

Research Article

ALLEGIANCE BLINDNESS, EXTRA-TERRITORIAL EXUBERANCE, AND SECURITY AMBIVALENCE: A CRITICAL ANALYSIS OF THE RULING OF THE EUROPEAN COURT OF JUSTICE ON PRODUCTS ORIGINATING FROM WESTERN SAHARA

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ABSTRACT

Background: *The European Court of Justice recently annulled Council Decision (EU) No. 2019/217, which had authorised the conclusion of an agreement—in the form of an exchange of letters—between the European Union and the Kingdom of Morocco. This agreement initially extended coverage of preferential trade treatment between the two parties to products originating in Western Sahara and subject to the control of Moroccan customs authorities. The ECJ’s ruling has removed those trade preferences and imposed a de facto EU embargo on the region. This article critically discusses the ECJ’s ruling on both legal and policy grounds. From a legal standpoint, the ECJ’s decision foregoes consideration of notions of sovereignty applicable to Western Sahara in virtue of Islamic law, which would have led to recognition of its enduring ‘allegiance’ to Morocco. Moreover, the same decision amounts to an instance of extra-territorial application of EU law and infringes the principle of indivisibility of agreements. From a policy standpoint, by acknowledging standing in virtue of mere non-State armed military presence, the ECJ’s ruling has offered to terrorist groups and rebel militias—in a context of profound instability in the Sahel region—a blackmail strategy vis-à-vis regional governments.*

Methods: *This critical review uses the descriptive approach to outline, analyse, interpret, and criticise the 2021 ECJ ruling, which denies preferential trade treatment to products from the Western Sahara region, even when under the control of Moroccan customs authorities, while Moroccan products continue to receive such treatment.*

Results and conclusions: *The European Court of Justice partially used the concepts of international law as it paid no regard to the concept of sovereignty in the Islamic world, which is connected to tribe, allegiance and loyalty. Further, extending the application of the European Law to a third state, which has several agreements with the European Union, must be devoid of any political dimension affected by regional conflicts and international balances. The enforcement of the referred ruling is tantamount to the economic embargo on the Western Sahara Region, which will inevitably affect the security situation thereof and thus bring it closer to the influence of terrorist groups.*

1 INTRODUCTION

The European Union (EU) has recently been facing an internal crisis of legitimacy, marked by a polarised debate around the future of European integration, decreasing approval of the Union among the public, and the strengthening of “euro-sceptical” positions.¹ Nevertheless, on the international level, it retains the position of “exporter” of normative values to the wider international community. The EU can do this through legislation, political statements, and even the European Court of Justice (ECJ) judicial rulings. In this paper, we undertake a close scrutiny of ECJ ruling No. T-279/19 of September 29 2021.² This judgement invalidated part of the Euro-Mediterranean Association Agreement between the European Union and the Kingdom of Morocco. Namely, it quashed the joint declaration found in Protocol No. 4 of the Association Agreement on the ‘application of Protocols 1 and 4 to the Euro-Mediterranean Association Agreement establishing an association between the European Communities and their Member States, on the one part, and the Kingdom of Morocco, on the other part.’³ This decision was met by a joint declaration by Morocco and the EU, in which they affirmed that they ‘will take the necessary measures to ensure the legal framework which guarantees the continuity and stability of trade relations.’⁴

1 Matthias Ruffert, ‘The European Debt Crisis and European Union Law’ (2011) 48(6) Common Market Law Review 1777, doi:10.54648/cola2011070.

2 Case T-279/19 *Front Polisario v Council* (General Court (EU), 29 September 2021) <<https://curia.europa.eu/juris/documents.jsf?num=T-279/19>> accessed 10 January 2024.

3 Council Decision (EU) 2019/217 of 28 January 2019 ‘On the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Association Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part’ [2019] OJ L 34/1.

“Western Sahara” is the term used by the United Nations for the area under the sovereignty of the Kingdom of Morocco, which is located to the south of the state along the northern borders of Mauritania.

4 ‘Morocco: Joint Statement of HR/VP Borrell and Minister of Foreign Affairs, Bourita’ (*EU Neighbours South*, 30 September 2021) <<https://south.euneighbours.eu/news/morocco-joint-statement-hrvp-borrell-and-minister-foreign-affairs-bourita/>> accessed 10 January 2024.

Initially, the joint declaration was to extend the agreement's coverage to products originating from Western Sahara,⁵ provided they were subject to the control of Moroccan customs authorities. This extension granted these products the same trade preferences as other products of Moroccan origin exported to the EU under Protocol No. 1.⁶ However, through this ruling, the ECJ nullified Council Decision (EU) 2019/217, dated January 28 2019, which granted permission to conclude said agreement with Morocco in the form of the exchange of letters. The consequence of this decision has been to single out products from Western Sahara for a worse export treatment, vis-à-vis products originating from other parts of Moroccan territory.

In previous instalments of these ongoing disputes brought before European judges by the Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro (Polisario Front), the ECJ delivered judgments (C-104/16 P; C-266/16) excluding that trade liberalisation and fisheries agreements could apply to the territory of Western Sahara, without first having obtained the consent of the Saharawi people, a requirement stemming from the principles of self-determination and the relative effect of treaties. Unlike these earlier cases, the one discussed in this paper, ruling no. T-279/19,⁷ also contains the controversial recognition of the Polisario Front's recognition regarding admissibility and standing to bring a lawsuit. The ECJ acknowledged that the Polisario Front had been deemed as the legitimate representative of the Saharawi people by several UN General Assembly resolutions.⁸ Therefore, despite lacking international legal personality, the ECJ concluded that the Polisario Front should nevertheless be considered capable of filing a request for annulment against agreements that would impact the self-determination of the Saharawi people, according to the principles of treaty efficacy.

As for consent, the mentioned earlier judgments of the ECJ considered that trade liberalisation and fisheries agreements could not apply to the territory of Western Sahara without having obtained the 'consent of the Saharawi people', a requirement stemming from the principles of self-determination and the relative effect of treaties. In reaction, the European Union and Morocco negotiated a treaty extension on the territorial application of the agreements to Western Sahara while claiming to respect the conditions

5 "Western Sahara" is the denomination adopted by the United Nations to refer to an area – formally under the sovereignty of the Kingdom of Morocco – located to the south of the state, along the northern borders of Mauritania.

6 S van Berkum, *Trade Effects of the EU-Morocco Association Agreement: Impacts on horticultural markets of the 2012 amendments* (LEI Report 2013-070, LEI Wageningen UR 2013) <<https://edepot.wur.nl/286919>> accessed 10 January 2024.

7 Jed Odermatt, 'International Law as Challenge to EU acts: Front Polisario II' (2023) 60(1) Common Market Law Review 217, doi:10.54648/cola2023009.

8 Rose M D'Sa, 'Peacekeeping and Self-Determination in the Western Sahara: The Continuing Dilemma of the United Nations and the Organisation of African Unity' (1986) 9(3) Strategic Studies 45.

set by the ECJ.⁹ To do this, the EU consulted groups and civil society organisations established in Western Sahara to obtain some form of approval for the conclusion of the new agreements. The Polisario Front denied the EU's invitation to participate in these consultations. In Case T-279/19, the ECJ held that the process of consultation led by the European Commission and involving mainly actors in favour of Morocco's position did not match the requirement for consent, as it could be conceived by treaty law. In addition, the European court stressed that the Council could obtain the consent of the Saharawi people through the Polisario Front, even though the latter refused to participate in the consultation process.

This article critically unpacks the multiple dimensions at play in such a decision, estimating that the EU is now in breach of its international obligations towards Morocco, which remain subject to international law. In particular, Section 2 focuses more closely on the legal aspects of the decision, beginning with the ECJ's assumptions concerning applicable law. Notably, the ECJ failed to consider notions of sovereignty—available under Islamic law—that would have been applicable to Western Sahara. This led the court to grant standing to the Polisario Front. Moreover, in making its decision, it relied implicitly on assumptions of “direct applicability” assumptions peculiar to the EU legal system but do not carry over to international treaties. Section 3 focuses instead on the contradiction the ECJ ruling creates with the principle of indivisibility of agreements, which limits the possibility to “sever” a party's obligations under a treaty. The section also traces some of the wider repercussions of the ruling, given the precarious security situation in the region. Finally, the conclusion draws together the findings from this two-pronged examination of what will be remembered as a controversial ECJ judgment.

2 THE ECJ'S JUDGMENT ON WESTERN SAHARA: PROBLEMATIC DEFINITIONS OF SOVEREIGNTY AND EXTRA-TERRITORIAL APPLICATION OF EU LAW

Issuing a judicial ruling requires that the competent court first determine the law applicable to the dispute—regardless of the type of dispute at hand. This is a necessary step because the dispositive section of the ruling (whenever the ruling carries a motivation) will stand on this preliminary determination. This section examines the ECJ's decision, beginning from the court's assumptions around the meaning of “sovereignty.” Specifically, the ECJ's ruling failed to consider the rich concept of sovereignty available under Islamic law. In addition, the same ruling confuses the

9 Ángela Suárez-Collado and Davide Contini, 'The European Court of Justice on the EU-Morocco Agricultural and Fisheries Agreements: An Analysis of the Legal Proceedings and Consequences for the Actors Involved' (2022) 27(6) *The Journal of North African Studies* 1160, doi:10.1080/13629387.2021.1917122.

respective regimes of application of European law and international law. This double confusion is reflected in the content and motivation of the ECJ ruling, such that it violates basic principles of the rule of law in the relations between sovereign states.

2.1. Failure to Assess Sovereignty under Islamic Law and to Differentiate Allegiance from Military Control

While both European and Islamic legal traditions claim to be universal, they diverge on what universalism means. The European legal tradition was formative to international law. For this reason, it inherited the exclusionary attitude that characterised the colonial project. This means that international law reproduced the colonial classifications by refining binaries based on the European view of the world. This is evident in Article 38, issued by the International Court of Justice (ICJ), which states that the court applies the customs accepted as law by civilised nations.¹⁰ Like the colonial mind, this stipulation typifies the peoples into civilised and uncivilised and assumes their customs as law accordingly. This way, legal otherness is subjected to the political test of the universalised Eurocentric notion of civilisation.

Critical approaches to Eurocentricity in international law have highlighted colonialism's impact on international law in response. Yet, Europe continues to influence historical knowledge, as Koskenniemi pointed out.¹¹ Ultimately, he showed how studying international law history depends on understanding it as a European cultural form. He argues that we must broaden our perspectives on legality beyond Eurocentric views. Without doing so, we cannot expect these historical narratives to diverge from epistemological colonialism and reveal overlooked governance experiences. Thus, scholarly advocacy should be directed to promoting a “legal relationality” and what Appleby Gabrielle and Eddie Synot called “political listening”.¹² In fact, the sovereignty of international law in defining what qualifies as law extends beyond the Islamic legal tradition. This is evident in the critical perspective of Third World Approaches to International Law (TWAAIL). Therefore, the issue with Eurocentrism in international law is not only one of universalism; it is also one of universalisation, which is a form of sovereignty in its own right. This ultimately leads to the old idea of the ‘mission civilisatrice’ with which the law as technique of social transformation was in solidarity.

Islamic universalism, in contrast, transcends nationalism, or ethnic particularism arises from the belief in God's sovereignty. What follows from this is an egalitarian

10 Statute of the International Court of Justice (adopted 25 June 1945) <<https://www.icj-cij.org/statute>> accessed 10 January 2024.

11 Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism* (Faculteit Geesteswetenschappen, Universiteit Utrecht 2011) 5.

12 Sophie Rigney, ‘On Hearing Well and Being Well Heard: Indigenous International Law at the League of Nations’ (2021) 2 TWAAIL Review 122.

approach to positive conceptions of sovereignty regardless of their cultural origin since they are all human constructs. True sovereignty, according to Islamic belief, rests with God but is delegated to the rightly guided community. Islamic sovereignty has an all-encompassing ethical dimension, addressing not only the exercise of political power but the entirety of human existence. In Islam, the distinction between public and private life does not exist, and God's sovereignty is a comprehensive mode of human existence, extending from birth to death.

Some scholars argue that Islam's contributions to international law are significant, emphasising that international law and Islamic law share more similarities than they are often credited for.¹³ But while this can hold true, a core difference lies in the fact that God's sovereignty speaks to humanity at large without pretending to invalidate other traditions' legal character. The special feature of modern *Siyar*, or the Islamic rules of international law, is reciprocity. Unlike domestic law, where customs, for instance, can become binding through consistent practice, international customs require consistent state practice over time and acceptance of the practice as law (*opinio juris*) to become binding.¹⁴

Islamic jurisprudence does not claim this ontological sovereignty over other legal systems. The classical approach offers a possible path for a dialogue of legal cultures based on mutual respect rather than exclusion. Classical Muslim jurists recognised a plurality of valid positive laws in the world.¹⁵ For them, the validity of laws depended on their societal context, not abstract criteria imposed from the outside.¹⁶ This offers a path of mutual respect between diverse legal cultures, as reflected in the classical Islamic juristic recognition of plural valid laws based on contextual validity rather than imposed abstract criteria.

That said, sovereignty is traditionally deemed to be the attribute of a state, embodying the highest level of exclusivity in exercising its powers on national territory. On an international level, this sovereignty is reflected in a state's independence vis-à-vis other states, encompassing both independence vis-à-vis foreign authorities and the capacity to protect oneself from interference by other states.¹⁷ A corollary of this notion of sovereignty is that each state also has the right to determine, in a sovereign manner and at its sole

13 Emilia Justyna Powell, 'Complexity and Dissonance: Islamic Law States and the International Order' (2022) 24(1) *International Studies Review* viac001, doi:10.1093/isr/viac001.

14 Mohammad Hashim Kamali, 'A New Constitution for Somalia – the Workshop on "Shari'ah Law in constitutions of Muslim countries: challenges for the Somali constitution-building process" (Djibouti, 6-10 February 2010)' (2010) 1(4) *Islam and Civilisational Renewal* 735, doi:10.52282/icr.v1i4.720.

15 Wael B Hallaq, *An Introduction to Islamic Law* (CUP 2009).

16 Abd al-Wahhab Khallaf, *Les fondements du Droit Musulman: 'Ilm Ousoul Al-Fiqh* (Al Qalam 1997).

17 A detailed discussion of the historical and jurisprudential development of the concept of state sovereignty lies beyond the scope of this paper. For a richer discussion, see, e.g., Jerzy Kranz, 'Notion de Souveraineté et le Droit International' (1992) 30(4) *Archiv des Völkerrechts* 411.

discretion, its internal political constitution, the attendant form of government, and its forms for exercising political power.¹⁸

The ECJ's ruling on the free trade agreement between Morocco and the EU presupposes a clear position on what constitutes sovereignty—one that will be first problematised and then read back into the judgment to highlight the contradictions to which it gives rise.¹⁹ Sovereignty, in effect, has often been described in the literature as a “plural,” “fluid,” “elusive,” “dynamic,” and “scalable” concept.²⁰ Put otherwise, it is not a monolithic attribute but possesses dynamic and scalable dimensions that allow adaptation to various social configurations.²¹ As a consequence, it is a minimum requirement that any scrutiny around the sovereignty of a disputed territory ought to include a careful contextualisation of the concept in relation to the specific situation in which it is meant to be employed.

Reading this understanding of sovereignty back into the ECJ ruling, one cannot help but notice the ECJ's application to Western Sahara of a notion of sovereignty that might apply to any European state, even though Western Sahara belongs to the Islamic world and is in principle subject to the rules of *Shari'ah* law. According to the latter, when Islam is the prevalent religion in a certain region, this entails the applicability of Islamic legal principles on a default basis (*dar al-islam*).²² In support of this point, it is helpful to consider that, during the pre-Spanish colonisation period in the region, no administrative structure in the Western sense had ever been established in Western Sahara. Rather, the prevalent form of organisation consisted of social clusters in the form of tribes, where each tribe had a *sheikh* serving as chief and a council to take any decisions relating to the day-to-day life of tribe members and political and religious affairs.

At the same time, this form of social organisation does not automatically imply that the tribes occupying a definite geographical area like the Western Sahara should be stripped of any notion of sovereignty. In this respect, the concept of sovereignty under Islamic law is quite flexible, by recognising notions like “tribe,” “allegiance”, and “loyalty” explicitly.²³

18 Dodzi Kokoroko, ‘Souveraineté Étatique et Principe de Légitimité Démocratique’ (2003) 16(1) *Revue Quebecoise de Droit International* 37, doi:10.7202/1069356ar.

19 Eva Kassoti and Ramses A Wessel, ‘EU Trade Agreements and the Duty to Respect Human Rights Abroad: Introduction to the Theme’ in Eva Kassoti and Ramses A Wessel (eds), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (CLEER 2020) 5.

20 Karim Benyekhlef, *Une Possible Histoire de la Norme: Les Normativités Emergentes de la Mondialisation* (Thémis 2008) 59.

21 Lider Bal, ‘Le Mythe de la Souveraineté en Droit International: La Souveraineté des États à l'Épreuve des Mutations de l'Ordre Juridique International’ (PhD thesis, University of Strasbourg 2012) 25.

22 Moussa Abou Ramadan, ‘Muslim Jurists’ Criteria for the Division of the World into Dar al-Harb and Dar al-Islam’ in Martti Koskenniemi, Mónica García-Salmónes Rovira and Paolo Amorosa (eds), *International Law and Religion: Historical and Contemporary Perspectives* (OUP 2017) 219, doi:10.1093/oso/9780198805878.003.0011.

23 Gianluca P Parolin, *Citizenship in the Arab World: Kin, Religion and Nation-State* (Amsterdam UP 2009). See also Mohamed Between, ‘Al-Wathīqa: The First Islamic State Constitution’ (2003) 23(1) *Journal of Muslim Minority Affairs* 103, doi:10.1080/13602000305940.

These notions are not simply based in a religious tradition, separate from all legal relevance, but have played a material role in State formation in the Middle East—hence the suggestion that they should count for adapting expectations of “sovereignty” to a different legal culture.²⁴ They equally remain in use today in several contemporary Islamic-based legal systems, such as the Kingdom of Morocco, the United Arab Emirates, and the Kingdom of Saudi Arabia.

An additional basis for considering these categories, originating in Islamic law, could be found in human rights standards. Namely, Islamic law should be an indigenous or tribal legal system that requires enforcement of legal dealings with tribal contexts. The Indigenous and Tribal Peoples Convention of the International Labor Organization (ILO 169) protects the tribal and indigenous *legal* self-determination of the peoples in question. This is not the only international legal basis for this principle, as indicated in a 2019 United Nations Office of the High Commissioner report.²⁵ Accordingly, the timid recognition by the ICJ of *Shari’ah law*—which Western Sahara tribes share with Morocco—as a “sufficient” basis for Morocco’s claim of sovereignty on the Western Sahara Case is plausible,²⁶ and only attenuated by the fact that the ICJ’s 1975 advisory opinion preceded the birth of the modern regime for tribal and indigenous rights, which only saw the light in 1984 with the World Council of Indigenous Peoples Declaration of Principles.²⁷

Nevertheless, it would be a contradiction to keep excluding Islamic legal categories that would be of material relevance to the case by discounting the import of the ICJ’s 1975 advisory opinion while following the same opinion in other respects, such as when the ECJ characterised Western as a tribal society. These considerations substantiate the contradiction of a Eurocentric interpretation of sovereignty in former European colonies, whereby self-determination is encouraged, provided it takes European legal forms and discounting the aspect of self-determination that applies to a different legal culture.

It is worthwhile noting that the suggestion advocating for a flexible concept of sovereignty, inclusive of “allegiance” relations, based on the grounds of Western Sahara’s inclusion in the domain of applicability of Islamic law, known as *dar al-islam*, is more than a simple argument by legal scholars. The same position was explicitly endorsed some time ago by the International Court of Justice (ICJ) in connection to Western Sahara. In its advisory

24 Philip S Khoury and Joseph Kostiner (eds), *Tribes and State Formation in the Middle East* (University of California Press 1991).

25 OHCHR, ‘Indigenous Justice Systems and Harmonisation with the Ordinary Justice System: Report’ (*UN Human Rights*, 2 August 2019) <<https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples/indigenous-justice-systems-and-harmonisation-ordinary-justice-system-report>> accessed 10 January 2024.

26 *Western Sahara*, Advisory Opinion (ICJ, 16 October 1975) <<https://www.icj-cij.org/case/61>> accessed 10 January 2024.

27 Jérémie Gilbert and Cathal Doyle, Cathal, ‘A New Dawn over the Land: Shedding Light on Collective Ownership and Consent’ in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 289.

opinion of October 16 1975, the ICJ relied on the principle of intertemporal law to conclude that Western Sahara never took on the status of *terra nullius* (territory belonging to no one).²⁸ But before relying on this passage of the ICJ's argumentation, it should be remembered that there is no clear-cut support for the thesis that the ICJ ever rejected Islamic law as a source of international law. On the contrary, as Lombardi correctly pointed out, the ICJ's Statute does not seem inclined in this direction, and the same court did resort to Islamic law in various manners in earlier cases.²⁹ In addition, the ICJ had already acknowledged the peculiar character of Morocco's system of government, even though it thereafter applied a vague notion of "constitutive insufficiency" to reject its claim to sovereignty over Western Sahara.³⁰ Having highlighted this preliminary point, the ICJ's inclusive position was also grounded in the observation that the practices of European states at the end of the nineteenth century gave precedence to cession (of sovereignty) over occupation (of *terra nullius*). By relying directly upon historical evidence of state practices during the period under consideration, the court was able to conclude—irrespective of possible differences in legal opinion across the adjudicating panel—that there was no record suggesting that lands inhabited by tribes or peoples with some form of social and political organisation had ever been treated as *terra nullius*.

In the same advisory opinion, the ICJ also tackled a second question on the presence of legal ties between the Kingdom of Morocco and Western Sahara. This question, unlike the first one, occasioned some dissenting opinions around the possibility of recognising non-European forms of territorial control under international law. In the case under consideration, both Morocco and Mauritania had asked the court to go beyond the *acquis* of international law and to try instead to imagine the social, political, and religious conditions prevailing in Northwest Africa on the eve of supposed Spanish colonisation. The majority opinion of the court seems to have taken up this invitation—leaning towards acknowledging non-European forms of territorial control—given how it eventually recognised the presence of legal ties between Morocco and the territory of Western Sahara.³¹

At the level of Islamic law, allegiance to the Sultan is deemed equivalent to allegiance to the state: it is precisely on this basis that the ICJ was able to ascertain the existence of Moroccan legal ties amongst the tribes of Western Sahara.³² The reason for this equivalence is that, under Islamic law, the Sultan is vested with central authority as commander of the faithful. Accordingly, he is, at the same time, the religious head of the community of believers *and* the guarantor of its temporal government. Acceptance of the

28 *Western Sahara* (n 26).

29 Clark B Lombardi, 'Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis' (2007) 8(1) *Chicago Journal of International Law* 85.

30 Michelle L Burgis, *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (Martinus Nijhoff 2009) 219.

31 *ibid* 203-5.

32 *Western Sahara* (n 26) Separate Opinion of Vice-President Ammoun.

Sultan's authority by the community of believers is manifested as "allegiance." Accordingly, whoever declares allegiance undertakes to obey the Sultan strictly and permanently as long as the latter remains faithful to the teachings of the *Qur'an*. This allegiance issues a duty of obedience analogous to the relation between a state and its subjects. The Sultan is, therefore, vested with supreme authority at the spiritual and political level, as he assumes, *inter alia*, the responsibility for defending the population and enhancing relations with foreign powers.³³ Contrastingly, the case that allegiance to the Sultan is deemed equivalent to allegiance to the state has no similar situations in modern European law. However, similar situations were reported in the fifteenth and sixteenth centuries, particularly during the Ottoman Empire. This is because allegiance to the Sultan is exclusively part of the Islamic political ideology.

As a consequence, it is submitted that the ECJ should have scrutinised the question of sovereignty over Western Sahara under the categories of tribe, allegiance, and loyalty since these would have played a central role in assessing the scope of territorial sovereignty in the region. Western Sahara includes tribes that profess the Islamic religion and, specifically, that adopt Islamic jurisprudence from the Maliki tradition. This confirms the historical connection to the central authority vested in the Sultan through allegiance.

"Allegiance" can, therefore, be used here as a "deconstructive" category vis-à-vis notions of sovereignty modelled after the typical forms of state authority—especially in light of the historical conditions that characterise Western Sahara. At the same time, the argument for recognising "allegiance" relations should not be taken as an isolated attempt to deconstruct an otherwise state-centric sovereignty paradigm. In fact, sovereignty as a concept *already* possesses a variable geometry, whereby it is ordinarily shared between state and non-state actors at all levels of government, depending on the nature of the issue under consideration.³⁴

This argument suggests, therefore, that "sovereignty" is best understood not as an absolute category but rather in connection with different organisational layers through which it materialises in practice. Indeed, there is an ongoing trend towards a distributed notion of sovereignty, such that many organisations—territorial units, companies, governmental agencies and NGOs—complement the exercise of state sovereignty. The most enlightening example consists of the regime that applies to indigenous and tribal peoples. The international regime for indigenous rights is premised on the notion of internal tribal sovereignty, whereby peoples have the right to exercise self-government within their states' borders.³⁵ According

33 Abdessamad Belhaj, 'Fondements Religieux du Pouvoir au Maroc' (2007) 16(1) *Mediterrán Tanulmányok* 35.

34 Jens Bartelson, 'The Concept of Sovereignty Revisited' (2006) 17(2) *The European Journal of International Law* 466.

35 Andrea Muehlebach, 'What self in self-determination? Notes from the frontiers of transnational indigenous activism' (2003) 10(2) *Global Studies in Culture and Power* 241, doi:10.1080/10702890304329.

to ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples, they also have the right to participate in decision-making processes concerning their identity or interests.

However, only four European States, namely Denmark (February 22 1996), the Netherlands (February 2 1998), Spain (February 15 2007) and Germany (June 23 2021), have ratified and included this principle in their domestic legislation.³⁶ Nevertheless, the European Parliament resolution of July 3 2018, on the Violation of the Rights of Indigenous Peoples in the World, including land grabbing, constitutes an important index of the traction that a less monolithic view of sovereignty is gaining even within EU institutions.³⁷

In view of the foregoing, the ECJ's exclusion of products originating in Western Sahara from the free-trade agreement with Morocco appears to rest on a problematic notion of sovereignty: it associates it with the mere presence of a non-elected armed group (Polisario Front) in the Western Sahara region, and on this basis justifies granting a standing before the court to the mentioned armed group. This is not to deny that there is a dimension of sovereignty directly related to issues of power, territorial control, and international status. The provision of internal security does count in the Westphalian system, after all, because it counters anarchic tendencies. However, the same connection becomes less useful when it reinforces separatist groups in the pursuit of status and security. Separatist militias are a narrower phenomenon than ethnically-based claims to sovereignty, which come into being when a group claims status and attempts to act as if they were sovereign on a military but also a political, social, and institutional level.³⁸ Instead, the Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro (Polisario Front)—a non-elected armed group—were allowed to stand as plaintiffs in the ruling before the ECJ.³⁹ It follows that, in the ECJ's reasoning, the mere presence of a paramilitary group was deemed sufficient to treat the latter as an organisation with standing before the court.

2.2. Extra-Territorial Application of EU Law

EU law occupies a unique place vis-à-vis international law, given its regional scope of validity on the territories of EU member states. This regional scope makes it less general relative to international law norms. At the same time, the EU is often categorised in the literature as a unique regional normative order that comes closer to the architecture of

36 Sedfrey M Candelaria, *Comparative Analysis on the ILO Indigenous and Tribal Peoples Convention No 169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Indigenous Peoples' Rights Act (IPRA) of the Philippines* (ILO 2012).

37 Theresa Reinold, *Sovereignty and the Responsibility to Protect: The Power of Norms and the Norms of the Powerful* (Routledge 2012).

38 Oliver P Richmond, 'States of Sovereignty, Sovereign States, and Ethnic Claims for International Status' (2002) 28(2) *Review of International Studies* 382.

39 Andreu Solà-Martin, 'The Western Sahara Cul-De-Sac' (2007) 12(3) *Mediterranean Politics* 399, doi:10.1080/13629390701622424.

international organisations.⁴⁰ On this basis, the primary constituency to which EU norms apply are member states (as well as the natural or legal persons to which certain classes of directly applicable—or directly effective—norms sometimes apply). Regarding non-member states these can be distinguished into those with agreements with the European Union and those that cannot rely on any such stipulations. It follows, nevertheless, that non-member states can only be defined in a negative way (i.e. in terms of rights and obligations that do *not* apply to them) relative to EU member states.⁴¹

In relation to the ECJ's pronouncement on Western Sahara, what is at issue is the possibility of extending the same principles and rules that govern EU law to a non-EU member state—effectively applying EU norms as though they were norms of international law. Such an outcome would manifestly contradict the principle of territoriality of European law and risk bringing about a degree of competition with the general rules of international law. Moreover, the eventuality of “extra-territorial” application of EU legal principles would end up placing the EU closer to an institution like the United Nations and its internal bodies—whose remit regularly involves drawing up, interpreting, and applying rules of international law.

What made this possible is the ambiguous attitude the ECJ adopted, which we submit constitutes an instance of imposing a European view of international law.⁴² The ECJ decided, for example, in favour of the admissibility and the granting of standing to the Polisario Front based on its own interpretation of UN practice in light of the text of Art. 263(4) of the Treaty on the Functioning of the European Union (TFEU). This is shown very clearly in para. 103, where the court states the following:

‘In so far as it is not disputed that the applicant was recognised by the UN bodies as the representative of the people of Western Sahara in the context of the self-determination process for that non-self-governing territory, their arguments relating to its not being the sole representative of the people of Western Sahara and to its representativeness of that people being limited to the self-determination process must, in any event, be rejected. The same applies to the arguments based on the fact that it has not been explicitly defined by the UN bodies as a national liberation movement or on the fact that it has not been given observer status with those bodies. For the same reasons, the argument that it has only ‘functional’ or ‘transitional’ legal personality must be rejected.’⁴³

40 Myriam Benlolo-Carobot, Ulas Candas et Églantine Cujo (dir), *Union Européenne et Droit International: En l'honneur de Patrick Daillier* (Editions A Pedone 2012) 1.

41 Isabelle Bosse-Platière et Cécile Rapoport, *L'état Tiers en Droit de L'union Européenne* (Bruylant 2014) 2.

42 Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (CUP 2018) doi:10.1017/9781108289436.

43 Case T-279/19 (n 2) para 103.

This position draws solely on the UN General Assembly resolutions 34/37 and 35/19 that cited the *Polisario Front* as the representative of the people of Western Sahara while ignoring subsequent UN practice that recognised *tribal chiefs* as representatives of the people of Western Sahara.⁴⁴ The report of the Secretary-General on the situation of Western Sahara of June 18 1990 (S/21360), approved by Security Council Resolution of June 27 1990 (658), has since set in motion a new UN practice confirming, throughout the 1990s, the work of the Saharan Identification Commission that identified how tribal chiefs do represent the people of Western Sahara. This evolution also occurred shortly after the adoption of the mentioned ILO 169 convention as the cornerstone of a new international legal regime for tribal and indigenous rights. In consequence, it is far-fetched to argue (as the ECJ did) that since the Polisario Front has been deemed *a* representative of Western Sahara's people, it should then be identified with *the* (sole) representative, considering that the word "the representative" has been withheld in consecutive UN resolutions.⁴⁵

One additional consideration relates to the difficulty of positioning, within the global order, the extra-territorial application of EU law. Namely, the EU does not—to date—have a constitution.⁴⁶ This differentiates its decisions from those of a federal union, like the US. In the case of the US, its constitution regulates relationships between federal and state governments and informs US interventions in its *de facto* role as a global superpower. Compared to the US, the EU has a more limited remit of intervention, strictly for the benefit of member states. It follows that extra-territorial application of EU law (as a normative order limited in scope to the benefit of its member states) looks even less intelligible than (already controversial) instances of extra-territorial enforcement of US decisions.

The ruling issued by the ECJ, which affects the legal regime for products originating in Western Sahara, can be construed as an extra-territorial application of European law because, in some sense, it sanctions the supremacy of European law over the national law of Morocco. Namely, it restricts the scope of application of a free-trade deal to the exclusion of a territory that—under Moroccan law—is subject to Moroccan sovereignty. This amounts to an extra-territorial application of European law in that the EU legal order constitutes an *exception* to the general principle that treaty norms only bind states and do not directly confer rights to (or place obligations upon) their subjects. Under what has been called the 'European Way of Law,'⁴⁷ it has indeed become commonplace for norms produced by EU bodies to apply "as though" they were state law. This is because the EU

44 Léa Gervais Glaenger, 'Self-Determination in the Western Sahara: Obstacles and Obligations' (2021) Senior Projects Spring 127 <https://digitalcommons.bard.edu/senproj_s2021/127/> accessed 10 January 2024.

45 Charles Dunbar, 'Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict' (2000) 54(4) *The Middle East Journal* 522.

46 Alina Kaczorowska, *European Union Law* (2nd edn, Routledge 2011) 28.

47 Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47(2) *Harvard International Law Journal* 329, doi:10.1093/acprof:oso/9780199231942.003.0006.

defines itself as an independent and *ad hoc* legal order, different from the wider body of international law, by virtue of the possibility of direct incorporation of its norms into the legal systems of its member states.⁴⁸ The first consequence of this European dimension is the insertion of a new, intermediate layer of normative organisation (EU law) between the national and international legal systems.⁴⁹ The direct incorporation of EU norms within national legal systems, therefore, issues a position of the supremacy of the EU order over national legal systems.⁵⁰ Secondly, and as a consequence, the EU normative system takes on an internally structured and hierarchical character.⁵¹ This is because of the need for institutional enforcement of this supremacy of EU law,⁵² which demands judicial review of member states' compliance.⁵³ At the same time, it is essential to note that the laws of a third state should not—ordinarily—be deemed “subordinate” to EU law, as it happens instead for the national laws of individual EU member states.

It follows that it is not justifiable for the ECJ simply to treat European law as equivalent to international law or to read international and European norms together to extend the scope of application of EU norms to third countries. Rather, this outcome could only validly hold in the case at hand, provided it could also withstand scrutiny based on (i) conventional concepts and rules in use in the legal system of the concerned state (in this case, the Kingdom of Morocco), and against (ii) the status of Western Sahara within *dar al-islam*, i.e. the sphere of applicability of Islamic law. In the case of Western Sahara, such scrutiny would invite an element of added complexity connected to the religious sources of international law—one that has been practically ignored by the ECJ's exclusion of Western Sahara products (subject to the control of the Moroccan customs authorities) from the trade preferences otherwise granted to products of Moroccan origin.⁵⁴

This last point is not merely a “trend” in international legal scholarship, considering how the increased cultural and geographical scope of international legal history has brought to light the genuine contribution of the Islamic legal tradition to shaping the international

48 Constanc Grewe, 'Constitutions Nationales et Droit de l'Union Européenne', *Repertoire de Droit Europeen* (2009) vol C(2), 6.

49 Jean-Sylvestre Bergé, 'Droit International Privé et Droit de l'Union Européenne', *Repertoire de Droit Europeen* (2017) vol D(33), 27.

50 Marc Blanquet, 'Effet Direct du Droit Communautaire', *Repertoire de Droit Europeen* (2008) vol E(12), 8.

51 Jacques Schwob, 'Traité Communautaires: Sources et Révision', *Repertoire de Droit Europeen* (1992) vol T(20), 13.

52 Jürgen Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law' (2012) 23(2) *The European Journal of International Law* 340, doi:10.1093/ejil/chs019.

53 Joël Molinier, 'Primaauté du Droit de l'Union Européenne', *Repertoire de Droit Europeen* (2011) vol E(3), 4.

54 Jacques Eric Roussellier, 'Elusive Sovereignty – People, land and frontiers of the desert: The case of the Western Sahara and the International Court of Justice' (2007) 12(1) *The Journal of North African Studies* 55, doi:10.1080/13629380601099500.

legal norms applicable at different times and in different regions.⁵⁵ Taking a view of sovereignty informed by the (applicable) Islamic law would have afforded more traction for understanding the complexity of the situation in Western Sahara. This region is inhabited by tribes, and those tribes have traditionally manifested their loyalty to the Kingdom of Morocco through allegiance—a category recognised under Islamic law—so this region ought to be considered as nevertheless part of that state. The effects of allegiance can also be noticed elsewhere in the Muslim world. For instance, the Turks pronounced an oath of loyalty to Muhammad as the prophet of the Islamic nation and thereby accepted to come to his just defence.⁵⁶ As a more general point, it should not come as a surprise that certain categories originating in religious practice have developed a legal dimension: church law, for instance, has also left vestigial forms in the legal system of most European states. The most common example in this regard is Germany, which has followed the Church's input to pass laws that prohibit or regulate biotechnological procedures.⁵⁷

A separate critique that can be made of the ECJ's judgment concerns the creative liberty the court took in adjudicating the matter. A judge might orient on a motive transcending the facts of the case to support or affirm a general principle of law and do so through a combined reading of many sources.⁵⁸ These sorts of situations disclose a political character to legal decision-making.⁵⁹ In the case of the EU, the definition of European policy depends largely on the prerogatives enshrined in the policies of individual member states,⁶⁰ and it is subject to influence by their economic and political interests.

It is submitted that this sort of judicial creativity is not warranted in the Western Sahara case on the grounds of the basic rule of law principles enshrined in the architecture of the EU and binding on the court. First of all, it has been mentioned earlier that the EU's powers are limited when it comes to their regional scope, the subjects to which they apply, the domains of regulation they cover, and the functions

55 Ignacio de la Rasilla, 'Islam and the Global Turn in the History of International Law' in Ignacio de la Rasilla del Moral and Ayesha Shahid (eds), *International Law and Islam: Historical Explorations* (Brill, Nijhoff 2018) 10, doi:10.1163/9789004388376_002.

56 Luigi Nuzzo, 'Law, Religion and Power: Texts and Discourse of Conquest' in Ignacio de la Rasilla del Moral and Ayesha Shahid (eds), *International Law and Islam: Historical Explorations* (Brill, Nijhoff 2018) 219, doi:10.1163/9789004388376_011.

57 Mirjam Weiberg-Salzmann and Ulrich Willems, 'Moralizing Embryo Politics in Germany: Between Christian Inspired Values and Historical Constrains' in Mirjam Weiberg-Salzmann and Ulrich Willems (eds), *Religion and Biopolitics* (Springer International 2020) 281, doi:10.1007/978-3-030-14580-4_13.

58 Joël Molinier, 'Principes Généraux', *Repertoire de Droit Europeen* (2011) vol P(27), 15.

59 John D Haskell, 'Subjectivity and Structures: The Challenges of Methodology in the Study of the History of International Law and Religion' in Ignacio de la Rasilla del Moral and Ayesha Shahid (eds), *International Law and Islam: Historical Explorations* (Brill, Nijhoff 2018) 94, doi:10.1163/9789004388376_006.

60 Valérie Michel, 'Constitution pour l'Europe: Traité', *Repertoire de Droit Europeen* (2006) vol C(137), 51.

they pursue.⁶¹ If one considers this latter point and reads it together with the basic notion that sovereignty is defined by the scope of powers vested in it, then it seems fair to conclude that the ruling of the ECJ on products originating in Western Sahara amounts to an unjustifiable extension—primarily taken on policy grounds—of the scope of application of European law to a non-EU territory.

Proceedings before the European Court of Justice are governed by rules in relevant treaties and their attendant protocols. Among these are the Statute of the European Court of Justice and the court's internal regulations.⁶² These rules serve to ensure its judicial mission as a body tasked with reviewing the interpretation and application of EU law,⁶³ albeit with a scope limited to European space and the peoples of EU member states. This means that, when it comes to a third state that is a signatory to an agreement with the EU, political considerations should not come into the foreground. Greater deference should be paid to the rule of law principles that underpin the international legal order. In the case at hand, these could have warranted stronger consideration of alternative legal categories (such as those equating sovereignty with "allegiance") when these apply to the matter at hand, without prejudice for their legal framework of origin—in this case, *Shari'ah* law—that pushes its roots in religious culture.

3 CONTRADICTIONARY EFFECTS OF THE ECJ RULING: THE INDIVISIBILITY OF AGREEMENTS AND THE NEEDS OF REGIONAL SECURITY

Besides matters of law, a ruling can also be evaluated in light of the consequences it produces. In this respect, the ECJ's ruling to exclude Western Sahara products from the system of preferential trade for products originating within Morocco gives rise to important contradictions with the principle of indivisibility of international agreements and with the security needs of the region, as acknowledged by a variety of international reports.

3.1. Consequences of Non-Compliance with the Principle of Indivisibility of Agreements

In recent years, security matters have gained prominence within the Euro-Mediterranean Association Agreement (EMAA) framework between Morocco and the EU.⁶⁴ This trend is evidenced by the continuing interest towards closer integration with security and law

61 Vlad Constantinesco et Valérie Michel, 'Compétences de l'Union Européenne', *Repertoire de Droit Europeen* (2011) vol C(19), 22.

62 Fabrice Picod, 'Cour de Justice: Procédure', *Repertoire de Droit Europeen* (2021) vol C(2), 9.

63 Marco Darmon et Christophe Vahdat, 'Cour de Justice', *Repertoire de Droit Europeen* (2007) vol C(1), 1.

64 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L 70/2 <http://data.europa.eu/eli/agree_international/2000/204/oj> accessed 10 January 2024.

enforcement agencies on the Arab side of the Mediterranean. Against this background, the EMAA facilitates equipment sales from the EU to Morocco to help patrol the Mediterranean coast more efficiently, thereby guarding Spanish territory against migrant flows towards Europe. Separate from the EMAA framework are additional “special relations” that the EU has been cultivating with many Arab states—including Morocco—for the prevention of terrorism.⁶⁵ It follows that security cooperation between the EU and Morocco currently takes place along two complementary axes: the EMAA framework and the framework of special relations.

The EMAA was signed in 2000, and it has a broad remit spanning from cooperation over economic, legislative, social, and cultural affairs to security matters—such as cooperation over customs arrangements (Article 59), contrast of money laundering (Article 61), and contrast of drug trafficking (Articles 62 and 63). The pursuit of a ‘special relation’ in EU-Morocco cooperation is evidenced instead by the Joint EU-Morocco document on strengthening bilateral relations/Advanced Status of 2007. This document lays down a framework for political and strategic dialogue between both parties, making way for diversified cooperation in several areas—including security matters.⁶⁶ It is important to stress that this focus on security is not just a passing highlight of the EU-Morocco relationship but has been steadily gaining ground due to the increasing size and type of security threats at European borders. For instance, the importance of the security aspect was reiterated in a joint statement issued at the fourteenth meeting of the EU-Morocco Association Council (a joint body established by the EMAA).⁶⁷

At the same time, security cooperation is a two-way street, meaning that the security of Europe’s Southern neighbours—within their borders—cannot be considered a separate matter: international cooperation ought also to generate positive security spillovers for the EU’s partners, like Morocco.⁶⁸ This means that the security of North Africa, the Sahel, and Morocco should also matter as a joint concern, with a view to preventing a void that would favour countries like Libya and the African Sahel States, characterised by pronounced fragility on security issues.

By proposing a multidimensional association with its southern neighbours, the EU is also not hiding its intention to promote a pure security approach for protection against real or

65 Francesco Cavatorta, *Raj Chari and Sylvia Kritzinger, The European Union and Morocco, Security Through Authoritarianism?* (Political Science Series 110, Institute for Advanced Studies 2006) 13-4.

66 Document Conjoint UE-Maroc sur le Renforcement des Relations Bilatérales / Statut Avancé (du 23 juillet 2007) <https://www.eeas.europa.eu/node/4327_en?s=204> accessed 10 January 2024.

67 Council of the EU, ‘Joint Declaration by the European Union and Morocco for the Fourteenth Meeting of the Association Council: Press Release’ (*European Council, Council of the EU*, 27 June 2019) <<https://www.consilium.europa.eu/en/press/press-releases/2019/06/27/joint-declaration-by-the-european-union-and-the-kingdom-of-morocco-for-the-fourteenth-meeting-of-the-association-council/>> accessed 10 January 2024.

68 Bénédicte Real, ‘Cooperation Between Morocco and Europe in Terms of Security: Is the European Union an Inevitable Partner?’ (2018) 6 *Journal of International Law and International Relations* 129.

potential risks that may originate in this region. This implies a close correlation between the security aspects highlighted by the Barcelona Declaration and the parallel European offer of cooperation on economic and financial matters.⁶⁹ It follows that this accent on security, which characterises the EU's broader policy to the Mediterranean region, should also govern the interpretation of any agreements between Morocco and the European Union insofar as they include security-related clauses. Even though these clauses take a general formulation, and despite the lack of a more organic agreement on security matters between the EU and Morocco, the reality of Euro-Mediterranean cooperation described above suggests that there is an unmissable focus on security in EU-Morocco relations, effectively vesting Morocco with the role of gatekeeper vis-à-vis terrorist threats, organised crime, and illegal cross-border migration.

These considerations suggest the centrality of bilateral security concerns at the heart of the EU-Morocco relationship. For this reason, it does not seem improbable that the removal of trade privileges on Western Sahara products might deteriorate the wider architecture of EU-Morocco relations and, particularly, warrant a suspension of all agreements between the parties, inclusive of their security clauses.

This suggestion would be a plausible application of the principle of indivisibility of international treaties, which equally applies to the agreements and protocols between Morocco and the European Union.⁷⁰ It implies that suspending the applicability of Protocol No. 1 to Western Sahara products can negatively impact all agreements between the parties, for instance, by casting uncertainty over the legal status of the residual trade privileges that the EU wishes to grant to Morocco to the exclusion of Western Sahara.

In support of this view, it is necessary to remind oneself that the residents of Western Sahara still benefit from the remaining agreements entered into between Morocco and the European Union: a point that was not disputed—and in fact reaffirmed—by the European Commission in its report of December 22 2021.⁷¹ This point lends decisive credit to the

69 Bouchra Essebbani, 'La Coopération Entre le Maroc et l'Union Européenne: De l'Association au Partenariat' (PhD thesis, Université Nancy 2 2008) 331.

70 Euro-Mediterranean Agreement establishing an association (n 64) 62.
The EMAA consists of five protocols that focus on, respectively, arrangements applying to imports into the Community of agricultural products originating in Morocco (Protocol 1); arrangements applying to imports into the Community of fishery products originating in Morocco (Protocol 2); arrangements applying to imports into Morocco of agricultural products originating in the Community (Protocol 3); the definition of originating products and methods of administrative cooperation (protocol 4); mutual assistance in customs matters between the administrative authorities (Protocol 5).

71 European Commission, '2021 Report on the Benefits for the People of Western Sahara on Extending Tariff Preferences to Products from Western Sahara' (*European Commission*, 22 December 2021) <https://ec.europa.eu/taxation_customs/2021-report-benefits-people-western-sahara-extending-tariff-preferences-products-western-sahara_fr> accessed 10 January 2024.

presumption that the European Court of Justice ruling wasn't adopted with a careful mapping of its possible ripple effects on the wider tapestry of EU-Morocco relations.

3.2. Security Risks Arising from the ECJ Ruling

The critical analysis developed thus far suggests that Morocco could hold a legitimate claim to sovereignty over Western Sahara on the grounds of “allegiance”—a category recognised by Islamic law and which applies to the region as part of *dar al-islam*. Secondly, the analysis has also shown how the ECJ's ruling that excludes Western Sahara products from the applicability of trade preferences under Protocol 1 of the EMLA fits poorly with the principle of indivisibility of international obligations and the wider repercussions on EU-Morocco relations. If the above is true, one might construe the ECJ's ruling on Western Sahara products as effectively an economic embargo on the disputed region. This will likely have repercussions on the economic and social situation of local residents and may increase the region's vulnerability to security and terrorist threats that are commonplace in the Sahel Region. Such an outcome would ultimately frustrate the stated intentions of European and international bodies. Additionally, this inconsistency could also be construed as a relinquishment—on the part of EU member states—of the international duty known as ‘Responsibility to Protect’ (RtoP).⁷²

Let us consider, as an example, the 2021 European Parliament report on the ‘New EU Strategic Priorities for the Sahel’.⁷³ The report recognises that recent events in the Sahel Region prove the extent of its political instability, offering troubling indications of weak democratic governance in the region. The activities of extremist groups and internal conflicts have weakened the region's democratic transition. This environment of political fragility and lack of government legitimacy has increased the difficulty of addressing security and humanitarian issues in the Sahel. Moreover, the persistent likelihood of rentierism posed by non-elected armed groups and an increasing pattern of violence against regions and resources have contributed to growing internal and cross-border displacements in the Sahel states. At the same time, the lack of adequate governance mechanisms to manage this displacement—further exacerbated by environmental degradation, resource scarcity, and population growth—has eventually led to an acute humanitarian crisis.

The same report observes that, since 2011, the European Union Strategy for the African Sahel has focused on both security and development in the hope of beginning to address such interconnected challenges. This notwithstanding, EU efforts have predominantly

72 Ivan Šimonović, ‘The Responsibility to Protect’ (2016) 8(4) UN Chronicle: Human Rights <<https://www.un.org/en/chronicle/article/responsibility-protect>> accessed 10 January 2024.

73 Eric Pichon and Mathilde Betant-Rasmussen, ‘New EU Strategic Priorities for the Sahel: Addressing Regional Challenges Through Better Governance’ (*European Parliament, Think Tank*, 7 July 2021) 1 <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)696161](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)696161)> accessed 10 January 2024.

focused on a military approach to combat the increased terrorist activity. This has secured tangible results but ultimately failed to provide long-term regional stability. In response to this, the European Union has also developed a new integrated strategy in the Sahel that explicitly targets the political dimension, with a focus on governance mechanisms, human rights, and cooperation with civil society and local authorities to safeguard the long-term integrity of security cooperation with the countries in the region.

Laying side-by-side the tone of this European Parliament report and the effect of the ECJ's ruling on Western Sahara products, it is difficult not to pick up profound contradictions. On the one hand, the EU recognises the instability of the African Sahel region (of which Western Sahara is an extension) and appears well aware of the risks to security and political stability and of conditions conducive to the rapid increase of terrorist activity. On the other hand, the ECJ ruling "embargoes" Western Sahara products, thereby reducing economic opportunities for inhabitants of the area.

The European Parliament's interest in the African Sahel Region has not been accidental; rather, it is borne of the awareness that this region is a source of migration flows and security threats for EU countries. Studies carried out by the North Atlantic Treaty Organization (NATO) have also underscored how the security architecture of the region—at least from a military point of view—invites action from the Arab side, with additional support necessary from North Africa, Europe and the international community, prioritising the need for dialogue with countries in the region.⁷⁴

The NATO report suggests that NATO must adopt a cohesive approach towards the African Sahel. This entails being transparent about the priority of security concerns in the area and the seriousness of the threat they pose to NATO strategic interests and, second, having a shared notion of the action that needs to be taken.⁷⁵ In this respect, it is difficult to see how the ECJ ruling would contribute to either of those goals.

Taking a humanitarian approach, the United Nations High Commissioner for Refugees issued a report in 2021, arguing that the deteriorating situation in the Sahel Region forces people to flee from homes and deprives vulnerable communities of basic services. This is a consequence of the fact that non-State armed groups directly target schools, health centres, and other key infrastructure. In turn, this leaves the civilian population exposed to extortion, targeted killings, cattle rustling, looting of shops, and threats of eviction from their villages.⁷⁶

74 Rabah Aynaou, NATO and the Security Challenges of the Sahel-Sahara Region Within the New Geopolitical Order (Research Paper 110, NATO Defense College 2015) 12 <<https://www.ndc.nato.int/news/news.php?icode=774>> accessed 10 January 2024.

75 NATO, *Strategic Foresight Analysis Regional Perspectives Report on North Africa and the Sahel* (HQ SACT Strategic Plans and Policy 2023).

76 UNHCR, 'Sahel Situation (Tillbéri and Tahoua Regions)' (*UNHCR Operational Update*, April 2021) 1 <<https://reporting.unhcr.org/sites/default/files/Niger%20Sahel%20fact%20sheet-April2021.pdf>> accessed 10 January 2024.

A 2001 American report issued by the United States Commission on International Religious Freedom, titled ‘Islamists in the Central Sahel Region’,⁷⁷ complements the picture drawn by the previous two reports. It takes stock of the fact that violent Islamist groups have moved into parts of Mali, Burkina Faso, and Niger, threatened religious freedom there, imposed aberrant interpretations of Islamic law, restricted religious practice, and executed individuals for their beliefs. These events have resulted in the growth of religious tensions and religious persecution across West Africa. The report deemed similar developments extremely worrying in light of US regional policy and its efforts to promote religious freedom.

This picture also applies to Western Sahara, which is on the fringes of the Sahel region and not immune from its criticalities. Hence, the ECJ ruling appears difficult to comprehend—even on policy grounds—when placed in this degrading security situation. This precariousness is most evident in Libya, which bears the scars of terrorism and the security threats characteristic of the Sahel region as a whole.⁷⁸

4 CONCLUSION

This article has undertaken a critical review of the 2021 ECJ ruling that excludes preferential trade treatment accorded to Moroccan products only those products originating in the Western Sahara region, even when they are subject to the control of Moroccan customs authorities. In legal terms, the ECJ’s ruling is questionable on the grounds of taking for granted a picture of sovereignty that—if commonplace on the European continent—is narrower than what other legal systems allow. For instance, concepts such as “allegiance” significantly broaden the scope of sovereignty under Islamic law, such that Morocco’s sovereignty over the region is not brought into question by the presence of a non-elected armed group and that the latter group does qualify for standing in international disputes. Instead, the ECJ seems to have made a political choice, as evidenced by its selective reading of international law, by casting to one side alternative possible notions of sovereignty under a non-Westphalian system like that of Islamic law—where categories like “tribe,” “allegiance,” and “loyalty” do make a difference. In doing so, the ECJ overlooked the international legal regime that applies to tribal and indigenous rights, which the European Union has endorsed, as well as the post-1990s practice within the UN for dealing with the uncertain representation of Western Saharas’ people. Moreover, even on an understanding of sovereignty modelled after that of states, it begs the question of whether the mere non-state paramilitary presence in a region should suffice to clear the threshold for international

77 Madeline Velluro, ‘Islamists in Central Sahel: Violent Islamist Groups in the Central Sahel’ (*USCIRF*, May 2021) 4 <<https://www.uscirf.gov/publication/factsheet-islamists-central-sahel>> accessed 10 January 2024.

78 Mohamed Eljarh, *Les Defis et Enjeux Securitaires Dans L’espace Sahelo-Saharien: la Perspective de la Libye* (Dialogues securitaires dans l’espace Sahalo-Saharien, Friedrich-Ebert-Stiftung, 2016) 5.

standing, as opposed to more encompassing notions of order and authority that transcend a narrow militaristic reading.

A second critique inheres in the extra-territorial application of EU law, which in the case at hand involves the invalidation of an international agreement by a court that has been set up under the EU legal architecture and whose remit is circumscribed to policing the legality of this order insofar as it applies to member states—but not to third parties like Morocco. Related to this is the critique of excessive judicial discretion in the ECJ's ruling, which seems more grounded in political considerations than in basic tenets of procedural justice. Indeed, these would have suggested a preliminary step of gathering—in a spirit of equanimity—the norms vying for application in the case, including those of a religiously established order like *Shari'ah* law. This aspect was, unfortunately, overlooked by the ECJ in its ruling.

Another strand of the argument involves the court's incomplete scrutiny of the practical consequences of its ruling. For example, in the context of alarming international reports suggesting deteriorating security conditions in the Sahel Region, a judgment that effectively imposes an embargo on Western Sahara products exacerbates vulnerability to terrorist groups and is difficult to square with a goal of enhanced stability in the Sahel region.

Last but not least, the ECJ's decision seems to fall foul of the principle of indivisibility of agreements by selectively misapplying only one part of its agreement with Morocco. This would be sufficient reason for Morocco to deem the remainder of the agreements and protocols between the parties as no longer binding—extending to political, economic, social, and cultural affairs, as well as to the security clauses that would be of particular interest to EU member states.

Given the foregoing, it is difficult to see a silver lining to the ECJ's ruling, which encourages non-elected armed groups in other regions of the world to follow suit and thereby enables them to use their position to threaten the economic interests of the state governments with whom they are in dispute over sovereignty. In the long run, this type of attitude could have material adverse effects on the relationship of the European Union with countries placed in the same position as Morocco.

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The Indivisibility of Agreements and the Needs of Regional Security. – 3.1. Consequences of Non-Compliance With the Principle of Indivisibility of Agreements. – 3.2. Security Risks Arising from the ECJ Ruling. – 4. Conclusions.

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