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EDITORIAL COMMENTS

Taking international law seriously?

Earlier this year, Advocate General Ćapeta, referring to the "clear failure of the UN-led political process" in furthering the process of self-determination of the people of Western Sahara, said that this failure "does not mean that the resolution of the Western Sahara question can be entrusted to the EU Courts. Those courts will not decide the future of Western Sahara."[1] The Advocate General is clearly right, but her comment prompts a reflection on the role of courts in the international political process and more specifically on the position of the Court of Justice when faced with questions of international law.

Since the earliest years the Court's approach to international law has displayed elements of ambiguity, as it seeks to assert the distinctness of the EU Treaties from "ordinary international treaties"[2] and to balance its judicial and regulatory autonomy with the EU's (now constitutionally-mandated) role as advocate for the "strict observance and development" of international law.[3] One has only to think of the subtle shift in its characterization of the Community, moving from "a new legal order of international law"[4] to simply a "new legal order".[5] Its willingness to accept international dispute settlement in principle while relying on Article 344 TFEU to protect its own judicial territory.[6] And its insistence that the EU is bound "to observe international law in its entirety"[7] while also holding that the obligations imposed by an international agreement "cannot have the effect of prejudicing the

1. Opinion of A.G. Ćapeta in the pending appeal against the judgment of the General Court annulling the Council's decision approving amendments to the EU's trade agreement with Morocco (amendments which extended the trade preferences under the agreement to goods originating in the territory of Western Sahara): Opinion in Joined Cases C-779 & 799/21 P, *European Commission* v. *Front populaire pour la libération de la saguia el-hamra et du rio de oro (Front Polisario), Council of the European Union* (C-779/21 P) and *Council of the European Union* v. *Front Populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* (C-799/21 P), EU:C:2024:260, para 7.
2. Case 6/64, *Costa* v. *ENEL*, EU:C:1964:66; Opinion 2/13, *Accession ECHR*, EU:C:2014:2454, para 157.
3. Art. 3(5) TEU.
4. Case 26/62, *Van Gend en Loos*, EU:C:1963:1.
5. Opinion 1/91, EU:C:1991:490, para 21, citing Case 26/62, *Van Gend en Loos*.
6. Opinion 1/17, EU:C:2019:341, paras. 106–111.
7. Case C-266/16, *Western Sahara Campaign UK*, EU:C:2018:118, para 47.

constitutional principles of the EC Treaty".[8] The ambiguities are real, but through them runs a thread of engagement with international law, reflecting what de Witte has called "the principled openness of the EU legal order to international law".[9] An engagement now underpinned by Articles 3(5) and 21 TEU,[10] and exemplified by the fact that although, as Advocate General Ćapeta said, the EU Courts cannot resolve the situation in Western Sahara or decide its future, they do nevertheless have to face the implications of the international legal position, for the EU and its political actors.

The Court of Justice has sometimes been criticized for paying insufficient attention to the international law dimension of a problem with which it is faced, preferring to focus – too narrowly, it may be alleged – on its own legal domain. In *Kadi*, for example, the Court was at pains to point out that it was concerned solely with the legality under EU law of an EU legal act, and that its ruling would have no bearing on the legal status of the Security Council resolution which the EU was seeking to implement.[11] This pluralist emphasis on the separation of the EU and international legal orders (the Member States being answerable to both) attracted criticism as did the "internal" focus of the judgment and, in the words of de Búrca, the "lack of direct engagement by the Court with the nature and significance of the international rules at issue in the case, or with other relevant sources of international law".[12] Compliance with international law was a matter for the EU's political institutions to ensure, rather than its courts.[13] This separation allowed the Court to sidestep the "political question" argumentation that Advocate General Poiares Maduro had identified in the Commission's submissions.[14]

8. Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission*, EU:C:2008:461, para 285.

9. De Witte, "Accession to international instruments as an EU legality constraint" in Kilpatrick and Scott (Eds.), *Contemporary Challenges to EU Legality* (OUP, 2021), p.100.

10. We may argue that the Court's interpretation of its own mandate in Art. 19(1) TEU to ensure that "the law is observed" should be influenced by the EU's mandate to respect and contribute to the observance and development of international law that we find in Arts. 3(5) and 21 TEU.

11. Joined Cases C–402 & 415/05, P. *Kadi and Al Barakaat International Foundation* v. *Council and Commission.*

12. De Búrca, "The European Court of Justice and the international legal order after *Kadi*", 51 Harv.Int'l L.J. (2010), 1, at 23.

13. Ibid., at 41.

14. Opinion in Joined Cases C–402 & 415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission*, EU:C:2008:11, paras. 33–34. The concept of a "political question" not susceptible to judicial review is derived from US constitutional law; A.G. Poiares Maduro rejected this approach (ibid., at para 34: "The implication that the present case concerns a 'political question', in respect of which even the most humble degree of judicial interference would be inappropriate, is, in my view, untenable"). See further Butler, "In search of the political question doctrine in EU law", 45 LIEI (2018), 329.

In a very different context, in *Commission* v. *Ireland (Mox Plant)* the Court's concern was with the integrity of the Union's own enforcement mechanisms and ensuring their autonomy was not compromised by Member State use of the arbitral regime established under the Law of the Sea Convention.[15] The Court of Justice did not engage with the implications of its ruling for the Convention regime more broadly, despite the fact that the EU is itself a party alongside its Member States, simply relying on the fact that the Convention itself envisages the possibility of other forms of dispute settlement.[16] Koskenniemi called the case "striking in its narrowness of vision".[17]

Where angels fear to tread

Despite these well-known examples, the EU Courts are increasingly being faced with cases involving (often politically sensitive) questions of international law and it is possible to identify a growing willingness – and perhaps confidence – on their part to engage actively with such questions.[18] To take, as one example, a group of cases on the application of EU trade agreements to disputed territories, and looking back from the Opinion of Advocate General Ćapeta quoted above, we can see a striking evolution in the Court's reasoning.[19] In 1994, in *Anastasiou,* the analysis is based firmly on the relevant provisions of the EU's agreement with the Republic of Cyprus, backed up by a standard reference to Article 31 of the 1969 Vienna Convention on the Law of Treaties.[20] The language is uncompromising:

> While the *de facto* partition of the territory of Cyprus, as a result of the intervention of the Turkish armed forces in 1974, into a zone where the

15. Case C-459/03, *Commission* v. *Ireland*, EU:C:2006:345.

16. Ibid., paras. 124–125.

17. Koskenniemi, "International law: Constitutionalism, managerialism and the ethos of legal education", (2007) *European Journal of Legal Studies*, 1. See also Klabbers, "The reception of international law in the EU legal order" in Schütze and Tridimas (Eds.), *Oxford Principles of European Union Law, Vol I* (OUP, 2018), p. 1208, at pp.1225–1226; for a somewhat less critical perspective, see Delgado-Casteleiro, "The exclusive jurisdiction of the Court and international courts: Commission v Ireland (Mox Plant)" in Butler and Wessel (Eds.), *EU External Relations Law: The Cases in Context* (Hart Publishing, 2022), p. 501.

18. Among many examples, in addition to those mentioned below, see e.g. Case C-366/10, *Air Transport Association of America* v. *Secretary of State for Energy and Climate Change*, EU:C:2011:864; Case C-599/14 P, *Council* v. *Liberation Tigers of Tamil Eelam* (*LTTE*), EU:C:2017:583; Joined Cases C-626/15 & 659/16, *Commission* v. *Council (Antarctic Treaty)*, EU:C:2018:925.

19. Although they all concern disputed territories, the factual and legal positions in these cases are of course different from each other; what is of interest here is the approach of the Court to, and the use it makes of, international law in its reasoning.

20. Case C-432/92, *Anastasiou*, EU:C:1994:277, para 43.

> authorities of the Republic of Cyprus continue fully to exercise their powers and a zone where they cannot in fact do so raises problems that are difficult to resolve in connection with the application of the Association Agreement to the whole of Cyprus, that does not warrant a departure from the clear, precise and unconditional provisions of the 1977 Protocol on the origin of products and administrative cooperation.[21]

The practical difficulties in applying the agreement are characterized as "the internal affairs of Cyprus" with which the Community has no right to interfere,[22] and a reference by the Commission to the ICJ Advisory Opinion on Namibia is quickly dismissed as irrelevant because of the different factual and legal situation.[23] At the time of this judgment, its internally-focused reasoning and avoidance of anything other than a simple acknowledgement of the *de facto* partition of Cyprus was not surprising, although it did attract criticism.[24]

By the time we get to *Brita* in 2010,[25] the Court is somewhat more open to international law-based reasoning. The judgment, which dealt with the import into the EU of goods from the occupied territories of the West Bank and Gaza strip, is founded squarely on the principle of the relative effect of treaties *(pacta tertiis)*, alongside the Court's interpretation of the EU-Israel and EU-PLO Association Agreement provisions on the territorial scope of, and certification of origin under, the two agreements.[26] But while significant, the use of international law is limited in scope. Unlike the Advocate General, the Court makes no reference to the need to look to international law, including UN Security Council Resolutions, in determining whether the West Bank and the Gaza Strip form part of the territory of the State of Israel for the purposes of the EU-Israel agreement, nor did it refer to the ICJ Advisory Opinion on the wall.[27] Its reasoning has been characterized as "unassuming", "short, simple and formalistic" and touching as little as possible on fundamental questions of

21. Ibid., para 37.
22. Ibid., para 47.
23. Ibid., para 49, referring to the Opinion on the legal consequences for States of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276(1970) (ICJ Reports 1971, p. 16).
24. Talmon, "The Cyprus question before the European Court of Justice", 12 EJIL (2001), 727, arguing that the Court "misjudged the scope and consequences of the principle of non-recognition in international law" and effectively applied economic sanctions, a step that falls properly within the province of the political institutions.
25. Case C-386/08, *Brita GmbH* v. *Hauptzollamt Hamburg-Hafen*, EU:C:2010:91.
26. Ibid., paras. 40–53.
27. Opinion of A.G. Bot in Case C-386/08, *Brita GmbH* v. *Hauptzollamt Hamburg-Hafen*, EU:C:2009:674, paras. 108–115. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p.136.

foreign policy and international law.[28] Indeed, Holdgaard and Spiermann saw the judgment as an opportunity missed, soon after the coming into force of the Lisbon Treaty, to demonstrate the Court's readiness to take seriously the Union's task to contribute to the strict observance and development of international law and to ensure consistency between EU policy and Treaty principles.[29]

Six years later, the judgment of the Court of Justice in *Front Polisario I*, in contrast, was centred on the need to ensure an international law-compliant interpretation of the EU-Morocco agreement. Whereas the General Court had developed a significant argument on the procedural necessity for the Council to take account of the human rights implications of its decisions,[30] the Court of Justice stressed the need to interpret the territorial scope of the agreement in line with the relevant rules of international law, including *pacta tertiis*, the principle of self-determination ("a legally enforceable right *erga omnes* and one of the essential principles of international law"[31]), the ICJ Advisory Opinion on Western Sahara and the relevant United Nations Resolutions.[32] Moreover, the practice of the Commission and Council (to accept *de facto* the application of EU-Morocco tariff preferences to goods originating in Western Sahara) could not be taken as a tacit acceptance of a modification of the agreement, since that "would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties, even though the European Union repeatedly reiterated the need to comply with those principles".[33]

This was of course not the end of the story. The Commission and Council responded to the judgment by attempting to maintain access to the EU market for goods from Western Sahara while respecting the "separate and distinct"

28. Holdgaard and Spiermann, "Case C-386/08, *Brita GmbH* v. *Hauptzollamt Hamburg-Hafen,* Judgment of the Court of Justice (Fourth Chamber) of 25 February 2010", 48 CML Rev. (2011), 1667, at 1681. See also Harpaz and Rubinson, "The interface between trade, law and politics and the erosion of normative power Europe: Comment on Brita", 35 EL Rev. (2010), 551.

29. Holdgaard and Spiermann, ibid., 1684.

30. Case T-512/12, *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* v. *Council,* EU:T:2015:953, paras. 223–247.

31. Case C-104/16 P, *Council* v. *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, EU:C:2016:973, para 88, citing East Timor (*Portugal* v. *Australia*), judgment, ICJ Reports 1995, p. 90.

32. Case C-104/16 P, *Council* v. *Front Polisario*, paras. 90–105.

33. Ibid., para 123. See also Case C-266/16, *Western Sahara Campaign UK*. Larik, "A line in the sand: The 'strict observance' of international law in the Western Sahara Case", *VerfassungsBlog* (2 March 2018), available at <verfassungsblog.de/a-line-in-the-sand-the-strict-observance-of-international-law-in-the-western-sahara-case/> (all websites visited 21 Aug. 2024).

status of the people of Western Sahara, and their consent as a third party, required by the principles of self-determination and the relative effect of treaties.[34] An agreement in the form of an Exchange of Letters amending the relevant Protocols purports, "without prejudice" to the status of the Western Sahara, to extend the operation of the agreement to products originating in that territory, and the Council's concluding Decision refers to "wide-ranging consultations".[35] Both the form of the consultation, which did not recognize Front Polisario as the representative of the people of Western Sahara, and the use of a "without prejudice" clause while accepting that products from Western Sahara will be treated as of Moroccan origin, may be questioned.[36] Front Polisario has contested the process of consultation, bringing successful actions for annulment against this agreement as well as the new Sustainable Fisheries Partnership Agreement with Morocco, judgments now under appeal to the Court of Justice.[37] It was in the context of this litigation that Advocate General Ćapeta handed down the Opinion cited earlier.[38]

This rapid retrospective demonstrates a growing willingness on the part of the Court to engage in interpreting and applying the substantive rules of international law. Indeed, when the Court revisited the question of imports from the West Bank and Gaza nearly a decade after *Brita* and two years after *Front Polisario I*, it made a point of referring to international humanitarian law as well as Article 3(5) TEU,[39] holding that information on the provenance of

34. Joint report by the Commission and the European External Action Service on benefits for the people of Western Sahara and public consultation on extending tariff preferences to products from Western Sahara, SWD(2018)346 final, accompanying COM(2018)481. Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, O.J. 2019, L 34/4.

35. Council Decision 2019/217/EU, O.J. 2019, L34/1.

36. Azarova and Berkes, "The Commission's proposals to correct EU-Morocco relations and the EU's obligation not to recognise as lawful the 'illegal situation' in Western Sahara", *EJIL:Talk!* (13 July 2018), available on <www.ejiltalk.org/the-commissions-proposals-to-correct-eu-morocco-relations-and-the-eus-obligation-not-to-recognise-as-lawful-the-illegal-situation-in-western-sahara/>.

37. Case T-279/19, *Front Polisario* v. *Council*, EU:T:2021:639, on appeal in Joined Cases C-779 & 799/21 P, *European Commission* v. *Front Polisario,* and *Council* v. *Front Polisario,* pending. Joined Cases T-344 & 356/19, *Front Polisario* v. *Council (Sustainable Fisheries Partnership Agreement),* EU:T:2021:640, on appeal in Joined Cases C-778 & 798/21 P, *European Commission* v. *Front Polisario,* and *Council* v. *Front Polisario,* pending. See also Statement by Sweden for the Council minutes concluding that "Sweden is not satisfied that the outcome of the consultation process can be said to constitute the free and informed consent of the people of Western Sahara". Council doc. 11441/18, paras. 55–56.

38. Opinion in Joined Cases C-779 & 799/21 P, *Front Polisario*.

39. Case C-363/18, *Organisation juive européenne and Vignoble Psagot Ltd* v. *Ministre de l'Économie et des Finances*, EU:C:2019:954, para 48. Harpaz, "Mandatory labelling of origin

goods exported to the EU from Israeli settlements in the occupied territories was required by EU labelling rules.[40] The factual and legal context of this group of cases is of course varied,[41] but in each case the Court was asked to consider the operation of the EU's international agreements against a background of international legal contestation. The internally focused analysis in *Anastasiou* is very different from the discussion of the principle of self-determination that we find in *Front Polisario I*. Indeed, Odermatt has argued that in the latter case the Court "turned treaty interpretation on its head, taking broad principles of international law as the starting point for its analysis rather than the text of the treaty itself".[42] This shift has consequences. The Court becomes an actor in the evolution of the international legal concepts that it analyses and applies, influencing their development. This may be welcomed,[43] but of course it also attracts criticism,[44] and the Court may be accused of stretching a principle,[45] of being selective in its use of certain principles of interpretation,[46] of using principles of treaty interpretation to

of products from territories occupied by Israel and the weight of public international law: *Psagot*", 57 CML Rev. (2020), 1585.

40. The Court goes further, in linking international law to the ethical choices made by the informed consumer; Case C-363/18, *Vignoble Psagot*, paras. 55–56: "consumers' purchasing decisions may be informed by considerations relating to the fact that the foodstuffs in question in the main proceedings come from settlements established in breach of the rules of international humanitarian law. In addition, the fact that a foodstuff comes from a settlement established in breach of the rules of international humanitarian law may be the subject of ethical assessments capable of influencing consumers' purchasing decisions, particularly since some of those rules constitute fundamental rules of international law."

41. Apart from the differing legal positions of the northern zone in Cyprus, the West Bank and Gaza, and the Western Sahara, we may note that *Anastasiou* and *Brita* were each concerned with the application of an EU trade agreement by the customs authorities of a Member State and its implications for the unity of the EU's common commercial policy: the UK in the first instance applying the rules somewhat flexibly according to its own policy priorities and Germany in the second implementing an agreed political position of the Union. It is perhaps not surprising that in these cases the Court's focus is on what the specific agreement requires. The *Front Polisario* cases in contrast have involved direct challenges to Council acts (and therefore by implication policy positions) on the basis of international law.

42. Odermatt, "Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario)", 111 AJIL (2017), 731, at 735.

43. See e.g. Cannizzaro, "In defence of *Front Polisario*: The ECJ as a global *jus cogens* maker", 55 CML Rev. (2018), 569, at 577, arguing that this case may "tacitly but decisively contribute to shaping a new role for *jus cogens* in the international legal order".

44. Kassoti, "The EU and Western Sahara: An assessment of recent developments", 43 EL Rev. (2018), 751.

45. E.g. the principle of *pacta tertiis* in the *Brita* case; see Holdgaard and Spiermann, op. cit. *supra* note 28, 1678–1679; Odermatt, op. cit. *supra* note 42, 736.

46. E.g. its treatment of "subsequent practice" in *Front Polisario*; Cannizzaro, op. cit. *supra* note 43, 578.

avoid legally and politically sensitive assessments of EU practice,[47] or of failing to take sufficient account of State and institutional practice.[48]

Further, if the Court becomes more ready to build international law into its reasoning, we can expect the different actors within the EU Court system to disagree in their interpretation of those concepts. In her Opinion in *Front Polisario II*, for example, Advocate General Ćapeta disagreed fundamentally with the General Court on who might express the "consent" of the people of Western Sahara and the degree to which Front Polisario should be regarded as representative of those people.[49] The Advocate General even suggests that the Court's review of the Council's exercise of political discretion in the light of its international law obligations, at least where there is disagreement about the precise scope of those obligations, should be limited to determining whether the Council's position is "a possible interpretation" of international law.[50] We may see this as unproblematic, contributory grist to the mill of the international legal order. Its contributory value will depend on the quality of legal analysis, but however high the quality, the Court is not (of course) an ultimate authority in the way that it is on the interpretation of EU law, and it is likely that its positions will take on a political quality within a broader and increasingly polarized international debate. Advocate General Ćapeta's comment on the limited role of the EU Courts in the underlying dispute may have been designed to address that, whether one sees it as a risk or an opportunity.

Do as I say, not as I do

A couple of additional comments are prompted by these reflections. First, to the extent that the Court is more willing to engage in substantive issues of international law – and there is still a question as to the degree to which this may be the case – how reliable is the will of the EU's political institutions to follow this lead and how will the Court respond to failure, on their part or that of the Member States? Certainly (as with any actor) the political interests of the Union do not always align with its international obligations, and while certainly capable of adroitness in avoiding direct conflict, the Court of Justice

47. Odermatt, op. cit. *supra* note 42, 737; Kassoti, "The ECJ and the art of treaty interpretation: Western Sahara Campaign UK", 56 CML Rev. (2019), 209, at 220; Harpaz, op. cit. *supra* note 39, 1598–1600.

48. Von Massow, "AG Ćapeta's Western Sahara Opinions: Undermining the law of decolonization", *EJIL:Talk!* (14 May 2024), available at <www.ejiltalk.org/ag-capetas-western-sahara-opinions-undermining-the-law-of-decolonization/>.

49. Opinion in Joined Cases C-779 & 799/21 P, *Front Polisario*, paras. 116–169.

50. Ibid., paras. 163–164.

tends to reticence in the face of political discretion.[51] Having insisted in *Front Polisario I* on an international law-compliant interpretation of the EU-Morocco agreement, the Court is now faced in *Front Polisario II* with a legal challenge to the Council and Commission's efforts to respond to that ruling, efforts which have already been subject to considerable criticism from an international law perspective.[52] The General Court's assessment, and eventual annulment, of the Council decision purporting to extend the reach of the EU-Morocco agreement to the territory of Western Sahara was based on a finding of (non-)compliance with the Court of Justice's earlier judgment.[53] The Advocate General's Opinion also takes the earlier judgment as a starting point in assessing the Council acts. International law is thus mediated through the filter of the Court's interpretation as part of the "law to be observed",[54] operating in a context of concern for institutional balance and the fundamental characteristics of the EU legal order.

Second, while Articles 3(5) and 21 TEU may encourage the Court of Justice to emphasize the importance of international law and the EU presents itself as a rule-based international actor, using law to achieve its objectives, the Union is operating in a global context where law is progressively less valued and even actively undermined. The EU's status as a soft power and its ability to achieve its security or normative objectives are increasingly in question. The need for the EU to respond to breaches of international law by third parties poses – as the *Front Polisario* cases exemplify – difficult choices for its political institutions, and the risk that international law begins to be seen as a luxury in a dangerous world places a real responsibility on strong regional courts such as the Court of Justice. The temptation to pay lip service to international law while failing to take it seriously is always present, perhaps now more than ever.

51. E.g. in relation to asylum and migration and the so-called "EU-Turkey statement", European Council Press Release 144/16, 18 March 2016; Joined Cases C-208-210/17 P, *NF* v. *European Council*, EU:C:2018:705; Spaventa, "Constitutional creativity or constitutional deception? Acts of the Member States acting collectively and jurisdiction of the Court of Justice", 58 CML Rev. (2021), 1697.

52. See e.g. Kassoti, "The Empire Strikes Back: The Council Decision amending Protocols 1 and 4 to the EU-Morocco Association Agreement", 4 *European Papers* (2019), 307; Azarova and Berkes, op. cit. *supra* note 36.

53. Case T-279/19, *Front Polisario* v. *Council*, paras. 268–272.

54. Art. 19(1) TEU, cf. note 10.