.org/sites/default/files/document/files/2024/05/mr790810mauretania-sahraouiagreement.pdf>. See also

the Joint Communique by Spain and Polisario Front signed in Algiers, 17 December 1980, available at

<https://nubeusc.sharepoint.com/sites/CentrodeEstudossobreSharaOccidentalCESO/Web/Forms/AllItems.aspx?id=%2Fsites%2FCentrodeEstudossobreSharaOccidentalCESO%2FWeb%2FEsp%2DFP%5FComunicado%2Dconjunto%5F17%2D12%2E80%5FREI%5Fvol%2D2%5Fn%2D1%5F1981%2Epdf&parent=%2Fsites%2FCentrodeEstudossobreSharaOccidentalCESO%2FWeb%2Fp=true&ga=1>. Note however that the OAU did not recognize Polisario as a national liberation movement while it accepted SADR as a State – something that leads Mastrodimos to argue that “Western Sahara is a state, with the majority of its territory under occupation from Morocco.” K. Mastrodimos, *supra* note 38, p. 100. Also agreeing that this can be seen as recognition of statehood by OAU M. N. Shaw, *International Law*, 9th ed., (Cambridge: Cambridge University Press, 2021), p. 214.

⁴⁷ M. N. Shaw, *ibid.*, pp. 213-214.

⁴⁸ K. Mastrodimos, *supra* note 38, pp. 78-79.



provided for under Art. 96(3) of Protocol I.⁴⁹ The depositary State, Switzerland, notified the declaration to the States parties, thereby marking the very first time that it actually accepted an Art. 96(3) declaration.⁵⁰ The provision allows national liberation movements engaged in a conflict in which the principle of self-determination is at stake to undertake to apply the Conventions and Additional Protocol I by means of a unilateral declaration. There are further issues with the line of reasoning followed by the AG and the Court. Rejecting the representative status of Polisario on the grounds that it is fighting exclusively for the creation of an independent State (while the self-determination process may have different outcomes according to UNGA Res. 1541 (XV) (1960)) ignores that, historically, most national liberation movements fought exactly for independence – without their representativeness being doubted.⁵¹ It seems unrealistic to expect that national liberation movements should remain neutral towards the outcome of the self-determination process in order to legally qualify as such. As von Massow argues this approach would have left most non-self-governing territories without a recognised representative.⁵² The internal memorandum circulated by the Swiss Federal Department of Foreign Affairs in which the decision to accept Polisario's unilateral declaration under Art. 96(3) of Protocol I was explained

states that the entity was considered an authority representing the Sahrawi people exactly because their de facto representation has been uncontested since the 1970s.⁵³ Moreover, logically, this line of reasoning would have required proof that, at least part of, the Saharawi people are in favour of other self-determination outcomes – which was not furnished.⁵⁴

At this juncture, the issue of deference to be paid to the political assessments by the Union's institutions resurfaces. As seen above, AG Ćapeta was quite explicit in that respect. In her Opinion, judicial recognition of Polisario as representing the Saharawi people is not an option open to the Court since this would be contrary to the foreign policy decision of the Union and it would undermine its neutral position as to the outcome of the self-determination process.⁵⁵ Although the Court did not expand on the issue, the fact that it largely sided with the AG's conclusions as to the international legal status of Front Polisario implies that the political aspect played a role in the judgment. Indeed, judicial confirmation of the status of Polisario as a national liberation movement and as the representative of the Saharawi people would directly contradict the practice of the Union's institutions that have not sought the entity's consent in the conclusion of the agreements extending to the territory of Western Sahara. The Court was careful to

⁴⁹ B. Saul, *The Status of Western Sahara as an Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources*, 27 *Global Change, Peace and Security* 301 (2015), at p. 304.

⁵⁰ K. Fortin, *Unilateral Declaration by Polisario under API accepted by Swiss Federal Council*, 2 September 2015, available at <https://www.armedgroups-international.org/2015/09/02/unilateral-declaration-by-polisario-under-api-accepted-by-swiss-federal-council/>.

⁵¹ P. Hilpold, *supra* note 42, p. 13. S. Von Massow, *supra* note 42.

⁵² S. von Massow, *ibid*.

⁵³ D. Gattuso, *supra* note 38, p. 1215. See also Eidgenössisches Departement für auswärtige Angelegenheiten, *Declaration unilaterale du Front POLISARIO d'application des Conventions de Genève et de leur premier Protocole additionnel dans son conflit avec le Maroc* (June 30, 2015), available at

<https://www.kubomacak.org/wp-content/uploads/2018/07/Polisario-memorandum-30052015.pdf>

⁵⁴ P. Hilpold, *supra* note 42, p. 13.

⁵⁵ Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, Opinion of AG Ćapeta, *supra* note 17, paras. 84-85.



highlight later on in the judgment that Polisario's objection to the agreement "as a movement which presents itself as the legitimate representative of that people" is not enough to call into question the existence of 'presumed consent' by the people of the territory.⁵⁶ This confirms that the Court attributed weight to the political assessment by the institutions regarding the international legal status of Polisario as a national liberation movement and as the representative of the Saharawi people. Was such deference allowed by international law? In its practice, the CJEU has noted that: "[T]he discretion of the institutions may be limited, including in the context of external relations, by a legal concept establishing objective criteria and guaranteeing the degree of foreseeability required by EU law".⁵⁷ The lack of clarity of the international legal framework regarding the qualification of a non-State actor as a 'national liberation movement' that is the legitimate representative of a self-determination unit coupled with the important role that recognition plays in this context muddy the waters here. At a minimum, one would have expected more in-depth engagement with the significant body of practice, both within and outside the UN context, that militates in favour of the proposition that Polisario enjoys international legal personality as a national liberation movement and as the representative

of the people of Western Sahara. The need for such detailed engagement is reinforced by previous findings of the General Court and of AG Wathelet regarding the international legal status of the entity. In the absence of such engagement, it seems that foreign policy considerations were accorded significance here. *mquatemporia natiur renim re, num voluptatem que dolorer chilloreressedis etum.*

3. Treaty-Making Capacity of Non-State Territorial Entities and Judicial Deference

In international law questions of territory are mixed questions of fact and law. Ralf Michael has traced the evolution of the concept of territory in international law and has eloquently described territory as "juridified land – land turned into territory through legal techniques."⁵⁸ This definition highlights that territory is a legal concept, albeit one highly contingent on geographical space.⁵⁹ There is evidence that the CJEU also shares the same understanding of 'territory'. In its case-law, the Court has observed that the concept indicates "the geographical space over which that State exercises the fullness of the powers granted to sovereign entities by international law ...".⁶⁰ This confirms that the CJEU accepts that territory is

⁵⁶ Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, *supra* note 13, para. 155. The Court deemed 'presumed consent' as a sufficient condition for the legality of the agreement under international law. For comment see A.M. Pelliconi, J. Odermatt, *Benefit v Consent: CJEU's Front Polisario II Judgment and the Law of Self-Determination*, 15 November 2024, NUS Centre for International Law Blog, available at <https://cil.nus.edu.sg/blogs/benefit-v-consent-cjeus-front-polisario-ii-judgment-and-the-law-of-self-determination/>

⁵⁷ Case T-578/12 *National Iranian Oil Company v Council*, EU:T:2014:678, para. 123, as quoted in Case T-279/19 *Front Polisario v Council*, *supra* note 14, para. 347.

⁵⁸ R. Michaels, *Territory*, in J. D'Aspremont, J. Huskell (eds.) *Tipping Points in International Law: Commitment and Critique*, (Cambridge: Cambridge University Press, 2021), p. 332, at p. 348.

⁵⁹ Also noting the close relationship between legal and geographical space in constructing territoriality H. L. Buxbaum, *The Practice(s) of Extraterritoriality*, in H. L. Buxbaum, T. Fleury Graff (eds.), *Extraterritoriality/L'extraterritorialite*, (Leiden: Brill, Nijhoff 2022), p. 3, at p. 4.

⁶⁰ Case C-104/16 P *Front Polisario I*, *supra* note 25, para. 95. See also Case C-363/18 *Organisation juive européenne and Vignoble Psagot*, EU:C:2019:54, para. 62. See also Case C-457/18 *Slovenia v Croatia*, ECLI:EU:C:2020:65, para. 105 in which the Court stated



not simply a matter of geography, but rather it is a legal concept that is closely linked to the physical space within which States' powers are lawfully exercised.⁶¹

Territorial disputes, and more broadly territorial issues, can be highly political since they often involve issues of sovereignty, Statehood as well as of conflicting interests.⁶² This raises the question of the Court's deference to the political institutions in questions involving the Union's engagement with non-recognized territorial entities.

Modern international law acknowledges that international legal personality is a spectral concept. While States are actors that "possess the totality of international rights and duties recognized by international law"⁶³, other actors, such as national liberation movements, insurgent groups and non-self-governing territories, may enjoy a degree of legal personality that offers them the capacity to act on the international plane (including treaty-making capacity).⁶⁴

Whether a particular entity possesses treaty-making capacity is a matter of recognition; other actors must recognize its treaty-making capacity.⁶⁵ The relevant rules of international law only impose very few limitations in this respect: territorial entities which were not realised illegally can acquire (relative) treaty-making capacity in *inter se* relations by means of recognition.⁶⁶

At the same time, it needs to be noted that the exercise of mere factual power over a certain geographical space does not create legal title over it. When it comes to questions of territorial status (including title to territory; modes of acquisition of territory; and means of modification of territorial status), international law does not reduce itself to merely recording the facts on the ground. In this sense, it is the existence of substantive principles of legality, rather than the factual exercise of effective control over territory, that affects and determines the lawfulness of territorial situations.⁶⁷ As Judge Kreca has observed: Effectiveness

that: "[I]n the absence, in the Treaties, of a more precise definition of the territories falling within the sovereignty of the Member States, it is for each Member State to determine the extent and limits of its own territory, in accordance with the rules of public international law."

⁶¹ For analysis, see E. Kassoti, The EU and Questions of 'Territory' under Public International Law (April 03, 2025). T.M.C. Asser Institute for International & European Law, ASSER Research Paper No. 2025-02, Forthcoming in Lucia Leontiev, A. Simonyan (eds.), *Territory and Territoriality in Eurasia: Law and Geopolitics*, Edward Elgar Publishing (2026), available at <https://ssrn.com/abstract=5204973> or <http://dx.doi.org/10.2139/ssrn.5204973>.

⁶² K. J. Alter, M. R. Madsen, The International Adjudication of Mega-Politics, 84 *Law & Contemp. Probs* 1 (2021). On the political nature of the question of State recognition, see Case C-399/22 *Confédération paysanne and tomates du Sahara occidental*, Opinion of AG Ćapeta, ECLI:EU:C:2024:262, para. 99.

⁶³ ICJ, *Reparations Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 174, at p. 180.

⁶⁴ E. Kassoti, The Normative Status of Unilateral Ad Hoc Commitments by Non-State Armed Actors in Internal Armed

Conflicts: International Legal Personality and Lawmaking Capacity Distinguished, 22 *J. Confl. Secur. Law* 67 (2017). The decision of the International Law Commission (ILC) to limit the Vienna Convention on the Law of Treaties (VCLT) to treaties between States implicitly acknowledged this. Article 3 VCLT excludes international agreements involving "other subjects of international law" – thereby confirming that although such agreements do not fall within the scope of the VCLT, they do exist as a matter of international law. ILC, Draft Articles on the Law of Treaties with commentaries, *Yrbk of the ILC* 1966, Vol. II, p. 190, para. 2.

⁶⁵ A. Peters, Treaty Making Power, Max Planck Encyclopedia of Public International Law, March 2009, para. 14, available at <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1494?prd=MPIL>.

⁶⁶ Art. 40 and 41 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yrbk of the ILC* 2001, Vol. II, Part 2, p. 31. ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reps 2010, p. 403, at para. 81. For analysis see J. Vidmar, *Territorial Status in International Law*, (Oxford: Hart Publishing, 2024), p. 180.

⁶⁷ E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Leiden: Martinus Nijhoff, 2006), p. 8.



in a system with a defined concept of legality may be legally accepted only in cases in which it does not conflict with the norms that serve as criteria for legality. Within the coordinates of the *de jure* order *effectiveness versus legality* is an incorrect approach, because to accept effectiveness as a rule “would be to apply a hatchet to the very roots of the law of nations and to cover with its spurious authority an infinite series of international wrongs and disregard for international obligations.”⁶⁸ The CJEU’s case-law also attests to an understanding that not only States, but also other non-State territorial entities may have a legally relevant territorial status (with varying degrees of legal capacity). In *Front Polisario I*⁶⁹ and in *Western Sahara Campaign UK*⁷⁰, the Court found that the territory of Western Sahara has a separate and distinct status in relation to that of any State (including Morocco) by virtue of the principle of self-determination, and thus, that the relevant EU-Morocco agreements could not extend thereto without the consent of the people of Western Sahara. In *Psagot*, a case relating to the labelling of products originating from the occupied Palestinian Territories, the Court made a distinction between States and territories – the latter term referring to “geographical spaces which ... have a separate and distinct status under international law.”⁷¹ The CJEU’s

jurisprudence also clarifies that, in the absence of a relevant rule of general international law, non-State territorial entities can acquire (relative) legal capacity on the basis of recognition. In *Spain v Commission (Kosovo)*,⁷² the Court was faced with the question of Kosovo’s participation in an EU agency. According to Spain, such participation was precluded on the grounds that the EU has not recognized Kosovo as an independent State and thus, Kosovo could not be considered a ‘third country’ within the meaning of the relevant EU regulation. On appeal, the AG in her Opinion invoked the EU’s own treaty practice with territorial entities that have not been recognized as sovereign States (such as the Palestine Liberation Organization, Hong Kong and Macao) in order to buttress the proposition that entities other than States may enjoy limited legal capacity on the international plane.⁷³ The Court itself stressed that the EU had entered into a number of agreements with Kosovo “thus recognising its capacity to conclude such agreements.”⁷⁴ It argued that the (EU law) principle of effectiveness entails that an entity should be treated as a third country for EU law purposes “while not infringing international law.”⁷⁵ It then referred to the ICJ’s Advisory Opinion on Kosovo⁷⁶ as proof of the latter statement.⁷⁷ The Court’s reference to the EU’s agreements with Kosovo, that

⁶⁸ Dissenting Opinion of Judge Kreca, ICJ, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ Reps 1996, p. 658, at p. 709 (emphasis in the original).

⁶⁹ Case C-104/16 P *Front Polisario I*, *supra* note 25, para. 92.

⁷⁰ Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty’s Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, ECLI:EU:C:2018:118, paras. 62-64.

⁷¹ Case C-363/18 *Organisation juive européenne and Vignoble Psagot*, *supra* note 60, para. 31.

⁷² Case C-632/20 P *Spain v Commission (Kosovo)*, ECLI:EU:C:2023:28. For comment see E. Kassoti, The EU and

Non-Recognized Territorial Entities – the CJEU’s Judgment in Case C-632/20 P *Spain v. Commission (Kosovo)*, 30 MJECL 642 (2023).

⁷³ Case C-632/20 P *Spain v Commission (Kosovo)*, Opinion of AG Kokott, ECLI:EU:C:2022:473, paras. 83-85.

⁷⁴ Case C-632/20 P *Spain v Commission (Kosovo)*, *supra* note 69, para. 55.

⁷⁵ *Ibid.*, para. 50.

⁷⁶ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, *supra* note 66, p. 403.

⁷⁷ Case C-632/20 P *Spain v Commission (Kosovo)*, *supra* note 72, para. 51.



explicitly do not entail recognition by the EU of Kosovo's status as a State, confirms that the Court also understands that a territorial entity may have relative, inter-se, law-making capacity on the basis of recognition. Importantly, the Court highlighted that the emergence of Kosovo was not tainted by any sort of illegality. This arguably reflects the Court's understanding that recognised subjects of international law, such as States and international organizations, may confer treaty-making capacity to territorial non-State entities subject only to the limitation that a territorial entity was not created illegally under international law.⁷⁸ Here, the Court's decision gave effect to the position of the political institutions regarding the international legal capacity of Kosovo, while steering clear of questions of Statehood. By confirming that the effective territorial situation in question was not brought about illegally, the Court ensured that the discretion afforded to the institutions was allowed under international law.

4. Territorial Illegality and Deference

Questions of deference have also arisen in the context of the EU's engagement with effective territorial situations that have been created in violation of international law. The persistent unwillingness of the EU courts to engage with the legal status of Western Sahara

as a territory occupied by Morocco (by way of contrast to the analogous situation in Palestine) illustrates the relevant issues well.

More particularly, in the context of the Western Sahara saga, the question pertaining to the capacity in which Morocco can legally enter into agreements with the EU that extend to the territory is central – albeit one that has never been addressed squarely by the EU courts.⁷⁹ The EU's conclusion of agreements with Morocco that extend to the territory raises questions as to the capacity in which Morocco can legally contract on behalf of Western Sahara and of its legal title over the territory. In turn, and in the context of the present enquiry, this raises questions of deference to the political institutions in relation to the legal qualification of Morocco's status vis-à-vis Western Sahara. From an international law point of view, there is little doubt that Western Sahara is not only a non-self-governing territory, but also one that is occupied by Morocco, since Morocco's presence therein meets the objective threshold of occupation under international humanitarian law, namely demonstration of effective authority and control over a territory to which the occupying State holds no sovereign title.⁸⁰ There is considerable authority buttressing this position. The UN General Assembly has twice characterized the presence of Morocco in Western Sahara as 'belligerent

⁷⁸ J., *supra* note 66, pp. 179-180.

⁷⁹ It has only been addressed by different AGs in their Opinions. However, AG Wathelet and AG Ćapeta have reached different conclusions – while Wathelet found that Western Sahara is occupied by Morocco AG Ćapeta has found that Morocco is the 'de facto' administering power of the territory. See Case C-266/16 *Western Sahara Campaign UK*, Opinion of AG Wathelet, *supra* note 19, paras. 234-255. Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, Opinion of AG Ćapeta, *supra* note 17, paras. 155-169.

⁸⁰ See Art. 42 of 1907 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War (The Hague Regulations), available at ihl-databases.icrc.org/ihl/WebART/195-200052?OpenDocument. "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." For analysis, see E. Kassoti, *Between Völkerrechtsfreundlichkeit and Realpolitik: The EU and Trade Agreements Covering Occupied Territories*, 26 *Ital. Yearb. Int. Law.* 139 (2017), at pp. 143-144.



occupation⁸¹ and a number of EU Member States describe Western Sahara as 'occupied'.⁸² The African Union also considers Western Sahara to be under occupation by Morocco.⁸³ It needs to be noted that a South African court⁸⁴, the referring court in the *Western Sahara Campaign UK* case,⁸⁵ AG Wathelet in his Opinion in *Western Sahara Campaign UK*⁸⁶ as well as the African Court on Human and Peoples' Rights⁸⁷ all subscribe to the same view. This status is vehemently denied by Morocco which considers Western Sahara as an integral part of its territory.⁸⁸ The existence of territorial illegality has consequences for third parties triggering obligations of non-recognition.⁸⁹ The obligation of non-recognition covers not only formal acts of recognition, but also "prohibits acts which would imply such recognition".⁹⁰ In the *Namibia* case,⁹¹ the ICJ elaborated on the scope and content of the obligation of non-recognition. The duty of

non-recognition entails, *inter alia*, that States are under an obligation to abstain: (a) from entering into treaty relations with the non-recognized regime in respect of the unlawfully acquired territory; and (b) from entering into economic and other forms of relationship concerning the unlawfully acquired territory which might entrench the non-recognized regime's authority over the territory.⁹² Practice shows that the duty of non-recognition is a self-executing one, i.e. there is no need for a binding decision by the Security Council for the duty of non-recognition to arise. The ICJ itself in the *Namibia* Advisory Opinion took note of the Security Council resolution that defined some of the steps to be taken by States against South Africa, it did not deal with that resolution *per se*.⁹³ Furthermore, the relevant passage of the Opinion did not relate to the obligation of non-recognition, but more generally, to the measures to

⁸¹ UN Doc. A/RES/34/37 (1979), para. 5; UN Doc. A/RES/35/19 (1980), para. 3.

⁸² See the statements cited in E. Kontorovich, 'Economic Dealings with Occupied Territories', (2015) 53 *Columbia Journal Transnational Law* 584, at 612, fn. 147.

⁸³ African Union, Legal Opinion on the legality in the context of international law, including the relevant United Nations resolutions and organization of African Unity/African Union decisions, of actions allegedly taken by the Moroccan authorities or any other State, group of States, foreign companies or any other entity in the exploration and/or exploitation of renewable and non-renewable natural resources or any other economic activity in Western Sahara, Annex to the letter dated 9 October 2015 from the Permanent representative of Zimbabwe to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/786 (2015), para. 21.

⁸⁴ South Africa, Eastern Cape High Court, Port Elizabeth, *Saharawi Arab Democratic Republic and Another v Owner and Charterers of the MV 'Cherry Blossom' and Others*, [2017] ZAECPHC 31, 15 June 2017, para. 38 available at www.saflii.org/za/cases/ZAECPHC/2017/31.html.

⁸⁵ Case C-266/16 *Western Sahara Campaign UK*, Opinion of AG Wathelet, *supra* note 19, para. 246.

⁸⁶ Case C-266/16 *Western Sahara Campaign UK*, Opinion of AG Wathelet, *supra* note 19, paras. 234-255.

⁸⁷ African Court on Human and Peoples' Rights, *Bernard Anbatayela Mornah v. Republic of Benin and others*, App. No. 028/2018, Judgment of 22 September 2022, para. 285, available

at <https://www.african-court.org/cpmt/storage/app/uploads/public/632/e0f/3ad/632e0f3ad580e748464681.pdf>.

⁸⁸ Human Rights Committee, Consideration of reports submitted by States parties under Article 40 of the Covenant, Sixth periodic reports of States parties due in 2008, Morocco, UN Doc. CCPR/C/MAR/6, 31 August 2015, para. 31.

⁸⁹ Art. 41 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *supra* note 66.

⁹⁰ ILC Commentary to Art. 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, *supra* note 66, p. 114, para. 5.

⁹¹ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reps 1971, p. 16, at paras. 122, 124. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 24, para. 159. ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, Advisory Opinion, 19 July 2024, para. 278, available at <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>.

⁹² *Ibid.*

⁹³ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *supra* note 91, para. 120.



be taken by the UN in order to bring the illegal situation to an end.⁹⁴ A review of the leading examples in practice associated with the duty of non-recognition (including the situations in Southern Rhodesia, Namibia, the Bantustans in South Africa and the Turkish Republic of Northern Cyprus) reveals that this practice is based almost entirely on General Assembly resolutions and Security Council resolutions adopted under Chapter VI – thus, confirming that there is no need for a binding decision by the Security Council for the duty of non-recognition to arise.⁹⁵ The Court in the *Namibia* case introduced an element of flexibility in the doctrine of non-recognition, the so-called '*Namibia* exception'.⁹⁶ According to the Court, while acts that are undertaken in pursuance of the illegal administration are to be considered null and void since they purport to enhance unlawful territorial claims, minor administrative acts, such as "the registration of births, deaths and marriages" are valid,⁹⁷ as they are considered "untainted by the illegality of the administration".⁹⁸ Importantly, recognition of the factual capacity of an illegally established authority to issue birth certificates etc does not equate recognition of any change in legal title over

territory.⁹⁹ As Vidmar stresses: "[I]t only means that these authorities have the ability to exercise de facto jurisdiction in certain spatial areas and that certain aspects of such jurisdictional power need to be accommodated internationally, particularly under private international law, for the benefit of the inhabitants."¹⁰⁰ At this juncture, a very recent development pertaining to the Moroccan claim of sovereignty over the territory needs to be mentioned. On 31 October 2025, the UN SC voted in favour of Res. 2797 renewing the mandate of the UN Mission in Western Sahara for another year. Although the actual text of the resolution is still not available, the relevant UN press release shows that for the first time the UN SC referenced Morocco's 2007 Autonomy Proposal – which envisages the territory as self-governing under Moroccan sovereignty¹⁰¹ – as the basis for future negotiations.¹⁰² The Resolution, tabled by the US, is a significant turning point in UN discourse regarding the territory. Although the resolution does not recognize Moroccan sovereignty over the territory and it does mention the Saharawi right to self-determination, it states that "genuine autonomy could represent a most feasible outcome". The adoption of the resolution has

⁹⁴ *Ibid.* See also S. Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, in C. Tomuschat, J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Erga Omnes Obligations* (Leiden: Brill), 2006, p. 99, at pp. 112-113.

⁹⁵ M. Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation*, in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p. 677, at pp. 679-683.

⁹⁶ E. Milano, *The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question*, *QIL, Zoom out I* (2014), p. 35, at p. 40.

⁹⁷ *Legal Consequences of the Presence of South Africa in Namibia*, *supra* note 91, para. 125.

⁹⁸ J. Crawford, *The Creation of States in International Law*, 2nd edn (Oxford: Clarendon Press, 2006), p. 167.

⁹⁹ European Court of Human Rights, *Case of Cyprus v Turkey*, App. No. 25781/94, Judgment of 10 May 2001, para. 92.

¹⁰⁰ J. Vidmar, *supra* note 66, p. 42.

¹⁰¹ Moroccan initiative for negotiating an autonomy statute for the Sahara region, Annex to the letter dated 11 April 2007 from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council, UN Doc. S/2007/206, 13 April 2007.

¹⁰² UN Press release, SC/16208, 31 October 2025, available at <https://press.un.org/en/2025/sc16208.doc.htm>. For analysis see K. Istrefi, *The Security Council and the Western Sahara: Between Self-Determination and Implicit Recognition of Moroccan Sovereignty*, *EJIL:Talk!*, 04 November 2025, available at <https://www.ejiltalk.org/the-security-council-and-the-western-sahara-between-self-determination-and-implicit-recognition-of-moroccan-sovereignty/>.



caused much controversy.¹⁰³ Its exact legal ramifications remain unclear since the text is open to interpretation and even States that voted in favour of the resolution have stated that they do not recognize the Moroccan claim to sovereignty over Western Sahara.¹⁰⁴ Although one may argue that the resolution is not changing the legal picture painted above since it does not mention that the Moroccan autonomy plan is *the* most feasible solution to the conflict (and thus, it does not prohibit outcomes incompatible with that plan), it marks the first time that the UN SC promoted a final status for Western Sahara under Moroccan sovereignty. Further practice is needed in order to assess its legal contours. In any case, the resolution does not impact the analysis below as its purported legal effects (if any), would be produced after 31 October 2025. At the same time, there is no doubt that this is a major political defeat for Front Polisario, and it reflects *the growing international support for Morocco's autonomy plans for the future of the territory*- including by key EU MS such as France.¹⁰⁵ The (mainstream) position in international law stands in stark contrast to the

position the EU political institutions have adopted in their engagement with Western Sahara. Although the EU has, on various occasions, expressed concern about the prolonged nature of the Western Sahara conflict and its implications for security, respect for human rights and cooperation in the region,¹⁰⁶ it has been observed that its language is “rather muted.”¹⁰⁷ The EU has not recognized Morocco as an occupying power of Western Sahara. Its current position is that the political process of Western Sahara should aim to reach “a just, pragmatic, lasting and mutually acceptable political solution ..., based on “compromise””.¹⁰⁸ Overall, the EU has, so far, restricted itself to expressions of support to UN efforts to resolve the political impasse between the parties to the conflict,¹⁰⁹ which can be considered a very minimal approach towards the position adopted in relation to the analogous situation in Palestine.¹¹⁰

In this context, it is important to stress that the Union has consistently upheld the view that Western Sahara constitutes a territory ‘*de facto*’ administered by

¹⁰³ C. Ross, A Step Back for Western Sahara, International Centre for Dialogue Initiatives, 07 November 2025, available at <https://dialogueinitiatives.org/a-step-back-for-western-sahara/>.

¹⁰⁴ UN Press release, SC/16208, 31 October 2025, *supra* note 102.

¹⁰⁵ Associated Press, France shifts Western Sahara stance, seeking closer ties with Morocco, 30 July 2024, available at <https://apnews.com/article/morocco-france-recognize-western-sahara-65856623c3fe5f565583de2d521570ed>.

¹⁰⁶ EU Annual Report on Human Rights and Democracy in the World in 2014, 22 June 2015, 10152/15, p. 186.

¹⁰⁷ P. Wrange, Occupation/Annexation of a Territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy, Study undertaken at the Request of the European Parliament 30 June 2015, PE 534.995, p. 43, available at [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU\(2015\)534995](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2015)534995).

¹⁰⁸ Council of the EU, Joint Declaration by the European Union and Morocco for the fourteenth meeting of the Association Council, 27 June 2019, available at [https://www.consilium.europa.eu/en/press/press-](https://www.consilium.europa.eu/en/press/press-releases/2019/06/27/joint-declaration-by-the-european-union-and-the-kingdom-of-morocco-for-the-fourteenth-meeting-of-the-association-council/)

[releases/2019/06/27/joint-declaration-by-the-european-union-and-the-kingdom-of-morocco-for-the-fourteenth-meeting-of-the-association-council/](https://www.consilium.europa.eu/en/press/press-releases/2019/06/27/joint-declaration-by-the-european-union-and-the-kingdom-of-morocco-for-the-fourteenth-meeting-of-the-association-council/).

¹⁰⁹ See the European External Action Service, 2024 Human Rights and Democracy in the World Report (Country Reports), p. 58, available at <https://www.eeas.europa.eu/sites/default/files/2025/documents/2024%20Human%20Rights%20and%20Democracy%20in%20the%20World%20%28country%20reports%29.pdf>.

¹¹⁰ M. Balboni, The EU's Approach to Western Sahara, Paper presented at the Conference organised by the South African Department of foreign Affairs, on Multilateralism and International Law with Western Sahara as a Case Study, Pretoria, South Africa, 4-5 September 2008, p. 1, available at <http://www.saharawi.org/oldsite/tesi/saharaocc1.pdf>. See for example the Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards, [2013] OJ C205/05, paras. 1, 3 where the EU expressly affirms that it does not recognize Israel's sovereignty over the occupied Palestinian Territories.



Morocco'.¹¹¹ By designating Morocco as the '*de facto* administrative power' of Western Sahara and by omitting any reference to its status as an occupying power the EU has managed to enter into and maintain trade relations with Morocco that cover Western Sahara without touching upon the thorny issue of Morocco's legal title over the territory. However, qualifying Morocco as the '*de facto* administrative power' of Western Sahara is fraught with difficulties. First, the concept of '*de facto* administrative power' simply does not exist as a matter of positive law.¹¹² The status of 'administering power' is a legal status granted by the UN and in the absence of such recognition a State cannot proclaim to be one.¹¹³ In any case, Morocco does not accept this status as it clashes with its claim to sovereignty over the territory. Furthermore, Spain's attempt to repudiate its status as an administrative power of Western Sahara in 1976¹¹⁴ was without legal effect since this status was conferred upon Spain by the UN and constitutes a status which Spain alone could not have unilaterally transferred.¹¹⁵

The UN still recognises Spain as the *de jure* administering power of Western Sahara¹¹⁶ and Spain has relied on this status to extend its international jurisdiction in criminal matters to crimes committed in Western Sahara.¹¹⁷ To what extent has the CJEU followed the lead of the political branches when it comes to determining the legal title (and treaty-making capacity) of Morocco over Western Sahara? In the first set of cases, the Court did not have to address the question since it found that the relevant EU-Morocco agreements did not legally extend to the territory. The question was only addressed by AG Wathelet in his Opinion in *Western Sahara Campaign UK* where the AG stated in no uncertain terms that Morocco is the occupying power of the territory.¹¹⁸ The issue was expressly addressed by AG Ćapeta in her 2024 Opinion in *Front Polisario II*. The AG was highly deferential to the position adopted by the institutions on the matter. The relevant part of the Opinion is worth quoting *in extenso*. Under international law, a State in *de facto* control of a territory has three possible legal

¹¹¹ See for instance Legal Service of the European Parliament, Legal Opinion: Proposal for a Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Compatibility with the principles of international law, SJ-0085/06, D(2006)7352, 20 February 2006, para. 37. Legal Service of the European Parliament, Legal Opinion: Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the fisheries Partnership Agreement in force between the two parties, SJ-0665/13, D(2013)50041, 04 November 2013, paras. 12, 17. For analysis see E. Kassoti, The EU and Western Sahara: An Assessment of Recent Developments, 43 *Eur. Law Rev.* 751 (2018), pp. 755-757.

¹¹² V. Chapaux, *The Question of the European Community-Morocco Fisheries Agreement*, in K. Arts, P. Pinto Leite (eds), *International Law and the Question of Western Sahara*, (Leiden: International Platform of Jurists for East Timor, 2009), p. 217, p. 223.

¹¹³ Arts. 73 and 74 of the UN Charter. V. Chapaux, *supra* note 112, p. 222.

¹¹⁴ Letter dated 26 February 1976 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General.

¹¹⁵ Case C-266/16 *Western Sahara Campaign UK*, Opinion of AG Wathelet, *supra* note 19, paras. 188-191.

¹¹⁶ The fact that the UN Secretary-General has not removed Spain from the annual reports on Article 73(e) suggests that the UN considers that Spain is still the *de jure* administering power of the territory. See UN Secretary-General, 'Information from Non-Self-Governing Territories Transmitted under Article 73(e) of the Charter of the United Nations: Report of the Secretary-General' A/31/275 (1976), A/40/269 (1985), A/50/548 (1995), A/60/69 (2005), A/70/67 (2015), A/79/63 (2024).

¹¹⁷ See the decisions by the Spanish Audiencia Nacional (National High Court): Auto No. 40/214, 4 July 2014, available at http://www.ligaprodechoshumanos.org/documentos/20140710_sala_penal_audiencia_nacional.pdf; and Summario1/2015, 9 April 2015, available at <http://www.rightsinternationalspain.org/uploads/noticia/37c008565d943d77468c0f275052d37b25ca7bcb.pdf>.

¹¹⁸ Case C-266/16 *Western Sahara Campaign UK*, Opinion of AG Wathelet, *supra* note 19, paras. 234-255.



classifications: sovereign, administrator or occupier. In relation to Western Sahara, the EU political institutions do not treat ... Morocco as an occupying power, or as a sovereign, but rather as an administering power ... In the exercise of external relations of the European Union, the EU political institutions have a wide margin of discretion. That extends to the interpretation of applicable norms in a situation, such as that at issue, where there is no clear position under international law as to whether a State can be treated as having assumed responsibility over a [non-self-governing territory] ... Given the lack of clear rules in EU or international law The decision by the EU political institutions to treat ... as the ('de facto') administrative power, ... cannot be challenged before the Court. To that extent, the Court must accept the position of the Council and the Commission as a possible interpretation of international law.¹¹⁹

The Court, for its part, did not directly address the question of the legal classification of Morocco's factual exercise of authority over Western Sahara. At the same time, it made clear that the agreement recognizes the legal effects of acts of the Moroccan customs authorities in the territory since its implementation "requires the presence of the Moroccan authorities in the territory of Western Sahara and the exercise by those authorities of administrative functions in that territory" – such as those

concerning the grant of certificates of origin for products originating in Western Sahara.¹²⁰

Arguably, the degree of deference shown to the political institutions in AG Ćapeta's Opinion is highly problematic. A core assumption here was that the relevant rules of international law regarding administering powers are unclear and that the ensuing lack of clarity allows the Court to choose an interpretation that corresponds to the institutions' position. However, as shown above, this is not the case. The relevant rules of international law do not leave much room for interpretation and Morocco cannot be considered a 'de facto' administering power – a category which does not exist as a matter of positive law and which it itself denies. In essence, the AG's approach allows considerations of effectiveness (in the sense of effective factual control) to shift territorial title – a position which is not accepted either in international law or in the CJEU's jurisprudence as the *Spain v Commission (Kosovo)* judgment attests to. The AG expounded on this a bit further in one of the footnotes to her Opinion.¹²¹ According to the AG, there is no merit to the question whether the EU may engage with the territory of Western Sahara "since there must be an avenue for the European Union to interact with certain territories in which it has a legitimate interest, without necessarily having to compromise the European Union's or its Member States' impartiality in relations to the status of those territories."¹²² The AG referred to the EU's practice of 'engagement without recognition' in order to buttress her view and provided the EU's

¹¹⁹ Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, Opinion of AG Ćapeta, *supra* note 17, paras. 155-164.

¹²⁰ Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, *supra* note 13, paras. 94-95.

¹²¹ Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, Opinion of AG Ćapeta, *supra* note 17, fn. 63.

¹²² *Ibid.*



approach to the conflict surrounding Abkhazia as a practical example thereof. However, in light of the Union's constitutional commitment to the "strict observance of international law", such a broad approach as the one advocated by the AG is controversial. The upper limit to the Union's engagement with non-recognized illegal entities should be international law. In this sense, although international law, as seen above, does not prohibit all types of engagement with illegally created *de facto* entities, the specific acts of engagement therewith need to be scrutinised to ensure that they do not compromise the EU's duty of non-recognition. Furthermore, the EU's approach to Abkhazia is decidedly different to Western Sahara. The EU supports the territorial integrity and sovereignty of Georgia, as recognised by international law, and it has expressly characterised Abkhazia as "the Georgian occupied breakaway region of Abkhazia."¹²³ Far from recognizing the occupying power's treaty-making capacity over Abkhazia, the EU's engagement with Abkhazia is conducted in terms that do not entrench the Russian illegal military presence in the territory.¹²⁴ It is difficult to make general statements about the weight accorded to the institutions' political assessments here since the Court did not directly address the legal status of Morocco vis-à-vis Western Sahara in the judgment. At the same time, the Court conceded that the agreement recognizes the (factual) jurisdictional authority of

Morocco for certain acts.¹²⁵ However, it did not elaborate on how this is grounded in international law. In other words, it remains unclear whether the Court considered that: a) the exercise of administrative acts by Moroccan authorities in Western Sahara falls within the 'Namibia exception' and thus, it is allowed under international law (i.e. whether the Court applied international law irrespective of the political branches); or b) whether it *sub silentio* accepted the position of the political branches that Morocco enjoys treaty-making capacity over the territory as the 'de facto' administering power. The reluctance to provide a clear answer leaves much to be desired. As discussed above, accepting the legal classification of the status of Morocco vis-à-vis Western Sahara by the political institutions is highly problematic from the viewpoint of international law. In the same vein, accepting (implicitly) that the acts by the Moroccan authorities in the territory of Western Sahara are acts of public administration that do not fall within the scope of the EU's duty of non-recognition is not without problems. The lack of discussion and analysis on part of the Court as to whether the acts of the Moroccan authorities could be considered as falling within the 'Namibia exception' cannot but be attributed to grounds of political expediency. The discussion of the 'Namibia exception' necessarily rests on a previous finding of territorial illegality – something that would directly oppose the position of the political branches. The fact

¹²³ European External Action Service, Statement by the Spokesperson on the so-called presidential elections in the Georgian breakaway region of Abkhazia, 15 February 2025, available at https://www.eeas.europa.eu/eeas/georgia-statement-spokesperson-so-called-presidential-elections-georgian-occupied-breakaway-region_en.

¹²⁴ A. Sabou, The EU "Engagement without Recognition" Policy in its Eastern Neighbourhood De Facto States: The Case of Abkhazia and South Ossetia, 1 *Studia Universitatis Babes-Bolyai-Studia*

Europaea (2017) 127. S. Kolarz, The European Union's Engagement with the 'de-facto States' in the Eastern Partnership, College of Europe, EU Diplomacy Papers 08/2020, pp. 29-30, available at https://www.coleurope.eu/sites/default/files/research-paper/edp_8_2020_kolarz_0.pdf.

¹²⁵ The Court expressly stated that the agreement recognises that Moroccan authorities have "certain administrative powers which are exercised in that territory". *Ibid.*, para. 147.



that the stance of the political branches played a role is reinforced when contrasted to the Court's approach when it comes to Israel/Palestine. In *Psagot*,¹²⁶ a case concerning the labelling of products originating from the Occupied Palestinian Territory, the Court unequivocally held that the establishment of settlements in some of the territories occupied by Israel gave expression to a policy of population transfer by Israel outside its territory contrary to international humanitarian law – a policy which has been condemned both by the UN and the EU.¹²⁷ Taking into account both the EU's commitment to contribute to the strict observance of international law under Art. 3(5) TEU, as well as consumer law considerations, the Court concluded in that case that that products originating in territories occupied by Israel must bear both the indication of that territory and the indication that they come from an 'Israeli settlement'.¹²⁸ In substantive terms, it is doubtful that the acts of the Moroccan authorities mentioned by the Court are acts that would fall within the purview of the 'Namibia exception'. The examples of acts that the ICJ itself gave in the *Namibia* case as being considered untainted by the territorial illegality refer to private international law acts, such as the registration of births, marriages and deaths, "the effects of which can be ignored only to the detriment of the inhabitants of the Territory."¹²⁹ The European Court of Human Rights in *Cyprus v Turkey* also argued that the obligation to disregard acts of de facto entities does not extend to acts relating to private-law

relationships.¹³⁰ Whether this extends to acts such as the granting of certificates of origin – acts that go well beyond the private law sphere – is doubtful. In *Anastasiou*, the Court had expressly rejected the attempt by the Commission to rely on the 'Namibia exception' to justify the acceptance by the UK customs authorities of movement certificates for agricultural products originating in occupied Cypriot territory which had been issued by the so-called 'Turkish Republic of Northern Cyprus', an entity not recognised by the European Union and its Member States.¹³¹ In *Brita*, the Court stressed that requirement of valid proof of origin issued by the competent authority cannot be considered to be a mere formality that may be overlooked.¹³² Thus, the CJEU's practice itself corroborates the view that acts including the grant of certificates of origin for products are not the type of acts that could be considered as falling outside the duty of non-recognition. Ultimately, there is no avoiding the fact that the discrepancy in the Court's position when it comes to Israel/Palestine on the one hand and Morocco/Western Sahara on the other mirrors the discrepancy in the approach of the Union's political institutions to these two situations. On this basis, it seems that the interpretation of relevant rules of international law and the judicial qualification of situations of territorial illegality is not conducted whole independently of the political branches. From the perspective of compliance with international law, this state of affairs is not satisfactory. Following the lead of

¹²⁶ Case C-363/18 *Organisation juive européenne and Vignoble Psagot (Psagot)* ECLI:EU:C:2019:954, paras. 34, 48, 56

¹²⁷ *Ibid.*, para. 48.

¹²⁸ *Ibid.*, para. 57.

¹²⁹ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *supra* note 91, para. 124.

¹³⁰ European Court of Human Rights, *Case of Cyprus v Turkey*, *supra* note 99, paras. 95-96.

¹³¹ Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, ECLI:EU:C:1994:277, paras. 38-41, 49.

¹³² Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, ECLI:EU:C:2010:91, para. 57.



the political institutions when it comes to determinations of territorial illegality would entail that compliance with international law (and more particularly with the non-recognition obligation) becomes, to a large extent at least, a matter of political considerations and not one of objective legal determination. The dangers of this approach are amplified by structural features of international law.¹³³ The international legal system lacks a centralised mechanism making authoritative determinations regarding the triggering of the duty of non-recognition – something that is left to the individual determination of the individual subjects of the system.

5. Conclusions

The contribution examined the question of judicial deference by EU courts in international law issues – with a specific focus on cases that involve an external territorial dimension. The picture that emerges from the analysis above is complex and the relevant practice does not lend itself easily to generalisations. At the same time, a few general patterns can be discerned. First, deference in this context does not equate judicial abstention. The case-law analysed here shows that the EU courts are more inclined to follow the lead of the political institutions when it comes to the interpretation of international law, rather than a wholesale labelling of questions of international law as questions for the political branches. The CJEU's consistent approach on the justiciability of the question of legal standing of international actors before EU courts demonstrates this

point well. At the same time, the case-law shows that the CJEU is (at least to some degree) deferential to the political assessments of the institutions when it comes to determinations relating to the international legal personality of international actors, their treaty-making capacity as well as the Union's engagement with illegally created de facto entities. The *degree* of deference to the political branches is more difficult to gauge. The practice shows that deference does not equate blind obedience – as the *Spain v Commission (Kosovo)* judgment as well as the contrast between the highly deferential attitude of the AG versus the much more minimalist approach followed by the Court in *Front Polisario II* attest to. The case-law suggests that here much depends on the room for manoeuvre that the international law rule itself leaves to determinations by the political branches. Thus, as seen above, the recognition of the treaty-making capacity of de facto entities is a matter of political decision and international law only imposes a few obligations in that process which are closely connected to the observance of *jus cogens* norms.

However, determining which rules of international law actually apply in a particular dispute is not a neutral exercise.¹³⁴ It is also a matter of interpretative choice which may itself raise questions of deference as the *Front Polisario II* judgment confirms. Here, the Court tried to strike a balance between the approach of the political institutions towards the EU's engagement with Western Sahara with international law orthodoxy by ignoring the international legal framework of occupation and

¹³³ E. Milano, *Front Polisario and the Exploitation of Natural Resources by the Administering Power*, 2 *European Papers* 953 (2017), at p. 956.

¹³⁴ On the 'politics of framing' see also E. Kassoti, G. Butler, *The Approach of the CJEU to International Law: Towards a Context-*

Specific Approach, in E. Fahey, I. Mancini (eds.), *Understanding the EU as a Good Global Actor: Ambition, Values and Metrics*, (Cheltenham: Edward Elgar, 2022), p. 261, at pp. 265-266.



avoiding to expressly rule on the politically sensitive question of Morocco's treaty-making capacity over Western Sahara. While the Court did not expressly adopt the institutions' narrative of Morocco as the "de facto administrative power" of Western Sahara, it avoided engaging with the international legal status of Morocco's presence in the territory. From a pragmatic point of view, the Court's approach is understandable; ruling that the situation is one of occupation would have significant repercussions on the EU's foreign policy affecting established interests. On the other hand, from the viewpoint of the Unions constitutional commitment to international law, this approach leaves much to be desired. After all, the CJEU is tasked to find and apply the law that the political institutions are meant to follow in any case – even in the absence of a judgment.¹³⁵

¹³⁵ J. I. Charney, *supra* note 8, p. 811.



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About this project

The [Global Europe project](#) at the T.M.C. Asser Institute

The EU's identity as a global actor is firmly anchored in a distinct normal and political agenda. The Union has consistently portrayed itself as a normative power committed to the ethos of international law, democracy, human rights and multilateralism. But the success of these efforts depends on its credibility and the extent to which the EU can generate support for and trust in its role as a global power. Externally, the EU's efforts are complicated by the shifting geopolitical balance of power: the 'America first' approach by the US, the rise of protectionism and State-led economies, such as China, increasing migration flows, digitalisation, and climate change. Internally, the Union's credibility is called into question with Brexit and the current rule of law crisis in new EU member states. The EU's challenges are not bound to the political realm, but also encompass legal complexities. The EU has seen the rise of autonomy as a 'structural principle of EU external relations', which further complicates the tension at the heart of the EU's identity: to what extent can the principle of autonomy be reconciled with the EU's constitutional commitment to respect international law? This research project is based on three pillars. First, it seeks to explore the internal and external factors that may challenge the EU's capacity to exercise value-based global leadership on a number of crucial issues. Second, it aims to critically reflect on whether the external projection of the EU as a virtuous normative power comports with its practice on the ground. Third, it addresses the descriptive, conceptual and normative challenges that complement the ever-expanding global reach of EU law. Ultimately, the project deals with questions of trust pertaining to the EU as an international legal actor. The 'Global Europe' project's research agenda can be found [here](#).

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