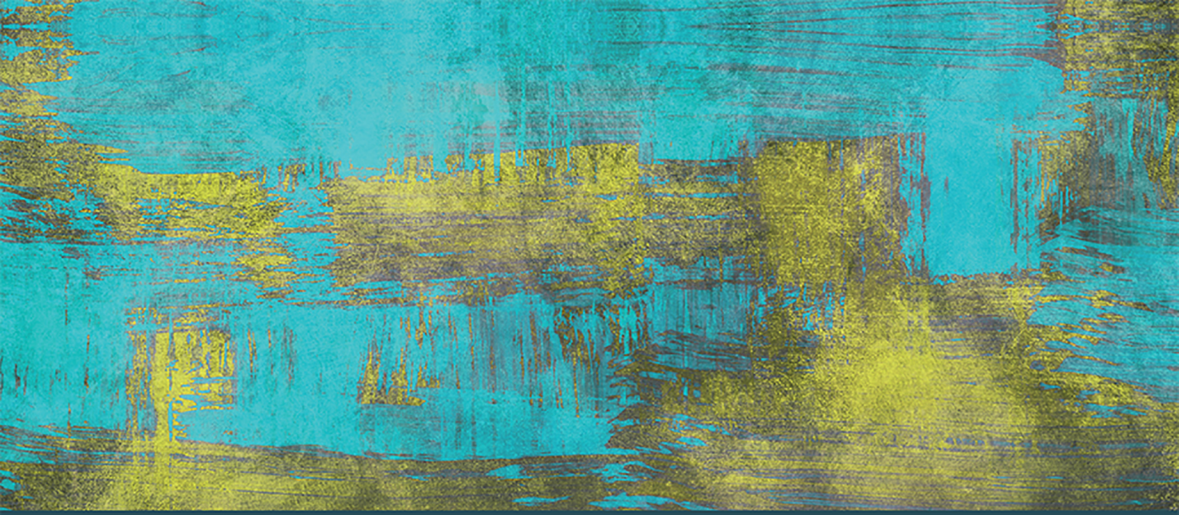
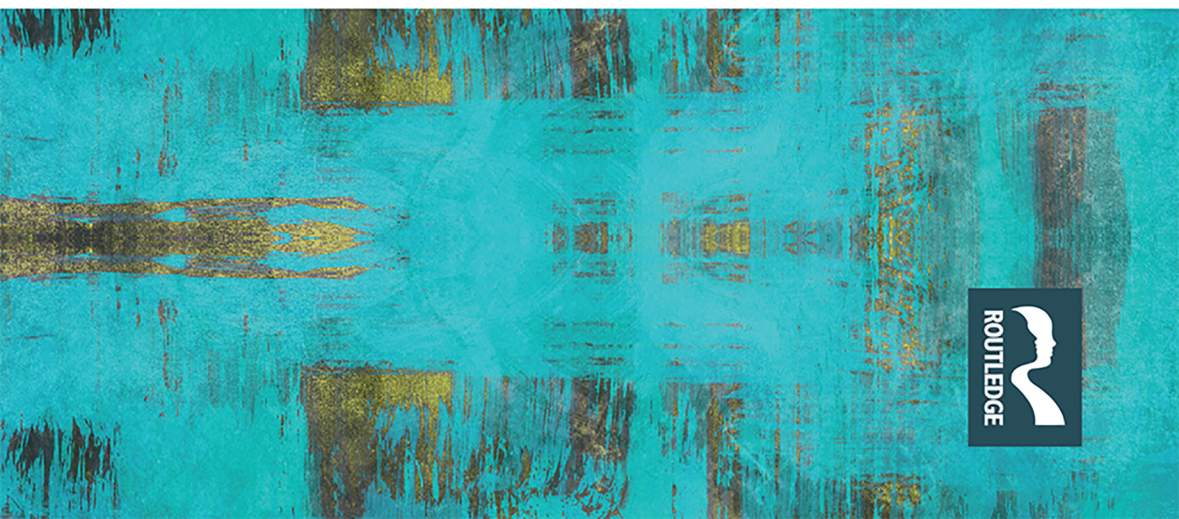


*Routledge Research in International Economic Law*

# THE LEGALITY OF ECONOMIC ACTIVITIES IN OCCUPIED TERRITORIES

## INTERNATIONAL, EU LAW AND BUSINESS AND HUMAN RIGHTS PERSPECTIVES

Edited by
Antoine Duval and Eva Kassoti



ROUTLEDGE

# The Legality of Economic Activities in Occupied Territories

This edited volume explores the question of the lawfulness under international law of economic activities in occupied territories from the perspectives of international law, EU law, and business and human rights.

Providing a multi-level overview of relevant practices, policies and cases, the book is divided into three parts, each dealing with how different legal fields have come to grips with the challenges brought about by the question of the lawfulness under international law of economic activities in occupied territories. The first part includes contributions pertaining to the international law dimension of the question. It contains chapters on the conjunction between jus in bello, jus ad bellum and international human rights law in the context of exploitation of natural resources in territories under belligerent occupation; on third party obligations flowing from the application of occupation law in relation to natural resources exploitation; and on State practice with regard to trading with occupied territories. The second part focuses on EU law and contains contributions that assess the EU's approach to occupied territories and the extent to which this approach comports with the EU's obligations under international law; contributions providing an in-depth assessment of the case-law of the CJEU on occupied territories; as well as contributions pertaining to the political considerations that may influence the legal framing of questions pertaining to occupied territories. The final part focuses on the business and human rights perspective, with chapters on investment arbitration as a means for holding the occupant accountable for its conduct towards foreign investments and investors; on the role and impact of the soft law framework governing corporate activity (such as the UN Guiding Principles) on business involvement with occupied territories; as well as a final case study on the dispute involving Israeli football activity in settlements located in the OPT and the legal responsibility of FIFA in this regard.

The book will appeal to academics, practitioners and policy-makers alike.

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# The Legality of Economic Activities in Occupied Territories

## International, EU Law and Business and Human Rights Perspectives

**Edited by**
**Antoine Duval and**
**Eva Kassoti**

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# Preface – John Dugard

## Economic activities in occupied territories

### *Is there a need for a reassessment of the law of occupation?*

John Dugard

I am pleased to have been invited to deliver the opening address at this workshop to examine the legality of economic activities in occupied territories.

I congratulate the Asser Institute for having organized this workshop on a topic that is much in the news but seldom subjected to the scrutiny it deserves by international lawyers. A keynote speaker is spared the task of preparing a thoroughly researched and carefully presented paper. Instead she or he is required to make a few challenging remarks on the topic under discussion and to leave it to those who have written carefully researched scientific papers to make a contribution to the learning on the subject at hand.

There is much to be said on the legality under international law of economic activities in occupied territories and of the lawfulness of third state economic relations with an occupying power in respect of occupied territory. And much will be said in this workshop on topics such as the permissibility of trading with an occupying power under the GATT, the trade relations of the European Union with occupied territories, the extraction of natural resources from occupied territories and the complicity of corporations that engage in economic activities in occupied territories. This conversation will take place within the traditional legal framework of the law of occupation contained in the Hague Regulations, the Fourth Geneva Convention of 1949, the Geneva Protocols of 1977 and customary international law. Occupation will be assumed to be a temporary state of affairs that will be brought to an end by negotiations between the occupying power and the occupied people. After all, this is the way the West, which sets the rules, likes to view most occupations in today's world.

But isn't there something strange about debating whether the supermarkets in Europe should be allowed to sell dates from Israel settlements in the occupied Jordan valley when people are being killed every week in occupied Gaza? Or examining the implications of the Association Agreement between the EU and Israel when homes are being demolished and communities bulldozed by the

occupying power? Or considering whether phosphate from the Western Sahara may be sold abroad when Morocco brutalizes displaced communities?

Isn't there a need for a fresh look at the present legal regime of occupation? Isn't there perhaps another legal regime that is more appropriate to the prolonged occupations of territories such as Palestine, Western Sahara and the Turkish Republic of Northern Cyprus? Isn't it necessary to distinguish between temporary occupations that will be brought to an end and those that will not be terminated by a negotiated settlement? Isn't it time to draw a line between genuine occupations and illegal occupations and to provide for harsher legal measures in the latter case?

I suggest that it is time to reconsider the law of occupation and to ask whether the present regime is genuinely committed to a peaceful resolution of the occupation or whether it is instead a fig-leaf for inaction and acceptance of the indefinite continuation of the occupation.

The law of occupation of today premised on the law of the past. In the past occupations were short. The use of force was lawful, annexation was lawful and coerced treaties of cession were lawful. Occupations were short because the victor either annexed the vanquished state in full or forced it to cede territory to it. The Hague Regulations and, albeit to a lesser extent, the Geneva Conventions are premised on pre-Charter law and the practice of the past which did not envisage a situation in which a state would occupy a territory with the intention of permanent possession and refrain from annexing it or forcing it to cede territory because of the prohibition on the use of force and the annexation of territory acquired by force. Nor did they envisage a situation in which a state would annex territory unlawfully but the international community would pretend that such annexation had not occurred and go on treating the annexation as one of occupation.

The extent to which the law of occupation is anchored in the past is illustrated by the strange language of article 6(3) in the Fourth Geneva Convention Relative to the Protection of Civilian Persons in time of War which declares that "In the case of occupied territory the application of the present Convention shall cease one year after the close of military operations" subject to the continuation of certain provisions for the duration of the occupation. Pictet in his authoritative *Commentary* of 1958 found this provision to be "reasonable" as he did not foresee occupations continuing for more than a year.[1] Strangely this provision was accepted at face value by the International Court of Justice in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[2] with no attempt to address the issue of prolonged occupation despite the fact that Israel was in the 37th year of its occupation at that time.[3]

1 *Commentary on IV Geneva Convention,* (International Committee of the Red Cross, 1958) 63.

2 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 125.

3 For criticism of this finding of the Court, see Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 283; John Dugard, 'Legal Consequences of the Construction of

One can only agree with the comment of Eyal Benvenisti that the Hague Regulations and the Geneva Conventions, "the two major instruments regarding the law of occupation, do not provide meaningful guidelines for lawful deviations from the regular rules of occupation in cases of protracted occupations."[4]

Today, many occupations are prolonged. Perhaps most. This is because the occupying power has no intention of entering into a peace treaty with the occupied territory. It would like to annex the territory or force the occupied territory to cede territory to it. But international law today does not allow this. So it must just hang on to the territory in the guise of occupation or risk the opprobrium of the international community by formally annexing the territory. If it chooses the latter course it will know that its annexation will not be recognized and that the international community will insist on treating it as a situation of occupation.

State practice is instructive. There are instances of occupation in which the occupying power has no ulterior motive, views the occupation as temporary and intends to end the occupation. In recent times the best illustration of such an occupation is that of Iraq which was occupied by the United States and the United Kingdom from 2003 to 2011.[5] In the West Bank, Israel pays lip service to the notion of a temporary occupation that is to be brought to an end by negotiation but in practice it has *de facto* annexed large portions of the territory under the pretext of security – as evidenced by the Wall in Palestinian territory – or by the settling of some 400,000 of its own citizens in the territory. In most cases today, however, the occupying power has formally annexed the territory in question. This is illustrated by the cases of Israel's annexations of East Jerusalem and the Golan, Morocco's annexation of Western Sahara and Russia's annexation of the Crimea. Alternatively, the occupying power has established a puppet regime that claims to be the TRNC, Abkhazia and South Ossetia.

In cases of *de facto* or *de jure* annexation the international community persists in holding the annexing power accountable under the law of occupation, as in the case of Western Sahara,[6] the TRNC,[7] the Crimea,[8] Golan[9] and East Jerusalem.[10] This approach persists despite the fact that the annexing power refuses to have regard to either the Hague Regulations or the Geneva Conventions governing the law of occupation, refuses to see the situation as temporary and has no intention of negotiating a peace treaty with the occupied power.

These annexations, *de jure* or *de facto,* that the international community allows to masquerade as occupations have one common feature. They are premised

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a Wall in the Occupied Palestinian Territory (2004)' in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International law* (Hart 2017) 555.

4 Eyal Benvenisti, *International Law of Occupation* (Second Edition, OUP 2012) 244.

5 See on this occupation, Aeyal Gross, *The Writing on the Wall. Rethinking the Law of Occupation* (CUP, 2017) 96–110.

6 Ibid., 116–120.

7 Ibid., 79–96.

8 Ibid., 124.

9 Dinstein (n 3) 19–20.

10 Ibid., 18–19.

on illegality. Not only annexation of territory in a world in which the acquisition of territory by forcible means is outlawed but also serious violations of the law of occupation. These violations include the denial of self-determination, colonization, apartheid, genocide, egregious violations of human rights and international humanitarian law and failure to administer the territory in good faith. In these circumstances occupation should no longer be viewed as a neutral factual situation.[11] Instead it should be viewed as a situation subject to norms of *jus cogens* which may render the occupation unlawful. A growing body of literature supports this view.[12] It has been argued by Michael Lynk, the United Nations Special Rapporteur on the Human Rights Situation in the Occupied Palestinian Territories, that Israel has crossed the red line between legality and illegality in its implementation of the occupation.[13]

There is therefore an urgent need for a reassessment of the law of occupation, one that distinguishes between legal occupations in which the occupying power accepts and abides by the Hague Regulations and Fourth Geneva Convention and views the occupation as a temporary state of affairs that will be brought to an end by negotiation and illegal occupations in which the occupying power has annexed the territory *de jure* or *de facto* or violated norms of *jus cogens* in the enforcement of the occupation.

Different regimes must be applied to these two categories of occupation. In the case of the former, restrictions of the kind imposed on genuinely occupied territories in the past should continue. But the latter category must be subjected to more severe restrictions and governed by more appropriate legal rules.

In the first place, insistence on bringing the occupation to an end by negotiation should be abandoned. In terms of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts[14] a state that commits an internationally wrongful act is obliged to cease the act forthwith.[15] Moreover, where the act constitutes the violation of a peremptory norm of general international law other states are obliged to co-operate in bringing the illegality to an end, refusing to recognize as lawful a situation created by the breach and desisting from aiding in the maintenance of the situation.[16] This means that there is no place for negotiation. The wrongdoing occupant must cease the occupation forthwith and states must take steps to ensure that this was done. This obvious consequence of an illegal occupation was reaffirmed by the International Court of Justice in its 1971 advisory opinion on Namibia when it held that the continued presence of South Africa in Namibia was illegal with the

11 See Benvenisti (n 4) 15–16.

12 Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' [2005] 23 *Berkeley Journal of International Law* 551; Gross (n 5).

13 UN General Assembly 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967' (2017) UN DOC A/72/556, para 65.

14 ILC, 'Report of the International Law Commission on the work of its fifty-third session' (23 April–1 June and 2 July–10 August 2001) UN DOC (A/56/10).

15 Article 30 (a).

16 Articles 40 and 41.

result that South Africa was obliged to withdraw its administration immediately and put an end to its occupation.[17]

This reasoning[18] has serious implications for the Palestinian conflict. The accepted wisdom pursued by the United States and the European Union is that the occupation is to be ended by negotiation, however one-sided it may be, however unequal the parties may be and however long it may take. This is ridiculous in terms of both political reality and international law. Israel has committed and is committing egregious violations of peremptory norms in occupied Palestine, ranging from apartheid,[19] colonization and the denial of self-determination to the unlawful acquisition of territory and the violation of *jus cogens* norms of human rights and international humanitarian law. It is obliged to cease this illegality forthwith and states – including the United States and the EU – are obliged to assist in this process.

Second, more severe sanctions should be imposed on occupying powers that have violated international law. Sanctions that come to mind immediately are a travel ban on citizens of the occupying power who have settled in the occupied territory following the occupation – a ban that would apply to Israeli settlers in the West Bank and East Jerusalem, Turkish settlers in the TRNC and Moroccan settlers in Western Sahara. And all trade and financial dealings with the occupying power and its settlers in the occupied territory should be prohibited. In addition the occupying state itself should be subjected to serious sanctions. Here the experience of apartheid South Africa serves as a useful precedent. Political, economic, sporting, educational and cultural sanctions were imposed on South Africa by individual states and international organizations. The United Nations imposed an arms embargo. Pension funds disinvested in companies that did business in South Africa and banks refused to make loans to the South African government.

In essence South Africa was subjected to such sanctions for its illegal occupation of Namibia[20] and the application of the policy of apartheid in both Namibia and South Africa itself. Like South Africa, Israel is in illegal occupation of a territory – Palestine. Like South Africa it applies apartheid in the territory.[21] Moreover, since the enactment of the Nation-State law in 2018, it is increasingly clear that apartheid is also applied in Israel itself. It is difficult in these circumstances to understand why the international community, and particularly the

17 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 133.

18 I am indebted to Ardi Imseis for this reasoning. See his PhD thesis, Ardi Imseis, 'The United Nations and the Question of Palestine: A Study in International Legal Subalternity' (Doctoral thesis, University of Cambridge 2018), 122ff.

19 See John Dugard and John Reynolds 'Apartheid, International Law and the Occupied Palestinian Territory' [2013] 24 *European Journal of International Law* 867; John Dugard, *Confronting Apartheid. A Personal History of South Africa, Namibia and Palestine, Johannesburg* (Jacana Media, 2018).

20 See above note 17.

21 See above note 19.

EU, should be pre-occupied with such trivia as a ban on the sale of products from occupied Palestine and the question whether Airbnb should be allowed to operate in settlements. Surely the time has come for action of the kind taken against apartheid South African?

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# Setting the scene

## The legality of economic activities in occupied territories

*Eva Kassoti and Antoine Duval*

### 1 Introduction

International law conceives of occupation as a temporary phenomenon. This cardinal principle of the law of belligerent occupation, namely that the occupier acquires only temporary authority, and not sovereignty, over the occupied territory[1] is reflected in Art. 43 of The Hague Regulations.[2] According to Pictet: "The occupation of a territory … is essentially a temporary, *de facto* situation, which deprives the occupied Power of neither its statehood nor its sovereignty; it merely interferes with its power to exercise its rights".[3] Accordingly, the main idea underpinning the legal framework governing occupation is that occupation is a temporary state of affairs and therefore, it is geared towards maintaining the *status quo ante bellum*.[4] However, in practice, most modern manifestations of occupation are prolonged ones such as the examples of Palestine, Western Sahara and Northern Cyprus underscore. This reveals a tension between the conceptualisation of the phenomenon as a temporary one – a paradigmatic vision that informs and is cardinal to the legal framework governing occupation – and

1 Eyal Benvenisti, *The International Law of Occupation* (Second Edition, Oxford University Press 2012) 7. Marco Sassoli, 'Article 43 of The Hague Regulations and Peace Operations in the Twenty-First Century' [Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25–27, 2004] 5. See also Art. 4 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted on 8 June 1977, entered into force 7 December 1978) 1125 UNTS (Protocol I).

2 Art. 43 of The Hague Regulations reads:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War (adopted on 18 October 1907, entered into force 26 January 1910) (The Hague Regulations).

3 Jean Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958) 275.

4 Benvenisti (n 1) 1–2.

the reality on the ground.[5] Thirty years ago in a seminal article on the topic of prolonged occupation Adam Roberts questioned the applicability and practical relevance of the international legal framework governing occupation to instances of prolonged military occupation.[6] As John Dugard's preface to this volume shows, this question remains as relevant today as it was 30 years ago.

Occupations (and especially prolonged ones) pose a myriad of challenges. Arguably, one of the main difficulties stemming therefrom relates to the issue of economic dealings with such territories and with their occupying powers. Economic dealings with occupying powers are governed by a complex and multilayered legal framework that includes both customary law norms (including the duties of non-recognition and non-assistance) and bilateral and multilateral treaties. Yet, the exact contours and scope of application of the international law duties incumbent upon occupying powers and third parties entering into economic dealings therewith are still clouded with uncertainty. The range of economic activities currently carried out in occupied territories also adds up to the complexity. Such activities may consist of trade agreements with the occupying powers that expressly or implicitly include the occupied territory, of agreements pertaining to the exploitation of natural resources of the occupied territory, of aid/or other source of financial assistance to the occupying power that is used to entrench its presence in the occupied territory as well as questions of importation and labelling of products originating from settlements in occupied territories. Does international law require a complete economic boycott against occupying powers or are some of the aforementioned activities allowed and if so, to what extent?

The question has acquired additional salience in the context of the EU's trade relations with occupied territories as evidenced by the recent *Front Polisario*[7] and *Western Sahara Campaign UK*[8] cases regarding the *de facto* application of a number of EU-Morocco agreements to the territory of Western Sahara. This line of case-law arguably shows a growing gap between EU rhetoric and practice. While the EU has consistently portrayed itself as a normative power committed to the strict observance and development of international law, its actual practice on the ground, as evidenced by its trade relations with different occupying powers, calls into question the 'normative power Europe' narrative. At the same time, the glaring inconsistencies in the EU's practice in relation to different occupied territories (such as Palestine on the one hand and Western Sahara on the other hand) question the legitimacy of its external action. Does the relevant EU practice manifest the existence of double standards and if so, is there a need

5 David Hughes, 'Moving from Management to Termination: A Case Study of Prolonged Occupation' [2019] 44 *Brooklyn Journal of International Law* 109, 122.

6 Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967' [1990] 84 *AJIL* 44, 47.

7 Case C-104/16 P *Council v Front Polisario* [2016] EU:C:2016:973.

8 Case C-266/16 *Western Sahara Campaign UK* v *Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* [2018] EU:C:2018:118.

for the adoption of coherent policies in relation to all occupied territories, or are there legal or factual differences between different occupied territories that justify a seemingly fragmented approach?

The picture becomes even more complicated considering that private corporations (i.e. non-State actors whose conduct largely falls outside the remit of public international law) carry out much of the economic activity in territories under occupation. In 2020, the Office of the High Commissioner for Human Rights is expected to launch a database that lists corporate actors that have directly or indirectly facilitated the growth of Israeli settlements in the Occupied Palestinian Territory (OPT) through their economic activity therein. A number of States, NGOs and scholars maintain that international law prohibits private actors from doing business in occupied territories. Still, the normative basis underpinning these claims is unclear. Do the duties of non-recognition and non-assistance also extend to non-State private actors? Even if it is accepted that international law, as it currently stands, does not regulate corporate activity directly, what is the role of the widely endorsed 2011 UN Guiding Principles on Business and Human Rights[9] in bringing about a change of corporate conduct towards occupied territories?

This edited volume purports to explore the question of the lawfulness under international law of economic activities in occupied territories from the perspectives of international law, EU law, and business and human rights. The goal is to provide a multi-level overview of relevant practices and policies. The book is divided into three parts, each dealing with how different fields have come to grips with the challenges brought about by the overarching and multifaceted question of the lawfulness under international law of economic activities in occupied territories. The first part includes contributions pertaining to the international law dimension of the question. It contains chapters on the conjunction between *jus in bello*, *jus ad bellum* and international human rights law in the context of exploitation of natural resources in territories under belligerent occupation, on third party obligations flowing from the application of occupation law in relation to natural resources exploitation, and on State practice with regard to trading with occupied territories. The second part focuses on EU law and contains contributions that assess the EU's approach to occupied territories and the extent to which this approach comports with the EU's obligations under international law, contributions providing an in-depth assessment of the case-law of the Court of Justice of the European Union (CJEU) on occupied territories as well as contributions pertaining to the political considerations that may influence the legal framing of questions pertaining to occupied territories. The final part focuses on

9 John Ruggie, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' [2011] 29 *Netherlands Quarterly of Human Rights* 2. The Guiding Principles were endorsed by the Human Rights Council in its resolution UNHRC Res 17/4 (6 July 2011) UN Doc A/HRC/17/4.

the business and human rights perspective, with chapters on investment arbitration as a means for holding the occupant accountable for its conduct towards foreign investments and investors, on the role and impact of the soft law framework governing corporate activity (such as the UN Guiding Principles) on business involvement with occupied territories as well as a final case study on the dispute involving Israeli football activity in settlements located in the OPT and the legal responsibility of FIFA in this regard.

In this light, the rest of this introductory chapter will briefly map out the legal framework governing economic activities in occupied territories, identify the main gaps thereof and also introduce the chapters included in this volume. From the outset, it should be stressed that this edited volume does not (and cannot) provide an exhaustive overview of the many legal and policy issues pertaining to the overarching question at the heart of this book. At the same time, we hope that this volume will provide some answers and, more importantly, that it will contribute towards raising awareness about this complex, yet extremely important, topic.

## 2 Setting the scene: the international legal framework

The main rules governing occupation in international law are found in the Fourth Geneva Convention and the Hague Regulations annexed to the 1907 Hague Convention respecting the Laws and Customs of War on Land. Both codify fundamental rules, which "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of customary international law".[10] For present purposes, one of the most important obligations incumbent upon occupying powers with respect to the people of the occupied territory is codified in Art. 55 of The Hague Regulations. Art. 55 grants the occupying power a right of usufruct over immovable public property and it is key to the occupant's right to exploit natural resources – thereby being of direct relevance to the question of produce coming from occupied territories.[11] The relevant provision reads:

> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Thus, the usufructuary principle emphasises that the occupier does not own the property of the territory under occupation, but may only use it, subject to the

10 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 79.

11 Daniëlla Dam de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press 2015) 227.

duty to safeguard the capital of these properties.[12] It is widely accepted that the concept of usufruct precludes exploitation of the natural resources of an occupied territory by the occupier for its own benefit; as Cassese stresses: "in no case can it exploit the inhabitants, the resources, or other assets of the territory under its control for the benefit of its own territory or population".[13] The occupier can only dispose of the resources of the occupied territory to the extent that is necessary for the purposes of maintaining a civilian administration in the territory and for the benefit of its people.[14] This limitation was confirmed in the relevant jurisprudence of the Nuremberg tribunals[15] and in practice.[16] More recently, it was acknowledged by the US-UK occupying authority in Iraq in 2003, who informed the President of the UN Security Council that they would "act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people",[17] resulting in a Chapter VII resolution affirming that principle.[18]

In this light, the principle of usufruct limits the purposes for which an occupant may use the natural resources of a territory under its control. Still, questions remain regarding the principle's scope of application and its interaction with other bodies and rules of international law. Ka Lok Yip' chapter examines the relationship among *jus in bello*, *jus ad bellum* and international human rights law in the context of the exploitation of natural resources in territories under belligerent occupation. Ka Lok Yip examines whether *jus in bello* allows an occupant to seize or administer different types of property in occupied territories and whether this may also extend to the exploitation of natural resources. The chapter continues by revisiting the relationship between *jus ad bellum* and *jus in bello* with reference to the exploitation of natural resources by an occupant in accordance with *jus in bello* in territories occupied in violation of *jus ad bellum*.

12 Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) 268. It is widely accepted that Art. 55 codifies a long-standing rule of customary international law. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, *Vol. I: Rules* (ICRC 2005) 179.

13 Antonio Cassese, 'Powers and Duties of an Occupant in relation to Land and Natural Resources' in Antonio Cassese, Paola Gaeta and Salvatore Zappala (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press 2008) 251. Dam de Jong (n 11) 229.

14 Dam de Jong (n 11) 231. Eyal Benvenisti, 'Water Conflicts during the Occupation of Iraq' [2003] 97 *AJIL* 860, 863–864 and 867–868. See also Institut de Droit International, Bruges Declaration on the Use of Force and Belligerent Occupation (2003) <www.justitiaetpace.org/idiE/declarationsE/2003_bru_en.pdf> accessed 17 January 2020.

15 US, Military Tribunal at Nuremberg, *Flick case*, Judgment, 22 December 1947; US, Military Tribunal at Nuremberg, *Krupp case*, Judgment, 29 July 1948, cited in Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. II: Practice* (ICRC 2005) 1041–1042.

16 US Department of State, Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez, 16 *ILM* 733 (1977) 743.

17 Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council (8 May 2003) UN Doc S/2003/538.

18 UNSC Res 1483 (2003) UN Doc. S/RES/1483, para 14.

The chapter then examines the occupant's obligations under international human rights law with a focus on the right to self-determination in the context of occupation and it is argued that such obligations cannot be subsumed under either *jus in bello* or *jus ad bellum* or both, but have their "own irreducible core content".

Apart from obligations addressed to the occupant, international law also imposes certain obligations on third parties when they enter into economic activities with the occupying powers. Overall, three obligations are relevant in this context: the duty of non-recognition, the duty of not providing aid or assistance in the commission of an unlawful act and the duty to ensure respect for international humanitarian law. The principle that legal rights cannot derive from an illegal act (*ex injuria jus non oritur*) provides the rationale underpinning the obligation of non-recognition.[19] The obligation serves as a mechanism to ensure that a *fait accompli* on the ground resulting from an illegal act does not "crystallize over time into situations recognized by the international legal order".[20] The principle finds support in the 1970 Friendly Relations Declaration[21] – which, according to the ICJ, reflects customary international law.[22] According to the International Law Commission (ILC) the obligation of non-recognition covers not only formal acts of recognition but also "prohibits acts which would imply such recognition".[23] In the *Namibia* case,[24] the ICJ elaborated on the scope and content of the obligation of non-recognition. The duty of non-recognition entails, *inter alia*, that States are under an obligation to abstain: (a) from entering into treaty relations with the non-recognised regime in respect of the unlawfully acquired territory; and (b) from entering into economic and other forms of relationship concerning the unlawfully acquired territory which might entrench the non-recognised regime's authority over the territory.[25] In their practice, international courts and tribunals have confirmed that forcible territorial acquisitions are the prime examples of unlawful situations giving rise to the obligation of non-recognition.[26]

19 James Crawford, 'Opinion: Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories' (Report for the Trade Unions Congress 2012) <www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 17 January 2020.

20 Martin Dawidowidz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 678.

21 UNGA Res. 25/2625 (1970) UN Doc A/RES/25/2625.

22 *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para 188.

23 ILC, 'Commentary to Art. 41 of the Draft articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its 53rd session', *Yearbook of the ILC* 2001, Vol. II, 114, para 5.

24 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (1971) (Advisory Opinion) ICJ Rep 16.

25 Ibid., paras 122, 124.

26 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] (Advisory Opinion) ICJ Rep 136, para 87. Arbitral Tribunal for Dispute over Inter-Entity

Despite the fact that the duty of non-recognition is well-entrenched both in theory and in practice, the exact contours of the duty's content remain unclear.[27] The *Namibia* opinion made it clear that the ambit of the prohibition includes the conclusion of treaties extending to unlawfully acquired territories since this would imply recognition of sovereignty over that territory. In international law the capacity of States to enter into agreements that apply within their territory is "an attribute of State sovereignty".[28] Thus, any claim by a non-recognised regime to treaty-making capacity in relation to territory under its control needs to be construed as a legal claim to sovereignty – which third parties are under an obligation not to recognise according to international law.[29] In this sense, extending the territorial scope of an agreement to an unlawfully acquired territory would certainly amount to a breach of a third party's obligation of non-recognition. However, although this particular aspect of the duty of non-recognition is fairly uncontested the same does not hold true for others. As Crawford observes:

> [W]hile some elements of the obligation of non-recognition are clear, such as the prohibition on diplomatic relations and conclusion of treaties, or invocation of treaties which recognise the unlawful regime as sovereign, beyond this, it is difficult to delineate any operative content to the obligation.[30]

In particular, it is open to question whether other types of cooperation with an unlawful regime, including the importation of products from settlements, would imply recognition of the unlawful regime's authority over the territory – thereby amounting to a violation of the duty of non-recognition.[31] According to

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Boundary in Brcko Area (Republika Srpska v Bosnia and Herzegovina), 14 February 1997, para 77. *Case concerning East Timor (Portugal v. Australia)* (Dissenting Opinion of Judge Skubiszewski) [1995] ICJ Rep 224, paras 125, 129. Dissenting Opinion of Judge Weeramantry, ibid., 139, 221 (viii). See also the practice mentioned in the commentary to Art. 41 of the Draft articles on the Responsibility of States for Internationally Wrongful Acts, fn 23, 114–115, paras 6–8.

27 Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in Christian Tomuschat and Jean-Marie Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Erga Omnes Obligations* (Martinus Nijhoff 2006) 104.

28 *Case of the S.S. "Wimbledon" (Britain et al. v Germany)* PCIJ Series A No 1, 14, 25.

29 Martin Dawidowicz, 'Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 267.

30 James Crawford (n 19) para 51. A number of judges disagreed with the majority opinion in *Namibia* exactly on the point of the precise content of the duty of non-recognition. For a detailed discussion see James Crawford, *The Creation of States in International Law* (Second Edition, Clarendon Press 2006) 165–167.

31 Cedric Ryngaert and Rutger Fransen, 'EU Extraterritorial Obligations with Respect to Trade with Occupied Territories: Reflections after the Case of *Front Polisario* before EU Courts' [2018] 2 *EWLR* 1, 16.

Moerenhout, the exportation of products from a settlement represents a claim of the non-recognised regime on the unlawfully acquired territory and, conversely, "the act of importation remains a legal act, which requires the stamp of approval from the importing state, which holds a sovereign power over its trade policy".[32] Thus, according to this line of argumentation, the importation of products into a third county's territory may be considered as implicit recognition of the unlawful regime's claim over the territory.[33] However, this view is far from uncontroversial. Some scholars consider the importation of products from settlements as falling outside the ambit of the duty of non-recognition altogether,[34] whereas others see importation as falling within the scope of the related but separate duty of not rendering aid or assistance in maintaining an illegal situation created by a serious breach of a *jus cogens* norm.[35]

The duty to respect international humanitarian law and the duty not to provide aid or assistance in the commission of an internationally wrongful act are also relevant in the context of establishing the obligations of third parties when they enter into economic relations with occupying powers. Still, difficulties persist in determining the scope of these duties as well as their applicability in practice. While Crawford opines that "it is doubtful that the obligation to ensure compliance with the Fourth Geneva Convention extends so far as to require any positive action on the part of individual States",[36] Dubuisson claims that the duty entails "that States are required to adopt reasonable measures which are in compliance with international law and which would effectively induce the State concerned to comply with international law".[37] Rutger Fransen's and Cedric Ryngaert's chapter deals with the question of importation by third parties of products derived from natural resources exploited in violation of the principles

32 Tom Moerenhout, 'The Consequence of the UN Resolution on Israeli Settlements for the EU: Stop Trade with Settlements' (EJIL:Talk! 2017) <www.ejiltalk.org/author/tommoerenhout/> accessed 17 January 2016.

33 Ibid. Note also that in Res. 2334 (2016), the UN Security Council expressly called upon all States "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967". UNSC Res 2334 (2016) UN Doc S/RES/2334, point 5.

34 See generally Eugene Kontorovich, 'Economic Dealings with Occupied Territories' [2015] 53 *Columbia Journal of Transnational Law* 584.

35 Commentary to Art. 41 of the Draft articles on the Responsibility of States for Internationally Wrongful Acts, fn 23, para 12. François Dubuisson, 'The International Obligations of the European Union and its Member States with regard to Economic Relations with Israeli Settlements' (Made in Illegality 2014), 41, <https://www.11.be/component/docman/doc_download/1546-made-in-illegality-rapport>. Crawford takes a middle position arguing that economic and commercial dealings between an unlawful regime and a third State

> may be considered as either a breach of the obligation of non-recognition … or they might be considered to amount to aid or assistance in the commission of an internationally wrongful act, contrary to articles 16 and 41(2) of the ILC Draft articles.

Crawford (n 19) para 84.

36 Crawford (n 19) para 45.

37 Dubuisson, (n 35) 31.

of occupation law. More particularly, their contribution focuses on the compatibility of such imports with the duty to ensure respect for international humanitarian law and the duty of non-assistance. Fransen and Ryngaert argue that the vague wording of the duty to ensure respect and the high complicity threshold required to trigger the duty of non-assistance mean that, in practice, it would be very difficult to engage the responsibility of third parties (such as the EU) for importing goods produced in violation of occupation law.

In the final chapter of this section, Eugene Kontorovich examines the legality of international trade with territories under belligerent occupation in light of both early and more recent practice. Kontorovich argues that the General Agreement on Tariffs and Trade (GATT) practice shows that the treaty allows States parties to extend their trade preferences to territories that they belligerently occupy. The chapter turns next to the examination of aspects of contemporary State practice including official advisories issued by States to their domestic firms concerning business in occupied territories, recent legislative efforts dealing with the question at bar and the conduct of business in such territories by government-owned firms. Kontorovich asserts that these aspects of State practice do not evidence the existence of a norm prohibiting business activity in occupied territories.

## 3 Setting the scene: the EU law perspective

The examination of the question at the heart of this volume, namely that of the legality of economic activities in occupied territories, from the vantage point of the EU is of particular importance since the EU maintains trade relations with most territories under prolonged occupation and many of those (Northern Cyprus, Crimea, Western Sahara, OPTs) are located in its immediate geographical neighbourhood. As a subject of international law, the EU remains bound by the international law framework governing these relations, and, in turn, its practice also informs and shapes the relevant framework. Furthermore, the difficulties associated with unilateral actions by Member States taken in order to enforce international law obligations in relation to trade with occupied territories – in the absence of EU law wide measures – underscore the need to examine the relevant EU law practice. The recent example of the Irish Control of Economic Activity Bill is a case in point. The Control of Economic Activity Bill'[38] was introduced to the Seanad (Ireland's upper house) in early 2018. The Bill essentially seeks to make the importation or sale of goods produced in settlements illegally established in occupied territories, the provision of certain services as well as the extraction of resources from an occupied territory a criminal offence.[39] Should the

38 Control of Economic Activity (Occupied Territories) Bill 2018, introduced by Senators Frances Black, Alice-Mary Higgins, Lynn Ruace, Colette Keheller, John G. Dolan, Grace O'Sullivan, and David Norris, (24 January 2018) <https://data.oireachtas.ie/ie/oireachtas/bill/2018/6/eng/initiated/b0618s.pdf>.

39 Ibid., 5.

Bill become law, Ireland will be the first EU Member State to criminalise trade with settlements. The objective of the Bill, as it is expressly stated therein, is to comply with Ireland's obligations under the IV Geneva Convention and under customary international humanitarian law.[40] At the same time, the main criticism levelled against the Bill is that it constitutes a measure that restricts trade unilaterally – thereby allegedly violating Ireland's obligations under EU law.[41] More particularly, the Irish government opposes the adoption of the Bill on the grounds of its alleged incompatibility with EU law which will – as the argument goes – expose Ireland to legal action not only by the European Commission but also by any private parties claiming to have been adversely affected thereby.[42] As a result, it is unlikely that the Bill will be enacted as law. The example of the Irish Bill illustrates the difficulties of reconciling a unilateral domestic measure purporting to secure compliance with a Member State's obligations under international law with EU law, a legal regime under which the exclusive competence to regulate external commercial policy has been conferred on the Union.[43] This example attests to and highlights the significance of examining whether the EU wide practice pertaining to economic activities with occupied territories comports with the international legal framework delineated earlier.

However, as seen earlier, the relevant international legal framework still remains to a certain extent nebulous. When this rather complicated framework is applied in the context of a *sui generis* international legal actor such as the EU, further difficulties and problems arise – especially in light of the fact that the EU has its own distinct set of rules regarding importation and labelling of products. Yet, this is not the only issue. The EU's approach to the question of economic dealings with occupied territories raises questions of consistency of its external action, legitimacy and, ultimately, questions pertaining to its identity as a global actor. The coming of age of the EU as a global actor has highlighted the need for consistency in its external action. Consistency, in this context, is viewed

40 Ibid., 3.

41 Statement by the Minister of State at the Department of Foreign Affairs and Trade (Deputy Helen McEntee), Debate on the Control of Economic Activity Bill: Report and Final Stages, Seanad Eireann Debate (5 December 2018) <www.oireachtas.ie/en/debates/debate/seanad/2018-12-05/27/> accessed 17 January 2020. See also Marie O'Halloran, 'Seanad Passes 'Historic' Bill to Ban Sale of Goods from Occupied Territories' (*Irish Times* 5 December 2018) <www.irishtimes.com/news/politics/oireachtas/seanad-passes-historic-bill-to-ban-sale-of-goods-from-occupied-territories-1.3721597> accessed 17 January 2020.

42 Statement by the Minister of State (n 41). See also Statement by the Minister of State at the Department of Foreign Affairs and Trade (Deputy Simon Coveney), Debate on the Control of Economic Activity Bill, Dail Eireann Debate (23 January 2019) <www.oireachtas.ie/en/debates/debate/dail/2019-01-23/25/> accessed 17 January 2020. Statement by the Minister of State at the Department of Foreign Affairs and Trade (Deputy Ciaran Cannon), Debate on the Control of Economic Activity Bill, Dail Eireann Debate (23 January 2019) <www.oireachtas.ie/en/debates/debate/dail/2019-01-23/25/> accessed 17 January 2020.

43 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 (TFEU), arts 3 and 207.

as a *conditio sine qua non* for the global effectiveness of EU foreign policy.[44] As a normative and political imperative, consistency implies that the EU's external action should be compatible with its own core values.[45] Art. 21(1) TEU provides that

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Furthermore, it implies that the Union values and principles shall be promoted in a consistent manner[46]; according to Art. 21(3) TEU: "The Union shall ensure consistency between the different areas of its external action and between these and its other policies". In this sense, consistency of external action is directly linked to the image of the EU as a credible and legitimate international actor.[47] In order to enhance this image, it is expected that the EU should avoid double standards and that pressures exerted by it on one external player should be consistent with pressures exerted on other external players.[48]

However, more recently, the EU's practice in relation to the conclusion of trade agreements covering occupied territories has increasingly challenged the narrative of 'normative power Europe'. Many NGOs and other civil society actors argue that the EU's economic dealings with occupying authorities are inconsistent with international law.[49] The EU has also been accused of adopting

44 Commission, 'Communication from the Commission to the European Council of June 2006, Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility' COM (2006) 278, 6.

45 Simon Duke, 'Consistency, Coherence and European External Action: The Path to Lisbon and Beyond' in Panos Koutrakos (ed), *European Foreign Policy* (Edward Elgar Publishing 2011) 28–29.

46 Pål Wrange and Sarah Helaoui, 'Occupation/Annexation of a Territory – Respect for International Humanitarian Law and Human Rights and Consistent EU Policy' (2015) <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2015)534995> accessed 17 January 2020.

47 Ian Hurd, 'Legitimacy and Authority in International Politics' [1999] 53 *International Organization* 379, 379–387. Joseph S. Nye, *Soft Power: The Means to Success in World Politics* (Public Affairs 2004) X.

48 Guy Harpaz, Normative Power Europe and the Problem of a Legitimacy Deficit: An Israeli Perspective [2007] 12 *European Foreign Affairs Review* 89, 97.

49 See for example the European Co-Ordination of Committees and Associations for Palestine, '"Made in Illegality" – STOP All Economic Relations with Illegal Israeli Settlements' (28 February 2014) <www.eccpalestine.org/made-in-illegality-stop-all-economic-relations-with-illegal-israeli-settlements/> accessed 17 January 2020. See also Western Sahara Resource Watch, 'EMMAUS Stockholm, Report: Label and Liability: How the EU Turns a Blind Eye to Falsely Stamped Agricultural Products Made by Morocco in Occupied Western

double standards – as its trade negotiations with Israel on the one hand and Morocco on the other evidence.[50]

Indeed, a comparison between the EU's approach to Palestine on the one hand, and to Western Sahara on the other hand, shows that there are glaring inconsistencies in the way in which the Union has treated these two occupied territories.[51] The EU has repeatedly stressed that it does not recognise Israel's sovereignty over the OPT and it has condemned the establishment and development of settlements therein.[52] Furthermore, the Union has entered into an agreement with the Palestine Liberation Organization (PLO). The EU-PLO Association Agreement aims to promote the economic and social development of the West Bank and the Gaza Strip and to encourage regional cooperation with a view to consolidating peaceful coexistence and economic and political stability.[53] Art. 73 of the EU-PLO Association Agreement states that it applies to the "territory of the West Bank and the Gaza Strip". It is noteworthy that the EU-PLO Agreement applies to the whole of the West Bank and the Gaza Strip – although PLO only has partial control of these territories.[54] By way of contrast, although the EU has, on various occasions, expressed concern about the prolonged nature of the Western Sahara conflict and its implications for security, respect for human rights and cooperation in the region,[55] it has been observed that its language is "rather muted".[56] The EU Annual Report on Human Rights and Democracy in the World 2014 states that Western Sahara is a "territory

Sahara' (18 June 2012) <www.vastsaharaaktionen.se/files/Label%20and%20Liability%20%20WSRW%20June%202012.pdf> accessed 17 January 2020.

50 Lorenzo Kamel, 'Is the EU Adopting a Double-Standards Approach toward Israel and the Palestinian Territories?' (*Opinio Juris*, 9 January 2014) <http://opiniojuris.org/2014/01/09/eu-adopting-double-standards-approach-toward-israel-palestinian-territories-part-1/> accessed 17 January 2020. Eugene Kontorovich, 'New EU/Morocco Fisheries Deal and Its Implications for Israel' (*The Jerusalem Post*, 9 December 2013) <www.jpost.com/Opinion/Columnists/New-EUMorocco-fisheries-deal-and-its-implications-for-Israel-334473> accessed 17 January 2020.

51 For a detailed analysis, see Eva Kassoti, 'The Legality under International Law of the EU's Trade Agreements Covering Occupied Territories: A Comparative Study of Palestine and Western Sahara' (2017) CLEER Working Paper No 2017/3.

52 Council conclusions on the Middle East Peace Process, 3166th Foreign Affairs Council Meeting, 14 May 2012, https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/foraff/130195.pdf. European Parliament Resolution of 5 July 2012 on EU policy on the West Bank and East Jerusalem (2012/2694[RSP]), http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0298&language=EN.

53 Art. 1(2) of the Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the PLO for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part [1997] OJ L187/3.

54 Christian Hauswald, 'Problems under the EC-Israel Association Agreement: The Export of Goods Produced in the West Bank and the Gaza Strip under the EC-Israel Association Agreement' [2003] 14 *EJIL* 591, 595.

55 EU Annual Report on Human Rights and Democracy in the World in 2014 (22 June 2015) <www.consilium.europa.eu/media/24484/st10152-en15.pdf> accessed 17 January 2020, 186.

56 Wrange and Helaoui (n 46) 43.

*contested* by Morocco and the Polisario Front"[57] – without making any reference to the legal status of Western Sahara as an occupied territory. While the text of the 2016 Annual Report (which was adopted in October 2017, namely after the delivery of the ECJ's *Front Polisario* judgment) is more carefully drafted stating that Western Sahara is a "non-self-governing territory, whose status remains the object of a negotiation process conducted under the auspices of the UN",[58] it still omits any reference to its status as an occupied territory. Overall, the EU has, so far, restricted itself to expressions of support to UN efforts to resolve the political impasse between the parties to the conflict,[59] which can be considered a very minimal approach towards the position adopted in relation to the comparable situation in Palestine.[60]

The EU's qualification of the legal status of Western Sahara is of particular importance in the context of its trade relations with Morocco. In this context, the Union has consistently upheld the view that Western Sahara constitutes a territory '*de facto* administered by Morocco'. In a series of Parliamentary questions querying Morocco's capacity to conclude agreements with the EU regarding the exploitation of the natural resources of the territory the Commission has steadfastly held to the view that Morocco is the *de facto* administering power of the territory and thus, it is able to conclude such agreements.[61] The same view

57 EU Annual Report on Human Rights and Democracy in the World in 2014 (n 55) 186. (Emphasis added).

58 EU Annual Report on Human Rights and Democracy in the World in 2016 (16 October 2017) <eeas.europa.eu/sites/eeas/files/annual_report_on_human_rights_and_democracy_in_the_world_2016_0.pdf> accessed 17 January 2020.

59 See the 2014 Draft Annual report from the High Representative for Foreign Affairs and Security Policy to the European Parliament, as endorsed by the Council on 20 July 2015, 11083/15, 23.

60 Marco Balboni, 'The EU's Approach to Western Sahara' (Multilateralism and International Law with Western Sahara as a Case Study, Pretoria, 4–5 September 2008) 1. See for example the Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards [2013] OJ C205/05, paras 1, 3 where the EU expressly affirms that it does not recognize Israel's sovereignty over the OPTs.

61 Answer given by Mr Borg on behalf of the Commission, Written Question E-0560/2006, 15 March 2006, <www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2006-0560&language=EN> accessed 17 January 2020. Joint Answer given by High Representative/Vice-President Ashton on behalf of the Commission, Written Questions E-0001004/11, P-001023/11, E-002315/11, 14 June 2011, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-001023&language=DE> accessed 17 January 2020. Answer given by Mr Çioloş on behalf of the Commission, Written Question E-006205/12, 29 August 2012, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-006205&language=EN> accessed 17 January 2020. Answer given by High Representative/Vice-President Ashton on behalf of the Commission, Written Question E-000235/14, 13 March 2014, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-000235&language=EN> accessed 17 January 2020. Joint Answer given by Vice President Mogherini on behalf of the Commission, Written Questions E-015222/15, E-015472/15, 4 February 2016, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-015472&language=EN> accessed 17 January 2020.

permeates the 2006[62] and 2013[63] Legal Opinions rendered by the Legal Service of the Parliament regarding the compatibility with international law of the 2006 EU-Morocco Fisheries Agreement[64] and the 2013 EU-Morocco Fisheries Protocol,[65] respectively. In both Opinions, the Legal Service of the Parliament referred to Morocco as the *de facto* administrative power of Western Sahara.[66] It is noteworthy that the 2018 Council Decision amending Protocols 1 and 4 to the EU-Morocco Association Agreement expressly characterises Western Sahara as a "non-self-governing territory, large parts of which are currently administered by Morocco".[67]

Before discussing the soundness of the EU's approach to the legal status of Western Sahara vis-à-vis Morocco from an international legal point of view, it is important at this juncture to highlight its significant political and legal ramifications. First, by designating Morocco as the '*de facto* administrative power' of Western Sahara and by omitting any reference to its status as an occupying power the EU has managed to enter into and maintain trade relations with Morocco without touching upon the thorny question of Moroccan sovereignty over the territory.[68] Second, the legal construct of Morocco as a '*de facto* administrative' – rather than an 'occupying' – power has important implications regarding its capacity to conclude treaties applicable to the territory and ultimately regarding its claim to sovereignty over the territory. In international law the capacity of States to enter into agreements that apply within their territory is "an attribute of State sovereignty".[69] In the context of non-self-governing territories,

62 Legal Service of the European Parliament, Legal Opinion: Proposal for a Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Compatibility with the principles of international law, SJ-0085/06, D(2006)7352, 20 February 2006 ('2006 Legal Opinion').

63 Legal Service of the European Parliament, Legal Opinion: Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the fisheries Partnership Agreement in force between the two parties, SJ-0665/13, D(2013)50041, 4 November 2013 ('2013 Legal Opinion').

64 Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco [2006] OJ L141/4.

65 Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and the financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco [2013] OJ L328/2.

66 2006 Legal Opinion, (n 62) para 37. 2013 Legal Opinion, (n 63) paras 12, 17.

67 Council Decision of 16 July 2018 regarding the signature, on behalf of the European Union, 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 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, [2018] OJ L310/1, point (3).

68 As acknowledged both by the Council and the Commission: "The Kingdom of Morocco would never have accepted the [Liberalization] agreement if the EU institutions had included in it a clause explicitly excluding its application to Western Sahara". Case C-104/16 P *Council v Front Polisario*, EU:C:2016:677, Opinion of Advocate General Wathelet, para 300.

69 *Case of the S.S. Wimbledon* (n 28) at 25.

there is evidence to suggest that sovereignty remains with the administering State.[70] The ICJ dealt with the question of sovereignty over non-self-governing territories in the *Right of Passage* case and it clearly accepted that the administering power retained sovereignty over the territory in question.[71] Furthermore, in its Advisory Opinion on *Western Sahara*, the Court clarified that the request, pertaining to the future status of the non-self-governing territory in question, did not relate to "existing territorial rights or sovereignty over the territory".[72] Thus, in principle, the legal construct of Morocco as 'administrative power' of Western Sahara would allow viewing Morocco as having the requisite degree of sovereignty to conclude agreements applicable to the territory.

However, the EU's qualification of the legal status of Western Sahara as a territory '*de facto* administered' by Morocco is questionable on a number of grounds.[73] First, the concept of '*de facto* administrative power' does not correspond to any legal category under international law. In other words, the concept simply does not exist as a matter of positive law.[74] The status of 'administering power' is a legal status granted by the UN and in the absence of such recognition a State cannot proclaim itself to be one.[75] Spain's attempt to repudiate its status as an administrative power of Western Sahara in 1976[76] was without legal effect since this status was conferred upon Spain by the UN and "constitutes a status which Spain alone could not have unilaterally transferred" – as confirmed in the 2002 Legal Opinion issued by the UN Under-Secretary General for Legal Affairs and Legal Counsel, Hans Corell ('Corell Opinion')[77] and also acknowledged by Advocate General Wathelet in his Opinion in the *Front Polisario* case.[78] The UN still recognises Spain as the *de jure* administering power of Western

70 Crawford (n 30) 613–615. Vera Gowland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Case of Southern Rhodesia* (Martinus Nijhoff 1990) 157.

71 *Case concerning Right of Passage over Indian Territory* (Merits) (1960) ICJ Rep 6, 39.

72 *Western Sahara* (Advisory Opinion) (1975) ICJ Rep 12, para 43. See also *Case concerning East Timor (Portugal v. Australia)* (Dissenting Opinion of Judge Skubiszewski) [1995] ICJ Rep 224, para 146. *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Counter-claims) [2002] ICJ Rep 303, para 209.

73 For a detailed discussion, see Eva Kassoti, 'The EU and Western Sahara: An Assessment of Recent Developments' [2018] 43 *ELR* 751, 754–757.

74 Vincent Chapaux, 'The Question of the European Community-Morocco Fisheries Agreement' in Karin Arts and others (eds), *International Law and the Question of Western Sahara* (International Platform of Jurists for East Timor 2009) 223.

75 Arts. 73 and 74 of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. Ibid., 222.

76 Letter dated 26 February 1976 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, UN Doc A/31/56.

77 Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, Hans Corell, addressed to the President of the Security Council, UN Doc S/2002/161, para 6.

78 Opinion of AG Wathelet (n 68) paras 188–191.

Sahara[79] and Spain has relied on this status to extend its international jurisdiction in criminal matters to crimes committed in Western Sahara.[80]

From an international legal perspective, there is little doubt that Western Sahara is not only a non-self-governing but also an occupied territory since Morocco's presence therein meets the objective threshold of occupation under international humanitarian law, namely demonstration of effective authority and control over a territory to which the occupying State holds no sovereign title.[81] The UN General Assembly has twice characterised the presence of Morocco in Western Sahara as 'belligerent occupation'[82] and a number of EU Member States describe Western Sahara as 'occupied'.[83] The African Union also considers Western Sahara to be under occupation by Morocco.[84] It needs to be noted that both a South African court[85] and the referring court in the *Western Sahara Campaign UK* case[86] also subscribe to the same view.

This exposition shows that there are significant discrepancies in how the EU has approached the question of economic activities in the occupied Palestine and in the occupied Western Sahara, respectively. These discrepancies arguably undermine the image of the EU as a global actor with a particular commitment to international law and raise questions in relation to the Union's economic relations with other occupied territories.

79 Report of the Secretary General, 'Information from Non-Self-Governing-Territories transmitted under Article 73e of the Charter of the United Nations'(2019) UN Doc A/74/63.

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

81 See Art. 42 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War (The Hague Regulations) (n 2). "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised". See also Christine Chinkin, 'Laws of Occupation' (Conference on Multilateralism and International Law with Western Sahara as a case study, Pretoria, 4–5 December 2008). Benvenisti (n 1) 43.

82 UNGA Res 34/37 (21 November 1979) UN Doc A/RES/34/37, para 5; UNGA Res 35/19 (11 November 1980) UN Doc A/RES/35/19, para 3.

83 See the statements cited in Kontorovich (n 34) 612, fn 147.

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

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

86 Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* [2018] EU:C:2018:1, Opinion of AG Wathelet, para 246.

In the first chapter of this section, Nikolas Kyriacou examines the draft direct trade regulation which was intended to allow direct trade between Northern Cyprus and the EU. The chapter identifies the central legal challenges facing the EU with respect to establishing trade relations with Northern Cyprus and inquires into the nature of the EU's obligations under both international and EU law. The chapter also examines whether and to what extent the recent *Western Sahara Campaign UK* judgment affects the potential for establishing trade relations between the EU and Northern Cyprus. Kyriacou argues that the Commission's proposal for direct trade with Northern Cyprus illustrates one of the main conundrums of establishing and maintaining trade relations with a territory under prolonged occupation. On the one hand, such measures are intended to end the economic isolation of those communities. On the other hand, public international law requires the non-recognition of illegal situations and refraining from assisting or aiding regimes that purport to alter the international status of a geographical area. The chapter concludes by stressing that the boundaries between the permissible measures intended to benefit local populations and the obligation to abide by the duty not to assist an illegal regime are often blurred in practice.

In the context of the debate regarding the EU's approach towards different occupied territories, questions of importation and labelling of settlement products are of paramount significance. In its 2019 judgment in *Psagot*, the CJEU ruled that products originating from the Israeli settlements must bear that designation of provenance according to EU law.[87] This ruling highlights the stark contrast in the treatment of products originating from OPT on the one hand and the occupied Western Sahara on the other hand. As far as the latter are concerned, the Union has thus far shown political disinterest in ensuring that products originating from the occupied Western Sahara are labelled as such.[88] Olia Kanevskaia's chapter reviews origin-related measures adopted by the EU against territories whose military and economic occupation was openly condemned internationally. By examining the EU's trade agreements with States that claim sovereignty over disputed territories, it examines which rules of origin apply to products imported into the EU from the Israeli settlements, Turkish Republic of Northern Cyprus, Western Sahara and Crimea. In particular, this chapter focuses on the conditions that exporters have to fulfil in order to bring their products into the EU under preferential trading rules. The findings of this chapter suggest that the EU lacks coherence both in its policy and practice towards trade with disputed territories, which, in turn, undermines the effectiveness of its measures and weakens the EU's position in international arena.

An important parameter in assessing the relevant EU practice is the CJEU's approach to economic dealings with occupied territories. As mentioned earlier,

87 Case C-363/18 *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* [2019] ECLI:EU:C:2019:954.

88 Kassoti (n 51) 54.

respect for international law is now expressly a core constitutional norm – something that has been acknowledged by the Court itself.[89] The EU's external projection of itself as an entity firmly committed to the strict observance and development of international law generates the expectation that its Courts also espouse something of this internationalist approach.[90] Thus, the way in which the EU courts have treated in their practice questions pertaining to economic activities in occupied territories is highly relevant in this context. Jed Odermatt's chapter is dedicated to exploring this question. The chapter begins by discussing the EU's international legal obligations towards areas of contested sovereignty and argues that the lack of a consistent policy and clear understanding of what these obligations entail is at the core of many of the legal problems ensuing therefrom. The chapter continues by discussing the two main cases that have come before the CJEU dealing with Western Sahara, namely the *Front Polisario* and *Western Sahara Campaign UK* cases, with a particular focus on the way the Court approached issues of international law in those two cases. Odermatt argues that the Court's narrow framing of the legal issues in the case allowed it to avoid some of the most politically sensitive questions raised in these proceedings, but also that the Court has mostly failed to give guidance to the EU institutions as it seeks to maintain economic relations with Morocco in a way that conforms with its obligations under international and EU law.

In the final contribution of this section, Pål Wrange discusses the aftermath of the Court's judgment in *Front Polisario* and, more particularly, the Commission's proposal amending the EU-Morocco Association Agreement[91] in order to enable the importation of fishery and agricultural products from the occupied Western Sahara. The chapter examines how international law arguments were used by the Commission in order to argue in favour of the continuation of trade relations with the territory under the auspices of the Association Agreement, a position that is difficult to reconcile with the obligations incumbent upon the EU on the basis of international law. The chapter identifies the main legal problems of extending the Agreement to expressly cover the territory of Western Sahara and shows how the Commission attempted to tackle (or circumvent) them in its proposal. The chapter concludes by arguing that the way in which the Commission chose to frame the relevant legal issues and its strategic and selective use of international law seems to be both normatively dubious and politically motivated.

89 Case C-366/10 *Air Transport Association for America v. Secretary of State for Energy and Climate Change* [2011] EU:C:2011:864, para 101 and Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v. Kadi* [2013] EU:C:2013:518, para 103.

90 Gráinne De Búrca, After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? [2013] 20 *Maastricht JECL* 168, 183.

91 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 L70/2.

## 4 Setting the scene: the business and human rights perspective

The debate on the legality of economic activities in occupied territories also involves an important business and human rights angle. In October 2017, Transavia, a low-budget airline, attracted considerable criticism for launching a new, direct route connecting Paris to Dakhla in the occupied Western Sahara.[92] More recently, in January 2019, Amnesty International released a report showing how digital tourism companies such as Airbnb, Booking.com, Expedia and TripAdvisor facilitate the entrenchment of Israel's unlawful presence in the OPTs by advertising listings therein.[93] An important development in this field came in March 2016 when the UN Human Rights Council requested the UN High Commissioner for Human Rights to produce a database that lists corporate actors that have directly or indirectly facilitated the growth of Israeli settlements in the OPT through their economic activity therein.[94] According to the High Commissioner, 206 companies have been initially 'screened' for inclusion in the database.[95] While there are resources-constraints and political manoeuvres which have delayed the publication of the database thus far, its release is expected imminently.[96]

The 2013 report by the international fact-finding mission on Israeli settlements is key to understanding the different types of business activities that may directly or indirectly enable and facilitate the construction and growth of settlements.[97] Both the UN Human Rights Council, in its resolution establishing a database of business enterprises engaged in economic activities linked to the Israeli settlements, and the UN High Commissioner for Human Rights, in his 2018 report on the topic expressly refer to the list of activities detailed in paragraph 96 of the

92 Eugene Kontorovich, 'Who Else Profits: The Scope of European and Multinational Business in Occupied Territories' [2017] 1 *Kohelet Policy Forum* <https://daks2k3a4ib2z.cloudfront.net/59f05a891481a800018f8f07/5a01d2f3240da900013da181_WhoElseProfits_online> accessed 17 January 2020.

93 Amnesty International, 'Destination: Occupation – Digital Tourism and Israel's Illegal Settlements in the Occupied Palestinian Territories' (2019) <www.amnesty.org/download/Documents/MDE1594902019ENGLISH.PDF> accessed 17 January 2020.

94 UN Human Rights Council Res 31/36 (2016) UN Doc A/HRC/RES/31/36, para 17.

95 Report of the United Nations High Commissioner for Human Rights,

> Database of all business enterprises involved in the activities detailed in paragraph 96 of the report of the international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian territory, including East Jerusalem.
>
> (26 January 2018) UN Doc A/HRC/37/39, para 19.

96 Ibid., para 26.

97 UN Human Rights Council, 'Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem' (07 February 2013) UN Doc A/HRC/22/63, para 96.

2013 report and use it as a starting point for their own analysis.[98] In this light, it is at least arguable that the list of business activities provided therein creates an authoritative reference that may be invoked against companies in all contexts of prolonged occupation.[99]

Six of the listed 10 activities are explicitly linked to the settlements. These include: the supply of equipment and materials facilitating the construction and the expansion of settlements and the wall, and associated infrastructures; the supply of surveillance and identification equipment for settlements, the wall and checkpoints directly linked with the settlements; the supply of security services, equipment and materials to enterprises operating in settlements; the provision of services and utilities supporting the maintenance and existence of settlements, including transport; banking and financial operations helping to develop, expand or maintain settlements and their activities, including loans for housing and the development of businesses; use of benefits and reinvestments of enterprises owned totally or partially by settlers for developing, expanding and maintaining the settlements.[100] The remaining four refer to activities that, while not geographically connected to settlements, form part of the processes that enable and support the establishment, expansion and maintenance of settlers' communities in the occupied territory. These include: the supply of equipment for the demolition of housing and property, the destruction of agricultural farms, greenhouses, olive groves and crops; the use of natural resources, in particular water and land, for business purposes; pollution and the dumping of waste in or transfer to villages of the people under occupation; captivity of the financial and economic markets of the people under occupation as well as practices that disadvantage their enterprises, including through restrictions on movement, administrative and legal constraints.[101] According to the UN High Commissioner for Human Rights, the direct or indirect involvement of businesses in settlement activities extends across all main industries and sectors, including the banking industry, the tourism industry, the private security industry, the technology industry, the construction and demolition industries, the real estate industry, the extractive industry, the telecommunications industry, the agricultural industry, the transportation industry, the manufacturing industry and others.[102]

Still the legal framework governing the lawfulness of private actors' economic activities in occupied territories remains a moving battleground. Can private corporations be held legally accountable for their involvement in illegal settlement enterprises? Or, is this accountability merely the result of public outrage and consumer boycotts stirred by as yet unenforceable legal claims? At this point in time, there is little evidence to suggest that national or international courts have

98 UN Human Rights Council Res 31/36 (2016) (n 94) para 17. Report of the UN High Commissioner for Human Rights (n 95) para 3.

99 Kontorovich (n 92) 5.

100 UN Human Rights Council Res 31/36 (2016) (n 94) para 96.

101 Ibid.

102 Report of the UN High Commissioner for Human Rights (n 95) paras 46–47.

recognised a specific legal duty stemming from international law bearing upon corporations pertaining to their activities in occupied territories.[103] The prohibition of transfer of an occupying power's population to the occupied territory (enshrined in Art. 49(6) of IV Geneva Convention), the principle of usufruct, the obligation to respect the right to self-determination and the obligation to respect the right to permanent sovereignty over natural resources are all addressed to – and thus, create obligations for – States. Similarly, there is little evidence to support the proposition that international criminal law, as it currently stands, recognises the criminal liability of corporations.[104]

Nevertheless, despite the absence of court decisions recognising an international corporate criminal or civil liability for economic activities conducted by businesses in occupied territories, activists and academics have started to systematically invoke the unanimous endorsement by the Human Rights Council of the United Nations Guiding Principles on Business and Human Rights (UNGPs) to claim that businesses bear a responsibility to respect human rights entailing not to engage in economic activity linked to illegal settlements in occupied territories. Thus, Daria Davitti's chapter examines the standards enshrined in the UNGPs to identify the scope of the obligations vested upon a company's host state, and of the responsibilities of the companies themselves using as a case-study Western Sahara. By taking Western Sahara as its analytical context, the chapter focuses first on the enabling role played by business actors involved in this territory, especially in terms of entrenching the occupation and hindering the self-determination of the people of Western Sahara, the Sahrawi. The chapter then analyses the relevance of the UNGPs and its three-pillar model to understand their operational applicability to Western Sahara as well as to other situations of prolonged occupation. Davitti's chapter focuses in particular on ascertaining whether and how heightened obligations of the home states and heightened responsibility of the companies themselves may offer a route towards the prevention of, and redress for, human rights abuses by business actors in such contexts. The chapter by Antoine Duval also engages with the impact of the UNGPs on the discussion surrounding business activities linked to settlements in occupied territories. His chapter focuses on a detailed case study of the dispute that opposed the Palestinian Football Association (PFA) to the Israeli one over the fate of six Israeli football clubs located in settlements. Human Rights Watch and the PFA argued that FIFA violated its commitments to abide with internationally recognised human rights as well as FIFA law by allowing this arrangement. The case is an interesting opportunity to study in action the (limited) impact of the UNGPs on the practice of corporations (or in this case a Swiss association) and to reflect on the business and human rights strategic turn taken by the discussion on the economic activities of businesses in the OPTs.

103 For a detailed discussion, see Eva Kassoti, 'Doing Business Right? Private Actors and the International Legality of Economic Activities in Occupied Territories' [2018] 7 *CILJ* 301.

104 James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 80.

Finally, an often-neglected aspect of the debate on economic activities in occupied territories relates to the role of investment tribunals adjudicating claims relating to such territories. Sebastian Wuschka's contribution aims to remedy this gap. Wuschka's chapter examines whether investment arbitration can serve as a means to hold the occupying State accountable for its conduct towards foreign investors and investments. The chapter begins by outlining the legal challenges that investment tribunals face when tasked to hear claims involving occupied territories. Next, it evaluates the broader consequences that investment tribunals' decisions may have for the territorial conflict at hand. Wuschka's chapter concludes by stressing that investment arbitration may prove a useful tool for private actors to exert pressure on the occupying State for the purpose of preventing a situation of prolonged occupation due to the significant amount of damages involved.

## 5 Conclusions

This volume arose from a workshop that took place at the T.M.C. Asser Institute in October 2018. The sensitive nature of the questions addressed in the workshop, as well as in this volume, presented a number of challenges for us, as organisers of the workshop and editors of this book, that went well beyond the mundane difficulties normally associated with organising an academic event. These challenges attest to the importance, complexity and topicality of the issues addressed here. The question of economic activities in occupied territories is a multifaceted, complex and politically charged one since it affects the everyday lives of numerous fellow human beings who live under occupation or have fled or been expelled from their homeland as a result thereof. We hope that this edited volume will bring us a step closer to answering some of the many aspects of the still nebulous question of the legality of economic activities in territories under occupation. More importantly, we hope that this volume will highlight the importance of rekindling the legal debate on this crucial question, a debate that often triggers emotional responses – whichever side of the fence one sits on. Still, the legal questions surrounding the topic demand scholarly engagement and deserve serious dispassionate exchanges of legal arguments and empirical findings. We hope that this book will provide a thorough basis to fuel future discussions on this matter and to question the scope of responsibility of various actors, States, international organisations, corporations, associations, consumers and citizens for their economic behaviour in the face of occupation.

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# 1 Exploiting natural resources in occupied territories – the conjunction between *Jus in Bello*, *Jus ad Bellum* and international human rights law

*Ka Lok Yip*

## 1 Introduction

This chapter examines the relationship among *jus in bello*, *jus ad bellum* and international human rights law in the context of the exploitation of natural resources in territories under belligerent occupation. This chapter is divided into three parts. The first part delineates whether, and if so to what extent, *jus in bello* allows an occupant to seize or administer different types of property in occupied territories and whether and how this may extend to the exploitation of natural resources. The second part of this chapter re-examines the relationship between *jus ad bellum* and *jus in bello* with reference to the exploitation of natural resources by an occupant in accordance with *jus in bello* in territories occupied in violation of *jus ad bellum*. By critically reviewing doctrinal debates and jurisprudence, the chapter demonstrates that the allowance under *jus in bello* for the use of force involved in the exploitation of natural resources in occupied territories cannot undo the prohibition on the same use of force in international relations under *jus ad bellum*. The third part of this chapter examines the occupant's obligations under international human rights law with a focus on the right to self-determination in the context of occupation and argues that such obligations cannot be subsumed under either *jus in bello* or *jus ad bellum* or both, but have their own irreducible core content.

## 2 Jus in Bello

The most explicit legal regulations of the exploitation of natural resources in occupied territories are contained in the body of international law commonly known as *jus in bello*, more specifically, the regulations annexed to the Convention (IV) respecting the Laws and Customs of War on Land[1] (the 'Hague

1 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) UKTS 10.

Regulations'). Section III of the Hague Regulations, entitled 'Military Authority over the Territory of the Hostile State' sets out different provisions allowing an occupant to seize or administer property that could encompass different forms of natural resources.

In relation to private property, Article 52 of the Hague Regulations forbids '[r]equisitions in kind … except for the needs of the army of occupation'. Even when requisitions in kind are allowed, the provision imposes further requirements: the requisitions must be proportional to the resources of the country, must not involve the inhabitants in military operations against their own country, must be demanded on the authority of the commander in the locality occupied and must be compensated for. The requisition of land, as an example of natural resources, could potentially fall within the scope of regulation of Article 52 of the Hague Regulations if the land is privately owned, as is often the case. In addition, Article 53 of the Hague Regulations allows for the seizure of 'munitions of war', even if they are private property, on the condition that they be restored and compensation fixed when peace is made. To the extent that any privately owned natural resources qualify as 'munitions of war', their seizure could potentially fall within the scope of regulation of Article 53 of the Hague Regulations.

In relation to public property, the Hague Regulations provide for different treatments depending on the types of property. For 'public buildings, real estate, forests, and agricultural estates', Article 55 of the Hague Regulations provides for the occupying State to act as their 'administrator and usufructuary' and obliges them to 'safeguard the capital of these properties, and administer them in accordance with the rules of usufruct'. For 'cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State', Article 53 of the Hague Regulations allows the army of occupation to take possession of them if they 'may be used for military operations'. In addition, Article 53 of the Hague Regulations also allows publicly owned 'munitions of war' to be seized. It is generally agreed that natural resources, so far as they are publicly owned, would fall within the scope of Article 55 of the Hague Regulations.[2] However, certain natural resources such as underground minerals or plants may be regarded as 'movable property' under Article 53 of the Hague Regulations once extracted or severed from the ground[3] and therefore they fall outside the scope of Article 55 of the Hague Regulations for no longer being appurtenant to the real estate.[4] Nonetheless, the extraction of these natural resources is still subject to the rules of usufruct pursuant to Article 55 of the Hague Regulations and an occupant with no right to these natural resources cannot create such right by simply extracting or severing them from the ground and converting them into

2 Yutaka Arai, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (BRILL 2009) 209.

3 Ibid., 211.

4 Edward R Cummings, 'Oil Resources in Occupied Arab Territories under the Law of Belligerent Occupation' [1974] 9 *The Journal of International Law and Economics* 558.

movables.[5] Some however seek to characterise oil, even when it is underground, as 'movable property' for the purpose of Article 53 of the Hague Regulations because of its similar physical state before and after being drilled from the ground (in contrast to other types of underground minerals).[6] This argument has not however been accepted in jurisprudence.[7] Nor has it been accepted that underground oil has 'a sufficiently close connexion with direct military use to bring it within the meaning of "munitions-de-guerre" in Article 53'.[8]

The significance of determining whether the relevant natural resources fall within the scope of Article 55 or Article 53 of the Hague Regulations is that the rules of usufruct referred to in Article 55 differ substantively from the criteria in Article 53 allowing the taking of possession of movable property or the seizure of war munitions. The concept of usufruct originates from Roman law and essentially allows a person to enjoy the fruits of property on the condition that the property itself is left unimpaired.[9] For instance, a usufruct of an apple tree would allow the beneficiary to eat any apples produced by that tree. However, a usufructuary is not entitled to alienate the subject matter of the usufruct; he cannot even alienate the usufruct.[10]

The application of the rules of usufruct in the context of military occupation has caused serious controversies. Following the Israeli occupation of the Abu Rudeis oil fields in the Sinai peninsula after the Six-Day War, Israel took control of and operated the oil production facilities, produced oil for domestic consumption and for sale and used the proceeds to pay for the occupation of the territory and other costs. While some accepted that Israel could use the proceeds of oil production from existing wells to cover its costs of occupation on the basis of Article 55 of the Hague Regulations,[11] a General Assembly resolution declared that 'all measures undertaken by Israel to exploit the … natural resources of the occupied Arab territories are illegal'.[12] Another controversy centred on Israel's opening of new oil wells. Israel argued that the discovery of additional reserves

5 Ibid., 559.

6 Yoram Dinstein, 'The International Law of Belligerent Occupation and Human Rights' [1978] 8 *Israel Yearbook on Human Rights* 104, 130.

7 per Whyatt C.J. in Singapore, Court of Appeal, N.V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission, 13 April 1956, 23 ILR 810, 822 and 824 ('*de Bataafsche* case'). See also Cummings (n 4) 577.

8 *de Bataafsche* case (n 7) 823.

9 As Justinian used to say *ius alienis rebus utendi fruendi salva rerum substantia* (Digest VII.I.I).

10 See Barry Nicholas and Ernest Metzger, *An Introduction to Roman Law* (Oxford University Press 1975) 146. Buckland concluded that the law of usufruct is substantially the same in Roman, modern European and US law; see W W Buckland, 'The Conception of Usufruct in Classical Law' [1927] 43 *Law Quarterly Review* 326.

11 As an example, see the US State Department Memorandum, which acknowledges that the occupying power can 'use, requisition, seize or destroy natural resources within the limits of what is required for the army of occupation and the needs of the local populace'; see Memorandum of Law, ILM 16 (1977), 703.

12 UNGA Res 3175 (1973) UN Doc A/RES/3175, passed by 90 votes to 5, with 27 abstentions. The resolution specifically referred to 'international conventions and regulations, especially the Fourth Geneva Convention, concerning the obligations and responsibilities of the occupying

and the opening of new wells enhanced the value of the overall asset, thereby coming within the allowance under Article 55 of the Hague Regulations, the sole purpose of which was, according to Israel, to prevent waste or destruction of the asset.[13] Others, however, argued that a usufruct does not entitle an occupant to enjoy something not previously exploited.[14] Similar debates recurred in the US/UK occupation of Iraq in 2003.[15]

Despite the limited instances of state practice supported by clear *opinion juris*, the primary objection to the contention that Article 55 of the Hague Regulations can be used as a basis for exploiting oil reserves is that the concept of usufruct requires that the asset subject to the usufruct should remain unimpaired. It is difficult to argue that underground minerals such as oil are unimpaired by their systematic exploitation as an economic activity. In the past, some jurists have argued that the Roman concept of usufruct allowed an occupier to mine coal, and hence that principle can be extended to allow the exploitation of underground minerals.[16] Yet this argument is misconceived because the Romans believed that coal mines, like marble, gold and silver mines, were inexhaustible (and, given the technology then prevailing, mines were *practically* inexhaustible) while we know today that these mines are in reality exhaustible. Therefore, the better view is that a usufructuary should not be entitled to exploit underground minerals.[17]

The exploitation of public land itself, as a type of natural resources whose nature differs from that of underground minerals in that it cannot be 'exhausted' in the same sense, poses a different set of questions. In 1981, when Israel proposed to build a canal through the Gaza Strip to link the Mediterranean and Dead Sea, the Supreme Court of Israel held that:

> Long-term fundamental investments [the building by the occupying forces of highways] in an occupied area [in the course of a prolonged occupation] bringing about permanent changes that may last beyond the period of the military administration are permitted if required for the benefit of the local population – provided there is nothing in these investments that might introduce an essential modification in the basic institutions of the area.[18]

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Power' in the preamble. See also Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 2008) 152–156.

13 See 'Israeli Ministry of Foreign Affairs Memorandum of Law on the Right to Develop New Fields in Sinai and the Gulf of Suez' [1978] 17 *ILM* 432.

14 There is considerable support for this proposition in, *inter alia*, Roman, French, Italian and Islamic law: see Cummings (n 4) 563, 565. Cummings pointed out that both US and British War Manuals only permitted the working of mines that were already open.

15 Arai (n 2) 214–215.

16 J H W Verzijl, *International Law in Historical Perspective* (Martinus Nijhoff Publishers 1973) 578.

17 See further Brice M Clagett and O Thomas Johnson, 'May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?' [1978] 72 *American Journal of International Law* 558, 568. See also Cummings (n 4) 553.

18 *A Teachers' Housing Cooperative Society v The Military Commander of the Judea and Samaria Region and Others*, HC 393/82, (1982) 14 *Israel Yearbook on Human Rights*, 301.

However, the British representative at the United Nations, speaking on behalf of the European Economic Community ('EEC'), objected to the proposal as follows:

> The plan, as announced by the Israeli Government would involve construction work across the Gaza Strip. The Ten [members of the EEC] consider that under general international law, and with reference to the Fourth Geneva Convention, such construction and alteration of property would exceed Israel's right as an occupying power. Under international law, an occupant exercises only a temporary right of an administration in respect of territory occupied by it. The proposed canal can in no way be considered an act of mere administration.[19]

This more restrictive reading of the rules of usufruct implicitly characterises the occupant as a quasi-fiduciary, acting in the interests of those in the territory.[20] Accordingly, even if the natural resource in question can be considered 'unimpaired' by the exploitation, the occupant still cannot exploit it in such a way as to profit from its position by recovering more than the costs of occupation and the provision for the local population.[21]

Whether the natural resources concerned are private or public,[22] the provisions for their use or seizure by the occupying power under the Hague Regulations do not extend to their appropriation for private and personal use, which amounts to pillage,[23] prohibited by both Article 47 of the Hague Regulations[24] and Article 33 of the later Fourth Geneva Convention.[25]

In sum, *jus in bello* applicable in occupied territories requires that the exploitation of public immovable natural resources must leave the resources unimpaired, that the occupant must not profit thereby and that the exploitation of privately owned natural resources must be for the needs of the army of occupation.

19 Geoffrey Marston, United Kingdom Materials on International Law 1981, *British Yearbook of International Law* (1981) 515, 516.

20 This seems to be uncontested. The United States and United Kingdom have stated on numerous occasions that the oil of Iraq belongs to the people of Iraq and that it will be used for their benefit. See for example the Joint Statement of George Bush and Tony Blair of 8 April 2003 that Iraqi oil 'represents the patrimony of the people of Iraq, which should be used only for their benefit'.

21 As Jessup stated, 'if the occupant acts in good faith for the management of the community under war conditions and not for his own enrichment, and if the rights of the individual owner under local law are respected, the occupant's action has a solid basis in law'. See Philip C Jessup, 'A Belligerent Occupant's Power over Property' [1944] 38 *American Journal of International Law* 457, 461.

22 Jean Pictet (ed), *Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 226–227.

23 Elements of Crimes for the ICC, Pillage as a war crime (ICC Statute, Article 8(2)(b)(xvi) and (e)(v)).

24 Art 47 of the Hague Regulations.

25 Art 33 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

Furthermore, the exploitation of any natural resources, public or private, must not be for private, personal use. The exploitation of natural resources in occupied territories would need to comply with all these rules in order to comply with *jus in bello*.[26] The violation of these rules would not only entail state responsibility for the occupant but also criminal responsibility for the individuals concerned,[27] either through the loss of combatant immunity under relevant domestic criminal law[28] or, where the violation is serious, by incurring liability for war crimes.[29]

Yet, does the full compliance with these *jus in bello* rules ensure the international legality of the exploitation of natural resources in occupied territories? The rest of this chapter presents a negative answer to this question by examining two other bodies of international law that, although not explicitly addressing the treatment of property in occupied territories, contain norms that could potentially be violated by the exploitation of natural resources in occupied territories.

## 3 Jus ad bellum

*Jus ad bellum* has been a much neglected body of international law in the context of occupation, under the shadow of a grave misconception about the meaning of the 'separation between *jus ad bellum* and *jus in bello*'. The idea that *jus in bello* applies independently *of jus ad bellum* is relatively uncontroversial,[30] leaving aside momentarily the moral debates among different schools of just war

26 'The Articles of the Hague Regulations . . . are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies a territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations'. US Military Tribunal, Nuremberg, In re Krupp and Others, Judgment of 30 June 1948, (1948) 15 AD 620, Case No. 214, 622.

27 Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law' 84 *International Review of the Red Cross* 401, 402.

28 For the views that seem to treat *jus in bello* itself as the source of combatant immunity, see Knut Ipsen, 'Combatants and Non-Combatants' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Third Edition, OUP 2013) 82; Roman Anatolevich Kolodkin, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction' (2010) UN Doc A/CN.4/631, para 86. This possibility has also been considered in Richard Baxter and others, *Humanizing the Laws of War* (Oxford Scholarship Online 2013) 58–72, 62–63. For the views that combatant immunity is a result of sovereign immunity subject to compliance with *jus in bello*, see Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' [1943] 31 *California Law Review* 530, 548–549; Louise Doswald-Beck, 'Unexpected Challenges: The Increasingly Evident Disadvantage of Considering International Humanitarian Law in Isolation' [2012] 11 *Santa Clara Journal of International Law* 1, 17–18; Hazel Fox and Philippa Webb, *The Law of State Immunity* (Third Edition, Oxford International Law Library 2013) 593.

29 Rule 156 in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (ICRC and Cambridge University Press 2005).

30 Adam Roberts, 'The Principle of Equal Application of the Laws of War' in David Rodin and Henry Shue (eds), *Just and Unjust Warriors : The Moral and Legal Status of Soldiers* (OUP 2008).

theorists.[31] But this relatively uncontroversial idea is often misappropriated as support for the mightily controversial proposition that just because something is legal under *jus in bello*, it cannot be illegal under *jus ad bellum*. This section exposes this misappropriation and demonstrates that activities allowed under *jus in bello*, such as the exploitation of natural resources in occupied territories in compliance with the stringent rules examined in the last section, could still potentially violate *jus ad bellum* to the extent that these activities involve the prohibited use of force in international relations. It does so by uncovering three misconceptions regarding the separation between *jus ad bellum* and *jus in bello*: that they apply at different periods of time, that they apply to different acts and that they apply at different normative planes, with *jus in bello* being the *lex specialis* to *jus ad bellum*.

### *3.1 Different temporal scope of application of jus in bello and jus ad bellum*

The claim that *jus ad bellum* is simply irrelevant during an occupation has been prominently made by Scobbie, based on the *Wall Advisory Opinion*,[32] in which the ICJ rejected Israel's claim for self-defence to construct a separation wall in the Occupied Palestinian Territory ('OPT'):

> The irrelevance of the *jus ad bellum*, as well as the invocation of self-defense, thus flows from the [ICJ]'s finding that the Fourth Geneva Convention is applicable de jure to the occupied Palestinian territory.... Once this trigger [of the existence of an armed conflict] has been met and the Fourth Geneva Convention is applicable, the time when self-defense could be invoked has passed: the resort to force has already occurred, and the situation is now governed by the different regime of international humanitarian law.[33]

In the specific context of exploitation of natural resources, this claim would imply that the extraction of natural resources in occupied territories, even if it involves the use of force, is beyond the reach of *jus ad bellum*, which stops applying once the international armed conflict ('IAC') comes into existence, thereby triggering the application of *jus in bello*. This line of thinking leads to the anomalous result that the use of force in international relations actually prohibited by *jus ad bellum* remains inchoate, and therefore inexistent, at the time when the obligation to refrain from it still exists but that once the use of force commences, the obligation to refrain from it no longer exists. Such use of force never in fact 'constitutes a breach of an international obligation of the State' under Article 2

31 Jeff McMahan, *Killing in War* (OUP 2009).

32 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*Wall Advisory Opinion*).

33 Iain Scobbie, 'Words My Mother Never Taught Me – "In Defense of the International Court"' [2005] 99 *American Journal of International Law* 76, 83–84.

of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA')[34] because it never coincides with the international obligation to refrain from it and cannot constitute a 'breach' of it. As the commentary on Article 2 of ARSIWA makes clear, to be internationally wrongful, a State's 'conduct must constitute a breach of an international legal obligation in force for that State at that time'.[35]

The consequence of accepting this view is that *jus ad bellum* can only ever be breached by a threat of force[36] because only the threat, which is potentially an internationally wrongful act itself, but not the use of force, could coincide with the obligation to refrain from it. This result manifestly renders redundant the words 'or use' in the prohibition against the 'threat or use of force' in Article 2(4) of the Charter of the United Nations ('UNC')[37] and goes directly against established authorities where an actual use of force, rather than the threat of it, was held to have violated *jus ad bellum*.[38]

The thesis of mutual exclusivity between the temporal periods of application of *jus ad bellum* and *jus in bello* had in fact long been rejected by Greenwood:

> It is a mistake, therefore, to assume that *ius ad bellum* and *ius in bello* continue to operate at different stages. While the former will always operate before the latter comes into play, once hostilities have commenced, it is necessary to consider both…. [T]he modern *ius ad bellum* applies not only to the acts commencing hostilities but also to each act involving the use of force which occurs during the course of hostilities. Each use of force, even after the outbreak of fighting, is prohibited if it cannot be justified by the right of self-defence recognized in Article 51 of the Charter.[39]

### *3.2 Different material scope of application of jus in bello and jus ad bellum*

One can sometimes discern from academic discourse an implicit assumption that the 'use of force' regulated by *jus ad bellum* and *jus in bello* is somehow different. According to that assumption, the use of force regulated by *jus ad bellum* refers

34 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc. A/56/83, 34.

35 Ibid.

36 This was defined as 'an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government' in Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 364. Not every actual use of force would be preceded by a threat of force.

37 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 34) 61.

38 *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 116, para 165 (*DRC v Uganda*); Partial Award, Jus ad Bellum, Ethiopia's Claims 1–8 (Eritrea Ethiopia Claims Commission, 19 December 2005), para 16 ('Eth-Eri Jus Ad Bellum Partial Award').

39 Christopher Greenwood, 'The Relationship between Ius Ad Bellum and Ius in Bello' [1983] 9 *Review of International Studies* 221, 222.

to the macro use of force at the outbreak of an IAC while the use of force regulated by *jus in bello* refers to the micro use of force during an IAC. The relevant acts regulated by Article 2(4) of the UNC are expressed as 'threat or use of force in international relations'. In the context of occupation, the relevant acts regulated by *jus in bello* include, as examined earlier, 'taking possession',[40] 'seizure'[41] or 'administration'[42] of different types of property. In addition, the occupant is obliged under *jus in bello* to take 'all the measures … to restore, and ensure, as far as possible, public order and safety'.[43] The occupant may also subject the population of the occupied territories to 'provisions … essential to enable the Occupying Power to fulfil its obligations … to maintain the orderly government of the territory, and to ensure the security of the Occupying Power'.[44]

The assumption that the acts regulated by *jus in bello* are different from those regulated by *jus ad bellum* seems to underlie some commentators' focus on the legality of the occupation as a collection of individual acts constituting 'a legal entity the whole of which represents more than the sum of its parts',[45] in relative neglect of the *jus ad bellum* legality of these constitutive, individual acts. For example, Gross seems to see *jus ad bellum* as only relevant to the 'prior use of force' that led to the occupation, not the use of force that sustains it, including the force involved in exploiting natural resources in occupied territories.[46] While he argues that a violation of the '*jus ad occupation*' (in contrast to '*jus in occupation*') duty to uphold the principles of sovereignty, trust and transience could render the occupation illegal per se,[47] he remains silent about the *jus ad bellum* legality of the individual acts of force that constitute the occupation itself. Similarly, Dajani saw the relevance of *jus ad bellum* to occupation only in the context of 'creeping annexation' when 'the sum of its parts rise beyond a violation of the *jus in bello* and contravene the *jus ad bellum*',[48] but not the relevance of *jus ad bellum* to the 'parts' in the use of force to administer, seize or take possession of property or in the other measures of public order or security.

These commentators' focus on the legality of the occupation or annexation as an aggregate phenomenon diverts attention from the legal status of their

40 Article 53 of the Hague Regulations.

41 Ibid.

42 Article 55 of the Hague Regulations.

43 Convention (IV) respecting the Laws and Customs of War on Land and its annex (n 1), Article 43.

44 Article 64 of the Fourth Geneva Convention.

45 See James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 266.

46 Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017) 4. See also Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' [2005] 23 *Berkeley Journal of International Law* 551, 557.

47 See Gross (n 46) 3; Ben-Naftali, Gross and Michaeli (n 46) 555–556.

48 Omar M Dajani, 'Israel's Creeping Annexation' [2017] 111 *AJIL Unbound* 51, 51. See similar views in Ariel Zemach, 'Can Occupation Resulting from a War of Self-Defense Become Illegal?' [2015] 24 *Minnesota Journal of International Law* 316.

constitutive parts, the underlying threat[49] or use of force required for a hostile army to establish and sustain its authority over a territory in order for the territory to be defined as 'occupied'. Such force might be used or threatened in two types of circumstances. First, force might be used or threatened for the purpose of maintaining the occupation, e.g. through halting and repelling (or, in case of threat, deterring) attacks from resistance against the occupant, the scale of such attacks not being sufficient to unsettle the classification of the situation as one of occupation. Second, force might be used or threatened for the purpose of protecting the local population, e.g. through enforcing local law against ordinary criminal activities. The two types of circumstances are not always clearly distinguishable, e.g. where the resistance movement adopts the strategy of attacking the local population to create general chaos with a view to undermining the governing power of the occupant. Both types of force fall within the scope of the 'threat or use of force in international relations' for it occurs in a foreign territory subject to belligerent occupation. Even in the quintessential case of 'law enforcement' in the second type of circumstances where force is used or threatened not for the purpose of maintaining the occupation and in that limited sense, not 'against the territorial integrity' of the occupied state, its substitution of the ousted sovereign as the law enforcement authority is still against its 'political independence'.

Both types of use of force are necessarily involved in the occupant's exploitation of natural resources in occupied territories, particularly when the exploitation is institutionalised and systematised by an economic infrastructure established and maintained for that purpose. Force would need to be threatened, if not actually used, to deter and counter local resistance opposed to the exploitation activities that might seek to disrupt these activities. Force would also need to be threatened, if not actually used, to enforce local law, whether pre-existing the occupation or enacted during the occupation,[50] to protect those engaged in the exploitation activities from violence that might be directed against them. When such threat or use of force cannot be justified by self-defence against an armed attack, there is a violation of *jus ad bellum*. While such threat or use of force by the occupant is not per se illegal under *jus ad bellum*, it will be so if not justified as acts of self-defence as an exception to the prohibition on the threat or use of force. The applicability of *jus ad bellum* to such use or threat of force in sustaining an occupation can be deduced from various academic opinion, judicial consideration and state practice.

49 As highlighted by the commentary to ARSIWA, the threat of force is potentially itself an internationally wrongful act; see 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 34) 61. Just like any other internationally wrongful act, it can continue, even if the actual use of force might cease upon successful initiation of the occupation of a territory.

50 See, in relation to the situation in the occupied West Bank, e.g. 'Under the Guise of Legality: Israel's Declarations of State Land in the West Bank' (February 2012) <https://www.btselem.org/sites/default/files/sites/default/files2/201203_under_the_guise_of_legality_eng.pdf> accessed 2 February 2019.

In the specific context of occupation, Ruys characterises certain kinds of occupation as 'armed attacks of an ongoing nature'.[51] This characterisation suggests that the force used or threatened to sustain an occupation should be continuously scrutinised under *jus ad bellum* and informs his argument that '[o]ccupation must end as soon as the direct source of the attacks has been neutralized; prolonged occupation or annexation is never justified'.[52] Similarly, both Benvenisti[53] and Cassese[54] have conditioned the lawfulness of an occupation on its necessity for self-defence purposes. The commentary to Article 14 of ARSIWA refers to 'unlawful occupation of part of the territory of another State' as an example of a continuing wrongful act. This reference also suggests that the force used or threatened to sustain a continuing occupation could constitute a continuing wrongful act under *jus ad bellum*, since occupation is not unlawful per se.[55]

The continuing relevance and applicability of *jus ad bellum* during an occupation is also supported by international jurisprudence. The ICJ held in *Nicaragua v. United States* that acts which breach the principle of non-intervention 'will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations'.[56] It follows that the use of force to maintain an occupation, a severe form of intervention, will also breach *jus ad bellum* unless it comes within the scope of self-defence against armed attack.[57] More explicitly, the ICJ held in *DRC v. Uganda* that Uganda's occupation of Ituri violated 'the principle of non-use of force in international relations'.[58] In considering the legality of Eritrea's occupation of certain territory previously under peaceful administration of Ethiopia, the Eritrea Ethiopia Claims Commission viewed Eritrea's '[resort] to armed force to … occupy Badme' as a violation of Article 2(4) of the UNC.[59] These judicial and quasi-judicial considerations did

51 Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 100.

52 Ibid., 116.

53 Eyal Benvenisti, *The International Law of Occupation* (OUP 2012) 17.

54 Antonio Cassese, 'Article 51' in Jean-Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies: commentaire article par article* (Economica 2005) 1333. For a similar argument, see John Quigley, *The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War* (Cambridge University Press 2013) 178.

55 Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 2. See also Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' [1990] 84 *The American Journal of International Law* 44, 66–67; Adam Roberts, 'What Is a Military Occupation?' [1984] 55 *British Year Book of International Law* 249, 293.

56 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 209.

57 ARSIWA art 21.

58 *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 116, para 345(1).

59 Eth-Eri Jus Ad Bellum Partial Award, paras 15–16; see also Vera Gowlland-Debbas, 'Some Remarks on Compensation for War Damages under Jus Ad Bellum' in Andrea de Guttry, Harry

not draw any distinction between the force used to bring about, and the force used to sustain, the occupation concerned, implying that the latter could also be assessed against the yardstick of *jus ad bellum*.

That occupation is also the concern of *jus ad bellum* is well supported by state practice. Article 3(a) of the United Nations General Assembly Definition of Aggression[60] explicitly qualifies as an act of aggression 'any military occupation, however temporary, resulting from' the invasion or attack by the armed forces of a State of the territory of another State. In relation to prolonged occupation, state practice has been to reject the claims for the legality of such prolonged occupation on grounds of its failure to qualify as necessary and proportionate self-defence under *jus ad bellum*.[61] Azerbaijan has described the presence of Armenia in Nagorno-Karabakh as 'illegal occupation'[62] and has called for 'the liberation of its occupied territories in line with Article 51 of the Charter'.[63] It also explicitly referred to '[t]he use of force against Azerbaijan to occupy its territories', highlighted the 'decisions of illegality emanating from the United Nations'[64] and referred to the occupation as a 'continuing aggression'.[65] A similar point was made by Iran in its pleadings in the *Oil Platform Case* that in the case of the invasion of another State's territory, 'in principle an attack still exists as long as the occupation continues'.[66]

In the specific context of exploitation of natural resources in occupied territories, the United States' objection to the alleged right of Israel to develop new oilfields in Sinai and the Gulf of Suez occupied following the Six-Day War was also based on *jus ad bellum*. Recalling the limitations in the Hague Regulations on the exploitation of the natural resources of occupied territories, the US State Department issued a legal memorandum stating that:

> These limitations are entirely consistent with, if not compelled by, the limited purposes for which force may be used under the UN Charter. It is difficult to justify a rule that the use of force in self-defence may, during any resulting occupation, give the occupant rights against the enemy sovereign not related to the original self-defence requirement, or not required as

Post and Gabriella Venturini (eds), *The 1998–2000 War between Eritrea and Ethiopia* (T.M.C. Asser Press 2009) 436.

60 UNGA Res. 3314 (14 December 1974) UN Doc A/RES/3314, annex, Definition of Aggression.

61 See examples cited in Christine D Gray, *International Law and the Use of Force* (Oxford University Press 2008) 154–155.

62 Letter dated from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General (21 January 2016), A/70/694–S/2016/63, 1–2.

63 Ibid., 3.

64 See Annex to the Letter from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General (15 August 2016), A/70/1016–S/2016/711, para 255.

65 Ibid., para 304.

66 *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (Reply and Defence to Counter-claim Submitted by the Islamic Republic of Iran) 1999 <https://www.icj-cij.org/files/case-related/90/8630.pdf> accessed 2 February 2019, at 150, para 7.47. The point was not subsequently disputed by the United States.

> concomitants of the occupation itself and the occupant's duties. A rule holding out the prospect of acquiring unrestricted access to the use of resources and raw materials, would constitute an incentive to territorial occupation by a country needing raw materials, and a disincentive to withdrawal.[67]

The UK's reaction to Israel's proposal to build a canal between the Mediterranean and the Dead Sea illustrates a similar concern driven by *jus ad bellum*:

> [T]he project as planned is contrary to international law, as it involves unlawful works in occupied territory and infringes Jordan's legal rights in the Dead Sea and neighbouring regions. No official support will be given by Her Majesty's Government in respect of the project.[68]

### *3.3 Different normative scope of application of jus in bello and jus ad bellum*

'Separation' between *jus ad bellum* and *jus in bello* might also be misconceived as the differentiation of their respective normative scopes of application, with *jus in bello* prevailing over or derogating from *jus ad bellum* because of the former's 'specialty'. This section demonstrates that this supposed normative hierarchy is based on a misinterpretation of some the arguments raised in the *Wall Advisory Opinion,* where *jus in bello* was referred to as the *lex specialis* to *jus ad bellum* in the context of military occupation.

In his oral pleadings before the ICJ on the *Wall Advisory Opinion*, Abi-Saab argued on behalf of Palestine that '[o]nce an armed conflict is brought into being, the *jus in bello* (or international humanitarian law) comes into play, as the *lex specialis* governing the ensuing situation regardless of the rules of the *jus ad bellum*'.[69] In Palestine's written statement, it was argued that:

> The entitlement of States to use force is accommodated and regulated by the Law of War, the *jus in bello.* The Fourth Geneva Convention permits forcible measures against civilian populations, subject to strict limits. That exhausts the legal rights of an Occupying Power. A State may not use all of its powers under the Fourth Geneva Convention and the Laws of War and then decide that those powers are inadequate and invoke the more general right of self-defence, which belongs to the *jus ad bellum*, in order to avoid the constraints of international humanitarian law.[70]

67 Memorandum of Law, ILM 16 (1977), 745–746.

68 See Marson (n 19) 515.

69 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Oral Pleading) 2004 <https://www.icj-cij.org/files/case-related/131/131–20040223-ORA-01-01-BI.pdf> accessed 2 February 2019.

70 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Written Statement submitted by Palestine) 2004 <https://www.icj-cij.org/files/case-related/131/1555.pdf> accessed 2 February 2019, para 534.

The majority of the ICJ in the *Wall Advisory Opinion* concluded that 'Article 51 of the Charter has no relevance' to the legality of the construction of the separation wall by Israel in the OPT.[71]

Some commentators deduce from these statements that the law of occupation is the *lex specialis* in relation to,[72] and therefore derogates from, *jus ad bellum*,[73] in the sense that 'the means of defence available to occupying powers seem to be governed exclusively by the law of belligerent occupation'[74] which belongs to 'the different regime of international humanitarian law'.[75] The rest of this sub-section will argue that such a view is based on a misinterpretation of the statements quoted earlier from the *Wall Advisory Opinion*, which, rather than denying the applicability of *jus ad bellum* in belligerent occupation, merely assert that *jus ad bellum* cannot justify an occupying power to use force in a manner that violates the law of belligerent occupation.[76]

Abi-Saab's reference to *lex specialis* in his oral pleading should be contextualised within Palestine's overall argument. Palestine's written statement that *jus in bello* exhausts an occupant's legal rights to take forcible measures against the civilian population need not imply that *jus in bello* derogates from or prevails over *jus ad bellum* in an occupation. On the contrary, that conclusion is precluded by Palestine's recognition that the requirements of the two bodies of law are cumulative. As an occupant, Israel could not take actions according to *jus ad bellum* to justify exceeding the limit of *jus in bello*. But as a party to an armed conflict, Israel was still subject to *jus ad bellum* (and its regulation of the right of self-defence), as clearly reflected in Palestine's preceding argument that the violence in the OPT was 'not on a scale or of a nature equivalent to an "armed attack" against Israel in the sense required for the exercise of the right of self-defence'.[77] Abi-Saab's designation of *jus in bello* as '*lex specialis*' did not suggest that it applies to the exclusion of *jus ad bellum*, only that compliance (if such was the case) with *jus ad bellum* cannot justify a breach of *jus in bello*, hence the reference to *jus in bello*'s application and effect 'regardless of *jus ad*

71 *Wall Advisory Opinion* (n 32) para 139.

72 Victor Kattan, 'The Legality of the West Bank Wall: Israel's High Court of Justice v. the International Court of Justice' [2007] 40 *Vanderbilt Journal of Transnational Law* 1425, 1489. See also Iris Canor, 'When "Jus Ad Bellum" Meets "Jus in Bello": The Occupier's Right of Self-Defence against Terrorism Stemming from Occupied Territories' [2006] 19 *Leiden Journal of International Law* 129, 144.

73 Christian J Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case' [2005] 16 *European Journal of International Law* 963, 970.

74 Ibid., 969.

75 Scobbie (n 33) 84.

76 This sub-section examines the general legal question of the relationship between *jus ad bellum* and *jus in bello* as it arose in the context of the arguments advanced in the *Wall Advisory Opinion* and does not purport to address the long historical disputes over the territory, sovereignty and statehood in historical Palestine which underpin the substantive merits on the *jus ad bellum* issues specific to that conflict.

77 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Written Statement submitted by Palestine) (n 70) para 531.

*bellum*', not 'exclusively of *jus ad bellum*'. Abi-Saab's emphasis on Israel's obligations as occupying power under *jus in bello* had been foregrounded earlier in his oral pleadings:

> [*Jus in bello*] applies, regardless of the characterization of the use of force by the belligerent occupant, that is whether it is an alleged aggressor or allegedly exercising self-defence. For it is a cardinal principle of *jus in bello* that its rules apply equally to all parties, irrespective of their rights and wrongs under the *jus ad bellum*.[78]

This understanding of Palestine's argument is aligned with the argument of the Arab League that

> the argument of self-defence cannot be used to justify any deviation from the applicable rules of international humanitarian law. Thus, where a violation of international humanitarian law is at stake, the argument of self-defence has no place, it is irrelevant.[79]

Indeed, the opening of Abi-Saab's oral pleadings clearly acknowledged that 'the rules and principles of international laws that have a bearing on the situation have a much wider scope than [*jus in bello*]', including 'the prohibition of the individual use of force and its corollary, the prohibition of conquest or the taking of territory by force'.[80] This was echoed further at the closing of his oral pleadings when he stated that 'arguing on the basis of the law of occupation does not mean recognition or acceptance of the legality of this occupation',[81] confirming that compliance (if such was the case) with *jus in bello* cannot justify a breach of *jus ad bellum*, which is what could potentially make the use of force to maintain the occupation illegal. The twin arguments that the compliance with *jus ad bellum* cannot justify a breach of *jus in bello* and the compliance with *jus in bello* cannot justify a breach of *jus ad bellum* reflect Abi-Saab's vision of the 'two branches of the law of war that have to be kept radically apart'.[82]

The enduring applicability of *jus ad bellum* in an occupation was pointed out in the subsequent oral pleading of Lowe that

> international law recognizes that in situations of armed conflict [occupation] may be necessary in order effectively to protect the State. Those rights

78 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Oral Pleading) (n 69). See also ibid., para 396.

79 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Written Statement submitted by The League of Arab States) 2004 <https://www.icj-cij.org/files/case-related/131/1545.pdf> accessed 2 February 2019, para 9.6.

80 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Oral Pleading) (n 69) 38–39.

81 Ibid., 46.

82 Ibid., 44.

> are essentially defensive, and they are temporary: occupying armies are expected to withdraw once the conflict that led to the occupation has ended.[83]

This understanding of Palestine's pleadings is confirmed by the majority opinion of the ICJ itself which states that 'the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel … can be found in the United Nations Charter'.[84] What the majority of the ICJ did not make clear is why the UNC was said to be relevant while Article 51 of the UNC was not. A sensible reading is that the sense in which the UNC was considered 'relevant' (i.e. applicable to regulate the situation) is different from the sense in which Article 51 of the UNC was not considered 'relevant' (i.e. available as a justification for the use of force in breach of *jus in bello*).

Assigning *jus in bello* normative priority over *jus ad bellum* based on the allegedly greater 'specialty' of *jus in bello* over *jus ad bellum* in military occupation ignores the continuing relevance of *jus ad bellum*, not to determining whether *jus in bello* is breached, but to the legality of the threat or use of force to maintain the occupation. Accepting the prevalence of *jus in bello* over *jus ad bellum* in military occupation effectively neutralises Article 2(4) of the UNC by withholding *jus ad bellum* scrutiny over such threat or use of force. The equal normative status of *jus ad bellum* and *jus in bello* entails the possibility that illegality under *jus ad bellum* can be as normative as legality under *jus in bello* and vice versa, which is the real hallmark of their 'separation'.

In sum, despite the explicitness of *jus in bello* rules regulating the seizure or administration of property in occupied territories, these rules cannot be regarded as derogating from or prevailing over the rules under *jus ad bellum* that apply to the use of force involved in such seizure or administration. In order for the exploitation of natural resources in occupied territories to be legal under international law, the related seizure or administration of property must comply with *jus in bello* while the related threat or use of force must comply with *jus ad bellum*. In addition, the exploitation of natural resources in occupied territories generates effects that come within the purview of international human rights law, whose compliance forms another crucial component of the overall legality of this economic activity under international law.

## 4 International human rights law

The exploitation of natural resources in occupied territories could affect a wide range of civil and political rights and socio-economic rights of the occupied population. Foremost among these is the right to self-determination, enshrined

83 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Verbatim record 2004/1) 2004 <https://www.icj-cij.org/files/case-related/131/131–20040223-ORA-01-00-BI.pdf> accessed 2 February 2019, 52–53.

84 *Wall Advisory Opinion* (n 32) para 86.

in the common Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the first two paragraphs of which state:

1 All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2 All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The obvious question this raises is how to interpret this right to self-determination in the context of the exploitation of natural resources in occupied territories, when the latter is, subject to the various restrictions as discussed in Section 2 earlier, permitted under *jus in bello.* The inadequacy of the traditional approach of *lex specialis*[85] or systemic integration[86] in ameliorating the tension between certain rules of *jus in bello* and international human rights law is particularly egregious in this context. This is because the very idea of the right to self-determination is inextricably linked to the principle of sovereign independence, to which an occupation in violation of the UN Charter poses as a direct affront. This inextricable link can be illustrated by the General Assembly resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources' which reaffirms the 'permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination'.[87] Specifically, the resolution declares that '[v]iolation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations'[88] and demands 'respect [for] the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter'.[89] Another relevant General Assembly resolution in this regard is the Charter of Economic Rights and Duties of States which states in paragraph 16.2 that '[n]o State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force'. It is no wonder therefore that Schabas finds the idea of *jus in bello* being *lex specialis* to other bodies of international law particularly

85 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 25; *Wall Advisory Opinion* (n 32) para 106.
86 *Hassan v the United Kingdom* App no 29750/09 (ECtHR, 16 September 2014), para 101–105.
87 Preamble to UNGA Res 1803 (1962) UN Doc A/5217.
88 Ibid., para 7.
89 Ibid., para 8.

perplexing.[90] Systemic integration between *jus in bello* and international human rights law that essentially leads to the same result necessarily warrants the same conclusion.[91] The exploitation of natural resources in occupied territories hence presents an exemplary case where international human rights law must be read independently from *jus in bello*.[92]

The ICJ has interpreted the right to self-determination as 'the right of the population … to determine their future political status by their own freely expressed will'.[93] Numerous UN resolutions have invoked the right of self-determination in relation to the population in occupied territories.[94] The 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples states that 'the subjection of peoples to alien subjugation, domination and exploitation' constitutes 'a denial of human rights, violation of the UN Charter and impediment to peace'.[95] Occupation by an occupant in violation of *jus ad bellum* received particular attention in the context of the right to self-determination in the 1970 Declaration on Friendly Relations which states that '[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter'.[96] It goes on to state that '[e]very State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence'.[97] Whether or not the occupation violates *jus ad bellum*, the exploitation of natural resources in occupied territories by the occupant no doubt has an impact on the right to self-determination, and the more systematic and institutionalised

90 William A Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum' [2007] 40 *Israel Law Review* 592, 611.

91 Silvia Borelli, 'The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship between International Human Rights Law and the Laws of Armed Conflict' in Laura Pineschi (ed), *General Principles of Law – The Role of the Judiciary* (Springer 2015) 265, 285–286.

92 See in general Derek Jinks, 'International Human Rights Law in Time of Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014).

93 *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 36. See also *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, 103, 105–106.

94 Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes* (Brill Nijhoff 1993) 159–160; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995) 115–116.

95 'Declaration on the Granting of Independence to Colonial Countries and Peoples', UNGA Res 1514 (XV) (1960) UN Doc A/RES/1514(XV), para 1.

96 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations', UNGA Res 2625 (XXV) (1970) UN Doc A/RES/2625(XXV), first principle (the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations).

97 Ibid., fifth principle (the principle of equal rights and self-determination of peoples).

the exploitation, the greater the impact. The Human Rights Committee made a specific link between the industrialised exploitation of natural resources by Israel in the occupied West Bank and the violation of the right to self-determination of the Palestinian population. It opined that the

> continuing confiscation and expropriation of Palestinian land … continuing restrictions on access of Palestinians … to natural resources, inter alia, agricultural land and adequate water supply … undermine the enjoyment by Palestinians of a wide range of their Covenant rights, including the right to self-determination.[98]

The compliance or otherwise with *jus in bello* has not been referred to in the Human Rights Committee pronouncements on the impact of occupation and the exploitation of natural resources in occupied territories on the right to self-determination. Nor has it been referred to in the analysis of state practice. Even violation of *jus ad bellum* was only occasionally referred to. This indicates that the substantive content of the human right to self-determination cannot be reduced to the compliance with either or even both of *jus in bello* and *jus ad bellum*. The potentially broader scope of international human rights law than either or both of *jus in bello* and *jus ad bellum* can be further deduced from the derogation clauses in many international human rights treaties. Under these derogation clauses, the key condition to allowing measures derogating from the relevant human rights obligations is that 'such measures are not inconsistent with its/their other obligations under international law'.[99] The exploitation of natural resources in occupied territories is an activity regulated by, apart from international human rights law, two other prominent bodies of international law, namely *jus in bello* and *jus ad bellum*. Allowing a derogation from international human rights law obligations on the condition that the activity satisfies the other bodies of international law (notably, *jus in bello* and *jus ad bellum*) plainly indicates that the international human rights law obligations to be derogated from require more than the mere compliance with *jus in bello* and *jus ad bellum*. This is because if international human rights law obligations entail no more than what is already obliged under other bodies of international law such as *jus in bello* and *jus ad bellum*, then consistency with 'other obligations under international law' would already achieve compliance with international human rights law obligations, rendering the derogation redundant.

98 Human Rights Committee, 'Concluding observations on the fourth periodic report of Israel' (21 September 2014) UN Doc CCPR/C/ISR/CO/4.

99 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 27(1), Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR) art 15(1) and International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art (1).

In sum, even if the exploitation of natural resources in occupied territories complies with the law of usufruct (in case of public immovable property) or military-related requirements (in case of private property), and the law justifying the use of force in international relations, it remains to be assessed whether the exploitation undermines the right to self-determination of the population in the occupied territories.

## 5 Conclusion

This chapter illustrates the different nuances within and across different bodies of international law relevant to the exploitation of natural resources in occupied territories. These different bodies of international law, despite their dealing with 'the same subject matter',[100] may contain different requirements addressing different normative demands of a given situation, some at a micro level while others at a macro level, entailing different legal requirements, the violation of which entail different sanctions and/or remedies. The deeper conceptual point is that different assumptions about reality underpin different international legal norms and the different impact they are intended to generate. It is only by appreciating these differences in interpreting and applying different bodies of international law relevant to the exploitation of natural resources in occupied territories that the potential promises of international law as a system can be fully realised.

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# 2 EU trade relations with occupied territories

## Third party obligations flowing from the application of occupation law in relation to natural resources exploitation

*Rutger Fransen and Cedric Ryngaert**

With perhaps the exception of Russian-occupied Crimea,[1] there is substantial international trade in goods originating in, or assembled with resources originating in occupied territories.[2] In some cases, these goods can even access foreign markets under preferential trade tariffs.[3] Some imports may, however, concern products that have been produced or have been derived from natural resources exploited by occupying regimes in violation of international occupation law. The international trade in products tainted by violations of occupation law elicits the question whether third parties, such as states and regional organizations, which import such products, violate secondary international obligations flowing from the application of occupation law.

This contribution focuses specifically on the obligations of the European Union (EU) in this respect. The focus lies on the EU for three reasons: (1) 28 EU Member States have conferred on it the exclusive competence to regulate

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1 For example, Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78/16. Council Regulation 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78/6.

2 For example, the EU External Action Service reported that there are 'several estimates' according to which 'these products represent a fraction of the total Israeli exports to the EU and less than 1% of the total trade'. European External Action Service, 'Indication of Origin: Fact Sheet' (European External Action Service 2015) <https://eeas.europa.eu/sites/eeas/files/20151111_fact_sheet_indication_of_origin_final_en.pdf> accessed 16 December 2017, 4. This would mean that the EU's annual import of products originating in the Israeli settlements would amount to an estimated €34.4 million.

3 For example, Council Regulation 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco [2006] OJ L 141/1.

external commercial policy,[4] (2) the EU has the second-largest share of imports in the world,[5] and (3) EU courts have recently subjected EU trade agreements to legal review, in relation to imports from occupied territories.[6] However, this contribution's analysis, which used public international law as the standard of legality review, has broader purchase: it could equally be applied to any other third state (or regional organization) engaging in trade relations with respect to products from occupied territories.

The legal review conducted in this contribution is a rather narrow, and perhaps truncated one. The contribution examines the compatibility of third parties' trade relations concerning products from occupied territories with *international occupation law*, i.e. a branch of international humanitarian law (the law of armed conflict).[7] The analysis extends to obligations arising under the *law of international responsibility*, which provides for a 'secondary' legal obligation of non-assistance incumbent on third parties in relation to breaches of primary obligations under international law such as occupation law.[8]

The contribution does not examine the compatibility of these relations with international trade law, the international duty of non-recognition, or international human rights law, while obviously not denying the relevance of a review in light of these respective legal regimes. Also, this contribution only addresses obligations in the context of *trade relations between states and regional organizations,* in particular the imports of products stemming from economic activities in occupied territories. It does not address direct obligations of private actors which carry out economic activities in occupied territory, nor does it address duties of states or regional organizations to regulate the activities of such private actors under principles of home state control and due diligence. Many of these perspectives feature elsewhere in this volume. Our perspective should be considered as a complement to these analyses.

4 Articles 3 and 207 of the Treaty on the Functioning of the European Union, Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

5 'Share of EU in World Trade' (Eurostat 2018), <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ext_lt_introle&lang=en> accessed on 17 January 2019.

6 Case T-512/12 *Front Polisario v Council of the European Union* [2015] ECLI:EU:T:2015:953 and Case C-104/16 *Council of the European Union v Front Polisario* [2016] ECLI:EU:C:2016:973; Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* [2018] ECLI:EU:C:2018:118.

7 See for the main treaty on occupation law: Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) (Fourth Geneva Convention).

8 We have already touched on these issues in Cedric Ryngaert and Rutger Fransen, 'EU extraterritorial obligations with respect to trade with occupied territories: Reflections after the case of Front Polisario before EU courts' [2018] 2 *Europe and the World: A Law Review* 7. However, in that contribution, the emphasis was laid on the EU courts' judgements in *Front Polisario*. As a result, the general analysis of third party obligations under occupation law and the law of responsibility was relatively basic. Our contribution to *this* volume allows us to engage more in-depth with those obligations. In particular, it allows us to develop various complicity-based scenarios that could be subsumed under the duty of non-assistance.

Section 1 of this contribution starts out by explaining the occupation law-based rules governing the exploitation of natural resources by the occupying regime. Based on an empirical analysis of practices of resource exploitation as they currently occur in various occupied territories, it is argued that some of these practices may well violate the occupant's obligations under occupation law. As these resources, or products derived from them, are traded internationally, this invites the question what obligations rest on third parties which engage in such trade relations, in our case the EU. This question, i.e. the main research question for this contribution, is addressed in Section 2. Section 2 examines international obligations arising under 'primary' norms of occupation law (Section 2.1), as well as 'secondary' obligations arising under the law of state responsibility (Section 2.2). Section 3 concludes.

## 1 The exploitation of natural resources under occupation law

Under international occupation law, the legal power of the occupying regime is considered as mere 'de facto capability, [and] not [as] a legal authority'.[9] Occupation does not change the legal status of the territory or its inhabitants; it merely seeks to fill a temporary legal vacuum that has arisen as a result of the factual situation of occupation. The law of occupation thus reflects the reality that the occupier has merely gained temporary control and has not been granted any sovereign rights over the occupied territory.

This means that, even if occupying regimes may have gained *de facto* effective control over occupied territories, they have not gained any sovereign rights or legal titles in relation to these territories. Such rights and titles remain with the local population of the occupied territory, e.g. the Palestinian population in the case of the Gaza Strip and West Bank territory or the Saharawi population in the case of Western Sahara.[10] Alternatively, they remain with the internationally recognized governments which have a recognized sovereign claim to the occupied territory, e.g. the governmental authorities of Syria (in relation to the Golan Heights), Cyprus (in relation to Northern Cyprus) or Ukraine (in relation to the Crimean Peninsula). The local population is subject to the law of occupation and

9 Michael Bothe, 'Effective Control: A Situation Triggering the Application of the Law of Belligerent Occupation' in Tristan Ferraro (ed), *Occupation and Other Forms of Administration of Foreign Territory: Expert Meeting* (International Committee of the Red Cross 2012) <https://www.icrc.org/en/publication/4094-occupation-and-other-forms-administration-foreign-territory-expert-meeting> accessed 27 December 2017, 38. As Bothe notes, the original French formulation of Article 43 of The Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907 also reflects this idea: 'un territoire est considére comme occupé lorsqu'il se trouve placé *de fait* sous l'autorité de l'armée ennemie'.

10 See also more extensively in the context of the Israeli occupied territories: Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' [2005] 23 *Berkeley Journal of International Law* 551, 614, especially 554.

not to the domestic jurisdiction of the occupying regime, unless occupation law provides for explicit exceptions to this general rule.[11]

Occupation law stipulates that the occupying power cannot 'exercise its authority in order to further its own interests, or to meet the needs of its own population'.[12] For natural resource exploitation, this implies that resources in occupied territory can only be exploited provided that the exploitation would benefit the (occupied) local population.[13] After all, the occupying power may only administer occupied public property in accordance with the principle of usufruct.[14] Thus, James Crawford has argued that 'the sale of settlement produce where no proceeds are returned to the local population (and in fact, directly compete with local produce) is contrary to the principle of usufruct'.[15]

A distinction could be made between renewable and non-renewable natural resources.[16] The exploitation of renewable natural resources, e.g. fish caught off the coast of Western Saharan and traded under the EU-Moroccan Fisheries

11 Christopher Greenwood, 'The Administration of Occupied Territory in International Law' in Emma Playfair (ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press 1992).

12 Antonio Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in Emma Playfair (ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press 1992).

13 See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, 253, para 248. There are some exceptions to this principle, notably a distinction is made between public and private property. Private property is in principle protected from confiscation, whereas the occupying power can only make use of public property for specific purposes, e.g. for military needs. See also Antonio Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in Antonio Cassese, Paola Gaeta and Salvatore Zappala (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press 2008).

14 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entry into force 26 January 1910) art 55. Such property may consist of 'public buildings, real estate, forests, and agricultural estates'. This means that the occupying power 'may use, but does not own the property'. James Crawford, 'Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories' (Report for the Trade Unions Congress 2012) <www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 17 January 2019. This arguably implies a prohibition of 'wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation'. Eyal Benvenisti, 'Belligerent Occupation' (Encyclopedia entry in Max Planck Encyclopedia of Public International Law 2009).

15 James Crawford, 'Opinion: Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories' (Report for the Trade Unions Congress 2012) <www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 17 January 2019, 25.

16 Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009), 215; Ben Saul, 'The status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' [2015] 27 *Global Change, Peace & Security* 301, 317; Iain Scobbie, 'Natural Resources and Belligerent Occupation: Mutation through Permanent Sovereignty' in Stephen Bowen (ed), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories* (Martinus Nijhoff Publishers 2009).

Partnership, should not result in a permanent depletion of these resources.[17] The rules regarding non-renewable resources (e.g. minerals, phosphate, timber, oil, natural gas) are somewhat stricter: while exploitation is possible, it should not exceed the levels of exploitation existing prior to the occupation.[18] The occupying regime might thus – legally – be barred from exploiting newly discovered non-renewable resources.[19] In any event, an occupying regime may not exploit resources to the detriment of their substance.[20]

It seems safe to argue that in various instances of belligerent occupation, at least some of the economic exploitation of resources of occupied territories – either by the occupying regime itself, or by private companies – is in violation of the usufruct requirements. Especially when the occupying regime denies its status as an occupying power and thus does not recognize the application of occupation law, it seems unlikely that the authorities of the occupying regime will abide by the principle of usufruct. When denying the application of occupation law altogether, it may be assumed that the occupying power will treat the occupied territory as its own. Several examples of such economic exploitation that is *prima facie* in violation of occupation law may be highlighted here. With regard to the case of the Israeli occupied territories, mention can be made of the recent licencing of Israeli oil companies for the exploitation of oil resources in the occupied (Syrian) Golan Heights,[21] as well as '[t]he use of

17 Instead, it should be 'sustainable and not abusive, consistent with the inter-generational dimension of the trusteeship principle'. Saul (n 16) 319.

18 In the context of the Moroccan occupation of Western Sahara, it has on this basis been suggested that Morocco's production levels cannot exceed those of 1975 (when Western Sahara was still under Spanish authority); see furthermore Saul (n 16) 319. See also arguing similarly in relation to Israeli oil exploitation activities in occupied territories: Brice Clagett and O. Thomas Johnson, 'May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?' [1978] 72 *American Journal of International Law* 558, 574–575.

19 For example by issuing licences for the exploitation of new mines. *Contra* Dinstein (n 16) 216. Also Gerhard von Glahn, *Law among Nations: An Introduction to Public International Law* (Allyn and Bacon 1996), 687–688.

20 Arguably, this renders the exploitation of non-renewable resources problematic. In the language of the UN Secretary-General: 'Extraction of minerals is in fact a depletion of capital and a detriment to the substance', see UN Secretary General (1983), Report of the Secretary-General, 'Implications, under international law, of the United Nations resolutions on permanent sovereignty over natural resources, on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories' (1983) UN Doc A/38/265-E/1983/85, para 39.

21 See for instance Creede Newton, Patrick Strickland, 'Israel's Oil Drilling in Golan Criticised' (*Al Jazeera*, 30 December 2014) <www.aljazeera.com/news/middleeast/2014/12/israel-oil-drilling-golan-criticised-201412147575950087 4.html> accessed 27 December 2017 and Claire Bernish, 'Drilling for Oil in the Israeli-Occupied Region of Syria's Golan Heights, A Violation of International Law' (*Global Research* 25 June 2016) <www.globalresearch.ca/drilling-for-oil-in-the-israeli-occupied-region-of-syrias-golan-heights-a-violation-of-international-law/5532455> accessed 27 December 2017. For an analysis of the (historical) question of oil exploitation of the Gulf of Suez: Brice Clagett and O. Thomas Johnson, 'May Israel as a Belligerent Occupant

natural resources, in particular water and land, for business purposes […] [and p]ollution, and the dumping of waste in or its transfer to Palestinian villages'.[22] With regard to the Moroccan occupied Western Saharan territory, civil society organizations have extensively documented the existence of and ongoing activities at several 'export-oriented' agricultural sites on the occupied Western Saharan territory. They have highlighted that firms engaged in resource exploitation are 'either owned by the Moroccan king, powerful Moroccan conglomerates or by French multinational firms', and that no such firms 'are owned by the local Saharawi and not even by small-scale Moroccan settlers in the territory'.[23] Also Ben Saul has described and criticized the ongoing Moroccan exploitation of natural resources on the occupied territory such as minerals, phosphate and timber.[24] In relation to the Russian occupation of the Crimean Peninsula, there have been reports that Russia plans to extract gas within the Ukrainian Exclusive Economic Zone in the Black Sea.[25] The maritime zone connected to the Crimean Peninsula is three times larger than the Peninsula itself and has

Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?' [1978] 72 *American Journal of International Law* 558.

22 UN Human Rights Council, 'Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem' (7 February 2013) UN Doc A/HRC/22/63, 20. See regarding the Israeli exploitation of water on the West Bank territory also UN Human Rights Council, 'Report of the Secretary-General on the Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan' (16 March 2017) UN Doc A/HRC/34/39, 11, para 22.

24 'Conflict Tomatoes: The Moroccan Agriculture Industry in Occupied Western Sahara and the Controversial Exports to the EU Market' (*Western Sahara Resource Watch* February 2012) <http://www.wsrw.org/files/dated/2012-02-13/conflict_tomatoes_14.02.2012.pdf> accessed 18 December 2017, 4.

24 Saul (n 16). See similarly providing an extensive analysis of these issues: Robert F Kennedy Human Rights and others, 'Report on the Kingdom of Morocco's Violations of the International Covenant on Civil and Political Rights in the Western Sahara on the Occasion of the Kingdom of Morocco's Fourth Periodic Report to the Committee on Economic, Social and Cultural Rights' (August 2015) <http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MAR/INT_CESCR_CSS_MAR_21582_E.pdf> accessed 27 December 2017, 15.

25 'Is Russia Extracting Ukrainian Gas?' (*Radio Free Europe: Radio Liberty*, 4 October 2017) <www.rferl.org/a/is-russia-extracting-ukrainian-gas/28773734.html> accessed 27 December 2017. See also on the disputed Sea of Azov and the Kerch Strait, which connects the Black Sea with the Sea of Azov: Dmytro Koval and Valentin J Schatz, 'Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov: Part I: The Legal Status of Kerch Strait and the Sea of Azov' (*Völkerrechtsblog*, 10 January 2018) <https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov/> accessed 17 January 2019. See for a recent incident between Russia and Ukraine in the Kerch Strait: Matthew Bodner and Patrick Greenfield, 'Ukraine President Proposes Martial Law after Russia Seizes Ships' (*The Guardian*, 26 November 2018). See for a legal appreciation of that incident: David B Larter, 'Experts Say Russia's Actions in the Kerch Strait Were Illegal' (*Defensenews.com*, 30 November 2018) <https://www.defensenews.com/naval/2018/11/30/even-if-you-believe-russias-story-its-actions-in-the-kerch-strait-were-illegal-experts-say/> accessed 17 January 2019.

been estimated to contain a potential 'trillions of dollars' of underwater natural resources.[26] The UN Human Rights Monitoring Mission in Ukraine has furthermore reported 'infringements of the right to property in Crimea […] amount[ing] to the confiscation of property without reparation'.[27] Regarding Turkish-occupied Northern Cypriot territory, mention can be made of 'the unlawful issue of titles of ownership of property' of Greek-Cypriot inhabitants of the occupied Northern Cypriot territory to Turkish Cypriot inhabitants and to the (estimated) 120.000 Turkish settlers that are currently living in the occupied territory.[28]

## 2 Obligations for third parties flowing from occupation law and the law of responsibility

Some EU imports may pertain to products that have been produced, or are derived from natural resources exploited in violation of the principles of occupation law. This begs the question whether international law bars or at least conditions such imports, or put differently, what obligations rest on third parties that engage in trade in said products.

The starting point of the analysis is that it is the *occupying regime* (such as Israel, Morocco, Turkey or Russia) which breaches occupation law. After all, occupation law sets out the legal obligations of the occupying power vis-à-vis the occupied population and territory. Importing states or regional organizations such as the EU are only a third party to this legal relationship. It is argued, however, that the legal responsibility of third parties could be engaged on the basis of third parties' duty to ensure respect for occupation law (Section 2.1). It could also be engaged on the basis of the duty of non-assistance arising under the law of international responsibility. This duty prohibits third parties from facilitating another state's violations of international law, including occupation law (Section 2.2). The question here is obviously whether the duty of non-assistance can ground third party obligations to condition or bar the import of the relevant

26 William Broad, 'In Taking Crimea, Putin Gains a Sea of Fuel Reserves' (*New York Times*, 17 May 2014) <https://www.nytimes.com/2014/05/18/world/europe/in-taking-crimea-putin-gains-a-sea-of-fuel-reserves.html> accessed on 2 December 2017. As Broad states, the Russians had already 'tried, unsuccessfully, to gain access to energy resources in the same territory in a pact with Ukraine less than two years earlier'.

27 Office of the United Nations High Commissioner for Human Rights, 'Report on the human rights situation in Ukraine: 16 May to 15 August 2017' (2017) <www.ohchr.org/Documents/Countries/UA/UAReport19th_EN.pdf> accessed 27 December 2017, 3, para 19.

28 This has also been condemned by the UN General Assembly; see UNGA Res 253 (16 May 1983). Many EU citizens have purchased private properties on the occupied 'TRNC' territory, which has triggered several law suits before domestic European courts and before the European Court of Human Rights initiated by Greek Cypriot individuals to whom the property allegedly belonged before the Turkish invasion. See for instance *Loizidou v Turkey* (1995) Series A no 310, Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others* [1994] ECLI:EU:C:1994:277.

products. It will be seen that the elements of intent and knowledge, as put forward by the legal regime of non-assistance, may prove problematic in this respect.

### *2.1 Duty to ensure respect for occupation law*

The responsibility of a third state for its trade with occupying regimes acting in violation of occupation law may possibly be engaged on the basis of a breach of the obligation to ensure respect for international humanitarian law. While, in principle, the law of occupation lays down legal obligations for the occupying power vis-à-vis the occupied population,[29] all State parties to the Fourth Geneva Convention are required to 'ensure respect' for the Convention.[30] This has been explicitly confirmed by the International Court of Justice (ICJ) in the *Wall Advisory Opinion*, in which it held that all States are 'under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by [the occupying power] with international humanitarian law as embodied in that Convention'.[31] A similar position has been taken by both the UN Security Council and the UN General Assembly.[32]

Obviously, the EU itself is not a party to the Geneva Conventions; accordingly, the obligation to ensure respect may only apply to EU Member States and not directly to the EU as an international organization. Thus, Breslin argued that even though the EU has published guidelines on the promotion of compliance with international humanitarian law, this would represent merely a 'commitment' or 'goal' of the EU and it 'appear[s] that both the EU and its Member States perceive international humanitarian law obligations as the primary responsibility of Member States, rather than of the EU itself independently'.[33] Still, it is of note that the duty to ensure respect has been recognized by the International Committee of the Red Cross (ICRC) as a customary rule of international humanitarian law, which may apply to *any* third party to an armed conflict.[34] It is generally recognized that international organizations, such as the

29 Crawford (n 14) 26.

30 Common Article 1 of the Geneva Conventions stipulates indeed that States parties undertake to 'ensure respect for the present Convention'.

31 See also *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 135, para 159.

32 See for instance UNSC Res 681 (20 December 1990) UN Doc S/RES/68 and UNGA Res 32/91 (13 December 1997) UN Doc A/RES/32/91.

33 Andrea Breslin, 'Ensuring Respect: The European Union's Guidelines on Promoting Compliance with International Humanitarian Law' [2010] 43 *Israel Law Review* 381, 384. See similarly also Frederik Naert, 'International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights' (Intersentia 2010), 512. See furthermore Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL) [2009] OJ C 303/12.

34 Rule 144 (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144#Fn_77_1> accessed 27 December 2017. 'States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law'.

EU, are bound by rules of customary international law, at least in so far as they concern the exercise of competences of the international organization.[35] Since the Treaty on the European Union has conferred upon the EU the exclusive competence to regulate the EU Common Commercial Policy,[36] it might be argued that also the EU, apart from just the EU Member States individually, has a legal obligation to ensure respect for occupation law.

It is not clear, however, what such an obligation means in the context of trade relations with occupying regimes.[37] Most interpreters have construed this obligation in rather general terms. Thus, for Pictet, the obligation to ensure respect means that States 'should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underpinning the Conventions are respected universally'.[38] The ICRC, for its part, provided in its study on customary international humanitarian law that 'States may not encourage violations of international humanitarian law by parties to an armed conflict', and that 'they must exert their influence, to the degree possible, to stop violations of international humanitarian law'.[39] The International Criminal Tribunal for the former Yugoslavia, in *Furundžija* (1998) and *Kupreškić* (2000), held in similarly vague terms that third parties have a 'legal interest' in the observance of international humanitarian law and would thus have a 'right to require respect' for these norms.[40] The latter statement certainly speaks to the *erga omnes* character of norms of international humanitarian law. However, this character may only yield third parties' *entitlement to invoke* the wrongdoer's responsibility for a violation of the Geneva Conventions,[41] rather

35 Indeed, in the language of the ICJ, the relevant criteria are the 'purposes and functions as specified or implied in [the international organization's] constituent documents and developed in practice'; see furthermore *Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174, 180. See furthermore Naert (n 33) 391–392.

36 Articles 3 and 207 of the Treaty on the Functioning of the European Union.

37 The scholarly discussion on the EU's primary legal duty to ensure respect for customary rules of international humanitarian law has until now mainly focused on issues relating to EU-led military operations; see for instance Marten Zwanenburg, 'Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations' in Steven Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (TMC Asser Press 2008) 400–-402; Frederik Naert, 'Observance of International Humanitarian Law by Forces under the Command of the European Union' [2013] 9 *International Review of the Red Cross* 637, 639.

38 Jean Pictet, 'Commentary to Article 1 of the 4th Geneva Convention' in Jean Pictet (ed), *The Geneva Conventions of 12 August 1949 Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958), 16. Also cited in François Dubuisson, 'The International Obligations of the European Union and Its Member States with Regard to Economic Relations with Israeli Settlements' (Made in Illegality 2014).

39 Rule 144 (n 34).

40 *Prosecutor v. Furundžija,* ICTY [1998] Case No. IT-95-17/1 and *Prosecutor v. Kupreškić*, ICTY [2000] Case No. IT-95-16-T.

41 Crawford (n 14) 15–16, especially para 41 ('Law does not compel those concerned to seek a remedy, even if they are entitled to do so'). It might be noted that this position has been disputed

than a more far-reaching prohibition of importing products that originate in violations of occupation law.

### *2.2 Duty of non-assistance*

Alternatively, third party legal obligations and responsibility in respect of trading in products produced in violation of occupation law could be grounded on the so-called duty of non-assistance. This duty of non-assistance has been codified in Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[42] and Article 14 of the Articles on the Responsibility of International Organizations (ARIO).[43] In the *Bosnian Genocide* case, the ICJ furthermore considered the duty of non-assistance to represent a rule of customary international law.[44]

The duty of non-assistance can be understood as a secondary rule of *attribution of responsibility*, prohibiting what in domestic law systems would be referred to as 'complicity'.[45] In relation to the EU – an international organization – the relevant provision is Article 14 ARIO, which stipulates that

> [a]n international organization which aids or assists a State […] in the commission of an internationally wrongful act by the State […] is internationally responsible for doing so if: (a) the […] organization does so with knowledge

by Dubuisson (n 38) 62. However, Dubuisson's argument seems untenable, since he states that Crawford's position would be accurate

> 'for the purposes of article 16 of the articles on the International Responsibility of States (complicity) to which he refers, [but that] this statement [would not] consider the responsibility of the State towards its obligation to ensure respect for humanitarian law'
>
> (see Dubuisson on 62)

Dubuisson indeed refers to Crawford's argumentation regarding economic and commercial dealings with a view to the duty of non-assistance under Article 16 of the Articles on State Responsibility (paras 84–92); however Dubuisson seems to overlook Crawford's extensive argumentation regarding the duty to ensure respect (paras 34–45).

42 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries: Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session', UN Doc A/56/10.

43 ILC, 'Draft articles on the responsibility of international organizations, with commentaries: Text adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session' (2011) UN Doc A/66/10, *Yearbook of the International Law Commission* Vol II, Part 2.

44 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43, 217, para 420.

45 In the context of the ARSIWA Crawford has noted that Articles 16 (aid or assistance), 17 (assumed powers) and 18 (coercion) jointly form the exception to the general principle of individual state responsibility as enshrined in Article 2 ARSIWA. See furthermore James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 395.

> of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization.[46]

This formulation raises, first of all, the question whether the EU's trade in products originating in occupied territories – which have been produced in violation of occupation law – would qualify as such an act of aid or assistance to the principal wrongdoer (the occupying regime in question). Crawford has interpreted the duty of non-assistance to contain three requirements in this respect:

> First, the complicit state must make some contribution to the wrongful act, though it need not be essential. Second, the contribution must be in the form of a positive act: neither active incitement nor a mere omission will suffice to ground responsibility. Third, … the assistance rendered must be 'significant'.[47]

The EU's opening up of its markets to the relevant products can be considered as a 'positive' act.[48] Given the economic significance of trade relations with the EU and the different occupying regimes, the EU's trade in these products arguably also facilitates these violations significantly enough so as to be considered as assistance in the sense of Article 14 ARIO.[49] In addition, the EU's imposition of restrictions on trade relations seems to have – at least in some cases – a (potential) significant negative impact on production in violation of occupation law.[50] In this context, it might for instance be recalled that when the EU Commission

46 The text of this article closely tracks the text of Article 16 of the Articles of ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc A/56/10.

47 Crawford (n 45) 405.

48 See on the requirement of positive act also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43. Compare with the more permissive approach in international criminal law, which also allows for negative action (non-action) to constitute complicity, Andrea Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' [2007] 5 *Journal of International Criminal Justice* 875, 883–884. See *Prosecutor v. Furundžija,* ICTY [1998] Case No. IT-95-17/1, para 207 and *The Prosecutor v. Jean-Paul Akeyesu*, ICTR [1998] Case No ICTR-96-4-T, para 704–705.

49 Aust has furthermore observed that violations can also be 'ongoing', which implies that '[a]ssistance which is given only after the initial breach of international law by another State could therefore also fall within the scope of [the duty of non-assistance]', see Helmut Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 253. The fact that the EU – at the end of the economic chain – would thus assist or facilitate the violation of occupation law only after the violation took place (at least the violations for the specific products that have been traded) would thus also not block the qualification of the EU's trade in products originating in occupied territories as a violation of the EU's duty of non-assistance.

50 UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk' (13 January 2014) UN Doc A/HRC/25/67, para 46.

published an interpretative notice containing labelling requirements, which was aimed at products originating in the Israeli settlements,[51] the Israeli Ministry of the Economy estimated a negative economic impact of circa '$50 million a year'.[52]

Article 14 ARIO not only contains a material element (conduct) but also a mental one: 'knowledge' of the circumstance of the international wrongful act. In the context of the EU's trade relations with occupied territories, such as the Israeli occupied territories and the Moroccan occupied Western Sahara, the EU cannot maintain to be completely unaware of the circumstances in which its aid or assistance is intended to be used.[53] While the text of Article 14 ARIO only requires 'knowledge of the circumstances of the internationally wrongful act', the Commentary of the International Law Commission (ILC) to the article adds a considerably stricter requirement, stating that 'the relevant State organ [should also have] *intended*, by the aid or assistance given, *to facilitate* the occurrence of the wrongful conduct'.[54]

It is difficult to adduce proof of such intent to facilitate in the context of the EU's trade relations with occupied territories. Sure enough, preferential trade arrangements concluded between the EU and different occupying regimes, as well as the extensive trade relations with a number of occupied territories, *de facto* facilitate the trade in goods that are potentially produced in violation of the law of occupation. However, the EU arguably has not *intended* to facilitate these violations; it only sought to improve trade relations with the countries in question. Even if there were such intent, there may be no evidence that establishes the intention.[55]

51 Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967 [2015] OJ C 375/4.

52 'EU Defends Decision to Label Goods Made in Israeli Settlements' (*EURACTIV*, 19 January 2016) <www.euractiv.com/section/agriculture-food/news/eu-defends-decision-to-label-goods-made-in-israeli-settlements/> accessed 16 December 2017.

53 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries: Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session' (2001) UN Doc A/56/10, 66, para 4.

54 Commentary (4) to Article 14 ILC, 'Draft articles on the responsibility of international organizations' with commentaries' (n 43). This text is in fact copied from the Commentary to Article 16 of ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (n 53). See also Crawford (n 14) 32: Crawford notes that

> the assisting act should be 'specifically directed toward assisting the crime [and there should be] actual knowledge of the circumstances […] [and] the State concerned must have intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct).,

55 Compare ILC, Statement at the 1518th Meeting of the International Law Commission (1978) UN Doc A/CN.4/SER.A/1978, para 28. Also cited in Aust (n 49) 233 (ILC member stating that '[n]o State would admit that it was helping another State to commit a wrongful act').

Some authors have argued that the ILC's requirement of intent renders the article 'unworkable'.[56] Others, however, have strongly defended it.[57] Crawford, for instance, held that the duty of non-assistance as enshrined in Article 14 ARIO is 'a substantial advance of the concept in international law', and that the inclusion of the strict requirement of 'intent' is 'sensible', especially in view of the 'potentially detrimental [effect on] state sovereignty in its broadest form'[58] that could flow from only requiring knowledge.

Eva Kassoti has recently attempted to reinterpret the required standard of 'intent', arguing that it is in fact 'akin to knowledge of the purpose for which the State receiving assistance intends to use it'.[59] She cites both the work of Helmut Aust on complicity and the ICJ judgement in the *Bosnia Genocide* case.[60] The ICJ has indeed stated that

> there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless *at the least* that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.[61]

Aust, however, reads the *Bosnia Genocide* case in a far more restrictive manner than Kassoti, arguing explicitly that 'the ILC wants [the article on the duty of non-assistance] to be interpreted narrowly so that the 'knowledge' element turns into something more akin to a requirement of wrongful intent'.[62] Aust states furthermore that the language used by the ICJ in the *Bosnian Genocide* case ('at the least') would 'suggest that, as a general rule, more than mere knowledge is required'.[63]

56 See for instance Bernhard Graefrath, 'Complicity in the Law of International Responsibility' [1996] 29 *Revue Belge de Droit International* 371, 375 and John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' [1986] 57 *British Yearbook of International Law 77*; Alexander Orakhelashvili, 'Division of Reparation between Responsible Entities' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010), 647–665 as also cited in Aust (n 49) 235–237.

57 See for instance Maya Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law' [2007] 12 *Journal of Conflict and Security Law* 359 and Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 282–289. As also cited in Aust (n 49) 237.

58 Crawford (n 45) 408.

59 E Kassoti, 'The Legality under International Law of the EU's Trade Agreements Covering Occupied Territories: A Comparative Study of Palestine and Western Sahara' (2017) CLEER Working Paper No 2017/3, 32.

60 Ibid., 32.

61 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43, para 421.

62 Aust (n 49) 235.

63 Ibid., 236.

Still, it is of note that Crawford himself held that 'if aid is given with certain or near-certain knowledge as to the outcome, intent may be imputed'.[64] On that basis, it could be argued that the EU's continued trade relations with occupied territories despite reported violations of occupation law could constitute such 'certain or near-certain knowledge as to the outcome'. The intent requirement could be fulfilled on the basis of the EU's knowledge of the possible illicit outcome. The mere fact that the EU continues its trade despite reports of the adverse effects for the local population of such economic exploitation could thus be construed as the necessary 'intent'. Thus, it is arguable that the EU, by continuing its trade relations with Morocco in relation to products from Western Sahara, in spite of reports highlighting that such trade does not benefit the local population,[65] aids or assists Morocco in the commission of an internationally wrongful act in the sense of Article 14 ARIO. That the EU is of the view that 'the extension of tariff preferences to products originating in Western Sahara will have a positive overall effect for the people concerned' does not change this'.[66]

This construction of intent in fact sails close to *dolus eventualis*, a notion that is used in the context of some domestic criminal law interpretations of accomplice liability. Under the *dolus eventualis* standard, a person's liability is engaged in relation to an unlawful circumstance, where he foresaw the possibility of this circumstance occurring and nonetheless proceeded with his conduct.[67]

64 Crawford (n 45) 408.

65 See notably the statement of 93 NGOs concerned with the people of Western Sahara, 'EU-Morocco Trade Agreement on Western Sahara: The Commission Ignoring the EU Court, Misleading Parliament and Member States and Undermining the UN' (2 July 2018) <www.wsrw.org/files/dated/2018-07-03/02072018-sahrcivilsocietyappeal.pdf> accessed 17 January 2019 ('We don't see how the agreement is benefitting Saharawis living in the occupied territories of Western Sahara, and how it will benefit the people of Western Sahara living in the refugee camps and neighbouring countries who are totally excluded in all aspects of this matter, from the consultations, negotiations and future implementation of the agreement'.). See also Valentina Azarova, Antal Berkes, 'The Commission's Proposals to Correct EU-Morocco Relations and the EU's Obligation Not to Recognise as Lawful the "Illegal Situation" in Western Sahara' (*EJIL:Talk!* 2018) <https://www.ejiltalk.org/author/vazarov/> accessed 17 January 2019 (stating that 'the Commission is seeking participation and consultation without the need for Sahrawi consent').

66 Council Decision 2018/1893 of 16 July 2018 regarding the signature, on behalf of the European Union, 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 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 [2018] OJ L 301/1, consideration 9.

67 See for an application in Dutch criminal law pertaining to 'extraterritorial' complicity in war crimes: *Van Anraat* District Court The Hague [2005] ECLI:NL:RBSGR:2005:AU8685, affirmed on appeal by Court of Appeal The Hague [2007] ECLI:NL:GHSGR:2007:BA4676; *Kouwenhoven* Court of Appeal's-Hertogenbosch (referral by Supreme Court) [2017] ECLI:NL:GHSHE:2017:1760. However, the relation between, on the one hand, the application of the prohibition of aid or assistance in the commission of an internationally wrongful act (in the sense of article 16 of ARSIWA) and, on the other hand, the notion of complicity as known within international criminal law remains difficult. Cassese has expressed his doubts on the

Intent/knowledge could be given an even more liberal interpretation by accepting mere *negligence* as the relevant standard for the assessment of possible violations of the EU's duty of non-assistance. The exact difference between *dolus eventualis* and negligence remains a topic of debate among legal scholars, as both notions are used in domestic criminal law to establish 'fault', the necessary element to establish legal liability.[68] Still, 'fault' can consist of either *dolus* (e.g. intention) or *culpa* (e.g. negligence): the former indicates various degrees of 'deliberate criminal conduct', whereas the latter is understood to consist of 'accidental criminal conduct'.[69] While both the notion of *dolus eventualis* and (conscious) negligence thus involve foreseeability (i.e. knowledge), the essential difference between the two is the extent to which the agent in question has reconciled himself with the foreseen eventuality: in the case of *dolus eventualis* there is at least some degree of intention (the acceptance of the possible illicit outcome), while in the case of mere negligence there is no intention at all. Accepting negligence as the relevant standard in relation to the duty of non-assistance would mean that the EU could be held legally responsible for a violation of the duty of non-assistance, even if the EU did not positively intend to facilitate the violations of occupation law, provided that the EU could have foreseen the possible facilitating effect of EU trade on violations of occupation law.

One could even go as far as to accept 'unconscious negligence' as the relevant standard. This would mean that the EU could be held responsible for negligently assisting the wrongdoer, even if it was in fact not aware of the circumstances, but could (and thus should) have been aware. These ideas are not entirely new. Some have argued in favour of the requirement of 'possible knowledge' of the illicit outcome as the requirement for complicity,[70] some have presented it as a question of 'due diligence'[71] and others have focused on the notion of foreseeability.[72] The issue also came up during the reading of the ARSIWA, when the Dutch delegation suggested to hold a State responsible for a violation of the duty of non-assistance 'when it knows or should have known the circumstances

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appropriateness of the transposition of 'criminal law categories to the corpus of international law of state responsibility'; see Cassese (n 48).

68 Contrary to many continental domestic law systems, the Anglosaxon law systems generally know only 'direct and oblique intention, recklessness, and inadvertent negligence'; see Dan Morkel, 'On the Distinction between Recklessness and Conscious Negligence' [1982] 30 *American Journal of Comparative Law* 329. See furthermore Paul Smith, 'Recklessness in *Dolus Eventualis*' (1979) 96 *South African Law* 81 for a specific analysis of the notion 'recklessness' in relation to *dolus eventualis*.

69 See for an extensive discussion E Kayitana, 'The Form of Intention Known as Dolus Eventualis in Criminal Law' (2008) SSRN Working Paper <https://ssrn.com/abstract=1191502> accessed 27 December 2017.

70 See for an overview of this debate Aust (n 49) 236.

71 Ibid., 236. See for instance Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in Philip Shiner and Andrew Williams (eds), *The Iraq War and International Law* (Hart Publishing 2008) 219.

72 Ibid., 236.

of the internationally wrongful act'.[73] In so doing, the delegation circumvented not only the requirement of positive intent but also the requirement of actual knowledge. However, the Dutch proposal did not make it to the final version of the ARSIWA.[74]

These arguments bring home the fact that the contours of the duty of non-assistance may not yet be clearly drawn. Still, intent may not have to be construed as strictly as one may think. Domestic standards of accomplice liability such as *dolus eventualis,* negligence or even unconscious negligence may inform the interpretation of Article 14 ARIO and Article 16 ARSIWA. On that basis, the responsibility of the EU and third countries may possibly be engaged for allowing trade with occupying states which violate occupation law: in line with Crawford's earlier suggestion, insofar as the former have near-certain knowledge of the commission of internationally wrongful acts by the occupying state, intent may be imputed to the EU and third countries.

## 3 Concluding observations

We have demonstrated that under dominant understandings of the duty to ensure respect for international humanitarian law and the duty of non-assistance (Article 14 ARIO and Article 16 ARSIWA), the responsibility of bystander states and the EU is unlikely to be engaged. The duty to ensure respect is too vaguely worded, whereas the duty of non-assistance requires intent to facilitate a violation, i.e. a high complicity threshold that is not normally met. Still, drawing on the constructive ambiguity of the requirement of knowledge in the relevant ILC articles, and bearing in mind that the requirement of 'intent' only features in the ILC Commentary, we have drawn attention to 'progressive' interpretations of the standards of intent and knowledge in the context of the duty of non-assistance. The complicity requirement of 'knowledge' is semantically rather capacious and unstable. Such notions as knowledge short of intention, risk-based *dolus eventualis*, negligence and due diligence could all be subsumed under the label of 'knowledge', especially if one accepts the openness of the law of responsibility to domestic liability doctrines.[75] This may allow the responsibility of third parties, such as the EU, to be engaged for maintaining trade relations in respect of products derived from natural resources exploited in violation of occupation law.

73 ILC, 'State Responsibility: Comments and observations received from Governments' (2001) UN Doc A/CN.4/515, 52.

74 Crawford (n 45) 406.

75 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Archeon 1927); Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' [2015] 26 *EJIL* 471, 471–476 (highlighting the private law aspect of state responsibility, and arguing, although in the specific context of causation, that 'private law might be helpful in cases where international law does not provide guidance or clear answers').

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# 3 Some state practice regarding trade with occupied territories

## From the GATT to today

*Eugene Kontorovich*

### 1 Introduction

This essay examines the legality of international trade with territories under belligerent occupation in light of state practice in the earliest years of the modern international trading system – shortly after World War II – combined with previously neglected aspects of state practice from recent years. Several scholars, non-government organizations (NGOs), and UN agencies have in recent years argued that public international law severely restricts the permissibility of foreign trade with occupied territories. (This chapter focuses on territories under prolonged occupation, the context in which these claims are typically made.)

The chapter will show that the provisions of the General Agreement on Tariffs and Trade (GATT) – the fundamental architecture of international trade – not only treat such business activity as permissible but also require other countries to extend full GATT preferences to them. It then turns to examining state practice, both to verify this understanding of the GATT and to compare it with any potential contemporary changes in the understanding of these relevant rules.

State practice is particularly relevant in this context because any potential obligations of states to refrain from economic activity in occupied territory are not clearly delineated by treaty – neither The Hague nor Geneva Convention provisions on occupation prohibit occupying powers from conducting economic activities in territories under their control; scholars claiming the existence of such prohibitions claim they are derivatives of general features of occupation or human rights law. In the absence of a positive prohibition, state practice is crucial to informing the precise scope of the relevant obligations.[1]

1 If—as it would seem—the purported norm against economic dealings is customary in nature, state practice would be the primary evidence of its existence and scope. See the *Case concerning the Continental shelf (Libyan Arab Jamahiriya v. Malta)* (Judgment) [1985] ICJ Rep 13, para 27 ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States ….") . Even if the prohibition is a corollary of treaty norms, subsequent state practice is of great relevance in interpreting the meaning of the relevant treaties, which do not speak directly to these questions. See ILC, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation: by Georg Nolte, Special Rapporteur' (19 March 2013) UN DOC A/CN.4/660; United Nations, General

Arguments that business activity in occupied territories violates international law have various sources, and are made in varying degrees of breadth. For example, some argue that an occupier may be engaged in some allegedly illegal conduct in the occupied territory – such as the use of natural resources, allowing its nationals to migrate into the occupied territory, or more broadly annexing the territory. The occupier's allegedly illegal actions are then said to infect or taint all economic activity conducted under its laws. Then, a second-degree illegality is said to attach to foreign firms that conduct trade in the area,[2] or even a third-degree illegality to foreign companies that do business with businesses that do business in the occupied territory.[3] Finally, some claim that an additional prohibition falls upon third-party states to prevent their firms from trading with firms that do business in such territories.[4] The argument is essentially one based on multiple degrees of "facilitation" – a term likely more copious than "aiding and abetting" – the underlying illegal conduct of the occupying power.[5] While none of these arguments explicitly turn on the mere fact of prolonged belligerent occupation, they do focus on the existence of settlements, which are an almost constant correlate of such occupations.[6] Moreover, they appear to employ standards of directness, causation, and facilitation that are not used to limit business activity with nations engaged in a wide variety of other human rights or international humanitarian law (IHL) abuses, suggesting that there is something essential about occupation underpinning these arguments.

Much of the discussion of these issues is based either on soft law instruments, such as the United Nations Guiding Principles on Business and Human Rights, or on deduction from abstract principles of international law, such as the principle of non-recognition, whose scope is greatly uncertain.[7] Moreover, much of the literature often focuses on legality with respect to only one or two particular territories, making the understanding of general rules difficult. This essay seeks to illuminate the question by examining several aspects of formal state

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Assembly, International Law commission, ILC, 'Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties: by Georg Nolte, Special Rapporteur' (26 March 2014) UN DOC A/CN.4/671.

2 See Valentina Azarova, 'Business and Human Rights in Occupied Territory: The UN Database of Business Active in Israel's Settlements' [2018] 3 *Business and Human Rights Journal* 187.

3 This seems to be the rational of the United Nations Human Rights Council's "database" of companies involved in Israeli settlements, which according to press reports includes numerous firms with only a transitive or indirect connection.

4 See Eva Kassoti, 'Between Völkerrechtsfreundlichkeit and Realpolitik: The EU and Trade Agreements Covering Occupied Territories'[2017] 26 *The Italian Yearbook of International Law* 139; Tom Moerenhout, 'The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories' [2012] 3 *Journal of International Humanitarian Legal Studies* 344.

5 See Kassoti (n 3); 'United Nations Office of the High Commissioner UN Human Rights Report 2017' (*OHCHR*) <www2.ohchr.org/english/OHCHRreport2017/pages/introduction.html> accessed 10 October 2019.

6 See Eugene Kontorovich, 'Unsettled: A Global Study of Settlements in Occupied Territory' [2017] 9 *Journal of Legal Analysis* 285.

7 See Eugene Kontorovich, 'Economic Dealings With Occupied Territories' [2015] 53 *Columbia Journal of Transitional Justice* 589.

practice with regard to a wide range of occupied territories and across various time periods.

Section 2 of this chapter examines the GATT's territorial scope provisions, including the debate over their interpretive notes, and the history of their application. It argues that GATT practice shows that the treaty allows state parties – at their own discretion – to extend their trade preferences to territories that they belligerently occupy. Thus, as a prima facie matter, GATT parties would be forbidden from restricting their trade with such occupied territories. While such restrictions might be excused or justified in particular circumstances, the general applicability of GATT in occupied territories is hard to reconcile with a general norm against foreign trade with such territories. This is also true if one adds in common correlates of occupation such as settlement activity or a lack of self-determination.

Section 3 turns to recent state practice, examining certain forms of practice and opinio juris that have largely been absent from prior discussions. Most significantly, it examines recent US federal and state legislation dealing with business in Israeli-controlled territories, which broadly supports the legality of such commercial conduct. It then turns to nonbinding governmental statements such as advice and guidance formally issued by states regarding business in occupied territories. Finally, it discusses the actual conduct of business by enterprises with substantial state ownership.

## 2 The GATT's territorial scope

This section argues that GATT protections apply to occupied territories. The affirmative extension of international trade preferences to such territories strongly demonstrates that foreign trade with them is not illegal. Indeed, it suggests that at least for GATT signatories, restrictions on such trade may be impermissible. But the purpose of this section is not to consider whether particular trade measures might be upheld by a WTO dispute resolution panel under particular grounds such as security or public morals exceptions. Rather, it is to show that occupied territories are presumptively within the scope of the primary international trade treaty, a point which is itself strong evidence against the existence of a *prohibitory* norm regarding such trade. Moreover, GATT practice has applied trade preferences to occupied territories under prolonged occupation, territories lacking self-determination, and occupied territories in which the occupying power engages in systematic extraction of natural resources.

### *2.1 GATT's scope*

The GATT[8] is one of the broadest and most fundamental treaties organizing international economic arrangements. The treaty entered into force on January 1, 1948. While it ultimately became the backbone of the much broader World

8 General Agreement on Tariffs and Trade 1947 (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194.

Trade Organization regime in 1995, the original agreement remains in force, subject to some amendments (not relevant here) made in 1994.[9]

GATT provisions are territorial in nature. Thus Article III (which guarantees equal treatment for imported products on a variety of measures) offers protection to "products of the territory of any contracting party." Article IX, which sets the rules for marks of origin, guarantees "no less favorable" marking requirements "to the products of territories of other contracting parties." Likewise, the Technical Barriers to Trade Agreement speaks of "products imported from the territory of any Member."

"Territory" under the GATT is defined as including non-sovereign areas of jurisdiction, and even includes areas under military occupation. This is clear from several articles of the treaty itself, as well as its *travaux preparatoires* and history of interpretation. The GATT itself defines the scope of its territorial application: "Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility…"[10] Notably, the determination of which "other territories" under a state party's control it receives GATT protections for is determined by the party itself.

To the degree there is practice and history shedding further light on the meaning of "territory," it reinforces the conclusion that the term refers to territory under *de facto* control rather than *de jure* sovereignty. One must begin with GATT's treatment of states more generally. The WTO agreements are not limited to states; governments without internationally recognized sovereignty like Taiwan are able to join. This indicates, as one researcher observed,[11]

> Political disagreement about who is the legitimate authority in a given territory is not supposed to interfere with the agenda of the trade body, which is only concerned with world trade but not with the issue of sovereignty. In other words, the WTO is attempting to create the necessary environment for smooth world trade by giving equal membership on the basis of economic preconditions, and therefore eschews to get entangled in disputes over sovereignty.[12]

It is for this reason that the European Union is able to carry on trade relations with Taiwan through the WTO framework even though the EU does not

9 General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 190; Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994, Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187.

10 Ibid. Art. XXV1(5)(a).

11 See Sigrid Winkler, 'EU-Taiwan Relations in the WTO: The Question of International Status' (Doctoral thesis, Institute for European Studies, Vrije Universiteit Brussel 2007).

12 Taiwan acceded to the WTO in 2002 under the name "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)." See Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu (Chinese Taipei) and the WTO (member information) (*World Trade Organization*) <www.wto.org/english/thewto_e/countries_e/chinese_taipei_e.htm> accessed 10 October 2019.

recognize Taiwan's sovereignty over any territory. The government of Taiwan has *de facto* sovereignty over the island, and this obliges all WTO parties to grant Taiwan the full benefits of international trade law, even if they do not recognize Taiwan's sovereignty.

Territories included in the GATT included many whose sovereignty was disputed, and where the de facto power's control was quite likely rooted in recent illegality. Thus Turkey's territory for GATT purposes included "the autonomous Sanjak of Alexandretta," which had been seized from Mandatory Syria less than a decade earlier.[13] As demonstrated by Moshe Hirsch,[14] several subsequent controversies about the application of GATT to overseas Portuguese possessions on the Indian subcontinent, the Panama Canal Zone, and Antarctica again reinforced the rule that free trade protections under WTO agreements are not concerned with the legal status of territory but, rather, with their *de facto* control. Moreover, these precedents all make clear that the status of non-sovereign territories under GATT is judged by the governing state itself; it is not the view of third-countries about the status of territories that determines their GATT status.

### *2.1.1 GATT's provisions on "territories"*

GATT Articles XXIV and XXVI:5(a) provide that the treaty applies not just to the metropolitan territory of contracting parties, but potentially also to "territories for which it has international responsibility." It is beyond dispute that such territories include colonies, dependencies, and protectorates; however the metropolitan power's control was established.[15] The applicability of GATT to territories lacking self-determination is not an anachronism; it still extends to numerous territories listed by the UN Special Committee on Decolonization.

As a prima facie matter, occupied territories fall under the international legal responsibility of the occupying power, even when the latter's presence is unlawful or embedded in a system of grave crimes.[16] But the question of whether Art.

13 One of the few customs entities named specifically and given particular protections by the GATT is the Free Territory of Trieste. See General Agreement on Tariffs and Trade 1947, XXIV(3)(c). The Territory was created by the UN Security Council Resolution (UNSC Res 16/37 (10 January 1947) UN Doc S/RES/16) as an independent entity, but was ultimately partitioned between Italy and Yugoslavia. Even its explicit protection in the GATT did not prevent the new *de facto* powers from extending their GATT preferences to the territory, with no inquiry into the underlying legality of their annexation.

14 See Moshe Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip' [2002] 26 *Fordham International Law Journal* 572.

15 See 'WTO Analytical Index, General Agreement on Tariffs and Trade (GATT) (1994)' (WTO) <www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm> accessed 10 October 2019, 917.

16 See ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, from the Report of the International Law Commission on the work of its fifty-third session'(10 August 2001) UN DOC A/56/10, Art. 17, commentary 5. This is confirmed by

XXVI:5(a) extends to territories under military occupation has been examined in the GATT framework, and has occasioned some contradictory statements in the interpretive notes. An interpretive note to article XXVI originally said that it excludes areas under military occupation. However, that note itself was removed in the 1954–1955 Review Session. Instead, it was replaced with a Final Note which stated that the applicability of the GATT in "the areas under military occupation has not been dealt with and is reserved for further study at an early date."[17] Finally, the Final Note itself was removed in 1957, leaving no official interpretive guidance on the matter.

### *2.1.2 The interpretive notes*

However, the history behind the interpretive notes demonstrates that they—like the exclusions of I.2 and associated annexes—meant to exclude some of large numbers of territories occupied at the end of World War II, rather than the general category of occupied territories. In other words, the note was intended to give GATT a purely prospective application, without resolving its impact on economically significant occupied territories like Germany and Japan. The discussions preceding the adoption of the interpretive note in 1947 show that the United States initially suggested language stating that the treaty "shall not bind any area or part thereof under present military occupation, nor any occupying authority therein." Indeed, this was the reason for the US suggestion of the term "present."[18] After much discussion, a joint US/UK proposal would have referred to "*the* areas under military occupation" ("the areas" rather than simply "areas" in order to clarify that a specific military occupation was intended). That is why it was specifically in 1957 that the interpretive note on occupied territories

recent arbitrations relating to Bilateral Investment Treaties in areas occupied by Russia, which have found Russia to have legal responsibility in Crimea.

See Giuseppe-Matteo Vaccaro-Incisa, 'Crimea Investment Disputes: Are Jurisdictional Hurdles Being Overcome Too Easily?' (*EJIL:talk!*, 9 May 2018) <www.ejiltalk.org/crimea-investment-disputes-are-jurisdictional-hurdles-being-overcome-too-easily/> accessed 10 October 2019.

17 See 'WTO Analytical Index, General Agreement on Tariffs and Trade (GATT) 1994, Article XXVI Acceptance, Entry into Force and Registration'(WTO) <www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm> accessed 10 October 2019, 919.

18 See ECOSOC, 'Report of Second Session of the Preparatory Committee of the Verbatim Report, Twenty-Eighth Meeting of the Tariff Agreement Committee' (24 September 1947) E/PC/T/TAC/PV/28, 33, statement of United States explaining that "the Occupying Powers" have not undertaken obligations under GATT towards "the occupied territories."; ECOSOC, 'Report of Second Session of the Preparatory Committee of Twenty-Forth Meeting of the Tariff Agreement Committee' (19 September 1947) E/PC/T/TAC/PV/24, 2, comments of UK delegate; ECOSOC, 'Report of Second Session of the Preparatory Committee of the United Nations conference on Trade and Employment' (19 September 1947) E/PC/T/W/342; Chinese delegate making clear that exclusion of occupied zones referred specifically to Germany and Japan.

was deleted, with the observation that it was "unnecessary" – the Allied occupation of Germany had just ended.[19]

The back-and-forth regarding the interpretive notes shows that the parties understood that, by default, "territories" under the "international responsibility" of a state, as used in GATT, encompassed all territories under the state's control, whatever their sovereign status, unless specifically excluded. The GATT contracting parties understood that this applied even to areas under military occupation, and thus discussed excluding or grandfathering some pre-existing occupations. And while a specific exclusion for *some* occupied territories was contemplated, and included in a since-deleted interpretive note, no general exclusion for all occupied territories from the scope of Art. XXVI:5(a) was ever even considered, much less adopted.

Moerenhout examines the history of the notes and comes to different conclusions.[20] He recognizes that the essence of the debate reflected in the interpretive notes was concern "by some Member Sates that … rules would allow the United States to trade with its occupied territories for too long."[21] In this view, the entire debate was over establishing the baseline for entering into the GATT, with respect to territories already under occupation – and on this question the drafting history clearly involves an agreement to disagree.[22] Yet from this Moerenhout divines a "hint" that the original intention was for territories under "international responsibility" to entirely exclude occupied territories. He also makes no mention of the Secretariat's subsequent discussion of a variety of occupied territories, and the Saar correspondence.

The understanding of the interpretive notes as being solely concerned with the treatment of then-existing occupations is consistent with many features of the agreement, which distinguish national arrangements, preferences, and laws in place at the time of GATT accession – and in particular at the time of the treaty's entry into force – from subsequent measures governed strictly by most favored nation (MFN) treatment and other GATT rules. These include GATT's "grandfather clause," which allowed contracting parties to continue to apply pre-existing legislation otherwise incompatible with GATT obligations,[23] as well as Art. XXXV, par. 1(b), which allows members to opt out of GATT obligations with respect to particular new members. The discussion about trading privileges in currently occupied territories was essentially a territorial version of the GATT's grandfather clause.

19 'The Review of the Agreement, Some advance Notes by the Secretariat' (General Agreement on Tariffs and Trade 1947, Doc. No. L/189, 12 April 1954) <https://docs.wto.org/gattdocs/q/GG/L999/189.PDF> accessed 10 October 2019.

20 See Moerenhout (n 4) 365–367.

21 Ibid., 367.

22 Ibid.

23 'WTO Analytical Index, General Agreement on Tariffs and Trade (GATT) 1994, Provisional Application' (WTO) 1071–1072.

### *2.1.3 Grandfathering occupations*

The understanding of the GATT interpretive notes as being concerned with the treatment of existing occupations is supported by the fact that similar concerns about the treatment of the economically and politically prominent occupations of Axis territories arose during the negotiation of the Fourth Geneva Convention itself. A straightforward reading of the Convention suggests its effect is purely prospective, and would not apply to occupations resulting from prior armed conflicts.[24] The issue arose during the discussion of Art. 6, relating to the "beginning and end of application" of the Convention. The delegates were quite aware of the major question of the applicability of the Convention to the existing occupations of Germany and Japan.[25] The US and UK delegates thought that such application would be "going too far,"[26] while others disagreed. The final text – allowing certain provisions to expire after one year of occupation, while others to continue indefinitely – is a compromise between the two views.

While the Geneva text still takes no formal position on the applicability to occupations created before the Convention came into effect, the delegates seemed to assume it would. On the other hand, subsequent practice does not support this.[27] It does not appear that the numerous European states that occupied territory after World War II applied the law of occupation there (for example, Netherlands and France in territory taken from Germany). The issue only appears to have been explicitly discussed at the end of the Soviet occupation of the Baltic States. The USSR did not apply the Convention in the Baltics, and it does not appear the ICRC, the UN, or any other body suggested it should. Nonetheless, some Baltic nationalists argued that the Convention had applied the entire time, and made the presence of Russian settlers illegal. This view appears to have won almost no support.[28] Whatever the conclusion regarding the applicability of Geneva IV to then-existing occupations – whether it did not apply at all, or as Art. 6 might suggests, applies only in part – these discussions show that grandfathering existing occupations was a particular consideration at the time.

24 Ibid., art 2, 153.

25 See *Final Record of the Diplomatic Conference of Geneva of 1949* (Vol. II, §A, 1949) 623–624.

26 Ibid., 624.

27 The United States itself only ratified the Geneva Conventions in 1955, after the occupations of the Federal Republic and Japan had ended, though the delay was apparently more a function of the Korean War than questions of occupation. Olivier Barsalou, 'Making Humanitarian Law in the Cold: The Cold War, the United State and the Genesis of the Geneva Conventions of 1949' (2008) *Institute for International Law and Justice Emerging Scholars*, Paper 11<http://iilj.org/wp-content/uploads/2016/08/Barsalou-Making-Humanitarian-Law-in-the-Cold-2008.pdf> accessed 10 October 2019. The United States did, however, continue to occupy West Berlin, in condominium with the Allied powers, until 1989. See generally, United States v. Tiede, 86 F.R.D. 227 (U.S. Dist. Ct. Berlin 1979). Nothing suggests the United States or its partners considered the relevant occupation provisions of the Geneva Conventions relevant to its conduct in West Berlin.

28 For a thorough discussion of the competing views, see generally, Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Martinus Nijhoff Publishers, 2003).

### *2.2 GATT practice regarding occupied territories*

The practice of the GATT Secretariat has always assumed that occupied territories could fall within the scope of the treaty. Significant aspects of this practice dealing with occupied territories, and demonstrating how the relevant provisions were understood by the drafters, have not been examined in prior scholarship. On April 16, 1951, the Secretariat circulated to the treaty parties "A Provisional List of Territories to which the Agreement is Applied."[29] Part A of the circular listed "those territories in respect of which the application of the Agreement has been made effective." These territories include one that was at the time under military occupation – France's agreement included the Saar, occupied from Germany.[30]

The Secretariat also solicited information from the parties about the status of several territories under their control to inquire whether the GATT had been made applicable to them. It requested the relevant contracting parties to "clarify[] the position of these territories" with respect to the GATT – suggesting that the decision whether to apply the treaty in these territories was up to the parties, consistent with the plain language of Articles XXIV and XXVI:5(a). This list included numerous territories specifically identified as being "under Military Administration" or occupation.[31] Thus the Secretariat was asking contracting states whether they had chosen to apply the GATT to territories under their military occupation. The circular suggests no legal concerns about such action, and makes it quite clear that the Secretariat regarded such action as the prima facie prerogative of the occupying power.

The only question about the Secretariat's memorandum on territorial application was raised by Germany. The Federal Republic responded to note that

> whilst mention of the Saar territory as part of the French customs area does correspond to the present actual situation, the legal status of the Saar territory, which can only be established by a peace treaty, must… in no way be prejudiced.

29 'The Territorial Application of the General Agreement, A Provisional List of Territories to which the Agreement is applied' (General Agreement on Tariffs and Trade 1947, Contracting Parties, 16 April 1951) GATT/CP/108, <https://docs.wto.org/gattdocs/q/GG/GATTCP/108.PDF> accessed 10 October 2019.

30 The Secretariat also noted that several areas annexed by France from Italy at the end of World War II would not fall within Italy's GATT declaration. These did not formally constitute occupied territory, as Italy "transferred" them under the Peace of Paris in 1947, though the transfer was clearly forcible. The French refer to the incident as an "attachment" of the villages to France, whereas Italians call it an "annexation." See Romain H. Rainero, 'L'opinion publique italienne et l'annexion de La Brigue et de Tende à la France' [2001] 62 *Cahiers de la Méditerranée* 215. This thus suggest that forcible territorial change does not preclude the application of GATT under the auspices of the acquiring power.

31 Ibid., 9–10. Such territories included Eritrea, Tripolitania, and Cyrenaica, occupied by the United Kingdom, and various islands, "formerly part of Japan, now under U.S. military occupation."

Germany did not in any way contest the validity of France's application of the GATT to the Saar. It merely noted that this application does not prejudge questions of territorial sovereignty.[32] Thus, Germany recognized that the question of sovereignty, self-determination, occupation, and GATT application are quite distinct. And it affirmed the principle that an occupying power accepts GATT obligations vis-à-vis its occupied territories – while also rejecting the notion that the extension of GATT privileges to the territory constitutes recognition by other parties.

Some might argue that GATT's allowance for trade with occupied territories is in conflict with modern human rights norms, and must reconcile with such norms through the principle of "systemic integration."[33] Systemic integration's application is non-obvious here, because the purported international rules that conflict with the GATT provisions are themselves largely hortatory or incipient. Nor does it appear to be proper under the terms of the Art. 31(c)(3) of the Vienna Convention, which allows for the interpretation of treaty text in light of "relevant rules of international law." This does not mean that a treaty's meaning can change based on subsequent external developments in other areas of international law. Rather, Art. 31(3) refers to international law as it exists at the time of the treaty's signing, as subsequent exogenous developments cannot change the meaning of the parties. (This point can be made clear by comparing Art. 31(3)(c) with (a) & (b), which deal with "subsequent" practice by the parties – "subsequent" is not used in relation to rules of international law.)

Even admitting, for the sake of argument, the need for structural integration of GATT's provisions and human rights norms, it is not clear why the former should be read in light of the latter, and not vice versa. Some might argue that GATT's territorial provisions are dated, perhaps even obsolete, and should read in light of modern sensibilities. True, GATT is quite clearly a product of an era that had not rejected colonialism. Yet the GATT provisions are manifestly not in desuetude. Not only does the treaty remain in force, the territorial provisions were retained verbatim when it was otherwise modernized and readopted in

32 See 'The Territorial Application of the General Agreement, Status of the Saar Territory' (General Agreement on Tariffs and Trade 1947, 13 August 1952) G/5/Add.2 <http://sul-derivatives.stanford.edu/derivative?CSNID=90670065&mediaType=application/pdf> accessed 10 October 2019. France and Germany did eventually settle the Saar question, and notified GATT members of the special trade arrangements the agreement involved. See 'Franco-German Treaty on the Saar: Memorandum Submitted by the Government of France and the German Federal Republic' (General Agreement on Tariffs and Trade, 4 July 1957) L/638, <www.wto.org/gatt_docs/English/SULPDF/90700157.pdf> accessed 10 October 2019.

33 The "systemic integration" norm is "allegedly" rooted in Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(c)(3), but its provenance is far from clear, and its application to negate treaty terms based on human rights norms is quite subjective. See Adamantia (Mando) Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' [2017] 66 *International and Comparative Law Quarterly* 3, 557.

1994. Moreover, the arguments for the illegality of business in occupied territories are based on broad extrapolations of the Fourth Geneva Convention and UN Charter, multilateral treaties as venerable as the GATT itself. It would be playing at favorites to close one's eyes to the GATT's permissive text while seizing on every possible implication of other contemporaneous treaties, which, one might add, do not deal as specifically with the subject of trade.

### *2.3 An aside: Palestine under the GATT*

The applicability of GATT to such territories leads to an interesting digression on very brief inclusion of Palestine, as this is the particular context for most or even all current discussions about GATT's application to occupied territories. GATT has indeed applied to Palestine. Great Britain included Palestine in GATT from April 19, 1948 until the end of the British Mandate on May 15, 1948.[34] But Britain had the prior year negotiated certain concessions in Palestine with Czechoslovakia and Belgium, which the State of Israel subsequently said it would not be bound by. The United Kingdom took the position that "Israel was in a way the successor state of Palestine," and thus the United Kingdom was no longer responsible for the territory. The Secretariat determined that under the law of state succession to treaties, Israel was not bound by the Mandatory government's GATT concessions, as they are too "important and far-reaching" to carry over to a new political entity in the same territory.[35] As a result, the states benefiting from the concessions were permitted to withdraw their corresponding concessions to the United Kingdom.[36]

### *2.4 Public international law exceptions*

Thomas Moerenhout has argued that numerous public international norms would trump GATT provisions if the latter were understood as prohibiting foreign boycotts of (Israeli) settlements. There is no reason to think that the people of the Saar, or Germany, or Libya, or Eritrea did not enjoy a right to self-determination; yet GATT provisions were regarded as applicable to them via the international legal responsibility of the occupying power. The happenstance

34 '2nd session, Note on the Status of the Agreement and Protocols' (General Agreement on Tariffs and Trade 1947, Contracting Parties, 24 August 1948) GATT/CP.2/4/Corr. 1 <http://sul-derivatives.stanford.edu/derivative?CSNID=90320009&mediaType=application/pdf> accessed 10 October 2019.

35 '3rd session, The Position of Palestine in Relation to the Agreement. Item 8 of the Agenda, Notes by the Secretariat' (General Agreement on Tariffs and Trade 1947, Contracting Parties, 29 April 1949) GATT/CP.3/17, 29 <http://sul-derivatives.stanford.edu/derivative?CSNID=90320137&mediaType=application/pdf> accessed 10 October 2019.

36 '3rd session, Summary Record of the Eleventh Meeting' (General Agreement on Tariffs and Trade 1947, Contracting Parties, 09 May 1949) GATT/CP.3/SR.11 <http://sul-derivatives.stanford.edu/derivative?CSNID=90060059&mediaType=application/pdf> accessed 10 October 2019.

of an ICJ Advisory Opinion noting a local right of self-determination on behalf of Palestinians neither establishes that as an unassailable legal fact, nor does it distinguish the case considerably from many other cases of occupation. Indeed, Moerenhout does not seem to place great weight on the self-determination point, as he argues that GATT does not apply to the Golan Heights, despite the lack of any ICJ opinion, or serious political claim, for self-determination by its inhabitants.

Trade with the territory is trade with settlements. Moerenhout argues that settlements are illegal, and thus any trade with them must be understood to be illegal. But settlements are population centers. Demographics is not business. Businesses in the occupied territories may include settlers, or they may not. Moreover, settlers may – and typically do – work at metropolitan economic concerns – but this does not make those businesses illegal. Moerenhout's argument proceeds down a long chain of implied illegality: starting with the prohibition on occupying powers transferring population, he then infers that the actual population centers are illegal, and then that their enterprises are illegal, and then that trade with them is illegal.

In any case, these issues have previously arisen under the GATT. It is useful to note in this regard that French nationals moved to Saar under French occupation,[37] and the goal of the occupation was explicitly to integrate the territory economically into metropolitan France.[38] Moreover, France was allowed to include Saar in its GATT obligations despite the fact that the principal purpose of its occupation of the territory was to extract German natural resources.[39]

## 3 Aspects of contemporary state practice

Prior research has shown that the overwhelming weight of state practice and judicial decisions does not support broad glosses on the notions of self-determination, non-recognition, or specific provisions of IHL as prohibiting third-party business in occupied territories.[40] Prior scholarship has focused on the practice of states themselves, including treaty practice and recent judicial

37 Much of the Saar's industrial facilities were entirely placed under French ownership, and much of the civilian administration was French. However, French migration to the area was limited, not by international law, but by the area's extraordinary post-war housing shortage, coupled with the gravitational pull of France's own massive labor shortages. See Bronson Long, *No Easy Occupation: French Control of the German Saar, 1944–1957* (Camden House, Boydell & Brewer, 2016) 92; James R. McDonald, 'Labor Immigration in France, 1946–1965' [1969] 59 *Annals of the Association of American Geographers* 116.

38 See O. R. Reischer, 'Saar Coal After Two World Wars' [1949] 64 *Political Science Quarterly* 50; Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, 1996) 394–399.

39 See generally Jacques Freymond, *The Saar Conflict, 1945–1955* (Stevens F.A. Praeger, 1960); Stefan Wolff, *Disputed Territories: The Transnational Dynamics of Ethnic Conflict Settlement* (Berghahn Books, 2003) 87–97.

40 See Kontorovich (n 7).

decisions. It goes without saying that aside from formal state practice, the actual conduct of business in occupied territories is extremely widespread and has almost never been protested by states, UN bodies, or human rights NGOs on legal grounds.[41]

To the extent scholars have sought to infer prohibitions on business in occupied territories from general international public law norms, such inferences seem in the nature of *lex feranda*, and in the face of unfettered business by third-country firms in such territories. One might argue that the widespread nature of such business only proves the lack of enforcement of the relevant norms, not their non-existence. However, when the non-enforcement of a purported rule of customary law approaches 100%, it should call into question the very existence of an underlying norm.[42] The failure of any state to prohibit such business on international law grounds (absent country-specific sanctions regimes) is telling. Indeed, even in rare cases where countries take minor steps like prohibiting public export credits to companies operating in occupied territories, they take no step to stop such activity, or claim it to be illegal.[43]

The following discussion will examine three aspects of recent state practice not discussed in my earlier research – official advisories issued by states to their domestic firms concerning business in occupied territories, recent legislative efforts dealing with the question, particularly in the United States, and finally the conduct of business in such territories by government-owned firms.

### 3.1 Governmental advisories and warnings

In recent years, some governments have issued public advisories about legal issues involved in business activity in specific territories. In such cases, the government clearly has adverted to and explicitly considered legal issues connected to such territories. These statements suggest that the relevant state does not think there is a general, or even broad, prohibition on businesses in occupied

41 The notable exception, of course, is business connected with the State of Israel. See Eugene Kontorovich, 'Who Else Profits: The Scope of European and Multinational Business in Occupied Territories' [2017] 1 *Kohelet Policy Forum* <https://daks2k3a4ib2z.cloudfront.net/59f05a891481a800018f8f07/5a01d2f3240da900013da181_WhoElseProfits_online> accessed 10 October 2019; Eugene Kontorovich, 'Who Else Profits: The Scope of European and Multinational Business in Occupied Territories' [2018] 2 *Kohelet Policy Forum* <https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/WhoElseProfits-e-version.pdf> accessed 10 October 2019.

42 The *Riwal* prosecution is often cited by those who argue for a prohibitive rule, but aside from its highly specific context involving the Israeli separation barrier, the singularity of the case suggests that states overwhelmingly do not adopt the prohibitive approach. And of course, that prosecution was ultimately dismissed. See Letter from Liesbeth Zegveld, Bohler Advocaten to National Public Prosecutors' Office, Rotterdam (15 March 2010) <www.alhaq.org/cached_uploads/download/alhaq_files/images/stories/PDF/accoutability-files/Complaint%20-%20English.pdf> accessed 10 October 2019.

43 'German government not supportive of business in Western Sahara' (*Western Sahara Resource Watch*, 22 January 2018) <www.wsrw.org/a105x4045> accessed 10 October 2019.

territories, even in situations of annexation. Moreover, many countries advise domestic firms about such business without issuing public advisories. While the content of the direct advice is obviously private, when it has been disclosed, it has been shown to be quite permissive.

For example, the Australian foreign ministry has issued an advisory on business with Western Sahara. It states that there "are international law considerations with importing natural resources sourced from the Western Sahara," and recommends firms seek further advice.[44] Aside from the specific issue of removing resources from the territory, the advisory does not suggest any prohibition on such business. This is in accord with the well-known opinion of the UN Deputy Secretary General, which sharply distinguishes between a permissive rule for business activity in general and resource extraction in particular.[45] The Dutch Government much more explicitly states, in business advisory for Morocco, that "Economic activities in Western Sahara are not by definition contrary to international law." It goes on to note that such business must benefit the Sahrawi people, and that such commerce nonetheless has reputational risks.[46] Going even further, the Dutch Foreign Ministry recently published a long guidebook advising domestic companies on opportunities in Morocco's renewable energy sector, including projects in Western Sahara.[47]

Similarly, several countries have issued guidance about doing business in Turkish-occupied northern Cyprus. These advisories only note the potential of liability for real estate transactions under the *municipal law* of the Republic of Cyprus, given that the actual owners may be Greek Cypriots.[48] While pointing out the Cypriot law makes real estate transactions in the north illegal, such advisories make no claim that they are illegal under international law.[49] Thus even when governments issue advisories specifically focused on legal concerns raised by settlement activity assisted by foreign nationals, they do not mention

44 See 'Morocco: Important Information on Western Sahara' (*Australian Department of Foreign Affairs and Trade*)<https://dfat.gov.au/geo/morocco/Pages/important-information-on-western-sahara.aspx> accessed 10 October 2019; 'Travel: Cyprus: Real Estate (2018)' (*Canadian Ministry of Foreign Affairs*) <https://travel.gc.ca/destinations/cyprus?_ga=2.94760536.510420370.1537890778-788856542.1537890778> accessed 10 October 2019 ("Seek independent legal advice if you consider the purchase, rental, advertisement or promotion of property in areas that are not under the effective control of the Government of Cyprus.").

45 See Letter from Under-Secretary-General for Legal Affairs, the Legal Counsel to the President of the Security Council (29 January 2002) <https://digitallibrary.un.org/record/458183> accessed 10 October 2019.

46 'Westelijke Sahara' (*The Netherlands Enterprise Agency*) <www.rvo.nl/westelijke-sahara> accessed 10 October 2019.

47 'Business Opportunities Report for Morocco's Renewable Energy Sector' (The Netherlands Enterprise Agency, 2018) www.rvo.nl/sites/default/files/2018/06/Business-opportunities-report-for-moroccos-renewable-energy-sector.pdf > accessed 10 October 2019, 2.

48 'Services for Australians Overseas' (*Australian High Commission*) <https://cyprus.embassy.gov.au/ncos/consular.html> accessed 10 October 2019.

49 See 'Trade Advice: Cyprus: Property in Occupied Northern Cyprus' (*Irish Department of Foreign Affairs and Trade*) <www.dfa.ie/travel/travel-advice/a-z-list-of-countries/cyprus/> accessed 10 October 2019.

any international legal concerns. They clearly assume that doing business in such territories is presumptively legal.[50]

To be sure, as part of a coordinated EU initiative, numerous European countries have in recent years issued substantively broader advisories in the case of Israel. These advisories typically warn that those contemplating business investment in Israel-controlled territories should "bear in mind… possible violations of international humanitarian law and human rights law," though they do not state that such business is generally or presumptively illegal. (Similarly, the advisories caution businesses to take into account "reputational risks," but this does not mean that reputational harm necessarily ensues.)

Taken by themselves, these advisories are some thin state practice in support of a restrictive rule, though they are too vague to give definition to that rule. However, the Israel advisories must be weighed in the overall assessment of state practice. The clearest statement in the Israel advisories warns about problems of title to land and natural resources, a private law issue, and is thus consistent with similar warnings in the Northern Cyprus context. Moreover, most of the countries issuing Israel-related advisories have not issued similar warnings in other contexts, suggesting that the warning of "risk" in the Israeli context is just that – a pragmatic and political caution, and statement of policy, rather than law.

This conclusion is buttressed by comparing the few instances in which states have issued separate advisories about doing business both in Israel-controlled territories and in other areas. For example, it is instructive to compare the UK's advisory regarding Western Sahara with its advisory concerning Israeli settlements[51]:

> **Israel**[52]
>
> There are therefore clear risks related to economic and financial activities in the settlements, and we do not encourage or offer support to such activity.

50 Hugh Lovatt, 'EU Member State Advisories on Israeli Settlements, European Council on Foreign Relations' (*European Council on Foreign Relations*, 26 November 2016) <https://www.ecfr.eu/article/eu_member_state_business_advisories_on_israel_settlements> accessed 10 October 2019 (quoting advisories from 18 European states and Japan).

51 Despite the UK's deep economic ties with Cyprus – based in part on its former sovereignty over the island and retention of sovereign base areas there – it has not issued any kind of advisories about doing businesses in Turkish-occupied northern Cyprus. Instead, it merely laconically informs UK companies that "The continued political division of the island of Cyprus affects doing business in the areas not controlled by the Republic of Cyprus (north of the island)." See 'Doing Business in Cyprus: Cyprus Trade and Export Guide, Updated 19 January 2018' (*UK Department for International Trade*) <www.gov.uk/government/publications/exporting-to-cyprus/exporting-to-cyprus> accessed 10 October 2019, sec. 2.1. At the same time, the United Kingdom does regard Cyprus as "occupied." See 'Overseas Business Risk – Cyprus, Updated 18 May 2017' (*UK Department for International Trade*) <https://www.gov.uk/government/publications/overseas-business-risk-cyprus/overseas-business-risk-cyprus> accessed 10 October 2019, sec. 1.1.

52 See 'Overseas Business Risk – Israel, Updated 26 February 2018' (*UK Foreign & Commonwealth Office*) <www.gov.uk/government/publications/overseas-business-risk-israel/overseas-business-

> Financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements, entail legal and economic risks stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognized as a legitimate part of Israel's territory. This may result in disputed titles to the land, water, mineral or other natural resources which might be the subject of purchase or investment….
>
> Possible violations of international humanitarian law and human rights law should also be borne in mind.
>
> EU citizens and businesses contemplating any economic or financial involvement in settlements should seek appropriate legal advice before proceeding.

**Western Sahara**[53]

> HMG does not provide legal advice to private companies and individuals in relation to their commercial activities. It is therefore for companies to take their own decisions on whether to do business in Western Sahara….*The conduct of economic activities by Morocco in Western Sahara is not in itself illegal,* but as de facto administering power, in order to comply with international law, *Morocco must ensure* that economic activities under its administration are conducted to the benefit and in the interests of the people of Western Sahara. Such economic activities include the exploitation of natural resources.
>
> *HMG has no policy of discouraging firms from conducting business in Western Sahara*. We have a general commitment to promoting responsible corporate behaviour by UK companies operating, or considering operating, overseas. This includes respect for the human rights of the people involved in or affected by their operations.

Taken together, these statements clearly indicate the lack of any belief by the United Kingdom in a general prohibition on business in occupied territories. Natural resources are in both cases treated as a special case. Nor do the advisories suggest any legal obligation on third-party countries; rather, obligations rest on the administering power. More generally, while EU advisories on Israel constitute an exception, the overall state practice regarding business advice in occupied territories does not provide evidence for a prohibitive norm. At the

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risk-israel--3> accessed 10 October 2019 (emphasis added); 'Overseas Business Risk – Israel, Updated 26 February 2018' (*UK Foreign & Commonwealth Office*) <www.gov.uk/government/publications/overseas-business-risk-israel/overseas-business-risk-israel--3> accessed 10 October 2019.

53 'Overseas Business Risk – Morocco, Updated 24 April 2017' (*UK Foreign & Commonwealth Office*)<www.gov.uk/government/publications/overseas-business-risk-morocco/overseas-business-risk-morocco> accessed 10 October 2019 (emphasis added).

very least, the contradictory practice of advisories suggests the lack of any norm; at the most, the overall practice across several occupied territories suggests state practice and opinio juris regards such economic activity as inherently legal.

### *3.2 Direct or unpublished governmental guidance to private companies*

Large-scale business activity by third-country firms in occupied territories is widespread, and involves some of Europe's largest industrial, financial, and telecommunications companies. While states typically do not comment about private business in occupied territories, they do sometimes provide direct advice to particular domestic firms engaged in or contemplating such activity.[54] The content of such communication is invariably private, but in rare cases where it comes to light, the advice does not reflect an opinio juris that international law prohibits such business.

For example, in New Zealand – a country both well-known for its concern for human rights, and one home to several companies importing phosphates from Western Sahara – the government's communications with these companies have become a matter of some interest to human rights groups. The position of the government on such business emerged when the trade minister was questioned about it in Parliament:

> I am advised that the New Zealand companies concerned are not in breach of either international or domestic law in importing phosphate from Morocco that may have been mined in Western Sahara…. I am also advised that there are no legal grounds for banning the trade from Morocco. Indeed, to do so would be subject to a legal challenge from Morocco under international trade law.[55]

### *3.3 Legislation*

Despite the several advisories discussed earlier, no state has general legislation dealing directly with the issue. However, it is worth noting some recent legislative developments in this area. Yet some recent legislative developments in the United States do speak the question of lawfulness in dealings with occupied territories. In 2015, President Obama signed into law a measure that stated that a "principal trade negotiating objectives of the United States for proposed trade

54 See Letter of Damien O'Connor, Irish Minister of State for Trade and Export Growth to Michael J. Barton (5 September 2018) <www.wsrw.org/files/dated/2018-09-13/nz-wscnz_05.09.2018.pdf> accessed 10 October 2019.

55 'Questions for Oral Answer — Questions to Ministers' (New Zealand Parliament, 632 Hansards Debates, 26 July 2006) <www.parliament.nz/en/pb/hansard-debates/rhr/document/48HansS_20060726_00000650/turei-metiria-questions-for-oral-answer-questions-to>, 4419.

agreements with foreign countries" is preventing boycotts of Israel or "Israeli-controlled territories."[56] The statute went on to bar any US federal court from recognizing any foreign court judgment against US persons

> foreign judgment is based, in whole or in part, on a determination by a foreign court that the United States person's conducting business operations in Israel or *any territory controlled by Israel* or with Israeli entities constitutes a violation of law.[57]

The exemption of such judgments clearly demonstrates that the United States does not regard the conduct of such business a violation of international law. If the United States regards these territories as occupied – a point that is less certain than commonly thought – this legislation is powerful state practice by the United States for the legality of business in occupied territories. Indeed, it may be the most direct state practice dealing with question, at least in the Israeli context.

There have been similar developments on the US federal level. In the past four years, over 20 state governments have adopted so-called "anti-BDS laws." These laws bar the state government from contracting with or investing in companies that boycott Israel or "Israeli-controlled territories."[58] These laws have been invoked, for example, to bar contracting and investment by Florida, Texas, and other states with Airbnb, after that company announced it will no longer be doing business in Jewish settlements in the West Bank.[59] An implicit premise of such legislation is that such boycotts are not only not required by international law but also that business in Israeli territories is fully lawful.[60]

Countervailing developments have taken place in Ireland, though they have not matured to the level of legislation, and thus do not constitute state practice. A bill pending in the Irish parliament purports to outlaw all trade with

56 19 U.S.C.A. § 4452(c)(1) (emphasis added).

57 Ibid., § 4452(e).

58 See e.g. Fl. Stat. § 215.4725(1)(a).

59 See Tovah Lazaroff, 'Texas Blacklists Airbnb over West Bank Boycott' (*Jerusalem Post*, 3 March 2019) <www.jpost.com/Israel-News/Texas-blacklists-Airbnb-over-West-Bank-settlement-boycott-582253> accessed 10 October 2019. Airbnb subsequently reversed its policy and said it would be doing business in the West Bank (and other disputed territories). See 'Update on Listings in Disputed Regions' (Airbnb, 9 April 2019) <https://press.airbnb.com/update-listings-disputed-regions/> accessed 10 October 2019.

60 To be sure, the practice of sub-national units counts for less in the formation of international custom, but many believe it does play a role. ILC, 'Draft conclusions on identification of customary international law with commentaries' (2018) UN DOC A/73/10, 135, comment 5 ("Practice of organs of a central government will usually be more significant than that of constituent units of a federal State or political subdivisions of the State."); Noe Cornago, 'Paradiplomacy as International Customary Law: Subnational Governments and the Making of New Global Norms' in Klaus-Gerd Giesen and Kees van der Pijl (eds), *Global Norms for the Twenty-First Century* (Cambridge Scholars Press, 2006) 77–81.

"settlements" in occupied territories.[61] This bill – which makes trading in settlement goods or services a crime punishable by jail time – would go much farther than any prior state practice. Indeed, its sponsors have made clear that they are seeking to set a new model or example for other countries to follow.[62]

Yet the bill says little about the issue of the international legality of business in occupied territories. While its title refers to "Occupied Territories" generally, the text defines "occupation" entirely differently from the Geneva Conventions, and in a way that leads it to only apply to Israel. (The bill's definition of "occupation" is limited to situations described as such by the ICC or ICJ – and not by the UN GA, the UNSC, the ECJ, the ECtHr, or any other international body.) Indeed, the sponsors of the bill assured lawmakers that it would not apply to Western Sahara or other contexts. Thus despite the bill's title and ostensible goal, it specifically chooses to not regulate almost all business with occupied territories. The bill's treatment of business with Israeli-controlled territories is also in marked contrast with Dublin's stance on trade with Western Sahara and Northern Cyprus,[63] making its value as evidence of opinio juris quite murky even if it would ultimately be enacted.

### *3.4 Business conducted by state-controlled or owned corporations*

A significant and unexplored issue is business activity in economic territories by state companies. A far from exhaustive survey of business activity in occupied territories reveals significant involvement by European state companies, that is, private corporations in which a sovereign state has whole or controlling ownership. The overall scope of such activity in recent decades is certainly much broader, and is reduced today in part as a result of broad privatization of state companies in Europe. (The discussion here leaves to one side companies of countries with centralized economies such as China.)

61 'Control of Economic Activity (Occupied Territories) Bill 2018, Bill 6 of 2018' (Irish Parliament Dáil Éireann, Third Stag) <https://data.oireachtas.ie/ie/oireachtas/bill/2018/6/eng/initiated/b0618s.pdf> accessed 10 October 2019.

62 See 'The Control of Economic Activity (Occupied Territories) Bill 2018' (*Senator Frances Black*, 10 October 2018) <www.francesblack.ie/single-post/settlement-goods> accessed 10 October 2019.

> It is the hope of the Civil Engagement Group, however, that the application of the bill could potentially be extended to territories when a similar case for occupation can be made, such as Western Sahara, where the suffering of the Sahrawi people is longstanding and well-reported. A collaborative approach is required here, based on consensus within the Oireachtas. The general principle is the same: where there is clear agreement that a territory is occupied for the purposes of international law, Ireland should do what it can to alleviate the human suffering that inevitably results and refuse to politically or economically support illegal settlement activity.

63 See 'Control of Economic Activity (Occupied Territories) Bill 2018' (Irish Parliament) 50–55.

While the activity of state-owned companies in occupied countries is quite extensive, its relevance to state practice for customary international law (CIL) purposes is far from clear. Strictly speaking, the acts of corporations, even state-controlled ones, are not state practice unless ratified or otherwise adopted by the state.[64] Some of the companies active in occupied territories have government officials sitting ex officio on their boards, and this may approach the threshold of "state ratification" – or at least the assent of those officials could be considered state practice. More broadly, such business conduct is not traditionally regarded as a form of state practice contributing to CIL.

Nonetheless, it is relevant to a discussion of norms against business in occupied territories, because almost all of the evidence for the existence of such prohibitions themselves do not rely on classic "hard law" such as custom created through general state practice. Rather, they rely on a variety of extralegal or "soft law" sources such as UN reports and documents. In a universe where such sources can be evidence of international norms it is hard to see why the extensive, public and often politically controversial business operations of government-owned companies would also not be relevant.

The examples below illustrate only a small part of the broad involvement of government-controlled companies in business activity in occupied territories.[65] (French companies are heavily represented, likely because of France's overall economic size, number of large state-controlled firms, and geographic location.)

- One notable example is Orange, S.A., formerly the French government communications agency, now privatized as major multinational telecommunications corporation. The French government is by far the largest single shareholder, and has significant control over the company, with 30% of the voting rights. Orange owns 49% of Meditel, a large Moroccan mobile-phone company that has extensive operations throughout Western Sahara. In 2016, Orange rebranded Meditel as Orange Maroc, fully bringing it under the Orange brand.
- Engie is a French multinational energy giant. Nearly one-third is owned by the government of France. The 19-member board of directors includes five directors appointed by and representing the government. In addition, a commissioner of the French government attends Engie board meetings in an advisory role. In 2016, Engie announced it was participating in a project to build a large industrial park and housing center near the Moroccan settlement of Laayoune. (It was also a bidder for another energy project in the territory, but lost out to an Italian-German consortium.)

64 Andre se Rocha Ferreira and others, 'Formation and Evidence of Customary International Law' (2013) 1 *UFRGS Model United Nations Journal* 182 <www.ufrgs.br/ufrgsmun/2013/wp-content/uploads/2013/10/Formation-and-Evidence-of-Customary-International-Law.pdf> accessed 10 October 2019.

65 See Kontorovich, 'Who Else Profits' 1 (n 41); Kontorovich (n 41), 'Who Else Profits' 2 (n 41).

- Air France-KLM is a descendant of the national airlines of France and the Netherlands, in which the French government still maintains the leading financial stake, and appoints members to the board of directors. Its financial report for the first half of 2017 states: "At June 30, 2017, more than 50% of Air France-KLM's share capital was owned by European interests – European Union Member States or States party to the European Economic Area Agreement." The company's wholly owned subsidiary, Transavia, has inaugurated direct air service from Europe to Western Sahara, which it describes as being an attractive vacation destination in southern Morocco.
- Bombardier is the world's leading manufacturer of both planes and trains, aerospace and ground rail transportation solutions. In 2016, Quebec's government-owned pension fund, Caisse de Dépôt et Placement du Québec (CDPQ), completed the purchase of 30% voting and ownership rights in Bombardier Transportation's holding company, BT Holdco, for $1.5 billion. The Bombardier website states that BT Holdco now "owns all of the assets of Bombardier's Transportation business segment." According to the agreement, CDPQ's consent is needed to appoint independent directors to Bombardier's board of directors. The company has been deeply involved in developing transportation solutions to integrate Western Sahara with Morocco. In Morocco, Bombardier is actively involved in the competition for the LGV high-speed railway project to connect Casablanca and Agadir, and increasingly develops its business and industrial effort for competition with other global leaders in the industry for LGV follow on projects and operation.[66] The Director of Bombardier Transport Morocco, the Morocco and Africa unit, stated in July 2017 that extending the line into "South Morocco regions" would be a lucrative achievement for the company.[67]

Bombardier supplied Spain's Canary Islands Binter Airlines with its latest new Bombardier CRJ1000 aircraft via a lease agreement with Spain's Air Nostrum, a regional franchisee for Iberia Airlines.[68] Among others, the aircraft is being inaugurated on Binter's newest line to Dakhla and Laayoune in Western Sahara.[69]

66 'Bombardier Transport annonce la mise en place d'un cluster industriel ferroviaire au Maroc' (*Maroc Dipomatique*, 21 October 2016) <http://maroc-diplomatique.net/bombardier-transport-annonce-mise-place-dun-cluster-industriel-ferroviaire-maroc/> accessed 10 October 2019.

67 Théa Ollivier, 'Taoufiq Boussaid confirme que Bombardier lorgne la LGV Casablanca-Agadir' (*Telquel*, 06 July 2017) <http://telquel.ma/2017/07/06/bombardier-transport-maroc-se-positionne-les-tramways-au-maroc-en-afrique_1553184> accessed 10 October 2019.

68 'Bombardier Welcomes Binter to the Family of CRJ1000 Operators' (*Bombardier*, 30 March 2017) <www.bombardier.com/en/media/newsList/details.bca-20170330-bombardier-welcomes-binter-to-the-family-of-crj1000.bombardiercom.html> accessed 10 October 2019.

69 'Binter lanza operaciones con un nuevo Bombardier' (*ABC Canarias*) <http://www.abc.es/espana/canarias/abci-binter-lanza-operaciones-nuevo-bombardier-201704221948_noticia.html> accessed 10 October 2019.

## 4 Conclusion

Both the provisions of the GATT and state practice under it confirm that a country could enjoy GATT's preferential treatment not just in respect to its own territories, but also to territories where it maintains a belligerent occupation. The extension of GATT to such territories is not just inconsistent with, but fundamentally contradictory to any suggestion that international law bans or substantially restricts economic activities by the occupying power, or third-party states, in occupied territory. In recent years, some scholars and NGOs have advocated for an interpretation of human rights law that would ban or restrict such economic activity. However, state practice has not followed this suggestion. In the rare cases in which "norm sensitive" governments publicly address the legality of such business – typically in the form of advisories to domestic firms about doing business in particular territories – the contents of such advice belie any opinio juris supporting a prohibitive norm. Indeed, state-controlled firms are among the most significant economic actors in numerous occupied territories. None of this says anything about the ethics of such business activity, or the desirability of a different norm being established. It does show no such norm currently exists, nor is there any substantial processes of crystallization of a new norm.

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# 4 The EU's trade relations with northern Cyprus obligations and limits under public international and EU law

*Nikolas Kyriacou**

## 1 Introduction

The Western Sahara judgement[1] serves as a useful reminder of the importance of the EU's economic and trade relations with respect to occupied territories. While not constituting a centrepiece of EU's external relations, indirect and direct economic and trade relations with such territories raise important legal challenges. In this respect, such trade relations become the meeting point of complex public international law issues underlying the status of such territories, on the one hand, with the obligations of States and international organisations, when establishing economic and trade relations with administrations in or with respect to those territories, on the other hand.

The chapter is divided into the following sections: I will first provide a short presentation of the chapter's scope, followed by a description of the development of trade relations between the EU and northern Cyprus,[2] which will serve both as a historical and a legal backdrop to the issue at hand. This backdrop will include a presentation of the three *Anastasiou* cases dealt with by the Court of Justice of the EU (CJEU) and, more importantly, an analysis of the Commission's proposal for the Direct Trade Regulation between the EU and northern Cyprus. I will then address the question whether, in the light of the Western Sahara judgement, the possibility of establishing trade relations with northern Cyprus is affected and I will conclude by considering how the EU's trade relationship with northern Cyprus resonates with obligations stemming from public international law.

* All views expressed herein are strictly personal.

1 Case C-266/16 *Western Sahara Campaign UK* [2018] EU:C:2018:118.

2 The Republic of Cyprus acceded to the EU in 2004 with the whole of its territory. Pending the comprehensive settlement of the Cyprus problem, the application of the acquis in the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control is suspended by virtue of Protocol 10 to the Act concerning the conditions of accession of the Republic of Cyprus. References in this chapter to "northern Cyprus" are shorthand references intended to be understood as referring to the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control. References to Cyprus should be understood as references to the Republic of Cyprus, unless otherwise explicitly mentioned in the chapter.

## 2 Scope of the chapter

Protocol n. 10 to Cyprus' accession to the EU addresses the uncommon conditions created by the division of the island by providing in its Article 1(1) that the application of the acquis in those areas of the Republic of Cyprus in which the Government does not exercise effective control is suspended and in Article 3(1) that nothing in the Protocol itself shall preclude measures with a view to promoting the economic development of the said areas.[3] This Protocol circumscribes also the geographical and material scope of this chapter: on the one hand, the geographical area concerned is northern Cyprus, whereas the material scope is EU and international law alike.

Cyprus' paradigm fits neatly within the overall theme of the international economic activities in occupied territories. The 1974 Turkish invasion resulted in the partial occupation of the island ever since. In 1983, the "Turkish Republic of Northern Cyprus" ("TRNC") was proclaimed and has been recognised only by Turkey. A number of EU Member States have maintained direct and indirect trade relations with that part of the island, while not extending recognition to the "TRNC".[4] In the aftermath of the 2004 rejection of the UN-sponsored plan for reunification of the island, the Commission tabled a legislative proposal with a view to introducing special conditions for trade with northern Cyprus.[5] For reasons that are explained *infra,* the Commission's proposal did not materialise.

While there are other cases of trade relations between the EU and disputed areas, such as the Occupied Palestinian Territory and Western Sahara, the case of EU trade relations with northern Cyprus can be distinguished from these cases: first, the establishment of trade relations between the EU and northern Cyprus is pursued by means of EU internal legislation and not by an international agreement, as in the cases of the Occupied Palestinian Territory[6] and Western Sahara. Second, trade relations between EU and northern Cyprus refer to a specific territorial part of one of EU's own Member States, which is under military occupation. The Occupied Palestinian Territory and Western Sahara cases relate to geographical areas where the EU founding treaties are not applicable. Third, the factual and legal status of the two aforementioned cases substantially differs

3 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – Protocol No 10 on Cyprus [2003] OJ L 236, 955.

4 'Turkish Republic of Northern Cyprus' (*State Planning Organisation, Statistics and Research Department*, Statistical Yearbook 2016) <http://www.devplan.org/Ist_yillik/IST-YILLIK-2016.pdf> accessed 21 January 2019, 279.

5 Commission, 'Proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control' COM (2004) 0466.

6 See Case C-386/08 *Brita* [2010] EU:C:2010:91 and Nellie Munin, 'Can Customs Rules Solve Difficulties Created by Public International Law? Thoughts on the ECJ's Judgment in Brita Case' [2011] 6 *Global Trade and Customs Journal* 193.

from the case of Cyprus, although all three are connected by the existence of a military occupation. In this respect, on the one hand, Western Sahara is acknowledged as a non-self-administered territory and the Occupied Palestinian Territory come under the jurisdiction of the Palestinian Authority, i.e. they carry a legitimate legal status under international law. The Republic of Cyprus, on the other hand, is a State, whose territorial integrity, sovereignty and independence are violated due to the prolonged occupation[7] of part of its territory by Turkey.

## 3 EU trade with northern Cyprus – the Anastasiou judgements

### *3.1 C-432/92- Anastasiou I*

In 1972, Cyprus and the EU concluded an Association Agreement,[8] which regulated trade between the two parties. This Agreement was completed by a Protocol in 1977. Following the division of the island in 1974, products from northern Cyprus continued to enjoy the European Community's preferential tariffs accorded by this Association Agreement. It was under this Agreement that the United Kingdom accepted the origin and phytosanitary certificates issued by the authorities having control of the northern part of Cyprus,[9] provided they bore either the designation "Republic of Cyprus" or "Cyprus Customs Authorities". Greek Cypriot producers and exporters of citrus fruit initiated proceedings before the UK High Court against the competent UK authorities seeking to have these authorities accept solely the certificates issued by the authorities of the Republic of Cyprus and not those originating from the authorities in northern Cyprus, irrespective of their content and actual designation.

The UK High Court's questions to the Luxembourg Court essentially inquired whether Community law precluded or required a Member State to accept certificates by the authorities in northern Cyprus, on the assumption that the issuing and verification procedures for these certificates were as dependable as those issued by the Republic of Cyprus. The High Court further inquired whether the practical impossibility for exporters in northern Cyprus to obtain certificates from or to export from the Republic of Cyprus was legally significant under European Community law.

7 The use of the term prolonged occupation is meant in the descriptive sense, given the 44 years of military occupation and does not imply the existence of a distinct legal category. On this discussion, see Micheal Lynk, 'Prolonged Occupation or Illegal Occupant' (*Ejiltalk*, 16 May 2018) <https://www.ejiltalk.org/prolonged-occupation-or-illegal-occupant/> accessed 21 January 2019.

8 Agreement establishing an Association between the European Economic Community and the Republic of Cyprus, [1973] OJ L 133/2.

9 "Northern part of Cyprus" is the term employed by the Court itself in the judgement. See paras 2, 11, 15 and other identical references in the text of the judgement.

The Court examined whether the provisions of the 1977 Protocol precluded acceptance by Member States' national authorities, upon importation of citrus or potatoes from the northern part of Cyprus, of movement certificates issued by authorities other than those of the Republic of Cyprus. It concluded that Member States' authorities were under an obligation not to accept movement and phytosanitary certificates issued by authorities other than the competent authorities of the Republic of Cyprus, with respect to fruit and potatoes imports. The two points upon which the Court based its conclusion were the following: the first was that the principle of mutual reliance and cooperation underpinned the movement certificates system and that such a system could only properly function if the procedures for administrative cooperation were strictly complied with.[10] For the Court, a cooperation of this kind was excluded with the authorities of an entity such as those established in northern Cyprus and further added that

> the acceptance of movement certificates not issued by the authorities of the Republic of Cyprus, would constitute, in the absence of the possibility of checks or cooperation, a denial of the very object and purpose of the system established by the 1977 Protocol.[11]

Having particular regard to phytosanitary certificates, the Court underlined that it would be impossible for an importing Member State to address enquiries about contaminated products or incorrect certificates to the authorities of an unrecognised entity. It concluded that only the authorities of the Republic of Cyprus could address such issues.[12]

The immediate effect of this judgement was that goods originating from northern Cyprus, not having valid movement certificates, could no longer benefit from the preferential treatment and tariffs that were accorded to identical products originating from the areas controlled by the Government of the Republic of Cyprus, by virtue of the Association Agreement.[13] Such goods could still enter the Community market, but only after paying the applicable duties, thus losing a competitive advantage vis-à-vis other identical products benefiting from preferential tariffs.

Two aspects of the judgement should be highlighted: first that the Court did not base any substantial part of its reasoning on public international law obligations that the Community might have had with respect to the non-recognition of the occupying authorities and of their acts.[14] Second, and related to the first

10 Ibid., paras 38–40.

11 Ibid., para 41.

12 Ibid., para 63.

13 Stefan Talmon, 'The Cyprus Question before the European Court of Justice' [2001] 12 *European Journal of International Law* 727, 736.

14 In this sense, it is difficult to see how "the Court applies public international law in an exemplary way", as Vedder and Folz suggest. See, Christopher Vedder and Hans-Peter Folz, 'A Survey of

point, it did not consider the legal effect of the UN Security Council Resolutions relating to the declaration of the "TRNC", especially with respect to the Security Council's call upon all States not to recognise the purported secession and not to facilitate or in any way assist this entity.[15] To the contrary, the Court framed its analysis in terms of the Community legal order,[16] with particular attention to the need for maintaining a uniform application of Community rules in the field of its commercial relations.[17]

### *3.2 C-219/98- Anastasiou II*

In the aftermath of the *Anastasiou I* judgement, a new case reached the Court of Justice of the EU concerning the importation into the United Kingdom of citrus fruit originating in northern Cyprus. The imports took place after the ships made a port call in Turkey, where Turkish authorities issued the requisite phytosanitary certificates for the shipments. These certificates were then presented to UK authorities. The questions referred to the CJEU by the House of Lords concerned the application of the (European Community) Directive on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community.[18] The essence of the questions submitted was whether, and under what conditions, the applicable directive permitted Member States to allow into their territories plants originating in a non-member country, to which special requirements applied and which, pursuant to the same Directive, must undergo an inspection evidenced by the issue of a phytosanitary certificate, where those plants were accompanied only by a phytosanitary certificate issued by the authorities of a non-member consignor country which was not the country of origin of the plants.[19]

The Court found that its conclusion in *Anastasiou I*, i.e. that phytosanitary certificates from a non-recognised entity must not be accepted by the authorities of Member States, did not imply that the same products could not be accepted in case they were accompanied by phytosanitary certificates issued only by a non-member consignor country (and not by the country of origin).[20] The Court attached three conditions to the possibility of importing goods in this way: first,

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Principal Decisions of the European Court of Justice Pertaining to International Law' [1997] 8 *European Journal of International Law* 508.

15 UNSC Res 541/1983 (18 November 1983) UN Doc S/RES/541 and UNSC Res 550/1984 (11 May 1984) UN Doc S/RES/550.

16 Marise Cremona, 'C-432/92, R. v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and Others, Judgement of 5 July 1994, Case Note' [1996] 33 *Community Market Law Review* 134.

17 Nicholas Emiliou, 'Cypriot Import Certificates; Some Hot Potatoes' [1995] 20 *European Law Review* 202, 210.

18 Case C-219/98 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* [2000] EU:C:2000:360.

19 Ibid., para 14.

20 Ibid., para 18.

the plants must have been imported to the country which later performed the checks, before being exported to the Community; second, the plants must have remained in that country for such time and under such conditions that enable the proper checks to be completed; and, third, the plants had not been subject to special requirements that could have been satisfied only in their place of origin.[21]

The *Anastasiou II* judgement effectively paved the way for the establishment of indirect trade between northern Cyprus and Member States and averted the consequences that the "TRNC" economy would have suffered should the Court have found that agricultural goods be accompanied by phytosanitary certificates issued only by the country of origin, as per the applicants' argument. What was at stake in this case was the correct interpretation and application of EC law, and especially ensuring the Directive's objective to protect the territory of the Community from the introduction and spread of organisms harmful to plants. Given that the Court considered that the objective could "be attained without requiring plants originating outside the Community to undergo a certification procedure in their country of origin", the Court remained strictly within the formal and technical confines of the Directive's provisions. It essentially declared itself to be agnostic as to the consequences that would flow from the fact that goods originated from a geographical area that was under occupation or that such goods were certified at some point in time by authorities not enjoying the privilege of international recognition.

### *3.3 Case 140/02- Anastasiou III*

The final act in the Anastasiou saga came about with the third judgement handed down by the Court in 2003. The factual setting remained the same, as in Anastasiou II. What had changed, in the intervening period between Anastasiou II and the launching of this third preliminary reference, was that the applicable EU legislation had been amended. The said amendment led the applicants to argue that the effect of the amendment was that citrus fruit was subject to the special requirement that its packaging bore an appropriate origin mark, which could only be satisfied in the country of origin. In turn, this entailed that UK authorities could not accept phytosanitary certificates for goods originating in northern Cyprus issued by the Turkish authorities.

Indeed, the questions addressed by the House of Lords inquired whether the special requirement that the packaging shall bear an appropriate origin mark pursuant to the amended Directive could only be fulfilled in the country of origin and whether the official statement prescribed by the same Directive as to the country of origin must be made by an official in the country of origin or by an official in a third country.

The Court answered both questions in the affirmative, i.e. that the special requirement that an appropriate origin mark be affixed to the plants' packaging

21 Ibid., para 38.

can be fulfilled only in the country of origin and that the phytosanitary certificate required in order to bring those plants into the Community must also be issued in their country of origin by, or under the supervision of, the competent authorities of that country.[22]

In order to reach these conclusions, the Court adopted a teleological interpretation of the Directive. According to its reasoning, the applicable Directive was designed to ensure a high level of phytosanitary protection against the bringing into the Community of harmful organisms in products imported from non-member countries. The system established by the Directive relied heavily on phytosanitary certificates, which constituted a fundamental procedural requirement enabling the objectives of the Directive to be met with regard to those products that came under its material scope.[23] The Court also added that such certificates issued by non-member countries could be accepted under certain conditions only,[24] while maintaining that citrus fruit such as those in the main proceedings enjoyed an additional level of protection, identical throughout the territory of the Member States.[25] Importantly, the Court recalled the *Anastasiou I* judgement to the point concerning the cooperation between competent authorities.[26]

### *3.4 Assessing the court's case law*

A *prima facie* combined reading of the Court's judgements seems to suggest that the Court oscillated between accepting and rejecting phytosanitary certificates for goods originating in northern Cyprus. However, the apparent change of the Court's position can be fully understood and be justified from the point of view of ensuring the full and effective application of EU law, preserving the integrity of the EU legal order and safeguarding the strict application of a set of technical rules established by the EU legislator. In all three cases, the conclusions reached by the Court ensured these three aims and did not seek to accommodate any other consideration, especially relating to the legality, under public international law, of the "TRNC" authorities.

How were these three judgements received by legal scholarship? Koutrakos maintains that the Court's approach showcases its appetite for "intervening for as little as possible in an issue which is highly charged in political terms".[27] This point is further elaborated by Skoutaris, who argues that the Court's reasoning in the Anastasiou saga "is a par excellence example of the pragmatic

22 Case C-140/02 *Regina on the application of S.P. Anastasiou (Pissouri) Ltd and Others v Minister of Agriculture, Fisheries and Food* [2003] EU:C:2003:520, para 75.

23 Ibid., para 46.

24 Ibid., para 47.

25 Ibid., para 49.

26 Ibid., para 63.

27 Panos Koutrakos, 'Legal Issues of EC-Cyprus Trade Relations' [2003] 52 *International and Comparative law Quarterly* 489, 493.

approach that the Luxembourg Court has adopted when dealing with issues arising from the conflict" which favours a seemingly depoliticised and overly technical approach.[28]

Talmon, writing at a time when only the Anastasiou I and II were handed down, criticises the Court's findings in these two cases considering that they were "based on a false premise: international non-recognition does not necessarily preclude cooperation between authorities of the non-recognising state and those of the unrecognised state".[29] The same author considers the Court's approach to be out of touch with reality since such cooperation existed *de facto* for a number of years between the authorities of the United Kingdom, Germany and the "TRNC". Based on this *de facto* cooperation and given that no EU or international rule prohibits States from cooperating with unrecognised States in general, so long as such cooperation does not amount to recognition, Talmon concludes that cooperation with Turkish Cypriot authorities could be effected, provided that it did not imply recognition. Both Skoutaris and Talmon seem to converge on the aspect of the economic ramifications the judgements brought about. The former suggests that "the Court, politically speaking, banned direct trade between the EU and the secessionist entity in the North" which "resulted in an even greater economic isolation of the Turkish Cypriot community".[30] The latter maintains that in fact the Court "applied economic sanctions, a measure that should be reserved for the political bodies responsible for the conduct of the Community's foreign relations".[31]

While there is merit to some of the positions described earlier, there is more to be said about the Court's judgements. For one, the Court indeed adopts a technical and apolitical stance to the questions referred to it. Its role is that of the final arbiter of EU law and, as such, it comes as no surprise that it is not lured in engaging in or pronouncing itself on the political aspect of the conflict in Cyprus or the ramifications thereof.[32] There is an important point to be made here: while technical questions may be seemingly neutral in character, such as the conditions under which packaging of citrus fruit takes place, the repercussions of the answers to these questions may have inevitable economic and political repercussions. Were the Court to decide otherwise on the questions referred to it, the Republic of Cyprus would have suffered the political, and possibly the economic, consequences of a pronouncement allowing the direct trade with northern Cyprus. Either way, it is inescapable that the Court's judgements produce political results for the parties involved. For the present author, it can safely be presumed that the Court is cognisant of the legal and political importance of

28 Nikos Skoutaris, *The Cyprus Issue – The Four Freedoms in a Member State under Siege* (Hart Publishing, 2011), 136.

29 Talmon (n 13) 743.

30 Skoutaris (n 28) 136.

31 Talmon (n 29) 750.

32 It should be reminded that the Court adopted the same stance in the *Brita* case, concerning goods originating in the Occupied Palestinian Territories, *Brita* (n 6).

its judgements and it is for this reason that it confined itself to interpreting the applicable EC legislation, rather than engaging with a wider set of public international rules or broader political considerations.

Talmon's position on the issue of (non-)recognition is particularly open to criticism for the following reasons. First, while acknowledging that *de facto* cooperation did indeed take place, this does not suggest per se that such cooperation is legitimate or that it may, in the aftermath of the Court's judgements, lead to the normalisation of the said cooperation. In other words, given that the Court found that cooperation with "TRNC" authorities was not permissible, this entailed that any previous cooperation was premised on a wrong interpretation and application of the law. Second, cooperation with recognised authorities respects the formal integrity of the Community system for plant protection, since such authorities have the presumption of field competency and knowledge. In the parameters of the Anastasiou judgements, failure on the part of these authorities to (re-)act in cases of contamination or wrong filling in of papers would render the Republic of Cyprus accountable towards the EU. On the other hand, a non-recognised entity could not be held accountable on the basis of EU-Cyprus Association Agreement or of any other legal framework. Third, Talmon's position does not take into account the obligation not to recognise the "TRNC", stemming from UN Security Council Resolutions 541 and 550. In this respect, it must be pointed out that the "TRNC" authorities, in performing acts of controls, issuing certificates and communicating with counterpart authorities, exercise powers that are reserved for the domain of the State. While *de facto* cooperation may not entail official and explicit recognition, this does not render such cooperation automatically permissible, especially under the light of the aforementioned Security Council Resolutions.

### *3.5 The Direct Trade Regulation*

Less than three months after the rejection of the UN-sponsored plan for the settlement of the Cyprus problem, the Commission submitted its proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic does not exercise effective control.[33] In its Explanatory Memorandum, the Commission stated that its proposal took up the invitation of the Council to put an end to the isolation of the Turkish Cypriot community and to facilitate the reunification of Cyprus by encouraging the economic development of the Turkish Cypriot community and by facilitating trade between the northern part of Cyprus and the EU Customs Territory and offering a preferential regime for products entering the customs territory of the EU.

33 Commission, 'Proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control' COM (2004) 466 final.

The choice of Article 133 EC (now 207 TFEU) as the legal basis for the draft Regulation was one of its most controversial aspects. Given that Cyprus acceded to the EU with its entire territory, while the application of the acquis in northern Cyprus was suspended, pursuant to Article 1(1) of Protocol 10 of the Act of Accession, the Commission considered that the Community Customs Code was not applicable in that geographical area and that, as a corollary, trade with that area had to follow the rules applicable to third countries.[34]

It should also be added that the preamble to the draft Regulation provided that the latter established special rules to facilitate trade between northern Cyprus and Member States other than Cyprus[35] and that "the Commission should determine annual tariff quotas for products in such a way as to encourage the development of trade, while avoiding the creation of artificial trade patterns or facilitating fraud".[36]

The main text of the draft Regulation essentially provides that products[37] originating in northern Cyprus "and transported directly therefrom may be released for free circulation into the customs territory of the Community",[38] that the Turkish Cypriot Chamber of Commerce or another body duly authorised for that purpose by the Commission shall issue certificates of origin for such products,[39] that the Commission shall determine the annual tariff quotas for these products[40] and that independent phytosanitary experts appointed by the Commission and operating in coordination with the Turkish Cypriot chamber of commerce shall inspect goods which consist of plants, plant products and other objects at the stage of production, harvest and preparation for marketing.[41]

### *3.6 The problematic aspects under EU and international law*

The Republic of Cyprus, as well as the Legal Services of the Council and of the European Parliament, met the Commission's proposal with strong opposition. In its Opinion on the proposal,[42] the Legal Service of the Council addressed the main problematic aspects of the proposal under EU and international law.[43]

34 Ibid., 3.
35 Ibid., preamble para 3.
36 Ibid., preamble para 4.
37 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code defined such products in articles 23 and 24 thereof [1992] OJ L 302.
38 Proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, art 1(1).
39 Ibid., Article 2(2).
40 Ibid., Article 4.
41 Ibid., Article 6(1).
42 Opinion of the Legal Service, 'Proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control' (2004) 11874/04.
43 The proposal for the Direct Trade Regulation has remained dormant on the level of the Conference of the Presidents of the European Parliament since 2010.

One of the central questions in this respect was the choice of the correct legal basis for the promulgation of the draft Regulation. The Commission based its proposal on Article 133 TEC, which related to the Union's Common Commercial Policy and came under the title of the Union's External Action. The Commission also identified Gibraltar, Ceuta and Melilla as examples where the same legal basis was used to regulate customs duties on imports from Member States' territories, which led outside the customs territory of the Union.

The Council Legal Service disagreed with this approach. It reminded that the reason why northern Cyprus was not within the customs territory of the Union was that the application of the acquis is suspended by virtue of Article 1(1) of Protocol n. 10 and that Article 1(2) of the same Protocol provides for a specific legal basis and procedure for withdrawing the said suspension.[44] For the Council's Legal Service, the Commission's proposal was tantamount to a withdrawal of the suspension of the acquis, with regard to a fundamental area of the common market. Such withdrawal was permissible solely under the terms of Protocol n. 10, which required a unanimous Council decision to that effect and not a qualified majority, as per the Commission's proposal. According to the same analysis, the proposal could not be reconciled with the case law of the CJEU with respect to the correct choice of the legal basis for a legislative measure.[45]

While the present author agrees with the general orientation followed by the Council's Legal Service, it is still necessary to elaborate on an additional issue on this aspect. It should be recalled that Article 3 of Protocol 10 provides as follows:

> "1 Nothing in this Protocol shall preclude measures with a view to promoting the economic development of the areas referred to in Article 1.
> 2 Such measures shall not affect the application of the acquis under the conditions set out in the Accession Treaty in any other part of the Republic of Cyprus".

This Article may be interpreted in two ways. The first is that the Protocol constitutes a *lex specialis* arrangement with regard to the suspension of the acquis, while endowing the Council with the competence to decide, by unanimity, on the withdrawal of the suspension of the acquis' application. The Protocol is silent as to whether the withdrawal should be a general or a partial one. As such, measures taken with a view to promoting the economic development of northern Cyprus should be understood as measures falling under Articles 1 and 2 of the Protocol. Under this reading, the aim of Article 3 is to clarify the scope of the competences of the Council under the Protocol. Furthermore, pursuant to Article 3(2) the same measures shall not affect application of the acquis under the conditions set out in the Accession Treaty, which, in turn, constitutes primary law. As such, the aforementioned conditions may not be amended or otherwise

44 Ibid., 3.

45 The legal opinion cites Case C-300/89 *Commission v Council* [1991] EU:C:1991:244, para 10. This is indeed settled case law, which has been confirmed in numerous subsequent cases. See by way of example Case C-330/15P *Tomana e.a.* [2016] EU:C:2016:601, para 37.

affected through the adoption of secondary legislation, as the proposed Direct Trade Regulation.

The proposed Regulation seems to be premised on a different interpretation of the Protocol's provisions, which maintains that the measures that may be adopted under Article 3 of Protocol 10 are not meant to include only measures under the Protocol, but encompass any measures that could have been adopted if the suspension of the acquis had not existed. This approach comes with two caveats: first, that the measures are intended for the economic development of northern Cyprus and, second, that they do not affect the application of the acquis in areas under the control of Republic of Cyprus. While this approach is not problematic from the point of view of its textual interpretation, it fails to respect the decision-making rule set out in Protocol no. 10, i.e. unanimity. That is to say that this second approach allows recourse to other legal bases in the Treaties, which establish qualified majority as the decision-making rule, thus depriving Article 3 of Protocol 10 of its useful effect. This second approach would thus allow for the piecemeal withdrawal of the suspension of the acquis and eventually render the Protocol's architecture an empty letter.

Irrespective of the preceding analysis, even if the Commission's choice of Article 207 TFEU as legal basis could be reconciled with the provisions of Protocol 10, it would still be a problematic one under primary law. As indicated earlier, Article 207 TFEU comes under the heading of the Union's External Action. The umbrella provision to this heading is Article 205 TFEU, which states that:

> The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.

The general provisions of the said Chapter 1 of Title V of the TEU include Article 3(5) thereof, which provides:

> In its relations with the wider world, the Union shall […] contribute […] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

In its celebrated judgement in Kadi, the CJEU put flesh on the bones of this obligation. In that judgement, the Court recalled that the EU "must respect international law in the exercise of its powers [and] that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law".[46]

46 Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] EU:C:2008:461, para 291.

The proposed Regulation is not consonant with international law, in at least two respects: (a) it does not respect Cyprus' sovereign right to declare its ports and airports to be closed to international traffic and to designate its own competent authorities; and, (b) it does not abide by the obligation enshrined in UN Security Council Resolutions not to provide assistance to the secessionist entity.[47] Thus, the proposed Regulation would also be considered not to be promulgated in accordance with EU law and direct trade with northern Cyprus would not be legitimately introduced.

An important aspect dealt with by the Council Legal Service was whether the draft Regulation presented problems with regard to international or EU law, given that the Republic of Cyprus had declared the ports in northern Cyprus to be closed. The Opinion observed that direct trade with northern Cyprus implied that goods would be exported from ports and airports in northern Cyprus and recalled that the Republic of Cyprus had declared ports in that geographical areas to be closed by a notice communicated to the International Maritime Organization in 1974.[48] Such closure is a sovereign right of the Republic of Cyprus and, according to the Council Legal Service, every State under international law has a duty to respect the decision made to that effect. In addition, there exists a specific duty of loyal cooperation between the Union and the Member States enshrined in Article 10 TEC (now Article 4(3) TEU),[49] which has been specified by the CJEU to entail that "the duty to cooperate in good faith governs relations between the Member State and the institutions" and that this duty is mutual for both the Member States and the Community institutions.[50] The Council Legal Service concluded that the adoption of the proposal would be *prima facie* contrary to international and EU law to the extent that it would ignore the sovereign right of the Government of Cyprus to declare the closure of the ports in northern Cyprus.[51]

The Council Legal Service is indeed correct in that under international law, there is no established right for ships of one State to enter the ports of another. Such right may only be provided in a treaty. Furthermore, international law does not oblige States to open their ports to international traffic, save for those instances that a treaty provides so.[52] International law recognises States, as the territorial sovereigns, the right to decide whether their ports shall be closed to

47 UN Security Council Resolution 550/1984 (para 3) called upon all States not to recognise the purported State of the "Turkish Republic of Northern Cyprus" set up by secessionist acts and not to facilitate or in any way assist the aforesaid secessionist entity.

48 See Opinion of the Legal Service (n 42), 5, fn. 6.

49 Article 4(3) TEU provides: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".

50 Case C-339/00 *Ireland v Commission* [2003] EU:C:2003:545.

51 Opinion of the Legal Service (n 42), 6, fn. 6.

52 Louise de Lafayette, 'Access to Ports in International Law' [1996] 11 *International Journal of Marine and Coastal Law* 1 (see State practice and treaty practice therein).

all, or to all foreign, shipping and traffic.[53] In the particular circumstances prevailing in northern Cyprus, the Government is not only entitled to exercise this right, but may also be considered to be under the legal duty to issue a formal notice to the effect that the ports are closed to international traffic, given that it does not exercise effective control in that particular geographical area and cannot abide by its international obligations for these ports as, for example, the safety aspects of shipping using the ports.

A logical corollary of the abovementioned consideration is that it remains for the Government to determine the conditions and the timing of an eventual reopening of the ports. The same conclusion is reached also with respect to the application of the obligations flowing from the UN Security Council Resolutions regarding the non-recognition of any other authority in Cyprus other than that of the Government of the Republic of Cyprus.

Finally, the Council Legal Service considered that the EU and its institutions are under a double obligation not to recognise any authority in northern Cyprus other than the Government of the Republic of Cyprus. From an international law perspective, the UN Security Council Resolutions lay down an explicit obligation of non-recognition of the "TRNC" and from the viewpoint of EU law, the Treaty of Accession is clear as to the fact that the Republic of Cyprus includes the whole of the island, even if the Government does not exercise effective control over the whole country. It flows from this position that designating a body in northern Cyprus that would be responsible for issuing certificates of origin and carrying out the necessary controls over products would constitute explicit recognition of another authority in northern Cyprus other than the legitimate Government of the Republic of Cyprus and that such provision would also be in violation of each Member State's right to determine the competent authorities which are responsible for the implementation of EU law on its own territory.[54]

Further to the Council's Legal Service analysis, two points must also be made. The first is founded upon the premise that the EU is endowed with specific powers and competences by way of conferral by the Member States. EU law does not allow EU institutions to establish or designate which authorities shall be responsible for the implementation of the acquis. This is a power inherent to statehood and cannot be alienated or delegated if only by the express consent of the State concerned. This argument addresses both the designation of the Turkish Cypriot Chamber of Commerce[55] and the appointment of EU officials to exercise functions and perform acts that are intrinsic to the core of State power.

53 George Kasoulides, *Port State Control and Jurisdiction* (Nijhoff 1993), 4.

54 Opinion of the Council Legal Service (n 42), 7, fn. 6.

55 Theodore Christakis, 'L'obligation de non-reconnaisance des certaines situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Brill 2005), 125: « Le problème lié à l'obligation de non reconnaissance de la « RTNC » a alors été « résolu » par une astuce juridique consistant à confier à un organisme « privé », la « chambre de commerce chypriote turque », la compétence pour la mise en œuvre du règlement ».

The second point is based on the treaty obligation in Article 3(5) TEU providing for strict observance of international law, including respect for the principles of the United Nations Charter. In this respect, UN Resolution 550/1984 calls upon all States not to recognise "TRNC" and not to facilitate or in any way assist the secessionist entity in northern Cyprus. The International Court of Justice set out the scope of non-recognition in its Namibia Opinion.[56] Commenting on this Opinion, Crawford considered that:

> In the first place, States may not enter into treaty relations with an unlawful regime with regard to the territory in dispute. In addition, States may not invoke or apply vis-à-vis the unlawful regime of the territory existing treaties applicable to the territory.[57]

It may be deduced from the Namibia Opinion that EU Treaties or secondary EU legislative measures promulgated cannot be applied vis-à-vis northern Cyprus pending occupation of that area and that the EU cannot enter into trade relations with an unlawful regime, especially if these relations entrench the authority of the occupying regime in the area. This is a line of argument supported by Kassoti in examining trade with Israeli settlements. She maintains that:

> There is little doubt that the importation of settlement goods into the EU contributes to the economic development of the settlements – thereby assisting to maintain the de facto illegal annexation of the territories in question. […] Clearly, access to the EU market a vital source of revenue for the settlements that facilitates their expansion and entrenchment; […] Thus, by failing to impose a clear ban on settlement goods, the EU is in breach of its obligation of non-recognition and non-assistance in maintain a situation created by a serious breach of peremptory norm of international law.[58]

Could the same argument be made for EU's trade relations with northern Cyprus? In my view this would be open to criticism as overly tenuous. It must be pointed out that the relevant passage from the ICJ's Opinion relates to a distinct set of obligations included in para 5 of UN Resolution 276 (1970), which calls on States, "particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa

56 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16.

57 James Crawford, 'Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories' (2012) <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 21 January 2019, para 48.

58 Eva Kassoti, 'Trading with Settlements: The International Obligations of the European Union with Regard to Economic Dealings with Occupied Territories' (Policy brief 02, Asser Institute, 2017) <http://www.asser.nl/about-the-institute/asser-today/are-the-eu-s-trade-activities-in-the-occupied-territories-of-palestine-and-western-sahara-legal/> accessed 21 January 2019, 8.

which are inconsistent with" the illegal presence of South Africa in Namibia. A similar call is not included in the UN Resolutions regarding the declaration of the "TRNC" and it would require a meticulous examination to unequivocally conclude that the obligation, included in UN Resolution 550, not to facilitate or in any way assist the secessionist entity in northern Cyprus would definitely prohibit all economic dealings and trade relations with the "TRNC". Such an examination would definitely require the examination whether the EU market would constitute a vital source of revenue for northern Cyprus. In turn, this would require a qualification of what constitutes "vital", especially in the light of the heavy dependence of "TRNC's" economy on Turkey's economic support and aid.

The aforementioned considerations illustrate that establishing a common set of standards for the EU's economic and trade relations with occupied territories may be more complex than intuitively anticipated and that it rather requires a context-specific exercise.

## 4. The EU's obligations under international and EU law with respect to trade with northern Cyprus

The thread of judgements in the *Anastasiou* cases and the legal analysis of the proposal for direct trade with northern Cyprus allow the following interim conclusions.

First, the EU is bound to strictly observe international law, with the principles of the UN Charter having particular status to this effect. This obligation is well entrenched in Article 3(5) TEU and permeates the EU's external action and relations with the world. As such, the framework of its actions is defined and restricted within the confines of international law and the principles of sovereign equality, good faith discharge of obligations, peaceful settlement of disputes, refrain from the threat or use of force against the territorial integrity or political independence of any state and other principles found in Articles 1 and 2 of the UN Charter.

Second, a concrete result of the general obligation of strict observance of international law is the duty of non-recognition and the duty not to provide assistance to an entity that is the result of the use of threat.[59] While fulfilment of the duty not to recognise the "TRNC" may easily be traced to the 1983 statement by the Ministers of the (at the time) European Community[60] and the standing

59 Martin Dawidowicz points out that "individual States are obligated under general international law not to recognise certain unlawful situations; they do not require the approval of UN organs to justify their actions since this obligation is self-executory", but also warns that the precise content of the obligation is unclear. See Martin Dawidowidz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010), 679, 683.

60 Frank Hoffmeister, *Legal Aspects of the Cyprus Problem – Annan Plan and EU Accession* (Martinus Nijhoff Publishers 2006), 84.

position of the EU for that matter,[61] the observance of the duty not to provide assistance may be more difficult to assess. In this respect, a total ban of any dealings, including those that are economic and trade in character, may constitute a safe indicator that such duty is undeniably abided by. Nevertheless, reality may prove harder to regulate, as some form of communication and exchanges is bound to take place. Establishing economic and trade relations need to be carefully examined in order to determine whether they constitute assistance or facilitation that may entrench the authority of an occupying regime.

An example of the conundrum posed by the scope of the duty not to facilitate or provide assistance, with particular focus on economic relations, is illustrated by the introduction of two EU Regulations: the Green Line Regulation and the Regulation establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community.[62] The former "is intended to facilitate trade and other links between the abovementioned areas and those areas in which the Government of the Republic of Cyprus exercises effective control"[63] and the latter's objective is to

> provide assistance to facilitate the reunification of Cyprus by encouraging the economic development of the Turkish Cypriot community with particular emphasis on the economic integration of the island, on improving contacts between the two communities and with the EU, and on preparation for the acquis communautaire.[64]

While it may be argued that the end recipients and beneficiaries of the economic development is the Turkish Cypriot community, collectively, and its members, on an individual level, the question still remains whether such development does not constitute, even indirectly, assistance to the "TRNC".

Third, can the proposal for direct trade and the case law in Anastasiou be reconciled? Anastasiou still holds as good law with respect to the specific categories of citrus fruit that were in question. As Hoffmeister observes, in the aftermath of the Anastasiou judgements, the exports from northern Cyprus to the EU are subject to the general tariff rates like third-country products.[65] It is important to highlight that what the direct trade proposal sought was not to answer the question whether trade with northern Cyprus is permissible,

61 See to this effect the Declaration by the European Community and its Member States [2005] 12541/05 stating:

> The European Community and its Member States recall that the Republic of Cyprus became a Member State of the European Union on 1st May 2004. They underline that they recognise only the Republic of Cyprus as a subject of international law.

62 Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction [2006] OJ L 65/5.

63 Regulation 866/2004, preamble para 5.

64 Regulation 389/2006, art 1.

65 Hoffmeister (n 60) 54–55.

but went a step further to provide the legal conditions under which goods from northern Cyprus would benefit from preferential treatment within EU territory. In this sense, the proposed Regulation sought to override the legal situation established by the Anastasiou judgements and to respond to the political situation created after the rejection of the UN plan for the reunification of Cyprus. In the absence of promulgation of the Direct Trade Regulation, the EU cannot accord preferential tariffs to goods originating in northern Cyprus. However, such goods may benefit from the status of "community goods" under the Green Line Regulation.

### *4.1 The impact of the Western Sahara judgement on the case of Cyprus*

Does the EU have additional obligations with respect to goods originating in northern Cyprus, in the light of the Court's judgement in the Western Sahara case?[66] In essence, this question seeks to establish whether the latter judgement introduced a judicial test, which any EU legislative measure must pass in order for direct trade with northern Cyprus to be established.[67] Due to the fact that the case in Western Sahara implicated the interpretation of an international agreement, as opposed to solely an EU legislative measure, and given the Court's particular focus on the interpretation of the territorial scope of the EU-Morocco Fisheries Partnership Agreement, no fully fledged and direct analogies may be drawn with the Direct Trade Regulation, in case the Direct Trade Regulation was promulgated and its validity was later challenged before the CJEU.

However, in examining the usefulness and potential transposition of the Western Sahara judgement in the factual and legal setting of an eventual establishment of direct trade between the EU and northern Cyprus, it could safely be considered as granted that the EU is bound, when exercising its powers, to observe international law in its entirety, including rules and principles of general and customary law, as well as provisions of international conventions that are binding on it.[68] Following the judgement's logic, if northern Cyprus were to be included within the scope of the Direct Trade Regulation, that would be contrary to certain rules of general international law, which are binding upon the European Union, Turkey and Cyprus,[69] namely the principle enshrined in Article 2(4) of the Charter of the United Nations that:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

66 *Western Sahara Campaign UK* (n 1).

67 It should be borne in mind that indirect trade is indeed possible. Goods from northern Cyprus reach Turkey and are later exported to the EU.

68 *Western Sahara Campaign UK* (n 1), para 47.

69 Ibid., para 63.

In such a case the examination of the territorial scope of the Direct Trade Regulation would possibly yield to the result that it is already covered by Protocol no. 10 to the Treaty of Accession and that such Regulation treats northern Cyprus as a third country, not being covered by the EU Treaties. Also, drawing on an analogy with the Court's analysis in the Western Sahara judgement, the Commission cannot properly support any intention to include northern Cyprus within the scope of the draft Direct Trade Regulation.[70]

The Court's analysis in the Western Sahara judgement did not address the issues analysed by the Advocate General on the applicability of international humanitarian law, the duty not to render assistance to an illegal situation and the obligations incumbent upon the EU as a matter of public international law. In fact, the AG in his analysis essentially provided for a meticulously devised test that permitted the judicial review of the validity of both the international agreements concluded by the EU and their acts of conclusion. This same test would be equally applicable in the case assessing the permissibility under EU law of direct trade with northern Cyprus.

There are four points of this test that are of particular relevance to northern Cyprus. The first is that judicial review of EU legislative acts is possible by relying on rules of international law.[71] The second is that the EU is under an obligation not to recognise an illegal situation arising from the breach of international humanitarian law and not to render aid or assistance in maintaining these situations.[72] The third and fourth points are interrelated given that the third inquires whether there is a military occupation and in the affirmative case, the fourth inquires whether the 1907 Hague Regulations concerning the laws and customs on land apply.[73] As the AG observes, establishing whether an occupation exists is a question of fact.[74] In the case of Cyprus, one could point to UN Resolutions[75]

70 Ibid., paras 71 and 72.

71 Ibid., para 86 with particular emphasis that conditions apply to this.

72 Case C-266/16 *Western Sahara Campaign UK* [2018] EU:C:2018:118, Opinion of AG Wathelet, para 241.

73 Ibid., paras 245–246.

74 Eyal Benvenisti offers a conceptual definition of occupation: "Effective control of a power over a territory to which that power has no sovereign title without the volition of the sovereign of that territory" in Eyal Benvenisti, *The International Law of Occupation* (Second Edition, Oxford University Press 2012). Christine Chinkin also reminds that:

> It is irrelevant whether the territory was occupied pursuant to an unlawful use of force in international law – it is the fact of occupation which creates the legal regime. Occupation is a matter of fact resting upon the assertion of authority and control.

Christine Chinkin, 'Laws of Occupation' (International Conference on Multilateralism and International Law, with Western Sahara as a Case Study, University of Pretoria, 4–5 December 2008) <http://www.arso.org/ChinkinPretoria2008.htm> accessed 21 January 2019.

75 UNSC Res 353 (20 July 1974) UN Doc S/RES/353 calling for "the withdrawal without delay from the Republic of Cyprus of foreign military personnel present otherwise than under the authority of international agreements"; UNGA Res 3212 (XXIX) (1 November 1974) urging the "speedy withdrawal of all foreign armed forces and foreign military presence and personnel from the Republic of Cyprus and the cessation of all foreign interference in its affairs"; and,

and pronouncements by international Courts affirming that northern Cyprus is indeed under military occupation.[76] As for the application of the 1907 Hague Regulations, Article 46 thereof provides that "[…] private property […] must be respected" and "[…] cannot be confiscated".

In his Opinion, the AG also examined whether the limitation on the obligation not to recognise an illegal situation, as enunciated in the Advisory Opinion on Namibia, had an impact on his analysis. He recalled that the Court rejected the parallel that the Commission attempted to draw between Cyprus and Namibia and then asserted that the limitation not to recognise an illegal situation in order not to deprive the people of Namibia of any advantages derived from international cooperation could not justify the conclusion of international trade agreements. He reminded that the conclusion of such agreements was covered by the obligation not to recognise illegal situations and stated that

> the effects of which can be ignored only to the detriment of the inhabitants of the Territory".[77] "the examples of the advantages from which the people of Namibia should be able to continue to benefit do not by any means include international trade agreements. In fact, the examples given by the International Court of Justice refer to the registration of births, marriages and deaths,

The same considerations are equally applicable to the case of trade with northern Cyprus.

### *4.2 Is the introduction of a total ban of import of goods from northern Cyprus to the EU possible?*

Actually, the EU's reaction to the annexation of Crimea may be said to reflect the AG's approach. In the case of annexation of Crimea and Sevastopol, the Union adopted legislative measures which prohibited the import of goods originating in these two areas, as well as the provision, directly or indirectly, financing or financial assistance, as well as insurance and reinsurance, related to the import of such goods.[78] Such goods may only be imported provided they have been made

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UNGA Res 37/253 (13 May 1983) UN Doc A/RES/37/253 "deploring the fact that part of the territory of the Republic of Cyprus is still occupied by foreign forces" and considering "the withdrawal of all occupation forces from the Republic of Cyprus as an essential basis for a speedy and mutually acceptable solution of the problem of Cyprus".

76 European Court of Human Rights, *Loizidou v Turkey* (1995) Series A no 310, para 54; *Demopoulos v Turkey*, App nos. 6113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04 (ECtHR, 1 March 2010) para 114; 'Military Occupation of Cyprus by Turkey' (*Rule of Law Academy*) <http://www.rulac.org/browse/conflicts/military-occupation-of-cyprus-by-turkey> accessed 21 January 2019.

77 *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 72), para 292.

78 Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol,

available for examination to, and have been controlled by the Ukrainian authorities and have been granted a certificate of origin by the Government of Ukraine.

Thus, one can already identify the asymmetrical response by the EU to two comparable factual situations. While Russia created an illegal territorial situation by use or threat of force, seeking to integrate that particular geographical area and not to establish another State,[79] as Turkey purported in northern Cyprus, there is still no apparent reason why the EU could not adopt the same measures with regard to goods originating from Crimea and northern Cyprus. Political considerations and *realpolitik* aside, the EU's reaction in Crimea may be instructive on how the Council perceives the rules that bind the EU with regard to trade with occupied territories: a total ban of import of goods, as in Crimea, is possible and measures may be introduced to this effect, but is far from being an obligation.

Individual Member State measures prohibiting the import of goods from northern Cyprus seem difficult to be adopted: first, the rules for the Common Commercial Policy are set at Union level and cannot therefore be adopted outside its realm. Second, the application of Article 24 of the Regulation on common rules for imports[80] allowing the application of prohibitions and quantitative restrictions on grounds of public policy presupposes that the illegality of the regime in northern Cyprus falls under the public policy justification that allows the adoption of such measures. Tridimas, opining on the compatibility of the Control of Economic Activity (Occupied Territories) Bill 2018 initiated in the Irish Senate with EU law, maintains that the promotion of respect for international law and the protection of fundamental rights can be considered as part of such public policy.[81] While this argument is attractive, it does not find support in the CJEU's case law.

On the one hand, research for the purposes of the present contribution shows that there is only one judgement by that Court which directly grapples with the permissibility of the "public policy" derogation. On the other hand, the said judgement does not lend support to Tridimas' argument. In fact, the Court made three important points in Van Gennip[82]: first, the Court reminded its general approach to derogations in that "Member States remain free to determine,

Articles 1(1) and (2) [2014] OJ L 183/70 and Council Regulation (EU) No 692/2014 of 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol [2014] OJ L 183/9, art 2.

79 Jure Vidmar, 'Crimea's Referendum and Secession' (EJIL: Talk!, 20 March 2014) <https://www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo/> accessed 21 January 2019.

80 Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports [2015] OJ L 83/16.

81 Takis Tridimas, 'Opinion in the Matter of the Control of Economic Activity (Occupied Territories) Bill 2018'(2018) <http://www.sadaka.ie/What_We_Do/Political_Lobbying/OccupiedTerritoriesCampaign/Files/TT_Legal_Opinion.pdf> accessed 4 September 2019.

82 Case C-137/17 *Van Gennip* [2018] EU:C: 2018:771, paras 56–58.

in accordance with their national needs, which can vary from one Member State to another and from one time to another, the requirements of public policy and public security". Second, that the public policy exception is a derogation from the fundamental principle of the free movement of goods, which must be interpreted strictly. According to the Court, the Member States cannot determine unilaterally the scope of such derogation without any control by the institutions of the EU. Third, and perhaps most importantly, the Court considered that the

> concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

In essence, the Court reiterates that while it is for Member States to determine whether a public policy reason exists that justifies the adoption of measures prohibiting the import of goods from a particular country, they do not enjoy an unconditional privilege. Member States must pass two tests in this respect. First, that the public policy derogation is justified by the existence of a thread to the fundamental interests of their society and second that any derogation measure remains under the ultimate oversight of the European institution, including that of the Court's itself. Given the scarcity of case law on this particular aspect and in the light of the Court's analysis in Van Gennip, it is at least doubtful whether individual Member State measures prohibiting the import of goods from northern Cyprus would be permissible.

### *4.3 Concluding remarks*

The EU's trade relationships with occupied territories do not follow a single pattern nor do identical legal rules have been followed in cases such as Western Sahara, northern Cyprus, Occupied Palestinian Territories or Crimea. In those instances where the Court was called upon to adjudicate on cases involving Western Sahara, the Occupied Palestinian Territory and northern Cyprus, it avoided entering the contested substance of the conflicts in question, but rather adopted a politically detached and legally technical analysis. While its legal reasoning may be perceived as neutral and apolitical at is essence, its judgements are bound to have political consequences. On the other hand, in the case of Crimea, an all-encompassing prohibition was imposed on imported goods. Seen from this perspective, this brings to the fore an instance of an asymmetrical application of EU law.

In the case of northern Cyprus, Turkish Cypriot goods do not enjoy preferential treatment, but can still be imported into the EU upon paying duties, just as other third-country goods.[83] Certificates for these products are issued

83 *Brita* (n 6).

by the authorities of the unrecognised "TRNC", which implies some form of acknowledgement of administrative capacity, albeit confined in the area of trade, of their role.

The EU legislative measures for the economic strengthening of the Turkish Cypriot community and the Commission's proposal for direct trade with northern Cyprus illustrate one of the conundrums of the Cyprus problem that may also be faced in other cases as well. On the one hand, the measures are intended to end the economic isolation of that community and lay the foundations for its economic convergence with the Greek Cypriot community, with a view to facilitating a future transition to a unified economy on the island, once a settlement ending the conflict is reached. Such convergence will inevitably improve the standard of living of the members of the Turkish Cypriot community and, as the Namibia Opinion entails, accord the advantages derived from international cooperation to them. On the other hand, public international law requires the non-recognition of illegal situations and refraining from assisting or aiding regimes that purport to alter the international status of a geographical area. The boundaries between the permissible measures intended to benefit local populations and the obligation to abide by the duty not to assist an illegal regime are often blurry.

The two extremes of the positions that may be adopted for the EU to establish trade relations with northern Cyprus are defined by the total ban of such trade and by the unrestricted or unqualified possibility to maintain such trade. Neither has been the case: direct and indirect trade is still possible, but goods originating in northern Cyprus cannot enjoy preferential treatment, nor can they be accompanied, at least in the instances discussed earlier, by certificates issued by authorities other than those of the Republic of Cyprus. Especially for the case of the Direct Trade Regulation, the powers of the EU are circumscribed by both EU and public international law, in light of the requirements for a correct legal basis to be used and of the strict observance for international law binding on the EU.

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# 5 EU labelling practices for products imported from disputed territories

*Olia Kanevskaia*

## 1 Introduction

Trade with disputed territories[1] has been a controversial issue in EU external relations: while acknowledging the illegality of occupation or annexation of these regions under international law,[2] the EU remains one of the largest trading partners of many disputed territories.[3] In this context, imports from such territories into the EU are often subject to additional requirements that intend to prove the origin of imported products and to ensure that they may be imported, if at all, under preferential trade rules: the measures range from an obligation to provide a certificate of origin issued by particular customs authority to the requirement that products' packages are accompanied by a label stating a very specific information regarding the origin of the good. These conditions, although reasonable from a customs law perspective, are not applied equally across all disputed territories, which questions both the legality and effectiveness of current EU trade practices.

This chapter seeks to examine the EU's approach regarding the import of products originating in four disputed territories: Israeli Settlements in the West Bank and East Jerusalem (hereinafter: Israeli settlements), Turkish Republic of Northern Cyprus (hereinafter: TRNC), Western Sahara and Crimea. Upon explaining the importance of rules of origin and marks of origin to international trade (Section 2) and mapping the applicable WTO and EU legal provisions on

1 This chapter refers to the occupied or annexed territories in question as to "disputed territories."

2 The presence of foreign administrative and military forces on these territories was condemned by a number of UN Resolutions: see UNSC Res 252 (21 May 1968) UN Doc S/RES/252, UNSC Res 267 (3 July 1969) UN Doc S/RES/267, UNSC Res 298 (25 September 1971) UN Doc S/RES/298, UNSC Res 478 (20 August 1980) UN Doc S/RES/478 (Israeli settlements); UNSC Res 541 (18 November 1982) UN Doc S/RES/541, UNSC Red 550 (11 May 1984) UN Doc S/RES/550 (TRNC); UNGA Res 37 (21 November 1979) (Western Sahara); UNGA Res 262 (27 March 2014) UN Doc A/RES/68/262 (Crimea).

3 For trade statistics, see e.g. DG Trade, 'European Union, Trade in Goods with Occupied Palestinian Territories' (*European Commission*, 12 June 2019) <https://ec.europa.eu/trade/policy/countries-and-regions/countries/palestine/> accessed 30 September 2019; EUROSTAT, 'Extra-EU Trade by Partner' <https://ec.europa.eu/eurostat/en/web/products-datasets/-/EXT_LT_MAINEU> accessed 30 September 2019.

rules of origin and origin marking (Section 3), the chapter reviews the rules that should be followed by economic operators in order to export goods from disputed territories into the EU. In particular, this analysis focuses on the territorial scope of the relevant trade agreements, applicable rules of origin and labelling measures adopted by the EU (Section 4). Ultimately, the chapter suggests that the EU's contradictory approach towards interpretation of the rules of origin, its selective application of labelling guidelines and reluctance to engage into broader political discussions weakens the EU position in international arena and undermines the consistency of its trade practices (Section 5).

## 2 Origin determination and marking

Rules of origin sit at the centre of international commerce. By defining how products acquire their "economic nationality," rules of origin essentially guide customs authorities when determining whether a product benefits from preferential treatment under a particular trade agreement or, to the contrary, is subject to trade restrictive measures. In this context, *preferential* rules of origin are used to establish whether goods fall within the scope of Preferential Trade Agreements (PTAs); in the absence of a trade treaty, import duties and trade remedies are determined using *non-preferential* rules of origin.[4]

As such, preferential rules of origin aim to prevent trade deflection and free-riding by ensuring that only the parties of a trade agreement can benefit from preferential treatment.[5] Their application, however, entails high administrative and transaction costs and may place a great burden on exporters and customs authorities.[6] Moreover, determination of origin becomes extremely challenging in the modern industrialized society, where production is globalized and carried out in multiple stages.[7] It is therefore not astonishing that, while rules of origin form an important component of any trade agreement, their design has often

4 See Moshe Hirsch, 'International Trade Law, Political Economy and Rules of Origin. A Plea for a Reform of the WTO Regime on Rules of Origin' [2002] 36 *Journal of World Trade* 171; Christina Moëll, *Rules of Origin in the Common Commercial and Development Policies of the European Union* (Juristförlaget i Lund 2008) 158.

5 Moshe Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip' [2002] 26 *FILJ* 572, 573.

6 Anna Andersson, 'Export Performance and Access to Intermediate Inputs: The Case of Rules of Origin Liberalization' [2016] 39 *The World Economy* 1048.

7 Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments' (n 5) 575; Hiroshi Imagawa and Edwin Vermulst, 'The Agreement on Rules of Origin' in Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer 2005). Gordon and Pardo suggest that rules of origin are based on two assumptions: "first, that the origin of a product can be determined, and second, that the territory from which the product originates is neither disputed nor occupied"; Neve Gordon and Sharon Pardo, 'The European Union and Israel's Occupation: Using Technical Customs Rules as Instrument of Foreign Policy' [2015] 69 *Middle East Journal* 74, 76.

provoked criticism,[8] especially when rules of origin are used as strategic tools of States' trade policies.[9]

Products' origin can typically be proved by different documentary evidence, including invoice declarations or certificates of origin; these documents, however, serve only for customs purposes and, in most cases, are not detectable to final users. In contrast, labels stating the area where a good was produced communicate origin information directly to consumers[10] and, at least potentially, may influence their choices and decisions to purchase a certain product. Such origin marking is often considered an effective alternative to other type of trade-restrictive measures related to determination of products' origin.[11] However, labels that provide wrong origin information may open avenues for deceptive practices.

Although rules of origin and marking of origin are regulated by different legal frameworks, they remain strongly related: to affix a correct label on a product, its origin first needs to be established following the applicable criteria. Hence, to understand labelling practices that EU importers should follow when trading with disputed territories, it is necessary to review the applicable legislation governing designation of products' origin. Since EU trade with disputed territories occurs in the context of both preferential and non-preferential rules of origin,[12] the next section discusses both types of origin designation, starting with the rules applicable under international trade law.

## 3 Legal framework for origin labelling

### *3.1 WTO law*

#### *3.1.1 Rules of origin under the WTO system*

Under WTO law, rules of origin are defined under a separate agreement (Agreement on Rules of Origin, hereinafter: ARO) that aspires to long-term harmonization of *non-preferential* rules of origin.[13] In turn, *preferential* rules of origin remain the matter of the relevant PTAs and free trade agreements (FTAs) and

8 See, among others, Patricia Augier, Michael Gasiorek and Charles Lai Tong, 'The Impact of Rules of Origin on Trade Flows' [2005] 20 *Economic Policy* 567; Mitsuo Matsushita and others, *The World Trade Organisation: Law, Practice, and Policy* (Second Edition, OUP 2006) 265; Petros Mavroidis and Edwin Vermulst, 'The Case of Dropping Preferential Rules of Origin' [2018] 52 *Journal of World Trade* 1.

9 Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments' (n 5); Gordon and Pardo, 'The European Union and Israel's Occupation' (n 7).

10 See, for instance, Bernard Hoekman and Stefano Inama, 'Harmonization of Rules of Origin: An Agenda for Plurilateral Cooperation?' [2018] 22 *East Asian Economic Review* 3.

11 See footnote n 48.

12 Although the EU maintains PTAs with States claiming control over the territories, products originating in the areas arguably do not benefit from the preferential treatment under those agreements.

13 Agreement on Rules of Origin, Preamble.

are covered by the ARO only marginally.[14] As such, the ARO prohibits application of rules of origin in a manner that is discriminatory, unduly burdensome or distortive to international trade,[15] and welcomes rules of origin that are transparent, objective and coherent, ideally based on a positive standard.[16] This, however, does not inhibit WTO Members from having a wide discretion when adopting their rules and criteria for origin determination.[17]

Following the ARO, a product receives its non-preferential origin either in a country where it has been wholly obtained or, when production takes place in multiple States, in a country of its last substantial transformation.[18] Where the latter takes place should be determined by using one of the three tests, namely: the *Ad Valorem* Percentage/Percentage Criterion Test, which focuses on a specific add-value to the product[19]; the Change of Tariff Classification Test (preferred by the EU for determination of *preferential* rules of origin), which implies change of products' tariff heading under the Harmonized System[20] used by WTO Members[21]; and the Manufacturing or Processing Operations/Technical Test (used by the EU for most non-preferential rules of origin), when a product is subjected to specific processing in its state of origin.[22] However, the application of these tests is not as straightforward as it may seem, in part since it is often difficult to establish whether the transformation was indeed "substantial."[23] Administering these tests also remains a time-consuming and cost-intensive exercise due to their complexity, possible simultaneous application and the requirement to provide sufficient evidence of processing.

Given that determination of origin is inevitably linked to the concept of territory, the ARO's silence on the territorial scope of the "country" is quite astonishing. A provision clarifying that the term "country" shall mean "the land … over which a country exercises sovereignty" was proposed during the ARO negotiation rounds, and it was suggested to include the concept of "products

14 See Agreement on Rules of Origin, Annex II.

15 Agreement on Rules of Origin, arts 2(b–d) and 3(a) (d); Panel Report *United States — Rules of Origin for Textiles and Apparel Product*, [2003], paras 6.23–24. It is unclear whether this prohibition concerns the effect on trade in intermediate stages of production or effect on trade in finished goods; Imagawa and Vermulst, 'The Agreement on Rules of Origin' (n 7) 613.

16 Agreement on Rules of Origin, arts 1.2, 9 and Annex II .3(b)

17 Panel Report *United States — Rules of Origin for Textiles and Apparel Product* [2003], paras 6.23–24.

18 Agreement on Rules of Origin, art 3(b).

19 Imagawa and Vermulst (n 7) 605.

20 The Harmonized Commodity Description and Coding System of the World Customs Organization (WCO).

21 Hirsch, 'International Trade Law, Political Economy and Rules of Origin' (n 4) 177; Imagawa and Vermulst (n 7) 605.

22 Ibid.; Imagawa and Vermulst (n 7) 604–605.

23 For instance, some believe the processing of agricultural raw materials is already a substantial transformation, while others find that substantial transformation does not exist for agricultural products and, in case of blending or mixing agricultural materials originating in more than one country, the products must be determined as originating in the place they were originally harvested or plucked. Imagawa and Vermulst (n 7) 655.

or activities in territories not subject to the jurisdiction of a single country".[24] Both proposals were eventually not accepted, partly due to Members' disagreements on politically sensitive terms such as "sovereignty" and their reluctance to engage in political discussion.[25] The ARO is thus of little use when discussing trade with disputed territories in the context of WTO law.

The question remains whether trade with such territories is ultimately prohibited by the General Agreement on Tariffs and Trade (GATT), and hence falls entirely outside the scope of Members' rights and obligations under the WTO Agreements.[26] Here the scholarship strongly disagrees: Moerenhout argues that Article XXVI 5(a) GATT on Members' acceptance of the Agreement in respect of the territories for which they have international responsibility does not apply to settlements in occupied territories due to Members' obligations under public international law, including the duty of non-recognition and non-assistance.[27] Hirsch, in turn, suggests that GATT applies a "practical-trade approach" and is not concerned with sovereignty over territories, but rather with *de facto* control.[28] The discussion on the territorial scope of the WTO Agreements, although extremely interesting, is yet not the main topic of this contribution[29]: while customs measures requiring provision of certain documentation or maintaining certain labels are undeniably linked to the concept of the territory, they are treated under different provisions of WTO law.

### *3.1.2 Marks of origin and labelling rules under the WTO system*

The import of goods with incorrect origin indication has been considered a deceptive practice even prior to the establishment of the WTO.[30] Yet, unlike for rules of origin, the WTO *acquis* does not strive to implement a harmonized system of marks of origin: the only provision in the WTO Agreement dealing with the origin labelling is Article IX of the General Agreement on Tariffs and Trade (hereinafter: GATT) which, apart from the general non-discrimination

24 Committee on Rules of Origin, 'Definition of the Term "Country": Request from the Technical Committee on Rules of Origin WCO' (*World Trade Organization*, 7 June 1995) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=123736,46209,802,30154,8287,21837,25777&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed 30 September 2019, 2 and 6; Imagawa and Vermulst (n 7) 648

25 See Imagawa and Vermulst (n 7).

26 By analogy, see discussion on the status of overseas territories under WTO law, Matthew Kennedy, 'Overseas Territories in the WTO' [2016] 65 *ICLQ* 741.

27 Tom Moerenhout, 'The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories' [2012] 3 *Journal of International Humanitarian Legal Studies* 344.

28 Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments' (n 5) 579.

29 See the contribution of E. Kontorovich in this volume.

30 Draft of International Trade Organisation Charter [1947], Press Release No. 291, Article VIII Likewise, the 1958 Recommendation noted that States are allowed to maintain provision protecting the "truth of origin marks". Recommendation on Marks of Origin, 7S/30; Working Party Report on "Marks of Origin" (21 November 1958) L/912/Rev.1, 7S/117.

clause[31] and a call to reduce inconveniences to exporters,[32] leaves the matter of origin marking to the discretion of Members. The narrative may change when national labelling measures become technical regulations and enter the realm of the Agreement on Technical Barriers to Trade (hereinafter: TBT) or, when it aims to achieve certain level of sanitary or phytosanitary protection, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).[33]

While the mentioned agreements serve as a useful tool to assess the legitimacy of various origin-related measures within WTO law, discussion on trade with occupied territories under the relevant Agreements is curbed by the limited provisions on rules of origin, as well as by the wide discretion of Members to set their own origin and marking criteria. WTO law thus provides no complete roadmap to analyse origin labelling measures applicable to goods imported from disputed territories. Accordingly, the next section examines the rules governing determination of origin and subsequent labelling of products in the legal framework of the EU.

## *3.2 EU economic law*

### *3.2.1 Rules of origin under the EU system*

The common European regulatory framework for import and export of goods is prescribed by the Union Customs Code (UCC).[34] The UCC provides that products obtain their *non-preferential* origin either in a country where they were wholly obtained or where they underwent their last, substantial, economically justified transformation that has resulted in a new product or comprised an important stage of manufacture.[35] To ensure compliance with non-preferential rules of origin, customs authorities are entitled to require proof of origin or any additional evidence to verify origin identification.[36] In turn, *preferential* rules of origin are determined in the EU's PTAs[37] and are likewise based on the criterion that goods are wholly obtained or result from sufficient processing or working.[38] Derogations from *preferential* rules of origin may be granted by the

31 General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 187 (GATT), art IX (1).

32 Ibid., art IX (2).

33 The discussion of these agreements falls outside the scope of this chapter. See Section 5.

34 Regulation (EU) 952/2013 of the European Parliament and of the Council laying down the Union Customs Code [2013] OJ L269/1 (Union Customs Code).

35 Union Customs Code, art 60. The tests for substantial transformation are similar to those suggested by the WTO framework. Note the difference with the wording of the ARO: where the ARO speaks of "last substantial transformation," the EU mentions "economically justified transformation" that results in a new product.

36 Union Customs Code, art 61.

37 Union Customs Code, art 64. The EU is empowered to conclude agreements with third countries or international organizations in the context of its Common Commercial Policy (CCP) pursuant to article 217 of the Treaty of Functioning of the EU (TFEU), Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326.

38 Union Customs Code, art 64 (3). Conditions for sufficient processing or working are further determined in PTAs.

Commission when compliance with the preferential rules of origin is temporarily impossible, or delayed, due to "internal or external factors."[39]

To alleviate concerns arising from the complexity of the "substantial transformation" tests,[40] the EU system foresees complementary rules for transformation criteria and allows goods to cumulate added value from different countries, without losing their originating status. This cumulation mechanism permits materials originating in a non-preference-seeking State to be imported into the EU under preferential status.[41] As such, European system of cumulation is believed to have significantly facilitated trade between EU and third countries, since it enabled producers to access more efficient suppliers, expanded manufacturers' possibilities and provided for economies of scale, which, in turn, improved export performance and reduced trade distortion effects of the rules of origin.[42] The EU legal framework for cumulation is laid down in the complex network of preferential agreements.[43] The most common mechanisms for "combining" origins is bilateral cumulation, which allows EU and its PTA partners to treat each other's products equivalently to their own.[44] To the contrary, diagonal, or pan-European cumulation, allows cumulating input materials originating in more than two different countries, provided that all States involved in manufacturing process are linked by FTAs among them and that rules of origin contained in those agreements are identical.[45]

### *3.2.2 Origin labelling under the EU system*

While documents related to the proof of preferential origin are a matter of EU's PTAs, origin marking, as well as labelling in general, contributes to the EU's objectives to protect consumers' economic interests and promote their right to information.[46] To make their choice under the freedom of goods, consumers need to be informed about various characteristics of the products they intend to

39 Union Customs Code, art 64 (6).

40 See Andersson (n 6).

41 Pieters K, *The Integration of the Mediterranean Neighbours into the EU Internal Market* (T.M.C. Asser Press 2010) 127.

42 While generally considered beneficial, cumulation may also bring negative effects on trade flows. See the empirical findings in Olivier Cadot and others, 'Product-Specific Rules of Origin in EU and US Preferential Trading Arrangements: An Assessment' [2006] 5 *World Trade Review* 199; Pamela Bombarda and Elisa Gamberoni, 'Firm Heterogeneity, Rules of Origin and Rules of Cumulation' [2013] 54 *International Economic Review* 307; Andersson (n 6).

43 See Commission notice concerning the application of the Regional Convention on pan-Euro Mediterranean preferential rules of origin or the protocols on rules of origin providing for diagonal cumulation between the Contracting Parties to this Convention [2018] OJ C325/6 ("cumulation matrix").

44 See also DG Trade, 'Common Provisions' (*European Commission*) <https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/common-provisions_en> accessed 30 September 2019.

45 Pieters (n 41) 131. For instance, country A should have an agreement with the EU, country B should have an agreement with the EU and countries A and B should also have an agreement between them.

46 TFEU, arts 12 and 169.

buy[47]; in this regard, labelling has traditionally been considered as one of the least restrictive means to transfer the relevant information to consumers.[48]

To illustrate, European Food Labelling Regulation[49] provides that the particulars of the place of origin or provenance should be stated where failure to give such information might mislead consumers as to the true origin of the foodstuff,[50] or where the objective of the labelling measure is to protect public health or prevent fraud, as long as the choice of a majority of consumers for a particular product is influenced by the origin labelling practice.[51] Unfair, or misleading, commercial practice is further prohibited by the Unfair Commercial Practice (UCP) Directive.[52] In this regard, a practice is considered misleading when the trader omits to provide essential information which the *average consumer* (emphasis added) needs in order to decide whether to purchase a certain product.[53] The Directive defines an average consumer as one "who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors."[54] In this context, it has been argued that the normative benchmark of the "average consumer" has been introduced as an operationalized test of the proportionality principle, and requires weighing freedoms of goods, cultures of different EU Member States and consumer protection.[55]

Although harmonization of origin marking is stronger in the EU than in the WTO, individual States still appear to enjoy wide discretion when designing their labelling measures to address UCPs, protect public health or provide correct information to consumers when their choice of product is affected by that information. In the past decade, however, the EU adopted a number of measures to address import of goods produced in the occupied

47 Catherine Bernard, *The Substantive Law of the EU. The Four Freedoms* (Fifth Edition, OUP 2016) 176.

48 The ECJ held in its judgement *Rau* that rules of labelling constitute an effective consumers protection, as it hinders the free movement of goods less than the number of other measures, e.g. the requirement to use only specific type of packaging; Case C – 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* [1982] ECR 03961, paras 12, 17; Case C-448/98 *Jean-Pierre Guimont v France* [2000] ECR I-10663, para 33.

49 Regulation (EU) 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers [2011] OJ L 304/18 (Food Labelling Regulation) art 1(3).

50 Ibid., art 26 (2)(a).

51 Ibid., art 39.

52 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22 (Unfair Commercial Practices Directive) art 5(1).

53 Ibid., art 7(1).

54 Ibid., preamble, rec. 18. According to AG Hogan, the fact that the average consumer is well informed implies a certain behaviour and a "positive approach" and "a greater interest in information" by that consumer. Case C-363/18 *Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l'Economie et des Finances* [2019] ECLI:EU:C:2019:494, Opinion of AG Hogan, para 48 (hereinafter: *Psagot*).

55 Jens-Uwe Franck and Kai Peter Purnhagen, 'Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and Its Normative Basis' in Klaus Mathis (ed), *Law and Economics in Europe—Foundations and Applications* (Springer Science 2014) 329.

territories. These measures, together with the applicable trade agreements and rules of origin between the EU and the relevant third States, are reviewed in the next section.

## 4 EU trade with disputed territories

### *4.1 Israeli settlements*

#### *4.1.1 Territorial scope*

Trade relationship between EU and Israel is governed by the Association Agreement (hereinafter: EU-Israel Association Agreement) that was signed in 2000.[56] The agreement reinforces a free trade area between the European Communities (now: the EU) and Israel by prohibiting any customs duties or quantitative restrictions and charges having an equivalent effect between the two parties,[57] and applies to "the territory of the State Israel," apparently meaning Israel's internationally recognized borders.[58] Since 1997, the EU also maintains a similar agreement with the Palestinian Liberation Organization (PLO) (hereinafter: EU-PLO Interim Association Agreement).[59] The EU-PLO Interim Association Agreement applies to "the territory of the West Bank and Gaza Strip,"[60] without distinguishing whether the territories are under Palestinian or Israeli control.

The two agreements came to forefront in the landmark decision of the European Court of Justice in case *Brita*, where the Court was invited to rule on the preferential treatment of settlements' products under the EU-Israel Association Agreement.[61] Contrary to what Advocate-General Bot suggested,[62] the Court

56 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L 147/3 (EU-Israel Association Agreement).

57 Ibid., arts 7, 8, 16 and 17.

58 Ibid., art 83. Similar language was also maintained in the earlier version of the Agreement; see Agreement between the Member States of the European Coal and Steel, Community, of the one part, and the State of Israel, of the other part [1975] art 27. At the same time, UK-Israel convention on double taxation that entered into force before 1967 applied to income tax and company tax levied in "Israel," defined as "the territory in which the Government of Israel levies taxation"; see James Crawford, 'Opinion: Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories' (Report for the Trade Unions Congress 2012) <www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 30 September 2019, 34.

59 Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the PLO for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip [1997] OJ L 187/3 (EU-PLO Interim Association Agreement).

60 Ibid., art 73.

61 Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-01289 (*Brita)*. In this case, imported goods, presumably originating in the settlements' territory, were labelled as "made in Israel" and accompanied by a formal certificate of origin issued by the Israel customs authorities; see *Brita,* paras 30–36.

62 Case C386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-01289, Opinion AG Bot, para 96.

did not interpret the territorial scope of the EU-Israel Association Agreement; rather, the Court invoked the EU-PLO Interim Association Agreement that covered goods imported from the West Bank to the EU.[63] In these circumstances, the Court reasoned that expending the Israeli customs authorities' competences to the territory of the West Bank would be equivalent to imposing on the Palestinian customs authorities a duty to refrain from their obligations under the EU-PLO Interim Association Agreement, thus creating an obligation for a third party without its consent and breaching Article 34 of the Vienna Convention on the Law of Treaties (hereinafter: VCLT).[64] The Court also did not support "forum-shopping" among Israeli exporters by prohibiting Member States' customs authorities to make elective determination which of the two agreements to apply, explaining that such practice would be tantamount to denying the obligation to provide a valid proof of origin in order to benefit from the preferential treatment.[65]

### *4.1.2 Rules of origin*

The criteria for the concept of origin under the EU-Israel Association Agreement are set out in its Protocol 4.[66] To benefit from the preferential treatment under the agreement, products should either be wholly obtained in Israel (meaning, for example, goods extracted from soil or seabed, harvested or born, or good products exclusively from those products)[67] or, in case products include materials that were not wholly obtained in Israel, have undergone sufficient working or processing there.[68] The Protocol offers an exhaustive list of operations that are insufficient to confer the status of originating products, including preservation of products, changes of packaging, affixing labels, simple mixing or assembly.[69] The Protocol further provides that to benefit from the Association Agreement, imported products should be accompanied by a movement certificate EUR.1, or an export declaration, in case the exporter is an authorized frequent shipper or the exported value of a product is small.[70] Exporters may need to submit a proof

63 Kontorovich emphasized that the scope of the agreements was not limited by Israel's illegal sovereignty claims over the disputed territories; see Eugene Kontorovich, 'Economic Dealings with Occupied Territories' [2015] 53 *Columbia Journal of Transitional Justice* 584, 597.

64 *Brita* (n 61) para 52. Remarkably, Advocate-General came to a different conclusion, suggesting that products originating in the Israeli settlements should not fall under the scope of either of the agreements. Opinion AG Bot (n 62) para 96.

65 *Brita* (n 61) para 56.

66 Protocol 4 concerning the definition of the concept of originating products and methods of administrative Cooperation [2000] OJ, L 147/50, 21 (Protocol 4), art 28. Protocols to the agreements discussed in this chapter form integral parts of these agreements. See, for instance, EU-Israel Association Agreement (n 56) art 8.

67 Protocol 4 (n 66) art 2(2) and art 4.

68 Ibid., art 2(4) and art 5(1).

69 Ibid., art 6.

70 Ibid., art 17(1), 22(1) and 23. This does not apply for a small exchange of goods between private persons not meant to be traded, or occasional imports of products for personal use or traveller's personal luggage.

of origin when applying for the EUR.1 certificate at the customs authorities of the exporting party,[71] but the originating status may be verified by the customs authorities of both exporting and importing States.[72]

These requirements are generally mirrored in Protocol 3 of the EU-PLO Interim Association Agreement[73]: to be considered originating in the territory of the West Bank and the Gaza Strip, goods should be either wholly obtained[74] or sufficiently worked or processed on the territory of the West Bank and the Gaza Strip.[75] When imported into the EU, the goods should be accompanied by a EUR.1 movement certificate issued by the customs authorities of the West Bank and the Gaza Strip,[76] or by an export declaration.[77] Remarkably, where the EU-PLO Interim Association Agreement speaks of "proof of origin," the EU-Israel Association Agreement specifically refers to the EUR.1 certificate.[78]

In theory, nothing precludes Israeli economic operators in the West Bank wishing to export their products to the EU to obtain the necessary customs documentation from the Palestinian customs authorities[79]: in this case, products originating in the West Bank would benefit from the preferential treatment of the EU-PLO Interim Association Agreement, in compliance with the *Brita* ruling. But what if the Palestinian authorities refuse to authorize the requested export – a situation that is quite likely to arise given the political and economic tensions in the region?

In this scenario, rescue can come from applying diagonal cumulation between the EU, Israel and Palestinian products, provided that all three countries are bound by an agreement between each other. And indeed, the Protocol on Economic Relations between Israel and the PLO, signed in Paris in 1994 as a part of the Oslo Accords,[80] (hereinafter: the Paris Protocol) establishes a free trade zone

71 Ibid., art 18.

72 Ibid., art 18, 25 and 32.

73 Protocol 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation [1997] OJ L 187/29 (Protocol 3).

74 Ibid., art 4.

75 Ibid., art 5. As in case with Protocol 4 to EU-Israel Association Agreement, Article 6 of Protocol 3 to EU-PLO Interim Association Agreement (n 59) provided when such working is insufficient.

76 Protocol 3 (n 73) art 16(4).

77 Ibid., art 15.

78 See ibid., arts 22, 23 and 31 vs Protocol 4 (n 66) arts 23, 35 and 32 covering the validity, submission and verification of the documents at issue.

79 Article 11 of Protocol 3 to EU-PLO Interim Association Agreement (n 59) merely states that application should be made by exporter or somebody who is authorized by exporter, without defining exporters' "nationality."

80 Signed in 1993, Oslo I in fact envisaged reorganization of power in the territories, and should not be categorized as withdrawal of occupation; see Neve Gordon, *Israel's Occupation* (University of California Press 2008) 21–21 and 170. In 1995, the parties signed Oslo II accords that covered security issues, incorporating Paris Protocol in its article XXIV.

between Israel and Palestinian territories.[81] Under the Paris Protocol, Israel is entitled to set trade policies for Palestine,[82] subject to limited exceptions.[83] This reflects the long-lasting practice of Israel largely determining Palestinian trade policy.[84] It is perhaps due to its implementation failure, questionable applicability[85] and the detrimental effects on Palestinian trade[86] that the EU does not consider the Paris Protocol sufficient to apply diagonal cumulation between Israel, Palestine and the EU.[87]

### *4.1.3 Labelling*

The Commission started to be concerned with the implementation of rules of origin by exporters of settlements' products only in the late 1990s.[88] In 2004, the EU and Israel drafted a "technical arrangement" that required Israeli customs authorities to state the place of production for all items exported to the EU; a notice to importers followed shortly, clarifying that the products imported

81 A so-called "quasi customs union," Paris Protocol, art VIII and IX. The parties also agreed that West Bank and the Gaza Strip should be viewed as "a single territorial unit" under the jurisdiction of the Palestinian Council, Oslo II Agreement, art XI.

82 Paris Protocol, arts III (5) (10). The protocol thus entrenches unequal relations, where Palestine is not allowed to choose its own trade regime. Gordon, *Israel's Occupation* (n 80) 174.

83 West Bank and Gaza could set their policies only on products specified in List A1, and A2, Paris Protocol, art III.

84 For instance, tariff measures adopted by Israel become automatically effective in West Bank and Gaza, and customs declarations of goods designed for the West Bank occur at Israeli points of entry and are carried out by Israeli customs officials; see Claus Astrup and Sébastien Dessus, 'Trade Options for the Palestinian Economy: Some Orders of Magnitude' [2001] Middle East and North Africa working paper series no. 21 <http://documents.worldbank.org/curated/en/232511468771323315/Trade-options-for-the-Palestinian-economy-some-orders-of-magnitude> accessed 30 September 2019. This has been the case as of 1967, when the territory was governed by the Military Orders (MOs) issued by Israeli military commanders for administrative and financial purposes, and which also controlled external trade. Gordon, *Israel's Occupation* (n 80) 27. An example is MO 103 on customs duties on goods brought into the area of West Bank from third countries, Raja Shehadeh, 'The Legislative Stages of the Israeli Military Occupation' in Emma Playfair (ed), *International Law and the Administration of Occupied Territories* (Clarendon Press 1992) 157. Interestingly, Gordon suggests that the reason for denying export licences for Palestinian agricultural products may have been the threat of competition for Israeli exports; Gordon, *Israel's Occupation* (n 80) 73.

85 Moerenhout claims that the Paris Protocol does not address settlements, since it only covers the areas under jurisdiction of the Palestinian Authority. Moerenhout (n 27) 370.

86 Astrup and Dessus (n 84).

87 See cumulation matrix, (n 43). Note that diagonal cumulation would not be possible for products of Golan Heights in the absence of an FTA between the EU with Syria.

88 Commission, 'Notice to Importers: Importations from Israel into the Community' OJ C 338/12, 8 November 1997. Curiously, Gordon and Pardo suggest that Commission's concerns were triggered in 1993 by a completely different investigation: namely, the Commission suspected that Brazilian juice concentrate was labelled as "Israeli juice" to benefit from the preferential treatment of EC-Israel Association Agreement; Gordon and Pardo, 'The European Union and Israel's Occupation' (n 7) 78.

from places under *de facto* Israeli administration are not entitled to benefit from preferential treatment under the EU-Israel Association Agreement.[89] This did not prevent the imported goods from being labelled as "made in Israel,"[90] in fact placing the burden to identify whether a certain village or zip code is covered by the EU-Israel Association Agreement on Member States' customs authorities. The Commission notice of 2012 did not seem to affect this practice.[91] In 2015, the Commission issued yet another notice[92]: this time, while stressing that misleading labelling practices may affect consumers' choice,[93] the Commission suggested to distinguish between products originating in settlements or in Palestinian territories by adding an expression "Israeli settlement" for the former, and "product from the West Bank (Palestinian product)" or "product from Palestine," for the latter.[94]

Recently, the AG Hogan's opinion in case *Psagot* stated that according to the Food Labelling Regulation, products originating in a territory occupied by Israel since 1967 should be accompanied by the geographical name of this territory and, in case applicable, the indication that the products come from the Israeli settlements.[95] In Hogan's view, indication of origin that is limited to 'product from the West Bank' or 'product from the Golan Heights,' despite being technically correct, omits to provide the additional geographical information that the product originates in Israeli settlements and hence misleads the consumers as to the true origin of this product.[96] Since, pursuant to the Food Labelling Regulation, ethical considerations constitute one of the criteria that are likely to influence the decision of a well-informed consumer whether to purchase certain products, occupation and breach of international law are situations that consumers may take into account when making such choice.[97]

89 Commission, Notice to Importers, Imports from Israel into the Community' [2005] OJ C20/02.

90 N Gordon and S Pardo, 'What Can Pro-Democracy Activists in Arab Countries Expect from the European Union? Lessons from the Union's Relations with Israel' [2013] 9 *Democracy and Security* 100, 110. See also European Parliament, 'Written Declaration pursuant to Rule 123 of the Rules of Procedure on the labelling of goods from the Occupied Palestinian Territories' [2010] 0064/2010.

91 Commission, 'Notice to Imports—Imports from Israel into the E.U' [2012] OJ C 232/5.

92 Commission, 'Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967' C(2015) 7834 final.

93 Interestingly, Commission referred in this regard to the Food Labelling Regulation, see ibid., 3.

94 Ibid., 34. It should be noted that labelling measures related to settlement products were also adopted in some Member States. In Ireland, The Control of Economic Activity (Occupied Territories) Bill aiming to ban imports from Israeli settlements has passed the Senate but was not accepted by the Parliament.

95 See *Psagot*, Opinion of AG Hogan (n 54).

96 Ibid., para 75.

97 Ibid., para 78. In this context, the AG found that the term "ethical considerations" in the context of country of origin labelling refers to "a wider ethical considerations which may inform the thinking of certain consumers prior to purchase," rather than considerations that only relate to food consumption (i.e. religious or ethical believes of the consumers). *Psagot*, Opinion of AG Hogan (n 54) para 51.

The EU legal approach to trade with Israeli settlements is clear: importation of settlements' products is not prohibited as such, yet subjected to many hurdles, ranging from obtaining customs documentation from Palestinian authorities to affixing labels indicating that products were "made in Israeli settlements." These measures also appear consistent with the EU's position on the territorial scope of the EU-Israel Association Agreement.

### *4.2 Turkish Republic of Northern Cyprus*

#### *4.2.1 Territorial scope*

Before 2004, trade relationship between the Republic of Cyprus and the European Economic Community was regulated by the Association Agreement that entered into force in 1973 (hereinafter: ECC-Cyprus Association Agreement).[98] The agreement applied to the territory of the Republic of Cyprus,[99] not specifying whether it included the territories that were not under the *de facto* control of the Cypriot government. Imports from the TRNC could not benefit from the EU-Turkey Customs-Union Agreement,[100] despite the existence of a "Joint Economic Area" between Turkey and Northern Cyprus.[101]

Upon Cyprus' accession to the EU, the application of the EU *acquis* to territories where the government of the Republic of Cyprus did not exercise effective control was suspended by Protocol 10 of the Accession Act.[102] However, Council Regulation No. 866/2004 later clarified that goods which are wholly obtained or have undergone their last processing in these areas may still be imported into the Republic of Cyprus on a free trade basis –and hence enter the EU internal

98 Agreement establishing an Association between the European Economic Community and the Republic of Cyprus [1973] OJ L 133/2 (ECC-Cyprus Association Agreement).

99 Ibid., art 16.

100 Decision No 1 /95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union [1996] OJ L 35/1, art 1. The Agreement is accompanied by the Additional Protocol that extended the scope of Turkey's customs union with the EU to the ten Member States that joined the EU in 2004, including the Republic of Cyprus, Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union [2005] OJ L254/58. Along with signing the protocol, Turkey released a statement that "… the signature, ratification and implementation of this Protocol neither amount to any form of recognition of the Republic of Cyprus referred to in the Protocol." See Ministry of Foreign Affairs, 'Declaration by Turkey on Cyprus, 29 July 2005' (*Republic of Turkey*) <http://www.mfa.gov.tr/declaration-by-turkey-on-cyprus_-29-july-2005.en.mfa> accessed 30 September 2019. As such, Turkey does not claim sovereignty over the TRNC; yet Turkey has been recognized to be responsible for the acts of TRNC on basis of "effective control" over the territories by the European Court of Human Rights, *Loizidou v. Turkey* (Merits) ECHR 1996-VI.

101 From 1998, the parties maintain Trade and Economic Cooperation Agreement, see Deputy Prime Ministry and Ministry of Foreign Affairs, Turkish Republic of Northern Cyprus, 'Relations with Turkey' < https://mfa.gov.ct.tr/foreign-policy/relations-with-turkey/ > accessed 30 September 2019.

102 Protocol No 10 on Cyprus [2003] OJ L236, art 10.

market.[103] Certificates of origin for these products may be issued by Turkish Cypriot Chamber of Commerce but only once authorized by the Government of the Republic of Cyprus.[104] The Commission also offered a draft proposal for a Council Regulation[105] suggesting a preferential regime for Turkish Cypriot products entering the EU Customs Territory and acceptance of certificates of origin issued by the Turkish Cypriot Chamber of Commerce.[106]

### *4.2.2 Rules of origin*

Under the Protocol to the ECC-Cyprus Association Agreement,[107] the Agreement applied to goods that were wholly obtained or have undergone sufficient working or processing transformation in *Cyprus*[108] (note the difference in wording with the rest of the Agreement that refers to the *Republic of Cyprus*). The Protocol further provided that Cypriot products imported into the EU were to be accompanied by the A.CY.1 movement certificate issued by the customs authorities of the Republic of Cyprus[109]: documentation issued by the TRNC was thus not sufficient for obtaining preferential treatment under the Agreement.[110] This, however, did not prevent the TRNC from issuing their own movement certificates,[111] – perhaps in an attempt to address the difficulties faced by Turkish Cypriot exporters when dealing with the customs authorities of the Republic of Cyprus.

The European Court of Justice was invited to ponder on the legitimacy of such certificates under the ECC-Cyprus Association Agreement in *Anastasiou I*.[112] The Court, bypassing the reasoning that acceptance of the TRNC's movement certificates is likely to be in conflict with a number of UN Resolutions,

103 Council Regulation (EC) 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol 10 to the Act of Accession [2004] OJ l 206, art 4. This move may be interpreted as preventing Turkish annexation of TRNC.

104 Ibid., art 4(5).

105 Commission, 'Proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control' COM (2004) 0466 final. Naturally, the draft was opposed by the Republic of Cyprus.

106 Ibid., article 3.

107 Protocol concerning the definition of the concept of "originating" products and methods of administrative cooperation [1973] OJ L133/37 (EEC-Cyprus Association Agreement Protocol).

108 EEC-Cyprus Association Agreement Protocol, arts 2 and 3.

109 Ibid., art 6.

110 This given the likelihood of refusal of Greek Cypriot authorities to issue certificates to Turkish exporters runs afoul with the Council's position that the Association Agreement was to benefit the whole population of the island.

111 The certificates were carrying old stamps of the Republic of Cyprus, until the latter introduced new stamps in 1983; see Stefan Talmon, 'The Cyprus Question before the European Court of Justice' [2001] 12 *European Journal of International Law* 727, 732.

112 Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others* [1994] ECR I-03087 (*Anastasiou I*).

held that the mutual reliance at the level envisaged under the 1977 Protocol between the authorities of the Northern Cyprus and the European Economic Community is excluded since neither the Community nor Member States have recognized the self-proclaimed TRNC.[113] This decision was subject to a fierce critique by the academic community: Talmon, for instance, suggested that while misjudging the scope of consequences of the principle of non-recognition in international law, the Court simply "taxed" the Turkish Cypriot products "out of the market" and applied economic sanctions – a competence reserved for the EU political bodies.[114]

The saga continued in *Anastasiou II:* this time, the dispute was fuelled by the difficulties of Turkish Cypriot exporters to obtain phytosanitary certificates for agricultural products from the authorities of the Republic of Cyprus, as required in the Plant Health Directive.[115] Instead, citrus fruit originating in the northern part of the island were inspected by Turkish officials during a short "layover" of cargo ships in Turkish ports, and continued their journey to the EU upon receiving the necessary phytosanitary certificates from the competent Turkish authorities.[116] Reluctant to get involved in any political discussion, the Court permitted this practice under certain conditions,[117] in a way opening avenues for Turkish Cypriot agricultural products to enter the EC market via "third countries."

The Court, however, changed its approach in *Anastasiou III,*[118] which dealt with the modified provisions of the EU Plant Health Directive. Following the amendments to the Directive, citrus fruit were subjected to an additional level of protection. Thus, Member States could only accept phytosanitary certificates issued by the authorities of the origin country.[119] Since the issuing of phytosanitary certificates was considered fundamental for attaining the Directive's objectives to ensure high level of phytosanitary protection, the Court held that such certificates indeed could not be issued by a third country other than the country of origin of the products.[120]

### *4.2.3 Labelling*

The second contested provision of the amended Plant Health Directive was the requirement that the origin mark obligatory under the Directive could only be affixed in the country where products originated.[121] Such origin label served

113 Ibid., paras 37–39.
114 Talmon (n 111) 742.
115 Case C-219/98 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* [2000] ECR I-5267 (*Anastasiou II*).
116 Ibid., para 11.
117 Ibid., para 36.
118 Case C-140/02 *Regina on the application of S.P. Anastasiou (Pissouri) Ltd and Others and Minister for Agriculture, Fisheries and Food* [2003] ECR I-10657 (*Anastasiou III).*
119 Ibid., para 23.
120 Ibid., paras 46 – 49.
121 Ibid., paras 23–24.

as a proof that the fruit was harvested in a country free from harmful organisms and granted exporters an exemption of special requirements of the Directive.[122] Following this reasoning, the Court held that allowing origin marks to be affixed in a country other than the country of origin of the goods would be paradoxical, even if the mark's validity is verified by an inspector in a third country.[123]

Unlike it is the case for labelling measures targeting products of the West Bank, the origin marking requirement of Plant Health Directive did not aim to inform consumers to prevent misleading trade practices. Rather, it intended to attain the objective of the Directive to protect public health. Currently, no labelling guidelines purposed at distinguishing Turkish Cypriot products from the products of Republic of Cyprus are maintained by the Commission or Member States. And while the EU still promotes reunification of the island under the mandate of the Republic of Cyprus, it also endeavours to build closer links with the Turkish Cypriot Community.[124]

### *4.3 Western Sahara*

#### *4.3.1 Territorial scope*

In 2000, the EU and Morocco signed an Association Agreement establishing free trade between the two parties.[125] The Association Agreement covers "the territories of the Kingdom of Morocco,"[126] which has been interpreted as including Western Sahara,[127] and served as a basis for the EU-Morocco Liberalization Agreement (hereinafter: Liberalization Agreement) concluded in 2010.[128] It is the *de facto* application of the EU-Morocco Liberalization Agreement to

122 Ibid., paras 6–7.

123 Ibid., para 60.

124 Proposals for pluralistic administrative authorities did not result in any negotiations and even if they had, the chances are slim that the Republic of Cyprus would agree with them. See European Commission, 'Representation in Cyprus' < https://ec.europa.eu/cyprus/about-us/turkish-cypriots_en> accessed 30 September 2019.

125 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 (EU-Morocco Association Agreement).

126 Ibid., art 94.

127 See Joint answer given by High Representative/VicePresident Ashton on behalf of the Commission [2011] OJ C 286.

128 Agreement of 13 December 2010 in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 of and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2012] OJ L 241/4.

Western Sahara that has been challenged in the General Court by Front Polisario, the Sahrawi national liberation movement.[129]

While finding that, under European and international law, the EU institutions enjoy a wide discretion to enter agreements with disputed territories,[130] the General Court held that the territorial scope of the Liberalization Agreement *de facto* extended to the territory Western Sahara; however, the General Court partially annulled the Council decision on conclusion of the Liberalization Agreement between the EU and Morocco, insofar it applied to Western Sahara, based on the Council's failure to carefully examine all facts such as whether the trade regime invoked by the Agreement will be detrimental to local population or infringe their fundamental rights, before approving the application of the Agreement to the disputed territory.[131]

On appeal,[132] the Court of Justice of the European Union (CJEU) had recourse customary international law through article 31(3)(c) of the VCLT, which states that treaties should be interpreted in the context of relevant rules of international law applicable in the relations between the parties. Referring the Sahrawi right to self-determination, the CJEU concluded that Western Sahara has a separate and distinct status from Morocco.[133] Recalling its judgement in *Brita*, the Court confirmed that in the light of the general international law principle of the relative effect of the treaties of Article 34 VCLT, treaties cannot impose obligations on confer rights on third States without their consent: in this regard, Sahrawi people should be considered as a third party of the EU-Morocco Agreement whose consent has not been expressed.[134] Accordingly, the Court of Justice concluded that neither the EU-Morocco Association Agreement nor the Liberalization Agreement applied Western Sahara and to the products originating

129 Case T-512/12 *Front populaire pour la libération de la saguiaelhamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECLI:EU:T:2015:953 (*General Court, Front Polisario*). The UN considers Front Polisario a legitimate representative of the Sahrawi people.

130 Ibid., para 223.

131 Ibid., paras 228–241.

132 Case C-104/16 P *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* [2016] ECLI:EU:C:2016:973 (Court of Justice, *Front Polisario)*. The ruling has been subjected to much critique as to the Court's application of international law and EU's extraterritorial obligations towards Sahrawi people; see Sandra Hummelbrunner and Anne-Carlijn Prickartz, 'It's Not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union' [2016] 32 *Utrecht Journal of International and European Law* 19; Eva Kassoti, 'The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)' [2017] 2 *European Papers* 339; Cedric Ryngaert and Rutger Fransen, 'EU Extraterritorial Obligations with Respect to Trade with Occupied Territories: Reflections after the Case of Front Polisario before EU Courts' [2018] 2 *Europe and the World: A Law Review* 7.

133 Court of Justice, *Front Polisario* (n 132) para 92.

134 Ibid., para 106.

in that territory.[135] The same fate befell the territorial scope of EU-Morocco Fisheries Partnership Agreement and the 2013 Protocol to the 2006 Fisheries Partnership.[136]

### *4.3.2 Rules of origin*

Products that are wholly obtained in Morocco, or that have undergone sufficient working or processing there, benefit from preferential treatment under the EU-Morocco Association Agreement upon being granted EUR.1 movement certificate by the customs authorities of Morocco.[137] Following the jurisprudence of the European Courts, this does not apply to products originating in Western Sahara. Yet, since the EU and Western Sahara do not have a trade agreement in place, it is unclear which authorities are competent to issue any customs documentation that may be required for exports into the EU. Recently, the Commission proposed to amend the Protocols of the agreement as applying to "products originating from Western Sahara which are subject to the control of the Moroccan custom authorities."[138] Even though the proposal was adopted with an intention to benefit the economic development of the region, its coexistence with the EU's rejection on Morocco's sovereignty over the Western Sahara remains unclear.[139]

### *4.3.3 Labelling*

Since the EU-Morocco agreements have been *de facto* applied to Western Sahara, it comes as no surprise that products originating there have been imported into the EU labelled as of Moroccan origin. For reasons that remain unknown, such labelling practice is not perceived as misleading consumers, or perhaps not in the way that the labelling of West Bank products as "made in Israel" does.[140] Considering the Commission's effort to extent the scope of the EU-Morocco

135 Ibid., para 116. This decision was also heavily criticized for selective application of international law by EU Courts; see Kassoti (n 132); Ryngaert and Fransen (n 132).

136 Case C-266/16 *Western Sahara Campaign UK v the Commissioners for her Majesty's Revenue and Customs and the Secretary of State for the Environment Food and Rural Affairs* [2018] ECLI:EU:C:2018:118.

137 Protocol 4 concerning the definition of originating products and methods of administrative cooperation [2000] OJ L 70/83 (Protocol 4), arts 2(2), 2, 9 and 18.

138 Commission Proposal for a Council Decision 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 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. COM(2018) 481.

139 Answer given by Vice-President Mogherini on behalf of the Commission (6 June 2018).

140 Answer given by Mr Cioloş on behalf of the Commission (11 June 2013) OJ C 20 E.

agreements to the territory of Western Sahara, adoption of any guidelines on origin labelling in the near future is unlikely.

## *4.4 Crimea*

### *4.4.1 Territorial scope*

The 2014 EU-Ukraine Association Agreement with Deep and Comprehensive Free Trade Area (hereinafter: EU-Ukraine Association Agreement) allows products originating in the territory of Ukraine to benefit from preferential treatment, tariff reduction and elimination of customs duties.[141] It is unclear whether and how the Agreement applies to the territory of Crimea. On the one hand, given its position on Crimea's annexation by Russia, the EU may be expected to consider the peninsula covered by the territorial scope of the Agreement. This reasoning is supported by the Court's decision in *Brita:* products originating in the West Bank were found to be covered by the agreement with PLO, and not the one with the State exercising *de facto* control over the region. At the same time, such application of the EU-Ukraine Association Agreement allows the *de facto* Russian administration of the annexed territory to benefit from the preferential trade between the EU and Ukraine. In fact, the EU has adopted a comprehensive sanctions package that, among others, prohibited investments in certain economic sectors of the Crimea region.[142] It is therefore also unlikely that Crimea is covered by any agreements between the EU and Russia.

### *4.4.2 Rules of origin*

According to the Russia/Ukraine sanctions package, Crimean products can be imported to the EU under the EU-Ukraine Association Agreement if accompanied by the certificate of origin issued by the competent Ukrainian authorities.[143] Again, the probability of Ukrainian authorities issuing customs documentation for economic operators acting under Russian administration is rather weak. On the contrary, export of Crimean products is likely to occur via Russia,[144] which will however deprive the exporters from the benefits of the EU-Ukraine Association Agreement.

141 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3 (EU-Ukraine Association Agreement) arts 26, 28 and 29. See also Protocol concerning the definition of the concept of 'Originating Products' and methods of administrative co-operation.

142 See Council Regulation (EU) 1351/2014 of 18 December 2014 amending Regulation (EU) No 692/2014 concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol [2014] OJ L365/46.

143 Council Regulation (EU) 692/2014 of 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol [2014] OJ L183/9, arts 2 and 3.

144 It should also be noted that Crimea is currently operating under Russian, and not Ukrainian, postcodes, and that Crimean mail is handled by state-owned Russian post.

### *4.4.3 Labelling*

The EU-Ukraine Association Agreement calls both parties to "endeavor to minimize" their labelling requirements, except when required for "the protection of health, safety, or the environment, or for other reasonable public policy purposes."[145] Any future measures related to origin labelling will thus have to be considered in the context of this provision.

## 5 Analysing EU trade practices in disputed territories

Despite condemning the presence of foreign administrative and military power on the territories discussed in this section, the EU demonstrates inconsistency in its trade practices with these areas. First, whereas the rules of origin codified in the EU's PTAs are almost identical, a common EU approach to customs authorities of disputed territories is lacking: cooperation with and recognition of such authorities ultimately affect how the products obtained in disputed territories are treated under the applicable trade agreements. Moreover, EU labelling practices for goods imported from disputed territories demonstrate little connection to the rules of origin provisions of the applicable PTAs. Thus, the Commission's labelling guidelines adopted to prevent misleading practices that may affect consumers' choices only address products imported from the West Bank. The EU's willingness to allow Turkish Cypriot products to enter the internal market as if they were imported from the Republic of Cyprus and its eagerness to accept Moroccan products originating in Western Sahara under preferential trading rules may be justified by its endeavour to promote the economic development of these regions. Yet, it is difficult to understand why a similar approach would not apply to Crimea or Israeli products of the West Bank.[146] Finally, while diagonal cumulation for products originating in TRNC and Western Sahara is precluded by the absence of PTA's between the EU and these territories, the Commission's reluctance to use the Paris Protocol for cumulation of rules of origin remains unexplained (Table 5.1).

Furthermore, the European Courts are remarkably consistent in eschewing any political considerations when faced with cases on trade with disputed territories. In fact, the Court opened up to discuss the territorial scope of a PTA only on appeal in *Front Polisario*, although the Court's interpretation of international law in this ruling remains rather questionable. Likewise, the Courts showed little awareness and consideration for the current commercial practices in the regions. This prompts the larger question of the EU's implementation of international law in the context of trade with disputed territories and its compliance with Article 3(5) TEU.

145 EU-Ukraine Association Agreement (n 141) art 58.

146 A similar reasoning holds for EU rules on granting financial aid to disputed territories, which however falls outside the scope of this chapter.

*Table 5.1* Comparison EU Trade Practices with Disputed Territories

| | *Israeli Settlements* | *TRNC* | *Western Sahara* | *Crimea* |
|---|---|---|---|---|
| **Applicable PTA** | EU-PLO AA (not EU-Israel) | EU-Cyprus AA *de facto* (before 2004); EU enlargement does not apply | EU-Morocco FTA *de facto* (before CJEU clarifications) | EU-Ukraine AA (not EU-Russia Partnership) |
| **Territorial clause in relevant PTAs** | "State of Israel"/ "territory of the WB & GS"(EU-PLO) | "territory of the Republic of Cyprus," including TRNC | "territories of the Kingdom of Morocco" | "territory of Ukraine" |
| **Required origin documentation** | Origin declaration (town/village name + zip code)/ phytosanitary documentation of PLO | Certificate of origin by TRNC authorities authorized by RoC | Certificates of origin issued by Morocco? | Certificate of origin issued by Ukrainian authorities |
| **Labelling practices** | "Product from West Bank"/"Palestinian Product" guidelines by MS | "made in RoC" | "Made in Morocco"/"Made in Western Sahara" | None as such, but marking and labelling minimized following EU-Ukraine AA |
| **Cumulation between the relevant states** | No | Yes (EU-TR) | NA | NA |
| **Preferential treatment** | Only for Palestinian products of WB and GS | TRNC products enter RoC (and thus EU) on free trade basis | None so far, but Council position: amendment protocols? | Only if certificate of origin is issued by Ukrainian authorities |

It remains challenging to establish whether origin-related instruments reviewed in this chapter are correctly implemented and contribute to the overall policy objectives pursued by the EU. Origin-designation tests currently used by the EU and WTO are complex and sometimes even obsolete given the reality of the globalized economy. In turn, origin marking measures can be easily circumvented, for instance by companies with branches abroad, or when labelling requirements are voluntary, as it is the case with the labelling guidelines for the West Bank products. Nonetheless, even non-mandatory measures are capable of steering consumer behaviour and influencing trade flows.[147] In the meantime,

147 See, for instance, Case 249/81 *Commission vs Ireland* [1982] ECR I-4006.

in the absence of harmonized EU approach towards labelling of products imported from disputed territories, Member States may opt for adopting their own national labelling rules.

If the CJEU in *Psagot* is to follow the AG's interpretation of Food Labelling Regulation,[148] national labelling measures may be adopted against products originating in disputed territories in case there is a link between the qualities of the goods and their geographical place origin: for instance, it may be the case that *de facto* administration uses different food standards or has a different level of phytosanitary protection.[149] Whether such national measures risk undermining the existence of the Common Commercial Policy and breach Members States' obligations under the applicable PTAs,[150] or even result in technical barriers to trade under the TBT or SPS Agreement of the WTO, remains the question for further research.[151]

## 6 Concluding remarks

This chapter analysed the EU's position on origin of goods produced in four regions under disputed authorities in the light of the applicable EU and WTO legislation on rules of origin and origin marking. By and large, it found that the rules of origin applicable to imports from the disputed territories should be viewed in the context of their *de facto* application and the territorial scope of the relevant PTAs. The chapter further observed that origin-related measures are applied by the EU in a selective, inconsistent manner, often lacking proper justifications for their adoption. Such practice is not only unfair for exporters from third countries but also undermines the strengths of the EU's political position on economic dealings with disputed territories.

It should however be acknowledged that any measure related to products' origin would be a weak instrument to convey a political message, for it will inherently lack effectiveness. As such, it is virtually impossible to differentiate where products are coming from with their appearance. Moreover, the true origin of exported goods may get lost in numerous supply chain processes, let alone processing or manufacturing operations. For these reasons, the EU's use of the rules of origin and labelling guidelines as political instruments leaves much to be desired. The observed inconsistency of the EU's trade practices adds to the ineffectiveness of the EU policy towards disputed territories.

148 At the moment of writing this contribution, the decision was still pending with the CJEU.

149 See in this regard, *Anastasiou III* (n 118).

150 As a recent example, see proposal of the Irish Parliament to adopt a bill prohibiting imports from occupied territories: 'Control of Economic Activity' (Occupied Territories Bill) (Bill 6 of 2018).

151 It should be noted that the Union law can only be reviewed in the light of WTO law where the former implements or refers to the latter, Case C-149/96 *Portugal v Council* [1999] ECR I-8395. In this context, see also Christina Eckes, 'International Law as Law of the EU: The Role of the Court of Justice' [2010] Cleer Working Papers 2010/6 <https://www.asser.nl/media/1622/clee10-6web.pdf> accessed 30 September 2019.

A number of issues raised by this comparative analysis remain unresolved: to what extend does entering into trade relationship with disputed territories entails their recognition? What consequences would the EU restrictive trade policy have on the economic development of disputed regions? How is trade with disputed territories regulated under WTO law, if at all? These questions are subject to future research in the area of international economic law.

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# 6 The EU's economic engagement with Western Sahara

## The *Front Polisario* and *Western Sahara Campaign UK* cases

*Jed Odermatt*

### 1 Introduction

There are currently 17 territories considered by the UN Special Committee on Decolonization as non-self-governing.[1] Two of the administering powers of these territories – France and the United Kingdom – are current or former Member States of the European Union (EU) and one of these territories, Gibraltar, was a part of the EU. The EU does not have a unified or coherent policy towards areas of contested sovereignty. The EU's relationship with such territories, including its economic engagement, is ad hoc, shaped by geopolitical concerns as well as legal considerations. This chapter focuses on one area of contested sovereignty, Western Sahara. Western Sahara stands out from the other territories on the UN list in a number of respects. Whereas the other territories are mostly small, former colonial overseas territories, like British Virgin Islands or French Polynesia, Western Sahara stands out as a large territory with a land mass of 266,000 km and a population of 584,000. Whereas the other administering powers are Western colonial powers, such as the United Kingdom, France and the United States, Western Sahara is controlled by neighbouring Morocco. And whereas these other states administer these territories as distinct entities, such as British Overseas Territories in the case of the United Kingdom, Morocco does not consider itself to be an administering state, but considers Western Sahara to be an integral part of the Kingdom of Morocco. Western Sahara, in the view of many experts, is considered an occupied territory.[2]

1 See United Nations Special Committee on Decolonization, 'List of Non-Self-Governing Territories' (*United Nations*) <https://www.un.org/en/decolonization/nonselfgovterritories.shtml> accessed 8 November 2019.

2 See Eyal Benvenisti, *International Law of Occupation* (Second Edition, OUP 2012) 171 "This also a tale of illegal annexation internationally recognized as such"; Steven R. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' [2005] 16 *European Journal of International Law* 695, 700; Ben Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' [2015] 27 *Global Change, Peace & Security* 301, 319: "..Western Sahara has been occupied territory since early 1976…"; Pål Wrange, 'Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara' [2019] 52 *Israel Law Review* 3.

The first part briefly discusses the EU's international legal obligations towards areas of contested sovereignty. The lack of a consistent policy and clear understanding of what these obligations entail is at the core of many of the legal problems discussed in this chapter. The next part discusses the two main cases that have come before the Court of Justice of the European Union (CJEU) dealing with Western Sahara, analysing in particular the way the Court approaches issues of international law in these cases. The final part turns to the EU's continued engagement with Western Sahara since these judgments. It argues that the Court's narrow framing of the legal issues in the case allowed it to avoid some of the most politically sensitive questions raised in these proceedings, but has mostly failed to give guidance to the EU institutions as it seeks to maintain economic relations with Morocco in a way that conforms with its obligations under international and EU law.

## *1.1 The EU's obligations towards areas of contested sovereignty*

### *1.1.1 Overview*

Most of the territory of Western Sahara has been under Moroccan control since 1975. Morocco considers Western Sahara to be a part of its territory; however no other states have recognised this. The conflict remains subject to ongoing international negotiations, and in a resolution of 30 April 2019, the United Nations Security Council renewed the mandate of the United Nations Mission for the Referendum in Western Sahara (MINURSO). This resolution stresses the need for the parties to continue negotiations in the context of the United Nations, reaffirming "that the *status quo* is not acceptable, and […] that progress in negotiations is essential in order to improve the quality of life of the people of Western Sahara in all its aspects".[3] The UN Security Council emphasises the need for a *political* solution to the ongoing dispute. EU policy, therefore, should not undermine the possibility of such a resolution, for instance, by further cementing the *status quo* in the territory.

The International Court of Justice (ICJ) rendered an advisory opinion on the dispute, finding that the ties between Morocco and Western Sahara were insufficient to establish Morocco's sovereignty over the territory. Importantly, it emphasised that people of Western Sahara, the Saharawi people, had the right to self-determination in relation to the territory.[4] Despite calls from the UN Security Council, the UN General Assembly and other states to withdraw from the territory, Morocco has continued to settle people in the territory, a process that makes the eventual resolution of the dispute more complicated.

The EU has entered into a series of agreements with Morocco on trade liberalisation and fishing opportunities (discussed below). These agreements specify

3 UN Security Council Resolution 2468 (2019), 30 April 2019, S/RES/2468 (2019).
4 *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, paras 70, 162.

that they apply to the territorial area in which Morocco has jurisdiction, leaving undefined the precise scope of application. The agreements have been applied in practice to the territory of Western Sahara and its coastal waters. This issue is the source of the legal problems faced by the CJEU in these cases. What, exactly, are the EU's international law obligations to Western Sahara, especially when it engages in agreements that apply *de facto* to its territory? The approach of the Court, as discussed below, has been to focus on the text of the agreements, in a way that ignores the clear intention of the parties and the broader context in which they have been applied.

The economic exploitation of resources in Western Sahara was more specifically dealt with in a 2002 letter of Hans Corell, who was requested by the United Nations Security Council to examine some of these international law issues.[5] The request focused on the oil exploration contracts in Western Sahara (issued by Morocco), and therefore does not deal with all of the legal issues related to economic engagement with the territory. The letter is important, however, since it has played an important role in the reasoning of the CJEU. According to Corell's advice, the territory is to be viewed through the prism of a non-self-governing territory. Although it does not go into detail on the implications of the territory being occupied under international law, it should be noted that the two legal statuses are not mutually exclusive.[6] One of the important conclusions of the letter was that the economic exploitation in this place could be deemed lawful if undertaken "for the benefit of the peoples of those [t]erritories, on their behalf or in consultation with their representatives".[7] The people have a right to those natural resources, and therefore must benefit from their exploitation. The letter focused on the issuing of mining contracts, but did not examine other forms of economic engagement, such as the export of agricultural goods, and of fishing resources, both of which have been the subject of the cases discussed in this chapter.

## 2 Front Polisario

The EU's policy towards Western Sahara had been subject to criticism from non-governmental groups, human rights campaigners, legal experts and academics. However, it was not until cases were brought before the CJEU that the EU institutions were forced to grapple with the legal implications of such policy. While the EU maintained that its policy respected its obligations under international law, critics argued that the EU's economic agreements with Morocco, to

5 Letter from the Under-Secretary-General for Legal Affairs, the Legal Counsel, to the President of the Security Council (29 January 2002).

6 Eugene Kontorovich, 'Economic Dealings with Occupied Territories' [2015] 53 *Columbia Journal of Transitional Justice* 584. Kontorovich is critical of the Commission's assessment: "… the Commission considers non-self-governing (NSG) status and occupied status to be mutually exclusive, a notion with no support in international law or practice".

7 Kontorovich (n 6), footnote 77.

the extent that they applied to the territory of Western Sahara, violated a number of the EU's (and the Member States') international legal obligations. The following sections focus on the two main sets of litigation, examining the ways in which the CJEU frames the legal issues.

### *2.1 General Court*

In *Front Polisario v Council*,[8] the EU General Court (GC) was asked to annul the Council Decision approving a 2010 Liberalisation Agreement between the EU and Morocco. The case was brought by Front Polisario (*Frente Popular de Liberación de Saguía el Hamra y Río de Oro*), the national liberation movement that represents the people of Western Sahara in international negotiations on the dispute.[9] Front Polisario challenged the Council Decision on the basis that it violated EU law and international law binding on the Union. The case involved two main questions. First, did Front Polisario have legal standing to contest the decision? Second, if so, did the decision violate EU law or public international law?

The first, procedural, question depended on whether Front Polisario could be considered as being legally affected by the Council Decision in question. The GC found in this regard that the contested decision was of "direct and individual concern" to Front Polisario, thus fulfilling the criteria for instituting proceedings to challenge an act under EU law.[10] Front Polisario is a subject of international law, but is not established under the law of any state. It produced evidence that it is a recognised national liberation movement under international law, pointing to UN Security Council and General Assembly Resolutions that confirm such status.[11] The GC emphasised that the question was not whether Front Polisario was recognised as a national liberation movement, but whether it had standing under EU law.[12] The GC reviewed the case law on standing, including *Lassalle v Parliament*,[13] and found that entities without legal personality under the law of a Member State or of a non-Member State could still be regarded as a "legal person" in certain circumstances.[14] This is when an "entity in question has constituting documents and an internal structure giving it the independence necessary to act as a responsible body in legal matters…".[15] Front Polisario, which has its own constituting document and fixed internal structure,

8 Case T-512/12 *Front Polisario v Council* [2015] EU:T:2015:953.

9 On legal status, see Eva Kassoti, 'The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)' [2017] 2 *European Papers* 339–356.

10 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326, art 263(4).

11 *Front Polisario v Council* (n 6) para 37.

12 Ibid., para 46.

13 Case 15–63 *Lassalle v Parliament* [1964] ECLI:EU:C:1964:9.

14 Ibid., para 52.

15 Ibid., para 53.

met these requirements.[16] The GC also found that Front Polisario could not be required to be established under the law of a state; in fact, it would have been impossible for it to be established under the law of Morocco.

Having found that Front Polisario possessed legal personality for the purposes of Article 263(4) of the Treaty on the Functioning of the European Union (TFEU), the next question was whether the contested decision was of direct and individual concern to Front Polisario. The Council argued that the international agreement in question was between the Union and the Kingdom of Morocco, and by its nature as a bilateral agreement could not produce legal effects on third parties such as Front Polisario. Here, the GC made an important finding, one which continues to have importance in future legal developments. It reasoned that in order for the decision to have legal effects on Front Polisario, the agreement in question must apply to the territory of Western Sahara. The GC thus ties the issue of "legal effects" to the agreement's territorial scope.[17] The Commission argued that, as a UN non-self-governing territory, Western Sahara has a separate and distinct status under international law, and the agreements cannot apply to the territory of Western Sahara without explicit extension to that territory.[18] Front Polisario replied by arguing that Western Sahara is not "administered" by Morocco under Article 73 of the United Nations Charter, but rather it is under military occupation. Moreover, Front Polisario pointed to the practice of the EU and Morocco in applying the agreement, and that it had been applied *de facto* to goods originating in the territory of Western Sahara.[19] This was not contested; in an answer to a question from the Court, the Commission and Council stated that the agreement was applied *de facto* with respect to the territory of Western Sahara.[20]

Despite this *de facto* application of the agreement with respect to the territory of Western Sahara, the Court found that the question of admissibility still hinged on whether the agreement applied *de jure* to that territory, a question which involved treaty interpretation.[21] The GC thus made a differentiation between practical effects, which were evident, and *legal effects*, which flowed from the terms of the agreement. In order to do this, it required looking at the territorial scope of the agreement, which did not define the territory of Morocco.[22] The EU and Morocco clearly disagree on what this term is supposed to mean. The GC found it to be legally significant that the agreement in question was

16 Ibid., paras 53, 54.
17 Ibid., paras 53, 73.
18 Ibid., paras 53, 75.
19 Ibid., paras 53, 77–80
20 Ibid., paras 53, 87.
21 Ibid., paras 53, 88 "It should be noted that the question [whether the agreement applies to applies to the territory of Western Sahara] ultimately requires an interpretation of the agreement, the conclusion of which was approved by the contested decision".
22 Article 94 of the Association Agreement simply refers to the territory of the Kingdom of Morocco.

concluded 12 years after the Association Agreement, with no change being made to the territorial application. The GC held that

> If the EU institutions wished to oppose the application to Western Sahara of the Association Agreement, as amended by the contested decision, they could have insisted on including a clause excluding such application into the text of the agreement approved by that decision.[23]

The GC thus put quite some emphasis on the intention of the parties to the agreement.

Once the GC had found that the agreement does apply to the territory of Western Sahara, it was then able to find that it did produce legal effects on Western Sahara, and that Front Polisario was to be considered as being individually concerned by the contested decision.[24] Having found that the case was admissible, the Court then turned to the substantive questions. Front Polisario challenged the contested decision on 11 grounds. The pleas in law related to the international law arguments ("external legality") and arguments founded in EU law ("internal legality"). These were (1) failure to state adequate reasons, (2) failure to comply with the "principle of consultation", (3) infringement of fundamental rights, (4) "breach of the principle of consistency of the policy of the European Union, by failing to observe the principle of … sovereignty", (5) "breach of the fundamental values of the European Union … and the principles governing its external action", (6) "failure to achieve the objective of sustainable development", (7) "incompatibility" of the contested decision "with the principles and objectives of the European Union's external action in the area of development cooperation", (8) breach of the principle of protection of legitimate expectations, (9) "incompatibility" of the contested decision "with several agreements concluded by the European Union", (10) the "incompatibility" of the contested decision with "general international law" and (11) the "law of international liability in EU law".

For the GC, the issues in the application were essentially about one key question: whether there was an absolute prohibition on the EU from concluding an agreement with a third state that applies to a "disputed territory".[25] A related question, in that regard, concerned the discretion of the EU institutions in concluding that agreement. The GC thus condensed the applicant's pleas in law to the question "whether and, if appropriate, under what conditions the EU may conclude an agreement with a third State such as that approved by the contested decision which is also applicable to a disputed territory".[26] It can be questioned whether it was appropriate for the GC to distil a multitude of complex legal questions to a single issue. The GC went through each of the pleas

23 *Front Polisario v Council* (n 6) paras 53, 102.
24 Ibid., paras 53, 111.
25 Ibid., paras 53, 117.
26 Ibid., para 53.

in law, and dismissed most of them by answering that they did not give rise to an absolute prohibition. Take, for example, the fifth plea, which argued that the contested decision is contrary to the EU's fundamental values which govern its external action. The GC answered that the EU institutions enjoy a wide discretion in the field of external economic relations, and stated

> it cannot be accepted that it follows from the 'values on which the European Union is based'… that the conclusion by the Council of an agreement with a third State which may be applied in a disputed territory is, in all cases, prohibited.[27]

The GC does not examine whether the agreement and the contested decision actually violate the EU's fundamental values in external action; rather, it states that the conclusion of an agreement that applies to a contested territory is not prohibited in *all cases*. The GC thus sets a high benchmark – and finds that nothing in the applicant's pleas show an absolute prohibition, under EU law or international law, against the conclusion of an agreement with a third state that is applied to a dispute territory.[28]

Having found that there was no absolute prohibition under EU law or international law, the GC then turned to the issue of the discretion of the EU institutions when concluding the agreement. The GC observed that the EU institutions have wide discretion in the area, partly, because "the rules and principles of the international law applicable in the area are complex and imprecise".[29] Citing the *Racke*[30] judgment, the GC finds that judicial review must be limited to whether the Council made "manifest errors of assessment" by approving the conclusion of the agreement. This means, among other things, that the Court must assess whether the EU institution has examined carefully and impartially all the relevant facts of the individual case before reaching its decision.[31] The Court recognised that there was no absolute prohibition on such agreements. However, it did recognise that when goods originating in a country that are produced under conditions that do no respect fundamental rights are exported to EU Member States, those Member States may indirectly encourage or profit from that practice.[32] The GC found that the Council

> should have satisfied itself that there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights.[33]

27 Ibid., paras 53, 165.
28 Ibid., paras 53, 215.
29 Ibid., paras 53, 124.
30 Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] EU:C:1998:293.
31 *Front Polisario v Council* (n 6) paras 53, 225.
32 Ibid., paras 53, 231.
33 Ibid., paras 53, 241.

The Council had failed to do so. As the Council had failed to fulfil its obligation to examine these issues before approving the conclusion of the agreement, the Court annulled the decision approving the agreement insofar as it applied to Western Sahara.

The GC thus found legal deficiencies, not stemming from public international law obligations, but from internal EU law obligations. The judgement was criticised on a number of grounds. The finding that Western Sahara is a "disputed territory" was particularly problematic. Kassoti stresses that Western Sahara is a non-self-governing territory, whose status is confirmed by the UN and an ICJ advisory opinion.[34] Similarly, the GC's approach to the question of Front Polisario's legal personality was criticised for essentially equivocating on its status under international law. The GC understandably sought to avoid making pronouncements on the legal status of Western Sahara or Front Polisario, and therefore found a way to address the case without having to answer such thorny issues. The GC perhaps did not want to prejudice the ongoing political process by weighing in on such issues. Yet as Kassoti has observed, the international law obligations owed by the EU depend upon issues of status.[35] Legal classification matters in international law, and by avoiding the issue of status, the GC's legal analysis fails to deal with the essential questions raised by the case. As discussed below, the way in which the Court narrowly frames the legal issues – by focusing on standing and territorial application – continues to shape the Court's legal rationale in later developments.

Following the GC's judgement, High Representative Federica Mogherini held a press conference with Salaheddine Mezouar, the Moroccan Minister for Foreign Affairs and Cooperation. Mogherini stated that "[w]ith regard to the judgment of the General Court of the European Union of 10 December 2015, I am well aware of the strategic importance of this issue, both for Morocco and for the European Union".[36] In a joint press conference, the Moroccan Foreign Minister stated "[t]he judgment of the Court is legally wrong and politically biased. It seriously jeopardizes cooperation between Morocco and the European Union".[37] Underlining the political importance of the case, he states, "this is not a simple court case, but an eminently strategic case, a fundamental element for the partnership's success".[38] The Council appealed the GC's decision.

34 Kassoti (n 9) 352.

35 Ibid., 353.

36 'Statement by High Representative/Vice-President Federica Mogherini at the press point with Mr Salaheddine Mezouar, the Moroccan Minister for Foreign Affairs and Cooperation' (*European External Action Service*, 4 March 2016) <https://eeas.europa.eu/headquarters/headquarters-homepage/2842/statement-high-representativevice-president-federica-mogherini-press-point-mr-salaheddine_en> accessed 9 November 2019.

37 'Joint press point by Federica Mogherini and Moroccan Foreign Minister Salaheddine Mezour' (*European External Action Service*, 6 July 2016) <https://eeas.europa.eu/headquarters/headquarters-homepage/4743/joint-press-point-federica-mogherini-and-moroccan-foerign-minister-salaheddine-mezouar_en> accessed 9 November 2019. (Unofficial translation by the author).

38 (Unofficial translation by the author).

### *2.2 Advocate General Opinion*

On 13 September 2016, Advocate General (AG) Wathelet delivered his Opinion in the appeal, arguing that the GC decision be set aside, and that Council Decision should not be annulled.[39] The AG's reasoning, like that of the GC, turned on an assessment of the "territorial scope" of the agreement, an issue which was "of paramount importance … because it permeates the entire action for annulment".[40] The AG therefore continued with the initial legal framing established by the GC, which asserted that the legal questions were fundamentally related to the issue of *de jure* territorial application. The AG disagreed with the GC's description of Western Sahara as a "disputed territory". Rather, he contended, Western Sahara has a separate and distinct status from the administering state under international law.[41] Because of Western Sahara's status as a non-self-governing territory, as determined by Article 73 of the United Nations Charter, the Liberalisation Agreement did not apply to Western Sahara without the express extension to that territory at the time of ratification.[42]

Whereas the GC dealt with issues of public international law in a rather superficial way, the AG was more robust and detailed in his analysis. However, since the AG had framed the main legal issue to be one of territorial application, this meant that international law issues were mainly related to the rules on the interpretation of treaties such as the relative effect of treaties[43] and subsequent practice.[44]

### *2.3 Appeal*

On 21 December 2016, the CJEU set aside the judgment of the GC and dismissed Front Polisario's action as inadmissible.[45] The judgment largely followed the reasoning of the AG, finding that the Liberalisation Agreement did not apply to the territory of Western Sahara, and as such, Front Polisario lacked standing to challenge the contested decision. In order to determine the territorial application of the Liberalisation Agreement, the CJEU reasoned, it had to engage in the process of treaty interpretation. It thus took account of the methods of treaty interpretation set out in the 1969 Vienna Convention on the Law of Treaties (VCLT).[46] The CJEU has held on a number of occasions that the VCLT rules on treaty interpretation represent customary international law, and are principles

39 Case C-104/16 P *Council v. Front Polisario* [2016] EU:C:2016:677, Opinion of AG Wathelet.
40 Ibid., para 54.
41 Ibid., para 75.
42 Ibid., paras 75–82.
43 Ibid., para 109.
44 Ibid., para 87.
45 Case C-104/16 P *Council v Front Polisario* [2016] EU:C:2016:973.
46 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Morocco has been a party since 1972, but the European Union is not.

binding upon the EU.[47] These rules, in essence, are tools that allow the interpreting body to decipher the intention of the parties to understand its meaning and contents. Article 31 VCLT sets out a general rule that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". However, rather than starting from the text of the treaty itself, the CJEU considered Article 31(3)(c), according to which a treaty is to be interpreted taking into account relevant rules of international law applicable between the parties, in order to understand context.[48] In this regard, the CJEU referred specifically to: (1) the principle of self-determination, (2) the territorial scope of treaties and (3) the *pact a tertiis* principle of the relative effect of treaties. The Court acknowledged that these principles are somewhat overlapping, but are autonomous rules, and dealt with each in succession.

Regarding the principle of self-determination, the Court found that this was not only a principle of customary international law but also "a legally enforceable right *erga omnes* and one of the essential principles of international law".[49] It referred to Article 1 of the Charter of the United Nations,[50] the ICJ judgments in *Western Sahara* and *East Timor*, and UN General Assembly Resolutions that have reaffirmed the principle, including Resolution 1514 (XV) "Declaration on the granting of independence to colonial countries and peoples".[51] The principle is thus applicable to the relations between Morocco and the EU, and one of which the Court is to take account.[52] The CJEU rejected the Commission's argument that the term "territory of the Kingdom of Morocco" in Article 94 of the Association Agreement should be interpreted to include the territory of Western Sahara. Whereas the GC did not attach legal significance to the fact that Western Sahara had been included in the list of non-self-governing territories since 1963, the CJEU found this to be significant, and found that the words "territory of the Kingdom of Morocco" could not be interpreted so as to include the territory in the Association Agreement.[53]

This interpretation was also supported by the principle enshrined in Article 29 VCLT, according to which, "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory". Article 29 was intended merely to set out a general rule

47 See Case C-386/08 *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen* [2010] EU:C:2010:91, para 42.

48 *Council v Front Polisario* (n 45) para 86.

49 Ibid., para. 88.

50 "The Purposes of the United Nations are: … " 2. To develop friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*, and to take other appropriate measures to strengthen universal peace".

51 UNGA Res 1514 (XV) (1960) UN Doc A/RES/1514(XV), para 2: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

52 *Council v Front Polisario* (n 45) para 89.

53 Ibid., para 92.

that a treaty is to apply with respect to the territories of its parties, and usually applies where a treaty does not define its territorial application.[54] However, here the Court attaches much more significance to the principle, finding that a treaty only applies with respect to territory over which a state exercises full sovereign powers, unless there is an *express provision* providing for its application to other territory. Accordingly, the term "territory", in its ordinary meaning, applies to geographical space in which a state exercises sovereign powers under international law.[55] Since the Association Agreement did not expressly state that it applied to Western Sahara, the CJEU reasoned, it could not be interpreted as applying to a non-self-governing territory.

The third main principle was the rule on the relative effect of treaties. This principle recognises the independence and sovereignty of states, and establishes that a treaty does not create rights and obligations for a third state without its consent (*pacta tertiis nec nocent nec prosunt)*. Article 34 VCLT refers to "third *states*".[56] Yet the CJEU refers to obligations on "third parties", without mentioning why it does so. The Court also did this when it previously applied the principle to interpret the EU-Israel Association Agreement in *Brita*.[57] In that case, the CJEU found that the agreement could not be applied to the territory of the West Bank since doing so would apply a treaty to a third party without its consent. A relevant difference between *Brita* and *Front Polisario* is that in the former case, there was an existing agreement between the Palestine Liberation Organization (PLO) and the EU, whereas there is no similar agreement between the EU and Western Sahara or other entity. Like *Front Polisario*, *Brita* was criticised, inter alia, for utilising international law to avoid more politically sensitive questions.[58] The CJEU considered Western Sahara a "third party" within the meaning of the *pacta tertiis* principle, and therefore the Association Agreement could not apply to it.[59] The CJEU opines at this point what would be necessary for the Agreement to apply to the territory of Western Sahara:

> As such, that third party may be affected by the implementation of the Association Agreement in the event that the territory of Western Sahara comes within the scope of that agreement, without it being necessary to determine whether such implementation is likely to harm it or, on the contrary, to benefit it. It is sufficient to point out that, in either case, that implementation

54 ILC, 'Draft Articles on the Law of Treaties and Commentaries, Commentary to Art. 25' (1966) UN Doc A/6309/Rev.1, 213, para 5.

55 *Council v Front Polisario* (n 45) para 95.

56 Under Article 2(1)(h) of the VCLT, "Third State" is defined as "a State not a party to the treaty".

57 *Brita* (n 47).

58 See e.g. Helmut Aust, Alejandro Rodiles and Peter Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' [2014] 27 *Leiden Journal of International Law* 75, 103 arguing that it is an example of the Court "somewhat stretching the scope of the *pacta tertiis* rule" in order to avoid the politically sensitive question of the territorial limits of Israel.

59 *Council v Front Polisario* (n 45) para 106.

> *must receive the consent of such a third party.* In the present case, however, the judgment under appeal does not show that the people of Western Sahara have expressed any such consent.[60]

The CJEU notes that *consent* of the third party would be necessary in order for the agreement to apply to the territory of Western Sahara. The question of what is considered consent, and who is to be considered representing the people of Western Sahara, is discussed below in Section 4.

The CJEU also differed from the GC in its analysis and application of the "subsequent practice" of the parties in the interpretation of the agreement. Article 31(3)(b) VCLT sets out that, in interpreting a treaty, account can be taken of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". This recognises that, in addition to a treaty's text, the practice of the parties is also relevant, especially since the aim of interpretation is to find the meaning and intention of the parties. The CJEU took into account the practice of the EU and Morocco in applying the Association Agreement. The CJEU found, however, that the GC erred in law, by failing to enquire whether such practice reflected the existence of an agreement between the parties, as required by VCLT Article 31(3)(b).[61] The fact that the agreement had been applied with respect to products originating from the territory of Western Sahara in certain cases was not contested. Yet, the CJEU held that this practice alone was not enough to alter the language of the agreement, as it did not reflect the existence of an agreement between the parties to "amend the interpretation of … the Association Agreement".[62]

The issue here turned on the intention of the parties, with particular focus on the intention of the EU. Did the EU intend the agreements to apply to the territory of Western Sahara? The CJEU reasoned that, if this were the case, then this

> would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties, even though the European Union repeatedly reiterated the need to comply with those principles, as the Commission points out.[63]

The CJEU also referred to the principle "that Treaty obligations must be performed in good faith".[64] The CJEU seems to argue that since the EU institutions profess to respect international law, the Association Agreement must be interpreted in a way that assumes the EU intends to act in accordance with principles of international law. It is an unusual approach to treaty interpretation.

60 Ibid.
61 Ibid., paras 120–125.
62 Ibid., para 122.
63 Ibid., para 123.
64 Ibid., para 124.

It uses the EU's apparent fidelity towards international law, to interpret an international agreement between two subjects of international law. Moreover, the CJEU does not make a convincing distinction between instances of *de facto* application of the agreement and examples of "subsequent practice" relevant for treaty interpretation. The CJEU was asked to determine whether the EU is violating its obligations under international law. It is odd, then, to use the EU's commitment to international law as a basis of interpretation when addressing this very question.

The CJEU's judgment is significant in that it recognises that Western Sahara is a non-self-governing territory with a separate and distinct status in international law, and not a part of the territory of Morocco. The Court's focus on the territorial application of the agreement, however, means that its analysis is limited solely to that question, and it does not examine the consequences of the EU concluding an agreement that applies *de facto* to the territory of Western Sahara. For instance, it does not analyse whether the EU is obligated not to recognise as lawful a situation created through a serious breach of peremptory norm of international law. In contrast with the GC's approach, it does not deal with the obligations the EU has, under international law or EU law, to respect the human rights of the people of Western Sahara. One might argue that the CJEU could not examine such issues, since it found Front Polisario did not have standing, and therefore it would be inappropriate to deal with such substantive questions. However, this is a consequence of the Court's legal framing; by narrowing the case to the issue of territorial application, and narrowing that issue to one of treaty interpretation, the CJEU avoided dealing with the broader context of the conflict.

## 3 Western Sahara Campaign UK

*Western Sahara Campaign UK* involved a challenge in the courts of England and Wales to several of the EU's agreements with Morocco. Western Sahara Campaign UK (WSCUK) is a non-governmental organisation based in the United Kingdom, whose aim is to support the right of the people of Western Sahara to self-determination and to promote the human rights of Saharawi people. It brought action before the High Court of Justice (England & Wales). Its first action concerned whether the Commissioners for Her Majesty's Revenue and Customs, United Kingdom (HMRC) were entitled to accept the importation, into the United Kingdom, of goods certified as originating in Western Sahara, as if they were goods certified as originating in the Kingdom of Morocco for the purposes of the Association Agreement between Morocco and the EU and its Member States.[65] The second action challenged the fisheries policy of the

65 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 ("Association Agreement").

UK Secretary of State for Environment, Food and Rural Affairs. This challenge was on the grounds that the policy included the waters adjacent to the territory of Western Sahara within the scope of the domestic legislation intended to implement the Fisheries Partnership Agreement (FPA),[66] its 2013 Protocol[67] and acts of secondary legislation whereby the EU allocated fishing opportunities to the Member States. WSCUK essentially argued that the EU's agreements with Morocco – the Association Agreement, the FPA and the 2013 Protocol, as well as secondary legislation implementing fishing opportunities – were contrary to Article 3(5) TEU. Like in the *Front Polisario* case, the proceedings dealt with the question of whether these agreements were concluded in violation of public international law. There were some key differences between the cases. First, the proceedings originated by way of a reference for a preliminary ruling in a Member State, rather than a direct challenge. The case was brought by an NGO based in an EU Member State, rather than an internationally recognised national liberation movement. The case also dealt with the FPA, which gave rise to questions about the application of the agreement to waters off the coast of Western Sahara. Despite these differences, the CJEU applied similar legal reasoning to find that the WSCUK did not have standing to bring the dispute.

### *3.1 National court proceedings*

In order to determine whether to make a reference under Article 267 TFEU to the CJEU, Blake J sought to determine whether there was "a credible arguable challenge to the validity of the EU measures".[68] Blake J noted, however, that while Article 3(5) TEU requires the EU to respect international law, it does not give detail on the standard of review required. The relevant case in that regard is *Air Transport Association of America*,[69] a case involving a challenge to EU legislation on emissions trading applied to aircraft. In that case, the CJEU examined some of the conditions under which EU legislation could be challenged under Article 3(5) TEU, and the standard of review. In that case, the CJEU set out different tests, depending on whether the principle of international law has its basis in a treaty, or in customary international law. Regarding the application of customary international law, the CJEU held that the review was to be confined to the question whether the EU institutions made a "manifest error of assessment" in applying those principles. After reviewing the arguments of the parties,

66 Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco [2006] OJ L 141, 4 ("Fisheries Partnership Agreement").

67 Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco [2013] OJ L 328, 2 ("2013 Protocol").

68 *R (Western Sahara Campaign UK) v The Commissioners for HMRC and the Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 2898 (Admin) para 5.

69 Case C-366/10 *Air Transport Association of America* [2011] EU:C:2011:864.

Blake J found that there was an arguable case that the Commission had made a manifest error in applying international law to the agreements. The judgment and the arguments of the parties paid particular attention in this regard to sources that were given less prominence in the CJEU judgement: the 2002 legal opinion of Hans Corell, the writing of scholars and the concerns about the agreements by some EU Member States and the European Parliament were all discussed.

It is also interesting to note that, had the case not concerned EU agreements, the English Court would not have had the power to review the validity of the agreement. The Court notes that "[t]here is little doubt that if the present challenge was solely based on common law rules, a domestic court might dismiss a claim that depends on an assessment of the legality of actions of a foreign sovereign".[70] The EU Treaties, particularly Article 3(5) TEU, allow challenges of acts of the EU that are alleged to not be in conformity with international law. Unlike some domestic legal systems, the EU legal order does not have an act of state doctrine, or political question doctrine, that would preclude cases that challenge the actions of a foreign sovereign.[71]

### *3.2 Advocate General Opinion*

The case concerned the application of the agreements to the territory of Western Sahara and to the waters off its coast. WSCUK argued that the inclusion of Western Sahara within the agreements violated international law binding on the Union. This included: (i) the right to self-determination, (ii) Article 73 of the Charter of the United Nations, which deals with the rights of the people of non-self-governing territories, (iii) provisions of the UN Convention on the Law of the Sea,[72] (iv) the obligation to bring to an end serious breaches of a peremptory norm of international law, (iv) the obligation not to recognise an illegal situation resulting from such a breach and (v) the obligation not to provide assistance for the commission of an internationally wrongful act. WSCUK further argued that the international agreements in question were not concluded on behalf of the people of Western Sahara nor in consultation with its representatives, and that there was no evidence that the people of Western Sahara had derived any benefit from those three international agreements.[73]

AG Wathelet analysed the issue of jurisdiction before turning to the substantive questions raised by the referring court. The first issue was whether the Court had jurisdiction to give a preliminary ruling on the validity of the FPA.

70 *Western Sahara Campaign UK* (n 68) para 7.

71 See Jed Odermatt, 'Patterns of Avoidance: Political Questions before International Courts' [2018] 14 *International Journal of Law in Context* 221.

72 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entry into force 16 November 1994) UNTS 1833 (UNCLOS).

73 Case C-266/16 *Western Sahara Campaign UK* v *Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* [2018] EU:C:2018:1, Opinion of AG Wathelet, para 32.

The Council argued that an international agreement was not an act of the instructions under Article 267 TFEU, and that the only procedure for analysing the validity of an agreement was the opinion procedure under Article 218(11) TFEU. Unlike *Front Polisario*, which dealt with the Council Decision approving the conclusion of an agreement, this case dealt with the validity of the agreement itself. The agreements between the EU and Morocco are acts on the international plane, and "are part of the international legal order".[74] Nonetheless, the AG did find the Court had jurisdiction to review the validity of the contested acts.

On the substantive issues, AG Wathelet found that the Fisheries Agreement and the 2013 Protocol are indeed applicable to the territory of Western Sahara and to the adjacent waters. AG Wathelet came to this conclusion based on applying the rules on the interpretation of treaties, in particular Article 31 VCLT.

The AG discussed the conditions set out in *Air Transport Association* (discussed earlier) for challenging the compatibility of an international agreement with Article 3(5) TEU. The AG recognised that individuals must satisfy certain conditions in order to be able to rely on international law; however, he added that "those conditions cannot be such as to render effective judicial review of the external action of the Union impossible in practice".[75] Relying on the *Air Transport Association* test, he argued, "would automatically preclude the possibility for individuals to rely on rules, however essential, of international law, such as the peremptory norms of general international law or the obligations erga omnes of international law…".[76] The AG argued that this approach, which focuses on the *competence* of the Union to conclude an agreement, is too restrictive:

> [i]t would be absurd to limit review of the contested acts solely to the question of the competence of the Union and automatically to preclude substantive review of those acts by reference to the most fundamental norms of international law which are relied on in the present case.[77]

The AG seeks to move the Court away from its previous case law, which focuses on the "manifest error" standard with regard to customary international law. He calls into question the Court's approach to treat customary law as fundamentally different from that of treaty law. The Court originally made this distinction on the assumption that customary international law, by its nature, does not have the same "degree of precision" as international agreements.[78] This assumption was challenged in the literature, and by AG Kokott in *Air Transport Association*. AG Wathelet makes the point that when rules of customary international law have

74 Opinion of AG Wathelet (n 73) para 48.
75 Ibid., para 86
76 Ibid., para 90
77 Ibid., para 92.
78 *Air Transport Association of America and Others* (n 69) para 110.

been "codified", they do not necessarily lack the same precision as a treaty, and therefore there is no reason to apply different standards depending on the source of international law. He proposes a unified approach be applied: "the Union must be bound by the rule relied on, the content of which must be unconditional and sufficiently precise and, last, the nature and the broad logic of which do not preclude judicial review of the contested act".[79]

The AG then examined whether the "nature and its broad logic" of the rules being relied upon precluded them from being used to assess the validity of the contested acts. He examined the right to self-determination and the principle of permanent sovereignty over natural resources, and rules of international humanitarian law applicable to the conclusion of international agreements concerning the exploitation of the natural resources of the occupied territory, and concluded that they do not preclude judicial review of the contested acts. The AG found that the contested acts are contrary to international law, and therefore violate the obligation in Article 3(5) TEU. Significantly, the AG found that the EU policy amounted to recognition of an illegal situation resulting from a breach of the right to self-determination of the people of Western Sahara.[80]

The full reasoning and assessment of the AG will not be analysed here. It should be noted, however, how the approach of the AG differs significantly from that of the Court. Whereas the AG's assessment goes into detail on a number of issues of international law, the Court does not conduct the same assessment. This turns on the Court's very different approach to the issue of territorial application.

### *3.3 Court of Justice*

In *Western Sahara Campaign UK*, the CJEU departs from the AG in a number of areas, and mainly uses the approaches adopted in *Front Polisario*, discussed earlier. On the procedural question, the CJEU held that it did have the power to assess whether international agreements concluded by the EU are compatible with international law, via the preliminary reference procedure.[81] When the Court receives a request for a preliminary ruling concerning the compatibility of such an agreement, it reasoned, such request must be understood as relating to the EU act approving its conclusion.[82] Review of its validity is to be conducted "in the light of the actual content of the international agreement at issue".[83] Since the EU Treaties set out that the Court shall give preliminary rulings on

79 Opinion of AG Wathelet (n 73) para 96.

80 Ibid., para 212.

81 Case C-266/16 *Western Sahara Campaign UK* v *Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* [2018] EU:C:2018:118, para 48.

82 Ibid., para 50.

83 Ibid., para 51.

the interpretation of *Union law* or on the validity of *EU acts*,[84] it would appear that this does not apply to acts on the plane of international law. Indeed, a procedure for determining whether an "envisaged" agreement is compatible with the Treaties exists in Article 218 (11) TFEU. Such procedure allows an ex ante assessment of whether an agreement concluded by the Union is compatible with the Treaties, thus preventing the situation whereby an agreement is later found to be incompatible and engaging the international responsibility of the Union. It had been discussed in some academic literature whether the validity of an international agreement could also be assessed via other procedures such as through the preliminary reference procedure. Lenaerts et al. argued that there was little practical distinction between the international agreement and the internal EU act concluding it.[85] In practical terms, this is correct; however, it should be remembered that there is a significant difference between the two legal sources. The agreement, as a source of law on the international plane, can only be found to be invalid according to the rules enshrined in the law of treaties; an issue regarding the internal procedure would only have internal legal ramifications for that party. The CJEU does not have the power to render invalid an act on the international plane. Importantly, this procedure does not involve the consent of the other party to the agreement, in this case Morocco. In the event the CJEU found the internal act (the decision approving the agreement) to be invalid, the EU institutions would be required to take steps to rectify the situation.

Like in *Front Polisario*, the Court determined that the legal questions all turned on the issue of the agreements' territorial scope: did the FPA and its Protocol apply to the territory of Western Sahara?[86] In order to address this question, the CJEU again found that it had to engage in an exercise in treaty interpretation. It focused, primarily, on the provisions of those agreements dealing with spatial application and scope. The FPA uses the term "the territory of Morocco and to the waters under Moroccan jurisdiction".[87] The agreement permits vessels flying the flag of an EU Member State to "engage in fishing activities in [the] fishing zones [of the Kingdom of Morocco]".[88] It defines "Moroccan fishing zone" as "the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco". The FPA provisions therefore did not provide much guidance on the issue, beyond asserting that they apply with respect to Morocco and its adjacent waters. Rather than assess the instruments (the Association Agreement, the FPA and 2013 Protocol) separately, the CJEU considered them collectively as a body of agreements, whose aims and purpose are closely related.[89] This meant that the understanding of "territory of Morocco" should

84 Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 19 (3) (b).

85 See Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (OUP, 2014) 459–460.

86 *Western Sahara Campaign UK* (n 81) para 56.

87 Fisheries Partnership Agreement, art 11.

88 Ibid., art 5.

89 *Western Sahara Campaign UK* (n 81) para 59.

be given a consistent meaning throughout. The FPA, therefore, was understood as defining "territory of the Kingdom of Morocco" in the same way as in Article 94 of the Association Agreement. As discussed earlier, the Court had previously held in *Front Polisario* that the term "territory of the Kingdom of Morocco" as referring to the area over which Morocco exercises sovereignty under international law, which excludes application to other territories such as Western Sahara. The Court confirms this finding by using the same logic it applied in *Front Polisario,* when it interpreted the agreement in the light of the EU's self-proclaimed fidelity to international law. The Court reasoned that

> If the territory of Western Sahara were to be included within the scope of the Association Agreement, that would be contrary to certain rules of general international law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, stated in Article 1 of the Charter of the United Nations, and the principle of the relative effect of treaties, of which Article 34 of the Vienna Convention is a specific expression […][90]

The Court thus diverges from the Opinion of the AG on a key point, that is, the importance to be attached to the *de facto* application of the agreements with respect to Western Sahara. For the AG, such application in practice demonstrated the intention of the parties, and was relevant to interpreting the scope of the agreement. The CJEU, on the other hand, dismisses the importance of the *de facto* application, and reasons that the Union could not have intended to apply the agreement to Western Sahara, because to do so would have meant the Union would be breaching international law. The Court separates the questions of the implementation of the agreements and their *de jure* application according to the text of the agreements. In the proceedings before the referring court, the defendants challenged the *application* of the agreement to goods that originate from the territory of Western Sahara and the application of the FPA to territorial waters of Western Sahara. The question referred to the CJEU focused on the validity of those agreements in the light of international law and Article 3(5) TEU.[91]

90 *Western Sahara Campaign UK* (n 81) para 63.

91 In particular, the referring court asked

> Is the [Fisheries Partnership Agreement] (as approved and implemented by Regulation No 764/2006, Decision 2013/785 and Regulation No 1270/2013) valid, having regard to the requirement under Article 3(5) TEU to contribute to the observance of any relevant principle of international law and respect for the principles of the Charter of the United Nations and the extent to which the [Fisheries Agreement] was concluded for the benefit of the Saharawi people, on their behalf, in accordance with their wishes, and/or in consultation with their recognised representatives?

Ibid., para 41.

Even if the FPA and protocol did not apply to the territory of Western Sahara and its coastal waters, could the parties have still agreed to establish a "special meaning" to the term? Article 31(4) VCLT sets out that "[a] special meaning shall be given to a term if it is established that the parties so intended". However, the CJEU finds that the EU could not have had such an intent. This is because such a "special meaning" given to the agreement would violate international law, and thus

> it would be contrary to the rules of international law referred to in paragraph 63 of the present judgment … if it were agreed that the waters directly adjacent to the coast of the territory of Western Sahara were to be included within the scope of that agreement.[92]

This is another example of the Court interpreting the agreement in the light of the EU's internal commitments to international law. The EU could not have intended to apply the agreements in a way that violated international law, the Court reasons, since if it were to do so, this means that the EU had intended to violate international law. The Court does not appear to be open to the other plausible interpretation: that the EU concluded an agreement that applies to the territory of Morocco, in violation of international law and Article 3(5) TEU.

In contrast to the AG, the Court attaches very little weight to the implementation of the agreement. The fact that the Council and the Commission were both of the position that the FPA and Protocol do apply to Western Sahara seems to play little role in its reasoning. To further support its conclusion that the agreements do not apply to the waters adjacent to the territory of Western Sahara, it refers to the geographical coordinates and baselines of its fishing zone supplied by Morocco (as required by the 2013 Protocol). The Court found that these coordinates did not form part of the text of that protocol, as they were notified on 16 July 2014, one day after the Protocol entered into force.[93] Even if they did not technically form part of the text of the protocol, these are still evidence of the intention of the parties, and form part of the broader context in which the agreements are interpreted and applied by the parties. This approach is in stark contrast to that of the AG, who looked at charts showing the extent of the fishing zones (supplied by the Commission), the minutes of third Joint Committee of the Fisheries Agreement, fishing catch statistics provided by the European Commission and declarations of EU Member States within the Council which suggested certain Member States had reservations about the policy. To the AG, this evidence all pointed to the conclusion that the parties' intention to apply the agreement to the waters of Western Sahara was "manifestly established".[94] Such an approach, focusing on the parties' actual intent, would have been more in

92 Ibid., para 71.
93 Ibid., para 81.
94 Ibid., para 72.

line with the established approach to treaty interpretation. The Court examined the EU's intent by referring to the EU's own constitutional provisions, namely Article 3(5) TEU, the very same article that was being replied upon to review the legality of the contested acts.

### *3.4 Debate and criticism*

The *Western Sahara Campaign UK* and *Front Polisario* cases have been commented and criticised in legal circles, mainly for the way in which they have dealt with important aspects of public international law. Criticism has focused, for example, on how the EU Courts have misapplied international law of treaties. Kassoti argues that the Court's approach to treaty interpretation and application of the Vienna rules is "highly problematic".[95] The Court is criticised, among other reasons, for giving excessive weight to Article 31(3)(c) VCLT at the expense of other means of interpretation.[96] Importantly, it overlooks the main goal of treaty interpretation, that is, to ascertain the intention of the parties to the agreement. The criticism is that, while the EU and its court seek to uphold the image of being "friendly" towards international law, it is problematic that the Court "applied international law rules on treaty interpretation in a way that few international lawyers would recognize".[97]

Another form of criticism is that the EU's policy towards Morocco is hypocritical, since it does not treat similar cases of occupation alike. For instance, Harpaz argues that the EU's policy of denying Israel the trade benefits with respect to the Occupied Palestinian Territories, while at the same time applying the Association Agreement with Morocco to the occupied territory of Western Sahara, "is not in line with the EU's commitment to strict observance of international law and that it erodes the credibility and legitimacy of the EU as a Normative Power".[98] The EU's policy of "application with no recognition" towards Morocco is at odds, he argues, with its policy towards Israel. This is not just contradictory, he argues, but potentially violates the letter and spirit of the Most Favoured Nation (MFN) principle in trade law.[99] Frid de Vries also argues that the CJEU overlooked a potentially important area of international law in these cases, that

95 Eva Kassoti, 'The ECJ and the Art of Treaty Interpretation: Western Sahara Campaign UK' [2019] 56 *Common Market Law Review* 219.

96 Kassoti (n 95) 219: "The Court's excessive reliance on Article 31(3)(c) VCLT, and the fact that it did not take into account the other means of interpretation contained in the Article, go against the 'crucible approach' intended by the ILC and employed in international judicial practice".

97 Ibid., 219.

98 Guy Harpaz, 'The Front Polisario Verdict and the Gap between the EU's Trade Treatment of Western Sahara and Its Treatment of the Occupied Palestinian Territories' [2018] 52 *Journal of World Trade* 619. See Guy Harpaz and Eyal Rubinson, 'The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita' [2010] 35 *European Law Review* 551.

99 Harpaz, 'The Front Polisario Verdict' (n 98) 626.

is, international trade law, and the GATT in particular.[100] By adopting a trade law approach, Frid de Vries argues, the Court could also have averted some of the "sensitive political issues" in the case.[101]

This criticism and commentary has mostly engaged with the CJEU's legal reasoning and debated the Court's approach on its own terms. It finds faults in the Court's application of specific rules or points to inconsistencies. Yet on a broader level, it is the very way that the CJEU framed the legal questions that is most problematic. The approach taken by AG Wathelet, while still examining the issues in terms of treaty interpretation, focuses more on the broader context of the dispute. It deals with what I consider to be the real legal question in this debate, the question of what the EU's international legal obligations are towards the territory of Western Sahara, and whether its policy conforms with this. The Court's approach was to limit the legal questions to that of territorial application of the agreements. Perhaps this is understandable given the sensitive subject matter, but a more thorough engagement with the substantive legal questions would have given the EU institutions greater clarity about how to act in the future when engaging with Morocco. This lack of certainty and guidance can help explain the behaviour of the other EU institutions since the judgments.

## 4 Continued engagement with Western Sahara

The approach taken by the Court allows it to tread a very delicate path: it was able to uphold the internal and external legality of the agreements with Morocco, while at the same time giving clear warning signals about the EU's policy towards Western Sahara. Front Polisario and WSCUK were both unsuccessful in their legal challenges; however, their challenges did allow the CJEU to recognise the separate and distinct status of Western Sahara, and to implicitly criticise EU policy, without going so far as to openly challenge its validity. The judgment has a number of effects beyond the legal challenge. At one level, it has simply brought the issue of Western Sahara to the attention of some people who would otherwise have never heard of the case. Another effect is that, as the EU negotiates new agreements with Morocco, it must ensure that it complies with the legal requirements established by the Court. The judgments keep legal (and diplomatic) relations between the EU and Morocco intact, but also clearly show that any future agreements must respect the right of the people of Western Sahara to self-determination.

On 4 March 2019, the Council adopted a decision approving the conclusion of a sustainable fisheries partnership agreement.[102] The preamble of that decision

100 Rachel Frid de Vries, 'EU Judicial Review of Trade Agreements Involving Disputed Territories: Lessons from the *Front Polisario* Judgments' [2018] 24 *Columbia Journal of European Law* 497.

101 Ibid., 524.

102 Council Decision 2019/441 of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement [2019] OJ L 77.

refers to the judgments in *Western Sahara Campaign UK*: "the Court held that neither the Agreement nor the Implementation Protocol thereto apply to the waters adjacent to the territory of Western Sahara".[103] It refers to the steps taken by the Commission and European External Action Service to assess whether the Fisheries Agreement would be for the "benefit" of the people of Western Sahara, and in compliance with the CJEU judgment:

> In view of the considerations set out in the Court of Justice's judgment, the Commission, together with the European External Action Service, took all reasonable and feasible measures in the current context to properly involve the people concerned in order to ascertain their consent. Extensive consultations were carried out in Western Sahara and in the Kingdom of Morocco, and the socioeconomic and political actors who participated in the consultations were clearly in favour of concluding the Fisheries Agreement. However, the Polisario Front and some other parties did not accept to take part in the consultation process.[104]

The results of the Commission's study were published in a Commission Staff Working Document on "Report on benefits for the people of Western Sahara and public consultation on extending tariff preferences to products from Western Sahara".[105] The Commission undertook public consultations with people in Western Sahara, examining the economic and human rights impact of the proposal. The Report concludes that "most people now living in Western Sahara are very much in favour of the extension of tariff preferences to products from Western Sahara under the EU-Morocco Association Agreement". The Commission document also notes that Front Polisario rejects the amendment to the EU-Morocco Association Agreement extending tariff preferences to products from Western Sahara, but dismisses these concerns, as they are "political reasons unrelated to the amendment itself". Front Polisario is of the view that such an extension would be viewed as consolidating Morocco's sovereignty over the territory.

The Commission's report has a number of flaws. It was constrained in its ability to attain appropriate data, particularly on the goods originating from Western Sahara. It was also constrained in its ability to obtain reliable information about

103 Ibid., Preamble, para 3.

104 Ibid., Preamble para. 11.

105 Commission, Commission Staff Working Document, Report on benefits for the people of Western Sahara and public consultation on extending tariff preferences to products from Western Sahara, Accompanying the document Proposal for a Council decision on the conclusion of an agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco on amending Protocols 1 and 4 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part. (2018) COM 481 final.

whether the "people" of Western Sahara approve the agreement. Does this entail only the representatives of the people of Western Sahara, or also, for example, other civil society organisations, businesses and individuals? However, the main methodological shortcoming is the way that the Commission understands and defines the idea of "benefit". It is almost entirely conceived in terms of economic benefit, and focuses on the potential impact on the Western Saharan economy. When analysing the potential impact on human rights, the Commission concludes: "By promoting a convergence of rules with EU standards in various fields, the Agreement will lead to indirect improvements in areas such as working conditions (including safety), labour legislation (including child labour), plant health measures and consumer protection". This is a rather narrow way of examining a complex and multi-faceted issue – it conflates convergence of EU rules with the improvement of human rights, without examining the broader impact of the policy.

On 16 January 2019, the European Parliament gave its consent to a draft Council Decision on the conclusion of the agreement between EU and Morocco.[106] The accompanying Press Release entitled "Preferential tariffs to help Western Sahara to develop" demonstrates the approach taken by the EU institutions generally.[107] It states that the proposal to lower tariffs in the territory of Western Sahara will benefit local populations. The European Parliament resolution also notes that the CJEU judgments on Western Sahara "did not specify … how the people's consent has to be expressed and considers therefore that some uncertainty remains as regards this criterion".[108] It recognises the difficulties of the Commission to ascertain the benefits of the policy to the people of Western Sahara, but concludes that there is overall support for the tariff preferences. Like the Commission report, it acknowledges that there was opposition in Western Sahara, stating, "others consider that the settlement of the political conflict should precede the granting of trade preferences".[109] The emphasis, then, is primarily on the socio-economic benefits to the population. It downplays concerns that such policy may have the effect of cementing the *status quo* and consolidating Morocco's control over the territory. While such arguments may be dismissed as "political", the fact that the internationally recognised political representatives of Saharawi people, Front Polisario, oppose the policy should be taken into account. When seeking to

106 European Parliament non-legislative resolution of 16 January 2019 on the draft Council Decision 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 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 (10593/2018 – C8–0463/2018 – 2018/0256M(NLE), 16 January 2019.

107 'Preferential tariffs to help Western Sahara to develop' (*European Parliament Press Service*, 16 January 2019) <http://www.europarl.europa.eu/news/en/press-room/20190109IPR23018/preferential-tariffs-to-help-western-sahara-to-develop> Accessed 9 November 2019.

108 European Parliament non-legislative resolution (n 106) para 12.

109 Ibid., para 11.

understand whether it will have a benefit for the people of Western Sahara, the effect of the agreements on the underlying territorial dispute must be given consideration.

While the CJEU judgment appears to be taken into consideration, the follow-up by the EU institutions acts on a narrow interpretation of that judgement. It focuses entirely on the issue of whether the application of tariff preferences would have a positive economic impact, but appears to overlook other issues dealt with by the judgment. For example, what are the obligations on the EU to respect the self-determination of the people of Western Sahara? Does this not entail, in addition to an economic impact assessment, an assessment of the impact EU policy has on the enjoyment of that right? The Council Decision on Sustainable Fisheries Partnership Agreement asserts that it is compliant with international and European law, but it does not appear to fully assess what, precisely, that law requires. The EU's policy towards Western Sahara and its economic relations with Morocco will likely lead to new disputes before the CJEU. However, the Court will not be able to side-step these thorny questions by stating that the agreement in question does not apply to the territory of Western Sahara. It may still use some avoidance strategies to limit full review, for example, by limiting the standing of the applicants, or by the narrow framing of the legal questions.

## 5 Conclusion

Like the other examples of occupation and contested sovereignty discussed in this volume, the situation of Western Sahara is a highly sensitive political issue. The EU and its Member States value the importance of good relations with Morocco, which involves much more than economic ties, but important cooperation on migration, counter-terrorism and security. This chapter has examined the cases that have come before the CJEU involving the EU's engagement with Western Sahara, and in doing so has focused mainly on the issues of EU and international law. It found weaknesses in certain parts of the EU Court's reasoning, particularly in the way it approached several aspects of the law of treaties, and the way it framed the legal questions before it. It is understandable why the CJEU would approach the case in such a way. The Court faced a myriad of legal issues – from the issue of recognition, to self-determination, and international humanitarian law, to questions under EU law. One might argue that as a regional integration court, the CJEU is not well-equipped to deal with fundamental questions of public international law, and has shown little engagement with such issues in past cases. By framing the legal issue as one of *de jure* territorial application, the CJEU was able to reaffirm the EU's commitment to international law, and to criticise the EU's policy towards Western Sahara, but in a way that was less antagonistic than declaring the agreements to be invalid. The CJEU relies, however, on a certain legal fiction – that the people of Western Sahara are not "affected" by these agreements, because they do not *legally* apply to that territory.

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# 7 Western Sahara, the European Commission and the politics of international legal argument

*Pål Wrange*

## 1 Introduction and background

### *1.1 Introduction*

On 10 July 2018, the Council of the European Union decided to approve an amendment to its Association Agreement with Morocco in order to enable the import of fishery and agriculture products from Western Sahara. The decision had to be in conformity with an earlier judgement by the Court of Justice of the European Union (CJEU) which had concluded that the agreement did not cover Western Sahara – a territory largely controlled by Morocco since 1975. The CJEU had reached its judgement based on reasoning under international law, in particular the law of treaties and the law of self-determination, and had found that Western Sahara was a separate territory which could be covered only with the consent of its people. After the judgement, the Council instructed the European Commission (COM) to negotiate an amendment which would enable continued trade, and in which 'the people concerned by the agreement have been adequately involved'. COM subsequently conducted consultations with 'stakeholders' in Brussels and Rabat. In the ensuing decision to adopt the amendment agreement, the Council noted that '[t]he Commission … has taken all reasonable and feasible steps in the current context to adequately involve the people concerned in order to ascertain their consent to the agreement'. Many international lawyers felt that the deal was still in violation of international law and the Court's judgement, but the Council was persuaded by COM's account. How did that happen?

International law can be thought of in different ways. For most people, it is a set of rules and principles that are supposed to guide behaviour and settle disputes. This is the assumption under which people apply and respect the law and fund the salaries of legal officers, as well as the assumption underlying scholarly doctrinal work. But international law can also be thought of as a set of argumentative and other practices – 'an activity, not a thing'[1] – which can be analysed

1 Dennis M. Patterson, 'Law's Pragmatism: Law as Practice and Narrative' in Dennis M. Patterson (ed), *Wittgenstein and Legal Theory* (Westview Press 1992), 85–121, 87; cited from Tanja

like any set of practices, arguments, texts. In this practice arguments are raised and tried, rejected or accepted. Different arguments are invoked against one another in ever changing patterns. Arguments are clustered and de-clustered; new arguments may enter an established cluster (perhaps arguments from a different 'regime'), while an established cluster may fragment into two or more clusters, when arguments that appeared to belong to the same debates no longer seem to concern the same 'matter'. And in this, the outcome often turns on the legal framing of the matter.

This is the approach that will be taken in this essay, which is interested in how international law arguments were used strategically by the COM to argue for a fairly difficult position, as manifested in the report about the consultations which the Council referred to in its decision.[2] I will look at the legal situation that the Commission faced, with a menu of legal positions, each embedded in wider ideas about law and society.

Even though I feel very strongly that COM ended up in the wrong corner, politically and legally, I will restrain my legal-normative self this time and only look at the issue as a strategic and rhetorical problem that COM had to solve.[3] Western Sahara and the EU's involvement has been analysed numerous times from a doctrinal point of view (in ways in which I almost often concur). However, here I will refrain from passing value judgements on the report and the process in which it was a part. Still, as a by-product of the analysis of strategic argumentation, this piece can be read as a critique[4] of the report, one that is based internally on the legal documents of the EU itself and externally on international law arguments.

In distinction to the consultation report, the opinions of COM's and the Council's legal service and other material (like the minutes from the meetings) are secret. However, it is possible to flesh out the often elliptical arguments in the report by using material like the Court's citations of COM's positions in the court proceedings as well as public presentations by COM officials.

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Aalberts and Thomas Gammeltoft-Hansen, 'Conclusion: The Dark Side of Legalization' in Tanja Aalberts and Thomas Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (CUP 2018) 208, 216.

2 Commission Staff Working Document SWD(2018) 346 final of 11.06.2018 [hereinafter Consultation Report]. The document is attached to the Commission,

> Proposal for a Council decision 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 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.

SWD(2018) 346 final, Brussels, COM(2018) 481 final, 2018/0256 (NLE) [hereinafter Amendment of Protocols 1 and 4].

3 Even though I am of the firm theoretical persuasion that international law is indeterminate, I find that for anyone who would like to rebut that claim, Western Sahara is an excellent example.

4 Of course, critique is different from criticism, although the two terms unfortunately are sometimes used interchangeably.

I will ask the following questions:

1 What was the task that COM needed to fulfil (Section 2)?
2 Which legal material did COM have to use, avoid, rebut or transform in order to fulfil that task (Section 3)?
3 How did COM handle this material (Section 4)?
4 Did this handling produce the expected result, and why (Section 5)?

But before I go into this, a background is needed.

### *1.2 Background*

In 1963, the Spanish colony of Western Sahara was listed as a non-self-governing territory (NSGT) by the United Nations.[5] In 1974, the UN General Assembly asked the International Court of Justice (ICJ) for an advisory opinion on the pre-colonial status of Western Sahara.[6] While the ICJ found that there had been pre-colonial ties between the territory of Western Sahara and Morocco, these ties were not 'of such a nature as might affect the application of… the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory'.[7] Shortly thereafter, on 6 November, King Hassan II of Morocco ordered the 'Green March' of civilians into Western Sahara, accompanied by military action. The same day, the UN Security Council, in Resolution 380, called upon Morocco 'immediately to withdraw… all the participants in the march'.[8] On 14 November, under military pressure, Spain agreed to cede administration of the territory to Morocco and Mauretania (which renounced its claims in 1979) and leave the territory by the end of February 1976. Morocco annexed Western Sahara in two steps in 1976 and 1979. Armed conflict ensued between Morocco and the Saharawi liberation Front Polisario, and the latter became recognised by the UN as the legitimate international legal representative of

5 There are a number of good recounts of this history. A fairly recent, and very thorough one, is Ben Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' [2015] 27 *Global Change, Peace and Security* 301 which can serve as a default reference for this brief history; see in particular 305–307. See also Stephen Zunes, 'Western Sahara, Resources, and International Accountability' [2015] 27 *Global Change, Peace & Security* 285; Jeffrey J. Smith, 'The Taking of the Sahara: The Role of Natural Resources in the Continuing Occupation of Western Sahara' [2015] 27 *Global Change, Peace & Security* 263. Smith is a prolific writer on the Western Sahara issue. The cited issue of Global Change, Peace and Security (27(3)) was devoted to Western Sahara and natural resources. Another recent and good article, cited by the *UK* High Court (see below), is Martin Dawidowicz, 'Trading Fish or Human Rights in Western Sahara' in Duncan French (ed), *Statehood and Self-Determination* (Cambridge University Press 2013) 250. See further, Karen Arts and Pedro Leite (eds) *International Law and the Question of Western Sahara* (International Platform of Jurists for East Timor 2007).

6 UNGA Res 3292 (XXIX) (13 December 1974) UN Doc A/RES/3292.

7 *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 68, para 162.

8 UNSC Res 380 (6 November 1975) UN Doc S/RES/380 (1975).

the people of Western Sahara for the purpose of negotiations about the future of the territory.[9] In 1991, after UN led negotiations, a settlement plan – endorsed by the UN Security Council in Resolutions 658 and 690 – was signed. Under that plan, a referendum on independence was to be held. Mostly due to lack of cooperation by Morocco (according to most observers), the plan was never implemented, and a few years later Morocco declared that independence for Western Sahara was no longer an option. A very fledgling peace process between Morocco and Polisario is still going on under UN aegis, for the purpose of achieving 'a just, lasting, and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara'.[10]

No state has recognised Moroccan sovereignty over Western Sahara, but non-recognition has been less persistent than in for instance the Middle East conflict or Crimea.[11] Polisario controls approximately 20–25% of the territory, and under the name 'the Sahrawi Arab Democratic Republic' (SADR), Western Sahara is a member of the African Union. A very large part of the Sahrawi population has fled to refugee camps in Tindouf, Algeria, while Moroccan settlers have moved in, investors have been allotted land, concessions have been granted and new infrastructure has been built for the needs of the newcomers and their exploitation of phosphates, fish, fresh water (for agriculture) and other natural resources.

## 2 COM's task

### *2.1 EU-Morocco relations*

The EU and Morocco have very close ties, which are based on an Association Agreement, in force since 2000. This agreement has been complemented with an agreement on the liberalisation of trade in agriculture and fisheries products (2012), and a Fisheries Partnership Agreement (FPA; 2006, revised in 2019), which gives a number of EU vessels the right to fish in Moroccan waters. Neither agreement mentions Western Sahara or discusses its status, but they have been applied to that territory.

### *2.2 The Polisario case and the Western Sahara Campaign case in the Grand Chamber of the Court of Justice*

While a number of critical legal arguments on the relation between the EU and Morocco have been made through the years, what forced the COM to make the analysis under review was two judgements in the CJEU.

9 UNGA Res 34/37 (21 November 1979) UN Doc A/RES/34/37.

10 See the UN Secretary General's report, UN Doc S/2019/787.

11 See Pål Wrange's and Sarah Helaoui's report for the European Parliament, 'Occupation/Annexation of a Territory – Respect for International Humanitarian Law and Human Rights and Consistent EU Policy' (2015) <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2015)534995> accessed 19 February 2019.

In December 2012, Polisario asked the General Court (GC) (the first instance, below the CJEU) to annul the EU Council's decision of the same year to adopt the liberalisation agreement between the EU and Morocco in so far as the agreement covered Western Sahara. Polisario won the case, which was then appealed to the CJEU.[12] At about the same time, a case regarding fishing arose in British Courts,[13] pursued by the NGO the Western Sahara Campaign UK, which contended that British authorities were acting unlawfully by applying the FPA to Western Sahara. The High Court requested a so-called preliminary ruling[14] and asked inter alia whether the FPA between the EU and the Kingdom of Morocco is valid.

The Grand Chamber of the CJEU dealt with the two cases in 2016 and 2018, respectively, with essentially the same line of reasoning.[15] While the claimants lost the cases in a technical sense, the Court's reasoning was welcomed as a victory. In 2016, it dismissed Polisario's claim for lack of standing, because the claimant was not affected by the agreement since it did not cover Western Sahara. Similarly, in 2018, it held that the FPA was not invalid, since it did not encompass Western Sahara.

The CJEU found that the term 'territory of the Kingdom of Morocco' in Article 94 of the Association Agreement, on which the challenged agreements were based,[16] could not be interpreted to mean that Western Sahara was included within the territorial scope of that agreement.[17] The court referred to the Friendly Relations Declaration which says that 'the territory of a colony or other Non SelfGoverning Territory has, under the [UN] Charter, a… separate and distinct [status]'.[18] Hence the people of Western Sahara was a third party to the agreement, and as such, they had not consented to be affected by it.[19] By reference to Article 34 of the Vienna Convention on the Law of Treaties,[20] the Court concluded that '[i]n those circumstances, it is contrary to the principle of international law of the relative effect of treaties to take the view that the territory

12 Case T-512/12 *Front populaire pour la libération de la saguiaelhamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECLI:EU:T:2015:953 [hereinafter *Front Polisario* GC].

13 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2898 (Admin), High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) made on 13 May 2016.

14 A preliminary ruling is a decision of the European Court of Justice (ECJ) on the interpretation of EU law, after a request from a court or tribunal of an EU Member State. The referring court will be obliged to implement the ruling.

15 Case C-104/16 P *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* [2016] ECLI:EU:C:2016:973; C-266/16 *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118.

16 *Front Polisario* (n 15) para 92.

17 *Front Polisario* (n 15) para 97; *Western Sahara Campaign UK* (n 15) para 64.

18 *Front Polisario* (n 15) para 90.

19 *Front Polisario* (n 15) para 106.

20 *Front Polisario* (n 15) para 90.

of Western Sahara comes within the scope of the Association Agreement'.[21] The conclusion that can be drawn is that the implementation of an agreement with Morocco that covers Western Sahara needs to have 'consent' by 'the people of Western Sahara'.[22] In order to simplify the story, I will hereafter focus on the trade agreement.

### *2.3 Follow up to the judgements*

COM acted immediately on the 2016 decision, and fishery and agricultural products were no longer given preferential treatment.[23] This state of affairs created frustration, not only for the exporters and importers of such products from Western Sahara. Already after the judgement in the GC, Morocco suspended contacts with the EU.[24] The Moroccan government made it known that it would use its position as a gate keeper on one of the three main migration routes to Europe, threatening to flood Europe with migrants in the aftermath of the 2015 refugee crisis. This widened and strengthened European interest in Morocco-EU relations.

On 19 December 2016, the day of the delivery of the judgement of the CJEU, Federica Mogherini, the 'Foreign Minister' of the EU, and Salaheddine Mezouar, the Foreign Minister of Morocco, met and determined that they would 'work together' in a 'spirit of privileged partnership' in order to address the implications of the judgement.[25] On 29 May 2017, the Council of Ministers of the EU adopted a secret negotiating mandate for the Commission – which negotiates on behalf of the EU – in order to 'adapt' the protocols to the Association Agreement.[26] On 10 July 2018, the Council decided to sign the negotiated

21 *Front Polisario* (n 15) para 107.

22 *Front Polisario* (n 15) para 106.

23 See Western Sahara Resource Watch, 'Vincent Piket, 25 April 2018, ALDE Seminar on EU-Morocco Relations' (2018) <https://www.wsrw.org/a106x4161> accessed 12 February 2019. However, the EU's implementation of the CJEU's judgement is far from faultless. See Charlotte Bruneau, 'EU Deeply Divided over Western Sahara Policy' (2017) *Al-Monitor* <https://www.al-monitor.com/pulse/originals/2017/03/morocco-western-sahara-eu-exports-polisario-front.html> accessed 12 February 2019. Since the EU, for a good part of the winter season, has no tariffs on the importation of tomatoes, this has not meant that much for the Moroccan exports from Western Sahara.

24 Aziz El Yaakoubi, 'Morocco Suspends Contacts with EU over Court Ruling on Farm Trade' (*Reuters*, 25 February 2016) <https://uk.reuters.com/article/uk-eu-morocco-westernsahara/morocco-suspends-contacts-with-eu-over-court-ruling-on-farm-trade-idUKKCN0VY273> accessed 19 February 2019.

25 'Déclaration conjointe par Federica Mogherini et le Ministre des Affaires étrangères et de la coopération du royaume du Maroc Salahddine Mezouar', Brussels, 21 December 2016 <https://eeas.europa.eu/headquarters/headquarters-homepage/18042/declaration-conjointe-par-federica-mogherini-et-le-ministre-des-affaires-etrangeres-et-de-la_fr> accessed 19 February 2019.

26 Outcome of the Council Meeting, 3544th Council meeting, Brussels, 29 and 30 May 2017, Doc 9716/17, <http://www.consilium.europa.eu/media/22238/st09716en17.pdf> accessed 19 February 2019. See also Green Party members of the European Parliament, 'Stop the Rogue

amendments, and after some controversy, the European Parliament approved the agreement on 16 January 2019.[27]

According to the Agreement, the EU and Morocco attach a Joint Declaration which provides in Paragraph 1 that products that 'originate in Western Sahara subject to controls by the Moroccan customs authorities shall benefit from the same trade preferences as those granted by the European Union to products covered by the Association Agreement'.[28]

Despite the wide-spread interest within the EU of appeasing Morocco, the new agreement had to be justified in relation to the judgement because no EU organ can openly defy the CJEU. It was for that reason that the Council mandated COM to ensure that 'the people concerned by the agreement have been adequately involved',[29] which COM fulfilled by conducting consultations after the signature of the agreement but before its adoption by the Council.[30]

However, COM could not limit its efforts to what the Council had provided. 'Adequate involvement' of 'the people concerned' is not necessarily the same thing as 'consent by the people of Western Sahara' (the CJEU's expression), and COM was no doubt aware of that. Therefore, the Court's formula of consent by the people still had to be reckoned with. This meant that COM, in the ensuing consultations as well as in the report, had to respond to questions about what consent means, as well as to questions about who should give that consent and what the consent should cover, since these issues concerned the requirement that the CJEU had set up for the application of the agreement to Western Sahara.

Another question, which was not directly dealt with in the judgement, but which seemed to be equally necessary to answer, was the question in which capacity Morocco concluded the agreement – sovereign, administering power, occupying power or something else. From the EU's point of view, Morocco was clearly not a sovereign over Western Sahara. Out of the other established legal

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EU Trade Talks with Morocco over Western Sahara' (2017) <https://www.greens-efa.eu/en/article/news/stop-the-rogue-eu-trade-talks-with-morocco-over-western-sahara/> accessed 19 February 2019.

27 European Parliament non-legislative resolution of 16 January 2019 on the draft Council Decision 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 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 (10593/2018 – C8-0463/2018 – 2018/0256M(NLE)) Final approval by the Council – which is given after approval by Parliament – was given in Council Decision (EU) 2019/217 of 28 January 2019.

28 Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2019] OJ L 34, 4–7.

29 It may be the case that the Council's directives to the COM were originally conceived in COM, but that is beyond what we know. This text can only proceed from what is in the public domain.

30 It did so with the assistance of the European External Action Service, a joint service of COM and the Council.

positions, it could be an occupying power or an administering power, but the CJEU had found that there was no common understanding between the EU and Morocco on any of those positions.[31] Under the amendment, the only thing that was agreed was that Morocco was a power that provided customs 'controls' to ensure conformity with EU standards, but in what capacity was not settled.[32]

## 3 Tools and traps – potential legal materials and their framing

In dealing with these issues, COM had to take account of a number of legal arguments that had been or could be invoked. Some of them were useful while others could trap COM into a position that was difficult to defend. COM was, of course, not restricted by existing arguments; it could make novel arguments. However, it was confined by the established canons of sources and of interpretation.

An international lawyer seized with a case will look at two types of sources: general sources with rules that appear to be applicable and authoritative pronouncements pertaining to the concrete case at hand. Had this been a doctrinal analysis, I would have used these sources intertwined, by invoking general rules and principles and then inserted more concrete dicta in order to help me determine whether the one or the other rule is applicable, and what it would mean in the concrete situation.

However, the present analysis takes a more phenomenological approach, looking at the situation as it must (or should) have looked to the lawyers in COM assigned to assist in the consultations. I will therefore merely set out the legal arguments which COM needed to take into account and then analyse how they may relate to one another, and I will do this in order to explain the choices that COM was facing, not to construct the 'better argument'.

### *3.1 General legal sources*

#### *3.1.1 Self-determination*

As mentioned, Western Sahara is included in the UN's list of NSGTs.[33] For such territories, the principle of self-determination and the law relating to NSGTs apply. Under modern international law, it is a violation of the principle of

31 *Western Sahara Campaign UK* (n 15) para 72.

32 Israel provides such 'services' to the Palestinian Authority, though not without difficulties, but that is by agreement with the Palestinian side. See Mutasim Elagraa, Randa Jamal and Mahmoud Elkhafif, 'Trade Facilitation in the Occupied Palestinian Territory: Restrictions and Limitations' (United Nations Conference on Trade and Development 2014) <https://unctad.org/en/PublicationsLibrary/gdsapp2014d1_en.pdf> accessed 18 September 2019.

33 For the latest annual report of the UN Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples for 2017, see UN Doc A/72/23.

self-determination to keep such territories under colonial or 'alien' control.[34] The Friendly Relations Declaration clarifies that a state may not use 'forcible action' to deprive peoples of 'their right to self-determination and freedom and independence' and adds that '[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the state administering it'.[35] Hence, such a territory is not a part of the state that administers it.[36] A colonial power is generally referred to as 'administering power' and an administering power has the responsibility to assist the people in the colony to reach full self-determination, which usually means independence.[37] As already indicated, Morocco has not claimed to have taken over that role, and it has not been recognised by anyone to have done so,[38] but the EU nonetheless treats it as one under the novel formula 'de facto' administering power.[39]

Further, under the law of self-determination, a people has a right to permanent sovereignty over its natural resources[40] and the right to 'freely dispose of their natural wealth and resources', as provided in Article 1(2) of the two UN covenants on human rights. The UN Charter's Article 73 on NSGTs points in the same direction, though more vaguely.

### *3.1.2 The law of force*

Western Sahara came under the control of Morocco after military action in the territory, which at that time was under the generally recognised sovereignty of Spain.[41] Hence, the law on the use of force may be relevant. Article 2(4) of the

34 Common Article 1 of the two 1966 UN human rights covenants provides that '[a]ll peoples have the right of self-determination' including to 'freely determine their political status and freely pursue their economic, social and cultural development'.

35 UNGA Res 2625 (XXV) 1970 UN Doc A/RES/2625(XXV).

36 On the term 'people', see Section 4.2.5.

37 Article 76 of the UN Charter also mentions self-government as an option, but in practice the goal has generally been independence.

38 The UN list of NSGTs does not indicate an administering power for Western Sahara but notes the following:

> On 26 February 1976, Spain informed the Secretary-General that as of that date it had terminated its presence in the Territory of the Sahara and deemed it necessary to place on record that Spain considered itself thenceforth exempt from any responsibility of any international nature in connection with the administration of the Territory, in view of the cessation of its participation in the temporary administration established for the Territory. In 1990, the General Assembly reaffirmed that the question of Western Sahara was a question of decolonization which remained to be completed by the people of Western Sahara.

United Nations, 'The United Nations and Decolonization: Non-Self-Governing Territories' <http://www.un.org/en/decolonization/nonselfgovterritories.shtml> accessed 23 October 2017. It is highly doubtful that Spain could avoid responsibility in this way. See (n 41).

39 Consultation Report (n 2) 6.

40 General Assembly resolution 1803 (XVII) of 14 December 1962, UN Doc A/RES/1803(XVII).

41 The argument has been credibly made that Spain is still the lawful sovereign. See for instance the suggestion in *Front Polisario*, Opinion of AG Wathelet (n 15) paras 188–192.

UN Charter prohibits 'the threat or use of force', and the Definition of Aggression (as well as the Friendly Relations Declaration) states that 'No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful' (Article 5(3)).[42]

### *3.1.3 The law of occupation*

An illegally annexed territory is, for the purpose of international law, still occupied.[43] It is therefore often argued that the status of Western Sahara is that of occupied territory.[44] International humanitarian law (IHL) provides that occupation is supposed to be a temporary affair.[45] An occupying power cannot use natural resources arbitrarily for its own purposes,[46] and any use must benefit the people of that territory or cover other legitimate costs of the occupation.[47] As will be touched upon further below, there are some similarities in this respect between the law on NSGTs and the law of occupation.[48]

### *3.1.4 The law of state responsibility*

Since the EU is a third party to the relation between Morocco and Western Sahara, the responsibility of third parties is a crucial issue. Under the ILC Articles on State Responsibility, no state shall recognise as lawful or assist in

42 UNGA Res 2625 (XXV).

43 See Article 47 of The Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950).

44 *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) para 135 as well as para 247 and the massive footnote in support of that view.

45 An occupying power shall, as a main rule, respect the laws of the occupied territory, subject to exceptions necessary for the security of the occupant and for public order and civil life, as well as measures necessary to respect other provisions of IHL and human rights (see below). See Pål Wrange, 'Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara' [2019] 52 *Israel Law Review* 3, 8 and 9 and sources cited therein.

46 See James Crawford, 'Opinion: Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories' (2012) <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 25 February 2018, 25.

47 Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 210 and 213–218; Eyal Benvenisti, *The International Law of Occupation* (Second Edition, OUP 2012) 81–83. See also the extensive discussion in Guy Harpaz and others, Expert Legal Opinion: January 2012, in the Israeli case HCJ 2164/09 *Yesh Din*, <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/%D7%A2%D7%AA%D7%99%D7%A8%D7%95%D7%AA/%D7%9E%D7%97%D7%A6%D7%91%D7%95%D7%AA/Quarries+Expert+Opinion+English.pdf> This rule makes a distinction between exhaustible and non-exhaustible resources. It is controversial whether the occupying power may use exhaustible resources at all. At any rate, any use is subject to the conditions outlined in the body text.

48 The force in power cannot use natural resources for its own good and must consider the interests of the people under its command and possibly also their wishes. Wrange (n 45) 20–26.

the maintenance of a serious breach of a jus cogens norm.[49] Lawyers therefore generally find that it is illegal to enter into an agreement with a power, if that agreement explicitly or implicitly recognises the annexation of illegally occupied territory or if it assists in upholding an illegal situation.[50]

### *3.1.5 Other relevant norms*

Since the Association Agreement and the accompanying agreements are treaties, treaty law is relevant, as the CJEU found (see below).

International criminal law has also sometimes been mentioned, in particular those provisions which stipulate individual liability for plunder and for introducing settlers, as well as the provisions on complicity in such war crimes. While they have been cited regarding Western Sahara, and could – with some credibility – be invoked in relation to those who in various ways assist in trade in goods from Western Sahara[51] – this has not been one of the most frequently mentioned regimes in this context, and will not be further considered here.

Another norm is the principle of non-intervention. The internal aspect is relevant only if the territory in question is under the sovereignty of the state. However, one could also argue that the relation between Morocco and Western Sahara and its people – whatever it may be – is one in which third parties should not interfere, since it falls under the sovereign right to conduct internal and external affairs. This, of course, assumes that the norms on third party responsibility referenced earlier are not applicable.

Further, of course, international trade law is relevant.[52] The underlying assumption of these norms is that trade is beneficial, and that is the whole premise of the EU.

In addition, international human rights law is frequently invoked in this situation. However, while human rights may be relevant for questions of popular

49 See in general, Stefan Talmon, 'The Duty Not to "Recognise as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Brill 2005) 99; David Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law' [2003] 2 *Chinese Journal of International Law* 105, 130–143.

50 Talmon appears to be even more categorical. Talmon (n 49) 119. See also Tristan Ferraro, 'Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory' (ICRC 2009) 59.

51 Jeffrey J. Smith, 'The Plundering of the Sahara: Corporate Criminal and Civil Liability for the Taking of Natural Resources from Western Sahara' (2011) ARSO <http://www.arso.org/PlunderingoftheaharaSmith.pdf> accessed 18 October 2019.

52 The rules of the WTO agreements apply to parties to those agreements unless there are more favourable free trade agreements in force between the parties such as the Association Agreement. Western Sahara is not a member of the WTO.

participation in government,[53] as well as for issues concerning the use of economic resources, human rights law has generally not been invoked regarding the status of Western Sahara, except common Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), which have already been cited in relation to self-determination.

### *3.2 Specific authoritative decisions*

All of these different regimes have rules that are potentially applicable and may yield different results, depending on how they are interpreted and applied, as will be discussed further below. One would think that a good lawyer would test all potentially applicable doctrines against a concrete situation. However, whether a particular lawyer (or legal institution) will in fact invoke the one or the other one depends on many factors. Some situations seem to fit very nicely into one regime, meaning that it is difficult to avoid applying it. In other cases, the choice of regimes is not straight-forward, and the argumentative battle will be partly between regimes – regime contestation.[54] For instance, in most situations of occupation, the occupying power will deny that it is an occupying power, and the application of the law of occupation will therefore be in dispute, or other parties may find that other regimes are more appropriate.

In such situations, concrete decisions pertaining to the situation will be very influential, even if they are not binding as such on those parties that are expected to apply the rules in question. Apart from the decisions of the CJEU, there are no binding decisions by any international organ pertaining to the relation between Western Sahara and Morocco, but there are a few decisions with political or legal persuasive authority.

#### *3.2.1 ICJ*

While the ICJ in 1975 found that there had been pre-colonial ties between the territory of Western Sahara and Morocco, these ties were not 'of such a nature as might affect the application of… the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory'.[55] This strongly suggests that the people of Western Sahara has the right of self-determination as it came to be developed into a right of decolonisation. It has been taken to provide such support in doctrine.

53 Article 26, International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171 (ICCPR).

54 Martti Koskenniemi, 'Hegemonic Regimes' in Margaret Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 305, 315.

55 *Western Sahara* (n 7) para 162.

### *3.2.2 The Security Council*

In Resolution 380, the UN Security Council called upon Morocco 'immediately to withdraw… all the participants in the march'.[56] This decision is not binding as such, but at least it suggests that it was not self-evident that Morocco had a right to insert its military forces into the territory. By implication that means that Western Sahara was not a part of Morocco. The Council's subsequent resolutions uphold the right of self-determination of the people of Western Sahara and the position of Polisario as a political representative of that people.[57] While neither of these resolutions is binding as such, they are difficult to ignore, in particular as two (soon one) EU members are also permanent members of the Council.

### *3.2.3 The General Assembly*

The UN General Assembly referred twice, in 1979 and 1980, to the 'continued occupation of Western Sahara by Morocco'.[58] The General Assembly's decisions are not binding, the resolutions were passed with far from consensus and the classification of Western Sahara as occupied has not been maintained since 1980. However, these resolutions at least indicate that it is not a far-fetched analysis to say that Western Sahara is occupied, since nothing substantive in that regard has happened since 1980; they are therefore still invoked by writers.

### *3.2.4 An opinion by the UN legal counsel*

In 2002, the then legal counsel of the United Nations, Hans Corell, provided an opinion to the Security Council on the exploration of mineral resources in Western Sahara.[59] The opinion did not use words like 'occupation' but it nevertheless noted that Spain had not, and could not, transfer sovereignty to Morocco and that Morocco was not listed as an administering power. Corell concluded:

> …given the status of Western Sahara as a Non-Self-Governing Territory, it would be appropriate for purposes of the present analysis to have regard to the principles applicable to the powers and responsibilities of an administering Power in matters of mineral resource activities in such a Territory.

He found that Article 73 of the UN Charter applied and that resource exploitation in NSGTs 'for the benefit of the peoples of these territories, on their behalf,

56 UNSC Res 380 (6 November 1975) UN Doc S/RES/380 (1975).

57 For instance, UNSC Res 2468 (30 April 2019) UN Doc S/RES/2468 (2019) op 3 and 4.

58 UNGA Res 34/37 (21 November 1979) UN Doc A/RES/34/37; UNGA Res 35/19 (11 November 1980) UN Doc A/RES/35/19.

59 Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Doc S/2002/161, para 1 [hereinafter Corell].

or in consultation with their representatives' were in line with the relevant obligations and principles.[60] Hence, any exploration must be in line with 'the interests and wishes of the people of Western Sahara'.[61]

This interpretation by Corell was a disinterested legal opinion provided in his office as the legal counsel of the United Nations. While it had no binding force as such, it has been invoked numerous times by actors on different sides of the argument, and it has achieved a kind of acceptance as a frame of reference.[62]

### *3.2.5 Two judgements by the CJEU*

The most significant opinion is, as already mentioned, that of the CJEU. Its decisions are *ipso jure* binding on the other EU organs, and the ratio decidendi (non-applicability of the agreements to Western Sahara) is generally taken to be prejudicial. In the two cases at hand, the judgements did not invalidate any act of the Union, but they found that these acts (the agreements) should be interpreted in a particular manner. Apart from the decision and the ratio decidendi, there were also other relevant pronouncements by the CJEU, as well as opinions by the Advocate General and the other courts involved.

The GC found that the application of the agreement to Western Sahara does not amount to recognition of sovereignty over that territory,[63] but that it is not absolutely prohibited to conclude agreements which relate to such territories.[64] The Court also noted that Morocco does not have any mandate from the UN or another international body to administer the territory, but it nevertheless clearly found that Morocco had to comply with obligations incumbent upon such a power.[65] The Court further held that it was the EU Council's obligation under EU law to satisfy 'itself that there was no evidence of an exploitation of the natural resources of the territory of Western Sahara … likely to … infringe their fundamental rights'.[66]

In the Western Sahara Campaign Case, the British judge, Justice Blake, found that Morocco's presence constitutes 'belligerent occupation'.[67] Blake further reviewed Morocco's claim to the territory, dismissed all possible bases and concluded that the sovereign territory of Morocco does not include Western

60 Ibid., para 1.

61 This rule, as interpreted by Corell, is directed to Morocco, not third states, but it has been held to guide also third parties like the EU.

62 Corell himself has interpreted this requirement to apply also to fishing and to be taken as a restriction rather than a licence. Hans Corell, 'The Legality of Exploring and Exploiting Natural Resources in Western Sahara' (2008) <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf> accessed on 22 February 2019.

63 *Front Polisario* GC (n 12) para 202.

64 *Front Polisario* GC (n 12) para 215.

65 *Front Polisario* GC (n 12) paras 233 and 235.

66 *Front Polisario* GC (n 12) para 241. However, the Council had failed in that respect para 247.

67 *Western Sahara Campaign UK* (n 13) para 18.

Sahara.[68] Blake referred to articles 40 and 41 of the International Law Commission's Draft Articles on State Responsibility which provide that states have a duty to cooperate to end serious breaches of customary international law (para 49).[69] The Advocate General of the CJEU (a legal advisor to the court) provided a number of important views in his opinions in the two cases, amounting to almost 140 pages. Inter alia, he found that Western Sahara was, beyond doubt, not only non-self-governing but also occupied, that it was not administered *de jure* and that an agreement that covered Western Sahara would surely constitute a recognition of Moroccan sovereignty over that territory.[70]

As already mentioned, when the Grand Chamber of the CJEU dealt with the two cases in 2016 and 2018, it found that Western Sahara was not a part of Morocco, that it had a status separate from Morocco, that an agreement could nevertheless cover Western Sahara but that that would require the consent of the people of Western Sahara. Like the GC and the High Court, the CJEU held that the presumption must be that an agreement does not apply beyond the recognised border of a state and that Western Sahara is not a part of Morocco.[71] Like the GC, the CJEU refers to the 'people' of Western Sahara, not to inhabitants or population. The court considered the possibility that Morocco might be a 'de facto administrative power' or an occupying power. It did not bother to determine whether that would have been 'compatible with the rules of international law' because 'the Kingdom of Morocco has categorically denied that it is an occupying power or an administrative power…'[72]

### *3.3 Legal doctrine*

Legal doctrine has assisted in concretising the general rules, principles and doctrines to the case of Western Sahara. It has been surprisingly consistent, and generally provides the following[73]: Western Sahara is not a part of Morocco and the

68 *Western Sahara Campaign UK* (n 13) para 40.

69 He also quoted Corell (ibid., [51–53]) in a text from 2008, in which the 2002 opinion is applied to the FPA. Corell found

> it incomprehensible that the Commission could find such support in the legal opinion, unless, of course, it had established that the people of Western Sahara had been consulted, and accepted the agreement, and the manner in which the profits from the activity were to benefit them.

Corell (n 62).

70 See *Front Polisario* GC, Opinion of AG Wathelet (n 12) para 269.

71 The Court noted that 'a treaty may, by way of derogation from the general rule … bind a State in respect of another territory if such an intention is apparent from that treaty or is otherwise established'. *Front Polisario* GC (n 12) para 98.

72 *Western Sahara Campaign UK* (n 15) para 72.

73 See for instance articles cited in n 5, 83 and 91 as well as Enrico Milano, 'The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: Fishing Too South' [2006] 22 *Anuario Espanol de Derecho Internacional* 413; Sven Simon, 'Western Sahara' in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds),

annexation is without effect,[74] and most commentators also therefore find the territory to be occupied.[75] Under some readings of this view, Morocco has no right whatsoever regarding Western Sahara. As an occupying power, Morocco may not introduce permanent changes into Western Sahara and may not avail itself of the natural resources of the territory at will. Since Western Sahara is an NSGT, it has a right to its resources, which may be used only in accordance with 'the interests and wishes of the people'.[76] As for third states (and organisations), they have the obligation to not knowingly assist[77] and for serious violations of 'peremptory norms' (jus cogens), they may not recognise or support an illegal annexation.[78]

### *3.4 Ways of framing the situation*

Based on the earlier account, these sources suggest five main ways of legally framing the relation between Western Sahara, Morocco and the EU, each frame involving a particular cluster of arguments.[79] Some of these frames correspond to distinct legal regimes, some do not.

1 The first one, seemingly unavoidable for COM, is the approach taken by the CJEU, namely the law of self-determination. The Court found that Western Sahara has a separate status as an NSGT and is thus a third party under treaty law.

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*Self-Determination and Secession in International Law* (OUP 2014), 255; Sandra Hummelbrunner and Anne-Carlijn Pickartz, 'It's Not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union' [2016] 32 *Utrecht Journal of International & European Law* 19.

74 See Article 47 of The Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950); UNGA Res 34/37 (21 November 1979) UN Doc A/RES/34/37; UNGA Res 35/19 (11 November 1980) UN Doc A/RES/35/19. See *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) para 247 and the magnificent footnote 223.

75 It is clear that Western Sahara was occupied in 1975 against the will of the AP, Spain (Saul (n 5) 315–316) and certainly against the will of the people concerned. Zunes (n 5) 288. The Madrid agreement of 14 November 1975 did not change that, because it was concluded under military coercion and because Spain did not have the right to cede the territory to another state but was under an obligation to ensure the self-determination of the people of that territory. Saul (n 5) 309–315. One could also make the argument that the conflict between Polisario and Morocco is an international conflict. Polisario is clearly a national liberation movement involved in a war of national liberation as defined in Article 1(4) of the First Additional Protocol to the Geneva Conventions. Morocco became a party to the protocol in 2011 and Polisario filed a declaration under Article 96(3) of the Protocol in 2015, bringing the conventions and the protocol into immediate effect. Saul (n 5) 304.

76 Corell (n 59) para 25.

77 Article 16, The International Law Commission's Articles on Responsibility of States for internationally wrongful acts, attached to UN Doc A/RES /56/83 (hereinafter ARSIWA).

78 Article 41, ARSIWA (n 77).

79 On clusters of argument, see Duncan Kennedy, 'A Semiotics of Legal Argument' in Roberta Kevelson (ed), *Law and Semiotics Volume III* (Springer 1989) 167, 183–184.

According to this view, an agreement 'must receive the consent' of the people of Western Sahara; otherwise it cannot be applied to that territory.

Conceptions of self-determination may be connected to different political ideas – nationalism, decolonisation, liberal democracy – and will likely have different legal meaning depending on what one associates it with. The CJEU's reading is the one that sprang from decolonisation, which is not surprising, since Western Sahara has been treated as such by the UN.

This approach emphasises the separate legal status of the territory, and in some readings even means that an NSGT can never be a proper part of the administering state. To apply the law of self-determination in this way would have been difficult to swallow for Morocco, since it would have undermined the legality and legitimacy of Moroccan control over Western Sahara; after all, in Morocco's view, the annexation is actually an example of decolonisation (from Spain). But this approach could also have been difficult to swallow for some EU Member States, since it could have been taken to undermine the legality of past and some present exercises of sovereignty over their colonial possessions. Further, as will become apparent, there were great practical obstacles to obtaining consent of the people of the separate territory.

At any rate, in the Court's interpretation, the requirement of consent did not completely rule out an agreement with Morocco over Western Sahara, and therefore gave some latitude for Morocco and for third parties, as we will see.[80]

2 The second perspective also proceeds from the law of self-determination but instead of a focus on the legal status and representation of the territory it emphasises the use of natural resources, as exemplified by the Corell opinion. This builds on Chapter XI of the Charter and focuses on the responsibilities of the administering power. It is originally a paternalistic perspective, as laid out in Chapter XI, but was imbued with an element of democracy in the Corell opinion ('wishes of the people').[81] This perspective is primarily applicable between the state that administers the people and the people of the NSGT and it takes the control of territory as granted. In particular in the UN Charter version from 1945, this regime pays no attention to the origin of the administering (that is, the colonial) power's control over the territory. Here the role of third parties is limited to avoiding direct support for any violations of the principle, in particular violations of jus cogens norms. While there is almost universal agreement that the right of self-determination applies to Western Sahara, whether the powers of an administering power can be invoked depends on how one views Morocco. Under COM's interpretation of the Corell opinion (contra

80 See also *Front Polisario*, Opinion of AG Wathelet (n 15) paras 76 and 108.

81 See Corell (n 59) 2 and 4. The Charter merely stated that the administering states should 'take due account of the political aspirations of the peoples', Article 73(b).

Corell himself), Morocco is a (*de facto*) administering power. Under this view, Morocco has some leeway; it could arguably invoke the rules applicable to *de jure* administering states (that is, colonial powers), provided that it complies with the important requirement of being guided by 'the *wishes* and interests of the people' of Western Sahara.

This second frame lends itself to a focus on the benefits of economic exchange, which is comfortable for an institution (such as COM) which is built on the idea that trade is good for everyone and which is often engaged in development co-operation. While this perspective in principle should be in harmony with the first one – they come out of the same legal regime – it would be more advantageous for COM to try to keep this frame distinct from frame 1, and in particular to focus on the bilateral relations between Morocco and the Sahrawis, rather than on the obligations of third parties. Furthermore, it is crucial to keep it insulated from the arguments that follow easily from frames 3 and 4.

3 The third frame is marked by the *jus contra bellum* and the principle *ex injuria non jus oritur*. Under this view, Western Sahara is illegally annexed (and therefore occupied), and Morocco should have no rights proceeding from its illegal use of force, since it constitutes a serious violation of a fundamental norm. (In principle, the *ex injuria* principle could also be applied regarding self-determination.) This view comes out of a combination of the idea that international law and institutions should prevent the use of force – the UN was created to 'save succeeding generations from the scourge of war' – and the fundamental principle of justice that no right should derive from a (fundamental) wrong.

This view has well-known consequences under the law of state responsibility for third parties, who may not recognise or assist the maintenance of such an illegal situation, as is the prevailing view of legal doctrine and as was vigorously argued by the Advocate General.[82] But these parties could also – perhaps – invoke the so-called Namibia exception, 'in order not to deprive the people of Namibia of any advantages derived from international cooperation'.[83]

All international bodies cited earlier seem to proceed from the premise that Western Sahara is not a part of Morocco, which more than suggests the

82 *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) para 129.

83 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16 [125]. See also Benvenisti (n 47) 85; Cedric Ryngaert and Rutger Fransen, 'EU Extraterritorial Obligations with Respect to Trade with Occupied Territories: Reflections after the Case of Front Polisario before EU Courts' (2018) 2 *Europe and the World: A Law Review* 1, 17–18. *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) para 288 and sequel discusses this with the conclusion that *Namibia* cannot be invoked to support the agreement.

application of *ex injuria*. Nonetheless, with the exception of the Advocate General, none of them has set out the consequences explicitly, which gives some room for the parties involved to avoid some stark stark legal effects.

Be that as it may, for COM it would have been politically impossible to apply this framework. Further, it may have felt uncomfortable in making such considerations, alien to the usual discourse on trade and welfare. And importantly, it would not be legally attractive; it would strongly suggest that no state can enter into an agreement with Morocco that covers Western Sahara, since that would constitute unlawful recognition of the illegal situation and perhaps also support of its maintenance.

4 The fourth set of rules is the law of occupation, which applies if Western Sahara is occupied. In distinction to the third regime, the law of occupation is agnostic as to the causes of the status of occupation; this law was created in the 19th century to deal with problems arising out of wars in Europe, where military victory was becoming discredited as a sufficient justification for rule,[84] and it is regulated in the Hague and Geneva conventions, concluded outside the scope of the UN. The law of occupation applies whenever one state controls territory as a result of armed conflict, regardless of the origin of the conflict. Nevertheless, in contemporary affairs – and in particular after World War II – the word 'occupation' has negative associations, and any use of that term suggests that the control is illegal, often clustered with frame 3.

As mentioned, doctrine almost invariably holds that Western Sahara is occupied; the claimants in the four proceedings explicitly assumed that Western Sahara was occupied and the High Court (as well as the Advocate General[85]) clearly agreed.[86] While occupation seems to be an almost inescapable conclusion of the fact that Morocco is not a recognised sovereign over Western Sahara, the specific legal opinions on Western Sahara have not been conclusive in that regard. The two instances of the CJEU held that Western Sahara was not a part of Morocco, but neither of them determined that Western Sahara is occupied. In the 2018 judgement, the Court discusses whether Morocco as an occupying power could dispose of fishing in the waters outside Western Sahara, but finds that that was not the intention of the FPA, 'since the Kingdom of Morocco has categorically

84 See Nehal Bhuta, 'The Antinomies of Transformative Occupation' [2005] 16 *European Journal of International Law* 721; Yutaka Arai-Takahashi, 'Preoccupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation' [2012] 94 *International Review of the Red Cross* 51, 56, 74–75 and *passim*. See also Benvenisti (n 47) 41. Cf. also Lassa Oppenheim, 'Legal Relations between an Occupying Power and the Inhabitants' [1917] 33 *Law Quarterly Review* 363, 363.

85 *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) paras 67–69.

86 Ryngaert and Fransen (n 83) 16. See also *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) para 247 and the massive footnote in support of that view.

denied that it is an occupying power or an administrative power with respect to the territory of Western Sahara'.[87] However, this is not an outright repudiation of the view that Western Sahara is occupied, just an interpretation of the intention of the parties.

The view that Western Sahara is occupied is totally consistent with the third frame. However, in accordance with its agnostic heritage, it provides some room for Morocco to dispose of the resources of Western Sahara.[88] An occupying power has the right to use the public resources of an occupied territory for certain legitimate purposes. As for relations with third states, it is controversial whether the occupying power has the right to contract on behalf of the occupied territory,[89] but that view could be contended with at least some credibility.[90] Hence, it could be argued that the law of occupation gives greater leeway than the CJEU's interpretation of the law of self-determination, and therefore, technically, would be more advantageous for Morocco and for COM.[91] However, given the contemporary association between occupation and illegal use of force, that route was politically unpalatable. While COM admitted during the proceedings that Western Sahara might be occupied, it has not maintained that position in public.[92]

87 *Western Sahara Campaign UK* (n 15) para 72.

88 This view is corroborated in a recent analysis by Ryngaert and Fransen (n 83).

89 The Advocate General finds, rightly I think, that if so, the occupying power has to act explicitly in that particular capacity. *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) para 252.

90 Switzerland held that the Coalition Provisional Authority had the authority to contract on behalf of Iraq during the occupation after the war in 2003. However, in that case, the CPA did so in its own name under the authority of an occupying power, not as a purported government authority of Iraq. On that issue, see Eva Kassoti, 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement' [2019] 4 *European Papers* 339, 313.

91 As has been explained by several writers, there is by no means a necessary contradiction between the view that Western Sahara is occupied and the view that it is non-self-governing. Further, as I have developed elsewhere, it is possible – though not common – to marry the two regimes, and it even seems that the three bodies referenced earlier thought that the two regimes are very similar or that the NSGT regime prevails. Wrange (n 45) 20–26. Hans Corell confirmed this in a circumscribed way in 2008, in his private capacity. Corell (n 69). The Advocate General was more explicit about the relation between the two regimes and found that they 'are not mutually exclusive'. *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) 267–268. See also Eva Kassoti, 'The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)' [2017] 2 *European Papers* 339, 353. See also Eugene Kontorovich, 'Economic Dealings with Occupied Territories' [2015] 53 *Columbia Journal of Transnational Law* 584, 610–615.

92 *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) para 235. The Council denied that there was occupation. Ibid. The head of the legal service of the EEAS, Gert-Jan van Hegelsom, at a hearing before the Human Rights Committee, avoided the question whether Western Sahara was occupied and said that in view of the ongoing peace efforts, it would not be 'helpful' to 'categorise' the situation. See videocast from the morning meeting of the European Parliament's Subcommittee on Human Rights 2 July 2015, at 10:17 <https://www.europarl.

5 The fifth view, which to my knowledge has not been argued in doctrine[93] but follows from some of COM's views, is that the status of Western Sahara is uncertain and is not the concern of third parties (like the EU) that want to engage with Morocco.[94] This could be linked to a strict reading of the principle of non-intervention. A diluted version of this view, clearly argued by COM, holds that, at any rate, the obligations vis-à-vis the people of Western Sahara fall only on Morocco, and that third parties have no responsibilities in this regard.[95] This take on frame 5 could be made to fit with the second frame (occupation) and possibly also with the fourth one (NSGT), as has been indicated earlier. However, after the judgements in the GG and the CJEU, this insulation of the EU from responsibility no longer seemed tenable.

As has already been indicated, between these five frames there is both coexistence and conflict. Some of them could be put into doubt by clusters of arguments from other frames, and over time such pairings even produced their own clusters; for instance, the fifth view will commonly be met with arguments from frame 3, and vice versa. Strictly speaking, variants 1–4 are not mutually exclusive, but can all apply at the same time. Further, 1 and 2 are linked (both follow from Western Sahara's status as an NSGT), and so are 3 and 4 (the application of 4 follows from 3). Variant 5 is completely incompatible with variants 1 and 3 but arguments can be made that it could fit with 2 or 4. I have analysed these positions in detail elsewhere[96] and it is not necessary to do so here for the purpose of this chapter.

When COM set out to explore if and how an amendment could be justified, all of the positions and arguments mentioned earlier were on the table, since they had been invoked by actors – including states – that had interacted with the Council and the Commission. When faced with several legal frames, the preferred contemporary advice by international lawyers is to adopt 'systemic integration'.[97] Even the Advocate General and the CJEU invoked the main embodiment of this principle, Article 31(3)(c) of the Vienna Convention on the Law

europa.eu/ep-live/en/committees/video?event=20150702-0900-COMMITTEE-DROI> accessed 19 February 2019.

93 The only (partial) exception, with a much more circumscribed view of third state obligations, is Kontorovich (n 91).

94 It is not stated in the documents in the current recent cases but has sometimes been stated in earlier discussions.

95 For COM's and the Council's view, see the references in *Front Polisario* GC, Opinion of AG Wathelet (n 12 paras 280 et seq.

96 Wrange (n 45). See also (n 91).

97 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission Finalised by Martti Koskenniemi, 13 April 2006, UN Doc A/CN.4/L.682 206 et seq.

of Treaties.[98] However, what COM did was rather to opt for a sort of strategic isolation. The CJEU roamed mainly in frame 1, Corell and GC in frame 2, the Advocate General ended up in 1, but clearly explored arguments in all frames, particularly in the opinion to the 2018 judgement. For COM, it was necessary to stay within the second frame (since frame 5 was no longer accessible). This meant that it had to both establish the self-sufficiency of this frame (by not involving itself in discussions of *why* Morocco would be seen as an administrative power) and prevent attacks by arguments from other frames, like the third and the fourth one.

## 4 The consultation report: exploiting the tools, avoiding the traps

### *4.1 Background to the consultations*

During the early years of the operation of the Association Agreement, COM had argued from frame 5 and maintained that Western Sahara is 'disputed territory', that the agreements do not recognise Moroccan sovereignty over Western Sahara, and that if the agreements are nevertheless applied to that territory, that is the responsibility of Morocco and of no concern of the EU; whatever obligations Morocco may have vis-à-vis the people of Western Sahara, that is a bilateral issue between the two.[99] After a number of countries had objected to the FPA in 2006, and even more so after the European Parliament refused to adopt the renewal of the implementation protocol in 2011, COM modified its position. Since much of the discussion then turned on the Corell opinion – which was the most authoritative opinion on Western Sahara to that date – COM addressed that view. However, instead of focusing on 'the interests *and wishes* of the *people*', as Corell had advised, COM negotiated a few minor changes to the FPA which would (very nominally) ensure that there were *benefits* to the local *population*.[100] That

98 *Front Polisario* (n 15) para 86. *Front Polisario*, Opinion of AG Wathelet (n 15) para 94. The CJEU was severely criticised for that, but the basis of the criticism was that the Court had overused it as a rule of interpretation for the EU-Morocco agreements. Eva Kassoti, 'The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)' [2017] 2 *European Papers* 23.

99 The position was still expressed in the court proceedings, even if the Corell view was also addressed. See n 95.

100 It is difficult to find sources in the public domain that set out the legal position of the Commission before the proceedings in the CJEU. However, there is some material from the discussions that finally led to the adoption of a protocol to the FPA in 2013, from which inferences can be made, and which show that the Commission's continued use of the word 'population' instead of 'people' in that period was conscious. In the explanatory memorandum to the proposal for a protocol, COM had argued that earlier, sceptical discussions in the Parliament had concerned 'the local population'. See Commission,

> Proposal for a Council Decision on the conclusion of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial

change worked, politically, and the European Parliament eventually accepted the protocol to the FPA in 2013. However, his position, too, became difficult for the Commission to sustain after the judgements by the Court of Justice – or at least one would have thought so. As a response to the CJEU's requirement of 'the consent of the people of Western Sahara', the negotiation mandate provided that COM should ensure that 'the people concerned by the agreement have been adequately involved',[101] which is not necessarily what the Court had required.

At any rate, before the proposals for a new agreement could be passed by the Council, the Commission did what it had not done previously, namely, to hold consultations with 'the people concerned'. This was remarkable, in a way; it is not the habit of COM or of any government to consult foreign persons affected by a trade deal before it is passed. But then, the EU is not in the habit of concluding agreements which cover third parties without their consent.

The consultations were reported in a working document entitled 'Report on Benefits for the People of Western Sahara and Public Consultation on Extending

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contribution provided for in the Fisheries Partnership Agreement in force between the two Parties.

COM(2013) 648 final 2013/0315 (NLE). However, the rapporteur of the European Parliament's development committee found in 2011 that it was 'unacceptable that Morocco has totally neglected the COM's questions on the benefits and the wishes of the Saharawi *people*' (my emph.). See 'Development Rapporteur Urges Parliament to Thumb Down Fish Deal' (2011) <https://www.wsrw.org/a204x2123> accessed 19 February 2019. Further, the opinion from 2013 of the European Parliament's Legal Service (which was leaked) refers to the 'inerests and wishes of the *people* of Western Sahara' (para 18; my emph), and there are similar references in the opinions of 2006 and 2009, cited in 2013, although the opinion is admittedly not consistent. See Legal Service of the European Parliament, Legal Opinion, Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the FPA in force between the two Parties – 2013/0315(NLE) SJ-0665/13 <https://wsrw.org/files/dated/2013-11-07/ep_legal_opinion_nov_2013.pdf> accessed 19 February 2019. There was also plenty of academic and policy writing on this hotly debated issue which made the distinction between 'people' and 'population' clear, including 'Western Sahara and the Protocol to the EU-Morocco Fisheries Partnership Agreement (FPA) of 2013 – a Legal Analysis', signed by 21 jurists (including myself) (2 December 2013) <https://www.wsrw.org/a217x2744> accessed 19 February 2019.

It should further be noted that before the passing of the protocol, eight states made statements, out of which four referred specifically to 'the people of Western Sahara' or similar formulas (Finland, the Netherlands, Sweden, the United Kingdom). These statements reflected previous debates on the Council. See COREPER (Part 1), Proposal for a Council Decision on the signing, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the FPA in force between the two Parties, Brussels, 14 November 2013, 15723/13 ADD 1. See also below, Section 5.

I represented Sweden in various EU discussions on Western Sahara around 2006 and in my subsequent capacity as an academic expert, I made two presentations before the European Parliament. The legal questions, including the difference between 'people' and 'population', were raised specifically and in some detail by Swedish representatives in several fora, in writing and orally, at least from January 2006.

101 See n 29.

Tariff Preferences to Products from Western Sahara' (the consultation report), which accompanied COM's proposal to the Council for the agreement, and which was referenced in the decision.[102] It thus formed a crucial part of the basis for the ensuing decision to adopt the amendments. The report explained that COM, 'in liaison with the European External Action Service, has … ensured that the people concerned by the Agreement have been appropriately involved by conducting consultations covering a wide range of socio-economic and political operators from the Western Saharan population'.

COM was not allowed to travel to Western Sahara and apparently did not even envisage visiting the refugee camps in Algeria.[103] Meetings were held in Brussels and Rabat with political and economic operators and four 'human rights groups' registered by the Moroccan government (see below, 4.2.5).[104] The consultations aimed to 'exchange views and comments on the potential benefits for the people and the economy of Western Sahara of extending the preferential treatment granted to Moroccan products to products imported from Western Sahara to the EU'.[105] Apart from that, the report does not explain how the consultations were conducted, nor is it, for most of the time, clear whether the referenced views were offered by the one or the other type of 'operator'.

The methodology (or perhaps lack thereof) has been severely criticised and it has also been questioned whether it is possible to draw any conclusions at all from the material that was gathered.[106] Nevertheless, it falls outside the scope of this essay to analyse this in any detail. Instead, what follows is a review of the reasoning in the report to the extent that it has a bearing on the law. I will analyse COM's conclusions and the arguments underpinning it as five rhetorical moves.

### *4.2 How the commission tackled the question in five moves*

#### *4.2.1 Treaty making power of Morocco*

The first question that had to be dealt with was in which capacity Morocco was a treaty partner – territorial sovereign, administering power, occupying power or something else? While the CJEU had not established that with regard to the pre-existing agreements, it had ruled out that they were concluded with Morocco as an administering or an occupying power. But this, of course, did not rule out that future agreements could be concluded with Morocco in any of those capacities. Still the agreement does not indicate Morocco's position; all we know is that Morocco offered the services of its customs authorities for products from Western Sahara, in order 'to ensure compliance with the rules necessary

102 Consultation Report (n 2). It was cited in the decision, recitals 8 and 10; see Amendment of Protocols 1 and 4 (n 2).

103 That possibility was not mentioned in the report.

104 See below text in and around footnote 137.

105 Consultation Report (n 2) 10.

106 See n 137.

for the granting of such preferences'.[107] Why Morocco would make this offer to a separate 'third party' is not explained. The report claims that 'nothing in the Agreement implies that it recognises Morocco's sovereignty over Western Sahara'. That conclusion has certainly been questioned, not least by the Advocate General,[108] but it is beyond doubt that the agreement must at a minimum be seen to recognise Morocco's right to contract regarding Western Sahara in at least some respect.

At any rate, the report noted that Morocco is an administering power, 'at least' *de facto*,[109] and the intended implication appears to be that this suffices to explain why Morocco is able to contract for Western Sahara (under the proviso that 'the people concerned' is 'adequately involved', of course). However, while Morocco is *de facto* administering Western Sahara, that does not in and of itself mean that it is a *de jure* 'administering power' in terms of the law of self-determination, with the rights and obligations ascribed to such states under international law.[110] Many entities administer territory, including occupying powers. Nevertheless, for COM (and also for the Council), the role of Morocco was explained by this conflation of *de facto* and *de jure*, a crossing of the line between fact and norm, is and ought.

### *4.2.2 Benefits*

The next rhetorical move was to focus on whether there would be benefits to the population. The Court said that it is not 'necessary to determine whether such implementation is likely to harm [the third party] or, on the contrary, to benefit it',[111] the third party here being the people of Western Sahara. 'Benefit' was, however, one of Corell's two cumulative requirements, based on the law relating to NSGTs, the second frame. So, in spite of the CJEU's dictum, there was some legal basis for COM to include this issue in the report. One may also guess that COM thought that the benefits would provide a more promising focus than the thorny issue of 'consent'. Out of the 28 pages of text in the report, 15 cover the question of benefits and only four the consultations.

Even so, the assessment must have been a disappointment, because the report does not determine whether the measures would actually benefit the indigenous people (the people of Western Sahara). 'It is clearly impossible to say that

107 Amendment of Protocols 1 and 4 (n 2), recital 6. In the words of the Advocate General, the EU and Morocco 'agree to disagree' about Morocco's status. *Front Polisario* GC, Opinion of AG Wathelet (n 12) para 67. Regarding the eventuality of an 'offer', see n 32.

108 See *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) para 194.

109 Amendment of Protocols 1 and 4 (n 2), recital 3. Consultation Report (n 2) 6. See also *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) para 98. The expression 'at least de facto' suggests that the author of the report holds that it is possible that Morocco has *de jure* powers over Western Sahara.

110 Kassoti (n 90) 311. The Advocate General rebuts this in a long argument. *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) paras 217–226.

111 *Western Sahara Campaign UK* (n 15) para 106.

the overall economic impact of such growth would systematically and directly benefit indigenous people. It can only be assumed that they would benefit, at least indirectly'.[112] That is a high degree of uncertainty. Further, the evaluation seemed to be based on a Pareto efficiency criterion, essentially meaning that *any* beneficial impact would suffice, and there was no discussion whether other measures could have benefited the population more.

A related move was to pair the people and the economy. Recall that the declared objective was 'to exchange views and comments on the potential benefits for the *people* and the *economy* of Western Sahara …' (my emphasis). However, what Corell – building on UN practice – was after was only the benefits for the *people*. The underlying assumption of COMs argument is clearly that what benefits the economy also benefits the people.[113] While this may be true in many cases, it is not necessarily so, in particular if segments of the population claim that they are discriminated against, which, of course, quite often is the case when one state 'administers' an alien territory.

At any rate, the results of the analysis of benefits evidently appeared so useful that they comprised the entirety of the 'Conclusion' of the report's 'Summary', which deserves to be quoted in full:

> Though the Western Saharan population cannot be neatly divided into groups with specific backgrounds, there are signs that economic activity generated by exports to the EU creates local jobs and thus helps all parts of the population, regardless of background, to a greater or lesser extent. These benefits would be compromised if exports to the EU did not enjoy the same tariff preferences as those granted to Morocco.[114]

### *4.2.3 Expression of will – consent?*

Having concluded this, COM needed to address the express conditions of the CJEU: consent by the people of Western Sahara. By substituting the phrase 'adequately involve [the] people concerned' for the Court's 'consent of the people of Western Sahara', the Council gave more leeway for itself and for COM, but it also opened up a new debate. What did 'adequately' mean? And how did 'involved' relate to the Court's term 'consent'? Even more fundamentally, who were the 'people concerned' – a question which may refer to some very fundamental debates about democracy.[115] Nevertheless, as we will see, COM never involved itself in such debates. Instead, it partly reverted to the Court's conditions

112 Consultation Report (n 2) 18.

113 See for example Explanatory Memorandum, attached to Amendment of Protocols 1 and 4 (n 2) 6–7.

114 Consultation Report (n 2) 3.

115 Until we have a democratic world government, every democracy will be bounded, inevitably inviting questions about who is included and who is excluded.

(which, of course, could inform the interpretation of the Council's formula)[116]; the report discusses 'people', as will be noted below, but it does not address the requirement of consent, and this is the third move.

Consent is a legal term of art. It may be express or implied, but it must be ascertained in some way. Still, the report does not use the term consent; in fact, in the document it appears only once, in an unrelated context. Instead of looking for 'consent' of the people, COM exchanged 'views and comments on the potential benefits' and then noted whether their interlocutors thought that the measures would be beneficial and whether their interlocutors were 'in favour of extending the tariff preferences …'.[117] It is not reported whether those consulted believed that the best way of attaining these benefits was through an agreement with Morocco or whether they perhaps had preferred some other way.[118] At any rate, the consultations do not appear to have resulted in consent in the formal, legal sense (at least not of the people of Western Sahara; see Section 4.2.5). And that leads us over to the next issue.

### *4.2.4 The object of the expression of will – the agreement?*

The following move was to change the topic of the consent (or 'exchange of views'). Instead of asking the interlocutors about their views of the agreements in their entirety, they focused on the economic consequences:

> A major argument by those opposed to extending the Association Agreement to cover Western Sahara is the fact that Morocco will be increasing structural investment in the territory many times over, with a political view to annexing it by changing its identity. It has allegedly implemented an overall administrative and economic policy to this end. The Polisario Front describes the exploitation of natural resources in Western Sahara under Moroccan control as 'economic plunder aimed at altering the structure of Sahrawi society'.[119]
>
> … That said, these criticisms were not motivated by specific negative effects on the people concerned in Western Sahara from the application of the planned tariff preferences, but by a fear that the preferences would maintain the status quo in Western Sahara, which they consider to be under Moroccan occupation.'[120]

116 This wording is possible to interpret in line with the judgement, in particular given that the intention of the formula presumably would have been to address the Court's conditions. Hence 'adequate involvement' could have meant 'consent' and the 'people concerned' could have been held to mean 'the people of Western Sahara'.

117 Consultation Report (n 2) 32.

118 One may think that an offer is beneficial in the sense that one gains something, and at the same reject it, perhaps because one believes that one could have gotten a better deal, because one holds that the deal is illegal or for some other reason.

119 Consultation Report (n 2) 14.

120 Explanatory Memorandum, attached to Amendment of Protocols 1 and 4 (n 2) 5 of the memorandum.

Hence, this line of criticism was dismissed by COM because it 'does not concern the subject of this report: it deals with an aspect of general policy, but not directly with the question of extending tariff preferences established in the EU-Morocco Association Agreement to products from Western Sahara'.[121] COM's perspective was based on the 'essentially economic nature of the Agreement', as well as the EU's desire to avoid weakening 'traditional trade flows'.[122] Hence, some types of objections to the agreement – essentially related to frames 3 and 4 – became irrelevant, since they did not target those aspects of the agreement that COM thought were important. COM thereby detached the political aspects from the economic ones and declared the former irrelevant.[123]

Further, the respondents were not trusted to determine what was important for *them* about the agreement. Even more notably, it is not clear that this detachment from politics accords with how the relevant actors thought of the agreement. Polisario's position has already been stated. As has also been mentioned, Morocco suspended contacts with the EU after the judgement in the GC, which clearly testified to the political importance that they attached to the matter.[124] Even the EU thought of the agreement in political terms, as shown by Mogherini's aforementioned reference in Rabat to the 'strategic importance' of this issue.

### *4.2.5 The subject of the expression of will – the people?*

Perhaps most fundamentally, the report has a particular view about who it is that is to give consent (or be 'adequately involved').

Recall that Corell in 2002 had asked for 'the interests and wishes of the *people* of Western Sahara' while the CJEU in 2016 said that the implementation/agreement 'must receive the consent of… the *people* of Western Sahara'.[125] The use of the term 'people' is crucial. A 'people' (as a *collective* count noun) is a political unit, with a right of self-determination, as set out in the Friendly Relations Declaration and common Article 1 of the 1966 Covenants. A population, by contrast, is a set of people (as a *plural* count noun) who happen to live in the same place. It may consist of a people in the legal sense, but it may also consist partly of colonialists and settlers. In present circumstances, 'the people' would refer to those Sahrawis that remain in the occupied areas as well as those

121 Consultation Report (n 2) 15. '[T]he question was not so much the territory's final status, as whether the EU should apply tariff preferences under the EU-Morocco Association Agreement to products from Western Sahara'. Consultation Report (n 102) 28.

122 The latter expression from the Consultation Report (n 102) 28.

123 Whether economic and political issues can be separated is, of course, a question with ideological implications.

124 El Yaakoubi (n 24). A further testament: According to the Council, '[t]he Kingdom of Morocco would never have accepted the agreement if the EU institutions had included in it a clause explicitly excluding its application to Western Sahara'. *Front Polisario*, Opinion of AG Wathelet (n 15) para 300.

125 *Front Polisario* (n 15) para 106.

that have fled to Algeria and other places.[126] By contrast, the 'population' in Western Sahara consists of those Sahrawis that remained *and* of settlers from Morocco (or other places), who, by some accounts, now constitute a majority of the population.[127]

In earlier iterations of this debate, COM had, without comment, simply substituted 'population' for 'people', for instance in the explanatory memorandum to the proposal for the revised Fisheries Protocol in 2013, in which COM claimed that one of the reasons for why the 2011 Protocol was rejected was that it was not ensured that "…the local populations would benefit from the economic and social benefits of that Protocol'.[128] In 2017, this simple operation was no longer possible, due to the conscious use of the word 'people' in the CJEU's judgement.

As already mentioned, the Council did not ask COM to involve 'the people of Western Sahara'. Instead, in a probably deliberate – and clever – play on ambiguity, the task related to 'the people concerned by the agreement'. Here, 'people' could refer to a collective unit (like in the law of self-determination; a *collective* count noun), but it could also be a set (in mathematical terms) of individuals in their individual capacities (a *plural* count noun). It is clearly in this latter way that COM uses the word 'people' in the phrase 'most people now living in Western Sahara'[129] or 'local people'.[130] 'Most people' here means most individuals. Read this way, as 'a collection of individuals', the expression 'the affected people' could reasonably cover employees and owners of the tomato farms, while perhaps excluding all those Sahrawis that are not employed in cash crop farming in Western Sahara and most certainly excluding those living in the refugee camps in Tindouf.[131]

Given its mandate from the Council, COM could have stopped here and claim that they had involved 'the people concerned'. Nevertheless, the authors of the

126 To the Advocate General, this referred to the 'Saharans originating in the Territory' or the 'Saharan populations originating in the Territory'. *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 15) para 283.

127 A terminological note: in most discourse on occupation, the collective of individuals living under occupation is referred to as a 'population'. For a random example, see Article 14 of the First Additional Protocol to the Geneva Conventions. This is logical, given that the purpose of IHL is to provide protection to human beings, not to deal with their political future.

128 Commission,

> Proposal for a Council decision on the conclusion of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement in force between the two Parties.

COM(2013) 648 final 2013/0315 (NLE), 2. As was clear from the legal opinion of the legal service of the European Parliament in 2013, it was the 'people' and not the 'population' that was relevant. See further n 100.

129 Consultation Report (n 2) 31.

130 Consultation Report (n 2) 8.

131 Even tomato importers in Perpignan and tomato consumers in The Hague could credibly be called 'affected people', or perhaps 'stakeholders' under prevailing corporate governance theories.

report must have felt that the choice of interpretation needed to be justified. In the agreement between Morocco and Polisario on the referendum for the self-determination of the people of Sahara, the constituency was defined as the individuals identified in a census conducted by Spain in 1974.[132] The consultation report did not refer to this definition, however, and to do so would have been politically inopportune, for the reasons explained earlier. Instead, the report first claimed that it was unclear whether 'people' meant the 'people living in the territory' or 'a specific set of inhabitants, in particular on the basis of ethnicity or community (Sahrawis)'.[133] Second, the report found that it was difficult to know who the second meaning referred to in this context – 'the Commission… has no precise, reliable way of deciding who to include in the (Sahrawi) 'people concerned''.[134] From these observations, COM concludes:

> Keeping in mind these differences and the difficulty of assessing the impact of the amendment on a people which has yet to be defined, this analysis focuses on the benefits for the population of Western Sahara…[135]

What COM meant by this is clear from the list of consulted entities (or 'interested parties'[136]), namely a 'wide range of economic and political operators from the Western Saharan population', which includes four politicians in Moroccan institutions, ten economic operators (including the gigantic phosphate company OCP) and four human rights associations, all licenced to operate under Moroccan law.[137] Even if these entities had been representative of the Western Saharan

132 See UN Doc S/21360, 18 June 1990, paras 23 et seq.

133 Consultation Report (n 2) 9

134 Ibid.

135 Consultation Report (n 2) 7.

136 Explanatory Memorandum, attached to Amendment of Protocols 1 and 4 (n 2) 5 of the memorandum.

137 This is not the place to go through all of the details, but it may be relevant to mention the following. As admitted in the report, any 'threat to territorial integrity', including advocating independence as the Polisario Front does, is punishable by fine or imprisonment. Consultation Report (n 2) 10. In line with this policy, only groups that have been registered by the Moroccan government were invited to take part, which immediately rules out groups that advocate independence or that claim that Western Sahara is not a part of Morocco. Only two Saharawi groups are registered by Morocco, and both of them, ASVDH and Al Ghad, have stated that they do not want to participate in a consultation process that undermines the right to self-determination.

Further, the EEAS listed a great number of 'stakeholders' which did not want to participate or who 'participated' only by protesting the procedure (including Al Ghad). The list included Polisario, which in fact refused to consult on the basis of an agreement with Morocco but offered to negotiate a new agreement. It also included 93 organisations who either refused to consult or actively opposed the agreement. See Kassoti (n 90) 315; 'Exclusive: Here Are the Moroccan Groups that the EU Consulted' (*Western Sahara Resource Watch*, 24 May 2018) < https://wsrw.org/a105x4165> accessed 19 February 2019; 'Here, the EU Commission Is Lying about WSRW – and 93 Other Groups' (*Western Sahara Resource Watch*, 14 June 2018), <https://wsrw.org/a105x4180>, accessed 19 March 2019; 'Unison Condemnation of the EU Commission from Western Sahara Groups' (*Western Sahara Resource Watch*, 03 February 2018) < https://www.

people, or its population, it would have been difficult to learn what they actually thought; as admitted by the report, it is illegal to question the integrity of Morocco, and Freedom House ranks Western Sahara as the fifth most unfree country or territory in the world.[138]

Hence, by putting the established definition of people in doubt and then explaining that the people in the established sense could not practically be consulted anyway, COM substituted the more manageable concept of population for the people, whereafter it asked some government approved operators and representatives from this set of individuals whether they liked the 'benefits' of the agreement.[139]

### *4.3 Conclusions*

The outcome of the report was satisfactory to COM, which in Recital 10 of its proposal for a Council Decision on the conclusion of the agreement stated that '[t]he majority of these operators said they were in favour of extending the tariff preferences in the Association Agreement to Western Sahara'.[140] So, from 'consent of the people of Western Sahara', as required by the Court of Justice, COM moved to consultations with 'operators' which 'are in favour' of tariff preferences and which display 'signs' that 'all parts of the population' will benefit 'to a greater or lesser extent' (see 4.2.3). Essentially, COM sidelined the question of treaty-making capacity, downplayed or reformulated the importance of the consent or wishes of the people and addressed not *the* people, but people and populations in Western Sahara about what they thought of the issue as defined by COM.

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wsrw.org/a105x4072> accessed 19 March, 2019; 'EU-Morocco Trade Agreement on Western Sahara: The Commission Ignoring the EU Court, Misleading Parliament and Member States and Undermining the UN' (*Western Sahara Resource Watch*, 2 July 2018) <www.wsrw.org>, accessed 19 March, 2019. On the consultations and 'people', see also Juan Soroeta Liceras, 'Current Validity of the External Dimension of the Self-Determination of Peoples. Pending Cases of Decolonization' [2018] 22 *Spanish Yearbook of International Law (SYbIL)* 131, 144–145.

138 Freedom House, Freedom in the World: Western Sahara, <https://freedomhouse.org/report/freedom-world/2019/western-sahara>, accessed 19 March, 2019.

139 Hence, this was essentially the same operation as in 2013, but this time explained. Cf. text around n 128.

140 Amendment of Protocols 1 and 4 (n 2). The next sentence reads: 'Those who rejected the idea did not identify any tangible negative consequences for the local population, but felt it essential that the Agreement should affirm Morocco's position on Western Sahara'. The word 'not' was clearly missing, but I find it highly unlikely that COM explicitly wanted to say that the agreement *should* affirm Morocco's position. A sarcastic person – which I am not – might have called the omission a Freudian slip. The final version, from 6 February 2019, after the approval by the European Parliament, said: 'Those who rejected the idea felt essentially that such an Agreement should affirm Morocco's position on Western Sahara'. This expression is at least equally curious. It is likely that the 'should' was supposed to have been 'would'. The French version is much clearer: 'Ceux qui ont rejeté l'extension estimaient essentiellement qu'un tel accord entérinerait la position du Maroc sur le territoire du Sahara occidental'. What to make of that, I will not even try to suggest.

## 5 The result: successful strategic isolation, well received

The Legal Service of the European Parliament, which compared the outcome with the CJEU's requirement (perspective 1), was sceptical of the conclusions of the report:

> 25. … It cannot be established with certainty whether the Union institutions are able in practice to secure the consent of the people of Western Sahara in order to meet the condition spelled out in the Court's judgment of 21 December 2016. …
>
> 26. If, therefore, the Commission seems to have taken any steps that were available to obtain a consent and could find that 'most of those interviewed by the [Commission and the EEAS] were in favour of extending the tariff preferences'… it seems difficult to confirm with a high degree of certainty whether these steps meet the Court's requirement of a consent by the people of Western Sahara, also taking into consideration that the conclusion of a positive consent is reached in spite of the negative opinion expressed by the Polisario Front.

Nevertheless, most members of the Council as well as the European Parliament chose to accept the conclusions. The reactions of some of the Member States previously negative to these agreements are significant. In 2006, Sweden voted against the adoption of the Fisheries Partnership Agreement and Finland abstained. When the FPA was to be extended in 2013, Denmark and Sweden voted against, the Netherlands, Finland and the United Kingdom abstained and Germany, Ireland and Austria expressed reservations. All of these countries made statements.[141] The Netherlands said this:

> Morocco, as the administering power of the Western Sahara, may not disregard the interests and wishes of the people of the Western Sahara, when applying the protocol to such maritime areas.

Finland, which had the clearest position alongside Sweden, said:

> In accordance with the principles of international law, including the right to self-determination, permanent sovereignty over natural resources and the protection of human rights and fundamental freedoms, Finland emphasizes the need to take into account the interests and opinion of the people in Western Sahara.

141 See COREPER (Part 1), Proposal for a Council Decision on the signing, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the FPA in force between the two Parties, Brussels, 14 November 2013, 15723/13 ADD 1.

At the time of the passing of the amendments to the trade liberalisation agreement in 2018, three years after the refugee crisis, Morocco's geopolitical position had improved. Only Sweden voted against. Denmark, Finland, Germany, Ireland issued the following statement.

> … Denmark, Finland, Germany and Ireland underline the importance of complying with EU law, of which international law may be considered an integral part when entering into bilateral agreements. We have taken careful note of [a Contribution by the Council Legal Service]. Denmark, Finland, Germany and Ireland have consistently emphasized that an agreement has to be consistent with the judgment of the Court of Justice handed down on 21 December 2016. … *We take the content and form of the Contribution as evidence that the Council Legal Service considers that entering into the presented agreement is fully consistent with the judgment of the Court of Justice handed down on 21 December 2016 in Case C-104/16 P and does not prejudice the status of Western Sahara.*
>
> On the basis of the above, Denmark, Finland, Germany and Ireland support the adoption of the Council decision on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement. (my emph)

This was a very convoluted statement, even by diplomatic standards. The only reason given for the approval is that the Council's legal service found that the agreement, negotiated by COM, was consistent with the judgement. It appears that the four countries were not convinced but chose to defer to the Council's legal service rather than to rely on their own legal analyses.

We can only speculate about what went on behind closed doors. However, judging from my experience of negotiations of this nature, my guess is that the four countries were still sceptical but had to find a fig leaf in order to square their often-principled position on matters of international law with the political exigencies of the time. COM's consultation exercise and rhetorical moves might have been just enough to enable the Council's legal service (in a secret document) to conclude that the legal requirements were fulfilled in a way which these four states could accept (though probably just barely).

Hence, I submit that a number of states were not convinced about the legal soundness of COMs (and the Council's legal service's) arguments, but that geopolitics put the bar very low. Nevertheless, I think that there was a bar. At least those countries that had earlier expressed reservations or even opposition would not have been willing to accept the deal had COM not conducted its consultations, even if flawed.

***

Out of the five main ways of framing the situation, COM would surely have preferred to remain in frame 5, which would have allowed the EU to not bother about the relation between Morocco and the Sahrawi. However, after the

proceedings in the CJEU, that was no longer possible. The priority then became to avoid frames 3 and 4. The law of force might have asked whether Morocco had any valid ground at all for controlling Western Sahara or its exports, while the law of occupation – which might have empowered Morocco to some extent – would have been very difficult politically. The CJEU judgements, though not easy to deal with, nevertheless provided a welcome indication that the annexation and occupation framework was not the right way to talk about the situation. Hence, COM could brush off the arguments that Morocco was an aggressor and illegal occupier of Western Sahara as irrelevant issues of 'general policy'. Further, the Court's phrase 'consent of the people of Western Sahara' provided an entry point, which allowed the Commission to move into the already familiar territory of NSGTs and create an argument which was not very convincing to many but which served the purpose of being a justification for the politically necessary decision at hand. While the separate status of an NSGT was the main reason for the Court's conclusion (frame 1), COM could use the regime of NSGT to bring in the law relating to the use of natural resources, as laid out by the UN legal counsel in 2002 (frame 2), and thus avail itself of the established concepts of NSGT and administering power. This provided an opportunity to seize upon the concept of benefit, and to use the potential ambiguity of the word people. Consequently, this frame, which was invoked by Corell and others in order to *limit* Morocco's powers, and was indeed so perceived until 2018, was instead used by COM to *enhance* those powers.

Instead of systemic integration, COM opted for strategic isolation of (its particular reading of) frame 2, and Member States and parliamentarians chose to go along. Hence, the strategy was successful: COM avoided frames 3 and 4, used frame 1 as an entry point to frame 2, transformed the dangerous definition of 'people' in both frames 1 and 2 and transformed the rules in the second regime to something which could – with rhetorical skills and a significant measure of good will – be made to fit the facts.

The practice of international law is not a science but an art; still, while it is indeterminate, it is not unpredictable and not without standards. Certain lines of arguments are more acceptable in the profession than others, and to ignore accepted arguments without addressing them is generally seen as unprofessional. Judged by these criteria, COM's report and its argumentation in general seem to be utterly substandard. However, to say that misses the point of what they were supposed to do. The legal service – a highly qualified group of people, from what I know – had clearly not been tasked by its masters to provide 'the better legal view', but to pursue a strategic argument for a predetermined political purpose. And in that, they clearly succeeded: it was a job well done, according to *that* remit and *those* standards.[142]

142 A legal advisor to an international organisation or a state is a civil servant, tasked to do what the political masters require. (Morocco's most consistent supporter in the EU, as in the Security Council, is France.) It is an almost inevitable feature of the job to sometimes have to do things that are morally dubious, and one does it because the general service that one provides to the rule-based order or some other goal is deemed worth it. But a red line is there, somewhere, which can probably only be drawn in sand.

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# 8 Business actors in Western Sahara

## Heightened obligations and responsibilities under the UNGP?

*Daria Davitti*

### 1 The international legal status of Western Sahara and the relevance of the UNGP

Much has been written, including within the context of this edited collection, on the international legal framework applicable to situations of prolonged occupation and/or to non-self-governing territories (NSGT), including in relation to the illegal exploitation of natural resources in such contexts.[1] To complement the existing literature, this chapter focuses on the United Nations Guiding Principles on Business and Human Rights (UNGP)[2] as a relevant set of standards which can offer guidance in ascertaining responsibility for the harm caused by business activities in situations of prolonged occupation and in NSGT. The UNGP, adopted unanimously in 2011 by the United Nations (UN) Human Rights Council, provide a three-pillar framework aimed at clarifying the state's obligation to protect human rights from third parties' interference (also known as pillar one), the companies' responsibility to respect human throughout their operations (pillar two) and the need to ensure effective remedies when human rights harm is caused, directly or indirectly, by business activities. The chapter takes the situation of Western Sahara as an emblematic analytical context in

1 Non-self-governing territories are territories whose decolonization process is still ongoing, and under Chapter XI of the Charter of the United Nations they are defined as 'territories whose people peoples have not yet attained a full measure of self-government'. Among the scholars who have examined Western Sahara, see Pål Wrange, 'Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara' [2019] 52 *Israel Law Review* 3, 5–11; Pedro Pinto Leite, 'Independence by *Fiat*: A Way Out of the Impasse – The Self-determination of Western Sahara, with Lessons from Timor-Leste' [2015] 27 *Global Change, Peace and Security* 361, 362–365. See also Martin Dawidowicz, 'Trading Fish or Human Rights in Western Sahara: Self-determination, Non-Recognition and the EC-Morocco Fisheries Agreement' in Duncan French (ed), *Statehood and Self-Determination* (Cambridge University Press 2013) 250; and Eva Kassoti, 'Doing Business Right? Private Actors and the International Legality of Economic Activities in Occupied Territories' [2018] 7 *Cambridge International Law Journal* 301, 313–314.

2 Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework' (21 March 2011) UN Doc A/HRC/17/31.

which business actors contribute to and enable a situation of occupation, thereby also hindering the right to self-determination of the people of Western Sahara. Business involvement, as discussed in this chapter, relates not only to the direct exploration and exploitation of natural resources but also to various infrastructural operations and business activities supporting such exploitation and therefore the occupation itself. A clear example of how business activities sustain and further consolidate the occupation, thus contributing to breaches of international law, is the contract signed in November 2019 between the Italian energy company Enel Green Power and the Moroccan authorities, namely the National Office of Electricity and Drinking Water (ONEE) and the Moroccan Agency for Sustainable Energy (MASEN), for the construction of a large wind farm in Boujdour, in occupied Western Sahara. This contract is part of a broader partnership that the Italian energy company concluded with Siemens and Moroccan group Nareva Holding to implement Morocco's Integrated Wind Energy Program,[3] a national plan for the development of renewable energy infrastructures in Morocco. The plan envisages the construction and operation of five wind farms, two of which in occupied Western Sahara (Boujdour and Tiskrad),[4] in addition to those already enabling the illegal extraction activities in Western Sahara's phosphate mines, also operated with Siemens' wind turbines.[5]

For the purposes of our analysis, the situation in Western Sahara is therefore interesting both because of the specific international legal status of this territory and because of the significant business involvement which exists there. The Spanish colony of Western Sahara was listed as a NSGT by the UN in 1963 as per article 73(e) of the UN Charter.[6] This means that this territory and its

3 See official ONEE's press release of 20 November 2019: 'L'ONEE, MASEN et le groupement Nareva Holding – Enel Green Power signent les contrats de projet Parc éolien de Boujdour (300 MW)' (Office National de l'Electricité et de l'Eau Potable, 20 November 2019) <www.one.org.ma/fr/pages/actua.asp?esp=2&id1=8&id2=70&t2=1&id=2920> accessed 22 December 2019, as reported by the international non-governmental organization Western Sahara Resources Watch on 28 November 2019 in 'Enel signs contract to build Boujdour wind farm' (Western Sahara Resource Watch, 28 November 2019) <www.wsrw.org/a105x4581> accessed 22 December 2019.

4 Western Sahara Resource Watch (n 3).

5 See the Sahara Wind's Report 'Sahara Desert Wind Farms: A Learning Curve to Scale-Up' (Sahara Wind) <https://saharawind.com/en/sahara-desert-wind-farms-a-learning-curve-to-scale-up> accessed 22 December 2019). According to the report, Foum El Oued wind farm, operated by 22 Siemens' wind turbines,

> supplies Morocco's state-owned phosphate conglomerate OCP group with electricity. This is made possible through Morocco's Renewable Energy Law 13-09 which enables wind-electricity to be wheeled directly to industrial end-users. The electricity is currently used for extraction; transport through a 98 km long conveyor belt and sea water desalinisation which is required for washing phosphate rock from the Boucraâ mine.

6 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16. For further details on this point, see Ben Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' [2015] 27 *Global Change, Peace and Security* 285, 304–315.

people, the Sahrawi, have not yet completed the process of decolonization. The right to self-determination of the Sahrawi has also been repeatedly affirmed by the UN General Assembly (UNGA) since 1965.[7] In 1974, following a UNGA's request,[8] Spain agreed to organize a referendum on the exercise of the right to self-determination in the territory but never lived up to this commitment. In 1975, upon UNGA's request,[9] the International Court of Justice (ICJ) issued an advisory opinion on the precolonial status of Western Sahara.[10] The Court found that the ties between Western Sahara and Morocco were not

> of such a nature as might affect the application of resolution 1514(XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.[11]

In the events that followed the ICJ advisory opinion, however, Morocco's attempt to seize the territory of Western Sahara through the Green March led to a series of debates and resolutions by the UN Security Council,[12] which were however systematically undermined and rendered unenforceable by the opposition of the United States and France.[13] The ineffective UN response to the Moroccan intervention resulted in the Madrid Accords,[14] through which Spain

7 See UN General Assembly Res 2072 (XX) (16 December 1965) UN Doc A/RES/2072; UNGA Res 34/37 (21 November 1979) UN Doc A/RES/34/37; UNGA Res 35/19 (11 November 1980) UN Doc A/RES/35/19.

8 UNGA Res 2229 (XXI) 'Question of Ifni and Spanish Sahara' (20 December 1966) UN Doc A/RES/2229.

9 UNGA Res 3292 (XXIX) 'Question of Spanish Sahara' (13 December 1974) UN Doc A/RES/3292.

10 *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 68.

11 Ibid., para 162.

12 See e.g. UN Security Council Res 377, 'The Situation Concerning Western Sahara' (22 October 1975) UN Doc S/RES/377; UNSC Res 379, Western Sahara (2 November 1975); UNSC Res 380, 'Western Sahara' (6 November 1975) UN Doc S/RES/379. In the latter resolution, the UN Security Council deplored the holding of the Green March, called upon Morocco to order the participants to the march immediate withdrawal from the territory of Western Sahara and called upon Morocco and all interested parties to respect the right to self-determination of the people of Western Sahara. For an analysis of the response to resolution 380 by the United States and France, see Stephen Zunes, 'Western Sahara, Resources, and International Accountability' [2015] 27 *Global Change, Peace and Security* 285, 289.

13 Zunes (n 12) 288–290.

14 'Declaration of Principles (Tripartite (Madrid) Accords) on Western Sahara by Spain, Morocco, and Mauritania' (14 November 1975) 14 *International Legal Materials* 1512. Smith argues that the Madrid Accords lapsed with Spain's withdrawal from Western Sahara on 26 February 1976. Alternatively, they were abrogated with the partition of the territory between Morocco and Mauritania under the Convention concerning the State Frontier Line established between the Islamic Republic of Mauritania and the Kingdom of Morocco (adopted 14 April 1976, entered into force 10 November 1976) 1977 UNTS 117. See Jeffrey J Smith, 'The Taking of the Sahara: The Role of Natural Resources in the Continuing Occupation of Western Sahara' [2015] 27 *Global Change, Peace and Security* 263, 266.

relinquished the administration of Western Sahara to Morocco and Mauritania. As part of these accords, ratified and notified to the UN in 1976, Spain also claimed that it considered itself free from any responsibility over the territory, although it retained access to the Saharan fishery for another 20 years and to 35% ownership of the Boucraâ phosphate mine until 2003, by virtue of the protocols to the Madrid Accords, publicly disclosed only after 2009.[15] Whilst Mauritania later renounced any claim over relevant areas, Morocco progressively annexed Western Sahara in 1976 and 1979. The conflict between Morocco and the UN-recognized legal representative of the people of Western Sahara, the *Frente Popular de Liberación de Sanguía el Hamra y Río de Oro* (Polisario), continues to date, despite various UN attempts to carry out a referendum, broker peace, achieve a settlement of the issue and a political solution which, ultimately, should provide for Sahrawi's self-determination and independence.[16] Crucially, the ICJ recently found in its *Chagos* advisory opinion that self-determination crystallized as a norm of customary international law in December 1960.[17] This further confirms that any action undertaken by Morocco with respect to the territory of Western Sahara was and still remains inconsistent with customary international law.

For the purposes of our analysis in this chapter, it is thus relatively uncontroversial to state that Morocco occupied Western Sahara in 1975, both against the will of the administering power, Spain, and against the will of its people.[18] With its insistence on including the votes of Moroccan settlers in any relevant referendum, Morocco continues to deny the self-determination of and any claim to independence by the people of Western Sahara.[19] Furthermore, it is important to clarify that Spain's attempt to relinquish responsibility and cede the territory to Morocco and Mauritania through the Madrid Accords does not change the factual status of the occupation, since Spain, as colonial power, was (and arguably still is) obliged to ensure the self-determination of the people of Western Sahara and, accordingly, had no right to cede their territory.[20] The illegal annexation by Morocco, therefore, is to be considered without effect and the status of Western Sahara, for the purposes of international law, still that of a recognized NSGT and, simultaneously, of an occupied territory, as confirmed

15 Smith (n 14). See also Jeffrey J Smith, 'State of Exile: The Saharawi Republic and Its Refugees', in Susan Akran and Tom Syring (eds), *Still Waiting for Tomorrow: The Law and Politics of Unresolved Refugee Crises* (Cambridge Scholars Publishing 2014) 45.

16 For a discussion of the various UN attempts at resolving the conflict, especially during the 1990s, see Zunes (n 12).

17 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) [2019] ICJ General List No. 169 (25 February 2019) para 152: 'The Court considers that, although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption'.

18 Saul (n 6) 315–316. See also Wrange (n 1) 8.

19 Zunes (n 12) 290–291.

20 Saul (n 6) 309–315. See also Wrange (n 1) 8.

by the UNGA in both 1979 and 1980.[21] Accordingly, it is important to clarify that there are two bodies of international law which remain applicable to the situation in Western Sahara and explicitly protect the natural resources belonging to the Sahrawi people and of fundamental importance for their future self-determination and development. First, the principle of permanent sovereignty over natural resources of non-self-governing peoples, which is related to the process of decolonization and to the right of self-determination, and which prohibits the exploitation of natural resources without Sahrawi's authorization and a clear benefit to them.[22] Second, the legal provisions relevant to occupied territories, which prohibit the exploitation of resources except for meeting the immediate needs of the occupied population.[23] Despite the clarity of the applicable law and the fact that no state has recognized Morocco's sovereignty over Western Sahara, the development of Moroccan settlements continues unabated, including through land concessions to investors and the commercial exploration and exploitation of natural resources such as fish (including through agreements with the EU and Russia), land and seabed petroleum, and phosphate mineral rock.[24]

This latter aspect of the occupation, and the implications that business operations in Western Sahara have for its people, their self-determination and independence are the starting point for our analysis in the remainder of this chapter. I argue that, for the purposes of the application of the UNGP and of the international legal standards they reflect, the context of Western Sahara undoubtedly represents a situation in which there is a high risk of gross abuses taking place, gross abuses that business actors may cause or contribute to throughout their operations. This characterization, in turn, means that home states of the business enterprises involved have heightened obligations, whilst business themselves have heightened responsibilities to prevent, stop and remedy human rights abuses that they are directly causing or to which they are contributing. The remainder of the chapter, therefore, examines how business activities in Western Sahara are better understood as high-risk operations (i.e. entailing a high risk of gross abuses) because of way in which they contribute to the occupation and further hinder the self-determination of the Sahrawi people. As I explain further in the next section, the UNGP are key to this high-risk characterization

21 See UNGA Res 34/37 and UNGA Res 35/19 (n 7).

22 In relation to sovereignty over natural resources, see UN Charter articles 73 and 74 (n 6). See also UNGA Res 1803 (XVII), 'Permanent Sovereignty over Natural Resources' (14 December 1962) UN Doc A/RES/1803. Accordingly, sovereignty over natural resources pertains to the non-self-governing population, not to the administering state.

23 In relation to applicable international humanitarian law and the relevant provisions applicable to occupied territories, including the prohibition against pillage enshrined in article 6 of the Fourth Geneva Convention: Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949,entered in force 21 October 1950) 75 UNTS 287.

24 J J Smith, 'International Law and Western Sahara's Maritime Area' [2019] 50 *Ocean Development and International Law* 117, 119–121. See also generally Smith (n 14); and E Hagen, 'Saharawi Conflict Phosphates and the Australian Dinner Table' [2015] 27 *Global Change, Peace and Security* 377, 378–380.

of business activities in Western Sahara and to further identifying the nature and scope of the heightened obligations and responsibilities pertaining to such operational contexts.

## 2 High risk of gross abuses: heightened obligations and heightened responsibility

The human rights abuses that have been taking place in Western Sahara throughout the 45 years of Moroccan occupation have been widely documented, and they include the extrajudicial killing and forced disappearance of political opponents, torture of political prisoners, violations of the freedom of expression and assembly of those demonstrating against the occupation, the introduction of settlers in the occupied territories and various forms of discrimination against the Sahrawi.[25]

The direct and/or indirect involvement of business actors in such abuses, on the other hand, has generally received less attention, although the last couple of decades have seen an increase in investors' activism and strategic litigation directed against companies operating in Western Sahara.[26] The achievement of an effective remedy for victims of business-related abuse, however, remains elusive, not least because traditionally non-state actors are not directly bound by international law. Home states are also reluctant to comprehensively regulate the transnational activities of companies registered or domiciled in their jurisdiction,[27]

25 See e.g. Amnesty International, 'Morocco and Western Sahara 2018' <www.amnesty.org/en/countries/middle-east-and-north-africa/morocco-and-western-sahara/morocco-and-western-sahara/> accessed 22 December 2019; and Human Rights Watch, 'World Report 2019: Morocco/Western Sahara' <www.hrw.org/world-report/2019/country-chapters/morocco/western-sahara#1bdb61> accessed 22 December 2019.

26 On investors' engagement in divesting campaigns see Hagen (n 24) 383–387. In terms of strategic litigation, see the complaints by European Center for Constitutional and Human Rights (ECCHR) and Global Legal Action Network (GLAN) against Messe Berlin Group for allowing the French company Azura Group to exhibit and trade agricultural products imported from occupied Western Sahara: 'On the Suspicion that your Business Partner Imports from Moroccan-Controlled Western Sahara' (ECCHR, 05 September 2019) <www.ecchr.eu/nc/en/press-release/on-the-suspicion-that-your-business-partner-imports-from-moroccan-controlled-western-sahara/> accessed 22 December 2019. See also GLAN's complaint before Ireland's National Contact Point for the Organisation for Economic Co-operation and Development (OECD) against San Leon Energy PLC in relation to the exploration and exploitation of oil in occupied Western Sahara, without the consent of the Sahrawi people: 'Complaint filed against Irish oil company for business dealings in annexed Western Sahara' (GLAN, 24 October 2018) <www.glanlaw.org/single-post/2018/10/24/GLAN-files-complaint-against-Irish-oil-companys-dealings-in-annexed-Western-Sahara> accessed 22 December 2019.

27 There are of course a few exceptions in terms of emerging regulations at the national and regional levels, but evidence shows that there is still room for improvement, as evidenced by the Accountability and Remedy Project I by the Office of the High Commissioner for Human Rights. See Human Rights Council, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability' (1 June 2018) A/HRC/38/20/Add.2.

partly in fear of loss of competitiveness, partly because of the benefit they may gain from such transnational activities. More comprehensive regulation would contribute to the establishment of clearer horizontal obligations in domestic law and regulatory frameworks,[28] and, in turn, close what in the business and human discourse is generally known as the 'governance gap'[29] between the human rights standards enshrined in relevant human rights instruments and reflected in the UNGP, on the one hand, and the measures adopted by states and companies to ensure effective remedies on the other hand. This governance gap appears particularly accentuated in the context of business involvement in occupied territories, where the willingness of the occupying powers to strengthen its control over occupied territory is matched by the lucrative gains of the various state and non-state actors involved.

It is important to understand that one of the main implications of classifying business operations in Western Sahara as entailing a high risk of gross abuses is that it is generally accepted that according to the UNGP 'high risk' and armed conflict situations demand special scrutiny by both home and host states, as well as by the companies involved. Whilst there is no agreed-upon definition of 'high-risk areas'[30] and principles 7 and 23(c) of the UNGP only refer to conflict-affected areas and the heightened risk of gross human rights abuses there, it is possible to refer to other relevant definitions to further delineate the scope and content of these terms, and ascertain their applicability to NSGT and occupied territories. The Organization for Economic Co-operation and Development (OECD), for instance, defines 'conflict-affected and high-risk areas' as follows:

> [c]onflict-affected and high-risk areas are identified by the presence of armed conflict, widespread violence or other risks of harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence.

28 For a discussion of developments towards direct horizontal effect through the jurisprudence of various national legal systems, see Lottie Lane, 'The Horizontal Effect of International Human Rights Law in Practice' [2018] 5 *European Journal of Comparative Law and Governance* 5, 21–24.

29 On the governance gap see generally Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' [2016] 1 *Business and Human Rights Journal* 41; Robert McCorquodale and Penelope Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' [2007] 70 *Modern Law Review* 598.

30 United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Due Diligence: Defining "Conflict-Affected" and "High-Risk Areas"' (Concept Note for a Side Event at the Business and Human Rights Forum 2013) <www.ohchr.org/Documents/Issues/Business/ForumSession2/Events/3Dec.1.SideEventProposal_ GenevaAcademy.pdf> accessed 22 December 2019.

> Such areas are often characterised by widespread human rights abuses and violations of national or international law.[31]

Similarly, the EU definition of 'conflict-affected and high-risk areas' characterizes them as '[a]reas in a state of armed conflict, fragile post-conflict areas, as well as areas witnessing weak or non-existing governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses'.[32] Both of these definitions therefore construe 'conflict-affected areas' in a broad manner and refer to them as examples of 'high-risk areas' more generally.

If we apply the earlier definitions to the context of Western Sahara, various elements of business activities taking place there clearly suggest that they are implemented in high-risk areas and/or in contexts that increasingly entail high-risk operations. For instance, the exploitation by Morocco of natural resources such as fish, petroleum (both land and seabed) and phosphate mineral rock in Western Sahara is clearly taking place without the consent of the Sahrawi people, who have repeatedly objected to such exploitation.[33] This means that these activities are contributing to Morocco's efforts to strengthen the occupation, not least through the involvement of other states and non-state actors in the exploitation of fish, oil and phosphate, as well as in the development of energy and tourist infrastructures, to consolidate the *marocanité* of the Sahara.[34] Any business involved in Western Sahara is therefore at risk of 'causing or contributing to gross human rights abuses', as per principle 23(c) of the UNGP, as they are at risk of contributing to the occupation and to the illegal exploitation of the natural resources rightfully owned by the Sahrawi people, in breach of the Fourth Geneva Convention and of the right to self-determination of the Sahrawi.

The UNGP do not explicitly define 'gross abuses', but the Interpretative Guide to the UNGP drafted by the Office of the High Commissioner for Human Rights (OHCHR) provides a non-exhaustive list of examples and refers to the *gravity* of the abuse:

> There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations

31 See 'Conflict-Affected and High-Risk Areas (CAHRAs)' (Conflict-Free sourcing initiative) <http://www.responsiblemineralsinitiative.org/emerging-risks/conflict-affected-and-high-risk-areas/> accessed 22 December 2019.

32 Ibid.

33 See Zunes (n 12) 291–292.

34 See Smith (n 14) 282 on the release of an internal document by the Moroccan government concerning Russia-Morocco fisheries treaties.

> if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups.[35]

The commentary to principle 14 also clarifies that the 'severity of impacts will be judged by their scale, scope and irremediable character'. The OHCHR Interpretative Guide further explains that the impact of business activities will be deemed to be *severe* based on the gravity of the harm, the number of people affected (both immediately and in the future) and based on whether it is possible to 'restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact'.[36] Based on the earlier point, there is little doubt for instance on the irremediable character of the depletion of Western Sahara's natural resources, and that this will impact the Sahrawi's ability to use them for their future development, once self-determination will be achieved. Furthermore, business activities that support the occupation hinder and delay the self-determination of the Sahrawi people. A careful reading of the UNGP clearly indicates that when companies engage in activities in Western Sahara, they embark in high-risk operations, that is to say business operations that entail a high risk of gross abuses.

As mentioned earlier, where the risk of gross abuses is heightened, the UNGP recognize the existence of heightened obligations vested upon the home state in which the companies are registered and heightened responsibilities for the companies themselves. According to UNGP 7, in fact, home states of companies operating in high-risk contexts are expected to 'help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships' and 'to assess and address heightened risks of abuses'.[37] As further explained in the commentary to UNGP 7 and in another UN Human Rights Council report in an addendum to the UNGP,[38] home states' engagement is not to be understood as replacing but as complementing the engagement of host states where the companies are operating. Home states' engagement should be proactive and take place as early as possible, in order to help companies avoid involvement in human rights abuses before the situation escalates.[39] UNGP 7, as discussed earlier, refers specifically to gross abuses and therefore concerns human rights abuses of a severe nature, because of their gravity, scale, scope and irremediable character.[40] The grossness of the abuse, therefore, is reinforced

35 OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretative Guide' <www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf> accessed 22 December 2019, 6.

36 Ibid., 8.

37 UNGP (n 2), Principle 7 and related commentary.

38 Human Rights Council, 'Business and Human Rights in Conflict-Affected Regions: Challenges and Options for State Responses' (27 May 2011) A/HRC/17/32 (hereinafter Addendum Report).

39 Ibid., para 10.

40 UNGP (n 2), Principles 14, 16, 17 and 21.

by the increased likelihood of occurrence[41] and both demand that home states are proactive and supportive of cooperative companies, but also that they deny 'access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation'. Crucially, UNGP 7(d) also requires home states to 'ensur[e] that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses'. The addendum report on conflict-affected areas confirms that home states should establish adequate regulatory frameworks, clarify the applicability of such frameworks to business entities and, for the most extreme situations, 'make sure that the relevant agencies are properly resourced to address the problem of business involvement in international or transnational crimes, such as corruption, war crimes or crimes against humanity'.[42] The commentary to UNGP 7 further clarifies that states should also 'consider multilateral approaches to prevent and address [gross human rights abuses], as well as support effective collective initiatives'.[43]

At this point, it is important to note that the broader debate over whether a home state has a general duty, in international law, to regulate the transnational activities of a company registered in its territory and/or jurisdiction, continues to generate a vast amount of literature.[44] This is partly because when the UNGP were adopted in 2011, the commentary to UNGP 2 took a conservative approach to the debate by stating that

> [a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of business domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.

Whilst the general debate in international law is thus far from settled, it is however uncontroversial to state that in high-risk contexts, because of the nature of gross abuses and of their high likelihood of occurrence, home states have a duty to *appropriately and effectively regulate* the transnational conduct of business enterprises in order to prevent business-related human rights abuse.

In relation to business enterprises themselves, the standards under pillar two of the UNGP provide that companies involved in Western Sahara should avoid infringing on the rights of others and address negative impacts that they have caused or contributed to. The primary mechanism to operationalize this

41 Radu Mares, 'Corporate and State Responsibilities in Conflict-Affected Areas' [2014] 83 *Nordic Journal of International Law* 293, 311.

42 Addendum Report (n 38) para 13.

43 UNGP (n 2) Principle 7 and related commentary.

44 See e.g. Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' [2018] 38 *Oxford Journal of Legal Studies* 841. See also Daria Davitti, 'Refining the Protect, Respect and Remedy Framework for Business and Human Rights and Its Guiding Principles' [2016] 16 *Human Rights Law Review* 55.

responsibility to respect is human rights due diligence,[45] which essentially consists of a set of processes aimed at ensuring that a company assesses its actual and potential 'adverse impacts', takes action when such adverse impacts are identified, tracks and communicates to relevant stakeholders the ways in which it addresses such impacts and contributes to remediating them. As explained so far, any business activity taking place in Western Sahara inevitably involves a high risk of gross abuses. This means that business enterprises operating in Western Sahara have a heightened responsibility to respect human rights, including in terms of how to carry out human rights due diligence and the type of remediation mechanisms that they are required to provide.

According to UNGP 24 and related commentary, they should have a clear and comprehensive understanding of the severity of the abuses that they become involved in and/or contribute to, in terms of scale and scope of the abuses but also in terms of the irremediable nature of the harm. It is important to emphasize that the primary focus of the human rights due diligence process, therefore, is not on the risk to the company, but on the higher risk to the people affected by the relevant business activities. Companies should therefore consider both the likelihood and severity of the risk. In operational contexts such as those of Western Sahara, the high risk of gross abuses may be so pervasive that it becomes almost impossible for a company not to be involved in them. UNGP 23(c) is particularly relevant in such contexts because it requires business enterprises to 'treat the risk of causing or contributing to gross human rights abuses *as a legal compliance issue wherever they operate*'.[46] This means that the legal uncertainty that usually surrounds transnational business activities becomes practically irrelevant: a company's lawyer 'should proactively monitor the company's efforts to prevent its involvement in such [gross] abuse, as they would do to prevent its involvement in any serious corporate crime'.[47] A joint reading of UNGP 23 and UNGP 24, therefore, demands that whenever companies are involved in high-risk operations they not only ascertain the likelihood of their involvement in or contribution to gross abuses, but that they also *prioritize* actions to prevent and address the most severe impacts. UNGP 24 in fact provides that '[w]here it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable'.[48] The continued involvement in Western Sahara of companies such as Enel, Siemens and Azura, to mention just a few, therefore, appears to ignore both the home states' obligation to protect human rights and the companies' responsibility to respect them as specifically articulated in the UNGP for high-risk contexts.

45 UNGP (n 2) Principles 17–21 and related commentary.

46 Ibid., principle 23(c) and related commentary, emphasis added.

47 John Sherman III, 'The UN Guiding Principles: Practical Implications for Business Lawyers' (2013) *In-House Defense Quarterly* 50 <www.shiftproject.org/resources/publications/un-guiding-principles-practical-implications-business-lawyers/> accessed 22 December 2019, 55.

48 UNGP (n 2) Principle 24 and related commentary.

## 3 Conclusion: beyond the 'Governance Gap'?

As discussed in this chapter, the legal status of Western Sahara as both a NSGT and an occupied territory means that business operations in Western Sahara inevitably entail a high risk of gross human rights abuses. In these cases, the UNGP clearly direct us to identify the nature and scope of the heightened obligations vested upon the home states of the companies engaged in these contexts, and the heightened responsibility pertaining to the companies themselves. Through a close analysis of the provisions in UNGP 7, 23(c) and 24 discussed in this chapter, it is apparent that the existence of heightened obligations and responsibility applicable in high-risk situations is broadly acknowledged, and that such heightened obligations and responsibilities are due to the grossness of the abuses and the likelihood of their occurrence in such contexts. Heightened home states' obligations entail, at a minimum, a duty to regulate the transnational activities of companies domiciled within a state's territory and/or under its jurisdiction. Such regulation should be aimed at effectively preventing companies from causing, or contributing to, human rights abuses in the course of their transnational operations. This would include the introduction, in the relevant domestic legal framework, of mandatory human rights due diligence for any company involved in Western Sahara and the provision of effective remedies for the harm deriving from business activities. Effective remedies would include, *inter alia*, providing access to the courts of the home state of the company, especially when the courts of the host states are unable to provide effective remedies or are otherwise inaccessible to the victims, and imposing civil and criminal liability on the companies themselves for their wrongful conduct. Failure to regulate the activities of companies operating in Western Sahara would result in a breach of the home state's obligation to protect from foreseeable human rights abuse, that is to say a breach of a positive obligation to protect.

Meaningful regulation will have to specify the type of mandatory human rights due diligence required of a company, and create a system whereby state support to companies (including continued registration and incorporation in the home state) would be made conditional to detailed reporting, auditing and corrective action whenever abuses are identified. Companies involved in Western Sahara, on the other hand, also have a heightened responsibility to treat the risk of gross human rights abuses as a legal compliance issue, and thus engage in ongoing monitoring and assessment of how they adversely impact human rights, publicly notify harm when encountered and promptly intervene to prevent abuses or stop them if they are already occurring. Anything short of this heightened approach would hollow out the significance of the UNGP in high-risk situations, but most importantly, it would also engage the responsibility of the home state for a failure of its obligation to protect, and trigger a requirement to remedy such breach. Companies' non-compliance, in turn, would lead to civil and criminal liability, as envisaged in the relevant domestic frameworks. Companies engaged in Western Sahara, therefore, will have to legally reconsider whether the continuation of their activities is indeed possible without incurring civil and criminal liability. Articulated in this way, heightened obligations and responsibility would go some

way towards offering a possible solution to ensuring both state and corporate responsibility for at least some of the abuses against the Sahrawi people.

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# 9 *Offside?* Challenging the transnational legality of Israeli football activities in the Occupied Palestinian Territories

*Antoine Duval*

The Fédération Internationale de Football Association (FIFA) is an unusual institution, a Swiss association counting more national members than the United Nations (UN) and more powerful than certain states.[1] It rules over global football in a controversial way and exercises, despite its formal private nature, a peculiar form of transnational authority over the beautiful game. In 1998 the FIFA Congress[2] welcomed the Palestinian Football Association (PFA) as part of its members – allegedly, as an attempt by then FIFA President, the Brazilian João Havelange, to showcase football as an instrument of peace between Israeli and Palestinians.[3] Since then, the Palestinian team has been able to engage in international football and its membership of FIFA has been a source of national pride and identity consolidation.[4] Ironically, almost 20 years after Palestine's anointment into the FIFA family, instead of peace it is the conflict between Israeli and Palestinians that moved to FIFA. In recent years the PFA and the Israeli Football Association (IFA) have been at loggerheads inside FIFA over the fate – I will refer to it as the transnational legality[5] – of five (and then six) football clubs

1 Borja Garcia and Henk Meier, 'Protecting Private Transnational Authority against Public Intervention: FIFA's Power over National Governments' [2015] 93 *Public Administration* 4, 890–906.

2 The FIFA Congress is the supreme and legislative body of FIFA. Each of the member association has one vote in the Congress.

3 Alan Tomlinson, 'FIFA and the Men Who Made It' [2000] 1 *Soccer & Society* 55, 65. As well as an opportunity to secure a new vote on which Havelange and his designated heir Joseph Blatter could count in FIFA elections, see John Sugden and Alan Tomlinson, *Football, Corruption and Lies* (Routledge 2016) 102.

4 Glen M.E. Duerr, 'Playing for Identity and Independence: The Issue of Palestinian Statehood and the Role of FIFA' [2012] 13 *Soccer & Society* 653.

5 The idea of framing the study in terms of 'transnational legality' instead of 'international legality' points to an approach focused on the centrality of the blending and assembling of law into transnational legal constructs. As should become clear, our case study mobilises private regulation, Swiss private law, international human rights law, soft law, international humanitarian law and arbitration law. It cannot be grasped from a single perspective but must be perceived from a position that does justice to this pluralist transnational legal assemblage.

affiliated to the IFA which are physically located in the Israeli settlements in the Occupied Palestinian Territories (OPT).

The chronicle of the legal intricacies of this conflict will serve as a backdrop to discuss arguments raised regarding the legality of business activities of corporations connected to the Israeli settlements. Indeed, as will be shown in the first part of this chapter, the discussion on the legality of economic activities in the OPT has recently taken a business and human rights turn involving systematic targeting of corporations by activists.[6] This shift can be traced back to the unanimous endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) by the UN Human Rights Council (HRC) in 2011. Interestingly, we will see that this business and human rights turn also played a role in the conflict between the IFA and the PFA. Nevertheless, the core of the case continued to unfold under what we will refer as FIFA law, the private regulations contractually imposed by FIFA upon its members. Indeed, despite FIFA's official embrace of human rights through the introduction of Article 3 FIFA Statutes in 2016,[7] international human rights law has played a minor role in the final decision of FIFA bodies and the Court of Arbitration for Sport (CAS). This case study is therefore an opportunity to examine how the strategy of naming and shaming private corporations, and in our case not-for-profit associations, for their direct or indirect business involvement in the settlements has fared. It is also an occasion to critically assess the strength of the human rights 'punch'[8] added to the *lex mercatoria*, or in our case the *lex sportiva*, by the UNGPs. For Ruggie and Sherman, FIFA's embrace of the UNGPs 'shows that the GPs are adding significant human rights punch to private law of contracts, the new *lex mercatoria*, whose global reach and enforceability can affect workplace conditions, the welfare of communities, and environmental practices worldwide'.[9] This chapter will put this claim to the test through a detailed qualitative review of the dispute between the PFA and the IFA.

6 For a comprehensive overview of the recent literature and cases, see Valentina Azarova, 'Business and Human Rights in Occupied Territory: The UN Database of Business Active in Israel's Settlements' [2018] 3 *Business and Human Rights Journal* 187 and Marya Farah and Maha Abdallah, 'Security, Business and Human Rights in the Occupied Palestinian Territory' [2019] 4 *Business and Human Rights Journal* 890.

7 Article 3 FIFA Statutes (2016) provides: 'FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights'. The trigger for this change was John Ruggie's report John G. Ruggie, '"For the Game. For the World." FIFA and Human Rights' (Corporate Responsibility Initiative Report No. 68, Harvard Kennedy School 2016).

8 John G. Ruggie and John F. Sherman III, 'Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice' [2015] 6 *Journal of International Dispute Settlement* 455.

9 Ibid., 456.

## 1 Building a human rights case against Israeli football activity in the OPT

The inclusion in this volume of a case study on the legality of football activity in Israeli settlements in the OPT is justified by the framing (and publicity) given to the case in 2016 by Human Rights Watch (HRW). The human rights organisation argued that by allowing IFA to integrate clubs geographically located in Israeli settlements in the OPT, FIFA was contributing through its business activities to human rights violations triggered by the existence of these settlements.[10] This controversy unfolded in the context of a wider push by activists and academics to hold companies accountable for their direct and indirect economic dealings with Israeli settlements.

### *1.1 Israeli settlements in the Occupied Palestinian Territories: the turn to business and human rights*

It would be impossible to comprehensively restate in this chapter the overwhelmingly dominant opinion, at least outside of Israel, that the Israeli settlements in the OPT are illegal under international law as they violate article 49(6) of the Fourth Geneva Convention.[11] This position has been a mainstay of international law for years now and has been regularly endorsed by the UN Security Council,[12] the General Assembly of the UN[13] and the International Court of Justice.[14] It is also a symbol of the profoundly asymmetric enforcement of international law, as Israel has yet to be brought in compliance with these authoritative statements. In September 2019, the Israeli Prime Minister Netanyahu even pledged to annex parts of the settlements rather than to disband them.[15] In fact, both the UN and the ICJ have proved unable to push Israel into complying with their decisions and resolutions. The more than 50 years of occupation and active settlement policies by Israel do not appear to be coming to an end anytime

10 'Israel/Palestine: FIFA Sponsoring Games on Seized Land' (*Human Rights Watch*, 25 September 2016) <www.hrw.org/news/2016/09/25/israel/palestine-fifa-sponsoring-games-seized-land> accessed 17 January 2020.

11 See in general on the international legality of Israel's occupation of the West Bank and Gaza, Eyal Benvenisti, *The International Law of Occupation* (OUP 2012) 239–241. For a general overview, see our introduction to this volume.

12 See UN Security Council Res 446 (22 March 1979) UN Doc S/RES/446; UNSC Res 452 (20 July 1979) UN Doc S/RES/452; UNSC Res 465 (1 March 1980) UN Doc S/RES/465, and most recently UNSC Res 2334 (23 December 2016) UN Doc S/RES/2334.

13 See for example UN General Assembly Res 72/14 (30 November 2017) UN Doc A/RES/72/14.

14 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] (Advisory Opinion) ICJ Rep 136, para 120.

15 David M. Halbfinger, 'Netanyahu, Facing Tough Israel Election, Pledges to Annex a Third of West Bank' (*The New York Times*, 10 September 2019) <www.nytimes.com/2019/09/10/world/middleeast/netanyahu-israel-west-bank.html> accessed 17 January 2020.

soon and fly in the face of the authority and effectiveness of international law.[16] Furthermore, while many states are emphatically acknowledging the illegality of Israeli settlements, few are those that are adopting policies to incentivise Israel to cease its systematic support to their existence.[17] It is in this rather cynical context that the recent turn to scrutinising private businesses involved in economic activities connected to Israeli settlements can be best explained. In other words, those of one of the main advocates of this turn, Richard Falk, the former UN Special Rapporteur on Palestinian human rights, this 'focus on business activities is partly an expression of frustration about the inability to obtain compliance with these fundamental legal obligations of Israel and the ineffectiveness of the U.N. efforts to condemn settlement expansion'.[18]

At the end of his term as Special Rapporteur, Falk produced two reports specifically dedicated to the role and responsibilities of companies active in the Israeli settlements.[19] Apparently inspired by the recent unanimous endorsement of the UNGPs, he harnessed their authoritative nature to urge both states and business enterprises 'to ensure the full and effective implementation of the Guiding Principles in the context of business operations relating to Israeli settlements in the occupied Palestinian territory'.[20] The Special Rapporteur also considered that 'all companies that operate in or otherwise have dealings with Israeli settlements

16 As pointed out by the current Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967:

> Despite the ongoing record of Israel of non-compliance with the directions of the international community, it has rarely paid a meaningful price for its defiance, and its appetite for entrenching its annexationist ambitions in East Jerusalem and the West Bank has gone largely unchecked. A deep-rooted problem at the heart of the conflict has not been the clarity of international law, but the unwillingness of the international community to enforce what it has proclaimed.

'Situation of human rights in the Palestinian territories occupied since 1967' (2018) UN Doc A/73/447, para 60.

17 France is a good example of a country that is reluctant in translating its official position in tangible acts; see Benedetta Voltolini, 'France and the Israeli Occupation: Talking the Talk, but Not Walking the Walk?' [2018] 4 *Global Affairs* 51. In general, lamenting the lack of 'political will' of states, see Farah and Abdallah (n 6) 27–28.

18 Michelle Nichols, 'U.N. Expert Calls for Boycott of Companies in Jewish Settlements' (*Reuters*, 25 October 2012) <www.reuters.com/article/us-palestinians-israel-un/u-n-expert-calls-for-boycott-of-companies-in-jewish-settlements-idUSBRE89O1II20121025> accessed 17 January 2020.

19 See 'Situation of human rights in the Palestinian territories occupied since 1967' (2012) UN Doc A/67/379 and 'Situation of human rights in the Palestinian territories occupied since 1967' (2013) UN Doc A/68/376.

20 UN Doc A/67/379 (n 19) para 89. Thereafter, in June 2014, the UN Working Group on Business and Human Rights issued a specific 'Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory' (*United Nations Office of the High Commissioner*, 6 June 2014) <www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf> accessed 17 January 2020.

should be boycotted, until such time as they bring their operations fully into line with international human rights standards and practice'.[21] In this regard, his view was that 'civil society efforts to pursue the implementation of the Guiding Principles establish a distinctive space between voluntary and obligatory action in the struggle to protect persons vulnerable to human rights abuse'.[22] His second report on the subject from September 2013 went further by focusing on the possible criminal and civil liabilities of two specific companies (Dexia Group and Re/Max International).[23] While steering clear from a definitive conclusion on their liability, Falk did find that they 'assist in the growth of settlements'.[24] And went on to, slightly rhetorically, ask: 'Do the activities of the global companies directly contribute to the violations of international law that the settlements constitute?' These reports mark the beginning of a more sustained focus by activists, academics and UN bodies on corporate responsibility in the context of economic links with the Israeli settlement. For example, shortly after the publication of the first report, the independent international fact finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people also decided to emphasise the responsibility of business enterprise in its report of February 2013. The mission stressed that companies

> must assess the human rights impact of their activities and take all necessary steps – including by terminating their business interests in the settlements – to ensure that they do not have an adverse impact on the human rights of the Palestinian people, in conformity with international law as well as the Guiding Principles on Business and Human Rights.[25]

The Falk reports had also the intended purpose to trigger civil society 'to vigorously pursue initiatives to boycott, divest and sanction'[26] the businesses involved. This call proved extremely successful, as civil society organisations (CSOs) picked up the baton and started to systematically raise the issue of corporate responsibility in the context of the Israeli settlements. Most prominently, WhoProfits,[27] Al

21 Ibid., para 91.
22 Ibid.
23 UN Doc A/68/376 (n 19).
24 Ibid., para 57.
25 'Report of the independent international fact finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem' (2013) UN Doc A/HRC/22/63, para 117.
26 A/67/379, para 98.
27 Who Profits is an independent research centre dedicated to exposing the role of the private sector in the Israeli occupation economy. While it started operating in 2007 as a project of the Coalition of Women for Peace, it became a fully fledged independent research centre only in 2013. The centre publishes specific reports on companies active in the settlements (see 'All Publications' (*Who Profits)* <www.whoprofits.org/publications/> accessed 17 January 2020) and maintains a comprehensive database (see 'Find a Company' (*Who Profits*) <www.whoprofits.org/> accessed 17 January 2020) listing these companies.

Haq,[28] Diakonia,[29] 11.11.11,[30] HRW[31] and Amnesty International[32] produced reports and sustained investigatory work focusing on the role and responsibility of corporations in supporting the existence and economic thriving of the Israeli settlements. The common narrative, found in almost all of these publications, is structured around the corporate responsibility to respect enshrined in the second pillar of the UNGPs.[33] In general, their views are very much captured by HRW's conclusions that

> any adequate due diligence would show that business activities taking place in or in contract with Israeli settlements or settlement businesses contribute to rights abuses, and that businesses cannot mitigate or avoid contributing to these abuses so long as they engage in such activities.[34]

Consequently, HRW contends that 'the context of human rights abuse to which settlement business activity contributes is so pervasive and severe that businesses should cease carrying out activities inside or for the benefit of settlements'.[35]

28 Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, West Bank. It was established in 1979 to protect and promote human rights and the rule of law in the OPT. The organisation published a short report on 'Business and Human Rights in Palestine' in 2016 (see 'Business and Human Rights in Palestine' (*Al-Haq*, 7 December 2016) <www.alhaq.org/publications/8063.html> accessed 17 January 2020) and is very active in the ongoing discussions on the subject.

29 See 'The Unsettling Business of Settlement Business' (*Diakonia*, 2015) <https://www.diakonia.se/globalassets/documents/ihl/ihl-in-opt/briefs/the-unsettling-business-of-settlememt-business.pdf> accessed 17 January 2020 (The Unsettling Business).

30 Barbara Kuepper and Ward Warmerdam, 'Doing Business with the Occupation – Economic and Financial Relationships of Foreign Companies with the Settlement Enterprise' (Profundo 2018).

31 See 'Occupation, Inc.: How Settlement Businesses Contribute to Israel's Violations of Palestinian Rights' (*Human Rights Watch*, 19 January 2016) <www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations-palestinian> accessed 17 January 2020 (Occupation, Inc.); 'Israeli Law and Banking in West Bank Settlements' (*Human Rights Watch*, 12 September 2017) <www.hrw.org/news/2017/09/12/israeli-law-and-banking-west-bank-settlements> accessed 17 January 2020; 'Bankrolling Abuse: Israeli Banks in West Bank Settlements' (*Human Rights Watch*, 29 May 2018) <https://www.hrw.org/report/2018/05/29/bankrolling-abuse/israeli-banks-west-bank-settlements> accessed 17 January 2020.

32 See 'Destination Occupation: Digital Tourism and Israel's Illegal Settlements in the Occupied Palestinian Territories' (*Amnesty International*, 2019) <www.amnesty.org/en/latest/campaigns/2019/01/destination-occupation-digital-tourism-israel-illegal-settlements/> accessed 17 January 2020 (Destination Occupation) and Amnesty International UK, 'Think Twice: Can Companies Do Business with Israeli Settlements in the Occupied Palestinian Territories While Respecting Human Rights?' (*Amnesty International UK*, 2019) <www.amnesty.org.uk/files/2019-03/Think%20Twice%20report.pdf?BrN9N0VX3RkzTJROuKYC46LE43hCPtTu=> accessed 17 January 2020 (Think Twice).

33 References to the UNGPs are ubiquitous; for examples see 'Occupation, Inc.' (n 31) 20; 'Think Twice' (n 32) 5–6; 'The Unsettling Business' (n 29) 12; Kuepper and Warmerdam (n 30) 3.

34 'Occupation, Inc.' (n 31) 2.

35 Ibid.

Similarly, many other CSOs[36] and academics[37] maintain that any economic involvement in the Israeli settlement runs contrary to the business responsibility to respect human rights and calls for immediate termination of these activities.

While CSOs have the tendency in their publications to inflate the risks of civil litigation or criminal pursuits faced by corporations economically involved with the Israeli settlement,[38] there are to date no known examples of successful civil liability cases or criminal investigations.[39] It is true, however, that some businesses have decided to put an end to their activities, or to cut their financial ties with companies active, in the Israeli settlements.[40] These decisions have often been the result of the mobilisation of civil society and of public campaigns of naming and shaming in which litigation strategies might play a key

36 See 'Destiny Occupation' (n 32) 8

> Any basic preliminary risk assessment by the companies would reveal that any business activity in or with settlements would unavoidably contribute to sustaining an illegal situation, as well as a regime that is inherently discriminatory and abusive of the human rights of Palestinians.

and 'Think Twice' (n 32) 25

> Regardless of the human rights impacts of specific activities, virtually all business activity in the Israeli settlements, no matter how everyday it seems, goes to support a system of abuse that is systematic, widespread and severe. This makes it impossible to determine how any business activity in or connected with the settlements can take place without contributing, at least indirectly, to adverse human rights impacts.

37 Yaël Ronen, 'Responsibility of Businesses Involved in the Israeli Settlements in the West Bank' (Research Paper No. 02-15, International Law Forum research paper series 2015) 36 ['These suggest that any business operating in the settlements can be viewed as beneficially complicit in the violations of human rights, since the settlements enterprise is inextricably dependent on violations of rights']. Azarova (n 6) 197

> The fact that the violations in question are integral to the business environment in the settlements means that businesses must abstain from undertaking activities in such contexts to guarantee their ability to align their operations with their responsibilities under the UNGP.

38 See for example 'Think Twice' (n 32) 27, 36.

39 Well-known examples of failed attempts include:

- the Veolia case before the French courts; see Valentina Azarova, 'Backtracking on Responsibility: French Court Absolves Veolia for Unlawful Railway Construction in Occupied Territory' (*Rights as Usual*, 1 May 2013) <https://rightsasusual.com/?p=414> accessed 17 January 2020;
- the *Bil'in v. Green Park International and Green Mount International* case dismissed on the ground of *forum non conveniens* by the Superior Court of Quebec; see the page dedicated to the case on the International Crimes Database at 'Bil'in v. Green Park International and Green Mount International' (*International Crimes Database*) <www.internationalcrimesdatabase.org/Case/938/Bil%27in-v-Green-Park/> accessed 17 January 2020;
- the *Corrie v. Caterpillar* case was dismissed by the Ninth Circuit (503 F.3d 974 (9th Cir 2007)) under the political question doctrine;
- and the decision of the Dutch prosecutor to stop its criminal investigation into Riwal for its contribution to the building of the wall; see Farah and Abdallah (n 6) 21–22.

40 For a recent list of businesses having divested from the settlements, see 'Think Twice' (n 32) 30–33.

supportive role.[41] Nevertheless, these instances remain quite isolated and many companies targeted have instead continued to do business with the settlements. Furthermore, from the side of those hoping to trigger a stronger responsibility of businesses for their economic dealings in the settlements, high hopes were vested in the preparation by the Office of the United Nations High Commissioner for Human Rights (OHCHR) of a specific database of business enterprises that have directly and indirectly enabled, facilitated and profited from the construction and growth of the settlements.[42] This database was requested by the HRC in its 2016 resolution 31/36.[43] Yet, the release of the database has been systematically delayed in the face of strong opposition by the United States in particular.[44]

Since the unanimous adoption of the UNGPs in 2011, we have witnessed a shift by a number of actors towards targeting companies involved economically in the Israeli settlements. This move is grounded in a systematic reference to the responsibility to respect human rights enshrined in the second pillar of the UNGPs. Yet, its success has been relative, to date only few of the companies targeted have ceased their activities in the settlements. Nonetheless, as discussed in the next section, it is also the frame that HRW decided to adopt in its clash against FIFA over the presence of clubs affiliated to the IFA in the Israeli settlements.

### *1.2 Framing football activity in Israeli settlements in business and human rights terms: Human Rights Watch's case against FIFA*

The question of the legality of the activity of Israeli football clubs located in settlements situated in the OPT took a public turn in September 2016 with a letter signed by 60 members of the European Parliament urging FIFA to 'rule that settlement clubs either fully relocate within Israel's internationally recognised

41 It is even presented as the 'most successful avenue for corporate responsibilisation'; see Mary Martin, 'Missing the Train. International Governance Gaps and the Jerusalem Light Railway' [2018] 4 *Global Affairs* 101, 105.

42 See the latest report of February 2018 by the United Nations High Commissioner for Human Rights on the database:

> Database of all business enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem.

(2018) UN Doc A/HRC/37/39. In general on the database, see Azarova (n 6).

43 See 'Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan' (2016) UN Doc A/HRC/RES/31/36, para 17.

44 Several CSOs released a critical joint statement on 1 October 2019, 'Continued Delay of the UN Database by the UN High Commissioner for Human Rights, Unfounded and Unacceptable' (*Human Rights Watch*, 1 October 2019) <www.hrw.org/news/2019/10/01/joint-statement-continued-delay-un-database-un-high-commissioner-human-rights> accessed 17 January 2020. See also Nick Cumming-Bruce, 'Clash over Israeli Settlements Has a New Front: A Delayed U.N. Report' (*The New York Times*, 5 March 2019) <www.nytimes.com/2019/03/05/world/middleeast/israel-united-nations-boycottcompanies.html> accessed 17 January 2020.

borders or are excluded from the Israeli Football Association'.[45] HRW's direct involvement in the dispute started shortly after with the release of a report on 25 September 2016, entitled 'Israel/Palestine: FIFA Sponsoring Games on Seized Land'.[46] The report documented the existence of six clubs, members of IFA, geographically located in Israeli settlements in the OPT. The six clubs being:

- Maccabi Ariel indoor (futsal) football club (Moadon Kaduregel Ulamot Maccabi Ariel), fielding an adult men's team in Ariel, upper league (indoor), near Salfit.
- Ariel municipal football club (Moadon Kaduregel Ironi Ariel), fielding an adult men's team in League C in Ariel.
- Beitar Givat Ze'ev Shabi, fielding an adult men's team in Givat Ze'ev, League B, near Ramallah.
- Beitar Ma'aleh Adomim, fielding an adult men's team in Ma'aleh Adumim, League B, outside Jerusalem.
- Hapo'el Oranit, fielding an adult men's team in Oranit, League C, across the Green Line from the Israeli city of Rosh Haayin.
- Hapo'el Jordan Valley (Hapo'el Bik'at Hayarden), fielding an adult men's team that plays its games in the West Bank settlement of Tomer and trains in Einat, inside Israel. The playing field in the settlement of Oranit is also listed as an official home field.

It claimed that by 'allowing the IFA to hold matches inside settlements, FIFA is engaging in business activity that supports Israeli settlements'. More specifically, HRW's investigation exposed that the football pitches used by the six clubs were built on land illegally taken from the Palestinians. It also concluded that the IFA was engaging in business activity in the settlement through the provision of employment and recreational services to the settlers. In doing so, it is argued that the IFA is supporting the economic viability of the settlement and is therefore 'propping up a system that exists through serious human rights violations'. The six clubs play in the lowest three leagues (A, B and C) of Israeli football, which are considered semi-professional. They are getting direct and indirect economic support from the relevant municipalities in the OPT, the IFA and the Israeli public lottery and provide services to the local population. Some of the clubs have an official purpose to promote the settlements by providing leisure activities

45 Ori Lewis, 'European MPs Call for FIFA to Act against Israeli Settlement Soccer Clubs' (*Reuters*, 9 September 2016) <www.reuters.com/article/us-israel-palestinians-soccer/european-mps-call-for-fifa-to-act-against-israeli-settlement-soccer-clubs-idUSKCN11F1PX> accessed 17 January 2020.

46 'Israel/Palestine: FIFA Sponsoring Games on Seized Land' (*Human Rights Watch*, 25 September 2016) <www.hrw.org/news/2016/09/25/israel/palestine-fifa-sponsoring-games-seized-land>. As the report is only available as a webpage, all quotations of the report in this section are made to the online page.

in order to attract new residents. Therefore, HRW believes they are 'contributing to the further transfer of Israeli civilians into the West Bank'. The clubs also employ coaches and provide compensation to some of the players of their top teams. These economic benefits are liable to making settlements 'a more attractive place to live by providing supplementary income close to home'. The main tenet of HRW's argument is that the settlements clubs are intimately connected to illegal grabbing of Palestinian land by Israeli settlers and are as well instrumental in maintaining the socio-economic attractiveness of the settlements.

HRW attributed IFA's decisions to FIFA based on the operation and structure of the football governance pyramid, as it considered that the work of the six clubs feeds into the training of Israeli players and, in turn, some of these players compete in international competitions from which FIFA derives considerable revenues.[47] The report claims that the games played by the six clubs are 'sponsored by FIFA' in contradiction with 'the commitment FIFA recently renewed, to respect human rights in its business activities'. The core demand of HRW being that FIFA 'require its affiliate, the Israel Football Association, which is conducting business in unlawful settlements that are off-limits to Palestinians, to move all FIFA-sanctioned games and activities inside Israel'. HRW continued to put pressure on FIFA along the slow process leading to the final resolution of this dispute,[48] but its arguments were mostly met with silence and failed to significantly sway the final decision of the FIFA Council. In the end, while HRW considered that this issue was 'not merely a dispute between national associations over the interpretation of FIFA rules', in practice it did play out primarily under FIFA law.

47 In other words:

> The clubs are an integral part of the Israeli football industry, which is in turn an integral part of the European and international football industry. While the settlement clubs play in the lower leagues, club managers told Human Rights Watch that some players work themselves up to the top two Israeli professional leagues. The settlement teams thus act as feeders for teams in the upper Israeli leagues, which compete in Europe and beyond. The professional leagues compete regionally and internationally and provide revenues to FIFA, UEFA, and the IFA in the form of ticket sales, broadcasting rights, and team promotional items. Even when the clubs play with other IFA clubs, they do so as part of FIFA and UEFA, promoting the professional football industry within Israel and beyond, including by building and maintaining a fan base of people who buy tickets, watch televised games and buy licensed football paraphernalia – all of which provides revenues to FIFA and UEFA.

48 See Letter from Sari Bashi to Gianni Infantino and Fatma Samoura (5 January 2017) <www.al-monitor.com/pulse/files/live/sites/almonitor/files/documents/2017/hrw_letter_fifa_settlements.pdf>. See as well Sari Bashi, 'FIFA Must Take Strong Stance against Israeli Settlement Clubs, 10 January 2017' (*Human Rights Watch*, 10 January 2017) <https://www.hrw.org/news/2017/01/10/fifa-must-take-strong-stance-against-israeli-settlement-clubs> accessed 17 January 2020 and 'FIFA: Delay of Israeli Settlement Club Decision Sets Back Reform' (*Human Rights Watch*, 11 May 2017) <https://www.hrw.org/news/2017/05/11/fifa-delay-israeli-settlement-club-decision-sets-back-reform> accessed 17 January 2020.

## 2 Litigating the case under FIFA law: history of a failed attempt

FIFA membership has long been perceived as a symbolic achievement for Palestinians, a source of nationalist pride and consciousness, which has served as a transnational platform to showcase their identity and legitimise their quest for an independent and sovereign state.[49] It is, thus, quite natural that FIFA became a relevant political space to pursue the struggle against Israel's occupation. Hence, while HRW framed the case as a human rights issue and attempted to appeal to FIFA's human rights commitments to encourage it to sever the ties between the six football clubs and the IFA, the PFA decided to follow a different legal strategy in order to attain the same goal. It worked inside FIFA to get the organisation to recognise that the IFA was violating Article 72(2) of the FIFA Statutes. This section aims to explicate the legal arguments put forward under this strategy and to retrace the procedural steps followed by the PFA's attempt up to the CAS award of July 2018, which put an end to the PFA's hopes.

### *2.1 Drawing borders under FIFA law: the case against IFA clubs located in Israeli settlements*

The first section discussed the growing awareness of – and advocacy against – the economic activities of corporations connected to Israeli settlements in the OPT. The FIFA case, however, while being also framed along those lines by HRW, unfolded primarily under an altogether different legal reference point: FIFA law. Indeed, the PFA primarily claimed that the IFA was noncompliant with Article 72(2) FIFA Statutes (edition 2016), which provides that 'Member associations and their clubs may not play on the territory of another member association without the latter's approval'. Hence, the claim advanced by the PFA, and supported by a lengthy expert opinion provided by the German Professor Andreas Zimmermann,[50] was that by engaging in football activities in settlements located in the OPT, the six clubs affiliated with the IFA were violating Article 72(2) FIFA Statutes, as the PFA's territory was deemed to cover the internationally recognised territory of a Palestinian state. It was claimed that the

49 Duerr (n 4).

50 Andreas Zimmerman, 'Legal Status of Israeli Football Clubs Located in the Occupied Palestinian Territory and Ensuing Legal Consequences for FIFA' (Diakonia) <www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/expert-opinions/legal-status-of-israeli-football-clubs-located-in-the-occupied-palestinian-territory-and-ensuing-legal-consequences-for-fifa.pdf> accessed 17 January 2020. See as well his two blogs, Andreas Zimmerman, 'Palestine v. Israel: 1:0? Palestine, Israel and FIFA: What Are the Laws of the Game? Part I' (*EJIL:Talk!*, 24 June 2015) <www.ejiltalk.org/palestine-v-israel-10-palestine-israel-and-fifa-what-are-the-laws-of-the-game-part-i/> accessed 17 January 2020 and Andreas Zimmerman, 'Palestine v. Israel: 1:0? Palestine, Israel and FIFA: What Are the Laws of the Game? Part I' (*EJIL:Talk!*, 25 June 2015) <https://www.ejiltalk.org/palestine-v-israel-1-0-palestine-israel-and-fifa-what-are-the-laws-of-the-game-part-ii/> accessed 17 January 2020.

concept of 'territory' used in Article 72(2) FIFA Statutes 'follows the public international law understanding'.[51] In particular, reference was made to the case *Football Association of Serbia v. UEFA* of the CAS and its finding that 'whatever constitutes an independent state or country within the meaning of public international law should be regarded as a "territory" eligible for membership according to Art. 5(1) UEFA Statutes'.[52] Zimmerman suggested that this interpretation was aimed at aligning UEFA's rules with the understanding of the notion of 'territory' adopted by FIFA and the International Olympic Committee (IOC) and that all three organisations have a 'common understanding following the international law definition of "territory"'.[53] Furthermore, he argued that there is 'no reason why this approach, applied by the CAS for admission purposes, should not also govern other rules, such as, in particular, Art. 72, para. 2 FIFA Statutes with its usage of the international law terminus technicus of "territory"'.[54] Thus, he concluded that 'CAS jurisprudence and organizational practice therefore establish that "territory" in terms of Art. 72, para. 2 FIFA Statutes denotes "territory" as recognized by the international community for purposes of international law'.[55] Hence, he deduced that the fact that Israeli settlement clubs 'have played and continue to play on occupied Palestinian territory under the auspices of the IFA without approval of the PFA therefore violates the right of the PFA under Art. 72, para. 2 FIFA Statutes'.[56] This view was not uncontested. Kontorovich argued that for FIFA 'territory, as is often the case in international texts, means jurisdiction' and that it 'clearly separates any question of sovereign statehood and territory from FIFA membership by not requiring that member federations be recognized states'.[57]

At that point, the case was shaping up as one that would raise fundamental questions as to the definition of the territory over which national football associations are competent to rule (and to exclude other associations to trespass

51 Ibid., 15. Referring to Franck Latty, *La Lex Sportiva: Recherche Sur Le Droit Transnational* (Martinus Nijhoff Publishers 2007) 682.

52 CAS 2016/A/4602, *Football Association of Serbia v. UEFA*, Award of 23 January 2017, para 123.

53 Zimmerman (n 50) 16. More broadly on these questions see Latty (n 51) 681–683. Specifically on the IOC's approach to territory, see Ryan Gauthier, *The International Olympic Committee, Law, and Accountability* (Routledge 2017) 56 and Jean-Loup Chappelet and Brenda Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The Governance of World Sport* (Routledge 2008) 50. Reflecting on the power of the IOC in the 'social construction of national sovereignty', see Byron Peacock, "A Virtual World Government unto Itself": Uncovering the Rational-Legal Authority of the IOC in World Politics' [2010] 19 *Olympika* 41.

54 Zimmerman (n 50) 16.

55 Zimmerman (n 50) 18.

56 Zimmerman (n 50) 19.

57 Eugene Kontorovich, 'The Palestinians' Unsporting and Illegal 'Football War' against Israel' (*The Washington Post*, 26 September 2016) <www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/26/the-palestinians-unsporting-and-illegal-football-war-against-israel/> accessed 17 January 2020.

on). Unfortunately, in the end, as we will see, the case failed entirely to live up to the arguments that were advanced. While this was the primary argument put forward by the PFA in this dispute, a subsidiary argument was based on the then newly introduced Article 3 FIFA Statutes, providing that FIFA 'is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights'. In line with HRW's business and human rights case, it was argued that FIFA violates this commitment by aiding and abetting 'the overall settlement enterprise which in turn de facto deprives Palestinians of their internationally recognized territory, something that is essential for realizing their right to self-determination'.[58] Yet, as we will see, this line of reasoning played an even more limited role in the unfolding of the case within FIFA and later at the CAS.

### *2.2 Saga of a failure: how the PFA tried and failed to get the IFA sanctioned under FIFA law*

As early as 2013, the PFA started to complain about various obstacles posed by Israel to the free travel of its members and about the location of a number of clubs affiliated to the IFA in Israeli settlements in the OPTs. This led to the creation in 2013 of a first task force led by the then President of FIFA, Joseph Blatter, but despite a number of meetings it failed to deliver a compromise and the dispute escalated with the introduction of a request by the PFA that the FIFA Congress sanction the IFA.[59] From thereon, the dispute took a more formal turn, ending with an award of the CAS rejecting all of the PFA's claims.

#### *2.2.1 Episode 1: The birth of the FIFA Monitoring Committee Israel-Palestine in 2015*

During the infamous 65th FIFA Congress of 28–29 May 2015, the member associations of FIFA voted to create the FIFA Monitoring Committee Israel-Palestine to monitor the situation and seek a resolution of certain issues between the IFA and PFA, among them: (i) the 'Territory Obstruction Issue', i.e. the movement of Palestinian football players, officials and equipment within, into and out of territories defined by several UN resolutions as 'Occupied Territories', and (ii) the 'Israeli Clubs Issue', i.e. the jurisdiction over five (later six) Israeli amateur clubs located in Israeli settlements within the OPT and playing in IFA-sanctioned championships.[60] The Committee was structured as a tripartite working group chaired by a FIFA representative, the former South African

58 Zimmerman (n 50) 23–24.

59 'Palestinians Seeking FIFA Sanctions against Israel' (*Haaretz*, 13 May 2014) <www.haaretz.com/israel-news/sports/palestinians-seek-fifa-sanctions-against-israel-1.5248197> accessed 17 January 2020.

60 CAS 2017/A/5166 & 5405, *Palestine Football Association v. Fédération Internationale de Football Association (FIFA)*, Award of 9 July 2018, para 6.

minister Tokyo Sexwale, and composed of delegates from both the IFA and the PFA.[61] The mandate of the committee was extended at the 66th FIFA Congress in May 2016. In the context of his mandate as chair of the Committee, Sexwale requested and received input from the UN on the question with a letter from Wilfried Lemke, then UN special adviser on sport for development and peace, who confirmed that he considered the six settlements clubs to be playing on Palestinian territory.[62] In early 2017 it became clear that the Committee had failed to come to an agreement and the PFA sent a first request to the FIFA Council for it to decide the matter, while the Chair of the Committee announced that he would provide his own final report in February 2017.[63] Shortly thereafter, in March 2017, the PFA decided to table a 'proposal to be voted by the Congress in order to recognise the PFA's entitlement to all its right as described in Article 13 of FIFA Statutes'.[64]

### *2.2.2 Episode 2: The failed vote at the 67th FIFA Congress*

While Sexwale was still finalising his report on the work of the Committee, including his recommendations for the FIFA Council, the PFA decided to bypass the Council and to request a vote of the FIFA Congress on the matter. The PFA proposed in particular that the FIFA Congress:

> Officially recognise PFA's rights as FIFA Member to run its football activities in accordance with the rules established in article 72.2 of FIFA Statutes as well as under the principle assumed by FIFA in the articles 3 and 4 of its Statutes to request the FIFA Council to propose and/or adopt disciplinary measures – as described in articles 16 and/or 17 of FIFA Statutes – against the Israeli Football Association for their responsibility with regards to the activities of at least 6 of its clubs in the internationally recognized territory of PFA.[65]

The proposal was ultimately included by FIFA onto the agenda of the 67th FIFA Congress as item 14.3 despite the protest of the IFA, which demanded that it be withdrawn. Nevertheless, the FIFA Council considered that it was 'premature' for the FIFA Congress to get involved and therefore decided to put a motion up for vote at the 67th FIFA Congress that read:

61 See 'FIFA Monitoring Committee Israel-Palestine holds first meeting in Zurich' (*FIFA*, 26 August 2015) <www.fifa.com/about-fifa/who-we-are/news/fifa-monitoring-committee-israel-palestine-holds-first-meeting-in-zuri-2673272> accessed 17 January 2020.

62 Peter Beaumont, 'UN Sets Out Position on Israeli Settlement Football Clubs in Letter to FIFA' (*The Guardian*, 11 October 2016) <www.theguardian.com/world/2016/oct/11/un-sets-out-position-on-israeli-settlement-clubs-letter-fifa> accessed 17 January 2020.

63 CAS 2017/A/5166 & 5405, *Palestine Football Association v. Fédération Internationale de Football Association (FIFA)*, Award of 9 July 2018, paras 6–7.

64 CAS 2017/A/5166 & 5405 (n 60) para 9.

65 Ibid.

> Considering that the matter is not a Congress competence but a Council competence, that a consolidated report of the monitoring committee is not yet ready, and that more time is needed to evaluate the situation and to take a decision, the Council proposes to the Congress to give time to the Council to take a decision before end of March 2018.

During the Congress, on 10 and 11 May 2017, the PFA President, Jibril Rajoub, took the floor to defend the PFA's proposal. He insisted that '[w]e are not looking for the suspension or expulsion, but rather the full recognition of our rights including that no Israeli clubs play in our territory as established in Article 72.2 and Article 3 of the FIFA Statutes'.[66] He argued that no other federation would

> accept that clubs from another association play in our territory and this is exactly what we are looking for: to stop all football and football-related activities run by IFA in Palestinian internationally recognized territories which was approved recently last December in the Security Council 2334.[67]

And proposed that IFA be given 'until the end of this season or a maximum of 6 months to disengage of all its football and football-related activities in Palestinian land or face the consequences of such an illegality'.[68] In other words, he urged the FIFA members to allow him 'to develop the game within my recognized borders and for the Israelis to develop the game in their internationally recognized borders according to the statutes of FIFA'.[69] The speech was followed by a reply from the IFA President who denounced the position of the PFA as political and insisted that the FIFA Congress 'did not have the power to establish political borders'.[70] Then the FIFA President took the word to urge the FIFA Congress to vote in favour of the motion that would delegate the matter to the FIFA Council and lead to the withdrawal of the PFA's own motion. The motion of the FIFA Council was endorsed by an overwhelming majority of FIFA's members (73%). This decision of the Congress was immediately appealed by the PFA to the CAS.

### *2.2.3 Episode 3: The inconclusive Sexwale Report*

In the meantime, Tokyo Sexwale managed to finalise the overdue report stemming from the work of the Monitoring Committee. After much criticism of his tardiness,[71] and a considerable amount of confusion on the nature of the interim

66 Ibid., para 14.
67 Ibid., para 16.
68 Ibid.
69 Ibid.
70 Ibid., para 17.
71 Sari Bashi, 'Tokyo Sexwale Should Answer for Delays Blamed for More Soccer on Stolen Land' (*Daily Maverick*, 23 May 2017) <https://www.hrw.org/news/2017/05/23/tokyo-sexwale-should-answer-delays-blamed-more-soccer-stolen-land> accessed 17 January 2020.

drafts communicated to the FIFA Council as well as regarding the process followed in the finalisation of the report,[72] Sexwale officially provided his final report to the FIFA Council on 27 October 2017.[73] From the outset it recognises that it would be 'misplaced to expect that FIFA, a football organisation, should provide a solution where some of the best minds have failed'.[74] Yet, it also states that FIFA as a 'citizen of the world' should not be 'unmindful of its global obligations in terms of international law and relevant agreed-upon international protocols including its own statutes with regards to the promotion and development of football'.[75] Sexwale then suggested three options to the FIFA Council, without providing a clear indication of his own preference:

- 'Option 1: Maintenance of the current Status Quo: The status quo remains in that the Israel Football Association continues to administer football on the territories under discussion (the settlements). Under this option it implies that there should be no action by FIFA until the Oslo discussions -or similar negotiations- involving facilitated or direct talks between the parties have resolved the Israel-Palestine conflict.
- Option 2: FIFA warns IFA — Yellow Card: In line with article 72.2 of the FIFA Statues, which proclaim that member associations and their clubs may not play on the territory of another member association without the latter´s approval, the IFA is given a warning by FIFA (yellow card) to rectify this issue by desisting to administer football on the territories concerned within a minimum period of six months. Failure to find a resolution within this period shall mean that the matter will revert to the FIFA Council for final decision-making.
- Option 3: Discussions should be encouraged between the IFA and the PFA: Continued discussions between the IFA and the PFA should be encouraged should be based (sic) purely on football issues aimed at finding accommodation on how to agree amongst themselves'.

The report concluded by calling on FIFA to 'resist any temptation to be caught in any political conflict such as the one between the Israelis and the Palestinians' and to 'look essentially after the interest of football'.[76] Adding, in a final section, that 'FIFA must be aware of, and sensitive to, its obligations under international

72 Liam Morgan, 'FIFA Monitoring Committee Hold Meeting as Sexwale Presents Israel-Palestine Report' (*Inside the Games*, 23 March 2017) <www.insidethegames.biz/articles/1048454/fifa-monitoring-committee-hold-meeting-as-sexwale-presents-israelpalestine-report> accessed 17 January 2020.

73 The full text of the Sexwale report is reproduced at 'Full text of Tokyo Sexwale Chairman's report to FIFA on Palestine-Israel' (*Medium*, 28 October 2017) <https://medium.com/@daoudkuttab/full-text-of-tokyo-sexwale-chairmans-report-to-fifa-on-palestine-israel-53c27c909a5b> accessed 17 January 2020.

74 Ibid., para 1.4.

75 Ibid., para 1.9.

76 Ibid., para 6.3.

law' and insisting that 'the FIFA leadership cannot any longer avoid is taking a decision on this matter'.[77] The ball was now firmly in the camp of the FIFA Council, which decided to uphold the status quo and to put an abrupt end to the dispute.

### *2.2.4 Episode 4: The FIFA Council washes its hands off*

After the receipt of the final Sexwale Report, the FIFA Council had to take a decision and so it did on 27 October 2017. Prior to this decision, the FIFA Human Rights Advisory Board had urged the Council to 'fully consider international human rights and humanitarian law standards' in reaching its final decision.[78] Whether this call for 'active consideration of these standards' was heard is rather doubtful. Indeed, the FIFA Council took

> note of the documents adopted by international governmental bodies concerning the relationship between Israel and Palestine – such as United Nations Security Council Resolution 2334, which comprises recommendations without sanctions – but has decided that it should not take any position on their contents.[79]

And acknowledged

> that the current situation is, for reasons that have nothing to do with football, characterised by an exceptional complexity and sensitivity and by certain de facto circumstances that can neither be ignored nor changed unilaterally by non-governmental organisations such as FIFA.[80]

Thus, as 'the final status of the West Bank territories is the concern of the competent international public law authorities', it decided 'that FIFA, in line with the general principle established in its Statutes, must remain neutral with regard to political matters'.[81] Consequently, the FIFA Council decided to 'refrain from imposing any sanctions or other measures on either the Israel FA or the Palestinian FA, as well as from requesting any other FIFA body to do so' and declared the matter closed 'until the legal and/or de facto framework has changed'. This put an abrupt end to the PFA's attempt to see the IFA sanctioned by FIFA for

77 Ibid., para 6.4.

78 First Report FIFA Human Rights Advisory Board: 'Report by the FIFA Human Rights Advisory Board' (FIFA 2017) <https://resources.fifa.com/mm/document/affederation/footballgovernance/02/91/92/38/fifahumanrightsenweb_neutral.pdf> accessed 17 January 2020.

79 'FIFA Council statement on the final report by the FIFA Monitoring Committee Israel-Palestine' (*FIFA*, 27 October 2017) <https://www.fifa.com/about-fifa/who-we-are/news/fifa-council-statement-on-the-final-report-by-the-fifa-monitoring-comm-2917741> accessed 17 January 2020.

80 Ibid.

81 Ibid.

the activity of the six football clubs located in the Israeli settlements. In taking this decision, the FIFA Council used the trope of its own political neutrality to decline to intervene in the dispute. Yet, by doing so it also implicitly supported the *de facto* situation on the ground and, therefore, seemed to be inevitably taking a side in a lively political dispute. Moreover, the Council also declined to pronounce itself on the fundamental question raised by the PFA under FIFA law of the definition of the territory over which it has jurisdiction in the sense of Article 72(2) FIFA Statutes. Unsurprisingly, the PFA decided to challenge this decision to the CAS as well.

### *2.2.5 Episode 5: The CAS award*

The CAS, the arbitral body seated in Lausanne which is competent to hear appeals against decisions taken by international sports governing bodies, decided to join both PFA appeals against the decisions of the FIFA Congress and of the FIFA Council into one procedure, which led ultimately to a single decision on 9 July 2018.[82] The CAS Panel included three arbitrators, one of them being a well-known international law scholar, Prof. Philippe Sands QC, whereas the two others were arbitrators well-versed in sports matters but with little experience of public international law. The core merits of the award were structured around two separate sections dedicated to the respective challenges against the separate decisions of the FIFA Congress and the FIFA Council.

The first part of the award is devoted to the decision of the FIFA Congress to deny a vote on the PFA's proposal and to delegate to the FIFA Council the competence to take a decision on the matter. The CAS Panel found that as

> the supreme body of FIFA […] which manifests by democratic vote the collective will of all of the FIFA members, the Panel considers that the Congress was well within its rights to take such action [e.g. to delegate the decision to the FIFA Council].[83]

It also considered that the 'FIFA Congress was also within its rights in acting to postpone the PFA's proposal'.[84] More specifically, the Panel debated whether the motion proposed by the FIFA President and adopted by the FIFA Congress was procedural or substantive in nature and concluded that it 'is properly to be treated as being a procedural motion'.[85] Furthermore, it added, based on the information provided by the parties' Swiss law experts, that

> whatever the FIFA Congress decides to do with an item on the agenda (e.g. accept, dismiss, delegate, postpone it, etc.) and to whatever extent it elects

82 CAS 2017/A/5166 & 5405 (n 60).
83 Ibid., para 72.
84 Ibid.
85 Ibid., para 81.

> to discuss it, the Congress is free to make that determination for itself '.[86] Thus, it found 'that the Motion, being a procedural motion, was presented and acted upon without violating any FIFA rules.[87]

The CAS Panel also refused to assess whether the decision complied with FIFA's human rights commitment enshrined in Article 3 FIFA Statutes as 'the argument goes to the *substance* of the PFA's proposal, which is not, on the approach taken by the Appellant, a matter that is before the Panel in the present arbitration'.[88] On this first leg of the case, the arbitrators unanimously concluded that the FIFA Congress could, based on the FIFA Statutes, legitimately decide to delegate the final decision on the substance of the PFA's motion to the FIFA Council. Consequently, the PFA could not against the will of the FIFA Congress force a vote on its proposal.

In the second part of the award, the CAS Panel dealt with the second appeal directed against the final decision of the FIFA Council. The dispute centred on the impact of the FIFA Council's decision. During the course of the proceedings FIFA clarified that despite the broad wording of the press release of the FIFA Council, the decision was confined to the FIFA Council only. The CAS Panel considered that this statement 'commits the Respondent [FIFA] and may be relied upon by the Appellant [PFA] in the future'.[89] More precisely, the Panel found that the 'FIFA Council took the Second Appealed Decision for itself only and, as such, its decision only concerns the Council and does not limit the other FIFA bodies, such as the FIFA Congress or disciplinary bodies'.[90] Consequently, 'the PFA […] remains free to draw up proposals for inclusion in a future FIFA Congress pursuant to Article 13(b) of the FIFA Statutes'.[91] In other words, the FIFA Council's decision appeared 'more in the nature of a policy statement than a decision that is intended to legally bind the Council for the future'.[92] Moreover, the arbitrators also concluded that 'by deciding not to act, the FIFA Council exercised its discretion in a valid manner under the FIFA Statutes and Swiss law'.[93] In other words, the CAS Panel was satisfied that the FIFA Council did not exceed its powers in rendering its decision on the legality of the IFA's integration of the six settlements clubs, nor did this decision actually bind other FIFA bodies, including the Congress and FIFA's internal judicial bodies.

This award put a (provisory) final point to the controversy, at least from a FIFA law standpoint, as the PFA declined to challenge the decision before the Swiss Federal Tribunal. It reveals the reluctance of the CAS Panel to review

86 Ibid., para 83.
87 Ibid., para 84.
88 Ibid., para 98.
89 Ibid., para 107.
90 Ibid., para 108.
91 Ibid.
92 Ibid., para 109.
93 Ibid., para 111.

the substance of the decision of the FIFA Council by recognising that it fell in the scope of the Council's margin of discretion. It leaves also a feeling of unfinished business, as the questions raised by the PFA with regard to the definition of its territory remain entirely unanswered. Finally, in light of the overwhelming evidence that Israeli settlements in the OPT constitute and contribute to systematic human rights violations, the refusal to scrutinise the Council's decision on the basis of FIFA's own human rights commitment enshrined in its statutes can only lead to some scepticism with regard to the 'punchy'[94] nature of this commitment.

## 3 Conclusion

This story is primarily one of a failure; the six Israeli clubs at the centre of the dispute are still affiliates of the IFA despite remaining physically located in Israeli settlements nested in the OPT. It exemplifies the difficulties faced by activists and CSOs in constructing human rights responsibilities for businesses (or private associations) outside of the shadow of the law. The unanimous endorsement of the UNGPs in 2011 triggered a clear strategic shift, reflected in other chapters of this book, leading activists to increasingly direct their claims at companies doing business directly or indirectly with Israeli settlements in the OPT. In other words, they 'moved the occupation of the West Bank from an issue of elite international politics and diplomacy and international law, to a narrative of governance and corporate complicity, making this a ground for resistance and activism'.[95] These 'cumulative actions of civil society'[96] have had some success in prompting businesses to divest from Israeli settlements. Yet, many of these accomplishments were premised on context, e.g. the degree of sensitivity of the company concerned to public outrage and the intensity of the negative reaction of the public concerned to the behaviour of that company. In the case of FIFA, despite its relative fragile public image due to its recent corruption scandal and a public backlash linked to the rights of migrant workers on building sites of the 2022 World Cup in Qatar, the question of the six Israeli clubs never triggered widespread public outrage or mobilisation.[97] In retrospect, our case study might provide interesting strategic insights for CSOs endowed with limited resources. When invoking the UNGPs to target a specific company for its activities public support is vital to success; this entails, in turn, that CSOs have to carefully prioritise companies closely and clearly linked to human rights violations of a

94 Ruggie and Sherman (n 8).

95 Martin (n 41) 101.

96 Farah and Abdallah (n 6) 30.

97 An Avaaz petition ('FIFA: Give Israeli Settlements the Red Card' (*Avaaz*) <https://secure.avaaz.org/campaign/en/red_card_occupation_full/> accessed 17 January 2020) did reach more than 150,000 signatures, but the media coverage and public mobilisation around the issue remained fairly limited compared for example to the attention given to the plight of migrant workers in Qatar.

sufficient degree of severity. Whether FIFA's indirect connection to six amateur football clubs, which did not decisively contribute to clearly visible human rights violations but very indirectly supported them, suffices to meet such a strategic threshold is rather questionable and might help explain the failure of HRW to garner sufficient public support to induce FIFA to intervene and trigger a change.[98]

On the one hand, this case study showcases the symbolic power of the UNGPs. Through their unanimous adoption they have shifted the game played around the OPT and opened a new front to resist Israel's settlement policy through the naming and shaming of companies directly or indirectly connected to them. In a way, the UNGPs have generated their own shadow and impacted the social licence on which businesses rely to operate. Whilst they officially should not 'be read as creating new international law obligations',[99] they are in practice used and invoked as if they did by CSOs. However, on the other hand, it also highlights the UNGPs' fundamental limitations, their current dependence on public mobilisation, economic incentives and moral convictions for relevance.[100] As they are not (yet) legally enforceable in courts or translated into forms of civil liability, they are still deprived of a judicial shadow. The litigation risks faced by corporations over their economic activities in the settlements remain in practice negligible. Even in the case of FIFA, which committed publicly to fulfilling its responsibility to respect human rights as provided in the second pillar of the UNGPs, our case study shows the limited 'punch' or bite of this pledge in practice. Concretely, the CAS in its award could easily disregard this commitment and shelter the margin of appreciation of the FIFA Council in this matter. The CAS Panel did not even feel the need to assess whether the FIFA Council decision was compatible with human rights. In other words, if FIFA officials do not take their promise to abide by the UNGPs seriously, based on this decision it seems there is little judicial arm-twisting that will be done by the CAS to force them to do so. Hence, it is mainly through strong extra-legal actions and social mobilisation that the human rights claims raised against the FIFAs of this world can at this point in time be successful. Nevertheless, FIFA's commitment to human rights and more broadly the embrace of the UNGPs provide a fertile terrain to stir up

98 In this regard, it is interesting to note that FIFA on the face of the nature of its activities and its limited and indirect involvement in the settlements would have probably not met the prioritisation criteria outlined by the OHCHR in preparation of its database of businesses active in the settlements. On the operation of the criteria, see Azarova (n 6).

99 'Guiding Principles on Business and Human Rights' (United Nations 2011) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 17 January 2020, 1.

100 Martin (n 41)

> Here we can begin to see the weakness of the UNGPs, for clearly no such means exist to take and enact access to remedy, given the absence of international law jurisdictions, Israel's resistance to the OPT's legal status, the weak or non-existent rights-claiming capacities of Palestinians and Israel's persistence in establishing exceptional forms of control over the West Bank.

public contempt and facilitate the imposition of costs onto corporations linked with the settlements. In order to go beyond such a limited mode of accountability, states will have to legislate to connect more directly a business' contribution to human rights violations through its activities and its civil (or criminal) liability. In this regard, the French law on the *devoir de vigilance* might provide an interesting example for such a regulatory combination.[101]

*In fine*, the transnational legality of Israeli football activity in the settlements remains an open question and the PFA remains free to attempt to raise the issue again in the near future, be it with the FIFA Congress or through an internal complaint with the judicial bodies of FIFA. However, the FIFA Congress has shown its aversion to taking a final decision on this matter and it is likely that FIFA's internal administrative and judicial bodies would decline to pursue a complaint. Still, this could provide another opportunity to bring the matter before the CAS and to urge it to give at least some legal punch to FIFA's human rights commitments.

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# 10 Investment tribunals adjudicating claims relating to occupied territories – curse or blessing?

*Sebastian Wuschka*

## 1 Introduction: investment tribunals and occupied or annexed territories

Historically, the development of the legal protection of what we nowadays call international investments and situations of conflict have always been closely interconnected. Modern investment law is highly influenced by the traditional law on the treatment of aliens, which itself was significantly shaped by the case law of various mixed claims commissions over the last two centuries.[1] Also the very first International Centre for Settlement of Investment Disputes (ICSID) arbitration based on a bilateral investment treaty (BIT), *AAPL v. Sri Lanka*, concerned the operation of Sri Lankan security forces during an internal conflict.[2] While armed conflicts did not play a prominent role in investment arbitration for the 20 years following the 1990 *AAPL* award, this situation has now changed. Arbitral tribunals have, over the last years, again begun to render awards concerning conflict scenarios, e.g. with regard to the protection of investments from terrorist attacks in Egypt[3] or from the internal conflicts in Libya.[4]

1 On these, see Rudolf Dolzer, 'Mixed Claims Commissions' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law-Online Edition* (OUP, last updated May 2011).

2 *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, 30 ILM 526.

3 *Ampal-American Israel Corp. et al. v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017.

4 *Cengiz İnşaat Sanayi ve Ticaret A.S. v. Libya*, Award, 3 December 2018, as reported by Investment Arbitration Reporter, 'Armesto-Chaired BIT Tribunal Sees Failure to Protect Turkish Investment, Orders $50+ Mil in New ICC Award; Updates on 6 Other Turkish Investor Claims v. Libya' (3 December 2018) <www.iareporter.com/articles/an-update-on-7-turkish-investor-claims-against-libya/> accessed 18 June 2019; *Way2B ACE v. Libya*, Award, May 2018, as reported by Investment Arbitration Reporter, 'Tribunal Finds that BIT's War-Losses Clause Does Not Exclude Operation of Other BIT Protections (Including Full Protection & Security), but Foreign Investor Fails to Meet Evidentiary Burdens' (8 January 2019) <www.iareporter.com/articles/tribunal-finds-that-bits-war-losses-clause-does-not-exclude-operation-of-other-bit-protections-including-full-protection-security-but-foreign-investor-fails-to-meet-evidentiary-burdens/> accessed 18 June 2019.

Similarly, also situations of occupation and, in particular, the investment claims filed against Russia with regard to its illegal annexation of Crimea in 2014 have further diversified the kind of cases investment tribunals have to deal with.[5] In these cases, the claimants seek to recover damages for alleged expropriations by Russia on the Crimean peninsula after it had established control over the territory. Several of these tribunals have already accepted jurisdiction to hear the cases. A group of tribunals has recently also already reached decisions on the merits, with *inter alia* one awarding USD 159 million to the investors in *Everest Estate et al. v. Russia*[6] and another tribunal awarding USD 1.3 billion to the claimant in *Oschadbank v. Russia*.[7]

These tribunals are the first to address a number of novel issues in investment law and arbitration.[8] For instance, they need to determine whether the territorial scope of the investment treaties relied upon by the claimants can be interpreted to include territory that a state only exercises *de facto* control over, but does not have a *de jure* title to.[9] In doing so, they also need to be mindful of the obligation of non-recognition of illegally acquired territory as a potential jurisdictional obstacle.[10] However, as the jurisdictional decisions that they have so far rendered indicate, the respective tribunals seem comfortable to hear the cases.

The question that arises as a consequence is whether investment arbitration in these circumstances contributes to a resolution of the existing inter-state conflict or rather further freezes that conflict, thereby solidifying the illegal territorial situation. On the one hand, as Russia is entitled to act as respondent in the mentioned arbitrations (even though it, in fact, has for the quite some time refused

5 The cases that were publicly known at the time of writing of this chapter are *Aeroport Belbek and Igor Valerievich Kolomoisky v. Russia*, PCA Case No 2015–07; *PrivatBank and Finilon v. Russia*, PCA Case No 2015–21; *Luzgor et al. v. Russia*, PCA Case No 2015–29; *PJSC Ukrnafta v. Russia*, PCA Case No 2015–34; *Stabil et al. v. Russia*, PCA Case No 2015–35; *Everest Estate et al. v. Russia*, PCA Case No 2015–36; *NJSC Naftogaz of Ukraine et al. v. Russia*, PCA Case No 2017-16; *Oschadbank v. Russia* (case reference not public).

6 See IA Reporter, 'Russia Held Liable in Confidential Award for Expropriation of Hotels, Apartments and Other Crimean Real Estate; Arbitrators Award Approximately $150 million (plus legal costs) for Breach of Ukraine Bilateral Investment Treaty' (9 May 2018) <https://www.iareporter.com/articles/russia-held-liable-in-confidential-award-for-expropriation-of-hotels-apartments-and-other-crimean-real-estate-arbitrators-award-approximately-150-million-plus-legal-costs-for-breach-of-ukraine-bi/> accessed 18 June 2019.

7 IAReporter, 'Russian Federation Is Hit with $1.3 Billion Dollar UNCITRAL Bilateral Investment Treaty Award' (26 November 2018) <https://www.iareporter.com/articles/russia-hit-with-1–3-billion-dollar-in-a-new-uncitral-bilateral-investment-treaty-award/> accessed 18 June 2019.

8 For a broader overview of these issues, see Sebastian Wuschka, 'Investment Claims and Annexation of Territory – Where General International Law and Investment Law Collide?' in Mesut Akbaba and Giancarlo Capurro (eds), *International Challenges in Investment Law and Arbitration* (Routledge 2018) 21–36.

9 On this, see also Richard Happ and Sebastian Wuschka, 'Horror Vacui: Or Why BITs Should Apply to Illegally Annexed Territories' [2016] 33 *Journal of International Arbitration* 245.

10 See below, Section 2.

to do so[11]), it could be argued that any acceptance of such claims by arbitrators constitutes an acknowledgement and thereby a reinforcement of the occupant's claim to territory.[12] On the other hand, *inter alia* since investment law offers a rather rigid enforcement mechanism and direct rights for individuals, I will advance the argument that investment arbitration in such circumstances can operate as one – if not sometimes the only – means to hold the occupant accountable. Further, it can serve the interest of both the individual investors affected but also the international community more generally.

This argument is presented as follows: First, I will very briefly outline the legal challenge investment tribunals face when they are tasked to hear claims with regard to illegally annexed or occupied territories and how the Crimea tribunals have responded to it. At the same time, this will set the scene regarding the bearing their decisions can have on the underlying territorial conflict (Section 2). Second, I will evaluate the potential broader consequences the investment tribunals' decisions might have for the territorial conflict (Section 3), before briefly concluding (Section 4).

## 2 The limited jurisdiction of investment tribunals only over investments 'in the territory' of the respondent state

The question whether or not investment treaties apply to annexed or occupied territory mainly revolves around the respective treaty's territorial scope of application. In this respect, investment treaties conform to the general rule in international law that treaties are limited in their application to the contracting parties' territories.[13] Also the BIT invoked in the Crimea cases, the Russia-Ukraine BIT of 1998,[14] only protects investments in the 'territory' of the respondent state,[15]

11 For quite some time, Russia refused to participate in the arbitral proceedings initiated against it by various investors from 2015 onwards. Yet, it appears to have changed its litigation strategy in response to the various jurisdictional rulings, damages awards and enforcement proceedings in mid-2019. See further on this below, Section 3.3.

12 See, e.g., Charlotte Lülf, 'The Protection of (Foreign) Investment during Belligerent Occupation' in Björnstjern Baade, Linus Mührel and Anton O Petrov (eds), *International Humanitarian Law in Areas of Limited Statehood* (Nomos 2018) 194 (215–216).

13 See Article 29 of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), which reads: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'

14 Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments dated 27 November 1998.

15 See, for instance, Article 1(1): '"Investments" shall denote all kinds of property and intellectual values, which are put in by the investor of one Contracting Party on the territory of the other Contracting Party in conformity with the latter's legislation […].' Further on that topic: Happ and Wuschka (n 9) 251; Peter Tzeng, 'Investments on Disputed Territory: Indispensable Parties and Indispensable Issues' [2017] 14 *Brazilian Journal of International Law* 122, 123.

which renders the classification of annexed Crimea one of the key issues for the tribunals in these cases. If a tribunal considered that annexed land does not form part of the 'territory' of the annexing state under the treaty, it had no jurisdiction.

Naturally, as discussed also by other contributions to this volume, the obligation of non-recognition of situations created by illegal acts, in particular through the use of force,[16] could present an obstacle here.[17] In the words of the UN International Law Commission (ILC), 'it not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.'[18] Most prominently, the UN General Assembly stressed the obligation of non-recognition in its *Friendly Relations Declaration*[19] as well as its *Definition of Aggression*.[20] For the situation in Crimea, it had recourse to the obligation of non-recognition in its Resolution 68/262, when it called upon

> all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol […] and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.[21]

Despite some debate on this issue in scholarly writings,[22] all of the investment tribunals that deal with the Crimea claims appear to have so far avoided addressing the legality of Russia's presence on the peninsula. Instead, they have opted for an interpretation of the BIT requirement of 'territory' that essentially equates

16 The obligation is best reflected in Article 41(2) of the ILC's Articles on State Responsibility, ILC Yearbook 2011, vol. II(2), 31–143, which set out that '[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.' A 'serious breach' within the meaning of Article 40 is therein equated to a violation of *jus cogens*, which the VCLT defines as

> a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
>
> (see Article 53 VCLT)

On non-recognition and *jus cogens* from a conceptual perspective, see also John Dugard, *Recognition and the United Nations* (CUP 1987), 123 *et seq.*

17 For a more elaborate discussion of the obligation of non-recognition and the jurisdiction of investment tribunals, see Wuschka (n 8) 23 *et seq.*

18 'ILC, Report of the International Law Commission on the Work of its Fifty-Third Session' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, 287, para 5.

19 UNGA Res 2734 (XXV) (16 December 1970).

20 UNGA Res 3314 (XXIX) (14 December 1974).

21 UNGA 'Territorial Integrity of Ukraine' (27 March 2014) UN Doc. A/RES/68/262, para 6.

22 Cf. only Tobias Ackermann, 'Investments under Occupation: The Application of Investment Treaties to Occupied Territory' in Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2019), 67–92; Patrick Dumberry, 'Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russian under the Ukraine–Russia BIT' [2018] 9 *Journal of International Dispute Settlement* 506, 508; Happ & Wuschka (n 9); Lülf (n 12); Tzeng (n 15).

it with territory under effective or *de facto* control.[23] None of the relevant decisions on jurisdiction or awards are public as of now. The decisions that were taken in two of these cases, namely *PJSC Ukrnafta v. Russia* and *Stabil et al. v. Russia*, have, however, been challenged before the Swiss Federal Tribunal and their content was therefore revealed in greater detail.[24] In the words of the Swiss Federal Tribunal, the tribunals in these cases have

> outlined in a comprehensible manner that the concept of territory referred to in Article 1(4) of the 1998 BIT is not to be construed in the sense of limiting the territorial scope of the agreement to exclusively include areas over which the respective contracting state exercises sovereignty it is due under international law.[25]

The case before the Swiss Federal Tribunal also illustrates quite well the potential implications of the tribunals' decisions for the Russian-Ukrainian territorial conflict that is at the bottom of the investment disputes. Directly the introductory paragraphs into the facts of the dispute unveil quite incautious formulations by Switzerland's highest court, when it described the claimant's investment in Crimea:

> Between 2003 and 2006, it acquired 16 petrol stations on the Crimean peninsula. In addition, it rented office space in the city of Feodosia, where 30 employees worked. In 2013, the claimant, after having made additional investments, controlled 10% of Crimea's fuel market. *Crimea was part of Ukrainian territory back then.*[26]

23 For reports on these decisions, see e.g. Investment Arbitration Reporter, 'Full Jurisdictional Reasoning Comes to Light in Crimea-related BIT Arbitration vs. Russia' (9 November 2017) <https://www.iareporter.com/articles/full-jurisdictional-reasoning-comes-to-light-in-crimea-related-arbitrationeverest-estate-v-russia/> accessed 18 June 2019; Investment Arbitration Reporter, 'Further Russia Investment Treaty Decisions Uncovered, Offering Broader Window into Arbitrators' Approaches to Crimea Controversy' (17 November 2017) <https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncoveredoffering-broader-window-into-arbitrators-approaches-to-crimea-controversy/> accessed 18 June 2019.

24 Swiss Federal Tribunal, Judgment of 16 October 2018, 4A_396/2017; Judgment of 16 October 2018, 4A_398/2017.

25 Swiss Federal Tribunal (n 24) para 4.3.2.; translation by the author from the German original:

> Das Schiedsgericht hat nachvollziehbar ausgeführt, dass der in Art. 1 Abs. 4 ISA 1998 verwendete Begriff des Territoriums („territory") im Hinblick auf den räumlichen Geltungsbereich des Abkommens nicht in dem Sinne einschränkend auszulegen ist, dass darunter ausschliesslich Gebiete zu verstehen wären, über deren Hoheitsgewalt der jeweilige Vertragsstaat nach völkerrechtlichen Grundsätzen rechtmässig verfügt.

26 Swiss Federal Tribunal (n 24) facts, Section A., translation by the author from the German original:

> Sie erwarb zwischen 2003 und 2006 16 Tankstellen auf der Halbinsel Krim. Zudem mietete sie in der Stadt Feodosia Büroräumlichkeiten, in denen 30 Angestellte arbeiteten. Im Jahre 2013 kontrollierte die Klägerin, nachdem sie weitere Anlagen getätigt hatte, zehn

In the next paragraph, when addressing the change in territorial control that had occurred, the Swiss Federal Tribunal stated:

> The claimant alleges that the Russian Federation […] had taken measures in connection with *the integration of the Crimean peninsula in 2014 – on 21 March 2014*, the treaty of integration was ratified and the law on integration was enacted – concerning the mentioned assets in the Crimea and led to their expropriation.[27]

Without any caveat as to the international legality of the integration of Crimea into the Russian Federation, this section reads as if the court was giving its and thereby Switzerland's blessing to the annexation. Admittedly, the court makes reference to the fact that the legality of the Russian presence in Crimea had not been pronounced upon by the arbitral tribunal[28] in its legal reasoning and also the parties before it had not raised the issue.[29] Nevertheless, a judgment that strictly observes the obligation of non-recognition should have been worded differently.

As this shows, there are several instances in which courts and tribunals that deal with investment claims relating to annexed or occupied territory could arrive at conclusions or make pronouncements that carry at least a perceived effect also for the inter-state conflict over the territory. Not only the investment tribunals themselves but also courts that decide on applications for annulment or enforcement relating to their awards can find themselves in such a situation. As the Crimea example further shows, however, arbitral tribunals are ready to find ways to allow investment claims with regard to illegally annexed or occupied territory to proceed, despite the obligation of non-recognition. At least the Swiss courts have so far also confirmed they accept arbitral jurisdiction in such cases.[30] The question that this approach obviously raises, in particular from

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> Prozent des Treibstoffmarkts der Krim. *Die Krim war damals Teil des ukrainischen Staatsgebiets.* (Emphasis added in both language variants)

27 Swiss Federal Tribunal (n 24) facts, Section A., translation by the author from the German original:

> Die Klägerin behauptet, die Russische Föderation […] habe im Rahmen *der Eingliederung der Krim-Halbinsel im Jahre 2014* – am 21. März 2014 wurde der Eingliederungsvertrag ratifiziert und das Integrationsgesetz erlassen – Massnahmen getroffen, welche die erwähnten Vermögenswerte auf der Krim betrafen und zu deren Enteignung führten. (Emphasis added in both language variants)

28 Swiss Federal Tribunal (n 24) paras 4.2. and 4.3.2.

29 Swiss Federal Tribunal (n 24) para 4.3.2.

30 It should be noted that further challenges to decisions on jurisdiction or awards in the Crimean cases are pending in France and the Netherlands. In the *Everest Estate* annulment proceedings, taking place in the Netherlands, a court in The Hague recently rejected to stay the enforcement of the award since Russia's annulment application *prima facie* did not reach the required threshold of probability of success; Gerechtshof Den Haag, *Russia v. Everest Estate et al.*, Judgment of 11 June 2019, ECLI:NL:GHDHA:2019:1452

a policy perspective, is what implications a decision by an investment tribunal going down one of these roads has on the underlying territorial conflict. This chapter's purpose therefore is to take a closer look at that question.

## 3 The approach taken by investment tribunals, the individual's interests and the underlying territorial conflict

This section will now, first, turn to criticism that has been raised with regard to the acceptance of jurisdiction by investment tribunals regarding the Crimea claims (Section 3.1). Subsequently, it will address the positive features that such investment arbitration proceedings can bring about with regard to the individual investors affected by an annexation or occupation (Section 3.2), but more broadly also with regard to the international communities interest to sanction illegal acquisition of territory (Section 3.3), which is the raison d'être of the obligation of non-recognition.

### *3.1 The acceptance of jurisdiction as an acknowledgement of the aggressor's territorial claim?*

The earlier illustrated decisions and the idea to apply investment treaties in occupied or annexed territories have indeed not remained without criticism. For instance, *Charlotte Lülf* has argued that investment tribunals accepting jurisdiction in such instances

> acknowledge and therewith strengthen the occupant's claim over the territory, as they are based on the idea of the transfer of treaty obligations to the occupying State. As such, they are an instrument of recognition of transfer of territory and might impede the notion of occupation as a temporary, but not inherent change of power.[31]

Similarly, *Patrick Dumberry* voiced the concern that the affirmative jurisdictional decisions by investment tribunals regarding the Crimea claims 'are giving effect to Crimea's change of status.'[32]

Indeed, as has been outlined earlier, the obligation of non-recognition prevents tribunals from taking any decisions that would have this effect. Yet, the characterization that the tribunals' decisions give effect to any change of status of Crimea falls short of their actual ramification. In fact, none of the tribunals – as far as it is publicly known – has actually pronounced upon the territorial dispute. Rather, what the tribunals did is to confirm their jurisdiction

31 Lülf (n 12) 215–216.
32 Dumberry (n 22) 508.

to (potentially) hold Russia liable for alleged treaty violations and, in some cases, actually to render awards in favour of individual claimants.

As already argued in greater detail elsewhere, the obligation of non-recognition does not necessarily contradict this approach.[33] The character of the obligation of non-recognition as a sanction and the principle of *ex injuria jus non oritur* mandate that an aggressor, the occupant or annexing state, must not enjoy any greater rights as a result of the annexation. It may not benefit therefrom. Where the obligation of non-recognition could lead to the inapplicability of dispute settlement under investment treaties, however, such a benefit would actually arise. In the case of Crimea, Russia could escape arbitral proceedings due to its illegal actions that it would otherwise have to face, since its investment treaties would simply extend to legally acquired territory by virtue of the so-called moving treaty frontiers rule and Article 29 VCLT.[34] Therefore, even though the tribunals may not have explicitly addressed the issue, for which they are rightly criticized, their decision to accept jurisdiction over the Crimea claims serves the obligation of non-recognition better than to leave the claimants with the sole option to seek recourse in local courts. Ultimately, these would then also be Russian courts in the case of Crimea.[35]

*Dumberry*, however, also argues that

> any such 'benefit' enjoyed by Russia [from a potential non-application of its investment treaties to Crimea] may only be in the short term. This is because foreign investors may be under the obligation to not continue doing business in Crimea under sanction regimes imposed by many States.[36]

Consequently, he suggests that

> the better solution remains adopting the strict application of the non-recognition principle and, consequently, refusing to extend Russian BITs to the territory of Crimea. This seems like the most efficient way to 'sanction' the illegal action of Russia.[37]

*Dumberry's* argument that Russia as the occupant in Crimea might only benefit from its illegal acquisition of the territory for a short period of time is certainly correct. Yet, this short period during which Russia might benefit from the fact that it could be considered under no investment treaty obligations in Crimea is

33 See, Happ and Wuschka (n 9) *passim*; Wuschka (n 8) 32. See also Ackermann (n 22) 85 *et seq.*

34 See further Wuschka (n 8) 28–29.

35 As the decision by a commercial arbitral tribunal confronted with a similar question in ICC case no 6474 of 1992 (2000) Yearbook Commercial Arbitration XXV, 279–311, likewise explained, any other decision would 'involve a much greater degree of "recognition"' of the illegal territorial situation (see para 22); see further on this Wuschka (n 8) 31–32.

36 Dumberry (n 22) 531.

37 Dumberry (n 22) 532.

of acute relevance. It is precisely also the very point in time when investors in Crimea are in urgent need of BIT protection, namely the period shortly after Russia had taken over effective control over the peninsula and during which it began to nationalize investments. Further, in the particular case of Crimea, the actual claimants are so far all nationals of Ukraine, the *de jure* sovereign over the territory, and not third-state nationals that would come under any sanctions regime.[38]

Consequently, a strict application of the principle of non-recognition would not only frustrate the purpose of the obligation itself but also unnecessarily put the relevant investors at a disadvantage. On the contrary, their rights could be protected through arbitral proceedings and Russia could – should their claim have merit – be held liable and thereby sanctioned at the same time if one accepts the application of investment treaties also to illegally annexed or occupied territories. As will be shown in the following, such an approach not only benefits the individual investors. It could also contribute to the settlement of the territorial dispute as such – at least more so than a non-application of investment treaties would.

### *3.2 The individual's perspective: potential alternatives to investment arbitration?*

From the perspective of the individual investor, investment arbitration in many cases will be the only means to hold the occupant accountable for violations of economic rights in the occupied or illegally annexed territory in a neutral forum. This section will illustrate this by discussing potential alternatives. While it is true that, in the case of Crimea, investors can also have recourse to the European Court of Human Rights (ECtHR),[39] human rights protection of property generally does not reach up to the level of protection under investment treaties and is further by far not universal (Section 3.2.1). In many instances, the only protection applicable to investments under occupation will be the international minimum standard of treatment under customary law. This standard, however, does not include a procedural side that grants direct rights of action to individuals,[40] leaving its enforcement to the inauspicious sphere of diplomatic protection (Section 3.2.2). As will be seen, also the creation of ad hoc fora, e.g. a 'Crimea Claims Tribunal', for occupation-related investment claims (Section 3.2.3), which is in any event unlikely at best, will not, at least not in the short-run, outbalance the benefits investment arbitration already possesses today (Section 3.2.4).

38 A separate question, which this contribution does not address, is whether such investments that were originally purely domestic in nature should benefit from protection under international investment law.

39 Cf. Dumberry (n 22) 518.

40 Dumberry (n 22) 518.

### *3.2.1 Human rights courts and treaty bodies*

Staying within the realm of the Crimea cases, the ECtHR is indeed an alternative forum for investors to seek recourse in against Russia, claiming a violation of Article 1(1) of the Additional Protocol No. 1 to the European Convention on Human Rights (the European Convention).[41] As already highlighted, such a protection standard is nevertheless not universal.[42] Compared to the difficulties the application of investment treaties in illegally annexed and occupied territories poses, however, the immediate advantage of an application to the ECtHR is the European Convention's broader scope of application: Also with regard to the protection of property under Additional Protocol No. 1,[43] the member states are bound in relation to 'everyone within their jurisdiction,[44] which the ECtHR generally also accepts for situations of occupation.[45] Yet, the Strasbourg court will not be the preferred choice for investors where arbitral tribunals are, at least conceivably, also available. There are several reasons for this, which will apply *mutatis mutandis* to other human rights fora, as well.

The first reason is a simple economic one. As the notorious *Yukos v. Russia* saga has shown, investment tribunals appear to employ a more generous approach when it comes to the quantification of damages. While the *Yukos* claimants obtained a just satisfaction judgment in an amount of EUR 1.96 billion in Strasbourg (still the largest amount awarded by the court),[46] the Permanent Court of Arbitration (PCA) tribunal awarded the shareholders in *Yukos* roughly USD 50 billion in three parallel awards (remaining also the largest amount of

41 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222. On the relationship between the European Convention and international investment law generally, see Maria Fanou and Vassilis P Tzevelekos, 'The Shared Territory of the ECHR and International Investment Law' in Yannick Radi (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar 2018) 93–136. See also Ursula Kriebaum, 'Is the European Court of Human Rights an Alternative to Investor-State Arbitration?' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 219–245; Christian Tomuschat, 'The European Court of Human Rights and Investment Protection' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century – Essays in Honor of Christoph Schreuer* (OUP 2009) 636–656.

42 It should be noted, however, that also the American Convention on Human Rights in Article 21 contains a right not to be deprived of property except under certain conditions. See further on the matter José E Alvarez, 'The Human Right of Property' [2018] 72 *University of Miami Law Review* 580, *passim*; Tomuschat (n 41) 638–640.

43 Cf. the protocol's Article 5.

44 Article 1 of the European Convention.

45 See, in particular, *Loizidou v Turkey* (Preliminary Objections) (1995) ECtHR Series A no 310, para 62. See further Daniel Costelloe, 'Treaty Succession in Annexed Territory' [2016] 65 *International and Comparative Law Quarterly* 343, 367 *et seq.*

46 *Yukos v. Russia* (just satisfaction) App No 14902/04 (ECtHR, 31 July 2014).

damages so far awarded in investment arbitration).[47] The arbitral awards are currently under review by Dutch courts. They have been set aside in the first instance for different reasons and then been reinstated in the second instance, leaving Russia with the possibility of an appeal to the Dutch Supreme Court as the last instance.[48] Despite that, the diverging results of the ECtHR case and the arbitral proceedings exemplify the impact that the different principles behind the two compensation systems have.[49] Under the European Convention, in contrast to investment treaties and arbitral practice,[50] '[c]ompensation needs to be just, not necessarily full.'[51]

Second, as *Fanou* and *Tzevelekos* point out, this 'difference in the amounts awarded is also indicative of the institutional and adjudicatory mentality of the ECtHR,[52], which – due to its origins and character as a human rights court – is not overly welcoming towards complex economic claims.[53]

Third, human rights court judgments, and in particular those of the ECtHR, do so far not possess a rigid enforcement system except for the member states' conventional obligation to comply with the court's judgments under Article 46.[54] In the *Yukos* case, for instance, the Russian Constitutional Court simply declared the payment of just satisfaction contrary to the Russian constitution,[55] thereby undermining the judgment's effect.

Finally, yet maybe most importantly, recourse to the ECtHR requires the exhaustion of local remedies, 'domestic remedies' in the wording of Article 35(1)

47 *Hulley Enterprises Limited (Cyprus) v. Russia*, PCA Case No AA 226 Award of 18 July 2014, para 1888; *Yukos Universal Ltd. (Isle of Man) v. Russia*, PCA Case No AA 227, Award of 18 July 2014, para 1888; *Veteran Petroleum Limited (Cyprus) v. Russia*, PCA Case No AA 226 Award of 18 July 2014, para 1888.

48 Gerechtshof Den Haag, Judgment of 18 February 2020, ECLI:NL:GHDHA:2020:234. For the previous instance, see Rechtbank Den Haag, Judgment of 20 April 2016, ECLI:NL:RBDHA:2016:4230. See further also Felix Boor, 'Die Aufhebung der Yukos-Schiedssprüche des Permanent Court of Arbitration vor dem Bezirksgericht in Den Haag – nur der Anfang einer langen Vollstreckungsodyssee?' [2016] 54 *Archiv des Völkerrechts* 297.

49 For a more detailed comparison of these two fora and their diverging results in the *Yukos* case, see Eric De Brabandere, 'Yukos Universal Limited (Isle of Man) v The Russian Federation: Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals' [2015] 30 ICSID Review 345.

50 In investment arbitration, tribunals generally apply the full compensation standard in reliance on the *Chorzów Factory* case; cf. *Case concerning the Factory at Chorzów* (Claim for Indemnity) (Jurisdiction) 1927 PCIJ Rep Series A No 9, 21, para 55; *The Factory at Chorzów* (Claim for Indemnity) (The Merits) 1928 PCIJ Rep Series A No 17, 47, para 125. See for a critical perspective, however, Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Fourth Edition, CUP 2017), 505–509.

51 Fanou and Tzevelekos (n 41) 101.

52 Fanou and Tzevelekos (n 41) 116.

53 Cf. ibid. Similarly Tomuschat (n 41) 654.

54 Notably, also the mechanism under Article 46(4) of the European Convention, under which a member state's non-compliance with the ECtHR's judgments can be brought before the court, has only recently been utilized for the first time in the European Convention's history. See *Mammadov v. Azerbaijan* App No 15172/13 (ECtHR, 29 May 2019).

55 See Fanou and Tzevelekos (n 41) 117 (with further references).

of the European Convention. This is generally not the case under investment treaties and before investment tribunals.[56]

### *3.2.2 Protection by way of diplomatic protection*

In addition to the potentially available human rights fora, an investor could, of course, always seek the assistance and protection of its home state in reliance on the minimum standard of treatment and by virtue of diplomatic protection – both judicially (where again the exhaustion of local remedies would be required) and extra-judicially. This, on the one hand, makes the enforcement of the individuals' rights dependent on their home state's exercise of discretion,[57] which was one of the reasons why international investment arbitration with direct rights of action by investors was actually established in the first place.[58] On the other hand, also the home state might not have any procedural options to pursue a claim in the absence of, e.g., the other state's acceptance of the jurisdiction of the International Court of Justice (ICJ) or other fora. In this respect, the situation for investors from the state the territory of which is under occupation is not different from the one investors from third states are in.

Crimea is a prime example of such a situation. Even though the Russian-Ukrainian conflict has found its way to the ICJ,[59] two United Nations Convention on the Law of the Sea (UNCLOS) PCA tribunals,[60] the International Tribunal for the Law of the Sea by way of a provisional measures application[61] and the ECtHR[62] by way of several inter-state applications, no basis for jurisdiction

56 See Kriebaum (n 41) 228. In greater detail also Ursula Kriebaum, 'Local Remedies and Standards for the Protection of Foreign Investment' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century – Essays in Honor of Christoph Schreuer* (OUP 2009) 417–462.

57 See only *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)* [1970] ICJ Reports 3 (44), para 9:

> The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.

58 See the historical overview given by Richard Happ and Noah Rubins, *Digest of ICSID Awards 1974–2002* (OUP 2013) 311–314.

59 ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine v. Russian Federation).

60 PCA, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation), PCA Case No 2017-06; PCA, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v. Russian Federation), PCA Case No 2019-28.

61 ITLOS, *Case Concerning the Detention of Three Ukrainian Naval Vessels* (Ukraine v. Russian Federation), Provisional Measures, ITLOS Case No 26.

62 See, in this respect, only *Ukraine v. Russian Federation* (re Crimea) App No 20958/14.

exists for a diplomatic protection claim regarding any Ukrainian nationals' property rights.[63] Notably, already the fragmentation of claims brought by Ukraine against Russia is a testament to the limited possibilities it has to bring the dispute before international dispute settlement bodies. Its claims relating to Crimea before the ICJ, for instance, are limited to violations of the International Convention on the Elimination of All Forms of Racial Discrimination[64] that it claims the Crimean Tatar people and ethnic Ukrainians on the peninsula have suffered.

For third-state nationals in Crimea, the possibility to have their host state engage in negotiations with Russia and seek compensation for harmed investment in that way might be at least more promising than the prospects Ukrainian investor will see in Ukraine doing so. Third states, however, might again also be reluctant to take up their nationals claim in light of the specificity of the situation and in particular with a view to their non-recognition obligation. Overall, reliance on diplomatic protection as a means for the protection of investments in occupied territories might prove helpful in very limited circumstances. Generally, it will be even of less practical use than for investment disputes that do not also involve a territorial conflict at the same time.

### *3.2.3 A new forum for investment claims relating to conflicts and occupation?*

Since 'the application of the Ukraine-Russia BIT is based on legal constructions, which are stretched to a considerable extent' and would 'not provide a robust and convincing dispute resolution tool in situations such as the annexation of Crimea',[65] it has also been suggested that another forum should be created for such cases – similarly to the Iran-US Claims Tribunal after the Iranian Revolution.[66] At least for the Russian-Ukrainian conflict, this option appears to be

63 A small caveat is necessary again with respect to the ECtHR here, since – based on Article 1(1) of the Additional Protocol No. 1 – Ukraine could also raise the violation of property rights of Ukrainian nationals through the inter-state complaint mechanism before the Strasbourg court. On diplomatic protection through the inter-state application before the ECtHR generally, see Isabella Risini, 'The Inter-State Application Under the European Convention on Human Rights: More Than Diplomatic Protection' in Norman Weiß and Jean-Marc Thouvenin (eds), *The Influence of Human Rights on International Law* (Springer 2015) 69–78.

64 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (Race Discrimination Convention).

65 Nikos Lavranos, 'The New Frontier: Investment Treaty Disputes in Times of War and Annexations' (*Practical Law Arbitration Blog*, 13 December 2017) <http://arbitrationblog.practicallaw.com/the-new-frontier-investment-treaty-disputes-in-times-of-war-and-annexations> accessed 18 June 2019.

66 Ibid. On the Iran-US Claims Tribunal generally, see Charles N Brower and Jason D Brueschke, *The Iran-United States Claims Tribunal* (Martinus Nijhoff 1998). For an account of the events leading to the Algiers Accord and thereby also the establishment of the Tribunal, see Gunnar Lagergren, '*The Formative Years of the Iran-United States Claims Tribunal*' [1997] 66 *Nordic Journal of International Law* 23.

inconceivable. While both Iran and the United States had certain interests to have their disputes and the disputes each of them had with the other's nationals adjudicated by a special tribunal,[67] the establishment of a similar dispute settlement body is hardly attractive for Russia, at least for now, due to the one-sided nature of the claims to be filed. Essentially, only Russia would become the respondent for private claims in that new forum.

The establishment of such a tribunal would also represent, to some extent, a retrograde step back to the times when mixed claims commissions were regularly established in post-conflict scenarios.[68] Their nature, however, also illustrates another reason why a 'Crimea Claims Tribunal' would encounter additional obstacles: Claims commissions were – on the inter-state level – usually bilateral institutions.[69] In such circumstances, it is a simple matter for the states involved to give their consent to the jurisdiction of the commission. In case of the claims filed with regard to annexed territories – even though regarding Crimea only formerly domestic, Ukrainian investors have so far been active – also third-state nationals (i.e. investors from another country than Russia and Ukraine) might be affected. Before mixed claims commissions, however, only nationals of the participating states, the states that were the parties to the prior conflict, have appeared so far. It would be unprecedented for a state to make a standing offer to arbitrate disputes relating to the conflict to any other state's nationals.

In contrast to these difficulties *de lege ferenda* in setting up a claims commission, investment treaties with their standing offer to arbitrate are in place not only for the bilateral relationship between Russia and Ukraine but also for many investors from third states. As a default, these should therefore also be had recourse to in order to avoid a further over-institutionalization of the investment dispute settlement arena where there is no apparent need for it but only difficulties in sight.[70]

### *3.2.4 The advantages of investment dispute settlement by way of arbitration*

Investor-state arbitration, by contrast, offers an established procedure for the resolution of the dispute, which also provides for strong enforcement options at the same time. This, as Tomuschat noted, gives investment arbitration 'an appreciable edge' over the enforcement mechanism under the European Convention,[71] but also over human rights treaty bodies or courts generally.

67 Cf. Lagergren (n 66) 24.

68 See Dolzer (n 1) *passim*.

69 See only Dolzer (n 1) *passim*.

70 Depending on the success of the European Commission's efforts to create a multilateral investment court, also in the framework of the discussions at UNCITRAL's Working Group III, a central forum to adjudicate investment claims under BITs and multilateral investment treaties may, in any event, be established in the more distant future. This is also acknowledged by Lavranos (n 65), who proposes to include 'specific provisions which would deal with claims concerning annexed or occupied territories' in that court's rules of procedure.

71 Tomuschat (n 41) 655.

In case the relevant BIT allows for ICSID arbitration, any award will have to be enforced by all ICSID member states 'as if it were a final judgment of a court in that State' under Article 54(1) of the ICSID Convention.[72] The ICSID Convention does not allow for review of the award by domestic courts. Only an annulment committee within the ICSID framework will be entitled to exercise that function.[73] Similarly, in all other investment arbitrations, as it is also the case with regard to the Crimea claims,[74] the New York Convention 1958[75] provides for an equally solid enforcement mechanism, albeit with more room for review by domestic courts.[76]

In addition to strong enforcement, the specific context of the Crimea claims also shows that another feature which used to be referred to regularly as a positive aspect of arbitral proceedings, namely their time-efficient character, can play out here. Even though it might not generally be true anymore that arbitration is, in any instance, the faster dispute resolution mechanism compared to litigation, at least many of the arbitral tribunals dealing with the Crimea claims have come to an end of the proceedings significantly ahead of the other dispute resolution fora Ukrainian claimants (i.e. the ECtHR) or Ukraine itself (i.e. the ICJ, PCA arbitral tribunals and the ECtHR) filed their claims in.

### *3.3 The state's perspective: a private sanctioning mechanism?*

These considerations equally play a role from the perspective of the state that is the respondent in the relevant arbitral proceedings and with respect to the inter-state level of the conflict. A strong enforcement mechanism leads to the result that the aggressor state, the occupant, is confronted with the execution of awards against it while it has little chances to resist. Especially as the amounts at stake in these proceedings are anything but small, the enforcement of investment awards against the aggressor exerts significant economic pressure. Combined with the relatively short period of time during which the proceedings reach an end,

72 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. In greater detail on the ICSID enforcement mechanism Stanimir A Alexandrov, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century – Essays in Honor of Christoph Schreuer* (OUP 2009) 322–337.

73 Cf. R Doak Bishop and Silvia M Marchili, *Annulment under the ICSID Convention* (OUP 2012) 15 mn 2.28.

74 Even though the Russian Federation has signed the ICSID Convention in 1992, it has subsequently never ratified it. For this reason, none of the cases with regard to Russia's actions in Crimea could have been initiated within the ICSID framework.

75 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

76 For a more detailed comparison of the two enforcement regimes, see Matthew Saunders and Claudia Salomon, 'Enforcement of Arbitral Awards against States and State Entities' [2007] 23 *Arbitration International* 467. See further August Reinisch, 'Enforcement of Investment Treaty Awards' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements – A Guide to Key Issues* (Second Edition, OUP 2018) 797.

investment arbitration can thereby also serve as a private sanctioning mechanism of the aggressor state's illegal actions. Relatively early damages awards that reach up to a noticeable amount of money (the extent of which is obviously relative to the respective state) should have the potential to have an impact on the attitude that state's decision-makers adopt towards the conflict – even more so, if they are enforced promptly. In the best-case scenario, such pressure can contribute to the state's willingness to reach a peaceful settlement of the inter-state conflict.

For the Russian-Ukrainian conflict, it has, for instance, been estimated that the damages claimed for in the Crimea arbitrations exceed USD ten billion.[77] The *Everest Estate* claimants were also already able to enforce their award that required Russia to pay USD 159 million through the attachment of assets of three Russian state-owned banks in Ukraine in October 2018,[78] which was on appeal also confirmed by the Ukrainian Supreme Court already in February 2019.[79] Thereby, the *Everest Estate* arbitration's result was enforced within a little less than five years from the time at which the annexation of Crimea took place.

It remains to be seen whether this influences Russia's perception and engagement with Ukraine as to the Crimean peninsula. For now, Russia has at least changed its litigation strategy in response to the various jurisdictional rulings, damages awards and enforcement proceedings: On 4 June 2019, it announced that it had challenged the *Stabil et al.* and *Ukrnafta* awards before the Swiss Federal Tribunal on the basis that the tribunal had erred when it failed to consider whether Crimea indeed formed part of Russia's sovereign territory, which the Swiss Federal Tribunal again rejected.[80] It further stated that, in contrast to previous arbitrations, it would now also participate in the still pending arbitral proceedings.[81] In the long run, the economic burden resulting from investment treaty awards might make the state change its overall approach to the resolution

77 Anders Åslund, 'Kremlin Aggression in Ukraine: The Price Tag' (Atlantic Council, 19 March 2018) <www.atlanticcouncil.org/images/publications/Kremlin_Aggression_web_040218_revised.pdf> accessed 18 June 2019. As the Ukraine's Justice Minister at the time, Pavlo Petrenko, is reported to have said in April 2014, Ukraine had suffered losses in the amount of approximately USD 80 billion 'incurred by state companies, ministries and departments' because of Russia's annexation of Crimea, which did not include 'lost profits and the value of minerals'; Reuters, 'Ukraine loses at least $80 billion since Russia takes Crimea' (28 April 2014) <https://www.reuters.com/article/us-urkaine-crisis-crimea/ukraine-loses-at-least-80-billion-since-russia-takes-crimea-idUSBREA3R0X320140428> accessed 18 June 2019.

78 Court of Appeal of Kyiv, *Everest Estate LLC et al. v. Russian Federation*, Decision of 5 September 2018. See further Global Arbitration Review, 'Crimea awards enforced in Ukraine' (3 October 2018) <https://globalarbitrationreview.com/article/1175219/crimea-award-enforced-in-ukraine> accessed 18 June 2019.

79 Supreme Court of Ukraine, *Everest Estate LLC et al. v. Russian Federation*, case no 796/165/2018, Judgment of 25 January 2019. See also Global Arbitration Review, 'Enforcement of Crimea award upheld in Ukraine' (7 February 2019) <https://globalarbitrationreview.com/article/1180117/enforcement-of-crimea-award-upheld-in-ukraine> accessed 18 June 2019.

80 Global Arbitration Review, 'Russia Challenges Crimea Awards and Changes Strategy' (6 June 2019) <https://globalarbitrationreview.com/article/1193767/russia-challenges-crimea-awards-and-changes-strategy> accessed 18 June 2019. See further Swiss Federal Tribunal, Judgment of 12 December 2019, 4A_244/2019, and Judgment of 12 December 2019, 4A_246/2019.

81 Global Arbitration Review, 'Russia Challenges Crimea Awards and Changes Strategy' (n 80).

of the inter-state conflict as well. At least, it may induce a stronger willingness to bring this dispute to an end on Russia's part.

## 4 Conclusions

As this contribution has shown, investment arbitration can serve as a means to hold the annexing or occupying power on a certain territory accountable for its conduct towards foreign investors and investments. Of course, however, arbitral tribunals need to be mindful of their mandate and the delicate situation they are dealing with. From a policy perspective, they should – and from a legal perspective, they must – refrain from making any pronouncement that would imply a recognition of the occupant's or annexing power's exercise of territorial control as legitimate.

This situation is definitely not a perfect one. Investment tribunals that adjudicate claims relating to occupied territories will always have to have recourse to a 'bipolar' definition of territory: Territory under the treaty is, in that parallel investment law universe, not necessarily a state's sovereign territory under general international law. From the perspective of the unity of international law and its application, such decisions cannot be considered a blessing.

They are, however, not a curse either. Investment tribunals give effect to the obligation of non-recognition in a better way when they affirm jurisdiction than if they were to decline jurisdiction. From the perspective of the individual, investment arbitration will provide the only cure for the harmed investors in many instances. It is the only means to hold the occupant accountable for violations of economic rights in the occupied or illegally annexed territory in a neutral forum, which is equally competent and amenable – differently from the ECtHR, for instance – to handle large-scale economic claims. As such, recourse to investment arbitration in cases such as the ones discussed in this contribution at least also presents a tool for private actors to exercise pressure on the occupying power. In particular, due to the significant amounts of damages involved, investment claims can therefore be another factor that makes a situation of continuous unlawful occupation unattractive for the aggressor state.

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