OBSERVARE
Universidade Autónoma de Lisboa
e-ISSN: 1647-7251
VOL. 17, Nº. 2
November 2026-April 2027

JANUS.NET
e-journal of International Relations

NAVIGATING THE EUROPEAN UNION'S POSITION ON WESTERN SAHARA: A TRADE-OFF BETWEEN SELF-DETERMINATION AND THE INSTRUMENTALISATION OF MIGRATION?

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Abstract

The Western Sahara question highlights the European Union's wavering commitment to upholding international law. This is reflected in its deepening association with Morocco across key areas such as trade, security, and migration. Morocco's instrumentalisation of migration across the Western Mediterranean can be interpreted as an attempt to influence the European Union and its Member States' position on Western Sahara. At the same time, its people continue to be denied their right to self-determination and control over their natural resources. In the clash between realpolitik and international law, one of them has to yield. While avoiding the political repercussions of denouncing Morocco's occupation of Western Sahara, the European Union has sustained the protracted political and legal stalemate, reinforcing the status quo and undermining the legitimate claim of the Saharawi people to determine their future.

Keywords

European Union; migration instrumentalisation; Morocco; self-determination; Western Sahara.

Resumo

A questão do Saara Ocidental põe em evidência o compromisso vacilante da União Europeia em defender o direito internacional. Isto reflete-se no aprofundamento da sua associação com Marrocos em áreas-chave como o comércio, a segurança e a migração. A instrumentalização da migração no Mediterrâneo Ocidental por parte de Marrocos pode ser interpretada como uma tentativa de influenciar a posição da União Europeia e dos seus Estados-Membros relativamente ao Saara Ocidental. Ao mesmo tempo, continua a ser negado ao seu povo o direito à autodeterminação e ao controlo sobre os seus recursos naturais. No confronto entre a realpolitik e o direito internacional, um dos dois tem de ceder. Ao evitar as repercussões políticas de denunciar a ocupação do Saara Ocidental por Marrocos, a União Europeia tem sustentado o prolongado impasse político e jurídico, reforçando o status quo e minando a reivindicação legítima do povo saharaui de determinar o seu futuro.

Palavras-chave

União Europeia; instrumentalização da migração; Marrocos; autodeterminação; Saara Ocidental.

How to cite this article
Simeão, José Tomás (2026). Navigating the European Union's Position on Western Sahara: A Trade-Off Between Self-Determination and the Instrumentalisation of Migration?. *Janus.net, e-journal of international relations*. VOL. 17, Nº. 2, November 2026-April 2027, pp. 113-130. DOI https://doi.org/10.26619/1647-7251.17.2.6

Article submitted on 5 September 2025 and accepted on 2 July 2026.



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Introduction

Western Sahara is the battleground for "one of the oldest unresolved ongoing conflicts in the world today" (Sansanwal and Kamath, 2020: 117). Control over the territory has been disputed since 1975 by the Kingdom of Morocco and the *Frente Popular de Liberación de Saguía el Hamra y Río de Oro* (Front Polisario), a nationalist liberation movement recognised as the representative of the inhabitants of Western Sahara (UN General Assembly, 1979: 204, para. 7), the Sahrawi people.

More than fifty years ago, in its seminal advisory opinion, the International Court of Justice (ICJ) affirmed the right of the territory's population to self-determination. However, despite the continued efforts of the United Nations (UN) to resolve this dispute, it has persisted with no resolution in sight. In particular, Western Sahara's self-determination remains a contentious and polarising topic for the European Union (EU).

Due to their aligned interests and priorities, the EU and Morocco are partners across various domains. Indeed, "[w]ith the Moroccan coast visible over the Straits of Gibraltar, Mediterranean EU member states are particularly concerned with migration, regional security, free trade and fisheries" (Kausch, 2009: 167). The migration issue, specifically, has dominated the European agenda over the past decade. Morocco plays a key role in controlling irregular migration from North Africa along the Western Mediterranean route, one of the most (in)famous transit corridors to Europe.

The Court of Justice of the European Union (CJEU) has repeatedly addressed the EU's obligations under international law and its duty to respect the principle of self-determination. Yet, beyond its legal dimensions, the conflict also raises complex political questions.

This article explores whether Morocco has instrumentalised migration (i.e., the strategic or threatened use of migratory flows to exert political pressure and obtain concessions) to influence the EU's position on Western Sahara's self-determination. It argues that this occurrence illustrates how *realpolitik* considerations can override the EU's and its Member States' commitment to upholding international law.

To engage critically with this perspective, the article first provides a historical overview of the conflict (section 2), followed by an assessment of the right of the people of Western

Sahara to self-determination (section 3). It then examines the EU's legal position in light of its relationship with Morocco (section 4), culminating in an analysis of the extent to which Morocco can be argued to have instrumentalised migration to consolidate its control over Western Sahara and influence the EU's position (section 5).

Between a rock and a hard place: Western Sahara's endless stalemate

Western Sahara is one of the world's remaining non-self-governing territories (NSGTs), frequently described as "Africa's last colony" (Smith, 2013: 267; Allen and Trinidad, 2024: 1). Bordered by Morocco to the north, Mauritania to the south and east, Algeria to the northeast, and the Atlantic Ocean to the west, the territory is predominantly desert but possesses valuable resources, including phosphate reserves, rich fishing grounds, and strategic maritime access (Sansanwal and Kamath, 2020: 112). Yet, notwithstanding decades of UN involvement, its decolonisation process remains unrealised.

Formerly administered by Spain, Western Sahara was placed on the UN list of NSGTs under Article 73 of the UN Charter in 1963 (Kalicka-Mikołajczyk, 2020: 36). Following the adoption of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which recognised the right of all peoples to determine their political status and pursue their economic, social, and cultural development (UN General Assembly, 1960a: 67; para. 2), Spain announced its intention to organise a referendum through which the Sahrawi people could determine the territory's future (Allen and Trinidad, 2024: 8).

However, competing sovereignty claims by Morocco and Mauritania prevented this process from materialising. Since gaining independence in 1956, Morocco, in particular, has consistently maintained that Western Sahara is part of its national territory (*Front Polisario v Council*, 2015: 2; para. 1).

In its 1975 advisory opinion, the ICJ concluded that historical allegiances between certain Sahrawi tribes and Morocco or Mauritania did not amount to territorial sovereignty, and therefore did not affect the Sahrawi people's right to self-determination (*Western Sahara*, 1975: 68; para. 162). Soon after, Morocco organised the Green March, during which approximately 350,000 civilians, accompanied by 20,000 troops, entered Western Sahara (Sansanwal and Kamath, 2020: 108). This occupation was consolidated by "the construction of a 2,700-kilometre warfare wall (…), thereby taking physical possession of two-thirds of Western Sahara" (Mordi, 2015: 102).

Spain then signed the Madrid Accords with Morocco and Mauritania, establishing a temporary tripartite administration of the territory. Although it required that the will of the indigenous population, as expressed through the *Djema'a* (a consultative assembly of indigenous Sahrawi representatives apointed by Spain), be respected (Mensi, 2018: 551; Pereira Coutinho, 2019: 107), this agreement could neither lawfully transfer administering authority nor confer sovereignty on Morocco or Mauritania (*Western*

Sahara Campaign UK [Opinion of Advocate General Wathelet], 2018: 44, 45; paras. 225, 230).[1]

Spain withdrew from Western Sahara in 1976 (Benabdallah, 2009: 419), considering it no longer had responsibility over the territory. This triggered an armed conflict between Morocco and Mauritania, and the Algeria-backed Front Polisario. Soon after, the Front Polisario proclaimed the Sahrawi Arab Democratic Republic (SADR). Following Mauritania's withdrawal from the conflict, Morocco consolidated its control over most of Western Sahara (UN General Assembly, 1979: 204; para. 5). Accordingly, some scholars characterise Morocco as an occupying power, exercising effective control over a territory to which it holds no sovereign title (Kassoti, 2020: 375-376; Kalicka-Mikołajczyk, 2020: 41).[2]

In 1991, UN mediation resulted in an agreement between Morocco and the Front Polisario that provided for "a ceasefire, the exchange of prisoners, the repatriation of refugees, the withdrawal of Moroccan forces from the territory and a referendum on self-determination" (Benabdallah, 2009: 419). The UN Mission for the Referendum in Western Sahara (MINURSO) was established to identify those eligible to vote in the referendum (Smith, 2013: 277; Mordi, 2015: 104), as well as to supervise the ceasefire.

However, such a referendum has yet to take place. Besides disagreements over voter eligibility (Darbouche and Zoubir, 2008: 92), Morocco rejects any referendum that includes independence as an option, while the Front Polisario opposes any autonomy proposal under Moroccan sovereignty that is not the result of a democratic vote. As Mordi (2015: 106) observes, it is difficult to foresee a compromise between actors "pursuing mutually exclusive goals of territorial aggrandisement on one hand, and independence on the other (…)". Alongside MINURSO's shortcomings, subsequent negotiation efforts have failed (Fernanández-Molina and Khakee, 2024: 2).

As a result, Western Sahara remains divided by the Moroccan sand wall, with Morocco controlling the western portion of the territory and the Front Polisario administering a smaller, less populated area in the east (Kalicka-Mikołajczyk, 2020: 39). The nearly three-decade ceasefire collapsed in 2020 after clashes in the demilitarised buffer zone, resulting in low-intensity armed hostilities resuming (Fernández-Molina and Khakee, 2024: 2). Although the UN continues to reaffirm the Sahrawi people's right to self-determination, no mutually acceptable political solution has materialised.

Western Sahara's exercise of the right to self-determination

The right to self-determination is enshrined in Article 1(2) of the UN Charter and Article 1 of both the International Covenant on Economic, Social and Cultural Rights and the

[1] Indeed, "the [UN] General Assembly has never recognised that the Kingdom of Morocco has the status of administering power (*de jure* or *de facto*) and even continues, to the present time, to show the Kingdom of Spain as administering power in its list of non-self-governing territories and administering powers" (*Western Sahara Campaign UK* [Opinion of Advocate General Wathelet], 2018: 45; para. 229).
[2] A detailed discussion of the law of occupation falls outside the scope of this article. Nonetheless, the relevant provisions include "Articles 42 and 43 of the 1907 Hague Regulations, Articles 2 and 64 of the Fourth Geneva Convention and Article 1(4) of the First Protocol additional of 8 June 1977 to the Geneva Conventions of 12 August 1949 (…)" (*Western Sahara Campaign UK* [Opinion of Advocate General Wathelet], 2018: 46; para. 237).

International Covenant on Civil and Political Rights (Van Elsuwege, 2018: 748). For NSGTs such as Western Sahara, this principle requires that their political status be determined "through free and genuine expression of will of people inhabiting the given territory" (Kalicka-Mikołajczyk, 2020: 37).

The right to self-determination is also regarded as a peremptory norm (*jus cogens*) of international law, giving rise to *erga omnes* obligations owed to the international community as a whole (Pereira Coutinho, 2018: 110). Accordingly, in light of Morocco's continued occupation in breach of the right to self-determination, States and international organisations are obligated not to recognise Morocco's sovereignty claims over Western Sahara and to refrain from dealings with Rabat concerning the region (Allen and Trinidad, 2024: 1).

UN General Assembly Resolution 1541 (XV) provides that a NSGT may realise its self-determination through one of three outcomes: (i) emergence as an independent State; (ii) free association with another State; (iii) or integration with an existing sovereign State (UN General Assembly, 1960b: 29, Annexe Principle VI). As Western Sahara remains on the UN NSGTs list to this day, its decolonisation process cannot be considered complete unless one of these is achieved in accordance with international law.

Morocco argues that the Sahrawi people have already exercised this right through the *Djema'a* in 1975 and 1976, legitimising Western Sahara's integration into the Moroccan state (*Western Sahara Campaign UK* [Opinion of Advocate General Wathelet], 2018: 31, 34; paras. 154, 171). However, in the context of these episodes, the *Djema'a* could not be considered as having expressed the free will of the Sahrawi people (Pereira Coutinho, 2019: 109-110). Accordingly, neither the UN nor Spain accepted that these events amounted to a genuine act of self-determination within the meaning of UN General Assembly Resolutions 1514 (XV) and 1541 (XV) (*Western Sahara Campaign UK* [Opinion of Advocate General Wathelet], 2018: 37; para. 184).

Consequently, Morocco's integration of Western Sahara into its territory cannot be recognised as the lawful completion of the decolonisation process. The territory was partitioned and annexed without a UN-supervised consultation of its people (Kalicka-Mikołajczyk, 2020: 39). The ensuing conflict has also displaced thousands of Sahrawis, many of whom are living in the Tindouf refugee camps administered by the Front Polisario, in Algeria (*Front Polisario v Council*, 2015: 4; para. 16).

The continued failure to ensure Western Sahara's right to self-determination also has consequences besides the territorial dispute itself. In particular, it raises the issue of whether third parties, such as the EU, can lawfully conclude and implement agreements with Morocco that extend to Western Sahara or its natural resources without the consent of the Sahrawi people.

"He that is not with me…": The EU and Western Sahara's self-determination

An overview of the EU-Morocco relationship

Morocco has a long-standing partnership with the EU across various sectors, including commerce, economic development, and good governance (Suárez-Collado and Contini, 2021: 1162). However, "[t]rade, security and migration are at the heart of EU-Morocco relations" (Sansawal and Kamath, 2020: 116).

Morocco is a privileged partner of the European Neighbourhood Policy (Mensi, 2018: 552). The goal of this overarching framework is to deepen cooperation between the EU and southwestern Mediterranean territories (Hamzaoui, 2020: 106), given the increasing interdependence between them (Benabdallah, 2009: 431). Namely, it "aims at exporting the EU's values and norms beyond the territorial borders of the Union to create an area of stability, security and prosperity in its vicinity" (Van Elsuwege, 2018: 750).

In this milieu, Morocco is the southern Mediterranean country that most benefits from financial support for economic and social development (Kausch, 2009: 166; Sansawal and Kamath, 2020: 116; Suárez-Collado and Contini, 2022: 1163). It also holds a special "advanced status" (Benabdallah, 2009: 431; Sansawal and Kamath, 2020: 116; Fernández-Molina and Khakee, 2024: 4), allowing for substantial political and economic integration with the EU (Kausch, 2009: 166).

The legal basis for EU-Morocco trade relations is the Euro-Mediterranean Agreement (Mensi, 2018: 552; Pereira Coutinho, 2019: 111), an Association Agreement between the European Communities and their Member States and Morocco signed in 1996. It set out conditions for the gradual liberalisation of trade in "goods, services and capital, and to promote trade and economic relations (…), through dialogue and cooperation, including in the fisheries and agriculture sectors" (Mensi, 2018: 552). This agreement also provided for cooperation in political, economic, social, scientific, and cultural areas (Benabdallah, 2009: 431).

The EU counts the fight against terrorism and control of irregular migration among its major political priorities (Pereira Coutinho, 2019: 110-111), relying on Morocco for these security and migration ventures. This encompasses the externalisation of migration control to third countries, in which Morocco has a crucial role. For instance, Suárez-Collado and Contini (2022: 1163-1164) note that, between 2018 and 2022, "EU-Morocco cooperation has stopped around 135,000 irregular migrants from reaching the continent via maritime routes off the Moroccan coast, while 38,000 would-be immigrants have been rescued at sea and over 300 people-smuggling networks disbanded".

Concerning Western Sahara, its conflict is important for the EU-Morocco *dialogue politique renforcé* because it impacts European interests, including the establishment of a regional free trade zone (Kausch, 2009: 167). Yet, the EU "has kept its legal relations with Western Sahara somewhat ambiguous" (Odermatt, 2023: 3). Although expressing concern for "the pro-longed nature of the conflict and its implications for security, respect for human rights and co-operation in the region" (Kassoti, 2020: 376), the EU has been reluctant to fully affirm Western Sahara's legal status as an occupied territory and its people's right to self-determination.

Furthermore, the EU's refusal to recognise Morocco's territorial claims while also withholding support from the Front Polisario and the SADR (Sansawal and Kamath, 2020: 115) compounds this sense of apprehension. As stated by Van Elsuwege (2018: 755), despite supporting the UN's negotiation process for a resolution based on international law, the EU has treated Western Sahara as a NSGT administered by Morocco. This tepid attitude sustains a *status quo* that benefits Morocco's aspirations, "reinforced by the intractability, long-frozen status, and low priority of the conflict" (Fernández-Molina and Khakee, 2024: 3).

Under their Association Agreement, the EU and Morocco concluded, *inter alia*, a "Liberalisation Agreement" (concerning agricultural, processed agricultural and fisheries products), a "Fisheries Agreement", and a "Fishing Protocol" to be implemented in areas under Morocco's jurisdiction (Pereira Coutinho, 2019: 111). Yet, in practice, they "were applied to goods originating from the territory of Western Sahara and its coastal waters" (Odermatt, 2023: 4). This led to the exploitation of natural resources belonging to the indigenous people in breach of international law (Allen and Trinidad, 2024: 37).

As such, it is unsurprising that the interpretation and application of these (and subsequent) agreements were challenged before the CJEU (Van Elsuwege, 2018: 753). As the following subsection considers, proceedings stemming from the EU-Morocco agreements have significant implications for Western Sahara's right to self-determination within the EU's legal landscape.

The legal implications of EU case-law on Western Sahara's self-determination

The EU's external action is based on respect for the UN Charter and international law (Van Elsuwege, 2018: 750). Multiple references in the EU treaties attest to a positive predisposition towards the latter (*völkerrechtsfreundlich*). According to Hummelbrunner and Prickartz (2016: 25), EU institutions must consider and conform to their obligations under it, for instance, when concluding international agreements with third States.

While the EU enjoys a certain degree of autonomy, it must align with international law and avoid breaching its responsibilities as an international (albeit *sui generis*) actor. Nevertheless, the CJEU retains "the right to decide on the validity, effect and applicability of international law in the EU legal order on a case-by-case basis, especially when there might be a conflict with EU constitutional principles" (Hummelbrunner and Prickartz, 2016: 25).

Given the EU's commitment to international law, one would expect its approach to Western Sahara's decolonisation and self-determination to reflect this. Instead, the EU has evaded addressing the territory's disputed status and failed to define the extent of its agricultural and fisheries agreements with Morocco. The CJEU has affirmed the essential nature of the right to self-determination (*Council v Front Polisario*, 2016: 15; para. 88). However, it has also "confined itself to an analysis of the territorial scope of the respective agreements without clarifying the substantive legal implications stemming

from the principle of self-determination in the EU legal order" (Van Elsuwege, 2018: 753).[3]

In *Front Polisario v Council* (2015), the General Court annulled the Council of the EU's decision approving the Liberalisation Agreement as far as it applied to Western Sahara (*Front Polisario v Council*, 2015: 34; para. 247). While the Court found no absolute prohibition on the EU concluding agreements with third States that may apply to a territory they control without recognised sovereignty such as Morocco (*Front Polisario v Council*, 2015: 21; para. 146), it held that the Council must assess if such agreements infringe the fundamental rights of the territory's population (*Front Polisario v Council*, 2015: 32; para. 227-228), which it had failed to do.

However, a year later, the CJEU overturned this judgment on appeal in *Council v Front Polisario* (Kassoti, 2020: 377), dismissing Front Polisario's action as inadmissible (*Council v Front Polisario*, 2016: 20; para. 134) and ruling that EU-Morocco agreements remained valid but were inapplicable in Western Sahara (Pereira Coutinho, 2019: 112). On the territorial scope of the Association Agreement, the Grand Chamber found that the expression "territory of the Kingdom of Morocco" could not be interpreted as applicable to Western Sahara given "the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination" (*Council v Front Polisario*, 2016: 16; para. 92). In this context, "territory" refers to the geographical area over which Morocco exercises the full range of sovereign powers under international law, excluding territories such as Western Sahara (*Council v Front Polisario*, 2016: 16, 20; paras. 95, 132).

The Court held that the EU is bound by the right to self-determination as part of the international law rules applicable to relations between the EU and Morocco (*Council v Front Polisario*, 2016: 15; para. 89). These include the principle of the relative effect of treaties (*pacta tertiis*), under which treaties cannot impose obligations or confer rights on third States without their consent (*Council v Front Polisario*, 2016: 16, 17; paras. 100, 103-107). As Pereira Coutinho (2019: 113) notes, the Sahrawi people are considered a third party in this sense and implementing EU-Morocco agreements in Western Sahara requires the consent of its people (represented by the Front Polisario), regardless of whether these agreements are beneficial or harmful to them.

The validity of the Fisheries Agreement, the Fishing Protocol, and related secondary legislation was also challenged in *Western Sahara Campaign UK* (2018). The applicants argued that the application of these instruments to Western Sahara and its adjacent waters breached international law (*Western Sahara Campaign UK*, 2018: 8; para. 32), namely the right to self-determination, the duty of non-recognition, the duty of non-assistance, and the principle of permanent sovereignty over natural resources (Kassoti, 2020: 383).

[3] This article does not engage in an exhaustive review of all CJEU case law on Western Sahara, focusing instead on the implications for self-determination arising from three selected cases: (i) *Front Polisario v Council* (T-512/12, 2015); (ii) *Council v Front Polisario* (C-104/16 P, 2016); and (iii) *Western Sahara Campaign UK* (C-266/16, 2018). It does not examine in detail the subsequent litigation culminating in the judgments in *Commission and Council v Front Polisario* (Joined Cases C-778/21 P and C-798/21 P, 2024a) and *Commission and Council v Front Polisario* (Joined Cases C-779/21 P and C-799/21 P, 2024b).

Although unsuccessful in their legal challenge, the applicants achieved a "symbolic victory" (Odermatt, 2023: 2): the Grand Chamber concluded that neither the territory of Western Sahara nor its adjacent waters fell within the territorial scope of these instruments (*Western Sahara Campaign UK*, 2018: 12, 13, 14; paras. 64, 73, 79, 83). This directly contradicted Morocco's view of Western Sahara as part of its territory, while also diverging from the General Court's previous characterisation of it as a "disputed territory" in *Council v Front Polisario* (Odermatt, 2023: 2).

In contrast to the CJEU's approach, the Advocate General took a firmer stance. He reaffirmed that the right to self-determination binds the EU, as established in *Council v Front Polisario* (*Western Sahara Campaign UK* [Opinion of Advocate General Wathelet], 2018: 24; para. 106). He also examined the contested instruments on their compliance with international law regarding: (i) self-determination; (ii) permanent sovereignty over natural resources; and (iii) the rules applicable to international agreements on the exploitation of occupied territories' natural resources (Mensi, 2018: 556).

The Advocate General found the fisheries exploitation breached the right to self-determination, considering the EU had failed to fulfil its obligation not to recognise the illegal situation and not to aid or assist in maintaining it (*Western Sahara Campaign UK* [Opinion of Advocate General Wathelet], 2018: 30-42; paras. 147-213). He also rejected the Council and the Commission's characterisation of Morocco as a "*de facto* administering power", as the concept does not exist in international law; Morocco is an occupying power unable to conclude agreements applicable to Western Sahara (*Western Sahara Campaign UK* [Opinion of Advocate General Wathelet], 2018: 43-46; paras. 221-235). Moreover, he argued these instruments disrespected Western Sahara's permanent sovereignty over its natural resources, as no safeguards ensured that fisheries exploitation would benefit the Sahrawi people (*Western Sahara Campaign UK* [Opinion of Advocate General Wathelet], 2018: 55; para. 285).

In *Council v Front Polisario* (2016: 19; para. 123), the CJEU argued that, since the EU has reaffirmed the importance of self-determination, its agreements with Morocco must be interpreted as reflecting its commitment to international law. The Grand Chamber reiterated this angle in *Western Sahara Campaign UK* (2018: 12, 13; paras. 63, 71). Kassoti (2020: 384) highlights the problematic nature of this, considering that, taken to the extreme, it suggests that the EU cannot be held in breach of international law simply because it has expressly committed to respecting it, regardless of the circumstances. Hypothetically, this would mean that conflicts between what the EU should do and what it actually does could be simply "interpreted away".

This reasoning also informed the legal challenges brought against subsequent EU-Morocco agreements extending to Western Sahara, invalid under EU and international law (Hummelbrunner and Prickartz, 2016: 34; Pereira Coutinho, 2019: 115).[4] Despite

[4] In *Front Polisario v Council* (Joined Cases T-344/19 and T-356/19, 2021a) and *Front Polisario v Council* (Case T-279/19, 2021b), the General Court held that the EU-Morocco trade and fisheries agreements, including amendments extending the scope of the Association Agreement to Western Sahara, had been concluded without the consent of the Sahrawi people. The Court found that the agreements were incompatible with the principles of self-determination and *pacta tertiis* and annulled the Council decisions approving them. On appeal, the Grand Chamber upheld the General Court's judgments, confirming that the agreements could not lawfully apply to Western Sahara without the consent of its people (*Commission and Council v Front Polisario*, 2024a; *Commission and Council v Front Polisario*, 2024b).

claiming to support neither the Front Polisario nor Morocco and favouring a UN-led solution for self-determination (*Front Polisario v Council*, 2015: 9-10; para. 56), the Council and Commission (and, at a later stage, Parliament) seemingly found a legal way to avoid fulfilling their international obligations (Suárez-Collado and Contini, 2022: 1175).

By failing to address the selective application of agreements in Western Sahara, the CJEU "carefully avoided the most contentious issues related to the (il)legality of the EU's – and as a corollary also Morocco's conduct – in light of the international law principle of self-determination" (Van Elsuwege, 2018: 760). This is troubling, as it leaves the question of how far the EU is willing to uphold international law when doing so conflicts with its interests unresolved.

The Western Sahara dispute has extremely sensitive political ramifications (*Western Sahara Campaign UK* [Opinion of Advocate General Wathelet], 2018: 4; para. 3). Given the implications of outright challenging Moroccan sovereignty, the EU has seemingly avoided addressing the repercussions of its external policy and practice towards Western Sahara (Kassoti, 2020: 388).

By maintaining trade relations with Morocco while dodging the legal implications of Western Sahara's occupied status, the EU's pledge to observe and develop international law is undermined. However, this selective engagement is not limited to an economic dimension. As explored next, EU-Morocco cooperation on security and migration further reveals how strategic considerations can prevail over normative imperatives such as self-determination.

Forcing the (Mediterranean) floodgates open: Has Morocco exploited migration to challenge the EU's position on self-determination?

The instrumentalisation of migration: a conceptual note

The notion of "instrumentalisation" of migration has gained prominence in recent years, as migration has "become one of the main manifestations of European relations with the outside world" (Hamzaoui, 2020: 114). However, this is not a new form of interstate diplomacy. As Adamson and Tsourapas (2019: 115, 117-118) note, migratory flows have long shaped States' interactions and have become an important aspect of bilateral and multilateral diplomacy.

The instrumentalisation of migration (also referred to as "weaponisation") involves the use of migratory movements for strategic and foreign policy purposes. In this context, migrants are used as pawns, instrumentalised "in the framework of long and remotely played geopolitical games (…) within the EU and elsewhere" (Ferrer-Gallardo and Gabrielli, 2022: 4). Greenhill (2010: 13) conceptualises one such practice as "coercive engineered migration", through which cross-border population movements are deliberately created or manipulated to bring about political, military, or economic concessions from one or several target States.

For the purposes of this article, the term is understood as the strategic or threatened use of migratory flows to exert political pressure and obtain concessions from another State

or international organisation. However, Yahmi (2024: 61) cautions that language such as "weaponisation" and "instrumentalisation" may be problematic given that it dehumanises migrants by framing them as tools of political agendas. However, as the author notes, there is no consensus on suitable alternative terminology for describing the use of migrants for political advantage.

This instrumentalisation can rely on issue linkages, with States using migration-based relations to pursue objectives in other areas, such as security and economic interests (Adamson and Tsourapas, 2019: 120; Álvarez-Miranda and Brey, 2023: 321). Thus, the use of migrants can be a means of exerting influence for States with limited resources and few alternative instruments at their disposal, allowing them to strengthen their bargaining position *vis-à-vis* more powerful States (Greenhill, 2010: 23, 30).

This is relevant in the context of EU migration externalisation, considering the mutual, albeit asymmetric, interdependence between the EU and countries of origin and transit. While externalisation is not inherently coercive, it can influence the bargaining relationship between arrival and transit States by inadvertently increasing the latter's leverage.

In the EU landscape, this is reinforced by the significant humanitarian and domestic consequences of movements across the Mediterranean, including the thousands of deaths of those attempting to reach European territory (Adamson and Tsourapas, 2019: 114). Besides altering the North-South power balances in the Mediterranean (Álvarez-Miranda and Brey, 2023: 321), these dynamics also test EU cohesion and solidarity, as different Member States face different costs and incentives in responding to migration pressures. For countries holding a critical role in these externalisation arrangements, this creates opportunities to instrumentalise migration to pursue broader political objectives.

Migration externalisation and Morocco's coercive leverage: a turning point?

Through the externalisation of border control and migration management, the EU has established a "protective belt" across neighbouring Arab Maghreb countries (major sources of immigration as origin and departure points), turning them into detention areas for irregular migrants (Hamzaoui, 2020: 114-115). As the Western Mediterranean route gained prominence after the 2015 European migrant crisis, Morocco's influence over the EU and key Member States has been significantly reinforced.

As noted before, Morocco is a vital partner for the EU on security, counterterrorism, and, more importantly, the control and prevention of irregular migration (Suárez-Collado and Contini, 2022: 1163). This reliance has contributed to sustaining Morocco's domestic political *status quo* (Faustini Torres, 2024: 36). Located just 14 kilometres from the Spanish coast and hosting the EU's only land borders on the African continent (i.e., Ceuta and Melilla, two small, albeit disputed, Spanish exclaves), Morocco is a major transit and departure point along the Mediterranean Sea. Indeed, Morocco is "the gateway to Europe and has long been the privileged passage for irregular North African and sub-Saharan migrants wishing to reach the (…) continent" (Benjelloun, 2021: 877).

Until recently, neither the EU nor its Member States officially recognised Morocco's sovereignty over Western Sahara (*Front Polisario v Council*, 2015: 33; para. 241). Yet, Member States have differing stances on the conflict (Sansawal and Kamath, 2020: 115). In fact, the EU has endorsed negotiations based on the Moroccan autonomy proposal (Council of the EU, 2026). Despite maintaining that any solution must provide for the self-determination of Western Sahara, this strengthens Morocco's political position without formally recognising its sovereignty.[5]

Spain, in particular, has sought to balance its obligations under international law against strategic interests. As the *de jure* administering power of Western Sahara (Allen and Trinidad, 2024: 56), Spain bears legal and moral responsibilities to ensure its decolonisation process (Darbouche and Zoubir, 2008: 101). Until 2021, Spain supported a UN-supervised referendum on Western Sahara's self-determination (Sansanwal and Kamath, 2020: 116). However, as Allen and Trinidad (2024: 67) contend, "Spain's change of policy was linked to Morocco stoking the migration crisis at the borders of Spain's North African enclaves (…) fuelled by the fact that the reversal of Spain's long-standing policy (…) has no obvious strategic rationale".

In 2021, an unprecedented event took place in Spain. Moroccan authorities opened the border between Morocco and Ceuta, allowing more than 10,000 migrants, including about 1,500 minors, to irregularly enter Spanish territory for nearly thirty-six hours (Álvarez-Miranda and Brey, 2023: 317). The incident followed the escalation of diplomatic tensions between Rabat and Madrid after the later admitted the Secretary-General of the Front Polisario (and proclaimed SADR President) for COVID-19 treatment (Yahmi, 2024: 57). Contrary to normal practice at the heavily securitised and fenced-off border, Moroccan authorities neither prevented nor pushed back migrants, while also encouraging them to continue moving forward (Ferrer-Gallardo and Gabrielli, 2022: 2).

It is difficult to interpret the timing and circumstances of this sudden border control and monitoring mechanisms "relaxation" as anything other than retaliation for Spain's actions. Although the migrants were returned *en masse* in the following days, Morocco temporarily and unilaterally suspended its border control cooperation with its EU neighbours (Ferrer-Gallardo and Gabrielli, 2022: 2). At the time, this was the largest recorded instance of irregular border crossings into Spanish territory.

Nevertheless, Morocco appears to have achieved its objective. Spain abandoned its long-standing support for a UN-led solution and backed Morocco's proposal for Western Sahara to become an autonomous region within the Moroccan state (Álvarez-Miranda and Brey, 2023: 317-318). In turn, Morocco resumed its "gatekeeper" role and readmitted the migrants. Ferrer-Gallardo and Gabrielli (2022: 3) describe this episode as a "handbook example of how to use the European obsession on border and migration control for foreign policy purposes, and how to manufacture a border/migration 'crisis'".

[5] Moreover, the UN Security Council has also expressed support for negotiations "taking as basis Morocco's Autonomy Proposal" and recognised that "genuine autonomy could represent a most feasible outcome", while reaffirming that the aim remained a mutually acceptable political solution providing for the self-determination of the Western Sahara people (UN Security Council, 2025: 2, para. 3). This reflects a broader international trend of support for Morocco's autonomy proposal, also evident in the positions adopted by the United States, Israel, and an increasing number of European countries, such as Germany, Spain, France, and the United Kingdom.

This shift contradicted the EU's position and the aforementioned CJEU rulings (Yahmi, 2024: 57). Yet, Morocco's strategic importance in trade, security, and, crucially, migration, has facilitated growing support for its position on Western Sahara among Spain, France, and more recently, the EU itself (Suárez-Collado and Contini, 2021: 1169; Council of the EU, 2026). As Faustini Torres (2024: 41) observes, "Morocco seems to have succeeded in silencing the EU on human rights, democracy, and self-determination".

However, the 2021 crisis was not an isolated incident. Following the *Council v Front Polisario* ruling in 2016, the EU and Morocco were precluded from concluding or applying trade agreements to Western Sahara without the expressed consent of its people. In response, Morocco issued thinly veiled threats targeting areas of particular strategic importance to the EU, including migration cooperation (Suárez-Collado and Contini, 2021: 1169). The subsequent increase in mass crossings into Ceuta and Melilla, along with a surge in arrivals on Spanish shores, has also been interpreted as a deliberate relaxation of Morocco's northern border controls during this period (Benjelloun, 2020: 883; Yahmi, 2024: 57).

The 2021 incident further evoked historical parallels with the Western Sahara conflict. As Álvarez-Miranda and Brey (2023: 327) note, it was characterised as "a second Green March" by immigrants ("our Green March") and the Ceuta population ("the Black March").

Given the EU's framing of irregular migration as a security threat that must be managed, it is unsurprising that Morocco has exploited this issue to pursue a broader geopolitical agenda. As this section has argued, the instrumentalisation of migration has become a tool of Morocco's *realpolitik* arsenal, enabling it "to enhance its economic situation, advance its interests, including the recognition of Western Sahara as part of its national territory, and thus coerce states to violate international legislation" (Yahmi, 2024: 57).

Nowhere are the costs of these transactional politics clearer than in the continued denial of Western Sahara's self-determination. By conceding to Morocco's demands, the EU and its Member States contribute to legitimising an illegal occupation while undermining the Sahrawi people's fundamental rights. As Yahmi (2024: 57) argues, Morocco's threats are deemed credible in light of "the EU's deeply rooted fear of being flooded by migrants". This enables the former to impose (if not outright coerce) concessions from both the EU and its Member States. This instrumentalisation operates on two interlinked levels: (i) through Morocco's migration management, and (ii) through its cooperation with the EU, particularly in the agricultural and fisheries sectors.

These domains are not isolated but mutually reinforcing, as Morocco's cooperation on migration and security also strengthens its bargaining position in securing favourable trade arrangements, even where these involve the exploitation of Western Sahara's natural resources without the consent of its people. The more dependent the EU is on Morocco's cooperation in managing migration, the greater Morocco's capacity to influence European policy on Western Sahara becomes.

Western Sahara's right to self-determination is grounded in international law, as affirmed by a series of international legal judgments and opinions, including those of the ICJ and the CJEU (Fernanández-Molina and Khakee, 2024: 3). This makes the EU's reluctance to uphold this principle in its relations with Morocco all the more perplexing. However, this can be understood, at least partially, as a consequence of its approach to migration

externalisation, which has weakened the EU's bargaining position and increased its vulnerability to Moroccan political pressure.

The EU has compromised its legal and moral commitments, exposing the malleable nature of its external action when migration is framed as a security threat. In this trade-off, it is the people of Western Sahara and their right to self-determination who ultimately bear the cost. The paradox at the core of the EU-Morocco relationship is not simply the coexistence of international law and *realpolitik*, but the extent to which the latter can prevail over the former.

Conclusion

This article has argued that Morocco has instrumentalised migration as political leverage to shape the EU's position on the Western Sahara conflict. Despite the CJEU reaffirming the territory's distinct status and the need to respect the consent of its people regarding the territory's natural resources, the EU's deepening cooperation with Morocco in trade, security, and migration has undermined its commitment to upholding its obligations under international law. The EU has tacitly contributed to Morocco's consolidation of its *de facto* control over Western Sahara, perpetuating the conflict's *status quo* and diminishing the prospects for the Sahrawi people to exercise their right to self-determination.

This analysis suggests that migration has become an effective instrument in Morocco's efforts to secure greater European alignment with its position on Western Sahara. The strengthening of EU-Morocco relations coincides with a broader shift among key Member States, most notably Spain and France, towards endorsing the Moroccan autonomy plan and sidelining the referendum on self-determination. The recurring threat of migration-related pressure appears to have reinforced Morocco's bargaining position.

The selective application of international law carries significant legal and political implications. While the EU has consistently professed its respect for international norms in its external relations, its approach to Western Sahara suggests that interests can take precedence over legal obligations. Beyond the unresolved question of self-determination, the implicit acceptance of Morocco's sovereignty claims has been criticised as difficult to reconcile with the EU's commitments to democracy and human rights (Kausch, 2009: 175).

Ultimately, in the clash between *realpolitik* and international law, one of them must yield. If the EU continues to prioritise short-term strategic considerations over its legal commitments, its credibility as a normative global actor is called into question. As international attention to the conflict continues to wane (Smith, 2013: 290), the prospects for a fair settlement become uncertain.

If, as this article argues, migration can be instrumentalised to influence the EU's position on Western Sahara, responsibility for sustaining the current impasse also extends beyond Morocco to those whose political choices have allowed the conflict to endure.

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