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The Legality under International Law of the EU's Trade Agreements covering Occupied Territories: A Comparative Study of Palestine and Western Sahara

Eva Kassoti

CLEER PAPERS **2017/3**

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CONTENTS

ABSTRACT

The paper examines the legality under international law of the EU's trade agreements covering occupied territories by focusing on two case-studies: Palestine and Western Sahara. Two main questions will be examined: first, is the EU's practice in conformity with its obligations under international law? Secondly, has the EU adopted a consistent approach when it comes to trade agreements covering occupied territories? It will be shown that, in some cases, the EU has fallen foul of international law and more particularly of the obligation to promote the right to self-determination and of the corollary obligations of non-recognition and of the obligation not to render aid and assistance in the commission of an unlawful act. Moreover, it will be shown that the EU has adopted a largely inconstant approach in its economic dealings with the occupied territories in question (and more particularly when it comes to the labelling of products originating from the territories in question) - something that severely undermines the international credibility and legitimacy of its external action. Overall, this contribution argues that there is a growing gap between EU identity rhetoric as a promoter of global fundamental values and international law on the one hand and realpolitik on the other.

ABOUT THE AUTHOR

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1. INTRODUCTION

The EU's identity as a global actor is firmly anchored in a distinct normative and political agenda; it has consistently portrayed itself as a normative power committed to core values such as democracy, the rule of law, human rights and to the observance, support and development of international law.[1] The EU's *Völkerrechtsfreundlichkeit*, namely its open attitude towards rules of international law, has been an important identity marker for the organization since its early days.[2] The Treaty of Lisbon has sought to further solidify the EU's image as an internationally engaged polity by emphasizing the organisation's commitment to "the strict observance and development of international law."[3] The EU's external projection of itself as a virtuous international actor generates the expectation that its Courts also espouse something of this internationalist approach.[4] However, it has been observed in the literature that the Court's approach to international law seems to have shifted over time.[5] Although in its earlier case-law the Court seemed to have adopted a friendly and open attitude towards international law,[6] more recent case-law, especially after *Kadi*,[7] evidences a more reserved, inward-looking attitude and a tendency to shield the autonomy of the EU legal order by eschewing engagement with international law.[8] According to de Búrca, the *Kadi* judgment served as an opportunity for the CJEU "to send a strong message about the relationship of EC law to international law, and most fundamentally, about the autonomy of the European legal order."[9] In

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[1] See generally I. Manners, Normative Power Europe: A Contradiction in Terms? 40 *Journal of Common Market Studies* 235 (2002).

[2] E. Cannizzaro, *The Neo-Monism of the European Legal Order*, in E. Cannizzaro, P. Palchetti, R. Wessel (eds.), *International Law as law of the European Union,* (Leiden: Martinus Nijhoff, 2012), p. 35, at pp. 56-57.

[3] See Art. 3(5) TEU. See also Art. 21(1) TFEU For the EU's ambitions as a global rule-maker, see R. Wessel, Flipping the Question: The Reception of EU Law in the International Legal Order, April 2016, pp. 4-6, available at www.utwente.nl/bms/pa/research/wessel/wessel115.pdf.

[4] G. de Búrca, After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?, 20 *Maastricht Journal of European and Comparative Law* 168 (2013), at p. 183.

[5] J. Odermatt, The Court of Justice of the European Union: International or Domestic Court?, 3 *CJICL* 696 (2014), pp. 699-700. C. Eckes, *International Law as Law of the EU: The Role of the European Court of Justice*, in E. Cannizzaro, P. Palchetti, R. Wessel (eds.), *supra* note 2, p. 353, at p. 364.

[6] See generally A. Rosas, With a Little Help from My Friends: International Case-Law as a Source of Reference for EU Courts, 1 *The Global Community Yearbook of International Law & Jurisprudence* 203 (2005). R. Higgins, The ICJ, the ECJ, and the Integrity of International Law, 52 *ICLQ* 1 (2003).

[7] Joined cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communitie* [2008], ECR I-6351.

[8] C. Eckes, *supra* note 5, p. 368. G. de Búrca, *The European Court of Justice and the International Legal Order After Kadi,* 51 *Harvard International Law Journal* 1 (2010), p. 5. J. Klabbers, *Völkerrechtsfreundlichkeit? International Law and the EU Legal Order*, in P. Koutrakos (ed.), *European Foreign Policy*, (Cheltenham: Edward Elgar Publishing, 2011), p. 95, at pp. 95, 97.

[9] G. de Búrca, *ibid.*

a similar vein, Klabbers stresses that "the story of the EU and international law as a happy family, is a seductive story, but it does have a few holes in its plot … [C]loser scrutiny reveals that the openness narrative is not supported by practice, in particular the practice of the courts."[10] The practice of the CJEU, Klabbers contends, evidences that it is not interested in being *völkerrechtsfreundlich* at all, "but rather in guarding its own identity. If and when possible it will happily do so in harmony with international law, but if and when impossible to do so harmoniously, international law will take the backseat."[11] The Court's shifting approach to international law has a direct impact on the identity of the EU as a global actor; if the trend of eschewing engagement with international law initiated in *Kadi* were to be followed, this would severely undermine the conventional narrative of the EU as a global actor that maintains particular fidelity to international law.

The coming of age of the EU as a global actor has also highlighted the need for consistency in its external actions. Consistency, in this context, is viewed as a *conditio sine qua non* for the global effectiveness of EU foreign policy.[12] As a normative and political imperative, consistency implies that the EU's external action should be compatible with its own core values.[13] 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;[14] according to Art. 21(3) TEU: "The Union shall ensure

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[10] J. Klabbers, *supra* note 8, at p. 97.

[11] *Ibid*., p. 97. Similarly, Denza argues that: "Towards other international legal orders, the Court is open and deferential to the extent compatible with its own mandate, as established in the Treaties and developed by its own jurisprudence. In the case of fundamental conflict with its own legal order, the Court will defend its own mandate." E. Denza, *Placing the European Union in International Context: Legitimacy of the Case Law*, in M. Adams, H. de Waele, J. Meeusen, G. Straetmans (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice,* (Oxford: Hart Publishing, 2013), p. 175, at pp. 194-195. The same position has been espoused by Kochenov and Amtenbrick: "Although openness to international law is the prevalent vision, whether international law should function in the EU internally depends on the blessing of the Union, which can also be withheld, should it contradict the EU's policy, objectives, rationale or principles." D. Kochenov, F. Amtenbrink, *Introduction: The Active Paradigm of the Study of the EU's Place in the World*, in D. Kochenov, F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Orde*r, (Cambridge: Cambridge University Press, 2014), p. 1, at p. 5.

[12] 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, p. 6.

[13] S. Duke, *Consistency, Coherence and European External Action: The Path to Lisbon and Beyond*, in P. Koutrakos (ed.), *supra* note 8, p. 15, at pp. 28-29.

[14] P. Wrange, Occupation/Annexation of a Territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy, Study undertaken at the Request of the Euro-

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.[15] 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.[16]

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.[17] The EU has also been accused of adopting double standards - as its trade negotiations with Israel on the one hand and Morocco on the other evidence.[18] Furthermore, the CJEU's pronouncements in *Brita*[19] and more recently in *Front Polisario*[20] have done little to diffuse the underlying tension between international law and the EU's external action in the field in question - thereby vindicating the view that, despite EU rhetoric to the contrary, the CJEU in its practice often shows a great deal of 'judicial recalcitrance' towards international law.[21] The 2015 study by the European Parliament on the EU's policy on occupied territories further highlights the need for clarity and consistency in the relevant area.[22] However, the topic has largely remained at the margins of scholarly attention and no holistic study thereof exists thus far.[23]

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pean Parliament 30 June 2015, PE 534.995, p. 52, available at <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2015)534995>.

[15] I. Hurd, Legitimacy and Authority in International Politics, 53 *International Organization* 379 (1999), at pp. 379-387. J. S. Nye, *Soft Power: The Means to Success in World Politics*, (New York: Public Affairs, 2004), p. X.

[16] G. Harpaz, Normative Power Europe and the Problem of a Legitimacy Deficit: An Israeli Perspective, 12 *Eur Foreign Aff Rev* 89 (2007), at p. 97.

[17] 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, available at <http://www.eccpalestine.org/made-in-illegality-stop-all-economic-relations-with-illegal-israeli-settlements/>. 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 Sahara, 18 June 2012, available at <http://www.vastsaharaaktionen.se/files/Label%20and%20Liability%20%20WSRW%20June%202012.pdf>.

[18] L. Kamel, Is the EU Adopting a Double-Standards Approach toward Israel and the Palestinian territories?, 09 January 2014, available at <http://opiniojuris.org/2014/01/09/eu-adopting-double-standards-approach-toward-israel-palestinian-territories-part-1/>. E. Kontorovich, New EU/Morocco Fisheries Deal and Its Implications for Israel, 09 December 2013, available at <http://www.jpost.com/Opinion/Columnists/New-EUMorocco-fisheries-deal-and-its-implications-for-Israel-334473>.

[19] Case C-386/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010], ECR I-1289.

[20] 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.

[21] F. Casolari, *Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation*, in E. Cannizzaro, P. Palchetti, R. Wessel (eds.), *supra* note 2, p. 395, at p. 395.

[22] P. Wrange, *supra* note 14, p. 52.

[23] A notable exception is E. Kontorovich, Economic Dealings with Occupied Territories, 53 *Colum. J. Transnat'l L.* 584 (2015).

In this light, the present paper examines the legality under international law of the EU's trade agreements covering occupied territories by focusing on two case-studies: Palestine and Western Sahara. Assessing whether the EU is a consistent normative foreign policy actor against the background of these two specific case-studies is ideal due to the considerable legal and factual similarities between them.[24] As it will be shown in detail below, both Palestine and Western Sahara constitute occupied territories whose people have the right to self-determination - as affirmed by the ICJ in the *Wall* Advisory Opinion[25] and in the *Western Sahara* Advisory Opinion[26] respectively. In both cases, the bilateral relations between the EU and the occupying State are regulated in a similar manner (EU-Israel Association Agreement,[27] EU-Morocco Association Agreement[28]) and both cases reached the ECJ.

Two main questions will be examined: first, is the EU's practice in conformity with its obligations under international law? Secondly, has the EU adopted a consistent approach when it comes to trade agreements covering occupied territories? It will be shown that, in some cases, the EU has fallen foul of international law and more particularly of the obligation to promote the right to self-determination and of the corollary obligations of non-recognition and of the obligation not to render aid and assistance in the commission of an unlawful act. Moreover, it will be shown that, in interpreting the agreements in question, the ECJ's reliance on international law has been formalistic, incomplete and one-dimensional, thereby debunking the myth of the EU's *Völkerrechtsfreundlichkeit*. Finally, it will be demonstrated that the EU has adopted a largely inconstant approach in its economic dealings with the occupied territories in question (and more particularly when it comes to the labelling of products originating from the territories in question) - something that severely undermines the international credibility and legitimacy of its external action. Overall, this contribution argues that there is a growing gap between EU identity rhetoric as a promoter of global fundamental values and international law on the one hand and realpolitik on the other.

For this purpose, the next section begins by setting out the international legal framework within which the analysis of the case-studies will take place. The

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[24] Due to space constraints, the present contribution will not cover the EU's trade activities in relation to other occupied territories including Northern Cyprus and the Russian occupied territories of Abkhazia and Crimea. A further reason for excluding these territories from the ambit of the present work is that the EU has not concluded agreements with the occupying power that may potentially extend to the occupied territory as is the case with Palestine and Western Sahara. For an analysis of the EU's trade practice in relation to other occupied territories see generally E. Kontorovich, *ibid*.,

[25] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reps* 2004, p. 136, paras. 155-156.

[26] *Western Sahara*, Advisory Opinion, *ICJ Reps* 1975, p. 12, para. 162.

[27] 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, adopted on 20 November 1995, entered into force 01 June 2000, OJ [2000] L147/3. (Hereinafter referrred to as the 'EU - Israel Association Agreement').

[28] 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, OJ [2000] L70/2. (Hereinafter referrred to as the 'EU – Morocco Association Agreement').

theoretical framework is divided in two parts. The first part deals with the obligations resting upon occupying authorities on the basis of international humanitarian law (obligations relating to the status of the occupied territory and obligations relating to the occupied territory's inhabitants) (section 2.1) and general international law (the obligation to respect the right to self-determination and the right to permanent sovereignty over natural resources) (section 2.2). The second part focuses on the obligations incumbent upon the EU (as a third party) flowing from the breach of the occupying power's duties as these were identified in the first part (obligations of non-recognition and non-assistance) (section 2.3). Against this background, the remainder of the paper provides a survey of the relevant EU practice by examining the case-studies of Palestine, Western Sahara,

2. THE INTERNATIONAL LEGAL FRAMEWORK

2.1 **Occupation**

The main rules governing occupation in international law are found in the Fourth Geneva Convention[29] and the Hague Regulations annexed to the 1907 Hague Convention respecting the Laws and Customs of War on Land.[30] 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."[31] Article 42 of The Hague Regulations, contains the legal definition of occupation. According to the text of the Article: "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." Thus, in international law, occupation is largely seen as a matter of fact dependent upon the demonstration of effective authority and control over a territory to which the occupying State holds no sovereign title[32] – and irrespective of whether sover-

[29] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949, entered into force 21 October 1950, available at <https://ihl-databases.icrc.org/ihl/INTRO/380>.

[30] 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), adopted on 18 October 1907, entered into force 26 January 2010, available at <https://ihl-databases.icrc.org/ihl/WebART/195-200052?OpenDocument>.

[31] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reps* 1996, p. 226, at para. 79.

[32] C. Chinkin, Laws of Occupation, Conference on Multilateralism and International Law with Western Sahara as a case study hosted by the South African Department of Foreign Affairs and the University of Pretoria, 4-5 December 2008, Pretoria, p. 198, available at <http://removethewall.org/wp-content/uploads/2014/05/Laws-of-Occupation-Christine-Chinkin-2009.pdf>. E. Benvenisti, The International Law of Occupation, 2nd ed., (Oxford: Oxford University Press, 2012), p. 43. See also generally T. Ferraro, Determining the Beginning and End of an Occupation under International Humanitarian Law, 94 *ICRC Review* 885 (2012).

eign title to that territory is contested.[33] It is widely accepted that Palestine (the West Bank, including East Jerusalem, and the Gaza Strip)[34] is an occupied territory.[35] Similarly, Western Sahara is an occupied territory since Morocco's presence therein meets the objective threshold of occupation under international humanitarian law as described above.[36] The UN General Assembly has twice characterized the presence of Morocco in Western Sahara as 'belligerent occupation'[37] and a number of EU Member States describe Western Sahara as 'occupied'.[38]

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[33] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, para. 95.

[34] J. Crawford, *The Creation of States in International Law,* 2nd ed., (Oxford: Clarendon Press, 2006), p. 425.

[35] UN SC Res. 242 (1967), UN Doc. S/RES/242 (1967); UN SC Res. 338 (1973), UN Doc. S/RES/338 (1973); UN SC Res. 478 (1980), UN Doc. S/RES/478; UN SC Res. 1860 (2009), UN Doc. S/RES/1860. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, paras. 70-78. See also: Supreme Court of Israel, *Beit Sourik Village Council v The Government of Israel*, HCJ 2056/04, 30 May 2004, para. 23; *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04, 21 June 2005, para. 14. See also B. Rubin, "Israel, Occupied Territories", Max Planck Encyclopedia of Public International Law, online version, October 2009, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1301?prd=EPIL>.

[36] See Art. 42 of The Hague Regulations. See also Art. 2(2) of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War which affirms that it applies to cases where the occupation occurs even without hostilities - which would encompass the Green March of 1975. In 1975, when Morocco invaded Western Sahara both Morocco and Spain, the *de jure* administrating power of Western Sahara since 1963 according to the UN (see Information from Non-Self-Governing-Territories transmitted under Article 73 *e* of the Charter of the United Nations, Report of the Secretary General, 1/02/2016, UN Doc. A/71/68) were parties to the Geneva Convention (IV). Thus, by forcibly displacing the Spanish authorities from Western Sahara in 1975, Morocco occupied Western Sahara without active hostilities against the territory's *de jure* administrative power – within the meaning of Art. 2(2) Geneva Convention (IV). In this view, the hostilities between Front Polisario and Morocco from 1975-2011 constituted a non-international armed conflict in an occupied territory but legally distinct from that of the continuing international conflict constituted by the occupation of the territory and the displacement of the Spanish authorities in 1975. The ratification of Additional Protocol I by Morocco in 2011 tranformed the internal armed conflict between Morocco and Front Polisario to an international armed conflict. See Art. 1(4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, entered into force 7 December 1978. For analysis of the status of Western Sahara as a territory occupied by Morocco, see B. Saul, The Status of Western Sahara as an Occupied Territory under International Humanitarian Law and the exploitation of Natural Resources, Sydney Law School, Legal Studies Research Paper no. 15/81, September 2015, pp. 5-23, available at <https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2663843>; C. Chinkin, *supra* note 32, pp. 197-203. M. Dawidowicz, *Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement*, in D. French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, (Cambridge: Cambridge University Press, 2013), p. 250, at pp. 272-273. Another view is that all hostilities in an occupied territory constitute an international armed conflict – see A. Cassese, *International Law*, 2nd ed., (Oxford: Oxford University Press, 2005), p. 420. This view has found some support in practice, see Supreme Court of Israel, *Public Committee against Torture in Israel v Government of Israel*, HCJ 769/02, 11 December 2005, paras. 18, 21; *A and B v State of Israel*, CrimA 6659/06, CrimA 1757/07, CrimA 8228/07, CrimA 3261/08, 11 June 2008, para. 9.

[37] UN GA Res. 34/37 (1979), UN Doc. A/RES/34/37, para. 5; UN GA Res. 35/19 (1990), UN Doc. A/RES/35/19, para. 3.

[38] See the statements cited in E. Kontorovich, *supra* note 23, p. 612, fn. 147.

Overall, there are two types of obligations resting on occupying powers: obligations relating to the status of the occupied territory and obligations relating to the occupied territory's inhabitants.[39] As far as the former are concerned, Art. 43 of The Hague Regulations[40] reflects a cardinal principle of the law of belligerent occupation, namely that the occupier acquires only temporary authority, and not sovereignty, over the occupied territory.[41] 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."[42] In light of the principle of self-determination, sovereignty over an occupied territory remains with the population under occupation.[43] Thus, Israel and Morocco have not acquired title over the territories they occupy purely on the basis of their status as occupying powers.

Turning to the obligations with respect to the people of the occupied territory, the most important one for present purposes 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.[44] Article 55 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 usufructary principle as laid down in Article 55 of The Hague Regulations emphasizes that the occupier does not own the property of the territory under occupation, but may only use it, subject to the duty to safeguard the

[39] C. Chinkin, *supra* note 32, p. 203.

[40] 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."

[41] E. Benvenisti, *supra* note 32, p. 7. M. Sassoli, Article 43 of The Hague Regulations and Peace Operations in the Twenty-First Century, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25-27, 2004, p. 5, available at <http://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf>. 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 (Protocol I), adopted on 8 June 1977, entered into force 7 December 1978, available at <https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf>.

[42] J.S. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (Geneva: International Committee of the Red Cross, 1958), p. 275.

[43] E. Benvenisti, The Security Council and the Law on Occupation: Framing the Occupied Palestinian Territory, 1 *IDF L.R.* 19 (2003), at p. 37. O. Ben-Naftali, A. M. Gross, K. Michaeli, Illegal Occupation: Framing the Occupied Palestinian territory, 23 *Berk. J. Int. Law* 551 (2005), at p. 554.

[44] D. Dam – de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations*, (Cambridge: Cambridge University Press, 2015), p. 227.

capital of these properties.[45] 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."[46] 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.[47] This limitation was confirmed in the relevant jurisprudence of the Nuremberg tribunals[48] and in practice.[49] 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"[50], resulting in a Chapter VII resolution affirming that principle.[51]

Both Israel and Morocco violate Art. 55 of The Hague Regulations to the extent that they use the natural resources of the territories under their control for their own benefit. Water resources in the West Bank are mainly used by the occupying power for the needs of the settlements.[52] According to a 2012 report issued by the UN Secretary General: "Palestinians have virtually no control over the water resources in the West Bank… The limitation of access to natural resources, in this case water, is directly connected to the existence of settlements."[53] Reports by human rights NGOs highlight how the West Bank settlement is mainly accomplished by the expansion of agricultural land to the detriment of

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[45] N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, (Cambridge: Cambridge University Press, 1997), p. 268. It is widely accepted that Art. 55 codifies a long-standing rule of customary international law. J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, (Cambridge: ICRC, 2005), p. 179.

[46] A. Cassese, *Powers and Duties of an Occupant in relation to Land and Natural Resources*, in A. Cassese, P. Gaeta, S. Zappala (eds.), *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, (Oxford: Oxford University Press, 2008), p. 250, at p. 251. D. Dam – de Jong, *supra* note 43, p. 229.

[47] D. Dam – de Jong, *ibid*., p. 231. E. Benvenisti, Water Conflicts during the Occupation of Iraq, 97 *AJIL* 860 (2003), at pp. 863-864, 867-868. See also Institut de Droit International, Bruges Declaration on the Use of Force and Belligerent Occupation, 02 September 2003, available at <http://www.justitiaetpace.org/idiE/declarationsE/2003_bru_en.pdf>.

[48] US, Military Tribunal at Nuremberg, *Flick case*, Judgment, 22 December 1947; US, Military Tribunal at Nuremberg, *Krupp case*, Judgment, 29 July 1948, cited in J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. II: Practice, (Cambridge: ICRC, 2005), pp. 1041-1042.

[49] 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), at p. 743.

[50] Letter dated 08 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, 08 May 2003, UN Doc. S/2003/538.

[51] UN SC Res. 1483 (2003), UN Doc. S/RES/1483, para. 14.

[52] Report by the Secretary-General, Israeli Settlements in the Occupied Palestinian territory, including East Jerusalem, and the Occupied Syrian Golan, 18 September 2012, UN Doc. A/67/375, para. 14.

[53] *Ibid.*

the Palestinian population.[54] According to Crawford: "It could be argued that the settlements are *per se* in breach of this principle [usufruct], given that the assets of the West Bank in the settlement areas are being utilized entirely for the benefit of Israel."[55] This proposition is substantiated by the 2013 report published by the Palestinian NGO Al-Haq. According to the report: "The existence of and growth in settlement produce is … made possible by Israel's extensive destruction and appropriation of Palestinian resources, including water, for the benefit of Israeli settlements and settlers."[56]

Turning to Morocco's exploitation of Western Sahara's natural resources, it needs to be observed that there is no evidence that the Sahrawi people benefit from such exploitation, or that such exploitation is undertaken in consultation with their representatives.[57] On the contrary, Polisario Front, the internationally recognised representative of the Sahrawi people, has opposed the conclusion of contracts between Morocco and foreign companies concerning the exploitation of Western Sahara's resources.[58] Furthermore, it needs to be noted that Morocco denies its status as an occupying power.[59] As such, it cannot in good faith argue that its exploitation of the natural resources of the territory is justified by the necessity of maintaining a civilian administration in the territory in accordance with the principle of usufruct.[60]

2.2 Other Relevant Principles of International Law: Self-Determination and Permanent Sovereignty over Natural Resources

Apart from obligations arising under the law of belligerent occupation, occupying powers also have obligations under general international law. The right to self-determination and the principle of permanent sovereignty over natural resources are the most relevant ones in the present context. The right to self-determination is a core tenet of international law; it is clearly accepted and

[54] Report by Israeli NGO Kerem Navot, Israeli Settlement Agriculture As a Means of Land Takeover in the West Bank, August 2013, p. 87, available at <http://rhr.org.il/heb/wp-content/uploads/Kerem-Navot.pdf>. B'Tselem, the Israeli Information Center for Human Rights in the Occupied Territories, Land Grab: Israel's Settlement Policy in the West Bank, May 2002, p. 47, available at <https://www.btselem.org/download/200205_land_grab_eng.pdf>.

[55] J. Crawford, Legal Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories, 24 January 2012, para. 61, available at <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>.

[56] Al-Haq, Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law, 2013, p. 24, available at <http://www.alhaq.org/publications/Feasting-on-the-occupation.pdf>.

[57] S. Koury, *The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law,* in K. Arts, P. P. Leite (eds.), *International Law and the Question of Western Sahara*, (Leiden: International Platform of Jurists for East Timor, 2009), p. 165, at p. 177.

[58] *Ibid.*

[59] B. Saul, *supra* note 36, p. 30.

[60] *Ibid.*

widely recognised as a peremptory norm of international law.[61] By virtue of this principle, peoples are to "freely determine their political status" and to "freely pursue their economic, social and cultural development."[62] The right to self-determination creates a concomitant obligation on States regarding the method by which decisions concerning peoples should be made, *i.e.* by taking into account their freely expressed will.[63] As expressly affirmed by the ICJ in its relevant Advisory Opinions, the right to self-determination applies both to the Palestinian people and to the Sahrawi people and thus, these peoples are entitled to freely determine their own future political status.[64]According to the ICJ the *de facto* annexation of land severely impedes the exercise of the right to self-determination and constitutes, therefore, a breach of the obligation to respect that right.[65] Thus, as long as Israel and Morocco maintain their *de facto* annexation of the territories in question (by means of settlements or otherwise)[66], that annexation amounts to a breach of their obligation to respect the right to self-determination.

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[61] Commentary to Art. 26 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, *Yrbk. of the ILC* 2001, Vol. II, p. 85, para. 5.

[62] Art. 1 of the International Covenant on Civil and Political rights (ICCPR), adopted on 16 December 1966, entered into force 23 March 1976, 999 *UNTS* 171; and Art. 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted on 16 December 1966, entered into force 3 January 1976, 993 *UNTS* 3.

[63] A. Cassese, *supra* note 36, p. 62. *Western Sahara*, *supra* note 26, paras. 58-59.

[64] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, paras. 155-156; *Western Sahara*, *supra* note 26, para. 162.

[65] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid.*, paras. 115-122. According to the Court: "[T]he route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, … There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, … , to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right." *Ibid*., para. 122

[66] As far as Israel is concerned, the UN Special Rapporteur on the situation of human rights in the occupied Palestinian territories has stressed: "That continued settlement of West Bank land, including East Jerusalem, cut off by the wall seems to be creating a fait accompli amounting to de facto annexation." 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. 16. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid.*, para. 121. Since assuming control of Western Sahara, Morocco has been encouraging its citizens to settle there. As a result, Moroccan settlers are now the majority of the population in the territory in question. J. Mundy, Moroccan Settlers in Western Sahara: Colonists or fifth Column, 15 *The Arab World Geographer* 95 (2012), at p. 95. As Dawidowicz notes that: "As a final measure, Morocco consolidated its *de facto* annexation and legal claim to territorial sovereignty over Western Sahara by incorporating it under Moroccan administrative law as forming part of four of its sixteen administrative regions." M. Dawidowicz, *supra* note 36, p. 260. The proposition that Morocco pursues a policy of *de facto* annexation of Western Sahara is further corroborated by the fact that, in its reports to UN human rights treaty bodies, Morocco refers to the territory as 'Moroccan Sahara'. Human Rights Committee, Consideration of Reports submitted by States Parties under Article 40 of the International Covenant on Civil and Political Rights, fifth periodic report submitted by Morocco, UN Doc. CCPR/C/MAR/2004/5, 11 May 2004, para. 39. Furthermore, in its 2006 Report the Office of the High Commissioner for human rights observed that Morocco does not allow any questioning of its sovereignty over the territory. Office of the UN High Commissioner for Human Rights (OHCHR), Report of the OHCHR Mission to

The right of peoples to permanent sovereignty over their natural wealth and resources is "a basic constituent of the right to self-determination."[67] The ICJ confirmed the customary law character of the principle in the *Armed Activities* case.[68] Judge Koroma opined that the Court's acknowledgement of the customary law status of the principle means that it remains "in effect at all times, *including during armed conflict and during occupation*."[69] Overall, and in the light of the ICJ's more general pronouncement on the applicability of human rights law in situations of armed conflict,[70] it is safe to assume that States must respect their obligations under human rights law in relation to the population under occupation, including the obligation to respect the right of a people to freely dispose of its natural resources.[71]

There is evidence to support the proposition that both Israel and Morocco are in violation of the principle in question. As mentioned earlier, several studies highlight how Israel has restricted Palestinian access to water and land resources for the benefit of the settlements.[72] The UN General Assembly has condemned the Israeli policy of exploiting natural resources in breach of the Palestinian peoples' rights over their natural resources.[73]

As far as Morocco is concerned, reports by NGOs indicate the existence of a number of plantations in the Dakhla region, owned by the King of Morocco or by Moroccan conglomerates, which use water resources from non-renewable underground water basins, thereby endangering the ecosystem of a region where water resources are scarce.[74] At the same time, while Western Sahara

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Western Sahara and the Refugee Camps in Tindauf 15/23 May 2006, 8 September 2006, para. 26, available at <http://www.arso.org/OHCHRrep2006en.htm>.

[67] UN GA Res. 1803 (XV II) (1962), UN Doc. A/RES/1803 (XV II).

[68] *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, *ICJ Reps* 2005, p. 168, at para. 244.

[69] Declaration by Judge Koroma in *Case concerning Armed Activities on the Territory of the Congo*, *ibid.*, p. 284, at para. 11. (Emphasis in the original). The UN General Assembly has affirmed the applicability of the principle in situations of belligerent occupation, see *e.g.* UN GA Res. 3336 (XXIX) (1974), UN Doc. A/RES/3336 (XXIX).

[70] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, para. 104.

[71] N. Schrijver, *Natural Resources, Permanent Sovereignty over,* Max Planck Encyclopedia of Public International Law, online version, June 2008, para. 22, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1442?prd=EPIL>.

[72] According to the International Fact-Finding Mission: "The settlements, including the associated restrictions, impede Palestinian access to and control over their natural resources." 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. 36. See also World Bank Study, Area C and the Future of the Palestinian Economy, 02 July 2014, available at <http://documents.worldbank.org/curated/en/257131468140639464/pdf/893700PUB0978100Box385270B00PUBLIC0.pdf>.

[73] UN GA Res. 60/183 (2005), UN Doc. A/RES/60/183. UN GA Res. 68/235 (2014), UN Doc. A/RES/68/235.

[74] Western Sahara Resource Watch Report: Conflict Tomatoes – The Moroccan Agriculture Industry in Occupied Western Sahara and the Controversial Exports to the EU Market, February 2012, p. 6, available at <http://www.wsrw.org/files/dated/2012-02-13/conflict_tomatoes_14.02.2012.pdf>. See also the report by the NGO Robert F. Kennedy Human Rights Center, Report on the Kingdom of Morocco's Violations of the International Covenant on Civil and Politi-

is rich in natural resources these are primarily located in the Moroccan-occupied part of the territory west of the wall built by Morocco;[75] a wall that stretches throughout the entire territory of Western Sahara separating the Moroccan-occupied territory from the Polisario-controlled area.[76] The wall effectively bars the Sahrawi people living east of the wall from accessing Western Sahara's natural resources located west of the wall.[77]

2.3 Third Party Obligations: The Obligation of Non-Recognition and the Obligation Not to Render Aid and Assistance in the Commission of an Unlawful Act

The previous sections illustrated how Israel and Morocco have engaged in internationally wrongful conduct. By continuing to annex territory *de facto*, Israel and Morocco are in breach of the Palestinian and the Sahrawi peoples' right to self-determination. Furthermore, by exploiting natural resources for their own economic ends and not for the benefit of the local populations, both Israel and Morocco are in breach of the Palestinian and the Sahrawi peoples' right to permanent sovereignty over their natural resources and of the principle of usufruct in accordance with Art. 55 of The 1907 Hague Regulations. The consequences for third parties of this unlawful conduct on the part of Israel and Morocco could arise in two ways: from the obligation of non-recognition and from the obligation of not rendering aid or assistance in the commission of an internationally wrongful act.

According to Art. 42(2) of the Draft Articles on the Responsibility of International Organizations, in cases of a serious breach of a *jus cogens* norm, international organizations have duties corresponding to those applying to States under Art. 41(2) of the Draft Articles on the Responsibility of States for internationally wrongful acts.[78] Thus, States and international organizations alike are under an obligation not to recognize as lawful a situation created by a serious breach of a peremptory norm of international law.[79]

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cal 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, p. 15, available at <http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MAR/INT_CESCR_CSS_MAR_21582_E.pdf>.

[75] Robert F. Kennedy Human Rights Center, *ibid.*, p. 12.

[76] Report by the Secretary General on the situation concerning Western Sahara, 10 April 2014, UN Doc. S/2014/258, paras. 3, 11, 12.

[77] Robert F. Kennedy Human Rights Center, *supra* note 74, p. 12.

[78] Commentary to Art. 42 of the Draft Articles on the Responsibility of International Organizations, with commentaries, adopted by the International Law Commission at its 63rd session, *Yrbk of the ILC* 2011, Vol. II, p. 66, para. 1.

[79] While it may be questioned whether customary international law knows of a general duty of non-recognition of *all* situations created by a serious breach of a peremptory norm, there is practice with regard to the non-recognition of situations created by a serious breach of the right to self-determination as the *Namibia* Advisory Opinion and the *Wall* Advisory Opinion evidence. For analysis and an exposition of the relevant practice see S. 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 C. Tomuschat, J.-M. Thouvenin (eds.), *The*

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.[80] 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."[81] The principle finds support in the 1970 Friendly Relations Declaration[82] – which, according to the ICJ, reflects customary international law.[83] 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."[84] In the *Namibia* case,[85] 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-recognized 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-recognized regime's authority over the territory.[86]

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.[87] The ICJ re-affirmed the duty of non-recognition in its *Wall* Advisory Opinion.[88] In resolution ES-10/15 the UN General Assembly acknowledged the Opinion and called upon all Member States "to comply with their *legal obligations* as mentioned in the advisory opinion."[89]

Fundamental Rules of the International Legal order: Jus Cogens and Erga Omnes Obligations, (Leiden: Martinus Nijhoff, 2005), p. 99, at pp. 102-103.

[80] J. Crawford, *supra* note 55, para. 46.

[81] M. Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation*, in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility*, (Oxford: Oxford University Press, 2010), p. 677, at p. 678.

[82] UN G.A. Res. 25/2625 (1970), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625.

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

[84] Commentary to Art. 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *supra* note 61, p. 114, para. 5.

[85] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion*, ICJ Reps* 1971, p. 16.

[86] *Ibid*., paras. 122, 124.

[87] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, para. 87. Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area (Republika Srpska v Bosnia and Herzegovina), 14 February 1997, para. 77, available at <http://www.ohr.int/?ohr_archive=brcko-arbitral-tribunal-for-dispute-over-the-inter-entity-boundary-in-brcko-area-award>. *Case concerning East Timor (Portugal v. Australia)*, Dissenting Opinion of Judge Skubiszewski, *ICJ Reps* 1995, p. 224, paras. 125, 129. Dissenting Opinion of Judge Weeramantry, *ibid.*, p. 139, at p. 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, *supra* note 61, pp. 114-115, paras. 6-8.

[88] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, para. 159.

[89] UN GA Res. ES-10/15 (2004), UN Doc. A/RES/ES-10/15, para. 3. (Emphasis added).

This formulation is important since it shows that States voting in favour of the resolution (including all EU Member States) have themselves characterised the obligations set out in the Opinion as 'legal obligations'. In the present context, it is also important to note that the EU has expressly acknowledged that it is bound by the international law duty of non-recognition in its 2013 Guidelines on the eligibility of Israeli entities working within Israeli settlements in Palestine for EU funding.[90] Both the 2013 report by the international fact-finding mission on Israeli settlements and the 2014 report by the Special Rapporteur on the situation of human rights in the occupied Palestinian territories corroborate the view that, in cases where illegal settlements are supported through trade, respect for international law entails ceasing trade relations therewith.[91]

It has been suggested that the duty of non-recognition, as spelled out in the *Namibia* Opinion, is non self-executing, but it may only arise as a result of a binding decision by the UN Security Council.[92] However, it bears noting that, while the Court took note of the Security Council Resolution that defined some of the steps to be taken by States against South Africa, it did not deal with that Resolution *per se*.[93] The relevant passage of the Opinion did not relate to the obligation of non-recognition, but more generally, to the measures to be taken by the UN in order to bring the illegal situation to an end.[94] Furthermore, in the *Wall* Advisory Opinion, the Court deduced the obligation of non-recognition from its finding of illegality – without having recourse to a (binding) determination by the Security Council.[95] A review of the leading examples in practice associated with the duty of non-recognition (including the situations in Southern Rhodesia, Namibia, the Bantustans in South Africa and the Turkish Republic of Northern Cyprus) reveals that this practice is based almost entirely on General Assembly resolutions and Security Council resolutions adopted under Chapter VI – thus, confirming that there is no need for a binding decision by the Security Council for the duty of non-recognition to arise.[96]

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[90] 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, OJ [2013] C205/05, para. 1.

[91] 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, *supra* note 72, paras. 115-116. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *supra* note 66, paras. 45-47.

[92] See for example the statement made by the representative of Australia, J. Crawford, at the Public Sitting held on 16 February 1995 in the *Case concerning East Timor*, CR 95/14, p. 56, at para. 63.

[93] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *supra* note 85, para. 120.

[94] *Ibid.* See also S. Talmon, *supra* note 79, pp. 112-113.

[95] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, paras. 154-160. See also E. Milano, The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: Fishing Too South?, 22 *Anuario Español de Derecho Internacional* 413 (2006), at pp. 444-445.

[96] M. Dawidowicz, *supra* note 81, pp. 679-683.

It is important to note that the Court in the *Namibia* case introduced an element of flexibility in the doctrine of non-recognition, the so-called '*Namibia* exception'.[97] According to the Court, while acts that are undertaken in pursuance of the illegal administration are to be considered null and void since they purport to enhance unlawful territorial claims, minor administrative acts, such as "the registration of births, deaths and marriages" and acts of benefit to the local population are valid,[98] as they are considered "untainted by the illegality of the administration".[99] Whether particular conduct is beneficial to the local population and as such it falls outside the scope of application of the obligation of non-recognition is difficult to answer *in abstracto*; as Crawford notes: "Ultimately, the question of whether a particular act falls within the *Namibia* exception … is highly fact-dependent."[100]

According to the ILC the rules applicable to relations between States also apply when an international organization aids and assists a State or another international organization in the commission of an internationally wrongful act.[101] Thus, Art. 14 and Art. 42(2) of the Draft Articles on the Responsibility of International Organizations correspond to Art. 16 and Art. 41(2) of the Draft Articles on State Responsibility spelling out the obligation of international organizations and States alike not to render aid or assistance in the commission of an unlawful act. According to the Commission, Art. 41(2) goes further that Art. 16 since it deals with conduct "after the fact", *i.e.* when the actual breach has ended - making it unlawful to assist the responsible State in maintaining the situation created by the breach.[102] On the other hand, Art. 16 is contemporaneous – making it unlawful to assist in the commission of the unlawful act.[103] Furthermore, Art. 42(2) applies only to breaches of *jus cogens* norms, whereas Art. 16 applies to all unlawful conduct. For present purposes, both Articles are relevant since Israel and Morocco are responsible both for breaches of *jus cogens* norms (right to self-determination) and of customary international law norms (principle of usufruct, right to permanent sovereignty over natural resources). The obligation of non-assistance "does not require the complete isolation of the responsible State."[104] As Jørgensen observes: "The obligation not to assist the responsible State is limited to acts that would assist in preserving the situation created by

[97] E. Milano, The Doctrine(s) of Non-Recognition: Theoretical Underpinnings and Policy Implications in Dealing with *De Facto* Regimes, paper presented at the ESIL Research Forum, Budapest, 28-30 September 2007, p. 2, available at <http://www.esil-sedi.eu/fichiers/en/Agora_Milano_060.pdf>.

[98] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *supra* note 85, para. 125.

[99] J. Crawford, *supra* note 34, p. 167.

[100] J. Crawford, *supra* note 55, para. 91.

[101] Commentary to Art. 14 of the Draft Articles on the Responsibility of International Organizations, with commentaries, *supra* note 78, p. 36, para. 1.

[102] Commentary to Art. 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *supra* note 61, p. 115, para. 11

[103] Commentary to Art. 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *ibid.*, p. 66, para. 1.

[104] N. Jørgensen, *The Obligation of Non-Assistance to the Responsible State*, in J. Crawford, A. Pellet, S. Olleson (eds.), *supra* note 81, p. 687, at p. 691.

the breach. It does not cover international co-operation with the responsible State in unrelated fields … However, a State may legitimately avoid all types of international co-operation if it so wishes."[105] Finally, in order for an entity to be responsible by way of complicity, it must not only be aware of the circumstances making the conduct of the assisted State unlawful, but it must also intend to facilitate the occurrence of the unlawful conduct by the aid or assistance given.[106]

Against this background, the remainder of the paper will focus on the EU-Israel and EU-Morocco trade relations with a view to assessing whether, and if so, to what extent, the EU complies with its obligations under international law – as these were identified above, as well as whether it has adopted a consistent approach in its economic dealings with Israel and Morocco. One important caveat needs to be inserted here. The following sections will not deal with the issue of the financial assistance given by the EU to these two States as questions of funding fall within the broader context of the European Neighbourhood Policy.[107]

3. CASE-STUDY: EU-ISRAEL TRADE RELATIONS

3.1 **Background to the Israeli-Palestinian Conflict**

At the end of World War I, a Mandate for Palestine was entrusted to Great Britain by the League of Nations.[108] In 1967, during the Six-Day-War between Israel and a number of Arab States, Israeli forces gained control over all the territories which had constituted Palestine under the British Mandate.[109] Since 1967 both the UN and the EU consider the West Bank, including East Jerusalem, and the Gaza Strip as territories occupied by Israel.[110] Israel disputes that the territories in question are occupied and instead refers to the West Bank and the Gaza Strip as 'disputed territories'.[111] A number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organisation (PLO)

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[105] *Ibid.*

[106] Commentary to Art. 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *supra* note 61, p. 66, paras. 3-5. According to the Commission: "There is no requirement that the aid or assistance shoud have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act." See also Commentary to Art. 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *ibid.*, p. 115, para. 11. According to the ILC: "As to the elements of "aid and assistance", article 41 is to be read in conjunction with article 16."

[107] For Israel, see <https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/israel_en and for Morocco see https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/morocco_en>.

[108] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, para. 70.

[109] *Ibid.*, para. 73.

[110] See for example UN SC Res. 242 (1967), *supra* note 34, UN GA Res. 67/19 (2012), UN Doc. A/RES/67/19. See also 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, *supra* note 90, paras. 2-3.

[111] Israeli Ministry for Foreign Affairs, Disputed Territories - Forgotten Facts about the West Bank and Gaza Strip, 01 February 2003, available at <http://mfa.gov.il/MFA/MFA-Archive/2003/

requiring *inter alia* the former to transfer to Palestinian authorities a number of powers and responsibilities exercised in the occupied territory; however, so far such transfers have remained partial and incomplete.[112] As a result, there is international consensus that the entire Palestinian territory remains under Israeli occupation.[113]

As mentioned above, the ICJ in its 2004 *Wall* Advisory Opinion unequivocally affirmed the right of the Palestinian people to self-determination and reiterated the obligation of third parties "not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory" and "not to render aid and assistance in maintaining the situation created by such construction."[114] On November 29th, 2012, the UN General Assembly accorded Palestine non-member observer State status in the UN.[115] On December 17th, 2014, the European Parliament adopted a resolution "supporting in principle Palestinian Statehood."[116]

3.2 The Territorial Scope of the EU-Israel Association Agreement and the EU's Obligation of Non-Recognition

The EU-Israel Association Agreement constitutes the legal basis for EU trade relations with Israel. The core aim of the agreement is to reinforce the free trade area between the EU and Israel.[117] Goods exported from Israel to the EU and *vice versa* benefit from preferential tariffs and customs duties.[118] However, according to Art. 7 of the Agreement, this preferential treatment applies only to products "originating in Israel." For the purpose of ascertaining entitlement to preferential treatment under the EU-Association Agreement, the origin of products is established by a EUR.1 movement certificate issued by the customs authorities of the exporting State.[119] The customs authorities of the importing State may request verification of the authenticity of the EUR.1 certificate and of the originating status of the products concerned from the customs authorities

Pages/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We.aspx>. See also B. Rubin, *supra* note 35, paras. 53, 63.

[112] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, para. 77.

[113] See for example UN SC Res. 1860 (2009), *supra* note 35; UN GA Res. 63/96 (2008), UN Doc. A/RES/63/96; UN GA Res. 69/24 (2014), UN Doc. A/RES/69/24. See also 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, *supra* note 90, para. 2.

[114] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, paras. 155-156, 159.

[115] UN GA Res. 67/19 (2012), UN Doc. A/RES/67/19 (2012), para. 2.

[116] European Parliament Resolution of 17 December 2014 on recognition of Palestine Statehood, 2014/2964 (RSP), para. 1.

[117] Art. 6 of the EU-Israel Association Agreement.

[118] Art. 9-20, *ibid.*

[119] Art. 18 of Protocol 4 to the EU-Israel Association Agreement concerning the definition of the concept of 'originating products' and methods of administrative cooperation, OJ [2006] L20/3.

of the exporting State.[120] An unsatisfactory verification procedure could result in the importing State refusing entitlement to preferential treatment.[121]

It is important to note that the territorial clause inserted in the Agreement fails to provide a definition of the Agreement's precise territorial scope; Art. 83 of the EU-Israel Association Agreement merely refers to the "territory of Israel." Another relevant agreement is the EU-PLO Association Agreement, which 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. [122] Art. 73 of the EU-PLO Association Agreement states that it applies to the "territory of the West Bank and the Gaza Strip" - without however defining the precise boundaries of these territories. 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.[123]

The ensuing lack of clarity has created serious problems in practice.[124] According to Israel, goods produced in the occupied Palestinian territory are produced in Israel's customs territory and thus, they should be entitled to preferential treatment under the Association Agreement.[125] In light of the EU's duty of non-recognition, the territorial scope of the EU-Israel Association Agreement is of utmost importance. In international law the capacity of States to enter into agreements that apply within their territory is "an attribute of State sovereignty."[126] Thus, any claim by an occupying power 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 recognize,[127] since, as mentioned above, occupation does not transfer sovereignty over the occupied territory.

The ECJ was confronted with the question of the territorial scope of the EU-Israel Association Agreement in the context of the *Brita* case. The case concerned the import to Germany of goods from an Israeli company located in the West Bank.[128] The German authorities withdrew the benefit of preferential treatment on the ground that it could not be conclusively established that the imported

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[120] Art. 33(1), 33(2) *ibid*.

[121] Art. 33(6) *ibid*.

[122] Art. 1(2) of the Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, adopted on 24 February 1997, entered into force 01 July 1997, OJ [1997] L187/3.

[123] C. 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, 14 *EJIL* 591 (2003), at p. 595.

[124] Opinion of Advocate General Bot, Case C-386/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, *supra* note 19, para. 26.

[125] Case C-386/08, *ibid*., para. 32. See also G. Harpaz, The Dispute Over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip – The Limits of Power and the Limits of the Law, 38 *Journal of World Trade Law* 1049 (2004), at p. 1051.

[126] *Case of the S.S. "Wimbledon", PCIJ Series* A, No. 1 (1923), p. 14, at p. 25.

[127] M. Dawidowicz, *supra* note 36, p. 218.

[128] Case C-386/08, *supra* note 19, para. 30.

goods fell within the scope of the EU-Israel Association Agreement.[129] Brita, the company that imports the products in question, brought the issue before the German courts, which then submitted a preliminary question to the ECJ.[130]

Despite an express invitation by the Advocate General to analyse the legal status of Israel's presence in the West Bank for the purpose of establishing the territorial scope of the Association Agreement, [131] the Court decided the matter solely with reference to the "politically-detached" principle of *pacta tertiis*.[132] The ECJ argued that the EU-PLO Association Agreement implicitly restricted the territorial scope of the EU-Israel Association Agreement.[133] According to the Court, construing the territorial clause of the EU-Israel Agreement:

> as meaning that Israeli customs authorities enjoy competence in respect of products originating from the West Bank would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the … provisions of the EC-PLO Protocol. Such an interpretation, the effect of which would be to create an obligation for a third party without its consent, would thus be contrary to the principle of general international law, '*pacta tertiis nec nocent nec prosunt*'.[134]

The judgment clarified that the scope of the EU-Israel Association Agreement does not extend to the occupied Palestinian territories, thereby making it abundantly clear that the EU has not implicitly recognised Israel's treaty-making capacity over these territories. At the same time, the Court's exclusive reliance on the *pacta tertiis* rule is formalistic and, more importantly, difficult to reconcile with the image of a court that shares an internationalist approach.[135] The failure to take into account the broader international legal framework of the dispute (including the status of Israel as an occupying power; the violation of the Palestinian peoples' right to self-determination; and the concomitant obligation of non-recognition on the part of the EU) in interpreting the territorial scope of the EU-Israel Association Agreement leaves much to be desired.[136] In this light, it is difficult to escape the conclusion that, by focusing exclusively on the *pacta tertiis* rule, the Court sought to achieve conformity with EU law while avoiding being drawn into political storms.[137]However, this judicial strategy severely undermines the normative power Europe narrative and lends evidentiary force to the argument that the CJEU, in its practice, shows a great deal of 'judicial recalcitrance' towards international law.

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[129] *Ibid*., para. 33.

[130] *Ibid*., paras. 35-36.

[131] Opinion of Advocate General Bot, *supra* note 124, paras. 109-112.

[132] G. Harpaz, E. Rubinson, The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita, 35 *E. L. Rev.* 551 (2010), at p. 566.

[133] Case C-386/08, *supra* note 19, paras. 50-53.

[134] *Ibid*., para. 52.

[135] G. Harpaz, E. Rubinson, *supra* note 132, pp. 565-566.

[136] R. Holdgaard, O. Spiermann, Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, Judgment of the Court of Justice (Fourth Chamber) of 25 February 2010, nyr, 48 CML Rev. 1667 (2011), at pp. 1680-1682.

[137] G. Harpaz, E. Rubinson, *supra* note 132, p. 566.

Finally, the narrow approach followed in *Brita* is reminiscent of that in *Anastasiou*.[138] The case arose from an action brought by a number of Greek Cypriot producers before the UK High Court of Justice for judicial review of the practice of UK authorities of accepting origin certificates (pursuant to the 1977 Protocol regarding products originating from Cyprus)[139] and phytosanitary certificates (pursuant to Directive 77/93/EEC on protective measures against the introduction into the Community of organisms harmful to plants or plant products)[140] issued by the authorities of the self-proclaimed Turkish Republic of Northern Cyprus ('TRNC').[141] The Court stated that the non-recognition of the TRNC either by the EU, or by its Member States precluded the possibility of mutual reliance and co-operation between the entity's authorities and those of the Member States according to the 1977 Protocol.[142] On this basis, it was held that "the acceptance of movement certificates not issued by the Republic of Cyprus would constitute … a denial of the very object and purpose of the system established by the 1977 Protocol."[143] The Court did not address at all the argument put forward by the Greek Government to the effect that acceptance of the certificates issued by the Turkish authorities in Northern Cyprus would be tantamount to violating a number of UN Security Council Resolutions condemning the Turkish occupation and calling upon all members of the international community not to recognise the self-proclaimed TRNC.[144] At the same time, the Court underscored that the strict interpretation of the 1977 Protocol "in order to ensure uniform application of the [EU-Cyprus] Association Agreement in all the Member States."[145] According to Koutrakos, this approach shows that the Court seeks to ensure the uniformity and effectiveness of EU law "whilst intervening as little as possible in an issue which is highly charged in in political terms" and is fully consistent with "the case-law in other areas of trade policy with significant foreign policy overtones, namely economic sanctions against third countries and exports of dual-use goods."[146]

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[138] Case C 432/92, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Anastasiou* [1994], ECR I-3087.

[139] Council Regulation 290/77 of 20 December 1977 on the conclusion of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and the Republic of Cyprus, OJ [1977] L339/1.

[140] Council Directive 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Community of organisms harmful to plants or plant products, OJ [1977] L26/20.

[141] S. Talmon, The Cyprus Question before the European Court of Justice, 12 *EJIL* 727 (2001), at pp. 734-737.

[142] Case C 432/92, *supra* note 138, paras. 39-40.

[143] *Ibid*., para. 41.

[144] P. Koutrakos, Legal Issues of EC-Cyprus Trade Relations, 52 *ICLQ* 489 (2003), at p. 492. N. Skoutaris, *The Cyprus Issue: The Four Freedoms in a Member State under Siege*, (Oxford: Hart Publishing, 2011), p. 130.

[145] Case C 432/92, *supra* note 138, para. 54.

[146] P. Koutrakos, *supra* note 144, p. 493.

3.3 Import into the EU of Products Originating in the Occupied Palestinian Territories: The EU's 'Labelling' Policy and the Obligations of Non-Recognition and Non-Assistance

The previous section showed that, despite its slender reasoning, the *Brita* judgment clarified that the occupied Palestinian territories do not fall within the territorial scope of the EU-Israel Association Agreement. However, the duties of non-recognition and non-assistance also entail abstaining from economic activities that may further entrench the unrecognised regime's authority over a territory.[147] As Crawford observes: "Economic and commercial dealings between Israel and a third State may be considered 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."[148] Taking into account that the EU remains one of the most important trading partners for the settlements with annual exports worth 300 million dollars,[149] the question of the compatibility with international law of the EU's policy towards settlement goods arises. In this light, the remainder of this section will analyse the status in EU law of settlement goods. It will be shown that the EU views the issue of importation of products originating in the settlements largely as a question of correct 'labelling' – pertaining to the identification of the precise place of origin of a product - and not as a question of compliance with obligations related to breaches of international law arising from the settlements. Against this background, the section will continue by assessing whether the EU's approach to settlement products is sufficient to meet the duties of non-recognition and non-assistance incumbent upon it by virtue of international law.

As explained above, Israel considers the occupied Palestinian territories as part of its customs territory; as a result, products originating from the settlements may benefit from the preferential treatment under the EU-Israel Association Agreement, unless the customs authorities of the importing State question the product's origin – something that happens only rarely.[150] The EU first addressed the issue in its 2001 Notice to Importers alerting importers of Israel's practice of issuing proofs of origin for goods coming from the occupied territories and informing them that "putting the goods in free circulation may give rise to customs debt."[151] In 2005 the EU and Israel reached a technical arrangement in order to resolve the dispute concerning the certification of origin of products originat-

[147] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), supra* note 85, para. 124.

[148] J. Crawford, *supra* note 55, para. 84.

[149] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *supra* note 66, para. 46.

[150] F. Dubuisson, The International Obligations of the European Union and its Member States with regard to Economic Relations with the Israeli Settlements, February 2014, p. 48, available at <http://www.madeinillegality.org/IMG/pdf/etude_def_ang.pdf>.

[151] Notice to Importers – Imports from Israel into the Community, OJ [2001] C328/04.

ing from the settlements.[152] A 2005 Notice to Importers clarified that, in the future, all certificates of origin must specify the name of the city, village or industrial zone where the goods were produced – in order to enable customs authorities to verify whether the products came from the occupied Palestinian territories and were, thus, not eligible for preferential treatment.[153] Despite these efforts, in practice, products are marked as originating in Israel even though their place of manufacture is in the occupied territories.[154]

As explained above, this practice finally brought the *Brita* case before the ECJ. Having established that the territorial scope of the EU-Israel Association Agreement does not cover the occupied Palestinian territories, the Court concluded that the customs authorities of Member States are entitled to refuse preferential treatment on the grounds that the goods in question originated in the occupied territories.[155] Despite the Court's ruling, a large number of goods produced in the settlements still benefit from preferential treatment, since, as the Commission emphasised in a resolution adopted in 2012, "customs authorities, despite their best endeavours, cannot possibly check and control each and every proof-of-origin document and every consignment preferentially imported from Israel to the EU."[156] A revised version of Notice to Importers was published in the same year providing a list of non-eligible locations and their postal codes.[157] However, this did not fully resolve the issue as no changes were made to the customs verification mechanisms.[158] Indeed, the 2013 report by the international fact-finding mission on Israeli settlements and the 2014 report by the Special Rapporteur on the situation of human rights in the occupied Palestinian territories confirmed that many products falsely labelled as 'made in Israel' are still imported into the EU.[159]

The 2015 Interpretative Notice on indication of origin of goods from the occupied Palestinian territories constitutes the latest attempt to resolve the problem of certification of origin of products originating from the settlements.[160] The Notice states that since the West Bank (including East Jerusalem) is not part of the Israeli territory according to international law, the "omission of geograph-

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[152] P. Wrange, *supra* note 14, p. 36.

[153] Notice to Importers – Imports from Israel into the Community, OJ [2005] C20/02.

[154] Al-Haq, *supra* note 56, pp. 16-17. 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, *supra* note 72, para. 99.

[155] Case C-386/08, *supra* note 19, paras. 53, 67.

[156] European Parliament Resolution of 16 February 2012 on the proposal for a Council decision on the conclusion of the regional Convention on pan-Euro-Mediterranean preferential rules of origin, 2012/2519 (RSP), point N.

[157] Notice to Importers – Imports from Israel into the Community, OJ [2012] C232/03.

[158] F. Dubuisson, *supra* note 150, p. 52.

[159] 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, *supra* note 72, para. 99. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *supra* note 66, para. 46.

[160] Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967, OJ [2015] C375/5.

ical information that the product comes from the Israeli settlements would mislead the consumer as to the true origin of the product."[161] Thus, the Notice encourages the use of expressions such as 'product from the West Bank (Israeli Settlement)'.[162] Although the Interpretative Notice constitutes a step towards the right direction, it is doubtful whether it will fully resolve the issue as no centralised, EU-wide control mechanism ensuring that settlement products do not get preferential access to the EU markets is envisaged thereunder.

This brief overview of the legal status of settlement products under EU law shows that the EU has largely addressed the question of importation of these products as a question of correct labelling for the purpose of ascertaining whether they benefit from preferential treatment under the Association Agreement and not as a question of compliance with international law. In this sense, from an EU point of view, this question is merely one of correct application of relevant EU law; the illegality under international law of the circumstances under which these goods are produced is not part of the relevant debate.[163] More importantly, the position adopted by the EU amounts to a denial of the benefits of preferential treatment to settlement goods, but does not prohibit the import of these products into the EU – even when they are clearly identified as originating from the settlements.[164] In this sense, from the standpoint of EU law, the import into and subsequent commercialisation of settlement goods within the EU becomes a question of providing accurate information to consumers – who are then free to choose whether to purchase them or not.[165]

However, the EU's approach to settlement goods is arguably in breach of its international obligation of non-recognition and non-assistance in maintaining a situation created by a serious breach of a peremptory norm of international law within the meaning of Art. 42(2) of the Draft Articles on the Responsibility of International Organisations. On the basis of the *Namibia* Advisory Opinion,[166] no economic relations can be maintained with Israel that would contribute to the development of the settlements in the occupied Palestinian territories. This proposition is further borne out by Security Council Resolution 2334 (2016) where the Security Council reaffirmed the illegality of the Israeli settlements in the occupied Palestinian territory and expressly called upon all States "to dis-

[161] *Ibid*., paras. 7, 10.

[162] *Ibid*., para. 10

[163] F. Dubuisson, *supra* note 150, p. 55.

[164] European Commission, Frequently Asked Questions on 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, 19 July 2013, answer to question 2, available at <https://eeas.europa.eu/sites/eeas/files/20130719_faq_guidelines_eu_grants_en.pdf>. According to the Commission: "There is no limitation of exports to the European Union of products produced in the settlements. According to the Association Agreement, these products however do not benefit from exemption from customs duties."

[165] F. Dubuisson, *supra* note 150, p. 56.

[166] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), supra* note 85, para. 124.

tinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967."[167]

There is no 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.[168] A 2012 joint NGO report showed that the EU is the main market for various settlement products including Ahava cosmetics, SodaStream carbonation devices and Keter plastic.[169] Clearly, access to the EU market represents a vital source of revenue for the settlements that facilitates their expansion and entrenchment.[170] For example, local municipalities use property taxes paid by Israeli businesses located in the occupied territories for the development of the settlements.[171] In this light, it cannot be convincingly argued that trade with settlements falls within the *Namibia* exception since, as it was shown above, the general scheme of settlement activity is geared towards consolidating the unlawful acquisition of Palestinian territory and does not benefit the local Palestinian population.[172] A number of international lawyers have criticised the EU's approach to settlement goods and it has been pointed out that the obligation of non-recognition and non-assistance mandates an all-out ban on settlement goods.[173] A 2015 study commissioned by the European Parliament as well as the 2014 Report by the Special Rapporteur on the situation of human rights in the occupied Palestinian territories also call for a clear ban on settlement produce.[174]

In view of the fact that, as it was shown above, water resources in the occupied Palestinian territories are mainly used for the needs of the settlements to the detriment of the local Palestinian population, it is at least arguable that, by allowing the import of settlement agricultural goods, the EU aids or assists the on-going commission of internationally wrongful acts, namely the breach of the principle of usufruct and the breach of the right to permanent sovereignty over natural resources within the meaning of Art. 14 of the Draft Articles on the Responsibility of International Organisations. This proposition is substantiated by the fact that there are numerous UN General Assembly resolutions expressly calling upon all States and international organisations not to cooperate with

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[167] UN SC Res. 2334 (2016), UN Doc. S/RES/2334 (2016), para. 5. See also UN SC Res. 478 (1980), UN Doc. S/RES/478 (1980), para. 5, where the Security Council called upon Member States not to recognize the annexation of East Jerusalem by Israel, or its consequences.

[168] T. Moerenhout, The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories, 3 *Journal of International Humanitarian Legal Studies* 344 (2012), at p. 359.

[169] Joint NGO Report, Trading Away Peace: How Europe helps sustain illegal Israeli settlements, October 2012, p. 22, available at <https://www.fidh.org/IMG/pdf/trading_away_peace_-_embargoed_copy_of_designed_report.pdf>.

[170] Al-Haq, *supra* note 56, p. 13.

[171] Coalition of Women for Peace, Research Project WhoProfits, SodaStream: A Case Study for Corporate Activity in Illegal Israeli Settlements, January 2011, pp. 6-7, available at <https://whoprofits.org/sites/default/files/WhoProfits-ProductioninSettlements-SodaStream.pdf>.

[172] J. Crawford, *supra* note 55, para. 91.

[173] See for example F. Dubuisson, *supra* note 150, p. 45, T. Moerenhout, *supra* note 168, p. 359.

[174] P. Wrange, *supra* note 14, p. 37. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *supra* note 66, paras. 46-47.

or assist in any manner in any measures taken by Israel to exploit the natural resources of the occupied territories.[175] Furthermore, in a 2016 resolution the Human Rights Council stated that "the conditions of harvesting and production for products made in settlements involve the breach of applicable legal norms, inter alia, the exploitation of the natural resources of the Occupied Palestinian Territory" and called upon all States to respect their legal obligations in that regard.[176]

In order to assess whether the EU is responsible by way of complicity, it needs to be examined whether the threshold of Art.14 has been reached, namely whether the EU knowingly and intentionally provides significant aid or assistance to Israel with a view to facilitating the commission of the wrongful acts in question.[177] The import into and subsequent commercialisation of settlement agricultural products within the territory of the EU may be considered, at the very minimum, as indirectly encouraging the illegal exploitation of Palestinian natural resources.[178] Whether this indirect encouragement amounts to 'significant aid and assistance' needs to be assessed against the backdrop of the size of the EU market and the volume of exports from the settlements to the EU[179] – the most common being agricultural products.[180] The EU is one of the largest economies in the world[181] and, as mentioned earlier, one of the most important trading partners for the settlements with annual exports worth 300 million dollars,[182] whereas Palestinian exports to the EU have an average value of 15 million euros a year.[183] In this light, allowing almost unrestricted access to one of the biggest markets worldwide may be considered as a significant contribution to Israel's unlawful exploitation of Palestinian natural resources contrary to the principle of usufruct and the right to permanent sovereignty over natural resources.

As far as the 'knowledge' requirement is concerned, there is no doubt that the EU is fully aware that the conditions of production of settlement agricultural products involve the unlawful exploitation of the natural resources of the occupied territories – especially in the light of the numerous UN General Assem-

[175] UN GA Res. 3005 (XXVII) (1972), UN Doc. A/RES/3005 (XXVII), para. 5; UN GA Res. 32/161 (1977), UN Doc. A/RES/32/161, para. 7; UN GA Res. 34/136 (1979), UN Doc. A/RES/34/136, para. 5; UN GA Res. 35/110 (1980), UN Doc. A/RES/35/110, para. 5; UN GA Res. 36/173 (1981), UN Doc. A/RES/36/173, para. 6; UN GA Res.

[176] Human Rights Council Res. 31/36 (2016), UN Doc. A/HRC/RES/31/36.

[177] Commentary to Art. 14 of the Draft Articles on the Responsibility of International Organizations, *supra* note 78, paras. 1-6.

[178] See *mutatis mutandis* Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* [2015], ECLI:EU:T:2015:953, para. 238.

[179] S. Hummelbrunner, A.-C. Prickarz, It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union, 32 *Utrecht J. Int. Eur. Law.* 19 (2016), at p. 31.

[180] Joint NGO Report, *supra* note 169, p. 20.

[181] European Commission, EU position in world trade, available at <http://ec.europa.eu/trade/policy/eu-position-in-world-trade/>.

[182] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *supra* note 66, para. 46.

[183] Joint NGO Report, *supra* note 169, p. 20.

bly resolutions condemning this very practice.[184] Turning to the 'intent' requirement, it needs to be noted that most authors have treated it with extreme scepticism since it would be quite difficult to prove in practice[185] and the ILC itself was aware that with respect to this element it was engaged more in progressive development than codification.[186] Despite the fact that the 'intent' requirement does not seem to rest on an entirely settled practice, it would be worthwhile examining whether it is fulfilled *in casu*. Based on the relevant debate within the ILC, Aust concludes that 'intent', in the context of complicity, is akin to knowledge of the purpose for which the State receiving assistance intends to use it – an interpretation that is supported by the ICJ's judgment in the *Genocide Convention* case.[187] Following this interpretation, 'intent', in the present context, would imply knowledge on behalf of the EU of Israel's intention to utilise trade for the maintenance and economic growth of the settlements to the detriment of the local Palestinian population. If 'intent' is construed in this way, it is safe to assume that this requirement is also fulfilled since the EU is fully aware that the import of settlement agricultural produce does not benefit the Palestinian people. The existence of a number of UN General Assembly resolutions expressly calling on all States and international organisations not to assist Israel in the continuing exploitation of the Palestinian natural resources corroborates this assumption.

3.4 **Interim Conclusions**

This section examined the trade relations between the EU and Israel with a view to assessing whether the EU's practice comports with its obligations under international law. It was shown that, despite the lack of clarity ensuing from the territorial clause inserted in the EU-Israel Association Agreement, the Court's ruling in *Brita* clarified that the territorial scope of the Agreement does not extend to the occupied Palestinian territories – thereby making it clear that the EU has not fallen foul of its obligation of non-recognition by implicitly recognising Israel's treaty-making capacity in relation to these territories. At the same time, it was argued that the Court's reasoning, and more particularly its exclusive reliance on the *pacta tertiis* principle, leaves much to be desired and erodes the image of the EU as a normative power firmly committed to the strict observance of

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[184] See the resolutions mentioned in fn. 175.

[185] For the relevant discussion see H. P. Aust, *Complicity and the Law of State Responsibility*, (Cambridge: Cambridge University Press, 2011), p. 236.

[186] J. Crawford, *supra* note 55, para. 78.

[187] H. P. Aust, *supra* note 185, pp. 233-235. *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), ICJ Reps* 2007, p. 3, paras. 420-421. According to the Court: "[T]he question arises whether complicity presupposes that the accomplice shares the specific intent *(dolus specialis)* of the principal perpetrator. But whatever the reply to this question, 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." *Ibid*., para. 421. (Emphasis added).

international law. Against this backdrop, the legal status under EU law of goods originating from the settlements was examined. The EU has made considerable efforts to ensure that settlement products do not benefit from preferential treatment, however, these efforts are largely thwarted by the lack of a centralised, effective mechanism guaranteeing that goods originating in the settlements are not preferentially imported into the EU. At the same time, it was shown that the EU views the question of importation of settlement products as a question of correct labelling for the purpose of ascertaining whether they benefit from preferential treatment and not as a question of compliance with international law. In this light, it was argued that, short of a total ban on the import of settlement products, the EU is in breach of the obligation of non-recognition and non-assistance in maintaining an illegal situation created by a serious breach of a peremptory norm of international law to the extent that the import of these products facilitates the expansion and entrenchment of settlements in the occupied territories. Furthermore, it was suggested that the EU is responsible, by way of complicity, for the on-going breach of the principle of usufruct and of the right of permanent sovereignty over natural resources, to the extent that it allows market access for settlement agricultural goods.

4. CASE-STUDY: EU-MOROCCO TRADE RELATIONS

4.1 **Background to the Western Sahara Dispute**

In 1963, the UN added Western Sahara, formerly a Spanish colony,[188] to its list of non-self-governing territories.[189] Three years later, the UN General Assembly urged Spain, as the administering power, to hold a referendum in order to enable the indigenous people of the territory to "exercise freely its right to self-determination."[190] Front Polisario, the main Sahrawi liberation movement, was formed in 1973 with a view to gaining independence for Western Sahara.[191] Competing claims between Morocco and Mauritania over the territory prompted the UN General Assembly to request an advisory opinion from the ICJ.[192] The Court opined that no legal ties existed between Western Sahara and Morocco and Mauritania of such a nature that could affect the application of the principle of self-determination of the peoples of the territory.[193] A few days after the ICJ rendered its opinion Moroccan armed forces entered the disputed territory and soon thereafter an armed conflict broke out between Front Polisario, on the one

[188] See generally T.M. Franck, The Stealing of the Sahara, 70 *AJIL* 694 (1976).

[189] On Western Sahara's inclusion in the list of non-self-governing-territories, see 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. 5.

[190] UN GA Res. 2229 (XXI) (1966), UN Doc. A/RES/2229/ XXI.

[191] The UN has recognized Polisario Front as the representative of the people of Western Sahara since 1979. See UN GA Res. 34/37, *supra* note 37, para. 7.

[192] *Western Sahara, supra* note 26, para. 162.

[193] Case T-512/12, *supra* note 178, para. 162.

hand, and Morocco and Mauritania on the other.[194] In February 1976 Spain officially declared its withdrawal from Western Sahara.[195] Three years later, in 1979, Mauritania and Polisario Front signed a peace agreement under which Mauritania agreed to withdraw its armed forces and relinquished its claim over Western Sahara.[196] Upon Mauritania's withdrawal, Moroccan armed forces annexed the remainder of the territory. The UN General Assembly swiftly condemned the annexation and characterized the presence of Moroccan army in the territory as 'occupation'.[197] Since then, several UN-brokered efforts have been made to resolve the dispute - which have however proved thus far futile.[198] As a result, the UN still recognizes Spain as the *de jure* administering power of Western Sahara, which remains on the UN's list of non-self-governing territories.[199] A series of resolutions by the UN Security Council and General Assembly have repeatedly affirmed the right of Sahrawi people to self-determination.[200]

Although the EU has, on various occasions, expressed concern about the pro-longed nature of the conflict and its implications for security, respect for human rights and cooperation in the region,[201] it has been observed that its language is "rather muted."[202] The EU Annual Report on Human Rights and Democracy in the World 2014, states that Western Sahara is a "territory *contested* by Morocco and the Polisario Front"[203] – without making any reference to the legal status of Western Sahara as an occupied territory or to the right of its people to self-determination. Overall, the EU has restricted itself to expressions of support to UN efforts to resolve the political impasse between the parties to the conflict,[204] which can be considered a very minimal approach towards the position adopted towards the comparable situation in Palestine.[205]

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[194] Human Rights Watch, *Keeping It Secret: The United Nations Operation in the Western Sahara*, October, 1995, available at <https://www.hrw.org/reports/1995/Wsahara.htm>.

[195] 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 – S/11997.

[196] Mauritano-Saharoui Agreement, concluded on 10/08/1979, annexed to Letter dated 18 August 1979 from the Permanent Representative of Mauritania to the United Nations addressed to the Secretary-General, UN Doc. A/34/427 – S/13503.

[197] UN GA Res. 34/37, *supra* note 37, para. 5. See also UN General Assembly Res. 35/19, *ibid.*, para. 3.

[198] For an overview, see M. Dawidowicz, *supra* note 36, at pp. 260-261.

[199] Information from Non-Self-Governing-Territories transmitted under Article 73 *e* of the Charter of the United Nations, Report of the Secretary General, 1/02/2016, UN Doc. A/71/68.

[200] For the most recent, see UN SC Res. 2285/2016, UN Doc. S/RES/2285.

[201] EU Annual Report on Human Rights and Democracy in the World in 2014, 22 June 2015, 10152/15, p. 186.

[202] P. Wrange, *supra* note 14, p. 43.

[203] EU Annual Report on Human Rights and Democracy in the World in 2014, *supra* note 191, p. 186. (Emphasis added).

[204] *Ibid.* See also 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, p. 23.

[205] M. Balboni, The EU's Approach to Western Sahara, Paper presented at the Conference organised by the South African Department of foreign Affairs, on Multilateralism and International Law with Western Sahara as a Case Study, Pretoria, South Africa, 4-5 September 2008, p. 1, available at <http://www.saharawi.org/oldsite/tesi/saharaocc1.pdf>.

4.2 The Territorial Scope of the Trade Agreements Concluded Between the EU and Morocco and the EU's Obligation of Non-Recognition

The EU is Morocco's largest trading partner accounting for 55.7% of its trade in 2015, while 61% of Morocco's annual exports go to the EU.[206] The EU-Morocco Association Agreement, which came into force in 2000, is the legal basis governing the relations between the two parties and its principal aim is to establish a free trade zone between the EU and Morocco.[207] In this light, the Agreement provides for reduced or no tariffs for certain products[208] and for the gradual implementation of measures for the greater liberalization of reciprocal trade in agricultural and fishery products.[209]In 2008 Morocco became the first country in the Southern Mediterranean region to be granted 'advanced status' – thereby marking a new phase of privileged relations.[210] Against this background, an agreement concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products was concluded between the EU and Morocco in 2010 and came into force in 2012.[211]

Neither the Association Agreement, nor the Liberalization Agreement clarify whether their territorial scope extends to Western Sahara. The Liberalization Agreement does not include a territorial clause, while Art. 94 of the Association Agreement merely refers to the "territory of the Kingdom of Morocco." However, both agreements have been interpreted in practice as including Western Sahara. There is much evidence to support this proposition. The Commission's Food and Veterinary Office has paid visits to Moroccan exporters located in Western Sahara to check compliance with EU health standards under the Association Agreement.[212] Furthermore, the Commission has included 140 Moroccan exporters located in Western Sahara to the list of approved exporters under the Association Agreement.[213] The High Representative of the Union for Foreign Affairs and Security Policy, Ashton, has expressly confirmed that the Liberalization Agreement allows Morocco to "register as geographical indications products originating in Western Sahara."[214] Finally, in the context of the *Front Polisario*

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[206] See <http://ec.europa.eu/trade/policy/countries-and-regions/countries/morocco/>.

[207] Art. 6 of the EU-Morocco Association Agreement.

[208] Arts. 7-30, *ibid.*

[209] Art. 16, *ibid.*

[210] Joint Statement EU-Morocco summit, Granada, 7 March 2010, 7220/10, at p. 6.

[211] Agreement 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, OJ [2012] L241/4. (Hereinafter referred to as the 'Liberalization Agreement').

[212] Case T-512/12, *supra* note 178, paras. 79, 99, 103.

[213] *Ibid.*, paras. 80, 99, 103. See also <https://webgate.ec.europa.eu/sanco/traces/output/MA/LBM_MA_en.pdf>; <https://webgate.ec.europa.eu/sanco/traces/output/MA/FFP_MA_en.pdf>; <https://webgate.ec.europa.eu/sanco/traces/output/MA/ABP-FSB_MA_en.pdf>.

[214] 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, avail-

case, both the Council and the Commission expressly acknowledged that the Liberalization Agreement has been *de facto* applied to the territory of Western Sahara.[215] Thus, it is safe to assume that, under these agreements, 'Saharan territory was included *sub silentio*."[216]

The question of Western Sahara gained considerable attention in the negotiations over the 2006 EU-Morocco Fisheries Partnership Agreement ('FPA')[217] and the 2013 EU-Morocco Fisheries Protocol.[218] In 2006 the EU and Morocco concluded a Fisheries Partnership Agreement allowing access for EU vessels to Morocco's fisheries for an initial period of four years.[219] In exchange, the EU paid Morocco a financial contribution of 144.4 million euros for the relevant period.[220] The FPA's reference to "waters falling within the sovereignty or *jurisdiction* of Morocco"[221] has been widely interpreted as including the waters off the coast of Western Sahara.[222] This interpretation is reinforced by the fact that the 2006 FPA replaced earlier fisheries agreements which were similar in geographical scope and under which EU vessels were authorised by Morocco to operate in Western Sahara waters.[223] Furthermore, while the southernmost geographical limit of the FPA is not clearly defined, thereby creating doubt as to whether it extends beyond the internationally recognized maritime boundaries of Morocco,[224] the practice of the parties has settled the matter and the Commission itself has acknowledged that fishing by EU vessels has taken place in the waters off Western Sahara.[225] Upon its expiry, the FPA was not auto-

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able at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-001023&language=DE>.

[215] Case T-512/12, *supra* note 168, para. 99.

[216] E. Kontorovich, *supra* note 23, p. 604.

[217] Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, adopted on 26 July 2006, entered into force 28 February 2007, OJ [2006] L141/4.

[218] 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, OJ [2013] L328/2. ('2013 Fisheries Protocol').

[219] Arts. 1, 12 of the FPA.

[220] Art. 2 of the Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries partnership Agreement between the European Community and the Kingdom of Morocco, OJ [2006] L141/9.

[221] Art. 2(a) of the FPA. (Emphasis added).

[222] V. Chapaux, *The Question of the European Community-Morocco Fisheries Agreement*, in K. Arts, P. P. Leite (eds.), *supra* note 57, p. 217, at p. 218. E. Cannizzaro, *A Higher Law for Treaties?*, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, (Oxford: Oxford University Press, 2011), p. 425, at p. 430.

[223] V. Chapaux, *ibid.*, p. 218. M. Dawidowicz, *supra* note 36, p. 268.

[224] 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, paras. 31-35.

[225] Reply from European Commissioner Ferrero-Waldner to Written Question E-4425/08, 12 September 2008, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-4425&language=PL>. Reply from the European Commission to Oral Question H-0079/09, 12 March 2009, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090312+ANN-01+DOC+XML+V0//EN#top>. See also Legal Service of the European Parliament, Legal Opinion: Protocol between the European Union

matically renewed - partly because of doubts regarding its compatibility with international law.[226]

Against this background a new Fisheries Protocol was negotiated and signed in 2013. The 2013 Protocol was modelled after its predecessor; it applies to "waters falling within the sovereignty or *jurisdiction* of Morocco"[227] and, according to its provisions, the EU, again, pays a financial contribution to Morocco for access to its waters[228] – including the waters off the coast of Western Sahara. The Commission has clarified that "the Western Sahara waters are included in the new Protocol."[229]It is noteworthy that several Member States raised serious concerns over the inclusion of Western Sahara in the new Protocol. Denmark and Sweden voted against the adoption of the Protocol raising doubt as to whether any economic gains resulting from its implementation would actually benefit the people of Western Sahara.[230] Finland, the Netherlands and the UK abstained from voting citing similar concerns.[231]

Despite some initial hesitation, the Parliament approved the new Protocol in 2013 acting on the advice of its legal service.[232] According to the opinion rendered by the Parliament's legal service, Morocco, as a "*de facto* administering power", is responsible for the economic development of Western Sahara.[233] The legal service claimed that, under international law, *de facto* administering powers are not prohibited from undertaking economic activities pertaining to natural resources in non-self-governing territories.[234] The opinion rendered by the Parliament's legal service was largely based on a 2002 opinion issued by the UN Under-Secretary General for Legal Affairs and Legal Counsel,[235] Hans Corell ('Corell Opinion').[236] The UN Security Council requested Corell to issue an

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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, 04 November 2013, para. 29. ('2013 Legal Opinion')

[226] European Parliament resolution of 14 December 2011 on the future Protocol setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, 2011/2949 (RSP), para. 9.

[227] Council Decision of 15 November 2013 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 paid for in the Partnership Agreement between the European Union and the Kingdom of Morocco, OJ [2013] L328/1, point (2).

[228] Art. 3 of the 2013 Fisheries Protocol, *supra* note 218.

[229] Answer given by Ms Damanaki on behalf of the Commission to Written Question E-007185/2013, 17 September 2013, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-007185&language=EN>.

[230] Statements by Denmark, Sweden, 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 Fisheries Partnership agreement in force between the two parties, 14 November 2013, 15723/13, ADD 1, pp. 2, 7, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015723%202013%20ADD%201>.

[231] Statements by Finland, the Netherlands and the UK, *ibid.*, pp. 5,7,8.

[232] E. Kontorovich, *supra* note 23, p. 606.

[233] 2013 Legal Opinion, *supra* note 225, para. 17.

[234] *Ibid*., para. 18.

[235] *Ibid*.

[236] Corell Opinion, *supra* note 189.

opinion on the legality, under international law, of certain contracts concluded between Morocco and foreign companies regarding the exploration of mineral resources in Western Sahara.[237] Corell analysed the question from the point of view of the status of Western Sahara as a non-self-governing territory and did not touch upon the status of Morocco as an occupying power. Having analysed the relevant State and judicial practice, he concluded that mineral resources activities in a non-self-governing territory are illegal if conducted in disregard of the needs and interests of the people of that territory.[238] On this basis, the Parliament's legal service concluded that the Protocol between the EU and Morocco is compatible with international law as long as "a certain amount of the financial contribution [granted by the EU] is allocated by Morocco to the benefit of Western Sahara population."[239] The conclusion of the 2013 Fisheries Protocol has been vociferously denounced by Front Polisario, since it would "give a sign of legitimisation to the Moroccan occupation of the Territory, thus contributing to the prolonging of the suffering of the Sahrawi people."[240]

In this light, it is difficult to escape the conclusion that by entering into a number of agreements with Morocco that have been *de facto* applied to the territory of Western Sahara, the EU has acted in breach of its obligation of non-recognition to the extent that it has recognised Morocco's treaty-making capacity with respect to Western Sahara and thus, implicitly, the Moroccan claim to sovereignty over the territory.[241] It is instructive that a number of other third-party States have publicly declared that their free trade agreements with Morocco do not extend to Western Sahara *exactly because* Morocco does not exercise internationally recognised sovereignty over the territory. The Norwegian Minister for Foreign Affairs has stated that the free trade agreement between the EFTA States and Morocco is not applicable to Western Sahara since Western Sahara is not part of Morocco's territory.[242] In a similar vein, the US has interpreted its free trade agreement with Morocco as not covering Western

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[237] *Ibid*., para. 1.

[238] *Ibid*., paras. 21, 24.

[239] 2013 Legal Opinion, *supra* note 225, para. 31. It bears noting that this was not the first time that the Corell Opinion was cited as evidence that, under international law, Morocco is allowed to conclude agreements regarding the exploitation of Western Saharan natural resources. In 2006, Commissioner Borg stated that: "Regarding the question whether Morocco can conclude agreements concerning the exploitation of natural resources of the western Sahara, the opinion of the UN legal adviser gives a clear answer … [T]he interpretation given by the UN legal adviser implies that Morocco is a 'de facto' administrative power of the territory of Western Sahara and consequently has the competence to conclude such a type of agreement." Answer given by Mr Borg on behalf of the Commission to Written Question E-0560/2006, 15 March 2006, available <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2006-0560&language=EN>.

[240] Statement by Mohamed Sidati, Minister, Representative of Polisario Front to the EU, 10 December 2013, available at <http://www.sadr-emb-au.net/polisario-front-eu-morocco-fisheries-agreement-undermines-un-efforts-to-find-solution-to-western-sahara-conflict-statement/>.

[241] M. Dawidowicz, *supra* note 36, p. 274. S. Koury, *supra* note 57, pp. 187-190. V. Chapaux, *supra* note 222, pp. 233-234. E. Cannizzaro, *supra* note 222, pp. 430-431.

[242] See the reply given by the Norwegian Minister for Foreign Affairs, Mr Jonas Gahr Store, to a parliamentary question, 11/05/2010, available at <http://www.wsrw.org/a105x1411>. For the position of Switzerland in relation to the EFTA-Morocco Free Trade Agreement, see the opinion of the Swiss Federal Council, 15/05/2013, available at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20133178>.

Sahara since "the United States and many other countries do not recognize Moroccan sovereignty over Western Sahara."[243]

The proposition that the EU's agreements with Morocco constitute implicit recognition of the latter's unlawful *de facto* annexation of Western Sahara is further buttressed by statements made by the UN Secretary-General and Morocco. In his 2006 annual report on Western Sahara, the UN Secretary-General specifically mentioned the FPA as proof that "as the impasse continues, the international community grows more accustomed to Moroccan control over Western Sahara."[244] Furthermore, upon the conclusion of the FPA, Morocco's Minister of Agriculture stated that "the financial aspect is not necessarily the most important aspect of this agreement. The political aspect is just as important."[245]

Against this background, the next section endeavours to explore how the ECJ treated the question of the territorial scope of the Association and Liberalization Agreements in the context of the *Front Polisario* case.

4.3 The ECJ and the Territorial Scope of the EU-Morocco Association and Liberalization Agreements: The *Front Polisario* Judgment

4.3.1 *Legal Background to the Dispute: The General Court's Judgment*

In 2012, Front Polisario, the main Sahrawi liberation movement, filed an action for annulment against the Council Decision adopting the Liberalization Agreement,[246] insofar as it approved its application to Western Sahara, on the grounds that it was incompatible to EU law and international law binding on the EU, including the right to self-determination and the principle of permanent sovereignty over natural resources.[247] On December 10th, 2015, the General Court delivered its judgment. It held that Front Polisario had legal standing for the purposes of Art. 263 TFEU since it enjoyed legal personality, as it had been treated by the EU institutions as a distinct person. [248] The question as to wheth-

[243] See the letter from the U.S. Trade Representative R. Zoellick to Rep. J. Pitts, 22/07/2004, 150 *Cong. Rec.* H667, available at <http://www.vest-sahara.no/files/pdf/Zoellick_FTA_2004.pdf>.

[244] Report of the Secretary-General on the situation concerning Western Sahara, 16 October 2006, UN Doc. S/2006/817, para. 20.

[245] Statement of Morocco's Minister of Agriculture, Mr Laenser, 28 February 2011, available at <http://www.wsrw.org/a204x1880>.

[246] Council Decision of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union 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 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, OJ [2012] L241/2.

[247] Case T-512/12, *supra* note 178, para. 115. For analysis of the case, see E. Kassoti, The *Front Polisario v Council* Case: The General Court, *Völkerrechtsfreundlichkeit* and the External Aspect of European Integration, European Papers, 23 March 2017, available at <http://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2017_I_010_Eva_Kassoti_3.pdf>.

[248] *Ibid*., paras. 46-60.

er the agreement at hand applied to the contested territory was considered crucial for the purpose of ascertaining whether the act in question was of direct and individual concern to Front Polisario.[249] Thus, the General Court went on to determine the territorial scope of the Liberalization Agreement. On the basis of a number of contextual factors indicating that both the Council and the Commission were aware of the fact that the Agreement has been *de facto* applied to the territory of Western Sahara for a long period of time – and that both institutions had failed to oppose that application,[250] the Court concluded that the Liberalization Agreement's territorial scope extended to Western Sahara.[251] Against this background, the Court decided that Front Polisario was directly and individually concerned by the contested decision as the only other participant in the UN-brokered negotiations between it and Morocco regarding the status of the territory.[252]

In substance the Court held that the Council's decision was vitiated by illegality since the Council failed to carefully examine all the relevant facts before adopting the contested decision.[253] More particularly, the General Court observed that the Council had failed to examine the impact of the Liberalization Agreement on the human rights situation in Western Sahara as well as to ensure that the exploitation of natural resources in the territory was conducted to the benefit of the local population in accordance with the principle of permanent sovereignty over natural resources.[254] On this basis, the General Court partially annulled the Council Decision on the conclusion of the Liberalization Agreement in so far as it approved the application of the Agreement to the territory of Western Sahara.[255]

4.3.2 *The ECJ's Judgment in Case C-104/16P* Front Polisario: Völkerrechtsfreundlichkeit or Realpolitik*?*

On December 21st, 2016, the ECJ delivered its appeals judgment in the *Front Polisario* case.[256] The Grand Chamber overturned the General Court's judgment and decided that Front Polisario did not have legal standing to bring an action for annulment against the Council decision adopting the Liberalization Agreement since, in its view, neither the Liberalization Agreement, nor the EU-Morocco Association Agreement legally extend to the territory of Western Sahara.[257] The ECJ ruled that the General Court erred in interpreting the territorial scope of the Liberalization Agreement as extending to Western Sahara to the extent that it failed to take into account Art. 31(3)(c) Vienna Convention on the Law of

[249] *Ibid*., paras. 73, 103.
[250] *Ibid*., paras. 77-87, 98-103.
[251] *Ibid*., para. 103.
[252] *Ibid*., paras. 61-114.
[253] *Ibid*., paras. 223-248.
[254] *Ibid*., paras. 228, 238, 241.
[255] *Ibid*., para. 247.
[256] Case C-104/16 P, *supra* note 20.
[257] *Ibid.,* paras. 92, 123, 132, 133.

Treaties[258]('VCLT') pursuant to which the interpretation of a treaty must be carried out in the light of "any relevant rules of international law applicable in the relations between the parties."[259] The Court pointed out three relevant rules of applicable international law that the General Court failed to take into account: the right to self-determination; Art. 29 VCLT relating to the territorial scope of international agreements; and the principle of the relative effect of treaties (the principle of *pacta tertiis*).[260]

According to the Court, the right to self-determination is an *erga omnes* right and one of the essential principles of international law, as evidenced by the relevant case-law of the ICJ,[261] applicable to all non-self-governing territories and to all peoples who have not yet achieved independence.[262] As a non-self-governing-territory whose peoples have an internationally recognized right to self-determination, Western Sahara has a legal status separate and distinct from that of Morocco and this legal status precludes the legal application of Art. 94 of the Association Agreement to the territory.[263]

Next, the Court turned to the 'territorial scope' rule enshrined in Art. 29 VCLT.[264] In the Court's view, the wording of the article implies that an international agreement is applicable only within the geographical space within which a State exercises its *full* sovereign powers and does not extend to other territories under its jurisdiction or international responsibility – unless the treaty expressly provides for such an extension.[265] This reading of Art. 29 VCLT precluded Western Sahara, as a non-self-governing territory, from being regarded as falling under Art. 94 of the Association Agreement.[266]

In its analysis of the relevant rules of international law applicable between EU and Morocco, the Court finally relied on the principle of the relative effect of treaties (*pacta tertiis* principle) enshrined in Art. 34 VCLT.[267] It was asserted that Western Sahara's status as a non-self-governing territory means that it constitutes a third party (*tertius*) in relation to the EU and Morocco.[268] Thus, the Association Agreement could not, in the Court's view, be interpreted as being applicable to the territory of Western Sahara to the extent that its people had not expressly consented thereto.[269]

Finally, the Court also disagreed with the General Court's assessment of the role of 'subsequent practice' in interpreting the Liberalization Agreement pursu-

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[258] Vienna Convention on the Law of Treaties, concluded on 23 May 1969, entered into force 27 January 1980, 1155 *UNTS* 331.

[259] Case C-104/16 P, *supra* note 20, para. 86.

[260] *Ibid*., para. 87.

[261] *Ibid*., para. 88. The ECJ cited the ICJ's Advisory Opinion on *Western Sahara* and the *East Timor* case. *Western Sahara, supra* note 26, paras. 54-56; *Case concerning East Timor (Portugal v. Australia, ICJ Reps* 1995, p. 90, para. 29.

[262] *Ibid.*

[263] *Ibid*., paras. 89-92.

[264] *Ibid*., paras. 94-99.

[265] *Ibid*. paras. 94-96.

[266] *Ibid*., para. 97.

[267] *Ibid*., paras. 100-107.

[268] *Ibid*., paras. 104-106.

[269] *Ibid*., paras. 106-107.

ant to Art. 31(3)(b) VCLT.[270] The ECJ held that the General Court failed to establish the requisite elements of Art. 31(3)(b) VCLT. In the Court's opinion, the instances of *de facto* application of the Association and Liberalization Agreements to Western Sahara did not warrant the conclusion that the EU and Morocco had actually *agreed* to extend the application of those treaties to the territory in question.[271] In the light of the finding that the Liberalization Agreement is not legally applicable to the territory of Western Sahara, the ECJ held that Front Polisario did not have legal standing to bring an action of annulment against the Council Decision approving the Liberalization Agreement and accordingly, it dismissed its action as inadmissible. [272]

The ECJ's approach to treaty interpretation in *Front Polisario* leaves much to be desired. First, the ECJ approached the question of interpretation of the territorial scope of the Association Agreement and, by extension, that of the Liberalization Agreement, largely through the lens of Art. 31(3)(c) VCLT. However, The Court's excessive reliance on Art. 31(3)(c) VCLT and the fact that it paid little or no attention to other elements contained therein go against the interpretative process envisaged thereunder; a process that is predicated on the combined application of *all* means of interpretation set out in Art. 31.[273] This not only shows the Court's unfamiliarity with the operation of Article 31 VCLT,[274] but it is also hardly reconcilable with the aim of treaty interpretation in general.[275] Thus, the excessive focus placed on Art. 31(3)(c) VCLT transformed the interpretive process from a quest to establish objectively the intention of the parties to a quest for the "relevant rules of international law applicable in the relations between the parties." More importantly, the Court's approach calls into question the very outcome of this process.

Secondly, the Court's findings are premised on the assumption that the legal status of non-self-governing territories (as entities separate and distinct from the States administering them) also implies that these entities enjoy some form of territorial sovereignty or title over territory; any other inference would run counter to the overall conclusion of legal inapplicability of the Association Agreement to the territory of Western Sahara. However, the Friendly Declaration's[276] reference to the 'distinct and separate status' of non-self-governing territories is generally understood to mean that these territories enjoy a separate *legal*

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[270] *Ibid*., paras. 117-125. According to the text of Art. 31(3)(b) VCLT, account must be taken, together with the context, of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

[271] *Ibid*., paras. 121-122.

[272] *Ibid*., paras. 131-134.

[273] Draft Articles on the Law of Treaties with commentaries, text adopted by the International Law Commission (ILC) at its 18th session (1966), 1966 *Yrbk of the ILC*, Vol. II, p. 219, para. 8. See also R. Gardiner, *Treaty Interpretation*, 2nd ed., (Oxford: Oxford University Press, 2015), pp. 31-32.

[274] According to Gardiner, in its interpretive practice pertaining to international agreements concluded with non-Member States, the ECJ "has not overtly progressed beyond the first paragraph of article 31 of the Vienna Convention." R. Gardiner, *ibid.*, p. 138.

[275] *Dispute regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*), *ICJ Reps* 2009, p. 213, at p. 237, para. 48. (Emphasis added).

[276] UN G.A. Res. 25/2625 (1970), *supra* note 82.

status, *i.e.* a measure of international legal personality, and not necessarily some form of territorial sovereignty.[277] Overall, neither Chapter XI of the UN Charter (dealing with non-self-governing territories), nor the Friendly Relations Declaration address matters of territorial title as such, as their focus lies with the development of these territories and the people concerned.[278] The question of territorial sovereignty over non-self-governing territories remains a controversial one and there is evidence to suggest that sovereignty remains with the administering State. [279] 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.[280] 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."[281] In the light of the indeterminacy surrounding questions of territorial sovereignty over non-self-governing territories, it is submitted that more by way of evidence should have been furnished by the Court in order to support the proposition that these entities enjoy a separate *territorial* status.

Furthermore, the Court's finding to the effect that Art. 29 VCLT creates a presumption against extraterritoriality is questionable and it does not comport with the drafting history of the Article. The ILC, in its commentary on the relevant article, made it abundantly clear that the matter of extraterritorial application of treaties was too complicated and it decided to leave it aside.[282] Accordingly, it is widely acknowledged that Art. 29 VCLT does not create a presumption either in favour or against the extraterritorial application of a treaty, as the matter simply does not fall under the scope of the Article.[283] In this light, the Court's conclusion that Art. 29 VCLT "precluded Western Sahara from being regarded as coming within the territorial scope of Association Agreement"[284] seems unsubstantiated.

The Court's interpretation and application of the *pacta tertiis* principle is also noteworthy. Here, the Court considered the peoples of Western Sahara as a 'third party',[285] thereby extending the *pacta tertiis* rule to non-State actors, as it

[277] J. Crawford, *supra* note 34, pp. 618-619.

[278] *Ibid*., p. 613.

[279] *Ibid*. See also A. Schwed, Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute, 6 *Fordham Int'l L.J*. 443 (1982). *Contra* I. Lukashuk, Parties to Treaties – The Right to Participation, 135 *RdC* 231 (1972), at pp. 254-255.

[280] *Case concerning Right of Passage over Indian Territory (Portugal v India)*, *ICJ Reps* 1960, p. 6, at p. 39.

[281] *Western Sahara, supra* note 26, para. 43.

[282] Draft Articles on the Law of Treaties with commentaries, *supra* note 273, pp. 213- 214, para. 5

[283] S. Karagiannis, *The Territorial Application of Treaties*, in D. Hollis (ed.), *The Oxford Guide to the Law of Treaties*, (Oxford: Oxford University Press, 2012), p. 305, at p. 318. K. Odendahl, *Article 29*, in O. Dörr, K. Schmalenbach, Vienna Convention on the Law of Treaties: A *Commentary,* (Heidelberg: Springer, 2012), p. 489, at p. 502. M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, (Oxford: Oxford University Press, 2011), p. 11

[284] Case C-104/16 P, *supra* note 20, para. 97.

[285] *Ibid*., para. 106.

had done before in *Brita*.[286] However, there are grounds to question the applicability of the principle to non-self-governing territories. The *pacta tertiis* rule expresses "the fundamental principle that a treaty applies only between the parties to it;"[287] and thus, treaties to which a State is not a party to are generally considered as *res inter alios acta* – a matter between others. The raison d'être of the principle is to ensure that States should not be bound against their will,[288] something that would run counter to two core tenets of international law, namely sovereignty and sovereign equality.[289] Thus, in international law, the principle is viewed as "a corollary of the principles of sovereignty, equality and independence of States."[290] Relevant legal literature suggests that the rule's conceptual roots in the notions of State sovereignty and sovereign equality preclude its application to State-non-State actor relationships.[291] State practice also supports the proposition that there are exceptions to the *pacta tertiis* rule vis-à-vis non-State actors. States may create entities with legal personality by means of a treaty and subject them to international obligations. International organizations are a case in point. These actors, while possessing legal personality, are third parties in relation to their constitutive treaties and they may incur obligations (amongst other by means of their constitutive treaties) even absent their consent.[292] In this light, the Court's unqualified assertion that the *pacta tertiis* rule applies *in casu* seems to rest on thin evidentiary grounds.

Finally, from an international law point of view, the Court's reluctance to engage extensively with the parties' 'subsequent practice in the application of the treaty' under Art. 31(3)(b) VCLT for the purpose of interpreting the territorial scope of the Association and Liberalization Agreements renders its findings questionable. The importance attached to the subsequent practice of the parties to a treaty in its interpretation constitutes one of the most distinctive features of the Vienna rules.[293] According to the ILC, "the importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes *objective evidence* of the understanding of the parties as to the meaning of the treaty."[294] Treaty terms are given meaning by action and thus, the subsequent practice of the parties is the best evidence of their intention.[295]

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[286] Case C-386/08, *supra* note 19, para. 52.

[287] J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., (Oxford: Oxford University Press, 2012), p. 384.

[288] *The Case of the SS Lotus (France v Turkey),* PCIJ Series A No 10, para 44.

[289] A. MacNair, *The Law of Treaties*, 2nd ed., (Oxford: Clarendon Press, 1961), p. 35.

[290] M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Leiden: Martinus Nijhoff, 2009), p. 467.

[291] D. Murray, *Human Rights Obligations of Non-State Actors*, (Oxford: Hart Publishing, 2016), pp. 94-105. S. Sivakumaran, Binding Armed Opposition Groups, 55 *ICLQ* 319 (2006), pp. 377-378.

[292] D. Murray, How International Humanitarian Law Treaties Bind Non-State Armed Groups, 20 *JCSL* 101 (2014), at p. 118. C. Chinkin, *Third Parties in International Law*, (Oxford: Clarendon Press, 1993), p. 12.

[293] R. Gardiner, *supra* note 273, p. 253.

[294] Draft Articles on the Law of Treaties with commentaries, *supra* note 273, p. 221, para. 15. (Emphasis added).

[295] R. Gardiner, *supra* note 273, p. 253.

International adjudicatory bodies routinely have recourse to the subsequent practice of the parties in interpreting treaty terms.[296]

The Court's approach to the element of 'subsequent practice' of the parties in the *Front Polisario* judgment does not reflect the importance attached thereto in international jurisprudence. Here, the Court did not take into account this element in establishing the ordinary meaning of the term 'territory of the Kingdom of Morocco', nor did it test the result of its initial textual interpretation against the background of this element in order to confirm its veracity. In a similar vein, the Court's dismissal of subsequent conduct by the EU and Morocco as mere *de facto* instances of application of the agreements at hand to the territory of Western Sahara[297] falls short of convincing since the Court failed to explain why these instances do not constitute subsequent practice within the meaning of Art. 31(3)(b) VCLT.

Overall, the Court's reliance on international law in the context of the *Front Polisario* judgment seems artificial and selective. In an obvious attempt to evade a politically sensitive issue, the Court used selectively international rules on treaty interpretation to limit the legal applicability of the EU-Morocco agreements to the latter's territory, while stopping short of addressing the *de facto* application of the agreements to Western Sahara.[298] The fact that the Court reaffirmed the right of the Sahrawi people to self-determination does not diminish the essentially political nature of the judgment. By circumventing the thorny question of the factual application of the agreements to Western Sahara, the Court effectively turned a blind eye to the EU's actual practice on the ground. It is quite telling that although the Court mentioned the right of the Sahrawi people to self-determination, it failed to make any reference to the concomitant obligation of non-recognition incumbent upon the EU by virtue of international law. Thus, ultimately, the *Front Polisario* judgment lends evidentiary force to critical voices in the literature that have casted doubt on the image of the EU, as evidenced by the jurisprudence of its principal judicial organ, as an actor maintaining a distinctive commitment to international law.[299]

At the same time, the judgment can hardly be seen as a victory either for the Council, or for Morocco. The judgment not only undermines Morocco's long-standing claim that Western Sahara constitutes an integral part of its territory, but also requires a careful recasting of the EU-Morocco trade relations; the EU and Morocco are finding themselves now in the difficult position of adjusting their actual practice on the ground to match the legal findings of the Court. The sober tone of the EU-Moroccan joint statement on the ECJ's ruling reflects the

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[296] See for example *Case concerning Kasikili/Seduku Island (Botswana v Namibia)*, *ICJ Reps* 1999, p. 1045, at para. 50. WTO Appellate Body Report, *Japan – Taxes on Alcoholic Beverages II*, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, 4 October 1996, pp. 12-13.

[297] Case C-104/16 P, *supra* note 20, para. 121.

[298] The same argument is made by S. Hummelbrunner, A.-C. Prickarz, EU-Morocco Trade Relations Do Not Legally Affect Western Sahara – Case C-104/16 P Council v Front Polisario, 5 January 2017, available at <http://europeanlawblog.eu/2017/01/05/eu-morocco-trade-relations-do-not-legally-affect-western-sahara-case-c-10416-p-council-v-front-polisario/>.

[299] J. Klabbers, *The European Union in International Law*, (Paris: A. Pedone, 2012), p. 77. See also generally G. de Búrca, *supra* note 8.

realization of the hurdles that lie ahead for both parties.[300] According to the statement, "both parties will examine all possible implications of the Court's judgment and will work together on any issue relating to its implementation."[301] The effect of the judgment on EU-Morocco trade relations could be far-reaching as there are currently two further actions pending before the Court concerning the validity of the FPA[302] and of the Council Decision on the conclusion of the 2013 Fisheries Protocol,[303] insofar as these instruments are applicable to the territory of Western Sahara. If the same line of reasoning is followed and the relevant instruments are found to be legally inapplicable to Western Sahara, this could potentially have a significant impact on the pattern of trade between the two parties.

4.4 The 2006 Fisheries Partnership Agreement, the 2013 Fisheries Protocol and the EU's Obligation of Non-Assistance

The previous section showed that despite the fact that the EU trade agreements with Morocco have been *de facto* applied to the territory of Western Sahara, thereby raising questions as to the compatibility of the relevant EU practice with its obligations under international law, the ECJ has interpreted the Association and Liberalization Agreements as not extending to the territory; an interpretation which, as it was discussed above, is of questionable soundness. Apart from their territorial scope, the EU agreements with Morocco are problematic on other grounds too.

As recounted earlier, the EU has paid, and continues to pay, a significant amount of money to Morocco for access to its waters, which, under both the FPA and the Fisheries Protocol, include the Western Sahara waters. On this basis, it is arguable that the EU aids and assists Morocco in illegally exploiting the natural resources of Western Sahara[304] contrary to the principles of usufruct

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[300] Joint Statement by the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission Federica Mogherini and the Minister for Foreign Affairs and Cooperation of the Kingdom of Morocco Salahddine Mezouar, 21 December 2012, available at <https://eeas.europa.eu/headquarters/headquarters-homepage/18042/declaration-conjointe-par-federica-mogherini-et-le-ministre-des-affaires-etrangeres-et-de-la_fr>.

[301] *Ibid*. (Translation by the author).

[302] 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*. This is a preliminary reference ruling concerning the validity of the FPA.

[303] Case T-180/14 *Front Polisario v Council*. This is an action for annulment brought by Front Polisario against Council Decision of 16 December 2013 on the conclusion, 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 Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, OJ [2013] L349/1.

[304] For the right of peoples of non-self governing territories to benefit from natural resources, including marine resources within their EEZ, see Resolution III, Final Act of the Third UN Conference on the Law of the Sea, UN Doc. A/CONF.62/121 (1982), para. 1(a). This has been reaffirmed in a number of UN General Assembly Resolutions adopted under the item 'Activities of Foreign Economic and Other Interests which Impede the Implementation of the Declaration on the Granting of Independence to Colonial Countries and and Peoples under Colonial Domination', see, Corell Opinion, *supra* note 189, para. 11. This has been acknowledged by the Legal Service of the

and the right to permanent sovereignty over natural resources. Undoubtedly, the EU's financial contribution to Morocco constitutes 'significant aid or assistance' within the meaning of Art. 14 of the Draft Articles on the Responsibility of International Organisations as it directly contributes to the unlawful exploitation of Western Sahara fisheries.[305] The link between the unlawful exploitation of the Western Saharan natural resources by Morocco and the conduct of the EU is further reinforced by the active role envisaged for the latter under the FPA. According to the terms of the agreement, the EU plays a leading role in the exercise of fishing activities by EU vessels in the relevant fishing zones; the EU both requests and receives the fishing licences on behalf of the ship-owners from Morocco's authorities, which are then given to the fishing vessels.[306]

Similarly, there is no doubt that the EU has acted with 'knowledge of the circumstances of the internationally wrongful act'. Front Polisario has publicly campaigned against the conclusion of the agreements in question and it has even brought the matter to the notice of the UN.[307]

As far as the element of 'intent' is concerned, there is evidence to suggest that the EU 'acted knowingly'[308], namely that it was aware that Morocco would not use the financial contribution received under the agreements for the benefit of the local Sahrawi population. First, the EU is fully aware of the fact that Morocco does not consider itself as an occupying power, but rather it considers Western Sahara as part of its sovereign territory.[309] In this light, the EU is aware that the probability of using the financial contribution in question for the benefit of the Sahrawi people is quite low. The explanatory memorandum to the proposal for a Council decision on the conclusion of the 2013 Fisheries Protocol acknowledged that past attempts to renew the FPA were rejected as it was not proven that "the local populations would benefit from the economic and social

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European Parliament, "Legal Opinion: Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Declaration by SADR of 21 January 2009 of Jurisdiction over an Exclusive Economic Zone of 200 nautical miles off the Western Sahara – Catches taken by EU-flagged vessels fishing in the waters off the Western Sahara", 13 July 2009, paras. 15-19, available at <http://www.wsrw.org/a105x1346>.

[305] For an overview of State practice on complicity in the context of economic co-operation, see H. P. Aust, *supra* note 185, pp. 147-151.

[306] Art. 6 of the FPA and Art. 1, 2 of the Annex to the FPA, Conditions governing fishing activities by community vessels in Moroccan fishing zones, OJ [2006] L141/13. See also E. Milano, *supra* note 95, p. 438. In case C-565/13, *Criminal proceedings against Ove Ahlström and Others* [2014], ECLI:EU:C:2014:2273, para. 34, the Court confirmed that Art. 6 of the FPA "must be interpreted as excluding any possibility for Community vessels to carry out fishing activities in Moroccan fishing zones on the basis of a licence issued by the Moroccan authorities *without the intervention of the competent European Union authorities*." (Emphasis added).

[307] Letter dated 18 May 2005 from Mohamed Sidati, representative of to the UU, to Joseph Borg, Commissioner, Directorate-General for Fisheries and Maritime Affairs, available at <http://www.wsrw.org/files/dated/2008-10-22/sidati_to_borg_18.05.06.pdf>. See also Case T-512/12, *supra* note 178, paras. 242, 245.

[308] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 187, para. 421.

[309] Opinion of Advocate General Wathelet, Case C-104/16 P, *supra* note 20, ECLI:EU:C:2016:677, para. 67.

benefits" of the agreement.[310] Indeed, the 2011 Opinion of the Committee of Development succinctly summarizes the disappointing results of the initial four-year period of the FPA with Morocco:

> After many requests from the Commission about benefits to the "local population", Morocco responded on 13 December 2010 with a PowerPoint document on the outcome of some investment programmes divided into 4 different regions – the "South" includes Western Sahara as well as other territory. The document does not show whether the people of Western Sahara have benefitted socio-economically from the agreement. Although the document claims that jobs are created in all areas, it is highly likely that the agreement mainly benefits Moroccan settlers, transferred into the territory in violation of Article 49 of the IV Geneva Convention of 1949. Regrettably, the document does not support any EU conclusion on benefits for either the local population or the Saharawi people.[311]

Despite this, the 2013 Fisheries Protocol does not contain any effective mechanism to guarantee that the exploitation of Western Sahara resources is carried out to the benefit of the Sahrawi people;[312] something that is considered by the EU as lying within the sole responsibility of Morocco. [313] During the 2014 meeting of the Joint Committee, established under Art. 10 of the FPA, a number of projects concerning Western Sahara were adopted, including the building of a new market in Dakhla and the building of housing for seamen in Boujdour; however, no indication was provided as to how these projects would directly benefit the people of Western Sahara.[314] As Passos stresses "no reference at all to the Saharawi people is to be found in the documentation."[315]

In this light and bearing in mind that ""if aid is given with certain or near-certain knowledge as to the outcome, intent may be imputed"[316], it is plausible that by concluding the agreements in question the EU knowingly and deliber-

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[310] Opinion of the Committee on Development for the Committee on Fisheries on the 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, 05 November 2013, COM(2013)0648-C7-2013/0315(NLE), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0417+0+DOC+XML+V0//EN#title3>.

[311] Opinion of the Committee on Development for the Committee on Fisheries on the draft Council decision on the conclusion of a Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, 08 November 2011, (11226/2011 –C7- 0201/2011/0139(NLE)), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0394&language=EN>. For an evaluation of the implementation of the FPA, see E. Hagen, *Fish before Peace: The EU's Controversial Fisheries in Occupied Western Sahara*, in M. Balboni, G. Laschi (eds.), *The European Union Approach Towards Western Sahara*, (Brussels: P.I.E. Peter Lang, 2017), p. 87, at pp. 108-116.

[312] P. Wrange, *supra* note 14, p. 45.

[313] 2013 Legal Opinion, *supra* note 225, paras. 17, 31.

[314] R. Passos, *Legal Aspects of the European Union's Approach to Western Sahara*, in M. Balboni, G. Laschi (eds.), *supra* note 311, p. 137, at p. 149.

[315] *Ibid.*

[316] J. Crawford, *State Responsibility: The General Part*, (Cambridge: Cambridge University Press, 2013), at p. 408.

ately facilitated the commission of internationally wrongful acts. The 2015 legal opinion issued by the Office of the Legal Counsel of the African Union on the legality of exploration and exploitation of natural resources in Western Sahara further corroborates this view.[317] According to the opinion:

> [A]ny exploration and exploitation of natural resources by Morocco, any other State, group of States, or foreign companies engaged by it in Western Sahara is illegal as it violates international law and resolutions of the United Nations and of the African Union. The exploitation of natural resources is also a threat to the integrity and prosperity of the people of Western Sahara. In this regard, foreign companies and any other State or group of States entering into agreements/contracts with Morocco for the exploitation of natural resources in Western Sahara *are aiding and abetting an illegal situation*, and such agreements and contracts are invalid.[318]

In this context, it needs to be observed that the opinion issued by the Parliament's legal service is misleading to the extent that it is based on an erroneous understanding of the relevant legal principles and of the Corell Opinion. First, the legal service's opinion assumes that the only entity responsible for ensuring that the exploitation of Western Sahara natural resources is conducted in accordance with international law is Morocco.[319] Thus, the opinion does not even contemplate the possibility that the EU, by paying Morocco for access to its waters including the waters off the coast of Western Sahara, may incur responsibility by way of complicity. However, international practice shows that considerations of complicity may play an important role in the context of economic co-operation.[320] Secondly, the opinion refers to Morocco as the '*de facto* administrating power' of Western Sahara – a concept that does not correspond to any legal category known under international law. Morocco does not administer Western Sahara under Art. 73 of the UN Charter, but militarily occupies it. The UN still recognises Spain as the *de jure* administering power of Western Sahara[321] and Spain relies on this status in order to extend its international jurisdiction in criminal matters to crimes committed in the territory.[322]

Thirdly, the legal service's opinion seems to assume that compliance with international law is guaranteed in so far as "a *certain amount* of the financial contribution" granted by the EU is allocated "to the benefit of Western Sahara *population*."[323] Thus, according to the opinion, incidental benefit to the local

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[317] 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. 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 engaged in the exploration and/or exploitation of renewable and non-renewable natural resources or any other economic activity in Western Sahara, 14 October 2015, UN Doc. S/2015/786.

[318] *Ibid.*, para. 60. (Emphasis added).

[319] 2013 Legal Opinion, *supra* note 225, paras. 17, 31.

[320] H. P. Aust, *supra* note 185, pp. 147-151.

[321] Information from Non-Self-Governing-Territories transmitted under Article 73 *e* of the Charter of the United Nations, *supra* note 199.

[322] Opinion of Advocate General Wathelet, *supra* note 309, para. 191.

[323] 2013 Legal Opinion, *supra* note 225, para. 31.(Emphasis added).

population would suffice to satisfy any obligations under international law.[324] However, this formulation reveals a fundamental misunderstanding of applicable international law. As seen in an earlier section, the principle of usufruct and the right to permanent sovereignty over natural resources mandate that *all* proceeds from the exploitation of natural resources of a territory benefit the people of the territory – save for the costs of maintaining a civilian administration therein. Furthermore, this formulation is problematic since international law requires that the exploitation of natural resources is carried out to the benefit of the *people of the territory*, *i.e.* the Sahrawi people, and not simply to the benefit of the *local population* – which mostly consists of Moroccan settlers transferred into the territory in violation of international humanitarian law.[325]

Furthermore, the extrapolation from Corell's opinion was quite gratuitous since the question put forward to Corell, as well as the factual and legal circumstances that gave rise to that question were different. First, it needs to be observed that Corell was asked to assess the legality of contracts concerning the *exploration*, not *exploitation*, of natural resources in Western Sahara.[326] Corell clarified that, while the granting of those contracts was not illegal *per se* to the extent that they did not entail exploitation of mineral resources, "if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories."[327] Secondly, the question put forward to Corell concerned the legality of contracts offered by Morocco to private companies, *i.e.* to non-State actors, and not the legality of an international agreement concluded between two subjects of international law. In this context, it is worthwhile stressing that Hans Corell has distanced himself from any attempts to construe his opinion as justifying the legality of the FPA. At a 2008 conference address, he stated that:

> It has been suggested that the legal opinion I delivered in 2002 has been invoked by the European Commission in support of the Fisheries Partnership Agreement. I do not know if this is true. But if it is, I find 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, had accepted that agreement, and the manner in which the profits from the activity were to benefit them. However, an examination of the agreement leads to different conclusions.[328]

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[324] E. Kontorovich, *supra* note 23, fn. 109.

[325] P. Wrange, *supra* note 14, p. 45. See also Art. 49 of the Geneva Convention IV.

[326] Corell Opinion, *supra* note 189, para. 1. For an analysis of the Opinion, see M. Brus, *The Legality of Exploring and Exploiting Mineral Resources in Western Sahara*, in K. Arts, P. P. Leite (eds.), *supra* note 57, p. 201.

[327] *Ibid*., para. 25.

[328] H. Corell, The Legality of Exploring and Exploiting Natural Resources in Western Sahara, Paper presented at the Conference organised by the South African Department of foreign Affairs, on Multilateralism and International Law with Western Sahara as a Case Study, Pretoria, South Africa, 4-5 September 2008, p. 242, available at <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>.

In this light, there's an argument to be made that by paying Morocco in order to gain access to Western Sahara fisheries the EU aids and assists in the ongoing commission of internationally wrongful acts. Furthermore, the legal service's opinion misconstrues the problem of EU complicity in the illegal exploitation of the natural resources of the territory as it is based on an incorrect understanding of the relevant legal principles and of the 2002 Corell opinion. Against this backdrop, the next section will examine the EU's approach towards products coming from the occupied Western Sahara for the purpose of assessing its compatibility with the obligations of non-recognition and non-assistance.

4.5 Import into the EU of Products Originating in Western Sahara and the EU's Obligations of Non-Recognition and Non-Assistance

The EU-Morocco Association Agreement does not provide for any special arrangements for products originating from Western Sahara. Since Morocco considers Western Sahara as part of its territory, in practice, products coming from Western Sahara are preferentially imported into the EU.[329] In this context, it needs to be noted that according to a 2012 report by NGO Western Sahara Resource Watch, Western Sahara agricultural produce is export-oriented: 95% of the agricultural goods produced in the occupied territory are exported to foreign markets – and principally to the EU.[330] These are invariably labelled as coming from 'Morocco'.[331] For instance, Albert Heijn, one of the biggest supermarket chains in the Netherlands, imports from Morocco part of their tomato range originating from Dakhla, Western Sahara, and sells them labelled as 'from Morocco'.[332] The Dutch Minister for Foreign Affairs has acknowledged that: "It is possible that products from Western Sahara carrying the label 'from Morocco' can be found in Dutch supermarkets."[333] Furthermore, there is evidence that products from the territory are on sale in German,[334] British[335] and Danish[336] supermarkets labelled as originating in Morocco. In a similar vein, a 2013 report released by Greenpeace shows that the Western Saharan coastal area accounts

[329] S. Koury, *supra* note 57, pp. 192-193.

[330] Western Sahara Resource Watch, EMMAUS Stockholm, *supra* note 17, p. 4.

[331] *Ibid*., pp. 10-16. E. Kontorovich, *supra* note 23, p. 609.

[332] *Ibid*., p. 12.

[333] Reply, also on behalf of the State Secretary for Economic Affairs, Agriculture and Innovation, by Dr. U. Rosenthal, Minister for Foreign Affairs, to questions from Member of Parliament Van Bommel (Socialist Party), 20 August 2012, available at <http://www.wsrw.org/files/dated/2012-08-29/dutch_statement_20.08.2012.pdf>.

[334] Question for written answer to the Commission, B. Lange (S&D), Subject: Labelling of Goods from Western Sahara, E-007130-14, 24 September 2014, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2014-007130+0+DOC+XML+V0//EN&language=lt>.

[335] The Guardian, Western Sahara's 'Conflict Tomatoes' Highlight a Forgotten Occupation, 04 March 2015, available at <https://www.theguardian.com/world/2015/mar/04/western-sahara-conflict-tomatoes-occupation-morocco-labelling-tax>.

[336] Afrika Kontakt, Western Sahara: Salt of the Earth Keeps Conflict Alive, 11 March 2016, available at <https://afrika.dk/article/salt-earth-keeps-conflict-alive>.

for half of Morocco's annual fisheries production.[337] The EU is the main importer of Morocco's fishery products; almost half of Morocco's fish and fishery products go to the EU - including fish caught in Western Saharan waters. [338]

Some Member States, such as the Netherlands and Sweden, have objected to the preferential import into the EU of products originating in Western Sahara on the grounds that the territory in question is not part of Morocco.[339] The issue of import into the EU of Western Sahara goods and their labelling has also been raised on numerous occasions by MEPs.[340] In his question to the Commission, MEP Meyers put the matter most succinctly:

> The plundering of natural resources by Morocco in the territories of the Western Sahara cannot be tolerated by the European public. Allowing all Moroccan products in access to European markets also allows goods produced in Western Sahara to be imported. Can the Commission ensure that, of all the 'Made in Morocco' products available on the European market, none is produced in the occupied territories of the Western Sahara and falsely labelled as Moroccan?[341]

Despite these objections, the Commission argues that neither the Association, nor the Liberalization Agreements foresee any specific rules regarding product labelling and, as such, the issue falls outside the scope of these agreements.[342] In the Commission's view, neither of these agreements provides a legal basis for differentiating Moroccan products imported into the EU on a territorial basis.[343] In this vein, it is maintained that, under relevant EU law, the only basis for im-

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[337] Greenpeace, Exporting Exploitation: How retired EU fishing vessels are devastating West African fish stocks and undermining the rights of local people, 2 December 2013, p. 25, available at <http://www.greenpeace.org/eu-unit/en/Publications/2013/Exporting-Exploitation/>.

[338] *Ibid.* See also WSRW, Key Bay has arrived in France with cargo from Western Sahara, 17 September 2016, available at <http://www.wsrw.org/a105x3579>.

[339] See the statement by the Swedish Minister for Trade, Ms E. Björling, 04 February 2013, available at <http://www.riksdagen.se/sv/dokument-lagar/dokument/svar-pa-skriftlig-fraga/jordbruksprodukter-fran-vastsahara_H012276>. Reply, also on behalf of the State Secretary for Economic Affairs, Agriculture and Innovation, by Dr. U. Rosenthal, Minister for Foreign Affairs, to questions from Member of Parliament Van Bommel (Socialist Party), *supra* note 333.

[340] See for example Question for written answer to the Commission, B. Lange (S&D), *supra* note 334. Question for written answer to the Commission, A. Westlund (S&D), Subject: Label and Liability – Stolen Tomatoes from Western Sahara, 21 June 2012, E-066205/2012, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2012-006205&format=XML&language=EN>.

[341] Question for written answer to the Commission, W. Meyer (GUE/NGL), Subject: Export of Moroccan-labelled products from the Western Sahara, 09 April 2013, E-003971-13, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-003971+0+DOC+XML+V0//EN>.

[342] 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, *supra* note 214. See also Answer given by Mr Çioloş on behalf of the Commission, Written Question E-006205/12, 29 August 2012, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-006205&language=EN>.

[343] 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, *ibid.* Answer given by Mr Çioloş on behalf of the Commission, Written Question E-003971/2013, 11 June 2013, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-003971&language=EN>.

posing particular labelling requirements would be "if its omission would mislead consumers"[344] – something that, according to the Commission, is not the case with imports from Morocco.[345] Thus, from the standpoint of the EU, the fact that products originating from Western Sahara are imported into the EU and *de facto* benefit from the preferential treatment under the EU-Morocco Association Agreement is not *per se* problematic. According to the (then) High Representative of the Union for Foreign Affairs and Security Policy, Ashton, Morocco, as the 'de facto administering power' of Western Sahara, is solely responsible for complying with any international law obligations pertaining to the exploitation of the natural resources of the territory.[346]

However, from an international law point of view, the EU's approach towards goods originating from Western Sahara is far from satisfactory. The duties of non-recognition and non-assistance in maintaining a situation created by a serious breach of a peremptory norm entail that the EU cannot maintain any economic relations with Morocco that might entrench its authority over Western Sahara. There is little doubt that the *de facto* preferential import of Western Saharan goods into the EU contributes to the entrenchment of Moroccan authority over the territory. NGO reports explain how the Moroccan government is developing the agricultural and fishery industries in the occupied Western Sahara for the purpose of populating the territory with settlers.[347] At the same time, there is no evidence that the trade agreements with the EU benefit the local Sahrawi population.[348] In this light, the effect of these agreements is to consolidate Morocco's unlawful acquisition of the territory – in violation of the EU's obligations of non-recognition and non-assistance.[349]

Furthermore, in the light of the fact that the Western Saharan agricultural and fishery industries are natural resource based, there is an argument to be made that by allowing the import of Western Saharan agricultural, fish and fishery products, the EU aids or assists the on-going breach of the principles of usufruct, as well as the breach of the right to permanent sovereignty over natural resources within the meaning of Art. 14 of the Draft Articles on the Responsibility of International Organisations.[350] As it was argued above in relation to products originating from the occupied Palestinian territories, allowing access to one of the biggest markets worldwide could be considered as a significant contribution to the unlawful exploitation of Western Saharan natural resources.[351] As far as the elements of 'knowledge' and 'intent' are concerned, the relevant arguments made in the previous section are also applicable here. [352] There is

[344] Answer given by Mr Çioloş on behalf of the Commission*, ibid.*

[345] *Ibid.*

[346] 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, *supra* note 214.

[347] Western Sahara Resource Watch, EMMAUS Stockholm, *supra* note 17, p. 3.

[348] T. Shelley, *Natural Resources and the Western Sahara*, in C. Olsson (ed.), *The Western Sahara Conflict: The Role of Natural Resources in Decolonization*, (Stockholm: Nordiska Afrikainstitutet, 2006), p. 17, at pp. 17-20.

[349] S. Koury, *supra* note 57, p. 191. V. Chapaux, *supra* note 222, pp. 233-235.

[350] S. Hummelbrunner, A.-C. Prickarz, *supra* note 179, p. 30.

[351] *Ibid.*, pp. 30-31.

[352] See section 4.4.

ample evidence to suggest that the EU is aware that the exploitation of Western Saharan natural resources by Morocco is potentially unlawful and that the probability of benefit accruing to the local population is very low.

Finally, the EU's approach to the issue of labelling of products coming from the Western Sahara stands in stark contrast to its approach to the analogous situation of products originating from the occupied Palestinian territories. The EU has shown political disinterest in ensuring that products originating from Western Sahara do not benefit from preferential treatment under the EU-Morocco Association agreement. NGOs,[353] MEPs[354] and scholars[355] have openly criticised the EU for applying double-standards. As one MEP put it:

> The Commission recently published a series of guidelines in which it described as 'incorrect and misleading' any labelling of declaring an item to be a 'product of Israel; when it fact it originates in the territories occupied by Israel since 1967, the correct labelling thus being 'of Gaza', 'of Palestine' – or indeed clarifying that the item originates in an Israeli settlement in Palestine. International legal experts have confirmed that these guidelines should apply equally to other territories occupied in violation of international law and, in particular, to products originating in Western Sahara illegally occupied by the Kingdom of Morocco. Consequently the label 'product of Western Sahara' (and not 'product of Morocco') should be used on any product originating in the occupied territories of Western Sahara and marketed in Europe. Is the Commission aware of the parallels between the illegal occupation of Palestine by the State of Israel and that of Western Sahara by the Kingdom of Morocco? Would it therefore consider that the guidelines used for the labelling of Palestinian products should also apply to Western Saharan products?[356]

Some Israeli writers have gone as far as to suggest that the differences between the EU's labelling policy towards Western Sahara and Palestine represent not merely double standards but also veiled anti-Semitism.[357]

The EU invariably justifies its inconsistent approach towards product labelling by pointing to the 'differences' between Israel/Palestine and Morocco/Western Sahara. According to the Commission, Western Sahara is a territory '*de facto*

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[353] Western Sahara Resource Watch, EMMAUS Stockholm, *supra* note 17, p. 17.

[354] Question for written answer to the Commission, F. Provera (EFD), Subject: Implications of the Moroccan fisheries deal for EU policy with regard to Israel, E-000235/14, 10 January 2014, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2014-000235+0+DOC+XML+V0//EN>. Question for written answer to the Commission, P. López Bermejo (GUE/NGL), Subject: Misleading Labeling of Products from Western Sahara, E-015472-15, 7 December 2015, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2015-015472+0+DOC+XML+V0//EN>.

[355] L. Kamel, *supra* note 18. See also A. Bell, E. Kontorovich, EU's Israel Guidelines: A Legal and Political Analysis, A Kohelet Policy Forum Research Paper, October 2013, p. 10, available at <http://en.kohelet.org.il/wp-content/uploads/2016/02/EUs-Israel-Grants-Guidelines-A-Legal-and-Policy-Analysis-Kohelet-Policy-Forum-Public-Version.pdf>. G. Harpaz, *supra* note 16, pp. 101-102.

[356] Question for written answer to the Commission, P. López Bermejo (GUE/NGL), supra note 354.

[357] G. Harpaz, *supra* note 16, p. 102, fn. 74.

administered' by Morocco, whereas Palestine is a territory occupied by Israel.[358] However, the Commission's argument falls short of convincing. The concept of '*de facto* administration' simply does not exist and both Western Sahara and Palestine are occupied territories under international law. Crawford has dismissed the EU's position towards Western Sahara as mere 'realpolitik';[359] a conclusion that is difficult to disagree with in the light of the glaring inconsistency in EU labelling policies towards products originating from these two territories.

4.6 **Interim Conclusions**

This section examined the trade relations between the EU and Morocco with a view to assessing whether the EU's practice is in line with its obligations under international law. It was shown that, in practice, the EU's agreements with Morocco have been *de facto* applied to the territory of Western Sahara and on this basis, it was argued that the EU has fallen foul of the duty of non-recognition. The ECJ's judgment in the *Front Polisario* case was discussed and it was maintained that the Court's finding of legal inapplicability of the Association and Liberalization Agreements to the territory of Western Sahara rests on shaky grounds. The section continued by arguing that by paying Morocco in order to gain access to Western Sahara fisheries, the EU aids and assists Morocco in the on-going commission of internationally wrongful acts. The focus turned next to the issue of import into the EU of products originating from Western Sahara. It was shown that, by way of contrast to products originating from the occupied Palestinian territories, the EU allows the import of products from Western Sahara – even though they are falsely labelled as coming 'from Morocco'. The section claimed the EU's approach to goods coming from the occupied Western Sahara is at variance with the international law obligations of non-recognition and non-assistance. It was also argued that the EU's inconsistent policy regarding labelling of products coming from occupied territories means that accusations of 'double-standards' are not without merit.

5. CONCLUSION

The paper showed that the EU's practice in relation to trade agreements covering occupied territories does not comport with the EU's self-portrayal as an internationally engaged polity committed to the strict observance and development of international law. While the ECJ's judgments in *Brita* and *Front Polisario* clarified that the agreements with Israel and Morocco do not legally extend to Palestine and Western Sahara respectively, their reasoning was slender and incomplete from an international law point of view. The EU's policy towards

[358] Joint Answer given by Vice-President Mogherini on behalf of the Commission, Written questions E-015222/15, E-015472/15, 04 February 2016, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-015472&language=EN>.

[359] J. Crawford, *supra* note 55, para. 131.

import of products originating from the occupied territories in question was examined and it was argued that by allowing settlement products to enter the European market, the EU is in breach of its obligation of non-recognition and non-assistance in maintaining a situation created by a serious breach of a peremptory norm of international law to the extent that such access facilitates the settlements' expansion and entrenchment. In this respect, the paper argued that compliance with international law necessitates a clear ban on settlement produce. The paper further claimed that by allowing the import of settlement goods the EU arguably aids and assists in the on-going commission of internationally wrongful acts, namely the breach of the principle of usufruct and the breach of the right to permanent sovereignty over natural resources. Finally, the paper showed that the position adopted by the EU towards labelling of products coming from the occupied Palestinian territories is inconsistent with the one adopted in the context of products originating in Western Sahara. This glaring inconsistency undermines the image of the EU as a normative power that promotes its values in a consistent manner. Overall, the paper showed that there is a growing gap between EU identity rhetoric as a promoter of global fundamental values on the one hand and realpolitik on the other. As long as the EU lacks the political will to enforce principles of international law in a consistent manner, the *Völkerrechtsfreundlichkeit* narrative will remain little more than a 'seductive story'.[360]

[360] J. Klabbers, *supra* note 8, p. 97.