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'THE (EUROPEAN) EMPIRE STRIKES
BACK?'
APPLYING THE IMPERIAL PARADIGM TO
UNDERSTAND THE EUROPEAN COURT OF
JUSTICE'S *IMBROGLIO* IN WESTERN
SAHARA

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‘The (European) Empire strikes back?’:
Applying the imperial paradigm to understand the European Court of
Justice’s *imbroglio* in Western Sahara

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Abstract

The Westphalian nation-state rationale no longer explains Europe’s foreign policy. New actors within the EU rival Member States for control over foreign policy, while pushing for normative goals in its borderlands and beyond. Reimagining the EU as an imperial polity allows for a better conceptualisation of its polycentric power structure, normative aspirations and multi-level neighbourhood permeation. Matching constructivist theses, the imperial paradigm also sheds light into EU officials’ ‘Europeanisation’ and patterns of socialisation. The ECJ’s involvement in the Western Sahara dispute is illustrative of this. The Court exposed the Council and the Commission’s wrong-doing, yet it eventually let them off the hook. It also scored an important normative goal by shielding Western Sahara’s status, thus almost irreversibly frustrating Morocco’s aspirations to annex the territory —its foremost foreign policy objective.

Introduction

Westphalian absolute sovereignty, hard power projection, and rigid borders no longer explain Europe’s foreign policy (EFP). Reimagining the EU as an imperial polity allows for a better conceptualisation of its polycentric power structure, normative aspirations, and multi-level neighbourhood permeation. The imperial paradigm, matching constructivist theses, also accounts for EU officials’ ‘Europeanisation’ and patterns of socialisation. The European Court of Justice’s (ECJ) ruling over the EU-Morocco Liberalisation Agreement¹ (LA) is illustrative of this. First, the Court exposed the Council and the Commission’s wrongdoing in neglecting Sahrawi rights to self-determination, thereby positioning itself as an alternative centre of authority in the international arena. Secondly, while ECJ officials championed Empire Europe’s normative crusade by shielding Western Sahara’s independent status, they refrained from punishing the two most powerful bodies of the institution they dearly identify

¹ Council Decision 2012/497/EU approved the conclusion of an agreement between the EU and Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products and introduced new protocols and amendments to the 2000 EU-Morocco Association Agreement

with. Thirdly, by giving a voice to the Polisario,² the Court showcased how Europe can have a say even in its neighbours' most sensitive national issues —such as Morocco's long-standing claim to the Sahrawi provinces.

The first part of this paper analyses three features of the EU's *'sui generis'* model of governance through the lens of the imperial paradigm. Its multi-layered decision-making process is reimagined as an empire's polycentric power structure; its normative aspirations as civilizational discourse; and its multi-level neighbourhood permeation as fuzzy, expanding borders. A second section explores the ECJ's increasing international actorness and explains its normative profile through constructivist theses. The following section dives into the facts behind the Western Sahara dispute, the impact of the General Court's (GC) initial annulment of the LA, and the Court's latter recognition of the territory's independence.

This paper tackles the challenge with help of scholarly research, legal records, and a set of seven semi-structured interviews with diplomats at the EU Delegation in Rabat; the Spanish and French embassies; the Moroccan embassy in Madrid; and practitioners in the former Directorate General of External Relations.³ A concluding section wraps up the findings and assesses the methodological usefulness of the paradigm. While not advancing a new theory, this paper is rooted in the firm belief that 'paradigms are not "true" or "false" in any naive sense. Rather they take us further (or less far) and are theoretically more or less fruitful' (Adler, 1987:4).

1. Theoretical discussion

According to Henry Kissinger, the foundation of the EU 'produced a degree of unity that had not been seen in Europe since the Holy Roman Empire' (2014:147). However, the latter was an institution which, using Voltaire's quip, was 'neither holy, Roman, nor an empire' (as quoted in Renna, 2015:60). According to US President Madison, it was 'a nerveless body, incapable of regulating its own members, insecure against external dangers, and agitated with unceasing fermentations in its own bowels' (as quoted in Wilson, 2016:1). Are thus Kissinger's words unwarranted, or can such an imperial system of governance solve the puzzle of seemingly contradictory European policies?

As polities 'that are simultaneously international actors and peculiarly structured political systems with a core and peripheries, empires fit awkwardly in research agendas' (Motyl, 2001:1-2). Yet it is precisely their system of 'organised anarchy' (de Wilde and Wiberg, 1996:5) that can better explain the EU's behaviour in the international arena. Statist models applied to the EU do not offer a satisfactory explanation. Unlike states, the EU 'has no effective monopoly over the legitimate

² 'Popular Front for the Liberation of Saguia el-Hamra and Río de Oro', Sahrawi liberation movement

³ Now merged into the European External Action Service (EEAS). Interviews were conducted in English, Spanish and French. Translation is that of the author.

means of coercion; [i]t has no clearly defined centre of authority; [i]ts territory is not fixed; [i]ts geographical, administrative, economic, and cultural borders diverge; and [...] is a very different kind of international actor than any of the states we know from history' (Zielonka, 2006:2-3). I henceforth focus on EFP and three premises: the EU's competing centres of authority, normative discourse, and fuzzy borders.

1.1. Multiple centres of authority: back to the future?

While the EU's consensus-based form of governance and 'polycentric power structure' (Idem:18), have been seen as the precursor of a pan-European polity (Lindberg and Scheingold, 1970:8; Bornschier, 2000:3), European decision-making is far from being concentrated —or 'Brusselised'— into a federal centre. It is still the result of 'pull and push' dynamics and involves a constellation of actors and processes. One has to factor in the interests of Member States, EU institutions, and newcomers such as the High Representative of the Union for Foreign Affairs and Security Policy (HR), the European External Action Service (EEAS), or the ECJ. The empowerment of these potential trouble-makers implies increasing diplomatic *imbroglios* for Member States. Farewell to states' *cuius regio, eius religio*.⁴

Far from moving towards an 'ever closer fusion' or 'the Europeanisation of national actors and institutions' (Wessels, 1997:267-8), sovereignty over international affairs is still a precious asset to European partners. The reluctance of national foreign ministries to partake in the EEAS (Balfour *et al.*, 2013:3) and diverging attitudes towards NATO membership or Europe's role in the conflicts of Iraq or Libya showcase some of the many hindrances towards continental homogenisation.

Whatever the actual limits to European integration in foreign policy, fully-sovereign Westphalian states have disappeared from Europe's international system. Like within an empire, 'no authority typically rules with exclusive powers... the central government rules indirectly through local governments, the latter develop self-government on important issues; and power sharing is widespread' (Colomer, 2011:395). Europe sports empires' 'relatively weak, limited, and decentralized government; inefficient economic system; and multiple cultural identities' (Zielonka, 2006:12). Hence, the characteristic internal tensions between the emperor and other rulers, bishopric polities, or city-states (Kautsky, 1982:127; Burns, 1988:179) may not radically differ from Council meeting rows and Commission's ultimatums.

However, neither the Westphalian nor the imperial ideal types should be overstretched or idealised. Westphalian absolute sovereignty did not arrive until the mid-nineteenth century, with the second industrial revolution, when the material conditions to exercise such authority fell within states' control (Maier 2002:21). On the other hand, however fruitful, the imperial paradigm risks becoming a 'catch-all'

⁴ 'Whose realm, his religion'

concept. Hardt and Negri (2000:xii), for instance, apply its decentred form of rule to the entirety of the world. In their view, empires not only administer lands and peoples, they can also ‘create’ them (Ibid.). Should we then speak of a European, Mediterranean, Eurasian, or global empire?

Several works in European studies have already presented the EU ‘as a successful intergovernmental regime designed to manage economic interdependence through negotiated policy co-ordination’ (Moravcsik, 1993:474). Yet while intergovernmentalism captures the bargaining nature of European policies, its state-centrism fails to account for the influence of European institutions and other subnational actors. ‘Multilevel governance’ models better match the rationale of empires. Indeed, Europe experiences a ‘polity-creating process’, ‘the locus of political control has changed’, and ‘individual state sovereignty is diluted in the Union by collective decision-making among national governments’ (Blank *et al.*, 1996:341).

Principal-agent models and Majone’s ‘logic of delegation’ (1999) also parallel the imperial share of power between supranational, national and subnational entities. The principal-agent model hints at the problem of delegating a task to an agent who has different objectives than the principal who delegates this task. Although ‘the principal can never hope to completely check the agent’s performance’ (Arrow, 1963), the ‘logic of delegation’ makes of this uncertainty a desirable gamble: aside from releasing itself from a time-consuming or complex burden, the principal can depoliticise or professionalise policy-making. The creation of some of the EU’s agencies and bodies—including the ECJ—could follow this motivation (Pollack 2007; Keleman 2002). They offer more visibility (Dehousse, 2008) and legitimacy (Leonard, 2009). Crucially, although the principal-agent rationale allows the imperial metropolis to permeate different subunits in the system, those actors’ ‘interests and resources alter the political game’ in return (Moe, 1989: 282).

1.2. Normative Empire Europe

Unlike other actors in the world stage, the EU is said to promote universal norms like democracy, human rights or sustainable growth. These normative goals not only betoken its distinct international role (Manners, 2002:236; Hill, 1993:305; Hill and Smith, 2011:38), they also collide with the ‘hegemonic ambitions of individual states that had emerged following the Peace of Westphalia in 1648’ (Fischer, 2000:1). Europeans no longer worship the old Machiavellian doctrine ‘that anything is justified by *raison d’État*’ (Bull, 1995:189).

Despite this laudable self-image, nonetheless, some see the EU’s universalism as the mere disguise of a realist power fighting for its own interests (Hyde-Price, 2006). Others equate its rhetoric to an empire’s ‘*mission civilisatrice*’: both ‘a device to legitimise the EU’s imperial policies in its neighbourhood’ (Zielonka, 2013: 35-6) and ‘the *modus operandi* of a normative empire’ (Del Sarto, 2015: 215-6). This would

explain the gap between Europe's discourse and its 'not-so-benevolent way' of pursuing foreign policy goals (Idem:228).

Civilising missions also shape the empire's identity. By interacting with the rest of the world, empires find their 'place under the sun'. Therefore, all civilising missions have a distinct ethical or universal connotation: from keeping the barbarians out, through teaching God's faith, to spreading the virtues of liberal democracy. Crucially, 'the success or failure of civilising missions depends on their ability to generate internal and external legitimacy rather than on their ability to meet moral criteria' (Zielonka:37).

Yet how ready, or willing, the Union is to pursue its normative goals is still object of intense academic debate. The contention at this point is that 'clinging to the notion of Civilian Power Europe not only stretches the term "civilian" past its breaking point, but also tends to induce excessively rosy-eyed views of the EU as an international actor' (Smith, 2005: 63). Civilian powers rely on non-military means (Maull, 1990:92-3), yet the Union's first foreign policy head, Javier Solana, notably argued that 'if the EU was to match its aspirations' it needed to 'bolster its military capabilities' (2009:1).

The imperial paradigm narrows the gap between what the EU says it does and what it really does. Within the imperial rationale, the EU's 'civilian identity' acts as the empire's legitimising *leitmotiv*. Like that of the Holy Roman Empire, Europe's foreign policy is not based on a 'might is right' principle. It tries to 'convince' other actors that its claim to universalism is superior. This is a radical split away from the Westphalian tradition. While the medieval universe was dominated by morality and religious dogma, Westphalia 'made the glorification of the state acceptable', reaffirming 'the belief that "the end justifies means" and "might makes right"' (Kegley and Raymond, 2002:135). The EU seems to have gotten past the Westphalian '*raison d'état*' and 'back' into medieval universalism.

However, instead of promoting universal rules, the EU may be better conceptualised as a 'civilising power' spreading its own understanding of those norms. The Union has a tendency to 'reproduce itself' (Bretherton and Vogler, 1999:249) and often gives internal solutions to external problems (Lavenex, 2004:695). The EU's 'imperial narrative' stems from its historical post-war experience, where the logic of regional political and economic cooperation constitutes 'the EU way of doing things'.

To draw ethical conclusions from the EU's *modus operandi*, 'a strong indicator, which would at the same time alleviate suspicions of hypocrisy and ensure consistency in the application and pursuit of norms, might be linked to what kind of legal principles the EU relies on in its external initiatives' and whether those affected by EFP are given a voice (Sjursen, 2006: 243-4) —thus the relevance of studying the ECJ's international role. Another way operates the two criteria of 'inclusiveness' and

‘institutional reflexivity’ (Bicchi, 2006:287). While inclusiveness hints at the degree of empowerment and ownership allowed to those affected by EFP; institutional reflexivity is the capacity of policymakers to exercise self-critique, escape routine-based behaviour, and (re)adapt their policies to achieve the desired ends. Reflexivity, or the lack thereof, is thus a strong indicator of power relationships between agents and individuals on the ‘receiving end’ (Idem:290). This paper applies both means of evaluation to the Western Sahara dispute.

1.3. Fuzzy borders: power ‘beyond the wall’

The preceding two premises are vital to understand what imperial borders look like. On the one hand, unlike in the Westphalian state, different layers of authority can expand and even transcend the formal limits of the empire. On the other hand, empires exhibit a civilising mission based on a universal agenda, often addressed to their borderlands. The convergence of both premises explains Brussels’ perception of its neighbourhood as a ‘near abroad’⁵, i.e. a group of states ‘which are accepted (at least formally) as independent neighbours but taken for granted as not quite foreign, in which [one has] ... tangible interests and [whose] economies are intrinsically linked to the ... centre’ (Page, 1994:789).

Post-colonial ties and much-desired stability lie behind EFP’s emphatic focus on the Middle East and North Africa region. The strategy pursued has been no less telling. The 1995 Euro-Mediterranean Partnership (EMP) sought to foster democracy and human rights in the South through ‘region building’ (Adler *et al.* 2006; Gillespie, 2002; 2004; Bicchi, 2006): the EU’s civilizational *leitmotiv* and ‘way of doing things’. However, it ‘downloaded’ its regionalism into a region paradoxically marked by perennial conflict and low economic integration (Barnett, 1995; Buzan and Waeber, 2003). The EMP process begot several EU-South accords, yet South-South agreements remained notoriously low and eventually unimplemented (Radwan and Reiffers, 2005). While human rights and democratisation were the underlying justification for North-South dialogue, these areas did not experience any significant improvement (Youngs, 2001). The EMP’s successor, the European Neighbourhood Policy (ENP), overcame this regional model by embarking upon a policy of differentiation. The ENP championed a ‘regatta approach’ among Mediterranean partners, a logic of positive — ‘more for more’ — conditionality, whereby the Union corrected the EMP’s shift away from rewards-based schemes (Del Sarto and Schumacher, 2005:37; Lannon, 2015:220; Landaburu, 2015).

This evolution correlates to three imperial predictions. First, the EU has projected its governance system and *modus operandi* beyond its borders. Secondly, instead of creating a region, it progressively developed bilateral relations with its Mediterranean

⁵ Concept associated with Russian foreign policy of the 1990s. Russia regarded the former Soviet nations as important areas for national interest (Christiansen *et al.*, 2000:392).

partners that very much resembled the imperial centre-periphery rationale: states had to 'comply' with EU 'demands'. Thirdly, 'cheating' characterised these relationships: the EU's weak 'imperial authority' failed to enforce agreements and prevent 'imperial sub-units' —MS and neighbours alike— from free-riding.

In its neighbourhood at least, the EU behaves like a modern imperial power. Modern empires typically exert informal rule and loose forms of control (Diez, 2011:45), exercise their authority 'at a long distance', defend their interests and those of their 'friends', and play a 'police role' in regional conflicts (Howe, 2002:30). If Lundestad (1986) coined the term 'empire by invitation' to refer to the way the US became the world's 'indispensable nation' (Blummenthal in Zenko, 2014; Albright, 1998), in a similar way Europe can be thought of as the Mediterranean's 'indispensable partner', with or without invitation. As might be true of Europe's Mediterranean ambitions, 'the metropolis does not always have a master plan of imperial conquest... States can become empires by default because they try to bring some order to unstable neighbours' (Zielonka, 2006:13).

Indeed, Brussels's regional permeation has rendered its borderlands into 'intermediate spaces between the inside and the outside of the polity' (Christiansen *et al.*, 2000:411). Good instances of Europe's power 'beyond the wall' are the 'securitisation' of Euro-Mediterranean relations (Cassarino, 2005; Joffé, 2007; Kausch and Youngs, 2009; Barbé *et al.*, 2009), the externalisation of border control (Lavenex and Wichmann, 2009), attempts at regional democratisation (Schimmelfennig and Scholtz, 2008; Youngs, 2002; Lavenex and Schimmelfennig, 2011), or the institutional 'isomorphism' between the EU and regional policies (Pace, 2007; Börzel and Risse, 2009). Importantly, the ECJ presides over the enforcement of all of these.

Morocco is a good example for some of these practices. It actively participates in Europe's security community (Bremberg, 2016), democratisation agendas (Haddadi, 2006; Kausch, 2008), and 'open skies' programme (Miccoa and Serebrisky, 2006; Bicchi, 2010). Its valuable partnership with Frontex in migration-control (Carrera, 2007) even earned Rabat the title of 'Europe's gendarme' (Wolff, 2008). The EU and its regional 'top student' are now so interdependent that such a sensitive issue as Western Sahara's status is traditionally casted aside as an unimportant historical particularity (Mundy and Zunes, 2010; Shelley, 2004), or an idealistic crusade of the European Parliament (Torrejón-Rodríguez, 2014).

2. The European Court of Justice: a new actor in EFP?

The medieval system of rule consisted of 'a patchwork of overlapping and incomplete rights of government' in which 'different juridical instances were geographically interwoven and stratified' (Ruggie, 1983:271). This resonates with the EU, which unlike no other international organisation, enjoys a 'effective supremacy of its law

over the laws of member governments' (Keohane and Hoffman, 1991:11). But has the ECJ evolved into a competing centre of authority in EFP? And, if so, could the 'Europeanisation' of its members explain its ambitions?

2.1. The ECJ's post-Lisbon actorness

The ECJ has been criticised for unduly extending the scope of EU law and overstepping its own jurisdiction, to the detriment of Member States' autonomy and reserved competences. Tensions are particularly acute in the realm of foreign policy. After the dismantling of the EU's old pillar architecture, the Treaty of Lisbon kept the established dichotomy between the Union's foreign policy and its other external competences. '[N]ot only did the authors of the Treaty entrench the procedural specificity of the Common Foreign and Security Policy (CFSP), they also attempted to circumscribe its effects, notably on Member States' foreign policies' (Hillion, 2014:47). And yet, in at least three different ways, Lisbon expanded the ECJ's international reach: 1) the Court now controls important CFSP acts like sanctions, thus ending with the policy's conventional immunity; 2) it bridges and watches over the integrity of the CFSP and the external dimension of the Treaty of Functioning of the EU (TFEU); and 3) enforces the 'general' underpinning principles of the EU's legal order (Curtin and Dekker, 2011:155).

The ECJ has indeed become a player with an international—even CFSP—dimension. Although previously the Court only had jurisdiction where it was explicitly provided (ex-Article 46 TEU), Lisbon reversed the rule. It can now rule except where the opposite is explicitly indicated (Rosas and Armati 2012:264). Furthermore, Member States 'undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein' (Article 344 TFEU). This includes disputes of international order, which can/must now be brought before the Court (Denza, 2002). The ECJ has effectively become the unrivalled watchdog of one of the most proactive actors of the international community.

Lisbon not only widened the ECJ's jurisdiction, it also modified the 'constitutional landscape within which the Court adjudicates, notably by adding emphasis on democratic principles and respect for human rights, the principle of sincere cooperation and the requirement of consistency' (Hillion, Ibid:24; Dougan, 2008:617). On the one hand, the vagueness of such principles allows for no small degree of interpretation. This gives the ECJ great political clout against other European actors—Member States included. For instance, in its 2012 case-law *European Parliament vs Council*, the Court made clear that 'the duty to respect fundamental rights is imposed ... on all the institutions and bodies of the Union', thereby reaffirming its power—and duty—to control the actions of all other EU institutions. On the other hand, the Court not only judges EU law now, but also international law. In fact, the ECJ has already pronounced itself about actions jointly

taken by all members of the Union, not when these acted within the realm of CFSP, but during the application of resolutions of the UN Security Council (Case T-14/98).

Far from being Westphalia-immune, Member States can be drawn into uncomfortable diplomatic *imbroglios*. If trade policy meets with difficult foreign policy scenarios, with particular turmoil. The *Brita GmbH vs Hauptzollamt Hamburg-Hafen* case, which put the EU at the centre of the Arab-Israeli conflict, is a good example of this. Jurisdiction over Single Market policies allowed the Court to conclude that ‘the EC-Israel Agreement and the EC-PLO Agreement [were] coequals, and that the territories of the two *countries* [did] not overlap’ (Kornfeld, 2010:5)[emphasis added]. Product differentiation, labelling, and origin control soon followed on. The dictum had far-reaching political consequences, and exhibited the ECJ’s capacity to ‘review the legality of legislative acts, of acts of the Council, of the Commission [...] of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties’ (Article 263, TFEU). Problematically, these ‘third parties’ might just be ‘any natural or legal person’, yet are in a position to ‘institute proceedings against an act addressed to [them] or which is of [their] direct and individual concern’ (Ibid.). The vast equivocality in the legal sources buttressing the Court’s power gives it great room for manoeuvre in deciding what causes to fight for or what arguments to side with.

2.2. *The ECJ: a legal Don Quixote?*

The ECJ has increased its jurisdiction over foreign policy. Its role as ‘guardian of the treaties’ has also conferred it greater intra-EU prominence. But what is this power used for? By choosing some cases over others, pressing for some charges in particular, or releasing public opinions, ECJ officials can push for particular political goals. The specialised and independent nature of their job, and the normative aspirations attached to it by the EU’s official ‘civilising rhetoric’, can explain their socialisation into patterns of ‘Europeanisation’. In short, officials mutate into the empire’s mandarins to pursue—and vow to—its normative agenda.

As the principal-agent model explains, the problem here lies in delegating a task to an agent who has different objectives to the principle who delegates this task. While Member States can never be too sure of these agents’ performance, the ‘logic of delegation’ makes of this uncertainty a desirable gamble. Empowering these autonomous ‘eurocrats’ at the Court can yield the depolitisation, professionalization, or cheapening of policies. However, because these actors’ ‘interests and resources alter the political game’ in return (Moe, 1989: 282). The bureaucratic structure develops its own politics.

ECJ judges, advocates general or lawyers can alter the EU’s political game in many ways. Why they would do so is more difficult to anchor. As neofunctionalism—also ‘pragmatic constructivism’ (Haas and Haas, 2002)—defends, officials’ progressive

socialisation into the ECJ ‘bubble’ could explain this loyalty shift. This political re-integration is ‘the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities towards a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states’ (Haas, 1958: 16). Crucially, ‘shifts in the focus of loyalty need not necessarily imply the immediate repudiation of the national state or government’ (Ibid:14). In the case of the EU, the process has often been referred to as ‘Europeanisation’.

Sticking to these postulates, it can be hypothesised that ECJ officials would be true imperial mandarins if they valued the new centre of attachment 1) as an end *per se*, 2) as a side-product of otherwise instrumental behaviour towards another ultimate goal, or 3) the new centre pressured them into conformity. Through these premises, constructivists can therefore explain the ‘Europhilia’ —or ascription to the empire’s *mission civilisatrice*— of actors within the ECJ. They can also account for their socialisation into patterns of cooperation with like-minded colleagues and imperial subunits, including in the borderlands. Problematically, what begins as intentional behaviour can become routinised over time, to the detriment of policies’ inclusiveness and reflexivity.

3. The ECJ’s Sahrawi *imbroglio*

In December 2016, the ECJ delivered its highly expected final judgement on the EU-Morocco Liberalisation Agreement (LA) case, on appeal by both the Council and the Commission after the General Court (GC) ruled in favour of the Polisario a year earlier. The ruling came to close a bitter chapter for relations across the Strait of Gibraltar, which had seen Morocco formally cutting ties with the EU after the dictum. While the GC had originally annulled the Agreement because it unlawfully included the territory of Western Sahara within its territorial scope (OJ, 2015a), the Court offered this time a pyrrhic victory to both Council and Commission instead. By circumventing the *de facto* application of the agreement to the disputed territory, the ECJ let the Commission and Council off the hook; yet it also recognised the territory’s separate status and exclusion from the Agreement. The Court’s decision has made clear that Rabat cannot bind Western Sahara, thus unleashing the Makhzen’s fury.

On the one hand, the judgment exposes the degree of penetration of the EU’s authority, civilising mission, and *modus operandi* in its borderlands —to the frustration of its neighbours. Morocco’s statement after the GC’s judgement is illustrative of this. As Rabat replied, the country could not ‘accept to be *treated as a subject of a judicial process*, and to be *buffeted between European institutions*’ (Moroccan Ministry of Foreign Affairs, 2016)[emphasis added]. On the other hand, the ruling shows the steadily expansion of the ECJ’s jurisdiction into the international arena. However uncomfortable to Member States, even authority over foreign policy

has become multi-layered and ever-contested. Indeed, the EEAS rejected the Court's dictum and appealed it immediately after the Rabat's heated press release. In the eyes of the EEAS' head and HR/VP Federica Mogherini, 'the agreements between Morocco and the European Union [were] not a violation of international law' (as quoted in Sakthivel, 2016).

The case raises a wider question: what happens when diplomacy falls no longer under the exclusive realm of diplomats and politicians, but may also be shaped by judges and courts? To understand this diplomatic *imbroglio*, the imperial paradigm is hereafter used to explore 1) Europe's (dis)interest on the dispute; 2) the Polisario's *ius standi*;⁶ 3) the Agreement's territorial scope; and 4) the ECJ's 'game of courts'.

1.1. *Western Sahara and Europe: conflict irresolution*

Western Sahara, Africa's last colony, is the scenario to one of the continent's longest-running conflicts. After over a century of rule over the territory, Spain's agonising generalissimo Franco decided to withdraw and signed the land over to Morocco and Mauritania in the Madrid Accords of 1975. Although in 1966 the UN General Assembly had passed Resolution 2229 (XXI) affirming 'the inalienable right of the people of Western Sahara to self-determination and independence', no referendum was held, and the Polisario Front, Morocco and Mauritania engaged in a 16-year war. Mauritania eventually relinquished its claim, thus leaving Morocco *de facto* controlling most of the territory bar for the exception of an insulated region to the East: the Sahrawi Arab Democratic Republic (SADR) ruled by the Polisario. Ever since Morocco's victory and triumphant '*Marche Verte*' in 1975, the Sahrawi population lives dispersed in areas controlled by Rabat, in refugee camps in Algeria (Tindouf being the largest), and in the SADR (see Figure 1).

European countries have differing positions towards the dispute, yet France and Spain's are the most relevant and influential. As a EU diplomat (Interview with EU Senior Diplomat, 2016) has pointed out, 'when it comes to Euro-Moroccan relations, "it takes two to tango", and those two are always Paris and Madrid'. France has traditionally tried to 'recognise Moroccan efforts to integrate the people of Western Sahara', as it considers 'this is the best prospect of development and prosperity for the Sahrawis' (Interview with a French Senior Diplomat, 2016). Paris' support for Rabat comes at nobody's surprise. 'France is Morocco's second largest arms supplier after the United States', 'it has come to be Morocco's biggest supporter in the EU', and 'also threatened to use its veto power at the Security Council should the UN favour a solution that undermines Morocco's position' (Sakthivel, 2016). Many see France's stance as a fundamental cause for the conflict's perpetuation and stagnation (Ibid.).

⁶ 'Right to appear before a tribunal or to make representations to another under international law' (Fellmeth and Horwitz, 2009)



Figure 1. Map of Western Sahara, source: UN MINURSO Operation, January 2017

Spain’s position is more complex. Madrid’s attitude towards the territory is marked by ‘a profound sense of collective guilt’ after a rushed decolonisation process (Interview with Spanish Diplomat, 2016b). At the same time, as Spanish diplomats like to emphasise:

‘Hispano-Moroccan relations are underpinned by unique historical, political, and economic ties. The relationship between the two monarchies appeals to Moroccans in a profound way and shapes their national identity in return... It is not difficult to understand why, like for the very King Mohammed himself, King Juan Carlos was seen by Moroccans as a sort of “European uncle”’ (Interview with Spanish diplomat, 2016c).

These ‘emotional’ ties could seem anecdotal, yet a sizeable part of EU-Morocco cooperation is in fact achieved via this ‘royal channel’. As a (non-Spanish) EU diplomat argues, the very fisheries agreement object of the ECJ’s ruling was ‘a gift from King Mohammed to the new Spanish government of Mariano Rajoy, who non-coincidentally toured Rabat in the traditional “Morocco-first” state-visit only a few weeks before Morocco agreed to the accord’ (Interview with EU Senior Diplomat,

2016b). Indeed, Sahrawi waters are of vital importance to recession-hit Spanish fishermen, as is Morocco's indispensable help in cross-border security. Upsetting Rabat is an unlikely foreign policy choice for Madrid.

While the UN Security Council (2002) affirms that Spain officially 'terminated its presence' in Western Sahara in 1976, the Spanish High Court, alluding precisely to the UN Charter, highlights Spain's obligation to ensure the protection, also in legal terms, of all Sahrawis (Audiencia Nacional, 2014). Conversely, Madrid believes the UN's global authority to be best suited to ensure the territory's future, a position shared by EU institutions. Neither the Commission nor the Council mentioned the binding jurisprudence before the ECJ. Instead, they officially claimed that the Agreement's text did not elicit the conclusion that the treaty would be applicable in Sahrawi territory. For the Council, the accord 'could not lead to any formal recognition of the rights claimed by the Kingdom of Morocco with regard to that territory' (OJ, 2015a:75). The Commission recalled UN Resolution 2625 (XXV), thereby stating that 'international agreements concluded by the power administering a non-self-governing territory do not apply to that territory' (OJ, 2015a:75). Former HR/VP Ashton's (2011:1) had also previously remarked that 'Western Sahara is considered a "non-self-governing territory" and Morocco its *de facto* administering power'. Problematically, the Commission attributed the controversial status of 'administering power' to Morocco, 'an international legal institution which does not exist as such' and is 'in dire contradiction to the principles of the UN' (Soroeta-Liceras, 2016:208.).

1.2. *The Polisario's ius standi*

The Polisario vindicates its status as 'subject of international law with the international legal personality granted to national liberation movements' (OJ, 2015a:37). It also claims being 'recognised as representative of the Sahrawi people by the bodies of the UN, the European Union, and the Kingdom of Morocco in negotiations' (Ibid.). In fact, the UN validated the Polisario-Mauritania 1979 peace agreement, and the European Parliament demanded its cooperation alongside the Red Cross and Morocco in two separate resolutions. Conversely, although both the Commission and the Council acknowledged the Polisario's 'capacity as representative of the Sahrawi people', they found the Polisario's personality 'questionable', and far from 'functional' or legally 'transitional' (Ibid.).

The GC positively valued the Polisario's internal statutes and political structure, yet its standing would eventually be granted by virtue of being an affected party by the actions of the Commission and the Council (Article 263(4) TFEU). According to the GC, existing jurisprudence justified that 'in some cases the concept of "legal person" ... is not necessarily the same as those specific to the various legal systems of the Member States' (OJ, 2015a:48). The GC also recalled that both the Council and the Commission supported the efforts of the UN Secretary General to reach a 'a fair,

long-lasting and mutually acceptable political solution, which allows self-determination for the people of Western Sahara' (Idem: 56)

Two important conclusions can be thereby extracted. First, as seen in section 2 of this paper, Article 263(4) TFEU has the potential to bring the ECJ into the international arena. *Interpreting* the LA as applying to Western Sahara automatically conferred standing to the Polisario, and allowed the GC to judge the case. Secondly, it is noteworthy that the GC should want to finish its assessment by reminding the Council and the Commission of their formal commitment to a 'mutually acceptable' solution allowing Sahrawi 'self-determination'. This points to a *contradictio in terminis*: Morocco rejects Sahrawi emancipation. By pointing to this contradiction, however, ECJ officials unveiled a lack of inclusiveness in EFP, and perhaps also of reflexivity. Neglecting Sahrawi rights was arguably presented as reminiscent of colonial practices.

After the Council and the Commission's appeal, the Court ruled that the LA could not be understood to apply to the territory (see next subsection). The Polisario lost its right to bring proceedings before the Court and the case was thus dismissed as inadmissible (OJ, 2016:132-133). Proving that the LA was never intended to apply to Western Sahara was the only way to escape the binding power of article 263(4) TFEU, even if it came at the price of relinquishing any access to the territory 'through the backdoor' –i.e. application by Moroccan occupant authorities. Crucially, it was the ECJ's broad power of interpretation over EU law that justified the Polisario's standing (and thus an investigation on the nature and causes of the alleged *de facto* treaty application).

1.3. *Territorial scope of the Agreement*

With damaging consequences for the EU's normative reputation, the GC acknowledged in 2015 the *de facto* application of the LA to Western Sahara as claimed by the Polisario. According to the Sahrawis, the Council and the Commission's connivance in implementing the accord in occupied territory could be proved in at least three ways.

First, by looking at the response by former HR/VP Ashton (2011:1) on behalf of the Commission to written questions from Members of the European Parliament:

'To the extent that *exports of products from Western Sahara are de facto benefitting from the trade preferences*, international law regards activities related to natural resources undertaken by an administering power in a non-self-governing territory as lawful as long as they are not undertaken in disregard of the needs, interests, and benefits of the people of that territory. The *de facto* administration of Morocco in Western Sahara is under a legal obligation to comply with these principles of international law. *The same*

applies to the envisaged Agreement on the liberalisation of trade on agriculture and fisheries products, which would modify the trade chapter of the Association Agreement’ [emphasis added].

In a similar way, the Council had stated that ‘Morocco is the power ... *de facto* administering Western Sahara ... [T]hat means that *the EU must address* Moroccan authorities, which are the only authorities which could *implement the provisions of the agreement in that territory*’ (OJ, 2015a:82)[emphasis added]. In the words of a Spanish diplomat, ‘this pointed at the “elephant in the room”, as it exposed that, from the beginning, the Council sought to use its good Moroccan ally to gain access to the considerably richer waters of Western Sahara’ (Interview with a Spanish Senior Diplomat, 2016a).

Secondly, as ‘documents available on the website of the Commission’s Directorate-General (DG) “Health and Food Safety” show[ed], after the conclusion of the Association Agreement with Morocco, the Food and Veterinary Office, which is part of that DG, made a number of visits to Western Sahara to check on the compliance by Moroccan authorities with health standards established by the European Union’ (OJ, 2015a:87). The Commission’s collaboration in the LA implementation was exposed, as it was its reluctance to accept that the Polisario yielded ‘any real power in the territory concerned’ or was ‘in a position to ensure that exports [complied] with the rules on public health’ (Idem:85).

Thirdly, the Commission’s inclusion of 140 companies established in Western Sahara in the treaty’s list of approved exporters further proved the manifest LA application in the territory. To this accusation the Commission simply replied that such list was thusly drafted ‘as a matter of convenience’, so as ‘to match regions as defined by Morocco’, ‘without the sign of any acknowledgment of annexation’ (Idem:86).

In light of this, the GC concluded that both the Council and the Commission had run counter to international law in at least two ways. First, by neglecting the rights of an affected third party in their dealings with Morocco. Secondly, by breaching the principle of ‘good faith’, as they knew Morocco would apply the treaty in Western Sahara and even cooperated with Rabat in its application (Idem:101).

The GC supported its findings with a poignant comparison: the EU’s trade agreements in Israel/Palestine —a compelling piece of jurisprudence given its context. Had the EU wanted to avoid the Agreement’s application in Western Sahara, an exclusion clause or a separate agreement with the Polisario would have been put in place. Like Western Sahara and the Polisario, neither Palestine nor the Palestine Liberation Organisation (PLO) enjoy full national recognition. Unlike the former, however, Palestinians have received greater support from the EU. Brussels has moved towards the recognition of the Occupied Territories (OT) as an independent party

different from Israel, and even signed an Association Agreement with the PLO in 1997 (OJ, 1997).

The facts of both cases are different. With regards to the import of products manufactured in the OT, the ECJ had ruled that Member States ‘may refuse to grant the preferential treatment provided for under the [Agreement with Israel] where the goods concerned originate[d] in the West Bank’ (OJ, 2010:91). Such conclusion stems from two considerations. First, Article 34 of the Vienna Convention on the Law of the Treaties (VCLT), under which a treaty does not create either obligations or rights for a *third State* without its consent. Second, ‘the fact that the European Union had also concluded an association agreement with the [PLO] for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, the latter being applicable *inter alia*, according to its terms, to the territory of the West Bank’ (OJ, 2015a)[emphasis added]. Interestingly, Article 34 VCLT —only applicable to ‘States’— was used with Palestine.

The lack of either a similar separate agreement or an exclusion clause was understood by the GC as proof that ‘the EU institutions were aware that the Moroccan authorities also applied the provisions of the Association Agreement ... to the part of Western Sahara [they] controlled’, ‘did not oppose that application’, and ‘cooperated to a certain extent’ with Morocco (OJ, 2015a:99). Crucially, the Court’s 2016 reassessment of the case arrived to a diametrically different conclusion, ruling instead that ‘the GC was bound not only to observe the rules of good faith interpretation ... but also ... any relevant rules of international law applicable in the relations between the parties’ (OJ, 2016:86). Namely, three main rules were ignored: the principle of self-determination, the VCLT territorial scope-rules and ‘good faith’ principles, and the principle of the relative effect of treaties.

First, the Court interpreted that self-determination was an ‘essential principle in international law’, ‘enforceable right *erga omnes*’, and as such, ‘applicable to relations between the EU and Morocco’ (OJ, 2016:88). Europe would always have to respect UN Resolution 2625 (XXV), inspired by such principle, establishing that ‘the territory of a colony or other Non-Self-Governing Territory has a ... separate and distinct [status]’ (Idem:90).

Secondly, the VCLT obliges signatories to interpret treaties in ‘good faith’ and as applying only to the ‘country’s territory’. Interestingly, this same legal framework both justified the GC’s demand for an explicit clause excluding the LA application to Western Sahara, and the Court’s interpretation that the words ‘Kingdom of Morocco’ could ‘not be interpreted in such a way that Western Sahara [was] included within the territorial scope of that agreement’ (OJ, 2016:92). In the Court’s final opinion, the LA was a subsidiary treaty to the 2000 Association Agreement, which by referring to Morocco’s ‘entire territory’ could only mean the geographical space over which such State exercises full sovereign power (Idem:94-99).

Lastly, while the Court recognised the Agreements' *de facto* application to Western Sahara, it also admitted that this practice was never intended to be *de iure*, that is, deliberately intended to violate or question Western Sahara's status as a Non Self-Governed territory with the right to self-determination (Idem:118-123).

1.4. 'Game of Courts'

The mismatch between the GC's initial ruling and the Court's 2016 final decision, a sort of 'game of Courts', begs for the following important observations:

First, the Court eventually circumvented the Agreement's *de facto* application, thus avoiding penalties for the EU duo. The Agreement's legal inapplicability to Western Sahara made of these instances of application 'factual anomalies falling outside the scope of appeal' (Hummelbrunner and Prickartz, 2017:1). Yet despite the inadmissibility of the case, the Court did remark these actions' illegality. Although the Polisario's loss of standing precluded any punitive measure against EU institutions, the normative 'imperial narrative' —hereby represented by the ECJ—succeeded in calling them off on their behaviour.

Secondly, while the final ruling considerably differed from the GC's, this came at nobody's surprise. Legal observers had already pointed out that the initial ruling presented 'some weak points in its line of argumentation' (Ibid.). Despite the ECJ's 'usually ... restrictive approach when it comes to the capacity of individuals to bring an action for annulment', the decision to allow standing to the Polisario given the facts provided could 'considerably open the pool of prospective complaints' (Hummelbrunner and Prickartz, 2016:34-35). In addition to this, the GC had showed certain reluctance to apply international law, perhaps by an unwillingness to imply that the EU may have incurred in its violation.

Thirdly, EU officials seemed keen on exonerating the EU from any potential international responsibility. One of the ECJ's very own advocate generals, Melchior Wathelet, publicly released a statement in the run-up to the Court's final ruling defending that 'Western Sahara [was] not part of Moroccan territory and therefore ... neither the EU-Morocco Association Agreement, nor the Liberalisation Agreement [were] applicable to it' (Wathelet, 2016:1-2).

Lastly, although the Front Polisario lost the appeal, it did not leave the ECJ empty-handed. Its distinct status under international law was shielded by the Court. As in the case of the PLO, the Polisario was treated as the subject of international legislation originally intended to bound *states*. For some commentators, 'the result they sought to achieve in the first place' (Hummelbrunner and Prickartz, 2017:1).

4. Conclusion

Acknowledging the country's close ties with its neighbours to the North, Hassan II often described Morocco as 'a tree with its roots in Africa and its branches in Europe'. As this paper's take on the ECJ's Western Sahara dictum shows, the imperial paradigm is a useful way to re-imagine EU-Morocco interdependence, as well as Europe's foreign policy towards the Alawite kingdom.

First, as predicted by the paradigm, Member States' monopoly over foreign affairs is now contested. The ECJ, by welcoming the appeals of third parties like the Sahrawi people and broadly interpreting international law, can send meaningful ripples across the political spectrum. Like in imperial systems, the Court is a centre of authority which coexists, and competes, with other EU actors. It allowed for the Polisario's voice to be heard and exposed Brussels' wrong doing. The imperial logic of delegation could explain why Member States might accept this rivalry. EU and international law will be effectively superior to their national jurisprudence at least for as long as this brings greater policy legitimacy and professionalisation.

Secondly, the concept of *mission civilisatrice* narrows the gap between EFP's normative discourse and the puzzle of real politics. First, as a self-legitimising narrative that (re)structures the identity of imperial mandarins like ECJ officials — thus altering the EU's political game in return. This constructivist perspective accounts for bureaucrats' 'Europhilic' ascription to the EU's *mission civilisatrice*, their socialisation into patterns of cooperation with like-minded actors, and their progressive loss of inclusiveness and reflexivity due to the routinisation of such practices. Indeed, while the ECJ exposed the Council and the Commission's misconduct, no punishment ensued. Arguably, sanctioning the EU's two most powerful bodies would represent a hard blow to the imperial authority mandarins dearly identify with. They seized the opportunity to correct Brussels' normative deviation while safeguarding Sahrawis' right to self-determination in the process.

Civilising missions can also be a *modus operandi*, i.e. the way in which the EU usually behaves. The ECJ's role abroad showcases patterns of EU self-replication. Because all legislation is subject to the Court's overview, its vast power of interpretation runs the risk of turning international relations into 'nasty' domestic affairs. Morocco, for instance, felt 'treated as a subject of a judicial process' and 'buffeted between European institutions'. Rabat's most important foreign policy goal — its claim over Western Sahara — was severely undermined by the ECJ, just because 'Europe's way of doing things' entails subjugating all its legislation to the Court's supervision.

Thirdly, its neighbourhood policies suggest that Europe sees its borderlands as a 'near abroad': countries which are accepted as independent, but not really as 'foreign'. Exhibiting traits of imperial governance, Europe *demand*s political reforms from its

Mediterranean partners in exchange for support, making them look like ‘schoolkids awaiting to be reprimanded’ in return (Interview with EU’s DG External Relations official, 2016). This echoes the medieval international system, where cheating was a fundamental part of emperor-subject relations, and the weak imperial centre struggled to get kings, bishopric units and lords to comply with imperial reforms.

While imperfect, the imperial paradigm offers an alternative to the Westphalian nation-state model, yet what implications does it have for Empire Europe’s normative record? Sjursen argued that ‘the kind of legal principles the EU relies on in its external initiatives’ would be a strong indicator of its ethical nature. The protection of human rights and democracy seems well enshrined in the quasi-constitutional order of the ECJ, notably after Lisbon. However, like in the case of Western Sahara, the Court’s guardian role can only come *a posteriori*, when actions by other EU institutions have already entered into force. Accordingly, if failing to account for Sahrawis’ rights denotes Brussels’s lack of inclusiveness *a priori*, Europe’s powerful Court in the realm of foreign affairs ensures that normative goals can be met. Likewise, the dictum offers some hope on the prospect of institutional reflexivity, since it begs for a new policy approach towards Morocco and Western Sahara. Unlike other international courts—including the International Court of Justice—the ECJ, perhaps pushed by its officials’ ‘Europhilia’, have allowed for the Polisario’s voice to be heard. It was the EU’s mixed canon of EU and international law that made it possible.

The ECJ’s role in the Western Sahara dispute raises two last considerations. First, in all sound polities, the role of a judge is different to that of a diplomat. For a Court to embark upon state-recognition may prove to be a counter-productive narrative in terms of self-legitimation and preservation. Secondly, while Westphalian Europe is gone, Empire Europe might have risen from its ashes, if only to prove that ‘history does not repeat itself, but it often rhymes’.

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