

BETWEEN VÖLKERRECHTSFREUNDLICHKEIT AND REALPOLITIK: THE EU AND TRADE AGREEMENTS COVERING OCCUPIED TERRITORIES

EVA KASSOTI*

Abstract

The EU's identity as a global actor is firmly anchored in a distinct normative and political agenda; it has consistently portrayed itself as a normative power committed to the strict observance of international law. However, more recently, the EU's practice in relation to the conclusion of trade agreements covering occupied territories has increasingly challenged the narrative of "normative power Europe". In this light, the present article attempts a survey of the relevant EU practice by focusing on two case studies: Palestine and Western Sahara. The article argues that, in both cases, the EU has fallen foul of the obligation to promote the right to self-determination and of the corollary obligation of non-recognition. Furthermore, it argues that the EU has adopted a largely inconsistent approach when it comes to the labelling of products originating from occupied territories – something that severely undermines the international credibility and legitimacy of its external action. Overall, this contribution asserts that there is a growing gap between EU identity rhetoric as a promoter of global fundamental values, on the one hand, and realpolitik, on the other.

Keywords: occupation; right to self-determination; obligation of non-recognition; obligation of non-assistance; product labelling; non-self-governing territories; *Völkerrechtsfreundlichkeit*.

1. INTRODUCTION

The EU's identity as a global actor is firmly anchored in a distinct normative and political agenda. It has consistently portrayed itself as a normative power committed to core values such as democracy, the rule of law, human rights and to the observance, support and development of international law.¹ The EU's *Völkerrechtsfreundlichkeit* – namely its open attitude towards rules of international law – has been an important identity marker for the organization since its early

* Eva Kassoti (Ph.D.), Lecturer in Law, The Hague University of Applied Sciences. CLEER Research Fellow, Asser Institute (The Hague).

¹ See generally MANNERS, "Normative Power Europe: A Contradiction in Terms?", *Journal of Common Market Studies*, 2002, p. 235 ff.

days.² The Treaty of Lisbon has sought to further solidify the EU's image as an internationally engaged polity by emphasizing the organisation's commitment to "the strict observance and development of international law".³ The EU's external projection of itself as a virtuous international actor generates the expectation that the Court of Justice of the European Union (ECJ) also espouse something of this internationalist approach.⁴ However, it has been observed in the literature that the Court's approach to international law seems to have shifted over time.⁵ Although in its earlier case law the ECJ seemed to have adopted a friendly and open attitude towards international law,⁶ more recent case law, especially after *Kadi*,⁷ evidences a more reserved, inward-looking attitude and a tendency to shield the autonomy of the EU legal order by eschewing engagement with international law.⁸

The coming of age of the EU as a global actor has also highlighted the need for consistency in its external actions. Consistency, in this context, is viewed as a *conditio sine qua non* for the global effectiveness of EU foreign policy.⁹ As a normative and political imperative, consistency implies that the EU's external action should be compatible with its own core values.¹⁰ Furthermore, it implies that

² CANNIZZARO, "The Neo-Monism of the European Legal Order", in CANNIZZARO, PALCHETTI and WESSEL (eds.), *International Law as Law of the European Union*, Leiden, 2012, p. 35 ff., pp. 56-57.

³ See Art. 3(5) of the Treaty on European Union (TEU). See also Art. 21(1) of the Treaty on the Functioning of the European Union (TFEU).

⁴ DE BÚRCA, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", *Maastricht Journal of European and Comparative Law*, 2013, p. 168 ff., p. 183.

⁵ ODERMATT, "The Court of Justice of the European Union: International or Domestic Court?", *Cambridge Journal of International and Comparative Law*, 2014, p. 696 ff., pp. 699-700; and ECKES, "International Law as Law of the EU: The Role of the European Court of Justice", in CANNIZZARO, PALCHETTI and WESSEL (eds.), *cit. supra* note 2, p. 353 ff., p. 364.

⁶ See generally ROSAS, "With a Little Help from My Friends: International Case-Law as a Source of Reference for EU Courts", *The Global Community Yearbook of International Law & Jurisprudence*, 2005, p. 203 ff.; and HIGGINS, "The ICJ, the ECJ, and the Integrity of International Law", *ICLQ*, 2003, p. 1 ff.

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

⁸ ECKES, *cit. supra* note 5, p. 368; DE BÚRCA, "The European Court of Justice and the International Legal Order After Kadi", *Harvard International Law Journal*, 2010, p. 1 ff., p. 5; and KLABBERS, "Völkerrechtsfreundlichkeit? International Law and the EU Legal Order", in KOUTRAKOS (ed.), *European Foreign Policy*, Cheltenham, 2011, p. 95 ff., pp. 95, 97.

⁹ Communication from the Commission to the European Council of June 2006, *Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*, COM (2006) 278, p. 6.

¹⁰ Art. 21(1) TEU. See also DUKE, "Consistency, Coherence and European External Action: The Path to Lisbon and Beyond", in KOUTRAKOS (ed.), *cit. supra* note 8, p. 15 ff., pp. 28-29.

the Union values and principles shall be promoted in a consistent manner.¹¹ In this sense, consistency of external action is directly linked to the image of the EU as a credible and legitimate international actor.¹² In order to enhance this image, it is expected that the EU should avoid double standards and that pressures exerted by it on one external player should be consistent with pressures exerted on other external players.¹³

However, more recently, the EU's practice in relation to the conclusion of trade agreements covering occupied territories has increasingly challenged the narrative of "normative power Europe". Many non-governmental organisations (NGOs) and other civil society actors argue that the EU's economic dealings with occupying authorities are inconsistent with international law.¹⁴ The EU has also been accused of adopting double standards – as its trade negotiations with Israel on the one hand and Morocco on the other evidence.¹⁵

In this light, the present article attempts a survey of the relevant EU practice by focusing on two case studies: Palestine and Western Sahara. Assessing whether the EU is a consistent normative foreign policy actor against the background of these two specific case studies is ideal due to the considerable legal and factual similarities between them. As it will be shown in detail below, both Palestine and Western Sahara constitute occupied territories whose people have the right to self-determination – as affirmed by the International Court of Justice (ICJ) in the *Wall*

¹¹ Art. 21(3) TEU. See also WRANGE, "Occupation/Annexation of a Territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy", Study undertaken at the Request of the EU Parliament, 30 June 2015, PE 534.995, p. 52, available at: <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU\(2015\)534995](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2015)534995)>.

¹² HURD, "Legitimacy and Authority in International Politics", *Int. Org.*, 1999, p. 379 ff., pp. 379-387; and NYE, *Soft Power: The Means to Success in World Politics*, New York, 2004, p. X.

¹³ HARPAZ, "Normative Power Europe and the Problem of a Legitimacy Deficit: An Israeli Perspective", *European Foreign Affairs Review*, 2007, p. 89 ff., p. 97.

¹⁴ See for example the European Co-Ordination of Committees and Associations for Palestine, "Made in Illegality", STOP All Economic Relations with Illegal Israeli Settlements, 28 February 2014, available at: <<http://www.eccpalestine.org/made-in-illegality-stop-all-economic-relations-with-illegal-israeli-settlements/>>. See also Western Sahara Resource Watch, EMMAUS Stockholm, Report: Label and Liability: How the EU Turns a Blind Eye to Falsely Stamped Agricultural Products Made by Morocco in Occupied Western Sahara, 18 June 2012, available at: <<http://www.vastsaharaaktionen.se/files/Label%20and%20Liability%20%20WSRW%20June%202012.pdf>>.

¹⁵ KAMEL, "Is the EU Adopting a Double-Standards Approach toward Israel and the Palestinian Territories?", 9 January 2014, available at: <<http://opiniojuris.org/2014/01/09/eu-adopting-double-standards-approach-toward-israel-palestinian-territories-part-1/>>; and KONTOROVICH, "New EU/Morocco Fisheries Deal and Its Implications for Israel", 9 December 2013, available at: <<http://www.jpost.com/Opinion/Columnists/New-EUMorocco-fisheries-deal-and-its-implications-for-Israel-334473>>.

Advisory Opinion¹⁶ and in the *Western Sahara* Advisory Opinion,¹⁷ respectively. In both cases, the bilateral relations between the EU and the occupying State are regulated in a similar manner – through the EU-Israel Association Agreement,¹⁸ and the EU-Morocco Association Agreement¹⁹ – and both cases reached the ECJ.

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

2. THE INTERNATIONAL LEGAL FRAMEWORK

2.1. Occupation

The main rules governing occupation in international law are found in the Fourth Geneva Convention²⁰ and the Regulations annexed to the 1907 Hague

¹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports, 2004, p. 136 ff., paras. 155-156.

¹⁷ *Western Sahara*, Advisory Opinion, ICJ Reports, 1975, p. 12 ff., para. 162.

¹⁸ Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the State of Israel, on the other part, adopted on 20 November 1995, entered into force 1 June 2000, OJ [2000] L147/3 (hereinafter "EU-Israel Association Agreement").

¹⁹ Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, on the other part, OJ [2000] L70/2 (hereinafter "EU-Morocco Association Agreement").

²⁰ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, entered into force 21 October 1950.

Convention.²¹ Both codify “intransgressible principles of customary international law”.²² Article 42 of the Hague Regulations, contains the legal definition of occupation: “Territory is considered occupied when it is actually placed under the authority of the hostile army”. Thus, in international law, occupation is largely seen as a matter of fact dependent upon the demonstration of effective authority and control over a territory to which the occupying State holds no sovereign title²³ – and irrespective of whether sovereign title to that territory is contested.²⁴ It is widely accepted that Palestine (the West Bank, including East Jerusalem, and the Gaza Strip)²⁵ is an occupied territory.²⁶ Similarly, Western Sahara is an occupied territory since Morocco’s presence therein meets the objective threshold of occupation under international humanitarian law as described above.²⁷ The UN General

²¹ Art. 42 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War (The Hague Regulations), 18 October 1907, entered into force 26 January 1910.

²² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports, 1996, p. 226, para. 79.

²³ CHINKIN, “Laws of Occupation”, Conference on Multilateralism and International Law with Western Sahara as a case study hosted by the South African Department of Foreign Affairs and the University of Pretoria, 4-5 December 2008, Pretoria, p. 198, available at: <<http://removethewall.org/wp-content/uploads/2014/05/Laws-of-Occupation-Christine-Chinkin-2009.pdf>>; and BENVENISTI, *The International Law of Occupation*, 2nd ed., Oxford, 2012, p. 43.

²⁴ *Legal Consequences of the Construction of a Wall*, *cit. supra* note 16, para. 95.

²⁵ CRAWFORD, *The Creation of States in International Law*, 2nd ed., Oxford, 2006, p. 425.

²⁶ UN SC Res. 242 (1967), UN Doc. S/RES/242 (1967); UN SC Res. 338 (1973), UN Doc. S/RES/338 (1973); UN SC Res. 478 (1980), UN Doc. S/RES/478; UN SC Res. 1860 (2009), UN Doc. S/RES/1860. See also *Legal Consequences of the Construction of a Wall*, *cit. supra* note 16, paras. 70-78; Supreme Court of Israel, *Beit Sourik Village Council v. Government of Israel*, HCJ 2056/04, 30 May 2004, para. 23; *Mara’abe v. The Prime Minister of Israel*, HCJ 7957/04, 21 June 2005, para. 14; RUBIN, “Israel, Occupied Territories”, in WOLFRUM (ed.), *The Max Planck Encyclopedia of Public International Law*, October 2009, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1301?prd=EPIL>>.

²⁷ See Art. 42 of The Hague Regulations. See also Art. 2(2) of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War which affirms that it applies to cases where the occupation occurs even without hostilities – which would encompass the Green March of 1975. In 1975, when Morocco invaded Western Sahara both Morocco and Spain, the *de jure* administrating power of Western Sahara since 1963 according to the UN (see Information from Non-Self-Governing-Territories transmitted under Article 73(e) of the Charter of the United Nations, Report of the Secretary General, 1/02/2016, UN Doc. A/71/68) were parties to the Geneva Convention (IV). Thus, by forcibly displacing the Spanish authorities from Western Sahara in 1975, Morocco occupied Western Sahara without active hostilities against the territory’s *de jure* administrative power – within the meaning of Art. 2(2) Geneva Convention (IV). In this view, the hostilities between Front Polisario and Morocco from 1975-2011 constituted a non-international armed conflict in an occupied territory but legally distinct from that of the continuing international conflict constituted by the occupation of the territory and the displacement of the Spanish authorities in 1975. The ratification of Additional Protocol I by Morocco in 2011 transformed the internal armed conflict between Morocco and Front Polisario to an international armed conflict. See Art. 1(4) of the Protocol Additional to the Geneva Conventions of 12 August

Assembly has twice characterized the presence of Morocco in Western Sahara as “belligerent occupation”²⁸ and a number of EU Member States describe Western Sahara as “occupied”.²⁹

Overall, there are two types of obligations resting on occupying powers: obligations relating to the status of the occupied territory and obligations relating to the occupied territory’s inhabitants.³⁰ As far as the former are concerned, Article 43 of the Hague Regulations reflects a cardinal principle of the law of belligerent occupation, namely that the occupier acquires only temporary authority, and not sovereignty, over the occupied territory.³¹ In light of the principle of self-determination, sovereignty over an occupied territory remains with the population under occupation.³² Thus, Israel and Morocco have not acquired title over the territories they occupy purely on the basis of their status as occupying powers.

Turning to the obligations with respect to the people of the occupied territory, the most important one for present purposes is codified in Article 55 of the Hague Regulations. Article 55 grants the occupying power a right of usufruct over

1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, entered into force 7 December 1978. For analysis of the status of Western Sahara as a territory occupied by Morocco see SAUL, “The Status of Western Sahara as an Occupied Territory under International Humanitarian Law and the exploitation of Natural Resources”, Sydney Law School, Legal Studies Research Paper No. 15/81, September 2015, pp. 5-23, available at: <https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2663843>; CHINKIN, *cit. supra* note 23, pp. 197-203; and DAWIDOWICZ, “Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC-Morocco Fisheries Agreement”, in FRENCH (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, Cambridge, 2013, p. 250 ff., pp. 272-273. Another view is that all hostilities in an occupied territory constitute an international armed conflict: CASSESE, *International Law*, 2nd ed., Oxford, 2005, p. 420. This view has found some support in practice: Supreme Court of Israel, *Public Committee against Torture in Israel v. Israel*, HCJ 769/02, 11 December 2005, paras. 18, 21; and *A and B v. Israel*, CrimA 6659/06, CrimA 1757/07, CrimA 8228/07, CrimA 3261/08, 11 June 2008, para. 9.

²⁸ UN GA Res. 34/37 (1979), UN Doc. A/RES/34/37, para. 5; UN GA Res. 35/19 (1990), UN Doc. A/RES/35/19, para. 3.

²⁹ See the statements cited in KONTOROVICH, “Economic Dealings with Occupied Territories”, *Columbia Journal of Transnational Law*, 2015, p. 584 ff., p. 612, footnote 147.

³⁰ CHINKIN, *cit. supra* note 23, p. 203.

³¹ BENVENISTI, *cit. supra* note 23, p. 7; PICTET, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, 1958, p. 275; and SASSÒLI, “Article 43 of The Hague Regulations and Peace Operations in the Twenty-First Century”, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, 25-27 June 2004, p. 5, available at: <<http://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf>>. See also Art. 4 of Additional Protocol I, *cit. supra* note 27.

³² BENVENISTI, “The Security Council and the Law on Occupation: Framing the Occupied Palestinian Territory”, *IDF Law Review*, 2003, p. 19 ff., p. 37; and BEN-NAFTALI, GROSS and MICHAELI, “Illegal Occupation: Framing the Occupied Palestinian territory”, *Berkeley Journal of International Law*, 2005, p. 551 ff., p. 554.

immovable public property and it is key to the occupant's right to exploit natural resources – thereby being of direct relevance to the question of produce coming from occupied territories.³³ The usufructuary principle emphasises that the occupier does not own the property of the territory under occupation, but may only use it, subject to the duty to safeguard the capital of these properties.³⁴ It is widely accepted that the concept of usufruct precludes exploitation of the natural resources of an occupied territory by the occupier for its own benefit.³⁵ The occupier can only dispose of the resources of the occupied territory to the extent that is necessary for the purposes of maintaining a civilian administration in the territory and for the benefit of its people.³⁶ This limitation was confirmed in the relevant jurisprudence of the Nuremberg tribunals³⁷ and in practice.³⁸ More recently, it was acknowledged by the US-UK occupying authority in Iraq in 2003, who informed the President of the UN Security Council that they would “act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people”,³⁹ resulting in a Chapter VII resolution affirming that principle.⁴⁰

Both Israel and Morocco violate Article 55 of the Hague Regulations to the extent that they use the natural resources of the territories under their control for their own benefit. Water resources in the West Bank are mainly used by the occupying power for the needs of the settlements.⁴¹ Turning to Morocco's exploitation of

³³ DAM and DE JONG, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations*, Cambridge, 2015, p. 227.

³⁴ SCHRIJVER, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge, 1997, p. 268. It is widely accepted that Art. 55 codifies a long-standing rule of customary international law, see HENCKAERTS and DOSWALD-BECK, *Customary International Humanitarian Law*, Vol. I: Rules, Cambridge, 2005, p. 179.

³⁵ CASSESE, “Powers and Duties of an Occupant in Relation to Land and Natural Resources”, in CASSESE, GAETA and ZAPPALA (eds.), *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, Oxford, 2008, p. 250 ff., p. 251; and DAM and DE JONG, *cit. supra* note 33, p. 229.

³⁶ DAM and DE JONG, *cit. supra* note 33, p. 231. See also Institut de Droit International, “Bruges Declaration on the Use of Force and Belligerent Occupation”, 2 September 2003, available at: <http://www.justitiaetpace.org/idiE/declarationsE/2003_bru_en.pdf>.

³⁷ US, Military Tribunal at Nuremberg, *Flick case*, Judgment, 22 December 1947; US, Military Tribunal at Nuremberg, *Krupp case*, Judgment, 30 June 1948; US, Military Tribunal at Nuremberg, *Krauch (I.G. Farben Trial) case*, Judgment, 29 July 1948, cited in HENCKAERTS and DOSWALD-BECK, *Customary International Humanitarian Law*, Vol. II: Practice, Cambridge, 2005, pp. 1041-1042.

³⁸ US Department of State, “Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez”, ILM, 1977, p. 733 ff., p. 743.

³⁹ Letter from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, dated 8 May 2003, UN Doc. S/2003/538.

⁴⁰ UN SC Res. 1483 (2003), UN Doc. S/RES/1483, para. 14.

⁴¹ Report by the Secretary-General, “Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and the Occupied Syrian Golan”, 18 September 2012, UN Doc. A/67/375, para. 14. Report by Israeli NGO Kerem Navot, “Israeli Settlement Agriculture

Western Sahara's natural resources, it needs to be observed that there is no evidence that the Sahrawi people benefit from such exploitation, or that such exploitation is undertaken in consultation with their representatives.⁴²

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

Apart from obligations arising under the law of belligerent occupation, occupying powers also have obligations under general international law. The right to self-determination and the principle of permanent sovereignty over natural resources are the most relevant ones in the present context. The right to self-determination is a core tenet of international law; it is clearly accepted and widely recognised as a peremptory norm of international law.⁴³ As expressly affirmed by the ICJ in its relevant Advisory Opinions, the right to self-determination applies both to the Palestinian people and to the Sahrawi people and thus these peoples are entitled to freely determine their own future political status.⁴⁴ According to the ICJ the *de facto* annexation of land severely impedes the exercise of the right to self-determination and constitutes, therefore, a breach of the obligation to respect that right.⁴⁵ Thus as long as Israel and Morocco maintain their *de facto* annexation of the territories in question (by means of settlements or otherwise),⁴⁶ that annexation amounts to a breach of their obligation to respect the right to self-determination.

as a Means of Land Takeover in the West Bank", August 2013, p. 87, available at: <<http://rh.org.il/heb/wp-content/uploads/Kerem-Navot.pdf>>. B'Tselem, the Israeli Information Center for Human Rights in the Occupied Territories, "Land Grab: Israel's Settlement Policy in the West Bank", May 2002, p. 47, available at: <https://www.btselem.org/download/200205_land_grab_eng.pdf>. AL-HAQ, "Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law", 2013, p. 24, available at: <<http://www.alhaq.org/publications/Feasting-on-the-occupation.pdf>>. See also CRAWFORD, "Legal Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories", 24 January 2012, para. 61, available at: <<https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>>.

⁴² KOURY, "The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law", in ARTS and LEITE (eds.), *International Law and the Question of Western Sahara*, Leiden, 2009, p. 165 ff., p. 177.

⁴³ Commentary to Art. 26 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission (ILC) at its 53rd session, YILC 2001, Vol. II, p. 85, para. 5.

⁴⁴ *Legal Consequences of the Construction of a Wall*, *cit. supra* note 16, paras. 155-156; *Western Sahara*, *cit. supra* note 17, para. 162.

⁴⁵ *Ibid.*, paras. 115-122.

⁴⁶ As far as Israel is concerned, see the Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, 13 January 2014, UN Doc. A/HRC/25/67, para. 16. See also *Legal Consequences of the Construction of a Wall*,

The right of peoples to permanent sovereignty over their natural wealth and resources is “a basic constituent of the right to self-determination”.⁴⁷ The ICJ confirmed the customary law character of the principle in the *Armed Activities* case.⁴⁸ Judge Koroma opined that the Court’s acknowledgement of the customary law status of the principle means that it remains “in effect at all times, *including during armed conflict and during occupation*”.⁴⁹ Overall, and in the light of the ICJ’s more general pronouncement on the applicability of human rights law in situations of armed conflict,⁵⁰ it is safe to assume that States must respect their obligations under human rights law in relation to the population under occupation, including the obligation to respect the right of a people to freely dispose of its natural resources.⁵¹

There is evidence to support the proposition that both Israel and Morocco are in violation of the principle in question. As mentioned earlier, several studies highlight how Israel has restricted Palestinian access to water and land resources for the benefit of the settlements.⁵² The UN General Assembly has condemned the Israeli policy of exploiting natural resources in breach of the Palestinian peoples’ rights over their natural resources.⁵³

As far as Morocco is concerned, reports by NGOs indicate the existence of a number of plantations in the Dakhla region, owned by the King of Morocco or by Moroccan conglomerates, which use water resources from non-renewable underground water basins, thereby endangering the ecosystem of a region where water

cit. supra note 16, para. 121. Since assuming control of Western Sahara, Morocco has been encouraging its citizens to settle there. As a result, Moroccan settlers are now the majority of the population in the territory in question. DAWIDOWICZ, *cit. supra* note 27, p. 260.

⁴⁷ UN GA Res. 1803 (XV II) (1962), UN Doc. A/RES/1803 (XV II).

⁴⁸ *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, ICJ Reports, 2005, p. 168 ff., para. 244.

⁴⁹ *Ibid.* Declaration by Judge Koroma, p. 284 ff., para. 11 (emphasis in the original). The UN General Assembly has affirmed the applicability of the principle in situations of belligerent occupation, see e.g. UN GA Res. 3336 (XXIX) (1974), UN Doc. A/RES/3336 (XXIX).

⁵⁰ *Legal Consequences of the Construction of a Wall*, *cit. supra* note 16, para. 104.

⁵¹ SCHRIJVER, “Natural Resources, Permanent Sovereignty Over”, in WOLFRUM (ed.), *The Max Planck Encyclopedia of Public International Law*, June 2008, para. 22, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1442?prd=EPIL>>.

⁵² Human Rights Council, Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem, 7 February 2013, UN Doc. A/HRC/22/63, para. 36. See also World Bank Study, Area C and the Future of the Palestinian Economy, 2 July 2014, available at: <<http://documents.worldbank.org/curated/en/257131468140639464/pdf/893700PUB0978100Box385270B00PUBLIC0.pdf>>.

⁵³ UN GA Res. 60/183 (2005), UN Doc. A/RES/60/183 ; UN GA Res. 68/235 (2014), UN Doc. A/RES/68/235.

resources are scarce.⁵⁴ At the same time, while Western Sahara is rich in natural resources these are primarily located in the Moroccan-occupied part of the territory west of the wall built by Morocco.⁵⁵ The wall effectively bars the Sahrawi people living east of the wall from accessing Western Sahara's natural resources located west of the wall.⁵⁶

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

The previous sections illustrated how Israel and Morocco have engaged in internationally wrongful conduct. The consequences for third parties of this unlawful conduct on the part of Israel and Morocco could arise in two ways: from the obligation of non-recognition and from the obligation of not rendering aid or assistance in the commission of an internationally wrongful act.

According to Article 42(2) of the Draft Articles on the Responsibility of International Organizations, in cases of a serious breach of a *jus cogens* norm, international organizations have duties corresponding to those applying to States under Article 41(2) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.⁵⁷ Thus, States and international organizations alike are under an obligation not to recognize as lawful a situation created by a serious breach of a peremptory norm of international law.⁵⁸

⁵⁴ Western Sahara Resource Watch Report, "Conflict Tomatoes – The Moroccan Agriculture Industry in Occupied Western Sahara and the Controversial Exports to the EU Market", February 2012, p. 6, available at: <http://www.wsrw.org/files/dated/2012-02-13/conflict_tomatoes_14.02.2012.pdf>. See also the report by the NGO Robert F. Kennedy Human Rights Center, "Report on the Kingdom of Morocco's Violations of the International Covenant on Economic, Social and Cultural Rights in the Western Sahara, on the occasion of the Kingdom of Morocco's fourth periodic report to the Committee on Economic, Social and Cultural Rights", August 2015, p. 15, available at: <http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MAR/INT_CESCR_CSS_MAR_21582_E.pdf>.

⁵⁵ Robert F. Kennedy Human Rights Center, *ibid.*, p. 12.

⁵⁶ *Ibid.*

⁵⁷ Commentary to Art. 42 of the Draft Articles on the Responsibility of International Organizations, with commentaries, adopted by the ILC at its 63rd session, YILC 2011, Vol. II, p. 66, para. 1.

⁵⁸ While it may be questioned whether customary international law knows of a general duty of non-recognition of *all* situations created by a serious breach of a peremptory norm, there is practice with regard to the non-recognition of situations created by a serious breach of the right to self-determination as the *Namibia* Advisory Opinion and the *Wall* Advisory Opinion evidence. For analysis and an exposition of the relevant practice see TALMON, "The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?", in TOMUSCHAT and THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Erga Omnes*

The principle that legal rights cannot derive from an illegal act (*ex injuria jus non oritur*) provides the rationale underpinning the obligation of non-recognition.⁵⁹ The obligation serves as a mechanism to ensure that a *fait accompli* on the ground resulting from an illegal act does not “crystallize over time into situations recognized by the international legal order”.⁶⁰ The principle finds support in the 1970 Friendly Relations Declaration⁶¹ – which, according to the ICJ, reflects customary international law.⁶² According to the International Law Commission (ILC) the obligation of non-recognition covers not only formal acts of recognition, but also “prohibits acts which would imply such recognition”.⁶³ In the *Namibia* case,⁶⁴ the ICJ elaborated on the scope and content of the obligation of non-recognition. The duty of non-recognition entails, *inter alia*, that States are under an obligation to abstain: (a) from entering into treaty relations with the non-recognized regime in respect of the unlawfully acquired territory; and (b) from entering into economic and other forms of relationship concerning the unlawfully acquired territory which might entrench the non-recognized regime’s authority over the territory.⁶⁵

In their practice, international courts and tribunals have confirmed that forcible territorial acquisitions are the prime examples of unlawful situations giving rise to the obligation of non-recognition.⁶⁶ The ICJ re-affirmed the duty of non-recognition in its *Wall* Advisory Opinion.⁶⁷ In Resolution ES-10/15 the UN General Assembly

Obligations, Leiden, 2005, p. 99 ff., pp. 102-103. See also DAWIDOWICZ, “The Obligation of Non-Recognition of an Unlawful Situation”, in CRAWFORD, PELLET and OLLESON (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 677 ff., pp. 681-683.

⁵⁹ CRAWFORD, *cit. supra* note 41, para. 46.

⁶⁰ DAWIDOWICZ, *cit. supra* note 58, p. 678.

⁶¹ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter, UN GA Res. 25/2625 (1970), UN Doc. A/RES/25/2625.

⁶² *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, ICJ Reports, 1986, p. 14 ff., para. 188.

⁶³ Commentary to Art. 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *cit. supra* note 43, p. 114, para. 5.

⁶⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports, 1971, p. 16 ff.

⁶⁵ *Ibid.*, paras. 122, 124.

⁶⁶ *Legal Consequences of the Construction of a Wall*, *cit. supra* note 16, para. 87; Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area (Republika Srpska v. Bosnia and Herzegovina), 14 February 1997, para. 77, available at: <http://www.ohr.int/?ohr_archive=brcko-arbitral-tribunal-for-dispute-over-the-inter-entity-boundary-in-brcko-area-award>. *Case concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, Dissenting Opinion of Judge Skubiszewski, ICJ Reports, 1995, p. 224 ff., paras. 125, 129. Dissenting Opinion of Judge Weeramantry, *ibid.*, p. 139 ff., p. 221 (viii). See also the practice mentioned in the commentary to Art. 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *cit. supra* note 43, pp. 114-115, paras. 6-8.

⁶⁷ *Legal Consequences of the Construction of a Wall*, *cit. supra* note 16, para. 159.

acknowledged the Opinion and called upon all Member States “to comply with their *legal obligations* as mentioned in the advisory opinion”.⁶⁸ This formulation is important since it shows that States voting in favour of the resolution (including all EU Member States) have themselves characterised the obligations set out in the Opinion as “legal obligations”. In the present context, it is also important to note that the EU has expressly acknowledged that it is bound by the international law duty of non-recognition in its 2013 Guidelines on the eligibility of Israeli entities working within Israeli settlements in Palestine for EU funding.⁶⁹ Both the 2013 report by the international fact-finding mission on Israeli settlements and the 2014 report by the Special Rapporteur on the situation of human rights in the occupied Palestinian territories corroborate the view that, in cases where illegal settlements are supported through trade, respect for international law entails ceasing trade relations therewith.⁷⁰

It has been suggested that the duty of non-recognition, as spelled out in the *Namibia* Opinion, is non self-executing, but it may only arise as a result of a binding decision by the UN Security Council.⁷¹ However, it bears noting that, while the Court took note of the Security Council resolution that defined some of the steps to be taken by States against South Africa, it did not deal with that resolution *per se*.⁷² Furthermore, the relevant passage of the Opinion did not relate to the obligation of non-recognition, but more generally, to the measures to be taken by the UN in order to bring the illegal situation to an end.⁷³ A review of the leading examples in practice associated with the duty of non-recognition (including the situations in Southern Rhodesia, Namibia, the Bantustans in South Africa and the Turkish Republic of Cyprus) reveals that this practice is based almost entirely on General Assembly resolutions and Security Council resolutions adopted under Chapter VI – thus, confirming that there is no need for a binding decision by the Security Council for the duty of non-recognition to arise.⁷⁴

The Court in the *Namibia* case introduced an element of flexibility in the doctrine of non-recognition, the so-called “*Namibia* exception”.⁷⁵ According to the

⁶⁸ UN GA Res. ES-10/15 (2004), UN Doc. A/RES/ES-10/15, para. 3 (emphasis added).

⁶⁹ Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards, OJ [2013] C205/05, para. 1.

⁷⁰ Human Rights Council, *cit. supra* note 52, paras. 115-116. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *cit. supra* note 46, paras. 45-47.

⁷¹ See for example the statement made by the representative of Australia, James Crawford, at the Public Sitting held on 16 February 1995 in the *Case concerning East Timor*, CR 95/14, p. 56, para. 63.

⁷² *Legal Consequences of the Presence of South Africa in Namibia*, *cit. supra* note 64, para. 120.

⁷³ *Ibid.* See also TALMON, *cit. supra* note 58, pp. 112-113.

⁷⁴ DAWIDOWICZ, *cit. supra* note 58, pp. 679-683.

⁷⁵ MILANO, “The Non-Recognition of Russia’s Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question”, QIL, 2014, p. 35 ff., p. 40.

Court, while acts that are undertaken in pursuance of the illegal administration are to be considered null and void since they purport to enhance unlawful territorial claims, minor administrative acts, such as “the registration of births, deaths and marriages” and acts of benefit to the local population are valid,⁷⁶ as they are considered “untainted by the illegality of the administration”.⁷⁷

According to the ILC, the rules applicable to relations between States also apply when an international organization aids and assists a State or another international organization in the commission of an internationally wrongful act.⁷⁸ Thus, Articles 14 and 42(2) of the Draft Articles on the Responsibility of International Organizations correspond to Articles 16 and 41(2) of the Draft Articles on State Responsibility spelling out the obligation of international organizations and States alike not to render aid or assistance in the commission of an unlawful act. According to the Commission, Article 41(2) goes further than Article 16 since it deals with conduct “after the fact”, i.e. when the actual breach has ended – making it unlawful to assist the responsible State in maintaining the situation created by the breach.⁷⁹ On the other hand, Article 16 is contemporaneous – making it unlawful to assist in the commission of the unlawful act.⁸⁰ Furthermore, Article 42(2) applies only to breaches of *jus cogens* norms, whereas Article 16 applies to all unlawful conduct. For present purposes, both Articles are relevant since Israel and Morocco are responsible both for breaches of *jus cogens* norms (right to self-determination) and of customary international law norms (principle of usufruct, right to permanent sovereignty over natural resources). The obligation of non-assistance “does not require the complete isolation of the responsible State”.⁸¹ Finally, in order for an entity to be responsible by way of complicity, it must not only be aware of the circumstances making the conduct of the assisted State unlawful, but it must also intend to facilitate the occurrence of the unlawful conduct by the aid or assistance given.⁸²

⁷⁶ *Legal Consequences of the Presence of South Africa in Namibia*, *cit. supra* note 64, para. 125.

⁷⁷ CRAWFORD, *cit. supra* note 25, p. 167.

⁷⁸ Commentary to Art. 14 of the Draft Articles on the Responsibility of International Organizations, *cit. supra* note 57, p. 36, para. 1.

⁷⁹ Commentary to Art. 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *cit. supra* note 43, p. 115, para. 11.

⁸⁰ Commentary to Art. 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *cit. supra* note 43, p. 66, para. 1.

⁸¹ JØRGENSEN, “The Obligation of Non-Assistance to the Responsible State”, in CRAWFORD, PELLET and OLLESON (eds.), *cit. supra* note 58, p. 687 ff., p. 691.

⁸² Commentary to Art. 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *cit. supra* note 43, p. 66, paras. 3-5. See also Commentary to Art. 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *ibid.*, p. 115, para. 11.

3. CASE STUDY: EU-ISRAEL TRADE RELATIONS

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

The EU-Israel Association Agreement constitutes the legal basis for EU trade relations with Israel. The core aim of the agreement is to reinforce the free trade area between the EU and Israel.⁸³ Goods exported from Israel to the EU and *vice versa* benefit from preferential tariffs and customs duties.⁸⁴ However, according to Article 7 of the Agreement, this preferential treatment applies only to products “originating in Israel”. The territorial clause inserted in the Agreement fails to provide a definition of the Agreement’s precise territorial scope; Article 83 of the EU-Israel Association Agreement merely refers to the “territory of Israel”. Another relevant agreement is the EU-PLO Association Agreement.⁸⁵ Article 73 of the EU-PLO Agreement states that it applies to the “territory of the West Bank and the Gaza Strip” – without however defining the precise boundaries of these territories. It is noteworthy that the EU-PLO Agreement applies to the whole of the West Bank and the Gaza Strip – although PLO only has partial control of these territories.⁸⁶

The ensuing lack of clarity has created serious problems in practice.⁸⁷ According to Israel, goods produced in the occupied Palestinian territory are produced in Israel’s customs territory and thus, they should be entitled to preferential treatment under the Association Agreement.⁸⁸ In light of the EU’s duty of non-recognition, the territorial scope of the EU-Israel Association Agreement is of utmost importance. In international law the capacity of States to enter into agreements that apply within their territory is “an attribute of State sovereignty”.⁸⁹ Thus, any claim by an

⁸³ Art. 6 of the EU-Israel Association Agreement, *cit. supra* note 18.

⁸⁴ *Ibid.*, Art. 9-20.

⁸⁵ Art. 1(2) of the Euro-Mediterranean Interim Association Agreement on Trade and Cooperation between the European Community, on the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, on the other part, adopted on 24 February 1997, entered into force 1 July 1997, OJ [1997] L187/3.

⁸⁶ HAUSWALD, “Problems under the EC-Israel Association Agreement: The Export of Goods Produced in the West Bank and the Gaza Strip under the EC-Israel Association Agreement”, *EJIL*, 2003, p. 591 ff., p. 595.

⁸⁷ *Case C-386/08, Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, Opinion of Advocate General Bot, ECR, 2010, I-1289, para. 26.

⁸⁸ *Ibid.*, para. 32. See also HARPAZ, “The Dispute Over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip – The Limits of Power and the Limits of the Law”, *Journal of World Trade Law*, 2004, p. 1049 ff., p. 1051.

⁸⁹ *Case of the S.S. “Wimbledon” (UK et al. v. Germany)*, Judgment of 17 August 1923, PCIJ Reports, Series A, No. 1, p. 14 ff., p. 25.

occupying power to treaty-making capacity in relation to territory under its control needs to be construed as a legal claim to sovereignty – which third parties are under an obligation not to recognise,⁹⁰ since, as mentioned above, occupation does not transfer sovereignty over the occupied territory.

The ECJ was confronted with the question of the territorial scope of the EU-Israel Association Agreement in the context of the *Brita* case. The case concerned the import to Germany of goods from an Israeli company located in the West Bank.⁹¹ Despite an express invitation by the Advocate General to analyse the legal status of Israel's presence in the West Bank for the purpose of establishing the territorial scope of the Association Agreement,⁹² the Court decided the matter solely with reference to the “politically-detached” principle of *pacta tertiis*.⁹³ The ECJ argued that the EU-PLO Association Agreement implicitly restricted the territorial scope of the EU-Israel Association Agreement.⁹⁴ Thus, the judgment clarified that the scope of the EU-Israel Association Agreement does not extend to the occupied Palestinian territories, thereby making it abundantly clear that the EU has not implicitly recognised Israel's treaty-making capacity over these territories. At the same time, the Court's exclusive reliance on the *pacta tertiis* rule is formalistic and, more importantly, difficult to reconcile with the image of a court that shares an internationalist approach.⁹⁵ The failure to take into account the broader international legal framework of the dispute (including the status of Israel as an occupying power; the violation of the Palestinian peoples' right to self-determination; and the concomitant obligation of non-recognition on the part of the EU) in interpreting the territorial scope of the EU-Israel Association Agreement leaves much to be desired.⁹⁶ In this light, it is difficult to escape the conclusion that, by focusing exclusively on the *pacta tertiis* rule, the ECJ sought to achieve conformity with EU law while avoiding being drawn into political storms.⁹⁷ However, this judicial strategy severely undermines the normative power Europe narrative and lends evidentiary force to the argument that the ECJ, in its practice, shows a great deal of “judicial recalcitrance” towards international law.

⁹⁰ DAWIDOWICZ, *cit. supra* note 27, p. 218.

⁹¹ Case C-386/08, *cit. supra* note 87, para. 30.

⁹² Opinion of Advocate General Bot, *cit. supra* note 87, paras. 109-112.

⁹³ HARPAZ and RUBINSON, “The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on *Brita*”, *EL Rev.*, 2010, p. 551 ff., p. 566.

⁹⁴ Case C-386/08, *cit. supra* note 87, paras. 50-53.

⁹⁵ HARPAZ and RUBINSON, *cit. supra* note 93, pp. 565-566.

⁹⁶ HOLDGAARD and SPIERMANN, “Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, Judgment of the Court of Justice (Fourth Chamber) of 25 February 2010, nyr”, *CML Rev.*, 2011, p. 1667 ff., pp. 1680-1682.

⁹⁷ HARPAZ and RUBINSON, *cit. supra* note 93, p. 566.

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

The duties of non-recognition and non-assistance also entail abstaining from economic activities that may further entrench the unrecognised regime's authority over a territory.⁹⁸ Taking into account that the EU remains one of the most important trading partners for the settlements with annual exports worth 300 million dollars,⁹⁹ the question of the compatibility with international law of the EU's policy towards settlement goods arises.

The EU first addressed the issue in its 2001 Notice to Importers alerting importers of Israel's practice of issuing proofs of origin for goods coming from the occupied territories and informing them that "putting the goods in free circulation may give rise to customs debt".¹⁰⁰ In 2005, the EU and Israel reached a technical arrangement in order to resolve the dispute concerning the certification of origin of products originating from the settlements.¹⁰¹ A 2005 Notice to Importers clarified that, in the future, all certificates of origin must specify the name of the city, village or industrial zone where the goods were produced.¹⁰² Despite these efforts, in practice products are marked as originating in Israel even though their place of manufacture is in the occupied territories.¹⁰³ As explained above, this practice finally brought the *Brita* case before the ECJ.

Having established that the territorial scope of the EU-Israel Association Agreement does not cover the occupied Palestinian territories, the Court concluded that the customs authorities of Member States are entitled to refuse preferential treatment on the grounds that the goods in question originated in the occupied territories.¹⁰⁴ Despite the Court's ruling, a large number of goods produced in the settlements still benefit from preferential treatment.¹⁰⁵ A revised version of Notice to Importers was published in 2012 providing a list of non-eligible locations and their postal codes.¹⁰⁶ However, this did not fully resolve the issue as no changes

⁹⁸ *Legal Consequences of the Presence of South Africa in Namibia*, *cit. supra* note 64, para. 124. See also CRAWFORD, *cit. supra* note 41, para. 84.

⁹⁹ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *cit. supra* note 46, para. 46.

¹⁰⁰ Notice to Importers – Imports from Israel into the Community, OJ [2001] C328/04.

¹⁰¹ WRANGE, *cit. supra* note 11, p. 36.

¹⁰² Notice to Importers – Imports from Israel into the Community, OJ [2005] C20/02.

¹⁰³ AL-HAQ, *cit. supra* note 41, pp. 16-17; and Human Rights Council, *cit. supra* note 52, para. 99.

¹⁰⁴ Case C-386/08, *cit. supra* note 87, paras. 53, 67.

¹⁰⁵ EU Parliament Res. of 16 February 2012 on the proposal for a Council decision on the conclusion of the regional Convention on pan-Euro-Mediterranean preferential rules of origin, 2012/2519 (RSP), point N.

¹⁰⁶ Notice to Importers – Imports from Israel into the Community, OJ [2012] C232/03.

were made to the customs verification mechanisms.¹⁰⁷ Indeed, the 2013 report by the international fact-finding mission on Israeli settlements and the 2014 report by the Special Rapporteur on the situation of human rights in the occupied Palestinian territories confirmed that many products falsely labelled as “made in Israel” are still imported into the EU.¹⁰⁸

The 2015 Interpretative Notice on indication of origin of goods from the occupied Palestinian territories constitutes the latest attempt to resolve the problem of certification of origin of products originating from the settlements.¹⁰⁹ The Notice states that since the West Bank (including East Jerusalem) is not part of the Israeli territory according to international law, the “omission of geographical information that the product comes from the Israeli settlements would mislead the consumer as to the true origin of the product”.¹¹⁰ Thus, the Notice encourages the use of expressions such as “product from the West Bank (Israeli Settlement)”.¹¹¹ However, it is doubtful whether it will fully resolve the issue as no centralised, EU-wide control mechanism ensuring that settlement products do not get preferential access to the EU markets is envisaged thereunder.

This brief overview of the legal status of settlement products under EU law shows that the EU has largely addressed the question of importation of these products as a question of correct labelling for the purpose of ascertaining whether they benefit from preferential treatment under the Association Agreement and not as a question of compliance with international law. In this sense, from an EU point of view, this question is merely one of correct application of relevant EU law; the illegality under international law of the circumstances under which these goods are produced is not part of the relevant debate.¹¹² More importantly, the position adopted by the EU amounts to a denial of the benefits of preferential treatment to settlement goods, but does not prohibit the import of these products into the EU – even when they are clearly identified as originating from the settlements.¹¹³ In this sense, from the standpoint of EU law, the import into and subsequent commerciali-

¹⁰⁷ DUBUISSON, “The International Obligations of the European Union and Its Member States with regard to Economic Relations with the Israeli Settlements”, February 2014, p. 52, available at: <http://www.madeinillegality.org/IMG/pdf/etude_def_ang.pdf>.

¹⁰⁸ Human Rights Council, *cit. supra* note 52, para. 99. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *cit. supra* note 46, para. 46.

¹⁰⁹ Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967, OJ [2015] C375/5.

¹¹⁰ *Ibid.*, paras. 7, 10.

¹¹¹ *Ibid.*, para. 10.

¹¹² DUBUISSON, *cit. supra* note 107, p. 55.

¹¹³ EU Commission, Frequently Asked Questions on Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards, 19 July 2013, answer to question 2, available at: <https://eeas.europa.eu/sites/eeas/files/20130719_faq_guidelines_eu_grants_en.pdf>.

sation of settlement goods within the EU becomes a question of providing accurate information to consumers – who are then free to choose whether to purchase them or not.¹¹⁴

However, the EU's approach to settlement goods is arguably in breach of its international obligation of non-recognition and non-assistance in maintaining a situation created by a serious breach of a peremptory norm of international law within the meaning of Article 42(2) of the Draft Articles on the Responsibility of International Organisations. According to the duty of non-recognition,¹¹⁵ no economic relations can be maintained with Israel that would contribute to the development of the settlements in the occupied Palestinian territories. This proposition is further borne out by UN Security Council Resolution 2334 (2016) where the Council reaffirmed the illegality of the Israeli settlements in the occupied Palestinian territory and expressly called upon all States “to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967”.¹¹⁶

There is no doubt that the importation of settlement goods into the EU contributes to the economic development of the settlements – thereby assisting to maintain the *de facto* illegal annexation of the territories in question.¹¹⁷ A 2012 joint NGO report showed that the EU is the main market for various settlement products.¹¹⁸ Clearly, access to the EU market represents a vital source of revenue for the settlements that facilitates their expansion and entrenchment.¹¹⁹ For example, local municipalities use property taxes paid by Israeli businesses located in the occupied territories for the development of the settlements.¹²⁰ In this light, it cannot be convincingly argued that trade with settlements falls within the *Namibia* exception since, as it was shown above, the general scheme of settlement activity is geared towards consolidating the unlawful acquisition of Palestinian territory and does not benefit the local Palestinian population.¹²¹ A number of international lawyers have

¹¹⁴ DUBUISSON, *cit. supra* note 107, p. 56.

¹¹⁵ *Legal Consequences of the Presence of South Africa in Namibia*, *cit. supra* note 64, para. 124.

¹¹⁶ UN SC Res. 2334 (2016), UN Doc. S/RES/2334 (2016), para. 5. See also UN SC Res. 478 (1980), UN Doc. S/RES/478 (1980), para. 5, where the Security Council called upon Member States not to recognize the annexation of East Jerusalem by Israel, or its consequences.

¹¹⁷ MOERENHOUT, “The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories”, *Journal of International Humanitarian Legal Studies*, 2012, p. 344 ff., p. 359.

¹¹⁸ These include Ahava cosmetics, SodaStream carbonation devices, and Keter plastic. See Joint NGO Report, “Trading Away Peace: How Europe Helps Sustain Illegal Israeli Settlements”, October 2012, p. 22, available at: <https://www.fidh.org/IMG/pdf/trading_away_peace_-_embargoed_copy_of_designed_report.pdf>.

¹¹⁹ AL-HAQ, *cit. supra* note 41, p. 13.

¹²⁰ Coalition of Women for Peace, Research Project WhoProfits, “SodaStream: A Case Study for Corporate Activity in Illegal Israeli Settlements”, January 2011, pp. 6-7, available at: <<https://whoprofits.org/sites/default/files/WhoProfits-ProductioninSettlements-SodaStream.pdf>>.

¹²¹ CRAWFORD, *cit. supra* note 41, para. 91.

criticised the EU's approach to settlement goods and it has been pointed out that the obligation of non-recognition and non-assistance mandates an all-out ban on settlement goods.¹²² A 2015 study commissioned by the EU Parliament as well as the 2014 Report by the Special Rapporteur on the situation of human rights in the occupied Palestinian territories also call for a clear ban on settlement produce.¹²³

4. CASE STUDY: EU-MOROCCO TRADE RELATIONS

4.1. *The Territorial Scope of the Trade Agreements Concluded between the EU and Morocco and the EU's Obligation of Non-Recognition*

The EU is Morocco's largest trading partner accounting for 55.7% of its trade in 2015 while 61% of Morocco's annual exports go to the EU.¹²⁴ The EU-Morocco Association Agreement, which came into force in 2000, is the legal basis governing the relations between the two parties and its principal aim is to establish a free trade zone between the EU and Morocco.¹²⁵ In this light, the Agreement provides for reduced or no tariffs for certain products¹²⁶ and for the gradual implementation of measures for the greater liberalization of reciprocal trade in agricultural and fishery products.¹²⁷ In 2008, Morocco became the first country in the Southern Mediterranean region to be granted "advanced status" – thereby marking a new phase of privileged relations.¹²⁸ Against this background, an agreement concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products was concluded between the EU and Morocco in 2010 and came into force in 2012.¹²⁹

Neither the Association Agreement nor the Liberalization Agreement clarify whether their territorial scope extends to Western Sahara. The Liberalization

¹²² See for example DUBUISSON, *cit. supra* note 107, p. 45; and MOERENHOUT, *cit. supra* note 117, p. 359.

¹²³ WRANGE, *cit. supra* note 11, p. 37; and Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *cit. supra* note 46, paras. 46-47.

¹²⁴ See at: <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/morocco/>>.

¹²⁵ Art. 6 of the EU-Morocco Association Agreement, *supra* note 27.

¹²⁶ *Ibid.*, Arts. 7-30.

¹²⁷ *Ibid.*, Art. 16.

¹²⁸ Joint Statement EU-Morocco summit, Granada, 7 March 2010, 7220/10, p. 6.

¹²⁹ Agreement in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 of and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, OJ [2012] L241/4 (hereinafter "Liberalization Agreement").

Agreement does not include a territorial clause, while Article 94 of the Association Agreement merely refers to the “territory of the Kingdom of Morocco”. However, both agreements have been interpreted in practice as including Western Sahara. There is much evidence to support this proposition. The Commission’s Food and Veterinary Office has paid visits to Moroccan exporters located in Western Sahara to check compliance with EU health standards under the Association Agreement.¹³⁰ Furthermore, the Commission has included 140 Moroccan exporters located in Western Sahara to the list of approved exporters under the Association Agreement.¹³¹ The High Representative of the Union for Foreign Affairs and Security Policy, Ashton, has expressly confirmed that the Liberalization Agreement allows Morocco to “register as geographical indications products originating in Western Sahara”.¹³² Finally, in the context of the *Front Polisario* case, both the Council and the Commission expressly acknowledged that the Liberalization Agreement has been *de facto* applied to the territory of Western Sahara.¹³³ Thus, it is safe to assume that, under these agreements, “Saharan territory was included *sub silentio*”.¹³⁴

The question of Western Sahara gained considerable attention in the negotiations over the 2006 EU-Morocco Fisheries Partnership Agreement (FPA)¹³⁵ and the 2013 EU-Morocco Fisheries Protocol.¹³⁶ In 2006, the EU and Morocco concluded the FPA allowing access for EU vessels to Morocco’s fisheries for an initial period of four years.¹³⁷ In exchange, the EU paid Morocco a financial contribution of 144.4 million euros for the relevant period.¹³⁸ The FPA’s reference to “waters falling

¹³⁰ Case T-512/12, *Front Polisario v. Council*, ECLI:EU:T:2015:953, paras. 79, 99, 103.

¹³¹ *Ibid.*, paras. 80, 99, 103. See also: <https://webgate.ec.europa.eu/sanco/traces/output/MA/LBM_MA_en.pdf>; <https://webgate.ec.europa.eu/sanco/traces/output/MA/FFP_MA_en.pdf>; <https://webgate.ec.europa.eu/sanco/traces/output/MA/ABP-FSB_MA_en.pdf>.

¹³² Joint Answer given by High Representative/Vice-President Ashton on behalf of the Commission, Written Questions: E-0001004/11, P-001023/11, E-002315/11, 14 June 2011, available at: <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-001023&language=DE>>.

¹³³ Case T-512/12, *cit. supra* note 130, para. 99.

¹³⁴ KONTOROVICH, *cit. supra* note 29, p. 604.

¹³⁵ Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, adopted on 26 July 2006, entered into force 28 February 2007, OJ [2006] L141/4. For analysis, see MILANO, “The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: Fishing Too South?”, *Anuario Español de Derecho Internacional*, 2006, p. 413 ff. See also generally BALBONI and LASCHI (eds.), *The European Union Approach towards Western Sahara*, Brussels, 2017.

¹³⁶ Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and the financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, OJ [2013] L328/2 (hereinafter “2013 Fisheries Protocol”).

¹³⁷ Arts. 1 and 12 of the FPA.

¹³⁸ Art. 2 of the Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, OJ [2006] L141/9.

within the sovereignty or *jurisdiction* of Morocco¹³⁹ has been widely interpreted as including the waters off the coast of Western Sahara.¹⁴⁰ This interpretation is reinforced by the fact that the 2006 FPA replaced earlier fisheries agreements which were similar in geographical scope and under which EU vessels were authorised by Morocco to operate in Western Sahara waters.¹⁴¹ Furthermore, while the southernmost geographical limit of the FPA is not clearly defined, thereby creating doubt as to whether it extends beyond the internationally recognized maritime boundaries of Morocco,¹⁴² the practice of the parties has settled the matter and the Commission itself has acknowledged that fishing by EU vessels has taken place in the waters off Western Sahara.¹⁴³ Upon its expiry, the FPA was not automatically renewed – partly because of doubts regarding its compatibility with international law.¹⁴⁴

¹³⁹ Art. 2(a) of the FPA (emphasis added).

¹⁴⁰ CHAPAUX, “The Question of the European Community-Morocco Fisheries Agreement”, in ARTS and LEITE (eds.), *cit. supra* note 42, p. 217 ff., p. 218; and CANNIZZARO, “A Higher Law for Treaties?”, in CANNIZZARO (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford, 2011, p. 425 ff., p. 430.

¹⁴¹ CHAPAUX, *ibid.*, p. 218; and DAWIDOWICZ, *cit. supra* note 27, p. 268. For the right of peoples of non-self governing territories to benefit from natural resources, including marine resources within their EEZ, see Resolution III, Final Act of the Third UN Conference on the Law of the Sea, UN Doc. A/CONF.62/121 (1982), para. 1(a). This has been reaffirmed in a number of UN General Assembly Resolutions adopted under the item “Activities of Foreign Economic and Other Interests which Impede the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples under Colonial Domination”, see Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, Hans Corell, addressed to the President of the Security Council, UN Doc. S/2002/161, para. 11. This has been acknowledged by the Legal Service of the European Parliament, “Legal Opinion: Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Declaration by SADR of 21 January 2009 of Jurisdiction over an Exclusive Economic Zone of 200 nautical miles off the Western Sahara – Catches taken by EU-flagged vessels fishing in the waters off the Western Sahara”, 13 July 2009, paras. 15-19, available at: <<http://www.wsrw.org/a105x1346>>.

¹⁴² Legal Service of the European Parliament, “Legal Opinion: Proposal for a Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Compatibility with the principles of international law”, SJ-0085/06, D(2006)7352, 20 February 2006, paras. 31-35.

¹⁴³ Reply from EU Commissioner Ferrero-Waldner to Written Question E-4425/08, 12 September 2008, available at: <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-4425&language=PL>>. Reply from the EU Commission to Oral Question H-0079/09, 12 March 2009, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090312+ANN-01+DOC+XML+V0//EN#top>>. See also Legal Service of the European Parliament, “Legal Opinion: Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the fisheries Partnership Agreement in force between the two parties”, SJ-0665/13, D(2013)50041, 4 November 2013, para. 29 (hereinafter “2013 Legal Opinion”).

¹⁴⁴ EU Parliament Resolution of 14 December 2011 on the future Protocol setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, 2011/2949 (RSP), para. 9.

Against this background a new Fisheries Protocol was negotiated and signed in 2013.¹⁴⁵ The 2013 Protocol was modelled after its predecessor; it applies to “waters falling within the sovereignty or *jurisdiction* of Morocco”¹⁴⁶ and, according to its provisions, the EU, again, pays a financial contribution to Morocco for access to its waters¹⁴⁷ – including the waters off the coast of Western Sahara. The Commission has clarified that “the Western Sahara waters are included in the new Protocol”.¹⁴⁸ It is noteworthy that several Member States raised serious concerns over the inclusion of Western Sahara in the new Protocol.

Despite some initial hesitation, the Parliament approved the new Protocol in 2013 acting on the advice of its legal service.¹⁴⁹ According to the opinion rendered by the Parliament’s legal service, Morocco, as a “*de facto* administering power”, is responsible for the economic development of Western Sahara.¹⁵⁰ The legal service claimed that, under international law, *de facto* administering powers are not prohibited from undertaking economic activities pertaining to natural resources in non-self-governing territories.¹⁵¹ The opinion rendered by the Parliament’s legal service was largely based on a 2002 opinion issued by the UN Under-Secretary General for Legal Affairs and Legal Counsel,¹⁵² Hans Corell (hereinafter “Corell Opinion”).¹⁵³ The UN Security Council requested Corell to issue an opinion on the legality, under international law, of certain contracts concluded between Morocco and foreign companies regarding the exploration of mineral resources in Western Sahara.¹⁵⁴ The UN Under-Secretary General analysed the question from the point of view of the status of Western Sahara as a non-self-governing territory and did not touch upon the status of Morocco as an occupying power. Having analysed the relevant State and judicial practice, he concluded that mineral resources activities in a non-self-governing territory are illegal if conducted in disregard of the needs and interests of the people of that territory.¹⁵⁵ On this basis, the Parliament’s legal service concluded that the Protocol between the EU and Morocco is compatible with international law as long as “a certain amount of the financial contribution [granted

¹⁴⁵ See *supra* note 136.

¹⁴⁶ Council Decision of 15 November 2013 on the signing, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution paid for in the Partnership Agreement between the European Union and the Kingdom of Morocco, OJ [2013] L328/1, point (2).

¹⁴⁷ Art. 3 of the 2013 Fisheries Protocol, *cit. supra* note 136.

¹⁴⁸ Answer given by Ms Damanaki on behalf of the Commission to Written Question E-007185/2013, 17 September 2013, available at: <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-007185&language=EN>>.

¹⁴⁹ KONTOROVICH, *cit. supra* note 29, p. 606.

¹⁵⁰ 2013 Legal Opinion, *cit. supra* note 143, para. 17.

¹⁵¹ *Ibid.*, para. 18.

¹⁵² *Ibid.*

¹⁵³ Corell Opinion, *cit. supra* note 141.

¹⁵⁴ *Ibid.*, para. 1.

¹⁵⁵ *Ibid.*, paras. 21, 24.

by the EU] is allocated by Morocco to the benefit of Western Sahara population".¹⁵⁶ The conclusion of the 2013 Fisheries Protocol has been vociferously denounced by Front Polisario.¹⁵⁷

In this light, it is difficult to escape the conclusion that by entering into a number of agreements with Morocco that have been *de facto* applied to the territory of Western Sahara, the EU has acted in breach of its obligation of non-recognition to the extent that it has recognised Morocco's treaty-making capacity with respect to Western Sahara and thus, implicitly, the Moroccan claim to sovereignty over the territory.¹⁵⁸ It is instructive that a number of other third-party States have publicly declared that their free trade agreements with Morocco do not extend to Western Sahara *exactly because* Morocco does not exercise internationally recognised sovereignty over the territory.¹⁵⁹

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

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

On 21 December 2016, the ECJ delivered its appeals judgment in the *Front Polisario* case.¹⁶⁰ The Grand Chamber overturned the General Court's judgment and decided that Front Polisario did not have legal standing to bring an action for annulment against the Council decision adopting the Liberalization Agreement since, in its view, neither the Liberalization Agreement, nor the EU-Morocco Association Agreement legally extend to the territory of Western Sahara.¹⁶¹ The ECJ ruled that

¹⁵⁶ 2013 Legal Opinion, *cit. supra* note 143, para. 31. See also answer given by Mr. Borg on behalf of the Commission to Written Question E-0560/2006, 15 March 2006, available at: <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2006-0560&language=EN>>.

¹⁵⁷ Statement by Mohamed Sidati, Minister, Representative of Polisario Front to the EU, 10 December 2013, available at: <<http://www.sadr-emb-au.net/polisario-front-eu-morocco-fisheries-agreement-undermines-un-efforts-to-find-solution-to-western-sahara-conflict-statement/>>.

¹⁵⁸ DAWIDOWICZ, *cit. supra* note 27, p. 274; KOURY, *cit. supra* note 42, pp. 187-190; CHAPAUX, *cit. supra* note 140, pp. 233-234; and CANNIZZARO, *cit. supra* note 140, pp. 430-431.

¹⁵⁹ See the reply given by the Norwegian Minister for Foreign Affairs, Mr. Jonas Gahr Store, to a parliamentary question, 11/05/2010, available at: <<http://www.wsrw.org/a105x1411>>. For the position of Switzerland in relation to the EFTA-Morocco Free Trade Agreement, see the opinion of the Swiss Federal Council, 15/05/2013, available at: <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20133178>>. See the letter from the US Trade Representative R. Zoellick to Rep. J. Pitts, 22 July 2004, 150 Cong. Rec. H667, available at: <http://www.vest-sahara.no/files/pdf/Zoellick_FTA_2004.pdf>.

¹⁶⁰ Case C-104/16 P, *Council of the European Union v. Front Polisario*, ECLI:EU:C:2016:973.

¹⁶¹ *Ibid.*, paras. 92, 123, 132, 133.

the General Court erred in interpreting the territorial scope of the Liberalization Agreement as extending to Western Sahara to the extent that it failed to take into account Article 31(3)(c) Vienna Convention on the Law of Treaties (VCLT).¹⁶² The Court pointed out three relevant rules of applicable international law that the General Court failed to take into account: the right to self-determination; Article 29 VCLT relating to the territorial scope of international agreements; and the principle of the relative effect of treaties (the principle of *pacta tertiis*).¹⁶³

The ECJ's approach to treaty interpretation in *Front Polisario* leaves much to be desired. First, the Court's findings are premised on the assumption that the legal status of non-self-governing territories (as entities separate and distinct from the States administering them) also implies that these entities enjoy some form of territorial sovereignty or title over territory; any other inference would run counter to the overall conclusion of legal inapplicability of the Association Agreement to the territory of Western Sahara. However, the Friendly Relations Declaration's¹⁶⁴ reference to the "distinct and separate status" of non-self-governing territories is generally understood to mean that these territories enjoy a separate *legal* status, i.e. a measure of international legal personality, and not necessarily some form of territorial sovereignty.¹⁶⁵ Overall, the question of territorial sovereignty over non-self-governing territories remains a controversial one and there is evidence to suggest that sovereignty remains with the administering State.¹⁶⁶ In the light of the indeterminacy surrounding questions of territorial sovereignty over non-self-governing territories, more by way of evidence should have been furnished by the Court in order to support the proposition that these entities enjoy title over territory.

Furthermore, the Court's finding to the effect that Article 29 VCLT creates a presumption against extraterritoriality is questionable and it does not comport with the drafting history of the Article. The ILC made it abundantly clear that the matter of extraterritorial application of treaties was too complicated and it decided to leave it aside.¹⁶⁷ Accordingly, it is widely acknowledged that Article 29 VCLT does not create a presumption either in favour or against the extraterritorial application of a treaty, as the matter simply does not fall under the scope of the Article.¹⁶⁸ In this light, the Court's conclusion that Article 29 VCLT "precluded Western Sahara from

¹⁶² Adopted 23 May 1969, entered into force 27 January 1980.

¹⁶³ Case C-104/16 P, *cit. supra* note 160, para. 87.

¹⁶⁴ UN GA Res. 25/2625 (1970), *cit. supra* note 61.

¹⁶⁵ CRAWFORD, *supra* note 32, pp. 618-619.

¹⁶⁶ *Ibid.* *Case concerning Right of Passage over Indian Territory (Portugal v. India)*, Judgment of 12 April 1960, ICJ Reports, 1960, p. 6 ff., p. 39; and *Western Sahara, cit. supra* note 17, para. 43.

¹⁶⁷ Draft Articles on the Law of Treaties with commentaries, text adopted by the ILC at its 18th session, YILC, 1966, Vol. II, pp. 213-214, para. 5.

¹⁶⁸ KARAGIANNIS, "The Territorial Application of Treaties", in HOLLIS (ed.), *The Oxford Guide to the Law of Treaties*, Oxford, 2012, p. 305 ff., p. 318; ODENDAHL, "Article 29", in DÖRR and SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties: A Commentary*,

being regarded as coming within the territorial scope of Association Agreement¹⁶⁹ seems unsubstantiated.

There are also grounds to question the ECJ's interpretation and application of the principle of the relative effect of treaties (*pacta tertiis* principle) to the extent that the applicability of this principle to international legal persons other than States remains unclear. The principle's conceptual roots in the notions of State sovereignty and sovereign equality arguably preclude its application to non-State actors.¹⁷⁰ State practice also supports the proposition that there are exceptions to the *pacta tertiis* rule vis-à-vis non-State actors. States may create entities with legal personality by means of a treaty and subject them to international obligations; international organizations being a case in point.¹⁷¹ In this light, the Court's unqualified assertion that the *pacta tertiis* rule applies *in casu* seems to rest on thin evidentiary grounds.

Finally, from an international law point of view, the Court's reluctance to engage extensively with the parties' "subsequent practice in the application of the treaty" under Article 31(3)(b) VCLT for the purpose of interpreting the territorial scope of the Association and Liberalization Agreements renders its findings questionable. The importance attached to the subsequent practice of the parties to a treaty in its interpretation constitutes one of the most distinctive features of the Vienna rules.¹⁷² International adjudicatory bodies routinely have recourse to the subsequent practice of the parties in interpreting treaty terms.¹⁷³ The Court's approach to the element of "subsequent practice" of the parties in the *Front Polisario* judgment does not reflect the importance attached thereto in international jurisprudence. In a similar vein, the Court's dismissal of subsequent conduct by the EU and Morocco as mere *de facto* instances of application of the agreements at hand to the territory of Western Sahara¹⁷⁴ falls short of convincing since the Court failed to explain why these instances do not constitute subsequent practice within the meaning of Article 31(3)(b) VCLT.

Heidelberg, 2012, p. 489 ff., p. 502; and MILANOVIC, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, Oxford, 2011, p. 11.

¹⁶⁹ Case C-104/16 P, *cit. supra* note 160, para. 97.

¹⁷⁰ MURRAY, *Human Rights Obligations of Non-State Actors*, Oxford, 2016, pp. 94-105; and SIVAKUMARAN, "Binding Armed Opposition Groups", ICLQ, 2006, p. 319 ff., pp. 377-378.

¹⁷¹ MURRAY, "How International Humanitarian Law Treaties Bind Non-State Armed Groups", *Journal of Conflict and Security Law*, 2014, p. 101 ff., p. 118; and CHINKIN, *Third Parties in International Law*, Oxford, 1993, p. 12.

¹⁷² GARDINER, *Treaty Interpretation*, 2nd ed., Oxford, 2015, p. 253; Draft Articles on the Law of Treaties with commentaries, *cit. supra* note 167, p. 221, para. 15.

¹⁷³ See for example *Case concerning Kasikili/Seduku Island (Botswana v. Namibia)*, Judgment of 13 December 1999, ICJ Reports, 1999, p. 1045 ff., para. 50; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages II*, adopted on 4 October 1996, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, pp. 12-13.

¹⁷⁴ Case C-104/16 P, *cit. supra* note 160, para. 121.

Overall, the Court's reliance on international law in the context of the *Front Polisario* judgment seems artificial and selective. In an obvious attempt to evade a politically sensitive issue, the Court used selectively international rules on treaty interpretation to limit the legal applicability of the EU-Morocco agreements to the latter's territory, while stopping short of addressing the *de facto* application of the agreements to Western Sahara.¹⁷⁵

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

As recounted earlier, the EU has paid, and continues to pay, a significant amount of money to Morocco for access to its waters, which, under both the FPA and the Fisheries Protocol, include the Western Sahara waters. On this basis, it is arguable that the EU aids and assists Morocco in illegally exploiting the natural resources of Western Sahara contrary to the principles of usufruct and the right to permanent sovereignty over natural resources. Undoubtedly, the EU's financial contribution to Morocco constitutes "significant aid or assistance" within the meaning of Article 14 of the Draft Articles on the Responsibility of International Organisations as it directly contributes to the unlawful exploitation of Western Sahara fisheries.¹⁷⁶ Similarly, there is no doubt that the EU has acted with "knowledge of the circumstances of the internationally wrongful act". Front Polisario has publicly campaigned against the conclusion of the agreements in question and it has even brought the matter to the notice of the UN.¹⁷⁷

As far as the element of "intent" is concerned, there is evidence to suggest that the EU "acted knowingly",¹⁷⁸ namely that it was aware that Morocco would not use the financial contribution received under the agreements for the benefit of the local Sahrawi population. The EU is fully aware of the fact that Morocco does not consider itself as an occupying power, but rather it considers Western Sahara as part of

¹⁷⁵ The same argument is made by HUMMELBRUNNER and PRICKARZ, "EU-Morocco Trade Relations Do Not Legally Affect Western Sahara – Case C-104/16 P Council v Front Polisario", 5 January 2017, available at: <<http://europeanlawblog.eu/2017/01/05/eu-morocco-trade-relations-do-not-legally-affect-western-sahara-case-c-10416-p-council-v-front-polisario/>>.

¹⁷⁶ For an overview of State practice on complicity in the context of economic co-operation, see AUST, *Complicity and the Law of State Responsibility*, Cambridge, 2011, pp. 147-151.

¹⁷⁷ Letter dated 18 May 2005 from Mohamed Sidati, Polisario representative to the EU, to Joseph Borg, Commissioner, Directorate-General for Fisheries and Maritime Affairs, available at: <http://www.wsrw.org/files/dated/2008-10-22/sidati_to_borg_18.05.06.pdf>. See also Case T-512/12, *cit. supra* note 130, paras. 242, 245.

¹⁷⁸ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports, 2007, p. 3 ff., para. 421.

its sovereign territory.¹⁷⁹ In this light, the EU is aware that the probability of using the financial contribution in question for the benefit of the Sahrawi people is quite low.¹⁸⁰ However, the 2013 Fisheries Protocol does not contain any effective mechanism to guarantee that the exploitation of Western Sahara resources is carried out to the benefit of the Sahrawi people,¹⁸¹ something that is considered by the EU as lying within the sole responsibility of Morocco.¹⁸² In this light and bearing in mind that “if aid is given with certain or near-certain knowledge as to the outcome, intent may be imputed”,¹⁸³ it is plausible that by concluding the agreements in question the EU knowingly and deliberately facilitated the commission of internationally wrongful acts.

In this context, it needs to be observed that the opinion issued by the Parliament’s legal service is misleading to the extent that it is based on an erroneous understanding of the relevant legal principles and of the Corell Opinion. First, the legal service’s opinion assumes that the only entity responsible for ensuring that the exploitation of Western Sahara natural resources is conducted in accordance with international law is Morocco.¹⁸⁴ Thus, the opinion does not even contemplate the possibility that the EU, by paying Morocco for access to its waters including the waters off the coast of Western Sahara, may incur responsibility by way of complicity. However, international practice shows that considerations of complicity may play an important role in the context of economic cooperation.¹⁸⁵

Secondly, the opinion refers to Morocco as the “*de facto* administrating power” of Western Sahara – a concept that does not correspond to any legal category known under international law. Morocco does not administer Western Sahara under Article 73 of the UN Charter, but militarily occupies it. The UN still recognises Spain as the *de jure* administering power of Western Sahara¹⁸⁶ and Spain relies on this status in order to extend its international jurisdiction in criminal matters to crimes committed in the territory.¹⁸⁷

¹⁷⁹ Opinion of Advocate General Wathelet, Case C-104/16 P, *Council of the European Union v. Front Polisario*, ECLI:EU:C:2016:677, para. 67.

¹⁸⁰ Opinion of the Committee on Development for the Committee on Fisheries on the proposal for a Council Decision on the conclusion of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement in force between the two Parties, 5 November 2013, COM(2013)0648-C7-2013/0315(NLE), available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0417+0+DOC+XML+V0//EN#title3>>.

¹⁸¹ WRANGE, *cit. supra* note 11, p. 45.

¹⁸² 2013 Legal Opinion, *cit. supra* note 143, paras. 17, 31.

¹⁸³ CRAWFORD, *State Responsibility: The General Part*, Cambridge, 2013, p. 408.

¹⁸⁴ 2013 Legal Opinion, *cit. supra* note 143, paras. 17, 31.

¹⁸⁵ AUST, *cit. supra* note 176, pp. 147-151.

¹⁸⁶ Information from Non-Self-Governing-Territories transmitted under Article 73(e) of the UN Charter, *cit. supra* note 27.

¹⁸⁷ Opinion of Advocate General Wathelet, *cit. supra* note 179, para. 191.

Thirdly, the legal service's opinion seems to assume that compliance with international law is guaranteed in so far as "a *certain amount* of the financial contribution" granted by the EU is allocated "to the benefit of Western Sahara *population*".¹⁸⁸ Thus, according to the opinion, incidental benefit to the local population would suffice to satisfy any obligations under international law.¹⁸⁹ However, this formulation reveals a fundamental misunderstanding of applicable international law. As seen in an earlier section, the principle of usufruct and the right to permanent sovereignty over natural resources mandate that *all* proceeds from the exploitation of natural resources of a territory benefit the people of the territory – save for the costs of maintaining a civilian administration therein. This formulation is also problematic since international law requires that the exploitation of natural resources is carried out to the benefit of the *people of the territory*, i.e. the Sahrawi people, and not simply to the benefit of the *local population* – which mostly consists of Moroccan settlers transferred into the territory in violation of international humanitarian law.¹⁹⁰

Furthermore, the extrapolation from Corell's opinion was quite gratuitous since the question put forward to Corell, as well as the factual and legal circumstances that gave rise to that question were different. First, it needs to be observed that Corell was asked to assess the legality of contracts concerning the *exploration*, not *exploitation*, of natural resources in Western Sahara.¹⁹¹ Corell clarified that, while the granting of those contracts was not illegal *per se*, "if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories".¹⁹² Second, the question put forward to Corell concerned the legality of contracts offered by Morocco to private companies, i.e. to non-State actors, and not the legality of an international agreement concluded between two subjects of international law.

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

The EU-Morocco Association Agreement does not provide for any special arrangements for products originating from Western Sahara. Since Morocco consid-

¹⁸⁸ 2013 Legal Opinion, *cit. supra* note 143, para. 31 (emphasis added).

¹⁸⁹ KONTOROVICH, *cit. supra* note 29, footnote 109.

¹⁹⁰ WRANGE, *cit. supra* note 11, p. 45. See also Art. 49 of the Geneva Convention IV, *cit. supra* note 20.

¹⁹¹ Corell Opinion, *cit. supra* note 141, para. 1. For an analysis of the Opinion see BRUS, "The Legality of Exploring and Exploiting Mineral Resources in Western Sahara", in ARTS and LEITE (eds.), *cit. supra* note 42, p. 201 ff.

¹⁹² Corell Opinion, *ibid.*, para. 25.

ers Western Sahara as part of its territory, products coming from Western Sahara are preferentially imported into the EU.¹⁹³ In this context, it needs to be noted that according to a 2012 report by NGO Western Sahara Resource Watch, Western Sahara agricultural produce is export-oriented: 95% of the agricultural goods produced in the occupied territory are exported to foreign markets – and principally to the EU.¹⁹⁴ These are invariably labelled as coming from “Morocco”.¹⁹⁵ For instance, Albert Heijn, one of the biggest supermarket chains in the Netherlands, imports from Morocco part of their tomato range originating from Dakhla, Western Sahara, and sells them labelled as “from Morocco”.¹⁹⁶ Furthermore, there is evidence that products from the territory are on sale in German,¹⁹⁷ British,¹⁹⁸ and Danish¹⁹⁹ supermarkets labelled as originating in Morocco. In a similar vein, a 2013 report released by Greenpeace shows that the Western Saharan coastal area accounts for half of Morocco’s annual fisheries production.²⁰⁰ The EU is the main importer of Morocco’s fishery products; almost half of Morocco’s fish and fishery products go to the EU – including fish caught in Western Saharan waters.²⁰¹

Some Member States, such as the Netherlands and Sweden, have objected to the preferential import into the EU of products originating in Western Sahara on the grounds that the territory in question is not part of Morocco.²⁰² The issue of import

¹⁹³ KOURY, *cit. supra* note 42, pp. 192-193.

¹⁹⁴ Western Sahara Resource Watch, EMMAUS Stockholm, *cit. supra* note 14, p. 4.

¹⁹⁵ *Ibid.*, pp. 10-16. See also KONTOROVICH, *cit. supra* note 29, p. 609.

¹⁹⁶ *Ibid.*, p. 12. Reply, also on behalf of the State Secretary for Economic Affairs, Agriculture and Innovation, by Dr. U. Rosenthal, Minister for Foreign Affairs, to questions from Member of Parliament Van Bommel (Socialist Party), 20 August 2012, available at: <http://www.wsrw.org/files/dated/2012-08-29/dutch_statement_20.08.2012.pdf>.

¹⁹⁷ Question for written answer to the Commission, B. Lange (S&D), Subject: Labelling of Goods from Western Sahara, E-007130-14, 24 September 2014, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2014-007130+0+DOC+XML+V0//EN&language=lt>>.

¹⁹⁸ “Western Sahara’s ‘Conflict Tomatoes’ Highlight a Forgotten Occupation”, *The Guardian*, 4 March 2015.

¹⁹⁹ “Western Sahara: Salt of the Earth Keeps Conflict Alive”, *Afrika Kontakt*, 11 March 2016, available at: <<https://afrika.dk/article/salt-earth-keeps-conflict-alive>>.

²⁰⁰ Greenpeace, “Exporting Exploitation: How Retired EU Fishing Vessels Are Devastating West African Fish Stocks and Undermining the Rights of Local People”, 2 December 2013, p. 25, available at: <<http://www.greenpeace.org/eu-unit/en/Publications/2013/Exporting-Exploitation/>>.

²⁰¹ *Ibid.* See also Western Sahara Resource Watch, “Key Bay Has Arrived in France with Cargo from Western Sahara”, 17 September 2016”, available at: <<http://www.wsrw.org/a105x3579>>.

²⁰² See the statement by the Swedish Minister for Trade, Ms E. Björling, 4 February 2013, available at: <http://www.riksdagen.se/sv/dokument-lagar/dokument/svar-pa-skriftlig-fraga/jordbruksprodukter-fran-vastsahara_H012276>; Reply, also on behalf of the State Secretary for Economic Affairs, Agriculture and Innovation, by Dr. U. Rosenthal, Minister for Foreign Affairs, to questions from Member of Parliament Van Bommel (Socialist Party), see *supra* note 196.

into the EU of Western Sahara goods and their labelling has also been raised on numerous occasions by members of the European Parliament (MEPs).²⁰³

Despite these objections, the Commission argues that neither the Association, nor the Liberalization Agreements foresee any specific rules regarding product labelling and, as such, the issue falls outside the scope of these agreements.²⁰⁴ In the Commission's view, neither of these agreements provides a legal basis for differentiating Moroccan products imported into the EU on a territorial basis.²⁰⁵ In this vein, it is maintained that, under relevant EU law, the only basis for imposing particular labelling requirements would be "if its omission would mislead consumers"²⁰⁶ – something that, according to the Commission, is not the case with imports from Morocco.²⁰⁷ Thus, from the standpoint of the EU, the fact that products originating from Western Sahara are imported into the EU and *de facto* benefit from the preferential treatment under the EU-Morocco Association Agreement is not *per se* problematic. According to the (then) High Representative of the Union for Foreign Affairs and Security Policy, Ashton, Morocco, as the "de facto administering power" of Western Sahara, is solely responsible for complying with any international law obligations pertaining to the exploitation of the natural resources of the territory.²⁰⁸

However, from an international law point of view, the EU's approach towards goods originating from Western Sahara is far from satisfactory. The duties of non-recognition and non-assistance in maintaining a situation created by a serious breach of a peremptory norm entail that the EU cannot maintain any economic rela-

²⁰³ See for example Question for written answer to the Commission, B. Lange (S&D), *supra* note 299; Question for written answer to the Commission, A. Westlund (S&D), Subject: Label and Liability – Stolen Tomatoes from Western Sahara, 21 June 2012, E-066205/2012, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2012-006205&format=XML&language=EN>>; Question for written answer to the Commission, W. Meyer (GUE/NGL), Subject: Export of Moroccan-labelled products from the Western Sahara, 9 April 2013, E-003971-13, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-003971+0+DOC+XML+V0//EN>>.

²⁰⁴ Joint Answer given by High Representative/Vice-President Ashton on behalf of the Commission, Written Questions: E-0001004/11, P-001023/11, E-002315/11, *cit. supra* note 132. See also Answer given by Mr. Çioloş on behalf of the EU Commission, Written Question E-006205/12, 29 August 2012, available at: <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-006205&language=EN>>.

²⁰⁵ Joint Answer given by High Representative/Vice-President Ashton on behalf of the Commission, Written Questions: E-0001004/11, P-001023/11, E-002315/11, *ibid.*; Answer given by Mr. Çioloş on behalf of the Commission, Written Question E-003971/2013, 11 June 2013, available at: <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-003971&language=EN>>.

²⁰⁶ Answer given by Mr Çioloş on behalf of the Commission, *ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ Joint Answer given by High Representative/Vice-President Ashton on behalf of the Commission, Written Questions: E-0001004/11, P-001023/11, E-002315/11, *cit. supra* note 132.

tions with Morocco that might entrench its authority over Western Sahara. There is little doubt that the *de facto* preferential import of Western Saharan goods into the EU contributes to the entrenchment of Moroccan authority over the territory. NGO reports explain how the Moroccan Government is developing the agricultural and fishery industries in the occupied Western Sahara for the purpose of populating the territory with settlers.²⁰⁹ At the same time, there is no evidence that the trade agreements with the EU benefit the local Sahrawi population.²¹⁰ In this light, the effect of these agreements is to consolidate Morocco's unlawful acquisition of the territory – in violation of the EU's obligations of non-recognition and non-assistance.²¹¹

Finally, the EU's approach to the issue of labelling of products coming from the Western Sahara stands in stark contrast to its approach to the analogous situation of products originating from the occupied Palestinian territories. The EU has shown political disinterest in ensuring that products originating from Western Sahara do not benefit from preferential treatment under the EU-Morocco Association agreement. NGOs,²¹² MEPs,²¹³ and scholars²¹⁴ have openly criticised the EU for applying double-standards. Some Israeli writers have gone as far as to suggest that the differences between the EU's labelling policy towards Western Sahara and Palestine represent not merely double standards but also veiled anti-Semitism.²¹⁵

The EU invariably justifies its inconsistent approach towards product labelling by pointing to the “differences” between Israel/Palestine and Morocco/Western Sahara. According to the Commission, Western Sahara is a territory “*de facto* administered” by Morocco, whereas Palestine is a territory occupied by Israel.²¹⁶ However, the Commission's argument falls short of convincing. The concept of “*de*

²⁰⁹ Western Sahara Resource Watch, EMMAUS Stockholm, *cit. supra* note 14, p. 3.

²¹⁰ SHELLEY, “Natural Resources and the Western Sahara”, in OLSSON (ed.), *The Western Sahara Conflict: The Role of Natural Resources in Decolonization*, Stockholm, 2006, p. 17 ff., pp. 17-20.

²¹¹ KOURY, *cit. supra* note 42, p. 191; and CHAPAUX, *cit. supra* note 140, pp. 233-235.

²¹² Western Sahara Resource Watch, EMMAUS Stockholm, *cit. supra* note 14, p. 17.

²¹³ Question for written answer to the Commission, F. Provera (EFD), Subject: Implications of the Moroccan fisheries deal for EU policy with regard to Israel, E-000235/14, 10 January 2014, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2014-000235+0+DOC+XML+V0//EN>>; Question for written answer to the Commission, P. López Bermejo (GUE/NGL), Subject: Misleading Labeling of Products from Western Sahara, E-015472-15, 7 December 2015, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2015-015472+0+DOC+XML+V0//EN>>.

²¹⁴ KAMEL, *cit. supra* note 15. See also BELL and KONTOROVICH, “EU's Israel Guidelines: A Legal and Political Analysis”, A Kohelet Policy Forum Research Paper, October 2013, p. 10, available at: <<http://en.kohelet.org.il/wp-content/uploads/2016/02/EUS-Israel-Grants-Guidelines-A-Legal-and-Policy-Analysis-Kohelet-Policy-Forum-Public-Version.pdf>>; HARPAZ, *cit. supra* note 13, pp. 101-102.

²¹⁵ HARPAZ, *cit. supra* note 13, p. 102, footnote 74.

²¹⁶ Joint Answer given by Vice-President Mogherini on behalf of the Commission, Written questions E-015222/15, E-015472/15, 4 February 2016, available at: <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-015472&language=EN>>.

facto administration” simply does not exist and both Western Sahara and Palestine are occupied territories under international law. Crawford has dismissed the EU’s position towards Western Sahara as mere “realpolitik”,²¹⁷ a conclusion that is difficult to disagree with in the light of the glaring inconsistency in EU labelling policies towards products originating from these two territories.

5. CONCLUSIONS

The article showed that the EU’s practice in relation to trade agreements covering occupied territories does not comport with the EU’s self-portrayal as an internationally engaged polity committed to the strict observance and development of international law. While the ECJ’s judgments in *Brita* and *Front Polisario* clarified that the agreements with Israel and Morocco do not legally extend to Palestine and Western Sahara respectively, their reasoning was slender and incomplete from an international law point of view. The EU’s policy towards import of products originating from the occupied territories in question was examined and it was argued that by allowing settlement products to enter the European market, the EU is in breach of its obligation of non-recognition and non-assistance in maintaining a situation created by a serious breach of a peremptory norm of international law to the extent that such access facilitates the settlements’ expansion and entrenchment. In this respect, the article argued that compliance with international law necessitates a clear ban on settlement produce. The article further claimed that by allowing the import of settlement agricultural, fish and fishery products, the EU arguably aids and assists in the on-going commission of internationally wrongful acts, namely the breach of the principle of usufruct and the breach of the right to permanent sovereignty over natural resources. Finally, the article showed that the position adopted by the EU towards labelling of products coming from the occupied Palestinian territories is inconsistent with the one adopted in the context of products originating in Western Sahara. This glaring inconsistency undermines the image of the EU as a normative power that promotes its values in a consistent manner. Overall, the article showed that there is a growing gap between EU identity rhetoric as a promoter of global fundamental values on the one hand and realpolitik on the other. As long as the EU lacks the political will to enforce principles of international law in a consistent manner, the *Völkerrechtsfreundlichkeit* narrative will remain little more than a “seductive story”.²¹⁸

²¹⁷ CRAWFORD, *cit. supra* note 41, para. 131.

²¹⁸ KLABBERS, *cit. supra* note 8, p. 97.