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EU extraterritorial obligations with respect to trade with occupied territories: Reflections after the case of *Front Polisario* before EU courts

Cedric Ryngaert ^{1*}, Rutger Fransen ²

¹ Professor of Public International Law, Utrecht University (RENFORCE research programme), The Netherlands

² Graduate Researcher School of Law, Utrecht University

* Correspondence: C.M.J.Ryngaert@uu.nl

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Abstract

This paper provides a critical analysis of the recent judgments of the General Court of the EU and the Court of Justice of the EU in the case of *Front Polisario v Council*, which concerned the application of the EU-Morocco Liberalisation Agreement to products from Western Sahara. The central argument is that both EU courts failed to adequately consider the nature of the Moroccan presence on Western Saharan territory: a belligerent occupation. In light of this occupation, the courts should have channelled the EU's extraterritorial obligations vis-à-vis the population of Western Sahara through the tailor-made regimes of the law of occupation and the international duty of non-recognition. It is argued that the application of the Liberalisation Agreement may notably run afoul of the EU's duty of non-recognition, but that the Agreement may still apply insofar as it benefits the local population. More fundamentally, after *Front Polisario*, the EU may want to reconsider all trade relations in respect of occupied territories by distinguishing between legitimate and illegitimate products.

Keywords: occupation; EU trade agreements; duty of non-recognition; Western Sahara; territorial scope of treaties

1. Introduction

The recent judgments of the General Court of the EU (GC) and the Court of Justice of the European Union (CJEU) in the case of *Front Polisario v Council* raise salient questions regarding the European Union's (EU) extraterritorial obligations in respect of EU trade agreements covering products from territories occupied by an EU trading partner, in this case, from Western Sahara, a territory claimed by Morocco.¹

This contribution commends the GC and the CJEU for reviewing the validity and territorial scope of application of the agreement in light of fundamental rights and the right to self-determination of the Saharawi people of Western Sahara. The review resulted in the partial annulment of the agreement by the GC and non-application of the agreement in respect of Western Sahara by the CJEU. We argue, however, that unfortunately, both EU courts failed to properly appraise the exact legal nature of the territorial situation in Western Sahara, possibly because of its international political sensitivity: namely a belligerent occupation by Morocco following, and accompanied by violations of peremptory norms of international law. The characterisation of the territorial situation as an occupation, which is in addition rooted in aggression and characterised by ongoing violations of the right to self-determination, has specific legal consequences under the international law of occupation and the duty of non-recognition. These consequences give a specific shape and content to the EU's extraterritorial obligations in the context of its trade relations in respect of occupied territories. As it happens, these consequences partly overlap with those flowing from the EU court's judgments, in particular the GC's judgment, which is based on fundamental rights. Still, explicit reliance on occupation law and the duty of non-recognition gives additional expression to the principled disapproval of illegal territorial situations by the international community, of which the EU forms part. It enables the EU, and its courts, to engage more explicitly with the applicable international law and to act as its (decentralised) law-enforcer in keeping with its constitutional commitment to contribute to the strict observance and the development of international law laid down in Article 3(5) of the Treaty on European Union (TEU). In addition, reliance on occupation law and the duty of non-recognition keeps the door ajar for natural resources exploitation and (preferential) international trade that could benefit the local population in a way that seems foreclosed by the CJEU's judgment.

This contribution first gives a brief overview of the GC and CJEU's *Front Polisario* judgments (Section 2). Subsequently, the alternative legal regimes of occupation law (Section 3) and the international duty of recognition (Section 4) are set out, including the legal consequences which should follow for EU trade agreements in respect of occupied territories. Section 5 concludes.

The disciplinary perspective of this contribution is one of public international law rather than of EU law. Methodologically, one particular agreement, the EU-Morocco Liberalisation Agreement (or more precisely the EU Council decision on that Agreement) is reviewed in light of the applicable legal regimes of occupation law and the duty of non-recognition. The relevance of the conceptual analysis however exceeds that specific agreement and, in fact, extends to all EU agreements, and even all international trade with respect to products originating from occupied territories. This contribution does not deny that EU trade agreements *in general* may raise distinct *fundamental/human rights* concerns, which invites the question whether the EU is under an obligation to apply such rights extraterritorially. The authors do not, however, thoroughly engage with issues of human rights extraterritoriality, apart from setting out the GC's reasoning in this respect. The authors' argument is that the distinct international legal status of an *occupied* territory mandates, in the first place, the application of the international law regimes of occupation law and the duty of non-recognition. In case of occupation and breaches of peremptory norms of international law, it does not suffice to rely on the right to self-determination only for purposes of treaty interpretation, or of determining the extraterritorial reach of EU fundamental rights. Rather, the EU and its courts should observe *all* rules of international law that are relevant to the situation at hand.

¹Case T-512/12 *Front populaire pour la libération de la saguiaelhamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECLI:EU:T:2015:953 and 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.

2. The GC and CJEU judgments in *Front Polisario*

This section discusses the legal reasoning of the GC and the CJEU in *Front Polisario*. We refrain from giving an overly detailed overview of the lessons for substantive and procedural EU law that may be drawn from the judgments. This has already been done extensively elsewhere.² Instead, we aim to provide the reader with the basic understanding of both judgments that is necessary for a proper grasp of our argument concerning the EU courts' lack of engagement with the international law of occupation and the duty of non-recognition, which Sections 3 and 4 develop further. Under Section 2.1, we give a succinct summary of the political situation in the Western Sahara that informed the legal claim brought before the European courts. In Sections 2.2 and 2.3, we present the legal reasoning of the GC and the CJEU respectively. In Section 2.4, we formulate a number of critical observations on the courts' reasoning, which serve as a prelude to the development of our main arguments based on occupation law and the duty of non-recognition.

2.1. Background to the *Front Polisario* case

Historically, Western Sahara has been both a colony and a province of Spain, which withdrew from the territory in 1975. Following the Spanish withdrawal, Morocco claimed sovereignty over Western Saharan territory. After an armed conflict, which also included neighbouring Mauritania, Morocco took effective control of most of the Western Saharan territory.³ The Saharawi national liberation movement, the Front Polisario, currently fights for the territory's autonomy. It controls only a minor part in the east of the Western Saharan territory, with large populations of Saharawi refugees living across the Algerian border.⁴ No State has recognised Morocco's sovereignty over the Western Saharan territory. The United Nations continues to consider Western Sahara as a non-self-governing territory in the sense of Article 73 of the UN Charter and both the International Court of Justice (ICJ) and the UN General Assembly have recognised the right to self-determination of the 'people of Western Sahara'.⁵

The legal claim brought before the EU courts by Front Polisario was an action for annulment of an EU Council Decision that had approved the conclusion of the Liberalisation Agreement between the EU and Morocco, that is a bilateral trade agreement.⁶ In essence, the Front Polisario claimed that

²Regarding the significance of the General Court's judgment: E Kassoti, 'The *Front Polisario v. Council* Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)' (2017) 2(1) European Papers 339. On the ramifications of *Front Polisario* for legal standing of persons in third countries, see also S Hummelbrunner and A Prickartz, 'It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union' (2016) 32(83) Utrecht Journal of International and European Law 19, especially p 26 and further. Arguing for more emphasis on the effects of the EU's external trade on human rights in third countries, see also N Kuplewatzky, 'An Appeal for Targeted Regulatory Protection of Human Rights in the European Union's External Trade Relations in Light of *Front Polisario*' (2016) 11(12) Global Trade and Customs Journal 568. Noting the ramifications of the GC's judgment for the extraterritorial application of the EU Charter of Fundamental Rights, see E Brouwer, 'AG Mengozzi's Conclusion in *X and X v Belgium* on the Positive Obligation to Issue Humanitarian Visas: A Legitimate Plea to Ensure Safe Journeys for Refugees' (2017) in *CEPS Policy Insights*, No 9, March 2017. Regarding the judgment of the CJEU, see E Kassoti, 'The ECJ and Treaty Interpretation: Case C-104/16 P *Council v Front Polisario* – Second Part' (2017) 2(1) European Forum 23.

³In UN Security Council Resolution 380 (1975), the UNSC condemned this march and demanded immediate withdrawal from the Western Saharan territory by Morocco.

⁴See for more information on the historical development of the conflict in Western Sahara, S Zunes and J Mundy, *Western Sahara: War, Nationalism, and Conflict Irresolution* (Syracuse University Press 2010).

⁵In 2016, Western Sahara was listed in an annex to the Report of 1 February 2016 of the UN Secretary-General on 'Information from Non-Self-Governing Territories transmitted under Article 73e of the Charter of the United Nations', p 3. Regarding the Western Saharan right to self-determination, see notably the International Court of Justice, *Advisory Opinion on the Western Sahara* [1975] ICJ Rep 12, para 70. The UN General Assembly (UNGA) furthermore reaffirmed the Western Saharan right to self-determination in UNGA Resolution 3292 (XXIX) adopted on 13 December 1974 also in reference to the UNGA's Declaration on the Granting of Independence to Colonial Countries and Peoples Adopted by General Assembly Resolution 1514 (XV) of 14 December 1960.

⁶Council 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 liberalisation 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, L 241/2).

this Agreement did not distinguish between products produced in Morocco and products originating from the Moroccan-controlled territory of Western Sahara. According to the claimant, the Council's failure to draw this distinction amounted to a violation of the fundamental rights of the people of Western Sahara and constituted a violation of public international law, in particular the Saharawi people's right to self-determination.⁷

2.2. The General Court of the European Union

Front Polisario formulated a total of 11 pleas on the basis of both EU law and international law. These ranged from an infringement of fundamental rights and a breach of the fundamental values of the EU and the principles governing the EU's external action, to the alleged 'incompatibility of the contested decision with general international law ... and the law of international liability in EU law'.⁸ The GC rephrased these pleas into the fundamental question whether there would be an 'absolute prohibition against concluding an international agreement on behalf of the European Union which may be applied to a territory in fact controlled by a non-member State, without the sovereignty of that State over that territory being recognised by the European Union and its Member States or, more generally, by all other States ("the disputed territory") and, where relevant, the existence of discretion of the EU institutions in that regard, the limits of that discretion and the conditions for its exercise'.⁹ In response to this question, the GC concluded first – without much explanation – that there would be no absolute prohibition under EU law or international law to conclude an agreement with a third State which may be applied to a 'disputed territory'.¹⁰ The GC added that the EU institutions 'enjoy a wide discretion' in the conduct of external economic relations, which led the Court to limit its review to 'a manifest error of assessment' of the Council when concluding the Liberalisation Agreement.¹¹ The GC then examined whether the Council had 'examined carefully and impartially all the relevant facts of the individual case'.¹² Since the Liberalisation Agreement would possibly 'facilitate' the export of products that originate from the occupied Western Saharan territory, the GC concluded that the Council was under an obligation to properly examine whether the agreement would result in a production of goods for export (1) to the detriment of the local population, or (2) that would entail an infringement of fundamental rights laid down in the EU Charter on Fundamental Rights.¹³ According to the GC, the Council could not simply count on Morocco to ensure that no exploitation of resources to the detriment of the local population would take place. Thus it had not sufficiently taken into account the interests of the local population.¹⁴ Therefore, the GC partially annulled the Council decision, insofar as it approved the application of the Liberalisation Agreement to Western Sahara.¹⁵ The imposition of such an extraterritorial obligation is to be welcomed in that this verification test would prevent the EU from indirectly encouraging infringements of fundamental rights, or profiting from the exploitation of resources to the detriment of the inhabitants of Western Saharan territory.¹⁶

⁷Case T-512/12 (n 1) para 115.

⁸ibid.

⁹ibid, para 117.

¹⁰ibid, para 215.

¹¹ibid, paras 223–5.

¹²ibid, para 225.

¹³ibid, para 228.

¹⁴ibid, para 241. The GC does not indicate a clear legal basis for this legal duty, other than that the Court seems to consider such a 'verification requirement' to apply in relation to any EU agreement which seeks to 'facilitate ... the export to the European Union of various products originating in the territory concerned', see para 228.

¹⁵ibid, para 247. The GC had earlier granted standing to the *Front Polisario*, on the ground that it was individually and directly affected by the EU Council decision, para 114.

¹⁶ibid, para 231 (regarding the infringement of fundamental rights) and para 238 (regarding the exploitation of resources). Some have criticised the limited application of this requirement, which apparently only seems to play a role in situations where the agreement might apply to what the court refers to as 'disputed territories'. For instance, Fleury-Graff has criticised this restriction to situations concerning 'disputed territories', on the grounds that it would effectively exclude Moroccan citizens living on (recognised) Moroccan soil whose fundamental rights might be adversely affected by the EU-Moroccan Liberalisation Agreement. Cf T Fleury-Graff, 'Accords de libre-échange et territoires occupés: a propos de l'arrêt TPIUE, 10 Décembre 2015, *Front Polisario c. Conseil*' (2016) 120 *Revue Générale de Droit International Public* 263, 276. Kuplewatzky has furthermore

2.3. The Court of Justice of the European Union

Whereas the GC accepted the de facto application of the Agreement to Western Sahara, and then went on to review the Council decision in light of fundamental rights, on appeal, the CJEU held that the Agreement did not apply *de jure* to Western Saharan territory in the first place. From a procedural perspective, this meant that Front Polisario did not enjoy standing to challenge the relevant Council decision, and thus that its claim was inadmissible. However, from the perspective of EU extraterritorial obligations toward ‘distant others’ – in the case the Saharawi people – the GC and CJEU judgments are not that far apart: both courts considered that the EU Council Decision adopting the Agreement raised concerns with respect to the rights of the Saharawi. Whereas the GC did so by emphasising the EU’s relevant extraterritorial fundamental rights obligations, the CJEU did so by co-applying the right to self-determination and the law of treaties via Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), pursuant to which treaties – such as the Liberalisation Agreement in the case at hand – are to be interpreted in light of all ‘relevant rules of international law applicable in the relations between the parties’.¹⁷ This ‘regime interaction’ article provided the gateway to throw the right to self-determination into the analytical crucible. Relying on the Saharawi right to self-determination, the CJEU held that the Western Saharan territory inherently maintains a ‘separate and distinct status’ from the Moroccan territory as a non-self-governing territory.¹⁸ Second, per Article 29 VCLT, the Liberalisation Agreement applied in principle solely to both parties’ territory, unless expressly provided for differently.¹⁹ Third, per Article 34 VCLT and again with a reference to the Western Saharan right to self-determination, the Court held that the Saharawi, in light of the relative effect of treaties, should be considered as a third party to the EU-Morocco relationship. The application of the law of treaties, in particular the law of treaty interpretation, in combination with the right to self-determination ultimately resulted in the Court’s conclusion that the Agreement did not apply *de jure* to Western Saharan territory and thus did not cover the products from Western Sahara. In 2018, the CJEU affirmed this reasoning in relation to the Fisheries Partnership Agreement between the EU and Morocco, and a Protocol thereto: it ruled that these agreements are not applicable to the waters adjacent to the territory of Western Sahara, as the territory of Western Sahara does not form part of the territory of the Kingdom of Morocco.²⁰

2.4. Critical reflections on the GC and CJEU judgment

Having discussed the main legal reasoning employed by the GC and the CJEU in their consideration of *Front Polisario*, this subsection offers a critical reading of the judgments as a prelude to our argument that the case should have been decided on the basis of occupation law (Section 3) and the duty of non-recognition (Section 4). For all their merits, the GC and CJEU judgments have two main fundamental shortcomings. First, both judgments fail to acknowledge that, legally speaking, Morocco’s presence on Western Saharan territory qualifies as a belligerent occupation. Accordingly, they fail to consider the relevance of the regime of occupation law tailored to such a situation. Second, both judgments fail to take into account the EU’s customary law obligation of non-recognition of breaches of peremptory norms.²¹

The GC, while to be commended for reviewing the EU Council decision in light of fundamental

argued for a wider ‘fundamental human rights test’ in the context of the EU’s external trade relations: N Kuplewatzky, ‘An Appeal for Targeted Regulatory Protection of Human Rights in the European Union’s External Trade Relations in Light of Front Polisario’ (2016) 11(12) *Global Trade and Customs Journal* 568.

¹⁷Case C-104/16 P (n 1) para 86.

¹⁸*ibid*, paras 90–3.

¹⁹*ibid*, paras 94–7.

²⁰Case C-266/16 Request for a preliminary ruling under Article 267 TFEU from the High Court of Justice (England & Wales), Queen’s Bench Division (Administrative Court) (United Kingdom), made by decision of 27 April 2016, received at the Court on 13 May 2016, in the proceedings *The Queen, on the application of: Western Sahara Campaign UK v Commissioners for Her Majesty’s Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs, intervening party: Confédération marocaine de l’agriculture et du développement rural (Comader)*, Judgment Of The Court (Grand Chamber) 27 February 2018, para 69.

²¹This obligation applies to the EU Member States and the EU equally. See 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, *Yearbook of the ILC* 2011, vol II, p 66, para 1.

rights, not just fails to mention the ongoing situation of occupation, but even mischaracterises Western Saharan territory as a ‘disputed territory’.²² In reality, Western Saharan territory is not *disputed* between two or more parties: there are no parties with competing claims over the territory or over the delimitation of boundaries.²³ Indeed, as early as 1975, the ICJ established in its Advisory Opinion on *Western Sahara* that Morocco did not hold any sovereign rights regarding Western Saharan territory.²⁴ Instead of a ‘disputed territory’, Western Saharan territory is an ‘occupied territory’ controlled by Morocco, in the sense of the 1907 Hague Regulations and the Fourth Geneva Convention of 1949 (see further Section 3.1).²⁵ By mischaracterising the territorial situation in Western Sahara, the GC failed to give due regard to the regime of occupation law and was thus unable to identify the applicable rules of international law.

From the flawed legal characterisation of Western Saharan territory as disputed territory, the GC derived that under international law there would be no absolute prohibition of concluding a trade agreement that might be applied to such a territory.²⁶ In so doing, the GC disregarded, or circumvented, the obligation of non-recognition under customary international law of a third State’s acts that breach peremptory norms of international law. For international organisations such as the EU, this obligation is enshrined in Article 42 of the ILC Articles on the Responsibility of International Organizations for Internationally Unlawful Acts (ARIO), which requires that ‘[n]o State or international organization shall recognize as lawful a situation created by a serious breach . . . , nor render aid or assistance in maintaining that situation.’²⁷ In the case of *Front Polisario*, this is notably the illegal territorial acquisition of (large parts of) Western Saharan territory by Morocco in violation of the Western Saharan right to self-determination (see further Section 4.1). Arguably, for the EU to conclude an agreement with Morocco regarding Western Saharan territory implies a recognition of the Moroccan sovereign claim to the Western Saharan territory.²⁸

The CJEU’s judgment, for its part, appears to be (even) more problematic than the GC’s in terms of legal reasoning, but especially in light of the actual outcome. While the CJEU did not characterise Western Sahara as a ‘disputed territory’, it considered Western Sahara to be a non-self-governing territory that enjoys a ‘separate and distinct’ status vis-à-vis Moroccan territory.²⁹ Although it may appear self-evident that a non-self-governing territory remains ‘separate and distinct’ from the territory of its administering State,³⁰ one should realise that under the UN system of non-self-governing territories, which was created

²²Case T-512/12 (n 1) employs the term ‘disputed territory’ in paras 117, 141, 142, 165, 198, 205, 210, 211, 215, 217, 220, 222, 223 and 227. For a more extensive analysis of the notion of ‘disputed territory’, see for instance G Distefano, ‘La notion de titre juridique et les différends territoriaux dans l’ordre international’ [1995] *Revue Générale de Droit International Public*, p 335 and further.

²³Case T-512/12 (n 1) paras 216–21, citing the judgment of 6 July 1995, T 572/93, *Odigitria v Council and Commission*, EU:T:1995:131, which used the terms ‘zone litigieuse’ in French and ‘zone in dispute’ in English. *Odigitria* pertained to a disputed maritime area, not to an occupied territory. AG Wathelet also took exception to the court’s use of this term in his Advisory Opinion on the case of *Front Polisario*: Opinion of Advocate General Wathelet of 13 September 2016, Case C-104/16 P (n 1) paras 73–4.

²⁴*Advisory Opinion on the Western Sahara* [1975] ICJ Rep 12, paras 84–129.

²⁵International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907 and the International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. While it is true that the Western Saharan territory is also a non-self-governing territory in the sense of UN Charter art 73, these legal statuses should not be considered mutually exclusive. As will be demonstrated under Section 3 of this contribution, the GC should have considered the Western Saharan status as an occupied territory for the assessment of Morocco’s legal relationship with the Western Saharan territory, as well as the EU’s trade relationship with the Western Saharan territory through dealings with Morocco in the context of *Front Polisario*.

²⁶Case T-512/12 (n 1) para 205, 215.

²⁷International Law Commission, art 41, ‘Draft articles on the responsibility of international organizations, with commentaries: Text adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session’ (2011) UN Doc A/66/10, *Yearbook of the International Law Commission*, vol II, Part Two.

²⁸Unfortunately, the GC seems to avoid this politically sensitive issue by stating merely that the application of the EU-Moroccan Liberalisation Agreement would not constitute any (implied) recognition of the Moroccan sovereignty claims on the Western Saharan territory, without properly engaging with what exactly amounts to recognition. Case T-512/12 (n 1) para 154.

²⁹Case C-104/16 P (n 17), paras 90–3.

³⁰Proclaimed principles of UNGA Resolution 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Adopted on a Report

in the context of decolonisation, the administering State is not Morocco but Spain.³¹ Thus, just like the GC, the CJEU seems to skirt the thorny issue of occupation, this time by invoking the legal regime relevant to decolonisation, although Morocco never colonised Western Sahara.³²

In any event, as the CJEU went on to hold that the Liberalisation Agreement did not apply to Western Saharan territory, any future de facto application of the Agreement was made impossible, thereby foreclosing any opportunity to grant preferential trade access to products originating from Western Saharan territory that are sourced in a manner beneficial to the local population.³³ Even if the CJEU had good intentions when it decided that the Agreement did not apply to Western Sahara in light of the Saharawi's right to self-determination, the irony is that it ultimately fails to do full justice to their rights, as products from Western Sahara are henceforth denied preferential access also if they are shown to clearly benefit the Saharawi people.³⁴ Although one can seriously doubt that such responsible sourcing currently takes place, one cannot exclude that in the future this may happen. It is precisely the regimes of occupation law and of non-recognition, to which we will now turn, that guarantee that exploitation and trade benefiting the local population can still take place.

3. Occupation law

Our main argument in this contribution is that the legal regimes applicable to the *Front Polisario* case are occupation law and the duty of non-recognition in respect of breaches of peremptory norms. This section unpacks why the law of occupation applies to Western Sahara (Section 3.1), and ascertains the legal implications for the EU's trade agreement regarding products originating from Western Sahara (Section 3.2).

3.1. Western Sahara as occupied territory

Morocco's presence on Western Saharan territory constitutes a *belligerent occupation*. This is not a new position; it has been taken by many scholars.³⁵ To be fair, the UN bodies have been reluctant to characterise the situation in Western Sahara as one of occupation. This may possibly have informed the EU courts' avoidance of the term 'occupation'. Indeed, the resolutions of the UN Security Council regarding

from the Sixth Committee (A/8082), A/RES/25/2625: 'the territory of a colony or other Non-Self-Governing Territory has, under the [UN] Charter, a . . . separate and distinct [status].'

³¹See also n 5. In 2016, Western Sahara was still indicated in the annexed list to the Report of 1 February 2016 of the UN Secretary-General on 'Information from Non-Self Governing Territories transmitted under Article 73 of the Charter of the United Nations', p 3. Eva Kassoti also notes this mistake, but does not further develop the effects this may have on the case. See Kassoti ('Second Part') (n 2) 33.

³²Kassoti has made a similar argument, claiming that, also with respect to the invoked regime of non-self-governing territories, the CJEU relied on international law in an 'artificial and selective' way and tried to 'evade a politically sensitive issue', when giving effect to VCLT art 31(3)(c). See Kassoti (Second Part) (n 2) 27. See also J Odermatt, 'Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) – Case C-104/16 P' (2017) 111(3) *American Journal of International Law* 738.

³³We may note the somewhat paradoxical nature of *Front Polisario*'s inadmissibility in this case. The Front Polisario has nonetheless welcomed the judgment for its confirmation of Western Sahara's international legal status as a non-self-governing territory and because – implicitly – the CJEU has rendered any application politically impossible.

³⁴This problem could only be solved by negotiating a preferential trade agreement with the Front Polisario or Western Sahara. The EU has indeed concluded such an agreement with the 'occupied' Palestinian Territories, see Euro-Mediterranean Interim Association Agreement on Trade and Cooperation between the European Community and the Palestine Liberation Organization (PLO), Brussels [1997] 6023/97 (C/97/50). However, Palestine, unlike Western Sahara, has its own internationally recognised authority, and is even considered as a State by a large number of international actors.

³⁵See for instance, C Chinkin, 'Laws of Occupation' in N Botha, M Olivier and D Van Tonder (eds), *Multilateralism and International Law with Western Sahara as a Case Study* (Unisa 2010) 19 and further. E Benvenisti, *The International Law of Occupation* (Oxford University Press 2012) 171; E Kontorovich, 'Economic Dealings with Occupied Territories' (2015) 53(3) *Columbia Journal of Transnational Law* 584; 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 and P Pinto Leite (eds), *International Law and the Question of Western Sahara* (International Platform of Jurists for East Timor 2006); B Saul 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' (2015) 27(3) *Global Change, Peace & Security* 301.

the referendum mission in Western Sahara do not use the term ‘occupation’.³⁶ The UN General Assembly employed the term twice in resolutions of 1979 and 1980, but has not since referred to Morocco’s presence on Western Saharan territory as an occupation.³⁷ Finally, the ICJ issued an Advisory Opinion regarding Western Sahara in 1975, but since Morocco had not yet taken control of the territory at the time it was not in a position to address the question of occupation, even if it still stated that Western Sahara enjoyed the right to self-determination,³⁸ and that there existed no legal ties of territorial sovereignty between Morocco and Western Saharan territory.³⁹ However, the absence of unambiguous determinations by the UN bodies does not affect the application of occupation law. Occupation law is an international humanitarian law regime that applies as soon as the requirements for a belligerent occupation are satisfied. Its application does not depend on a decision taken by an international authority.

The regime of the law of occupation is largely codified in the Hague Regulations of 1899 and 1907 and the 4th Geneva Convention of 1949, which the ICJ has recognised as containing ‘intransgressible principles of international customary law’.⁴⁰ Per Article 42 of the 1907 Hague Regulations, a territory is considered occupied when it is ‘*actually* placed under the authority of the hostile army’.⁴¹ The Article requires three cumulative constitutive elements: (1) the presence of foreign forces; (2) the exercise of authority over the occupied territories;⁴² and (3) the non-consensual nature of belligerent occupation.⁴³ The first two elements are relatively easily met in the case of Western Sahara. As the ICJ clarified in *Armed Activities on the Territory of the Congo*, it has to be demonstrated that the occupying power not only has a (military) presence on the occupied territory, but also holds the actual authority in this area.⁴⁴ While this ‘test’ has been criticised as being somewhat too strict,⁴⁵ it does not seem disputed – notably not even by the EU Commission and the EU Council in *Front Polisario* – that Morocco exercises ‘actual authority’ over large parts of Western Saharan territory. In fact, while the CJEU avoids the language of occupation law, it does acknowledge Morocco’s control over Western Sahara: ‘[t]o the present day . . . the Kingdom of Morocco controls the majority of the territory of Western Sahara, which a wall of sand constructed and guarded by the Moroccan army separates from the rest of the territory controlled by the Front Polisario.’⁴⁶ It is also of note that armed force need not actually have been used, since occupation law applies to all partial or total occupations ‘even if the said occupation meets with no armed resistance’.⁴⁷

The third requirement for the application of occupation law – the lack of consent – might deserve some further scrutiny. Western Sahara was not a recognised sovereign State, but a non-self-governing territory administered by Spain at the time Morocco took effective control of Western Saharan territory. Since Western Sahara was not recognised as a sovereign international legal person, what is relevant for the

³⁶Even in the resolutions relating to the referendum mission MINURSO installed by the UNSC, the Council refrains from labelling the situation an ‘occupation’. See also the relevant UN Documents on MINURSO, Resolutions of the Security Council <<https://peacekeeping.un.org/en/mission/minurso>> accessed 15 July 2018. See for instance, UNSC Resolution 690 (29 April 1991), UN Doc S/RES/690.

³⁷For the two UNGA resolutions stating the occupation, see UNGA resolutions 34/37 (21 November 1979) and 35/19 (11 November 1980).

³⁸*Advisory Opinion on the Western Sahara* [1975] ICJ Rep 12, para 70.

³⁹*ibid*, paras 84–129.

⁴⁰*Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, p 257, para 79. Similarly *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep 168, p 229, para 172.

⁴¹Art 42, International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, 187 CTS 227; 1 Bevens 631 (emphasis added).

⁴²The element of ‘actual authority’ is discussed solely in the context of – and as a precondition of – the applicability of occupation law and not as a criterion for the exercise of extraterritorial jurisdiction in the context of human rights law.

⁴³ICRC, ‘Occupation and Other Forms of Administration of Foreign Territory’ Expert Meeting, March 2012, pp 10, 17 and further.

⁴⁴In *casu*, for the ICJ this meant that it went on to enquire whether the Ugandan armed forces actually ‘substituted their own authority for that of the Congolese Government’. See also *Armed Activities on the Territory of the Congo* (n 40) pp 229–30, paras 172–3.

⁴⁵ICRC (n 43) 19.

⁴⁶Case C-104/16 P (n 1) para 37.

⁴⁷Common arts 2 of the Geneva Conventions of 1949 and Additional Protocols, and their Commentaries.

current analysis is thus whether, at the time, *Spain* consented to Morocco taking control and administering Western Sahara territory. It is highly doubtful whether Spain validly consented to Morocco's and Mauritania's entry of the Western Saharan Territory after Spain left. Arguably, the signing of the Madrid Agreement, which settled Spain's exit from Western Sahara, was driven by Morocco's threat to use force.⁴⁸ Moreover, even if one disagrees with the position that the Madrid Agreement was invalidated on grounds of 'coerced consent',⁴⁹ the Agreement would still be fundamentally flawed as it was concluded in violation of the Western Saharan right to self-determination. Indeed, the Madrid Agreement neither provided for the necessary referendum among the Western Saharan local population on the question of the future status of Western Saharan territory, nor did it (in the words of the UN Legal Counsel) 'confer upon any of the signatories the status of administering Power, a status which Spain alone could not have unilaterally transferred'.⁵⁰ Thus, the 'consent' given by Spain – whether coerced or not – can in any case not be understood as valid consent to Morocco taking control of (large parts of) Western Saharan territory.⁵¹ In the absence of valid consent, as has also twice been concluded by the UN General Assembly,⁵² Morocco's presence and exercise of authority in Western Sahara can only be understood as an occupation in the sense of the Hague Regulations of 1899 and 1907, the Additional Protocol I of 1977 to the Geneva Conventions of 1949, and customary international law.⁵³

3.2. The implications for the EU

From an occupation law perspective, at issue in *Front Polisario* was, in essence, whether occupation law allows for the occupying power's – in this case Morocco's – exploitation of natural resources, and, if it does not, whether the EU facilitates such illicit exploitation by concluding a Liberalisation Agreement with Morocco, which provides for preferential access of products derived from these resources. The EU itself may not be a party to the 4th Geneva Convention on occupation law, but as mentioned above, the ICJ has accepted the customary status of occupation law. In keeping with the requirement that the EU respect international law in its external relations,⁵⁴ which includes international humanitarian law,⁵⁵ the customary international law occupation regime is binding on the EU.

It is also recalled that the CJEU has proved willing to review EU acts in light of norms of public international law. In this context, the CJEU generally refers to Article 3(5) TEU, pursuant to which the Union is to contribute to the strict observance and the development of international law. The Court has derived from that provision the obligation for the EU to observe international law in its entirety when

⁴⁸Saul (n 35) 312–5. Saul also notes other (domestic) political factors such as President Franco's sudden illness and the ongoing political transition in Spain.

⁴⁹This 'coerced consent' through the threat or use of force does not affect the application of occupation law, see furthermore ICRC (n 43) 21. See also for a more in-depth analysis of the effects of coercion in the context of the VCLT: O Dörr and K Schmalenbach, 'Article 52. Coercion of a State by the Threat or Use of Force' in O Dörr and K Schmalenbach (eds) *Vienna Convention on the Law of Treaties* (Springer 2012) 871–96.

⁵⁰Letter dated 29 January 2002 from the Under Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Doc S/2002/161, 12 February 2002 (Corell Opinion) para 6.

⁵¹See for the relevant criteria for the assessment of the validity of consent: *inter alia* International Court of Justice (2005) *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005 [2005] ICJ Reports 168, p 196, para 42 and further.

⁵²See UN General Assembly Resolution 34/37 (1979) UN Doc., A/RES/34/37, para 5 and UN General Assembly Resolution 35/19 (1990) UN Doc., A/RES/35/19, para 3.

⁵³Saul (n 35) 315. Saul also counters the Moroccan contestation of the Spanish legal title to Western Sahara which would – according to the Moroccan argument – prevent the application of occupation law, since Morocco did not occupy the sovereign territory of an internationally recognised State. As Saul concludes, correctly, this argument should be rejected. Per the ICJ's Advisory Opinion on *The Legality of the Wall*, international humanitarian law (IHL) applies also to all 'territories not falling under the sovereignty of one of the contracting parties'. *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (International Court of Justice 2004), 9 July 2004, [2004] ICJ Reports 136, para 95.

⁵⁴Treaty on European Union arts 3(5) and 21(1).

⁵⁵So far this issue has mainly been addressed in the context of EU-led military forces becoming engaged in armed conflict. See, e.g. F Naert, 'Observance of international humanitarian law by forces under the command of the European Union' (2013) 95 *International Review of the Red Cross* 637, 639. There is no reason, however, to limit the application of IHL to provisions concerning the conduct of hostilities. Occupation law forms part and parcel of humanitarian law.

it adopts an act, including customary international law, which is binding upon the EU institutions.⁵⁶ This means that the validity of an EU act may be affected by the fact that it is incompatible with rules of international law, at least when a number of conditions are fulfilled.⁵⁷ However, even when these conditions were not fulfilled, it remains no less true that, on the international plane, the relevant EU act may engage the EU's international responsibility for breach of international law. Therefore, even if internal review powers (jurisdiction) of EU courts were to be absent in relation to international occupation law, an examination of the international law implications of the EU's economic relations with occupied territories is called for.

Before addressing the EU's international responsibility in relation to imports of products derived from natural resources that have been exploited in violation of occupation law,⁵⁸ the general rationale behind occupation law should first be understood, as well as the occupying power's potential entitlement to exploit natural resources located in occupied territory. Occupation law seeks to fill a temporary legal vacuum that has arisen as a result of the factual situation of occupation. Under occupation law, the legal power of the occupant is considered as a mere '*de facto* capability, not [as] a legal authority'.⁵⁹ Occupation law reflects the reality that the occupant has merely gained temporary control and has not been granted any sovereign rights over the occupied territory. Occupation does not change the legal status of the territory or its inhabitants. The latter remain subject to international occupation law and not (or only to the extent allowed by occupation law) to the domestic law of the occupant.⁶⁰ In the case of Western Sahara, Morocco may have effective control over large parts of Western Sahara territory, but it does not have any sovereign right or legal title regarding this territory: these remain with the local population of Western Sahara.⁶¹

Against this background, occupation law contains several provisions regarding the use or exploitation of property during occupation. One of the fundamental principles of occupation law is that the occupying power – in this case Morocco – may not 'exercise its authority in order to further its own interests, or to meet the needs of its own population'.⁶² Thus, in principle, occupation law only allows for the exploitation of resources located on occupied territory in so far as these activities benefit the (occupied) local population.⁶³ This can also be derived from the ICJ's judgment in *Armed Activities on the Territory of the DR Congo*.⁶⁴ More specifically, occupation law requires the occupying power to administer occupied

⁵⁶Case C-366/10 *Air Transport Association of America and Others*, EU:C:2011:864, para 101. On the status of customary international law in EU law, see also the Opinion of Jacobs AG, Case C-162/96, *Racke*, EU:C:1997:582.

⁵⁷As outlined notably by the CJEU in Case C-308/06 *Intertanko and Others*, EU:C:2008:312, para 45; Case C-366/10 (n 56) paras 52–5. First, the EU must be bound by those rules. Second, the nature and the broad logic of the international treaty in question must not preclude the ECJ from examining the validity of an EU act in the light of its provisions. Third, the rules of international law relied upon for the purpose of examining the validity of the EU act in question appear, as regards their content, to be unconditional and sufficiently precise, that is, they contain a clear and precise obligation that is not subject, in its implementation or effects, to the adoption of any subsequent measure.

⁵⁸See for a more extensive argumentation in this regard Saul (n 35).

⁵⁹M Bothe, "'Effective Control': a Situation Triggering the Application of the Law of Belligerent Occupation", Background Document, Appendix 1 to ICRC, 'Occupation and Other Forms of Administration of Foreign Territory', Expert Meeting, March 2012, p 38. As Bothe notes, the original French formulation of art 43 of International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907 also reflects this idea: 'un territoire est considéré comme occupé lorsqu'il se trouve placé *de fait* sous l'autorité de l'armée ennemie' (emphasis added).

⁶⁰C Greenwood, 'The Administration of Occupied Territory in International Law' in E Playfair (ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press 1992) 245.

⁶¹See also more extensively in the context of the Israeli occupied territories: O Ben Naftali, A Gross and K Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23(2) *Berkeley Journal of International Law* 551, especially 554.

⁶²A Cassese (1992), 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in E Playfair (ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press 1992) 420–1.

⁶³The 1949 Geneva Convention IV art 53 also leaves open this possibility for when it is 'absolutely necessary by military operations'. Military necessity does not apply here, however.

⁶⁴*Armed Activities on the Territory of the Congo* (n 40) para 248. There are some exceptions to this principle, notably a distinction is made between public and private property. Private property is in principle protected from confiscation, whereas the occupying power can only make use of public property for specific purposes, e.g. for military needs. However, these exceptions

public property consisting of ‘public buildings, real estate, forests, and agricultural estates’ in accordance with the principle of *usufruct*.⁶⁵ This means that the occupying power ‘may use, but does not own the property’.⁶⁶ This arguably implies a prohibition of ‘wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation’.⁶⁷ In this regard, several authors have suggested that a distinction be made between renewable and non-renewable natural resources.⁶⁸ Applied to Western Sahara, this would mean that the exploitation of renewable natural resources of Western Saharan territory under Moroccan occupation, such as fish traded under the EU-Moroccan Fisheries Partnership Agreement, should not lead to permanent depletion, but instead has to be ‘sustainable and not abusive, consistent with the inter-generational dimension of the trusteeship principle’.⁶⁹ Non-renewable resources, such as minerals, phosphate, timber and natural gas, could only be exploited according to the levels of production that existed and were envisaged prior to the occupation of the occupied territory.⁷⁰ This may imply that Morocco’s production levels cannot exceed those of 1975 (when Western Sahara was still under Spanish authority). Moreover, Morocco is barred from exploiting new non-renewable resources, for example by issuing licences for the exploitation of new mines. While this strict position is not universally shared,⁷¹ it is common ground that Morocco, having only a *usufructuary* position as per Article 55 of the Hague Regulations, may not use or exploit property to the detriment of its substance.⁷²

Assuming that some EU imports of products from Western Sahara might concern products derived from natural resources that have been exploited in violation of occupation law,⁷³ the next question is what this means for the EU’s trade relations. Does the EU violate an international legal obligation under occupation law when allowing the importation of these products? The complicating factor is obviously that the EU does not itself violate occupation law, but may only facilitate Morocco’s violations.⁷⁴ It is argued here that the EU’s responsibility for such facilitation could be engaged on the basis of its failure to ‘ensure respect’ for occupation law, or alternatively for ‘aiding and assisting’ Morocco’s breaches of occupation law. However, as is discussed more in detail below, the conditions of application of these legal grounds are restrictive. This complicates holding the EU responsible for allowing trade in products from occupied territories to the detriment of the local population.

As to the first legal ground, it is of note that, while the obligations stemming from occupation law in principle constitute legal obligations only owed by an occupant to the occupied,⁷⁵ all State parties to the

do not seem applicable to the (preferential) trade that could take place under the EU-Moroccan Liberalisation Agreement that was contested in the *Front Polisario* case.

⁶⁵International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, art 55.

⁶⁶J Crawford, ‘Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories’ (2012) Report for the Trade Unions Congress, p 24 <www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 15 July 2018.

⁶⁷E Benvenisti, ‘Belligerent Occupation’, in *Max Planck Encyclopedia of Public International Law* [MPEPIL], May 2009, para 30.

⁶⁸Y Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 215; Saul (35) 317; I Scobbie, ‘Natural Resources and Belligerent Occupation: Mutation through Permanent Sovereignty’ in S Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories* (Brill Nijhoff 1997). See also Report of the Secretary-General, UN Doc A/38/265-E/1983/85, 21 June 1983, para 39.

⁶⁹Saul (n 35) 319.

⁷⁰*ibid*, 319. See also, arguing similarly in relation to Israeli oil exploitation activities in occupied territories: B Clagett and O Johnson, ‘May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?’ (1978) 72 *American Journal of International Law* 558, 574–5.

⁷¹See for instance Dinstein (n 68) 216. Also G Von Glahn, *Law Among Nations: An Introduction to Public International Law* (7th edn, Longman 1996) 687–8.

⁷²Arguably, this renders the exploitation of non-renewable resources problematic. In the language of the Secretary-General: ‘Extraction of minerals is in fact a depletion of capital and a detriment to the substance.’ UN Secretary General (1983), Report of the Secretary-General, UN Doc A/38/265-E/1983/85, 21 June 1983, para 39. See also, A Cassese, ‘Powers and Duties of an Occupant in Relation to Land and Natural Resources’ in A Cassese (ed), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press 2008) and D Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press 2015).

⁷³See for a more extensive argumentation in this regard, Saul (n 35) 301.

⁷⁴Note that facilitation in the context of the duty of non-recognition is only addressed below in Section 4.

⁷⁵Crawford (n 66).

Fourth Geneva Convention are legally obliged to *ensure respect* for the Convention.⁷⁶ On the basis of this duty to ensure respect, it could be argued that EU Member States, as well as the EU itself (on which the Member States have conferred the exclusive competence regarding external trade), are under a (primary) legal duty to ensure Morocco's compliance with the law of occupation through the tools available to them, including through the conditioning of trade relations. Crawford, however, has taken the view that the duty to ensure respect does not reach that far and that third States, as non-directly affected States, instead of incurring a legal obligation to condition trade, are only *entitled to invoke* the wrongdoer's responsibility for a violation of the Geneva Conventions.⁷⁷ This is in keeping with the common understanding of the consequences of *erga omnes* obligations in the law of responsibility, which appear to be limited to invocation indeed.⁷⁸ Moreover, from the vague wording of States' duty to ensure respect for international humanitarian law, it cannot unambiguously be derived that States are under a duty not to import products 'contaminated' by violations of occupation law.

Alternatively, one could ground the EU's duty to exclude products stemming from the illegal exploitation of natural resources located on occupied territory on the EU's duty of non-assistance (or prohibition of complicity). This duty is laid down in the Articles on the Responsibility of International Organizations (ARIO 2011).⁷⁹ The relevant Article 14 ARIO provides that '[a]n international organization which aids or assists a State ... in the commission of an internationally wrongful act by the State ... is internationally responsible for doing so if: (a) the ... organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization.'⁸⁰ This duty of non-assistance aims to prevent the commission of acts that assist in preserving a situation created by a breach of international law.⁸¹ Applied to the situation at hand, this could be any act that would facilitate Morocco's potential exploitation of natural resources in Western Sahara in violation of the law of occupation.

The conditions for the application of the duty of non-assistance are relatively strict, however. The International Law Commission's Commentary to Article 14 ARIO states as a requirement that 'the relevant ... organ *intended*, by the aid or assistance given, *to facilitate* the occurrence of the wrongful conduct'.⁸² While the EU may possibly have been aware of the circumstances of the potential illegal exploitation of natural resources in Western Sahara, the requirement of intention to facilitate thus demands for evidence which seems rather impossible to obtain, for example evidence that the EU had the *intention to facilitate* this exploitation by concluding a Liberalisation Agreement that covered products from Moroccan-occupied Western Sahara. The Council of the EU possibly only wished to deepen trade relations with Morocco and simply did not pay much attention to the dire situation of the Saharawi. This line of reasoning can also be found in the GC's judgment, where the Court held that the Council should have better verified the impact of the Agreement on the fundamental rights of the Saharawi.

⁷⁶See also, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, 9 July 2004, [2004] ICJ Reports 136, p 200, para 159.

⁷⁷Crawford (n 66) 15–6.

⁷⁸ILC Articles on State Responsibility art 48; ILC Articles on the Responsibility of International Organizations art 49.

⁷⁹'Draft articles on the responsibility of international organizations, with commentaries: Text adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session' (A/66/10), *Yearbook of the International Law Commission* (International Law Commission 2011) vol II, Part Two.

⁸⁰The text of this article closely tracks the text of art 16 of the Articles of International Law Commission (2001), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries: Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session', UN Doc A/56/10, *Yearbook of the International Law Commission* (International Law Commission 2001) vol II, Part two as corrected.

⁸¹N Jorgensen, 'The Obligation of Non-Assistance to the Responsible State' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 691.

⁸²Commentary (4) to Article 14 International Law Commission (2011) (n 79) 102 (emphasis added). This text is in fact copied from the Commentary to Article 16 of International Law Commission (2001) (n 80) as corrected. See also Crawford (n 66) 32: Crawford notes that 'the assisting act should be 'specifically directed toward assisting the crime [and there should be] actual knowledge of the circumstances ... [and] the State concerned must have intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.

There is no clear evidence, however, that the Council would have *intended* to facilitate these rights violations, or the illicit exploitation of natural resources. Consequently, the responsibility of the EU will not normally be engaged on grounds of aiding and assisting.

Such responsibility could only be engaged if the requirements for aiding and assisting were, *de lege ferenda*, lowered to those of *dolus eventualis*, pursuant to which an actor's responsibility is engaged where he foresees the possibility of an unlawful circumstance or consequence occurring, and nonetheless proceeds with his conduct.⁸³ Given the systemic effects of trade relations on, and the encouragement of possibly illicit practices of natural resources exploitation outside the territory of the importing State, a standard of responsibility that is broader than the one propounded in the ARIIO may be advisable, all the more so bearing in mind the EU's constitutional aim of contributing 'to the strict observance and development of international law' in its relations with the wider world.⁸⁴ A broader standard may allow for the EU's international responsibility to be engaged in the context of trade relations with occupied territories, in case the EU recklessly or negligently disregards the impact of such relations on the enjoyment of human rights, or on the exploitation of natural resources to the detriment of the interests of the local population of the occupied territory.⁸⁵

That being said, under any applicable or proposed responsibility standard, the EU's responsibility will *not* be engaged insofar as the traded products are derived from exploitation of natural resources that *benefits* the population of the occupied territory. In that case, there is, in accordance with the law of occupation, no breach of international law to begin with. In light of the information available regarding Morocco's practices in Western Sahara, wrongful acts may be very likely to take place, but as already signalled, it is not excluded that Morocco's exploitation of certain resources, whether at present or in the future, may benefit the Saharawi. Accordingly, by deciding that the Liberalisation Agreement does not apply at all to Western Sahara, the CJEU in *Front Polisario* may have denied legitimate economic opportunities to the Saharawi.⁸⁶

4. The duty of non-recognition

Apart from occupation law, there is another international law regime that is particularly relevant to the situation of occupied territories, and which has also been bypassed by the EU courts: the regime governing the consequences of serious breaches of peremptory norms, in particular third parties' duty of non-recognition of such breaches. Occupations are often accompanied by such violations, as they are

⁸³The issue also came up during the reading of the Articles, when the Dutch delegation suggested widening the application scope of the Draft Article, circumventing not only the requirement of intent, but also the requirement of actual knowledge. The contribution of The Netherlands suggested that Article 16 should instead read '[t]hat State does so when it knows or should have known the circumstances of the internationally wrongful act.' International Law Commission, State Responsibility: Comments and observations received from Governments (A/CN.4/515), *Yearbook of the International Law Commission* (International Law Commission 2001) vol II, part one, p 52. However, the Dutch proposal did not make it to the final version of the ILC Articles. J Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 406. Arguably, the EU's continued trade relations with occupied territories despite the reported violations of occupation law could arguably constitute such certain or near-certain knowledge as to the outcome. The acceptance of *dolus eventualis* as the relevant standard would thus mean that the intent requirement could be fulfilled on the basis of the EU's knowledge of the possible illicit outcome: the mere fact that the EU continues its trade despite reports of the adverse effects for the local population of such economic exploitation could thus be construed as the necessary 'intent'.

⁸⁴Treaty on European Union (TEU) art 3(5). This also constitutes a formal aim of the EU's external action programme (per TEU art 21(2)) and the EU's external action in the context of its Common Commercial Policy in particular (TEU art 205).

⁸⁵One still may need to establish that the exploitation or human rights violation would have been internationally wrongful if committed by the EU, by virtue of ARIIO, art 14(b). While the EU is not, as such, party to international human rights treaties or the Geneva Conventions, it is arguable that the relevant acts are also wrongful under customary international law, which *is* binding on the EU. See T Konstantinides, 'The Meso Level: Means of Interaction between EU and International Law: Customary International Law as a Source of EU Law: A Two-Way Fertilization Route?' (2016) 35(1) *Yearbook of European Law* 513.

⁸⁶Compare European Commission, Brussels, 11 June 2018 COM (2018) 479 final 2018/0257 (NLE), Proposal for a Council Decision relating to the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, p 4 ('Amending the relevant Protocols to the Association Agreement also allows EU tariff preferences to be granted on the basis of an assessment of the advantages for local populations and respect for human rights').

typically triggered by the unlawful use of force, and are characterised by continuous violations of the occupied people's right to self-determination.

Per Article 42 ARIO, States and international organisations (1) shall cooperate to bring to an end through lawful means any such serious breach; and (2) bear a duty not to recognise as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation. With regard to the first element, maintaining trade relations with the occupant – more specifically trading products originating in the occupied territory without further requirements regarding the production of these goods – can arguably not be characterised as a genuine effort to 'bring to an end through lawful means' the serious breach in question, that is, the situation of belligerent occupation of the Western Sahara territory. However, from the limited application in practice of this 'duty to cooperate to bring to an end', it appears that, on the one hand, such a duty is only ancillary to the duty of non-recognition, and on the other, that international cooperative efforts should take place primarily at the level of the United Nations. Most notably, the ICJ held in its Advisory Opinion on the *Legality of the Wall* that all States had an obligation 'not to recognize the illegal situation resulting from the construction of the wall', only to add later – additionally – that the 'United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime'.⁸⁷ As the EU 'fully supports the efforts made by the United Nations Secretary-General and his personal envoy to help the parties reach a fair, lasting and mutually acceptable political solution that would ensure the self-determination of the people of Western Sahara under agreements aligned with the principles and objectives of the Charter of the United Nations, as set out in the Resolutions of the UN Security Council, in particular Resolutions 2152 (2014) and 2218 (2015)',⁸⁸ the focus of the current analysis will be on the more immediate duty not to recognise situations stemming from a serious breach of peremptory norms, and the related obligation not to aid or assist in maintaining such situations. When using the notion of 'duty of non-recognition' in this section, we also imply the obligation not to aid or assist, as, in the context of trade with occupied territories, similar arguments could be developed in relation to both obligations.⁸⁹

This section first addresses the relevance of the non-recognition regime for Western Sahara (Section 4.1), and then goes on to examine its implications for the EU's trade in products originating from Western Sahara and occupied territories more generally (Section 4.2). It is argued that the conclusion of an EU trade agreement with respect to products originating from occupied territories may amount to an implicit recognition of an unlawful situation. However, at the same time, it is submitted that a widely accepted exception to the duty of non-recognition may keep the door ajar for trade access, including preferential trade access of certain products, specifically in case such trade benefits the local population in the occupied territory.

4.1. Relevance of the duty of non-recognition

The duty of non-recognition reflects the more general principle of international law that *ex injuria ius non oritur*. In essence, this duty prohibits States from recognising – whether explicitly or implicitly – any legal claim or entitlement that stems from an unlawful act.⁹⁰ The duty of non-recognition harks back to the 1932 Stimson doctrine, a policy of the United States not to recognise international territorial

⁸⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, pp 136, 202, para 163.

⁸⁸ European Commission, Proposal for a Council Decision relating to the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, Brussels, 11.6.2018 COM (2018) 479 final 2018/0257 (NLE), 2.

⁸⁹ S Hummelbrunner and A Prickartz, 'It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union' (2016) 32(83) *Utrecht Journal of International and European Law* 19 ('As to the obligation not to render aid or assistance in maintaining a situation created by a breach of an obligation *erga omnes*, similar arguments which could speak against the approval of the contested EU-Morocco Agreement can be brought forward').

⁹⁰ M Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 678.

changes brought about by the use of force.⁹¹ Currently, the duty of non-recognition extends to all violations of peremptory norms of international law. As stated above, the duty of non-recognition for international organisations such as the EU is enshrined in Article 42 ARIO, which requires that '[n]o State or international organization shall recognize as lawful a situation created by a serious breach . . . , nor render aid or assistance in maintaining that situation.'⁹² Article 41 ARIO defines a 'serious breach' as a 'gross or systematic failure' to fulfil 'an obligation arising under a peremptory norm of general international law'.⁹³ A peremptory norm has in turn been defined as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'.⁹⁴ It will be argued that an EU trade agreement with respect to products originating from occupied territories may amount to the (implicit) recognition of breaches of peremptory norms.

Arguably, with respect to the situation in Western Sahara, Morocco has violated, in a gross or systematic manner, at least two peremptory norms: (1) the prohibition of aggression, and subsequently, (2) the Saharawi right to self-determination.⁹⁵ First, Morocco's invasion of Western Saharan territory arguably constituted an act of aggression in the absence of a UN Security Council authorisation and without the circumstances for self-defence being present.⁹⁶ Second, Morocco's subsequent illegal annexation of Western Saharan territory also amounts to a violation of the Western Saharan right to self-determination, since it prevents the local population from determining the future of their territory.⁹⁷ Third, the ongoing exploitation of natural resources in the occupied Western Saharan territory may be in breach of the local population's right to permanent sovereignty over natural resources, which forms an essential part of the right to self-determination.⁹⁸ The peremptory character of both the prohibition of aggression and, the right to self-determination has been unambiguously confirmed, and more specifically, the 'attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples' – that is, the scenario of Western Sahara – has been qualified as a serious breach of a peremptory norm giving rise to the application of the duty of non-recognition.⁹⁹ Upon seizing the Western Saharan territory and by considering it as 'an integral part of its own territory',¹⁰⁰ Morocco has in addition issued a clear *legal claim* to Western Sahara – a requirement for the application of third parties' duty of non-recognition –

⁹¹Q Wright, 'The Legal Foundation of the Stimson Doctrine' (1935) 8(4) *Pacific Affairs* 439.

⁹²Art 41 of the International Law Commission, 'Draft articles on the responsibility of international organizations, with commentaries: Text adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session' (A/66/10), *Yearbook of the International Law Commission* (International Law Commission 2011) vol II, Part Two.

⁹³*ibid*, art 41 (1) and (2).

⁹⁴Vienna Convention on the Law of Treaties art 53, UNTS 1155.

⁹⁵Arguably the (still ongoing) Moroccan settler movement could potentially constitute a breach of art 49(6) of the 4th Geneva Convention ('The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'). We will not engage further with this argument, however. See for a critical analysis of the settler movement and the Saharawi exodus: J Mundy, 'Moroccan Settlers in Western Sahara: Colonists or Fifth Column?' (2012) 15(2) *The Arab World Geographer* 95.

⁹⁶See for a more extensive argumentation that Morocco's invasion of Western Sahara territory constituted an 'act of aggression': Koury (n 35) 174–6.

⁹⁷The ICJ recognised the Western Saharan right to self-determination in its Advisory Opinion on Western Sahara, see *Advisory Opinion on the Western Sahara*, 16 October 1975, [1975] ICJ Rep 12, para 70. We may also note that the envisaged UN-supported referendum has yet to take place. See furthermore, the relevant UN Documents on MINURSO (n 36).

⁹⁸Koury (n 35) 176–8. See furthermore on the relation between the permanent sovereignty over natural resources and the right to self-determination: M Özden and C Golay, 'The Right of Peoples to Self-Determination and to Permanent Sovereignty over their Natural Resources Seen From a Human Rights Perspective' (2010), Third World Centre (CETIM).

⁹⁹Respectively comment (4) and (5) on art 40 in International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries: Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session', UN Doc A/56/10, *Yearbook of the International Law Commission* (International Law Commission 2011) vol II, Part two as corrected, pp 113–4. Reproduced in International Law Commission, 'Draft articles on the responsibility of international organizations, with commentaries: Text adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session' (A/66/10), *Yearbook of the International Law Commission* (International Law Commission 2011) vol II, Part Two, 53.

¹⁰⁰Case T-512/12 (n 1) para 100. Similarly, see Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 21 December 2016, para 30.

in contradiction with the ICJ's earlier ruling that there are no sovereign ties between Morocco and the Western Saharan territory.¹⁰¹

Finally, it can be noted that the duty of non-recognition is of a 'self-executory' nature.¹⁰² This means that once a peremptory norm of international law has been seriously breached, all other States and international organisations are under a legal duty of non-recognition regarding the effects of this violation, regardless of whether or not the UN organs have considered the matter. Accordingly, it is immaterial that these organs may not clearly have established the breach of a peremptory norm by Morocco, or may not have called on, or compelled States to refrain from recognising the situation in Western Sahara.

4.2. Legal consequences for the EU

In the previous subsection, it has been submitted that the application of the duty of non-recognition is triggered by Morocco's claim of authority over Western Saharan territory. This means that all States and international organisations have a duty under international law not to recognise Morocco's territorial claims over Western Saharan territory. However, it still needs to be established that by concluding a trade agreement with Morocco, the EU has recognised a serious breach of a peremptory norm. This is a question of the scope and content of the duty of non-recognition: what acts by third parties qualify as acts of recognition?

It can be gathered from case law and commentary on the duty of non-recognition that this duty is not to be understood too narrowly, as prohibiting mere *explicit* recognition. The Commentary to the Articles on State Responsibility notes that the duty of non-recognition not only prohibits 'formal recognition' of an unlawful situation, but also 'acts which would imply such recognition'.¹⁰³ Entering into economic relations concerning an occupied territory may well amount to implicit recognition. In effect, in its *Namibia* Advisory Opinion, the ICJ opined that the duty of non-recognition entailed that States are 'under obligation to abstain from entering into treaty relations with [the occupying power] in all cases in which [it] purports to act on behalf of or concerning [the occupied territory]'.¹⁰⁴ According to the ICJ in that opinion, the duty of non-recognition imposes 'upon Member States the obligation to abstain from entering into economic and other forms of relationship or dealings with [the occupying power] on behalf of or concerning [the occupied territory] which may entrench its authority over the Territory'.¹⁰⁵

In view of these statements, the *de facto* application of the EU-Morocco Liberalisation Agreement to Western Sahara – as affirmed by both the Council and the Commission and upheld by the GC¹⁰⁶ – seems problematic, in that it appears to constitute an implied recognition of the legality of Morocco's presence on Western Saharan territory.¹⁰⁷ What is more, not just the granting of preferential access to products originating from Western Sahara is problematic, but so may be the mere conduct of trade relations and the importation into the EU of any products from Western Sahara, irrespective of whether preferential tariffs apply. Moerenhout, for instance, has argued in relation to EU trade in products originating from the Israeli

¹⁰¹ *Advisory Opinion on the Western Sahara* (International Court of Justice 1975) 16 October 1975, [1975] ICJ Rep 12, paras 84–129.

¹⁰² Dawidowicz (n 90) 683.

¹⁰³ Comment (5) on art 41 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session, *UN Doc A/56/10* (Yearbook of the International Law Commission 2001) vol II, Part two as corrected, p 114. Also: *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971, [1971] ICJ Rep 16, para 121: this 'may imply a recognition that South Africa's presence in Namibia is legal'.

¹⁰⁴ *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971, ICJ Rep 16, para 122.

¹⁰⁵ *ibid*, para 121 (quote). The ICJ focuses specifically on economic relations in para 124 of the Advisory Opinion.

¹⁰⁶ Case T-512/12 (n 1) para 87.

¹⁰⁷ In this regard, we may highlight the affirmative answers of the High Representative before the EU Parliament concerning the Liberalisation Agreement that Morocco could indeed 'register as geographical indications products originating in Western Sahara'. The common response given by the High Representative of the Union for Foreign Affairs and Security Policy, Vice President of the Commission, Catherine Ashton, on behalf of the Commission to the written questions from Members of the European Parliament with the references E001004/11, P001023/11 and E002315/11, OJ 2011 C 286 E, p 1.

settlements, built on occupied Palestinian territories in violation of the Geneva Conventions, that ‘the act of importation remains a legal act, which requires the stamp of approval from the importing state, which holds a sovereign power over its trade policy’.¹⁰⁸ According to Moerenhout, ‘[h]aving the knowledge that settlements, among others through trade, make a claim on the territory of Palestine, makes such an act of importation implicit recognition’.¹⁰⁹ This line of reasoning is admittedly far from generally accepted. Kontorovich, for instance, has claimed that having trade relations does not amount to recognition at all.¹¹⁰ Crawford advocates a more moderate position concerning the exact content of the prohibition resulting from the duty of non-recognition, arguing that some acts should be permitted, especially those ‘which do not purport to secure or enhance territorial claims, such as those of a commercial, minor administrative or ‘routine’ character, or those which are of immediate benefit to the population’.¹¹¹ Despite the ongoing academic debate, at least some differentiation between products from the occupied territories and products from the occupant’s metropolitan territory, e.g. via the attachment of labels indicating the origin of the product, may be called for to prevent a violation of the duty of non-recognition.¹¹²

What is important for our argument, however, is also that, even if in principle such trade relations would violate the EU’s duty of non-recognition, this duty is not considered as absolute, meaning that there are legitimate exceptions to it. In its *Namibia* Advisory Opinion, the ICJ, while affirming the general prohibition of entering into relations with a State in respect of an occupied territory, added an ‘element of flexibility’:¹¹³ it stated that non-recognition ‘should not result in depriving the [local population] of any advantages derived from international co-operation’.¹¹⁴ Benvenisti has argued that the rationale would, more specifically, apply to ‘bilateral and regional treaties such as free trade areas which ensure the livelihoods of the occupied inhabitants’.¹¹⁵ It is also observed that this so-called *Namibia* exception is very similar to the occupying power’s aforementioned right of usufruct to exploit the natural resources of an occupied territory to the benefit of the local population.

Applied to the case of Western Sahara, the *Namibia* exception means that the EU-Morocco Liberalisation Agreement is valid, or applies to the territory of Western Sahara, insofar as the importation of products derived from Morocco’s natural resources exploitation in Western Sahara benefits the local population. These results of the application of the non-recognition regime for trade with occupied territories differ, at least in theory, from the results of the CJEU’s judgment in *Front Polisario*. It is recalled that, applying the law of treaties informed by the right to self-determination, the CJEU denied products originating in Western Sahara preferential trade access altogether. That being said, the non-recognition regime yields outcomes that resemble those of the judgment of the GC, which allowed preferential trade insofar as the EU Council has ensured ‘that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights.’¹¹⁶ From a consequentialist perspective, the GC judgment is thus preferable, even if the GC failed to acknowledge the reality of the occupation of Western Sahara.

As a way forward, in the aftermath of the CJEU’s judgment in *Front Polisario*, which excluded preferential trade in products originating in Western Sahara, the EU could possibly state explicitly that it only seeks to trade, on a non-preferential basis, in goods that originate from the occupied Western Saharan territory in so far as these goods benefit the local population.¹¹⁷ One should nevertheless realise that the

¹⁰⁸T Moerenhout, ‘The Consequence of the UN Resolution on Israeli Settlements for the EU: Stop Trade with Settlements’ (European Journal of International Law (EJIL) Talk Blog) <www.ejiltalk.org/the-consequence-of-the-un-settlements-resolution-for-the-eu-stop-trade-with-settlements/> accessed 15 July 2018.

¹⁰⁹ibid.

¹¹⁰E Kontorovich, ‘Economic Dealings with Occupied Territories’ (2015) 53(3) Columbia Journal of Transnational Law 584.

¹¹¹Crawford (n 66) 22. These acts should be considered ‘untainted by the illegality of the administration’, see J Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 167.

¹¹²E.g. EU Commission, ‘Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967’, Brussels, 11 November 2015, 7834.

¹¹³Crawford (n 66) 20.

¹¹⁴*Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 104) para 125.

¹¹⁵Benvenisti (n 35) 85.

¹¹⁶Case T-512/12 (n 1) para 228.

¹¹⁷This is also – more or less – the approach of the aforementioned European Commission proposal for a Council Decision,

imposition of a full trade ban on goods that do not benefit the local population is difficult to implement, as for each product the EU would have to review the exploitation context on the basis of limited available information.¹¹⁸ A more workable alternative, as applied by the EU to products from Israeli settlements in the Occupied Palestinian Territories,¹¹⁹ may be for the EU to require the attachment of a consumer label on imported (finished) products. Such a label would indicate the geographic origin of the products, or even the geographic origin of the materials they contain¹²⁰ – occupied Western Sahara or the metropolitan territory of Morocco – while leaving the ‘political’ decision to transact to the consumer rather than the EU itself.

5. Conclusion

EU trade agreements in respect of products originating from occupied territories raise distinct questions for the EU’s extraterritorial obligations vis-à-vis the local population of those territories. Such obligations may derive from international human rights law, but in this contribution, it has been argued that the specific international law regimes of occupation law and the prohibition of recognising situations resulting from breaches of peremptory norms apply in the first place. In a sense, these regimes serve as *lex specialis* for the EU’s importation of products from occupied territories. This is not to deny, however, that at least some human rights continue to apply in armed conflicts, alongside international humanitarian law, which includes occupation law.¹²¹

Unfortunately, in the first ever challenge before EU courts of the legal validity of a trade agreement concluded between the EU and a third State (Morocco) acting as an occupying power in a territory (Western Sahara), the GC and subsequently the CJEU failed to properly characterise the relevant territorial situation as one of occupation. Instead, the EU courts applied alternative legal regimes to the EU-Morocco Liberalisation Agreement and its effects on the population of Western Sahara, such as the EU Charter on Fundamental Rights and the Vienna Convention on the Law of Treaties, in combination with peoples’ right to self-determination.

From a narrow doctrinal perspective, these regimes may appear appropriate and may have been relatively convincingly applied by the EU courts. Indeed, at first sight, the GC can be applauded for giving the Charter extraterritorial application, and for, on that basis, imposing a human rights verification test on the Council of the EU when it intends to conclude a trade agreement with a third State.¹²² The CJEU, for its part, can be credited for giving effect to the right to self-determination of the Saharawi through the law of treaties, and on that basis restricting the geographic scope of the Liberalisation Agreement to the metropolitan territory of the occupant (Morocco) to the exclusion of Western Saharan territory. In so deciding, the EU courts, while formally only addressing the validity of an EU Council decision on a technical bilateral trade agreement, served as ‘extraterritorial’ bystander courts vindicating the rights and interests of the oppressed Saharawi. Given the unavailability of other international dispute-settlement mechanisms with jurisdiction over the plight of the Saharawi, this assumption of responsibility for the

2018, above n 88. The Commission, however, takes the view that all economic activities in Western Sahara benefit the local population. *Id.*, p 8 (‘[I]t can be concluded from this study that there are economic and production activities in Western Sahara that would benefit greatly from the same tariff preferences as those granted to the Kingdom of Morocco.’). See for a critique of this proposal: V Azarova and A Berkes, ‘The Commission’s Proposals to Correct EU-Morocco Relations and the EU’s Obligation Not to Recognise as Lawful the ‘Illegal Situation’ in Western Sahara’ (*EJIL:Talk!*, 13 July 2018) <www.ejiltalk.org/the-commissions-proposals-to-correct-eu-morocco-relations-and-the-eus-obligation-not-to-recognise-as-lawful-the-illegal-situation-in-western-sahara/> accessed 19 September 2018.

¹¹⁸See also the methodological constraints cited by the Commission in its 2018 proposal, above n 88, 5.

¹¹⁹See EU Commission (2015), ‘Interpretative Notice on Indication of Origin of Goods from the Territories Occupied by Israel since June 1967’, Brussels, 11 November 2015, 7834.

¹²⁰The requirement to indicate the geographic origin of a product may be circumvented by shipping raw materials from Western Sahara to Morocco, and finalising the product in Morocco rather than Western Sahara (e.g. bottling Western Saharan oil in Morocco). Requiring the origin of the materials may solve this problem, although it may be difficult for controllers to trace where exactly the materials come from – unless Morocco allows EU inspectors to conduct verification and tracing on the territory of Western Sahara and Morocco.

¹²¹E.g. A Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (2006) 100 AJIL 580.

¹²²See for a rationalization of the GC’s approach: C Ryngaert, ‘EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations’ (2018) (20) *International Community Law Review* 374–93.

fate of distant others is laudable. It is no surprise then that the *Front Polisario* – the Saharawi national liberation movement – hailed the GC and CJEU’s judgments as a victory.

Still, this victory leaves a somewhat sour taste, as the justice provided to the Saharawi is only partial. The EU courts ducked the fundamental legal and ethical question in the case, namely the consequences to be derived from the status of Western Sahara as an occupied territory that has come into being and is sustained by violations of peremptory norms of international law by the occupant. Possibly, the EU courts considered themselves to be on safer political ground by invoking the EU’s internal fundamental rights law (GC), or ‘neutral’ treaty law (CJEU). There may have been concern that dropping the political bombshell of occupation may trigger unforeseen and undesirable consequences.¹²³ After all, when UN Secretary-General Ban Ki-moon characterised Western Sahara as an occupied territory upon visiting a camp for Western Sahara refugees in March 2016, Morocco immediately ordered the UN to cut staff in Western Sahara.¹²⁴

The EU courts’ tendency to the technical rather than the ethical, reflected by their avoiding of questions pertaining to substantive values, by relying on formal legal categories such as treaty interpretation,¹²⁵ is of course not new. Andrew Williams has earlier drawn attention to this in a wide-ranging contribution on the values of EU law, emphasising the timid role of the EU courts in this regard.¹²⁶ With respect to trade in products originating from occupied territories more specifically, the EU courts’ predilection for the technical could already be gleaned from a 2010 CJEU preliminary ruling concerning the refusal of a German customs office to grant a German company preferential treatment to the importation of products manufactured in the Israeli-occupied West Bank.¹²⁷ In that case, the CJEU, relying on the *pacta tertiis* rule codified in VCLT Article 34, held that such products fell within the scope of the association agreement which the EU had concluded with the Palestinian Authority rather than the association agreement it had concluded with Israel – also without citing the elephant in the room of the prolonged Israeli occupation of the West Bank.¹²⁸ In *Front Polisario*, the CJEU (unlike the GC) considered that the same rule applied even in the absence of a rival association agreement.¹²⁹

Sensitive political questions have legal overtones, however. In situations of occupation that are preceded and accompanied by violations of peremptory norms of international law, for example unlawful use of force and denial of self-determination, it behoves the EU courts to apply the appropriate legal regimes of occupation law and the duty of non-recognition, as these are tailored to the peculiar challenges confronting an occupied population. If the EU courts had applied these regimes, they may have found

¹²³ See on the avoidance of a ‘politically sensitive issue’ also, Kassoti (n 2).

¹²⁴ R Gladstone, ‘Morocco Orders UN to Cut Staff in Disputed Western Sahara Territory’ *New York Times* (New York, 17 March 2016). In reality, the GC’s judgment also led to a temporary suspension of diplomatic relations by Morocco (A El Yaakobi, ‘Morocco Suspends Contacts with EU Over Court Ruling on Farm Trade’ *Reuters* (Rabat, 25 February 2016)). But these were swiftly restored. The CJEU’s judgment, which declared the *Front Polisario*’s claim formally inadmissible for lack of standing, could obviously be presented as a legal victory for Morocco, which did not necessitate any retaliation against the EU.

¹²⁵ Also J Odermatt, ‘Council of the European Union v *Front populaire pour la libération de la sagaïa-el-hamra et du rio de oro* (*Front Polisario*) – Case C-104/16 P’, (2017) 111(3) *American Journal of International Law* 738 (noting the CJEU’s focus on ‘narrow issues of treaty interpretation without taking into account the broader context of the dispute and other principles of international law’).

¹²⁶ A Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’ (2009) 29(3) *Oxford Journal of Legal Studies* 549, 560; referring also to C Radaelli, *Technocracy in the European Union* (Longman 1999).

¹²⁷ C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, [2010] OJ C100/4, [2010] ECR I-1289. See also Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others. Reference for a preliminary ruling, High Court of Justice, Queen’s Bench Division – United Kingdom* [1994] ECR I-03087, ECLI identifier: ECLI:EU:C:1994:277 (case concerning the application of preferential treatment under the EEC-Cyprus Association Agreement to products originating in the so-called ‘Turkish Republic of Northern Cyprus’).

¹²⁸ It is conceded that in the operational part of the judgment, the CJEU used the term ‘occupation’ once, where it held that ‘the Israeli customs authorities gave no reply to the letters which the German customs authorities had sent in order to check whether the products at issue had been manufactured in *Israeli-occupied* settlements in the West Bank’ (para 66, emphasis added). However, it is likely that the CJEU only repeated the wording of the letter from the German authorities. In any event, it did not attach any particular consequences in terms of the application of occupation law or the duty of non-recognition to the characterisation of the West Bank as an occupied territory.

¹²⁹ CJEU, *Front Polisario*, paras 102–7. *Contra* GC, *Front Polisario*, paras 96–7. It can obviously be contested whether a ‘people’ (a non-State actor) qualifies as a third party in the sense of the Vienna Convention art 34.

the EU internationally responsible for facilitating violations of occupation law committed by its trading partner Morocco, or for implicitly recognising an illicit territorial situation in violation of the duty of non-recognition. They may also have found that these regimes nevertheless allow for natural resources exploitation that benefits the local population, and, thus, that trade in products from occupied territories need not necessarily be in violation of international law.¹³⁰ Both in terms of moral symbolism and practical consequences, such counterfactual judgments would have differed fundamentally from the actual judgments rendered by the EU courts in *Front Polisario*, especially the CJEU's judgment.

Ultimately, however, it may be a simplification to conceive of *Front Polisario* just as a failure of the CJEU to engage properly with international law. At a more fundamental level, *Front Polisario* also represents a conflict *internal to* international law, namely between on the one hand *general* international law, in particular the duty of non-recognition and the law of occupation, and *specific* international law, in the case bilateral trade treaties concluded between the EU and third States. It is our argument that the validity of such specific law should be reviewed in light of basic principles of general law. After all, general international law does not (just) provide fallback rules in case specific international law fails to elaborate on certain issues, but also provides baseline rules which specific law cannot bypass.

Obviously, the CJEU has rendered its judgment, thereby closing the case regarding the scope of application of the EU-Morocco Liberalisation Agreement. However, our critique does not amount to shutting the stable door after the horse has bolted. After all, *Front Polisario* only pertains to trade *preferences* and does not affect non-preferential trade in products from Western Sahara. Such trade can continue unabated after the CJEU's judgment. Occupation law, and the duty of non-recognition and its exceptions remain relevant to this trade, which also exists between the EU and other occupied territories, such as the Israeli-occupied West Bank and Turkish-occupied Northern Cyprus. It is advisable for the EU to reconsider all these relations, and to develop a coherent framework that legally differentiates trade that benefits the local population from trade that does not.

Declarations and conflict of interests

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¹³⁰As already mentioned, this dovetails with the GC's judgment, which required the EU Council to verify whether the agreement did not adversely affect the local population.