Western Sahara, the European Commission and the Politics of International Legal Argument

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1 Introduction and background

1.1 Introduction

On 10 July 2018, the Council of the European Union decided to approve an amendment to its Association Agreement with Morocco in order to enable import of fishery and agriculture products from Western Sahara. The decision had to be in conformity with an earlier judgment by the Court of Justice of the European Union (CJEU) which had concluded that the agreement did not cover Western Sahara -- a territory largely controlled by Morocco since 1975. CJEU had reached its judgment based on reasoning under international law, in particular the law of treaties and the law of self-determination, and had found that Western Sahara was a separate territory which could be covered only with the consent of its people. After the judgment, the Council instructed the European Commission (COM) to negotiate an amendment which would enable continued trade, and in which 'the people concerned by the agreement have been adequately involved'. COM subsequently conducted consultations with 'stakeholders' in Brussels and Rabat. In the ensuing decision to adopt the amendment agreement, the Council noted that '[t]he Commission ... has taken all reasonable and feasible steps in the current context to adequately involve the people concerned in order to ascertain their consent to the agreement.' Many international lawyers felt that the deal was still in violation of international law and the Court's judgment, but the Council was persuaded by COM's account. How did that happen?

International law can be thought of in different ways. For most people, it is a set of rules and principles that are supposed to guide behaviour and settle disputes. This is the assumption under which people apply and respect the law and pay salaries to legal officers, as well as the assumption underlying scholarly doctrinal work. But international law can also be thought of as a set of argumentative and other practices -- 'an activity, not a thing'¹ -- which can be analysed like any set of practices,

¹ Dennis M. Patterson, 'Law's Pragmatism: Law as Practice and Narrative' in Dennis M. Patterson (ed.), *Wittgenstein and Legal Theory* (Westview Press, 1992), 85-121, at 87; cited from Tanja Aalberts and Thomas Gammeltoft-Hansen, 'Conclusion: The dark side of legalization' in Tanja Aalberts and Thomas Gammeltoft-Hansen (eds.), *The Changing Practices of International Law* (CUP 2018) 208, 216.

arguments, texts, etc. In this practice arguments are raised and tried, rejected or accepted. Different arguments are invoked against one another in ever changing patterns. Arguments are clustered and de-clustered; new arguments may enter an established cluster (perhaps arguments from a different 'regime'), while an established cluster may fragment into two or more clusters, when arguments that appeared to belong to the same debates no longer seem to concern the same 'matter'. And in this, the outcome often turns on the legal framing of the matter.

This is the approach that will be taken in this essay, which is interested in how international law arguments were used strategically by the European Commission (COM) to argue for a fairly difficult position, as manifested in the report about the consultations which the Council referred to in its decision.² I will look at the legal situation that the Commission faced, with a menu of legal positions, each embedded in wider ideas about law and society.

Even though I feel very strongly that COM ended up in the wrong corner, politically and legally, I will restrain my legal-normative self this time and only look at the issue as a strategic and rhetorical problem that COM had to solve.³ Western Sahara and the EU's involvement has been analysed numerous times from a doctrinal point of view (in ways in which I almost often concur). However, here I will refrain from passing value judgments on the report and the process in which it was a part. Still, as a byproduct of the analysis of strategic argumentation, this piece can be read as a critique⁴ of the report, one that is based internally on the legal documents of the EU itself and externally on international law arguments.

In distinction to the consultation report, the opinions of COM's and the Council's legal service and other material (like the minutes from the meetings) are secret. However, it is possible to flesh out the often elliptical arguments in the report by using material like the Court's citations of COM's positions in the court proceedings as well as public presentations by COM officials.

I will ask the following questions:

1. What was the task that COM needed to fulfill (section 2)?
2. Which legal material did COM have to use, avoid, rebut or transform (section 3)?
3. How did COM use this material (section 4)?
4. Did they produce the expected result, and why (section 5)?

² Commission Staff Working Document SWD(2018) 346 final of 11.06.2018, [hereinafter Consultation Report]. The document is attached to the Commission's Proposal for a Council decision on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [SWD(2018) 346 final], Brussels, 11.6.2018 COM(2018) 481 final, 2018/0256 (NLE) [hereinafter Amendment of Protocols 1 and 4].

³ Even though I am of the firm theoretical persuasion that international law is indeterminate, I find that for anyone who would like to rebut that claim, Western Sahara is an excellent example.

⁴ Of course, critique is different from criticism, although the two terms unfortunately are sometimes used interchangeably.

But before I go into this, a background is needed.

1.2 Background

In 1963, the Spanish colony of Western Sahara was listed as a non-self-governing territory (NSGT) by the United Nations.⁵ In 1974, the UN General Assembly asked the International Court of Justice (ICJ) for an advisory opinion on the pre-colonial status of Western Sahara.⁶ While the ICJ found that there had been pre-colonial ties between the territory of Western Sahara and Morocco, these ties were not 'of such a nature as might affect the application of ... the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory'.⁷ Shortly thereafter, on 6 November, King Hassan II of Morocco ordered the 'Green March' of civilians into Western Sahara, accompanied by military action. The same day, the UN Security Council, in Resolution 380, called upon Morocco 'immediately to withdraw... all the participants in the march'.⁸ On 14 November, under military pressure, Spain agreed to cede administration of the territory to Morocco and Mauretania (which renounced its claims in 1979) and leave the territory by the end of February 1976. Morocco annexed Western Sahara in two steps in 1976 and 1979. Armed conflict ensued between Morocco and the Saharawi liberation front Polisario, and the latter became recognised by the UN as the legitimate international legal representative of the people of Western Sahara for the purpose of negotiations about the future of the territory.⁹ In 1991, after UN led negotiations, a settlement plan – endorsed by the UN Security Council in Resolutions 658 and 690 – was signed. Under that plan, a referendum on independence was to be held. Mostly due to lack of cooperation by Morocco (according to most observers), the plan was never implemented, and a few years later Morocco declared that independence for Western Sahara was no longer an option. A very fledgling peace process between Morocco and Polisario is still going on under UN aegis, for the purpose of achieving 'a just, lasting, and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara'.¹⁰

⁵ There are a number of good recounts of this history. A fairly recent, and very thorough one, is Ben Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' (2015) 27 *Global Change, Peace and Security* 301 which can serve as a default reference for this brief history; see in particular pp 305-307. See also Stephen Zunes, 'Western Sahara, Resources, and International Accountability' (2015) 27 *Global Change, Peace & Security* 285; Jeffrey J. Smith, 'The Taking of the Sahara: the Role of Natural Resources in the Continuing Occupation of Western Sahara', (2015) 27 *Global Change, Peace & Security* 263. Smith is a prolific writer on the Western Sahara issue. The cited issue of *Global Change, Peace and Security* (27(3)) was devoted to Western Sahara and natural resources. Another recent and good article, cited by the UK High Court (see below), is Martin Dawidowicz, 'Trading Fish or Human Rights in Western Sahara' in Duncan French (ed), *Statehood and Self-Determination* (Cambridge University Press 2013) 250. See further, Karen Arts & Pedro Leite (eds) *International law and the question of Western Sahara* (International Platform of Jurists for East Timor, 2007).

⁶ UNGA Res 3292 (XXIX) (13 December 1974) UN Doc A/RES/3292.

⁷ *Western Sahara, Advisory Opinion* [1975] ICJ Rep 68 [162].

⁸ UNSC Res 380 (6 November 1975) UN Doc S/RES/380 (1975).

⁹ UNGA Res 34/37 (21 November 1979) UN Doc A/RES/34/37.

¹⁰ See the UN Secretary General's report, UN Doc S/2019/787.

No state has recognised Moroccan sovereignty over Western Sahara, but non-recognition has been less persistent than in for instance the Middle East conflict or Crimea.¹¹ Polisario controls approximately 20-25% of the territory, and under the name 'the Sahrawi Arab Democratic Republic' (SADR), Western Sahara is a member of the African Union. A very large part of the Sahrawi population has fled to refugee camps in Tindouf, Algeria, while Moroccan settlers have moved in, investors have been allotted land, concessions have been granted and new infrastructure has been built for the needs of the newcomers and their exploitation of phosphates, fish, fresh water (for agriculture) and other natural resources.

2 COM's task

2.1 EU-Morocco relations

The EU and Morocco have very close ties, which are based on an Association Agreement, in force since 2000. This agreement has been complemented with an agreement on the liberalisation of trade in agriculture and fisheries products (2012), and a Fisheries Partnership Agreement (FPA; 2006, revised in 2019), which gives a number of EU vessels the right to fish in Moroccan waters. Neither agreement mentions Western Sahara or discusses its status, but they have been applied to that territory.

2.2 The Polisario Case and the Western Sahara Campaign Case in the Grand Chamber of the Court of Justice

While a number of critical legal arguments on the relation between the EU and Morocco have been made through the years, what forced the COM to make the analysis under review was two judgments in the Court of Justice of the European Union.

In December 2012, Polisario asked the General Court (the first instance, below the CJEU) to annul the EU Council's decision of the same year to adopt the liberalisation agreement between the EU and Morocco in so far as the agreement covered Western Sahara. Polisario won the case, which was then appealed to the CJEU.¹² At about the same time, a case regarding fishing arose in British Courts¹³, pursued by the NGO the Western Sahara Campaign UK, which contended that British authorities were acting unlawfully by applying the Fisheries Partnership Agreement to Western Sahara. The

¹¹ See Pål Wrange's and Sarah Helaoui's report for the European Parliament, 'Occupation/Annexation of a Territory – Respect for International Humanitarian Law and Human Rights and Consistent EU Policy', 25 June 2015, <[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)> accessed 19 February 2019.

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

¹³ *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2898 (Admin), High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) made on 13 May 2016.

Court requested a so-called preliminary ruling¹⁴ and asked inter alia whether the FPA between the EU and the Kingdom of Morocco is valid.

The Grand Chamber of the CJEU dealt with the two cases in 2016 and 2018, respectively, with essentially the same line of reasoning.¹⁵ While the claimants lost the cases in a technical sense, the Court's reasoning was welcomed as a victory. In 2016, it dismissed Polisario's claim for lack of standing, because the claimant was not affected by the agreement since it did not cover Western Sahara. Similarly, in 2018, it held that the FPA was not invalid, since it did not encompass Western Sahara.

The CJEU found that the term 'territory of the Kingdom of Morocco' in Article 94 of the Association Agreement, on which the challenged agreements were based¹⁶, could not be interpreted to mean that Western Sahara was included within the territorial scope of that agreement.¹⁷ The court referred to the Friendly Relations Declaration which says that 'the territory of a colony or other Non- Self-Governing Territory has, under the [UN] Charter, a ... separate and distinct [status]'.¹⁸ Hence the people of Western Sahara was a third party to the agreement, and as such, they had not consented to be affected by it.¹⁹ By reference to Article 34 of the Vienna Convention on the Law of Treaties,²⁰ the Court concluded that '[i]n those circumstances, it is contrary to the principle of international law of the relative effect of treaties to take the view that the territory of Western Sahara comes within the scope of the Association Agreement'.²¹ The conclusion that can be drawn is that the implementation of an agreement with Morocco that covers Western Sahara needs to have 'consent' by 'the people of Western Sahara'.²² In order to simplify the story, I will hereafter focus on the trade agreement.

2.3 Follow up to the judgments

COM acted immediately on the 2016 decision, and fisheries and agricultural products were no longer given preferential treatment.²³ This state of affairs created frustration, not only for the exporters and importers of agricultural products from

¹⁴ A preliminary ruling is a decision of the European Court of Justice (ECJ) on the interpretation of EU law, after a request from a court or tribunal of a EU Member State. The referring court will be obliged to implement the ruling.

¹⁵ Case C-104/16 P *Council of the European Union v Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario)* [2016] ECLI:EU:C:2016:973; C-266/16 *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118.

¹⁶ *Front Polisario* (n 15), para 92.

¹⁷ *Front Polisario* (n 15), para 97; *Western Sahara Campaign UK* (n 15) [64].

¹⁸ *Front Polisario* (n 15), para 90.

¹⁹ *Front Polisario* (n 15), para 106.

²⁰ *Front Polisario* (n 15), para 90.

²¹ *Front Polisario* (n 15), para 107.

²² *Front Polisario* (n 15), para 106.

²³ See Western Sahara Resource Watch, 'Vincent Picket, 25 April 2018, ALDE seminar on EU-Morocco relations', 26 April 2018) <<https://www.wsrw.org/a106x4161>> accessed 12 February 2019. However, the EU's implementation of the CJEU's judgment has far from faultless. See Charlotte Bruneau, 'EU deeply divided over Western Sahara policy', *Al-Monitor*, 22 March 2017 <<https://www.al-monitor.com/pulse/originals/2017/03/morocco-western-sahara-eu-exports-polisario-front.html>> accessed 12 February 2019). Since the EU, for a good part of the winter season, has no tariffs on the importation of tomatoes, this has not meant that much for the Moroccan exports from Western Sahara.

Western Sahara. Already after the judgment in the the General Court, Morocco suspended contacts with the EU.²⁴ The Moroccan government made it known that it would use its position as a gate keeper on one of the three main migration routes to Europe, threatening to flood Europe with migrants in the aftermath of the 2015 refugee crisis. This widened and strengthened European interest in Morocco-EU relations.

On 19 December, 2016, the day of the delivery of the judgment of the CJEU, Federica Mogherini, the 'Foreign Minister' of the EU, and Salaheddine Mezouar, the Foreign Minister of Morocco, met and determined that they would 'work together' in a 'spirit of privileged partnership' in order to address the implications of the judgment.²⁵ On 29 May, 2017, the Council of Ministers of the EU adopted a secret negotiating mandate for the Commission – which negotiates on behalf of the EU -- in order to 'adapt' the protocols to the Association Agreement.²⁶ 'On 10 July 2018, the Council decided to sign the negotiated amendments, and after some controversy, the European Parliament approved the agreement on 16 January, 2019.²⁷

According to the Agreement, the EU and Morocco attach a Joint Declaration which provides in Paragraph 1, that products that 'originate in Western Sahara subject to controls by the Moroccan customs authorities shall benefit from the same trade preferences as those granted by the European Union to products covered by the Association Agreement'.²⁸

Despite the wide-spread interest within the EU of appeasing Morocco, no EU organ can openly defy the CJEU, and the new agreement had to be justified in relation to the judgment. It was for that reason that the Council mandated COM to ensure that 'the people concerned by the agreement have been adequately involved',²⁹ which

²⁴ Aziz El Yaakoubi, 'Morocco suspends contacts with EU over court ruling on farm trade' (Reuters, 25 February 2016) <<https://uk.reuters.com/article/uk-eu-morocco-westernsahara/morocco-suspends-contacts-with-eu-over-court-ruling-on-farm-trade-idUKKCN0VY273>> accessed 19 February 2019.

²⁵ 'Déclaration conjointe par Federica Mogherini et le Ministre des Affaires étrangères et de la coopération du royaume du Maroc Salaheddine Mezouar', Brussels, 21 December 2016 <<https://eeas.europa.eu/headquarters/headquarters-homepage/18042/declaration-conjointe-par-federica-mogherini-et-le-ministre-des-affaires-etrangees-et-de-la-fr>> accessed 19 February 2019.

²⁶ Outcome of the Council Meeting, 3544th Council meeting, Brussels, 29 and 30 May 2017, Doc 9716/17, <<http://www.consilium.europa.eu/media/22238/st09716en17.pdf>> accessed 19 February 2019. See also Green Party members of the European Parliament, 'Stop the rogue EU trade talks with Morocco over Western Sahara', 25 September 2017 <<https://www.greens-efa.eu/en/article/news/stop-the-rogue-eu-trade-talks-with-morocco-over-western-sahara/>> accessed 19 February 2019.

²⁷ European Parliament non-legislative resolution of 16 January 2019 on the draft Council decision on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (10593/2018 – C8-0463/2018 – 2018/0256M(NLE)) Final approval by the Council – which is given after approval by Parliament – was given in Council Decision (EU) 2019/217 of 28 January 2019.

²⁸ Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, *OJ L* 34, 6.2.2019, p. 4–7.

²⁹ It may be the case that the Council's directives to the COM were originally conceived in COM, but that is beyond what we know. This text can only proceed from what is in the public domain.

COM fulfilled by conducting consultations after the signature of the agreement but before its adoption by the Council.³⁰

However, COM could not limit its efforts to what the Council had provided. 'Adequate involvement' of 'the people concerned' is not necessarily the same thing as 'consent by the people of Western Sahara' (the CJEU's expression), and COM was no doubt aware of that. Therefore, the Court's formula of consent by the people still had to be reckoned with. This meant that COM, in the ensuing consultations as well as in the report, had to respond to questions about what consent means, as well as to questions about who should give that consent and what the consent should cover, since these issues concerned the requirement that the CJEU had set up for the application of the agreement to Western Sahara.

Another question, which was not directly dealt with in the judgment, but which seemed to be equally necessary to answer, was the question in which capacity Morocco concluded the agreement – sovereign, administering power, occupying power or something else. From the EU's point of view, Morocco was clearly not a sovereign over Western Sahara. Out of the other established legal positions, it could be an occupying power or an administering power, but the CJEU had found that there was no common understanding between the EU and Morocco on any of those positions.³¹ Under the amendment, the only thing that was agreed was that Morocco was a power that provided customs 'controls' to ensure conformity with EU standards, but in what capacity was not settled.³²

3 Tools and traps – potential legal material and their framing

In dealing with these issues, COM had to take account of a number of legal arguments that had been or could be invoked. Some of them were useful while others could trap COM into a position that was difficult to defend. COM was, of course, not restricted by existing arguments, it could make novel arguments. However, it was confined by the established canons of sources and of interpretation.

An international lawyer seized with a case will look at two types of sources: General sources with rules that appear to be applicable and authoritative pronouncements pertaining to the concrete case at hand. Had this been a doctrinal analysis, I would have used these sources intertwined, by invoking general rules and principles and then inserted more concrete dicta in order to help me determine whether the one or the other rule is applicable, and what it would mean in the concrete situation.

³⁰ It did so with the assistance of the European External Action Service, a joint service of COM and the Council.

³¹ *Western Sahara Campaign UK* (n 15), para 72.

³² Israel provides such 'services' to the Palestinian Authority, though not without difficulties, but that is by agreement with the Palestinian side. See Mutasim Elagrar, Randa Jamal and Mahmoud Elkhafif, 'Trade Facilitation in the Occupied Palestinian Territory: Restrictions and Limitations' (United Nations Conference on Trade and Development, 2014) <https://unctad.org/en/PublicationsLibrary/gdsapp2014d1_en.pdf> accessed 18 September 2019.

However, the present analysis takes a more phenomenological approach, looking at the situation as it must (or should) have looked to the lawyers in COM assigned to assist in the consultations. I will therefore merely set out the legal arguments which COM needed to take into account and then analyse how they may relate to one another, and I will do this in order to explain the choices that COM was facing, not to construct the 'better argument'.

3.1 General legal sources

3.1.1 Self-determination

As mentioned, Western Sahara is included in the UN's list of non-self-governing territories.³³ For such territories, the principle of self-determination and the law relating to non-self-governing territories apply. Under modern international law, it is a violation of the principle of self-determination to keep such territories under colonial or 'alien' control.³⁴ The Friendly Relations Declaration clarifies that a state may not use 'forcible action' to deprive peoples of 'their right to self-determination and freedom and independence' and adds that '[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the state administering it'.³⁵ Hence, such a territory is not a part of the state that administers it.³⁶ A colonial power is generally referred to as 'administering power' and an administering power has the responsibility to assist the people in the colony to reach full self-determination, which usually means independence.³⁷ As already indicated, Morocco has not claimed to have taken over that role, and it has not been recognised by any one to have done so,³⁸ but the EU nonetheless treats it as one under the novel formula 'de facto' administering power.³⁹

Further, under the law of self-determination, a people has a right to permanent sovereignty over its natural resources⁴⁰ and the right to 'freely dispose of their

³³ For the latest annual report of the UN Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples for 2017, see UN Doc A/72/23.

³⁴ Common Article 1 of the two 1966 UN human rights covenants provides that '[a]ll peoples have the right of self-determination' including to 'freely determine their political status and freely pursue their economic, social and cultural development.'

³⁵ UNGA Res 2625 (XXV) 1970 UN Doc A/RES/2625(XXV).

³⁶ On the term 'people', see Section 4.2.5.

³⁷ Article 76 of the UN Charter also mentions self-government as an option, but in practice the goal has generally been independence.

³⁸ The UN list of NSGTs does not indicate an administering power for Western Sahara but notes the following: 'On 26 February 1976, Spain informed the Secretary-General that as of that date it had terminated its presence in the Territory of the Sahara and deemed it necessary to place on record that Spain considered itself thenceforth exempt from any responsibility of any international nature in connection with the administration of the Territory, in view of the cessation of its participation in the temporary administration established for the Territory. In 1990, the General Assembly reaffirmed that the question of Western Sahara was a question of decolonization which remained to be completed by the people of Western Sahara.' The United Nations, 'The United Nations and Decolonization: Non-Self-Governing Territories', <<http://www.un.org/en/decolonization/nonselgovterritories.shtml>> accessed 23 October 2017. It is highly doubtful that Spain could avoid responsibility in this way. See n 41.

³⁹ Consultation Report (n 2), p 6.

⁴⁰ General Assembly resolution 1803 (XVII) of 14 December 1962, UN Doc A/RES/1803(XVII).

natural wealth and resources', as provided in Article 1(2) of the two UN covenants on human rights. The UN Charter's Article 73 on NSGTs points in the same direction, though more vaguely.

3.1.2 The law of force

Western Sahara came under the control of Morocco after military action in the territory, which at that time was under the generally recognized sovereignty of Spain.⁴¹ Hence, the law on the use of force may be relevant. Article 2(4) of the UN Charter prohibits 'the threat or use of force', and the Definition of Aggression (as well as the Friendly Relations Declaration) states that 'No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful' (Article 5(3)).⁴²

3.1.3 The law of occupation

An illegally annexed territory is, for the purpose of international law, still occupied.⁴³ It is therefore often argued that the status of Western Sahara is that of occupied territory.⁴⁴ International humanitarian law (IHL) provides that occupation is supposed to be a temporary affair.⁴⁵ An occupying power cannot use natural resources arbitrarily for its own purposes,⁴⁶ only if that benefits the people of that territory or covers other legitimate costs of the occupation.⁴⁷ As will be touched upon further below, there are some similarities in this respect between the law on NSGTs and the law of occupation.⁴⁸

3.1.4 The law of state responsibility

Since the EU is a third party to the relation between Morocco and Western Sahara, the responsibility of third parties is a crucial issue. Under the ILC Articles on State

⁴¹ The argument has been credibly made that Spain is still the lawful sovereign. See for instance the suggestion in *Front Polisario* (n 15), opinion of AG Whatelet, paras 188-192.

⁴² UNGA Res 2625 (XXV).

⁴³ See Article 47 of The Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

⁴⁴ *Western Sahara Campaign UK* (n 15), opinion by AG Wathelet, para 135 as well as para 247 and the massive footnote in support of that view.

⁴⁵ An occupying power shall, as a main rule, respect the laws of the occupied territory, subject to exceptions necessary for the security of the occupant and for public order and civil life, as well as measures necessary to respect other provisions of IHL and human rights (see below). See Pål Wrange, 'Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara,' (2019) 52 *Israel Law Review* 3, 8 & 9 and sources cited therein.

⁴⁶ See James Crawford, 'Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories', London 24 January 2012, <<https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>> accessed 25 February 2018, 25.

⁴⁷ Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP, 2009) 210 & 213-218; Eyal Benvenisti, *The International Law of Occupation* (2nd ed, OUP 2012) 81-83. See also the extensive discussion in Guy Harpaz and others, Expert Legal Opinion: January 2012, in the Israeli case HCJ 2164/09 *Yesh Din*, <<https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/%D7%A2%D7%AA%D7%99%D7%A8%D7%95%D7%AA/%D7%9E%D7%97%D7%A6%D7%91%D7%95%D7%AA/Quarries+Expert+Opinion+English.pdf>> This rule makes a distinction between exhaustible and non-exhaustible resources. It is controversial whether the occupying power may use exhaustible resources at all. At any rate, any use is subject to the conditions outlined in the body text.

⁴⁸ The force in power cannot use natural resources for its own good and must consider the interests of the people under its command and possibly also their wishes. Wrange (n 45) 20-26.

Responsibility, no state shall recognise as lawful or assist in the maintenance of a serious breach of a jus cogens norm.⁴⁹ Lawyers therefore generally find that it is illegal to enter into an agreement with a power, if that agreement explicitly or implicitly recognises the annexation of illegally occupied territory or if it assists in upholding an illegal situations.⁵⁰

3.1.5 Other relevant norms

Since the Association Agreement and the accompanying agreements are treaties, treaty law is relevant, as the CJEU found (see below).

International criminal law has also sometimes been mentioned, in particular those provisions which introduce individual liability for plunder and for introducing settlers, as well as the provisions on complicity in such war crimes. While they have been cited regarding Western Sahara, and could – with some credibility – be invoked in relation to those who in various ways assist in trade in goods from Western Sahara⁵¹ – this has not been one of the most frequently mentioned regimes in this context, and will not be further considered here.

Another norm is the principle of non-intervention. The internal aspect is relevant only if the territory in question is under the sovereignty of the state. However, one could also argue that the relation between Morocco and Western Sahara and its people – whatever it may be – is one in which third parties should not interfere, since it falls under the sovereign right to conduct internal *or* external affairs. This, of course, assumes that the norms on third party responsibility referenced above are not applicable.

Further, of course, international trade law is relevant.⁵² The underlying assumption of these norms is that trade is beneficial, and that is the whole premise of the EU.

In addition, international human rights law is frequently invoked in this situation. However, while human rights may be relevant for questions of popular participation in government,⁵³ as well as for issues concerning the use of economic resources, human rights law has generally not been invoked regarding the status of Western Sahara, except common Article 1 of the ICESCR and the ICCPR, which have already been cited in relation to self-determination.

⁴⁹ See in general, Stefan Talmon, 'The Duty Not to 'Recognise as Lawful a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Brill, 2005) 99; D Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law' (2003) 2 *Chinese Journal of International Law* 105, 130-143.

⁵⁰ Talmon appears to be even more categorical. Talmon (n 49) 119. See also Tristan Ferraro, 'Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory' (ICRC 2009) 59.

⁵¹ J.J.P. Smith, 'The plundering of the Sahara: Corporate criminal and civil liability for the taking of natural resources from Western Sahara' (ARSO, 2011) <<http://www.arso.org/PlunderingoftheaharaSmith.pdf>> accessed 18 October 2019.

⁵² The rules of the WTO agreements apply to parties to those agreements unless there are more favourable free trade agreements in force between the parties, such as the Association Agreement. Western Sahara is not a member of the WTO.

⁵³ Article 26, International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

3.2 Specific authoritative decisions

All of these different regimes have rules that are potentially applicable and may yield different results, depending on how they are interpreted and applied, as will be discussed further below. One would think that a good lawyer would test all potentially applicable doctrines against a concrete situation. However, whether a particular lawyer (or legal institution) will in fact invoke the one or the other one depends on many factors. Some situations seem to fit very nicely into one regime, meaning that it is difficult to avoid applying it. In other cases, the choice of regimes is not straight-forward, and the argumentative battle will be partly between regimes -- regime contestation.⁵⁴ For instance, in most situations of occupation, the occupying power will deny that it is an occupying power, and the application of the law of occupation will therefore be in dispute, or other parties may find that other regimes are more appropriate.

In such situations, concrete decisions pertaining to the situation will be very influential, even if they are not binding as such on those parties that are expected to apply the rules in question. Apart from the decisions of the CJEU, there are no binding decisions by any international organ pertaining to the relation between Western Sahara and Morocco, but there are a few decisions with political or legal persuasive authority.

3.2.1 ICJ

While the ICJ in 1975 found that there had been pre-colonial ties between the territory of Western Sahara and Morocco, these ties were not 'of such a nature as might affect the application of ... the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory'.⁵⁵ This strongly suggests that the people of Western Sahara have the right of self-determination as it came to be developed into a right of decolonization. It has been taken to provide such support in doctrine.

3.2.2 Security Council

In Resolution 380, the UN Security Council called upon Morocco 'immediately to withdraw... all the participants in the march'.⁵⁶ This decision is not binding as such, but at least it suggests that it was not self-evident that Morocco had a right to insert its military forces into the territory. By implication that means that Western Sahara was not a part of Morocco. The Council's subsequent resolutions uphold the right of self-determination of the people of Western Sahara and the position of Polisario as a political representative of that people.⁵⁷ While neither of these resolutions is binding

⁵⁴ Martti Koskeniemi, 'Hegemonic regimes' in Margaret Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 305, 315.

⁵⁵ *Western Sahara, Advisory Opinion* [1975] ICJ Rep 12 [162].

⁵⁶ UNSC Res 380 (6 November 1975) UN Doc S/RES/380 (1975).

⁵⁷ For instance, UNSC Res 2468 (30 April 2019) UN Doc S/RES/2468 (2019) op 3 and 4.

as such, they are difficult to ignore, in particular as two (soon one) EU members are also permanent members of the Council.

3.2.3 General Assembly

The UN General Assembly referred twice, in 1979 and 1980, to the 'continued occupation of Western Sahara by Morocco'.⁵⁸ The General Assembly's decisions are not binding, the resolutions were passed with far from consensus, and the classification of Western Sahara as occupied has not been maintained since 1980. However, these resolutions at least indicate that it is not a far-fetched analysis to say that Western Sahara is occupied, since nothing substantive in that regard has happened since 1980; they are therefore still invoked by writers.

3.2.4 An opinion by the UN Legal Counsel

In 2002, the then legal counsel of the United Nations, Hans Corell, provided an opinion to the Security Council on the exploration of mineral resources in Western Sahara.⁵⁹ The opinion did not use words like 'occupation' but it nevertheless noted that Spain had not, and could not, transfer sovereignty to Morocco and that Morocco was not listed as an administering power. Corell concluded: '...given the status of Western Sahara as a Non-Self-Governing Territory, it would be appropriate for purposes of the present analysis to have regard to the principles applicable to the powers and responsibilities of an administering Power in matters of mineral resource activities in such a Territory.' He found that Article 73 of the UN Charter applied and that resource exploitation in Non-Self-Governing Territories 'for the benefit of the peoples of these territories, on their behalf, or in consultation with their representatives' were in line with the relevant obligations and principles.⁶⁰ Hence, any exploration must be in line with 'the interests and wishes of the people of Western Sahara'.⁶¹

The interpretation by Corell was a disinterested legal opinion provided in his office as the legal counsel of the United Nations. While it had no binding force as such, it has been invoked numerous times by actors on different sides of the argument, and it has achieved a kind of acceptance as a frame of reference.⁶²

3.2.5 Two judgments by the CJEU

The most significant opinion is, as already mentioned, that of the CJEU. Its decisions are ipso jure binding on the other organs, and the ratio decidendi (non-applicability

⁵⁸ UNGA Res 34/37 (21 November 1979) UN Doc A/RES/34/37; UNGA Res 35/19 (11 November 1980) UN Doc A/RES/35/19.

⁵⁹ Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Doc S/2002/161, para 1 [hereinafter Corell].

⁶⁰ Corell (n 59) para 1.

⁶¹ This rule, as interpreted by Corell, is directed to Morocco, not third states, but it has been held to guide also third parties, like the EU.

⁶² Corell himself has interpreted this requirement to apply also to fishing and to be taken as a restriction rather than a license. Hans Corell, 'The legality of exploring and exploiting natural resources in Western Sahara', 5 December 2008 <<http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>> accessed on 22 February 2019.

of the agreements to Western Sahara) is generally taken to be prejudicial. In the two cases at hand, the judgments did not invalidate any act of the Union, but they found that these acts (the agreements) should be interpreted in a particular manner. Apart from the decision and the ratio decidendi, there were also other relevant pronouncements by the CJEU, as well as opinions by the Advocate General and the other courts involved.

The General Court (GC) found that the application of the agreement to Western Sahara does not amount to recognition of sovereignty over that territory,⁶³ but that it is not absolutely prohibited to conclude agreements which relate to such territories.⁶⁴ The Court also noted that Morocco does not have any mandate from the UN or another international body to administer the territory, but it nevertheless clearly found that Morocco had to comply with obligations incumbent upon such a power.⁶⁵ The Court further held that it was the Council's obligation under EU law to satisfy 'itself that there was no evidence of an exploitation of the natural resources of the territory of Western Sahara ... likely to ... infringe their fundamental rights.'⁶⁶

In the Western Sahara Campaign Case, the British judge, Justice Blake, found that Morocco's presence constitutes 'belligerent occupation'⁶⁷ Blake further reviewed Morocco's claim to the territory, dismissed all possible bases and concluded that the sovereign territory of Morocco does not include Western Sahara.⁶⁸ Blake referred to articles 40 and 41 of the International Law Commission's Draft Articles on State Responsibility which provide that states have a duty to cooperate to end serious breaches of customary international law (para 49)⁶⁹ The Advocate-General of the court (a legal advisor to the court) provided a number of important views in his opinions in the two cases, amounting to almost 140 pages. Inter alia, he found that Western Sahara was, beyond doubt, not only non-self-governing but also occupied, that it was not administered de jure, and that an agreement that covered Western Sahara would surely constitute a recognition of Moroccan sovereignty over that territory.⁷⁰

As already mentioned, when the Grand Chamber of the CJEU dealt with the two cases in 2016 and 2018, it found that Western Sahara was not a part of Morocco, that it had a status separate from Morocco, that an agreement could nevertheless cover

⁶³ *Front Polisario* GC (n 12) para 202.

⁶⁴ *Front Polisario* GC (n 12) para 215.

⁶⁵ *Front Polisario* GC (n 12) para paras 233 & 235.

⁶⁶ *Front Polisario* GC (n 12) para 241. However, the Council had failed in that respect para 247.

⁶⁷ *Western Sahara Campaign UK* (n 13) [18].

⁶⁸ *Western Sahara Campaign UK* (n 13) [40].

⁶⁹ He also quoted Corell (*ibid* [51-53]) in a text from 2008, in which the 2002 opinion is applied to the Fisheries Partnership Agreement. Corell found 'it incomprehensible that the Commission could find such support in the legal opinion, unless, of course, it had established that the people of Western Sahara had been consulted, and accepted the agreement, and the manner in which the profits from the activity were to benefit them'. Corell (n 62).
<http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>.

⁷⁰ See *Front Polisario* GC (n 12), Opinion of AG Wathelet, para 269.

Western Sahara but that that would require the consent of the people of Western Sahara. Like the GC and the Hight Court, CJEU held that the presumption must be that an agreement does not apply beyond the recognized border of a state and that Western Sahara is not a part of Morocco.⁷¹ Like the GC, CJEU refers to the 'people' of Western Sahara, not to inhabitants or population. The court considered the possibility that Morocco might be a 'de facto administrative power' or an occupying power. It did not bother to determine whether that would have been 'compatible with the rules of international law' because 'the Kingdom of Morocco has categorically denied that it is an occupying power or an administrative power...'⁷²

3.3 Legal doctrine

Legal doctrine has assisted in concretizing the general rules, principles and doctrines to the case of Western Sahara. It has been surprisingly consistent, and generally provides the following:⁷³ Western Sahara is not a part of Morocco and the annexation is without effect,⁷⁴ and most commentators also therefore find the territory to be occupied.⁷⁵ Under some readings of this view, Morocco has no right whatsoever regarding Western Sahara. As an occupying power, Morocco may not introduce permanent changes into Western Sahara and may not avail itself of the natural resources of the territory at will. Since Western Sahara is an NSGT, it has a right to its resources, which may be used only in accordance with 'the interests and wishes of the people'.⁷⁶ As for third states (and organisations), they have the obligation to not knowingly assist⁷⁷ and for serious violations of 'peremptory norms' (jus cogens), they may not recognise or support an illegal annexatio.⁷⁸

⁷¹ The Court noted that 'a treaty may, by way of derogation from the general rule ... bind a State in respect of another territory if such an intention is apparent from that treaty or is otherwise established'. *Front Polisario* GC (n 12), para 98.

⁷² *Western Sahara Campaign UK* (n 15), para 72.

⁷³ See for instance articles cited in n 5, 83 and 91 as well as Enrico Milano, 'The new Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: fishing too south', *Anuario Espanol de Derecho Internacional* 22 (2006) 413; Sven Simon, 'Western Sahara', in Christian Walter, Antje von Ungern-Sternberg, Kavus Abushov (eds.) *Self-determination and Secession in International Law* (OUP, 2014), 255; Sandra Hummelbrunner and Anne-Carlijn Pickartz, 'It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union', *Utrecht J. Int'l & Eur. Law* 32 (2016) 19.

⁷⁴ See Article 47 of The Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.; UNGA Res 34/37 (21 November 1979) UN Doc A/RES/34/37; UNGA Res 35/19 (11 November 1980). UN Doc A/RES/35/19. See *Western Sahara Campaign UK* (n 15), opinion of AG Whatelet, para p 247 and the magnificent footnote 223.

⁷⁵ It is clear that Western Sahara was occupied in 1975 against the will of the AP, Spain (Saul (n 5) 315-316) and certainly against the will of the people concerned. Zunes (n 5) 288. The Madrid agreement of 14 November 1975 did not change that, because it was concluded under military coercion and because Spain did not have the right to cede the territory to another state but was under an obligation to ensure the self-determination of the people of that territory. Saul (n 5) 309-315. One could also make the argument that the conflict between Polisario and Morocco is an international conflict. Polisario is clearly a national liberation movement involved in a war of national liberation as defined in Article 1(4) of the First Additional Protocol to the Geneva Conventions. Morocco became a party to the protocol in 2011 and Polisario filed a declaration under Article 96(3) of the Protocol in 2015, bringing the conventions and the protocol into immediate effect. Saul (n 5) 304.

⁷⁶ Corell (n 59) para 25.

⁷⁷ Article 16, The International Law Commission's Articles on Responsibility of States for internationally wrongful acts, attached to UN Doc A/RES/56/83 (hereinafter ARSIWA).

⁷⁸ Article 41, ARSIWA (n 77).

3.4 Ways of framing the situation

Based on the above account, these sources suggest five main ways of legally framing the relation between Western Sahara, Morocco and the EU, each frame involving a particular cluster of arguments.⁷⁹ Some of these frames correspond to distinct legal regimes, some do not.

1. The first one, seemingly unavoidable for COM, is the approach taken by the CJEU, namely the law of self-determination. The Court found that Western Sahara has a separate status as an NSGT and is thus a third party under treaty law. According to this view, an agreement 'must receive the consent' of the people of Western Sahara, otherwise it cannot be applied to that territory.

Conceptions of self-determination may be connected to different political ideas -- nationalism, decolonization, liberal democracy -- and will likely have different legal meaning depending on what one associates it with. The CJEU's reading is the one that sprang from decolonisation, which is not surprising, since Western Sahara has been treated as such by the UN.

This approach emphasizes the separate legal status of the territory, and in some readings even means that an NSGT can never be a proper part of the administering state. To apply the law of self-determination in this way would have been difficult to swallow for Morocco, since it would have undermined the legality and legitimacy of Moroccan control over Western Sahara; after all, in Morocco's view, the annexation is actually an example of decolonization. But this approach could also have been difficult to swallow for some EU member states, since it could have been taken to undermine the legality of past and some present exercises of sovereignty over their colonial possessions. Further, as will become apparent, there were great practical obstacles to obtaining consent of the people of the separate territory.

Nevertheless, in the Court's interpretation, the requirement of consent did not completely rule out an agreement with Morocco over Western Sahara, and therefore gave some latitude for Morocco and for third parties, as we will see.⁸⁰

2. The second perspective also proceeds from the law of self-determination but instead of a focus on the legal status and representation of the territory it emphasises the use of natural resources, as exemplified by the Corell opinion. This builds on Chapter XI of the Charter and focuses on the responsibilities of the administering power. It is originally a paternalistic perspective, as laid out in Chapter XI, but was imbued with an element of democracy in the Corell opinion ('wishes of the people').⁸¹ This perspective is primarily applicable between the state that administers

⁷⁹ On clusters of argument, see Duncan Kennedy, 'A Semiotics of Legal Argument' in R. Kevelson (ed.) *Law and Semiotics* Volume III (Springer, 1989) 167, 183–184.

⁸⁰ See also *Front Polisario* (n 15), opinion of AG Whatelet, paras 76 and 108.

⁸¹ See Corell (n 59) p. 2 and 4. The Charter merely stated that the administering states should 'take due account of the political aspirations of the peoples,' Article 73(b).

the people and the people of the NSGT and it takes the control of territory as granted. In particular in the UN Charter version from 1945, this regime pays no attention to the origin of the administering (that is, the colonial) power's control over the territory. Here the role of third parties is limited to avoiding direct support for any violations of the principle, in particular violations of jus cogens norms. While there is almost universal agreement that the right of self-determination applies to Western Sahara, whether the powers of an administering power can be invoked depends on how one views Morocco. Under COM's interpretation of the Corell opinion (contra Corell himself), Morocco is a (de facto) administering power. Under this view, Morocco has some leeway; it could arguably invoke the rules applicable to de jure administering states (that is, colonial powers), provided that it complies with the important requirement of being guided by 'the wishes and interests of the people' of Western Sahara.

This second frame lends itself to a focus on the benefits of economic exchange, which is comfortable for an institution (such as COM) that is built on the idea that trade is good for everyone and which is often engaged in development cooperation. While this perspective in principle should be in harmony with the first one – they come out of the same legal regime – it would be more advantageous for COM to try to keep this frame distinct from frame 1, and in particular to focus on the bilateral relations between Morocco and the Sahrawis, rather than on the obligations of third parties. Furthermore, it is crucial to keep it insulated from the arguments that follow easily from frames 3 and 4.

3. The third frame is marked by the *jus contra bellum* and the principle *ex injuria non jus oritur*. Under this view, Western Sahara is illegally annexed (and therefore occupied), and Morocco should have no rights proceeding from its illegal use of force, since it constitutes a serious violation of a fundamental norm. (In principle, the *ex injuria* principle could also be applied regarding self-determination.) This view comes out of a combination of the idea that international law and institutions should prevent the use of force – the UN was created to 'save succeeding generations from the scourge of war' – and the fundamental principle of justice that no right should derive from a (fundamental) wrong.

This view has well-known consequences under the law of state responsibility for third parties, who may not recognise or assist the maintenance of such an illegal situation, as is the prevailing view of legal doctrine and as was vigorously argued by the Advocate General.⁸² But these parties could also – perhaps -- invoke the so-called Namibi exception, 'in order not to deprive the people of Namibia of any advantages derived from international cooperation'.⁸³

⁸² *Western Sahara Campaign UK* (n 15), Opinion of AG Wathelet, para 129.

⁸³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16 [125]. See also Benvenisti (n 47) 85; Cedric Ryngaert and Rutger

All international bodies cited above seem to proceed from the premise that Western Sahara is not a part of Morocco, which more than suggests the application of *ex injuria*. Nonetheless, with the exception of the Advocate General, none of them has set out the consequences explicitly, which gives some room for the parties involved to omit those stark effects.

For COM it would have been politically impossible to apply this framework. Further, it may have felt unconformable in making such considerations, alien to the usual discourse on trade and welfare. And importantly, it would not be legally attractive; it would strongly suggest that no state can enter into an agreement with Morocco that covers Western Sahara, since that would constitute unlawful recognition of the illegal situation and perhaps also support of its maintenance.

4. The fourth set of rules is the law of occupation, which applies if Western Sahara is occupied. In distinction to the third regime, the law of occupation is agnostic as to the causes of the status of occupation; this law was created in the 19th century to deal with problems arising out of wars in Europe, where military victory was becoming discredited as a sufficient justification for rule,⁸⁴ and it is regulated in the Hague and Geneva conventions, concluded outside the scope of the UN. The law of occupation applies whenever one state controls territory as a result of armed conflict, regardless of the origin of the conflict. Nevertheless, in contemporary affairs – and in particular after World War II -- the word ‘occupation’ has negative associations, and any use of that term suggests that the control is illegal, often clustered with frame 3.

As mentioned, doctrine almost invariably holds that Western Sahara is occupied, the claimants in the four proceedings explicitly assumed that Western Sahara was occupied and the High Court (as well as the Advocate General⁸⁵) clearly agreed.⁸⁶ While occupation seems to be an almost inescapable conclusion of the fact that Morocco is not a recognised sovereign over Western Sahara, the specific legal opinions on Western Sahara have not been conclusive in that regard. The two instances of the CJEU held that Western Sahara was not a part of Morocco, but neither of them determined that Western Sahara is occupied. In the 2018 judgment, the Court discusses whether Morocco as an occupying power could dispose of fishing in the waters outside Western Sahara, but finds that that was not the intention of the FPA, ‘since the Kingdom of Morocco has categorically denied that it is an occupying

Fransen, ‘EU extraterritorial obligations with respect to trade with occupied territories: Reflections after the case of Front Polisario before EU courts’ (2018) 2 *Europe and the World: A law review* 1, 17-18. *Western Sahara Campaign UK* (n 15), opinion of AG Whatelet, para 288 and sequel discusses this with the conclusion that *Namibia* cannot be invoked to support the agreement.

⁸⁴ See Nehal Bhuta, ‘The antinomies of transformative occupation’ (2005) 16 *European Journal of International Law* 721; Yutaka Arai-Takahashi, ‘Preoccupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation’ (2012) 94 *International Review of the Red Cross* 51, 56, 74-75 and *passim*. See also Benvenisti (n 47) 41. Cf also Lassa Oppenheim, ‘Legal Relations Between an Occupying Power and the Inhabitants’ (1917) 33 *Law Quarterly Review* 363, 363.

⁸⁵ *Western Sahara Campaign UK* (n 15), opinion of AG Whatelet, paras 67-69.

⁸⁶ Ryngaert and Fransen (n 83) 16. See also *Western Sahara Campaign UK* (n 15), opinion of AG Whatelet, para 247 and the massive footnote in support of that view.

power or an administrative power with respect to the territory of Western Sahara'.⁸⁷ However, this is not an outright repudiation of the view that Western Sahara is occupied, just an interpretation of the intention of the parties.

The view that Western Sahara is occupied is totally consistent with the third frame. However, in accordance with its agnostic heritage, it provides some room for Morocco to dispose of the resources of Western Sahara.⁸⁸ An occupying power has the right to use the public resources of an occupied territory for certain legitimate purposes. As for relations with third States, it is controversial whether the occupying power has the right to contract on behalf of the occupied territory,⁸⁹ but that view could be contended with at least some credibility.⁹⁰ Hence, it could be argued that the law of occupation gives greater leeway than the CJEU's interpretation of the law of self-determination, and therefore, technically, would be more advantageous for Morocco and for COM.⁹¹ However, given the contemporary association between occupation and illegal use of force, that route was politically unpalatable. While COM admitted during the proceedings that Western Sahara might be occupied, it has not maintained that position in public.⁹²

5. The fifth view, which to my knowledge has not been argued in doctrine⁹³ but follows from some of COM's views, is that the status of Western Sahara is uncertain and is not the concern of third parties (like the EU) that want to engage with Morocco.⁹⁴ This could be linked to a strict reading of the principle of non-intervention. A diluted version of this view, clearly argued by COM, holds that, at

⁸⁷ *Western Sahara Campaign UK* (n 15), para 72.

⁸⁸ This view is corroborated in a recent analysis by Ryngaert and Fransen (n 83).

⁸⁹ The Advocate General finds, rightly I think, that if so, the occupying power has to act explicitly in that particular capacity. *Western Sahara Campaign UK* (n 15), opinion of AG Whatelet, para 252.

⁹⁰ Switzerland held that the Coalition Provisional Authority had the authority to contract on behalf of Iraq during the occupation after the war in 2003. However, in that case, the CPA did so in its own name under the authority of an occupying power, not as a purported government authority of Iraq. On that issue, see Eva Kassoti, 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement' (2019) 4:1 *European Papers* 307-317, 313 <www.europeanpapers.eu> accessed 9 September 2019.

⁹¹ As has been explained by several writers, there is by no means a necessary contradiction between the view that Western Sahara is occupied and the view that it is non-self-governing. Further, as I have developed elsewhere, it is possible – though not common – to marry the two regimes, and it even seems that the three bodies referenced above thought that the two regimes are very similar or that the NSGT regime prevails. Wrange (n 45) 20-26. Hans Corell confirmed this in a circumscribed way in 2008, in his private capacity. Corell (n 69). The Advocate General was more explicit about the relation between the two regimes and found that they 'are not mutually exclusive'. *Western Sahara Campaign UK* (n 15), opinion of AG Whatelet 267-268. See also Eva Kassoti, 'The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)' (2017) 2:1 *European Papers* 339-356, 353. See also Eugene Kontorovich, 'Economic Dealings with Occupied Territories' (2015), 53 *Columbia Journal of Transnational Law* 584, 610-615.

⁹² *Western Sahara Campaign UK* (n 15), opinion of AG Whatelet, para 235. The Council denied that there was occupation. *Ibid.* The head of the legal service of the EEAS, Gert-Jan van Hegelsom, at a hearing before the Human Rights Committee, avoided the question whether Western Sahara was occupied and said that in view of the ongoing peace efforts, it would not be 'helpful' to 'categorise' the situation. See videocast from the morning meeting of the European Parliament's Subcommittee on Human Rights 2 July 2015, at 10:17 <<https://www.europarl.europa.eu/ep-live/en/committees/video?event=20150702-0900-COMMITTEE-DROI>> accessed 19 February 2019.

⁹³ The only (partial) exception, with a much more circumscribed view of third state obligations, is Eugene Kontorovich, 'Economic Dealings with Occupied Territories' (2015), 53 *Columbia Journal of Transnational Law* 584.

⁹⁴ It is not stated in the documents in the current recent cases but has sometimes been stated in earlier discussions.

any rate, the obligations vis-à-vis the people of Western Sahara fall only on Morocco, and that third parties have no responsibilities in this regard.⁹⁵ This take on frame 5 could be made to fit with the second frame and possibly also with the fourth one, as has been indicated above. However, after the judgments in the GE and the CJEU, this insulation of the EU from responsibility no longer seemed tenable.

As has already been indicated, between these five frames there is both co-existence and conflict. Some of them could be put into doubt by clusters of arguments from other frames, and over time such pairings even produced their own clusters; for instance, the fifth view will commonly be met with arguments from frame three, and vice versa. Strictly speaking, variants 1-4 are not mutually exclusive, but can all apply at the same time. Further, 1 and 2 are linked (both follow from Western Sahara's status as an NSGT), and so are 3 and 4 (the application of 4 follows from 3). Variant 5 is completely incompatible with variants 1 and 3 but arguments can be made that it could fit with 2 or 4. I have analysed these positions in detail elsewhere⁹⁶ and it is not necessary to do so here for the purpose of this paper.

All of the positions and arguments mentioned above were on the table, since they had been invoked by actors – including states -- that had interacted with the Council and the Commission. When faced with several legal frames, the preferred contemporary advice by international lawyers is to adopt ‘systemic integration’.⁹⁷ Even the Advocate General and the CJEU invoked the main embodiment of this principle, Article 31(3)(c) of the Vienna Convention on the Law of Treaties.⁹⁸ However, what COM did was rather to opt for a sort of strategic isolation. CJEU roamed mainly in frame 1, Corell and GC in frame 2, the Advocate General ended up in 1, but clearly explored arguments in all frames, particularly in the opinion to the 2018 judgment. For COM, it was necessary to stay within the second frame (since frame 5 was no longer accessible). This meant that it had to both establish the self-sufficiency of this frame (by not involving itself in discussions of *why* Morocco would be seen as an administrative power) and prevent attacks by arguments from other frames, like the third and the fourth one.

4 The Consultation Report: Exploiting the tools, avoiding the traps

4.1 Background to the consultations

During the early years of the operation of the Association Agreement, COM had argued from frame 5 and maintained that Western Sahara is ‘disputed territory’, that

⁹⁵ For COM's and the Council's view, see the references in *Front Polisario* GC (n 12), opinion by AG Whatelet, paras 280 et seq.

⁹⁶ Wrange (n 45). See also n 91.

⁹⁷ ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, 13 April 2006, UN Doc A/CN.4/L.682 206 et seq.

⁹⁸ *Front Polisario* (n 15) [86]. *Front Polisario* (n 15) opinion of AG Whatelet, para 94. The CJEU was severely criticized for that, but the basis of the criticism was that the Court had overused it as a rule of interpretation for the EU-Morocco agreements. Eva Kassoti, ‘The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)’, *European papers: a journal on law and integration* 2 (2017) 23-42.

the agreements do not recognize Moroccan sovereignty over Western Sahara, and that if the agreements are nevertheless applied to that territory, that is the responsibility of Morocco and of no concern of the EU; whatever obligations Morocco may have vis-à-vis the people of Western Sahara, that is a bilateral issue between the two.⁹⁹ After a number of countries had objected to the Fisheries Partnership Agreement (FPA) in 2006, and even more so after the European Parliament refused to adopt the renewal of the implementation protocol in 2011, COM modified its position. Since much of the discussion then turned on the Corell opinion – which was the most authoritative opinion on Western Sahara to that date – COM addressed that view. However, instead of focusing on ‘the interests *and wishes* of the *people*’, as Corell had advised, COM negotiated a few minor changes to the FPA which would (very nominally) ensure that there were *benefits* to the local *population*.¹⁰⁰ That change worked, politically, and the European Parliament eventually accepted the protocol to the FPA in 2013. This position, too, became difficult for the Commission to sustain after the judgments by the Court of Justice – or at least one would have thought so. As a response to the CJEU’s requirement of ‘the consent of the people of Western Sahara’, the negotiation mandate provided that

⁹⁹ The position was still expressed in the court proceedings, even if the Corell view was also addressed. See n 95.

¹⁰⁰ It is difficult to find sources in the public domain that set out the legal position of the Commission before the proceedings in the CJEU. However, there is some material from the discussions that finally led to the adoption of a protocol to the Fisheries Partnership Agreement in 2013, from which inferences can be made, and which show that the Commission’s continued use of the word ‘population’ instead of ‘people’ in that period was conscious. In the explanatory memorandum to the proposal for a protocol, COM had argued that earlier, sceptical discussions in the Parliament had concerned ‘the local population’. See 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, Brussels, 23.9.2013 COM(2013) 648 final 2013/0315 (NLE). However, the rapporteur of the European Parliament’s development committee found in 2011 that it was ‘unacceptable that Morocco has totally neglected the European Commission’s questions on the benefits and the wishes of the Saharawi *people*’ (my emph.). See ‘Development rapporteur urges Parliament to thumb down fish deal’ 19.10.2011 <<https://www.wsrw.org/a204x2123>> accessed 19 February 2019. Further, the opinion from 2013 of the European Parliament’s Legal Service (which was leaked) refers to the ‘interests and wishes of the *people* of Western Sahara’ (para 18; my emph), and there are similar references in the opinions of 2006 and 2009, cited in 2013, although the opinion is admittedly not consistent. See Legal Service of the European Parliament, Legal Opinion, Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement in force between the two Parties – 2013/0315(NLE) SJ-0665/13 <https://wsrw.org/files/dated/2013-11-07/ep_legal_opinion_nov_2013.pdf> accessed 19 February 2019. There was also plenty of academic and policy writing on this hotly debated issue which made the distinction between ‘people’ and ‘population’ clear, including ‘Western Sahara and the Protocol to the EU-Morocco Fisheries Partnership Agreement (FPA) of 2013 – a Legal Analysis’, signed by 21 jurists (including myself), 2 December 2013 <<https://www.wsrw.org/a217x2744>> accessed 19 February 2019.

It should further be noted, that before the passing of the protocol, eight states made statements, out of which four referred specifically to ‘the people of Western Sahara’ or similar formulas (Finland, the Netherlands, Sweden, the United Kingdom). These statements reflected previous debates on the Council. See COREPER (part 1), Proposal for a Council Decision on the signing, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement in force between the two Parties, Brussels, 14 November 2013, 15723/13 ADD 1. See also below, section 5.

I represented Sweden in various EU discussions on Western Sahara around 2006 and in my subsequent capacity as an academic expert, I made two presentations before the European Parliament. The legal questions, including the difference between ‘people’ and ‘population’ were raised specifically and in some detail by Swedish representatives in several fora, in writing and orally, at least from January 2006.

COM should ensure that ‘the people concerned by the agreement have been adequately involved’,¹⁰¹ which is not necessarily what the Court had required.

At any rate, before the proposals for a new agreement could be passed by the Council, the Commission did what it had not done previously, namely, to hold consultations with ‘the people concerned’. This was remarkable, in a way; it is not the habit of COM or of any government to consult foreign persons affected by a trade deal before it is passed. But then, the EU is not in the habit of concluding agreements which cover third parties without their consent.

The consultations were reported in a working document entitled ‘Report on Benefits for the People of Western Sahara and Public Consultation on Extending Tariff Preferences to Products from Western Wahara’ (the consultation report), which accompanied COM’s proposal to the Council for the agreement, and which was referenced in the decision.¹⁰² It thus formed a crucial part of the basis for the ensuing decision to adopt the amendments. The report explained that COM, ‘in liaison with the European External Action Service, has ... ensured that the people concerned by the Agreement have been appropriately involved by conducting consultations covering a wide range of socio-economic and political operators from the Western Saharan population.’

COM was not allowed to travel to Western Sahara and apparently did not even envisage visiting the refugee camps in Algeria.¹⁰³ Meetings were held in Brussels and Rabat with political and economic operators and four ‘human rights groups’ registered by the Moroccan government (see below, 4.2.5).¹⁰⁴ The consultations aimed to ‘exchange views and comments on the potential benefits for the people and the economy of Western Sahara of extending the preferential treatment granted to Moroccan products to products imported from Western Sahara to the EU.’¹⁰⁵ Apart from that, the report does not explain how the consultations were conducted, nor is it, for most of the time, clear whether the referenced views were offered by the one or the other type of ‘operator’.

The methodology (or perhaps lack thereof) has been severely criticized and it has also been questioned whether it is possible to draw any conclusions at all from the material that was gathered.¹⁰⁶ Nevertheless, it falls outside the scope of this essay to analyse this in any detail. Instead, what follows is a review of the reasoning in the report to the extent that it has a bearing on the law. I will analyse COM’s conclusions and the arguments underpinning it as five rhetorical moves.

¹⁰¹ See n 29.

¹⁰² Consultation Report (n 2). It was cited in the decision, recitals 8 and 10; see Amendment of Protocols 1 and 4 (n 2).

¹⁰³ That possibility was not mentioned in the report.

¹⁰⁴ See below, text in and around footnote 137.

¹⁰⁵ Consultation Report (n 2) 10.

¹⁰⁶ See n 137.

4.2 How Commission tackled the question in five moves

4.2.1 Treaty making power of Morocco

The first question that had to be dealt with was in which capacity Morocco was a treaty partner – territorial sovereign, administering power, occupying power or something else? While the CJEU had not explained that with regard to the pre-existing agreements, it had ruled out that they were concluded with Morocco as an administering or an occupying power. But this, of course, did not rule out that future agreements could be concluded with Morocco in any of those capacities. Still the agreement does not indicate Morocco's position; all we know is that Morocco offered the services of its customs authorities for products from Western Sahara, in order 'to ensure compliance with the rules necessary for the granting of such preferences.'¹⁰⁷ Why Morocco would make this offer to a separate 'third party' is not explained. The report claims that 'nothing in the Agreement implies that it recognises Morocco's sovereignty over Western Sahara'. That conclusion has certainly been questioned, not least by the Advocate General,¹⁰⁸ but it is beyond doubt that the agreement must at a minimum be seen to recognize Morocco's right to contract regarding Western Sahara in at least some respect.

At any rate, the report noted that Morocco is an administering power, 'at least' *de facto*,¹⁰⁹ and the intended implication appears to be that this suffices to explain why Morocco is able to contract for Western Sahara (under the proviso that 'the people concerned' is 'adequately involved', of course). However, while Morocco is *de facto* administering Western Sahara, that does not in and of itself mean that it is a *de jure* 'administering power' in the terms of the law of self-determination, with the rights and obligations ascribed to such states under international law.¹¹⁰ Many entities administer territory, including occupying powers. Nevertheless, for COM (and also for the Council), the role of Morocco was explained by this conflation of *de facto* and *de jure*, a crossing of the line between fact and norm, is and ought.

4.2.2 Benefits

The next rhetorical move was to focus on whether there would be benefits to the population. The Court said that it is not 'necessary to determine whether such implementation is likely to harm [the third party] or, on the contrary, to benefit it,'¹¹¹ the third party here being the people of Western Sahara. 'Benefit' was, however, one of Corell's two cumulative requirements, based on the law relating to NSGTs, the

¹⁰⁷ Amendment of Protocols 1 and 4 (n 2), recital 6. In the words of the Advocate General, the EU and Morocco 'agree to disagree' about Morocco's status. *Front Polisario* GC (n 12), Opinion of AG Wathelet, para 67. Regarding the eventuality of an 'offer': see n 32.

¹⁰⁸ See *Western Sahara Campaign UK* (n 15), opinion of AG Wathelet, para 194.

¹⁰⁹ Amendment of Protocols 1 and 4 (n 2), recital 3; Consultation Report (n 2) 6. See also *Western Sahara Campaign UK* (n 15), opinion of AG Wathelet, para 98. The expression 'at least *de facto*' suggests that the author of the report holds that it is possible that Morocco has *de jure* powers over Western Sahara.

¹¹⁰ Kassoti (n 90) 311. The Advocate General rebuts this in a long argument. *Western Sahara Campaign UK* (n 15), opinion of AG Wathelet, para 217-226.

¹¹¹ *Western Sahara Campaign UK* (n 15), para 106.

second frame. So, in spite of the CJEU's dictum, there was some legal basis for COM to include this issue in the report. One may also guess that COM thought that the benefits would provide a more promising focus than the thorny issue of 'consent'. Out of the 28 pages of text in the report, 15 cover the question of benefits and only 4 the consultations.

Even so, the assessment must have been a disappointment, because the report does not determine whether the measures would actually benefit the indigenous people (the people of Western Sahara). 'It is clearly impossible to say that the overall economic impact of such growth would systematically and directly benefit indigenous people. It can only be assumed that they would benefit, at least indirectly.'¹¹² That is a high degree of uncertainty. Further, the evaluation seemed to be based on a Pareto efficiency criterion, essentially meaning that *any* beneficial impact would suffice, and there was no discussion whether other measures could have benefited the population more.

A related move was to pair the people and the economy. Recall that the declared objective was 'to exchange views and comments on the potential benefits for the *people* and the *economy* of Western Sahara ...' (my emphasis). However, what Corell -- building on UN practice -- was after was only the benefits for the *people*. The underlying assumption of COM's argument is clearly that what benefits the economy also benefits the people.¹¹³ While this may be true in many cases, it is not necessarily so, in particular if segments of the population claim that they are discriminated against, which, of course, quite often is the case when one state 'administers' an alien territory.

At any rate, the results of the analysis of benefits evidently appeared so useful that they comprised the entirety of the 'Conclusion' of the report's 'Summary', which deserves to be quoted in full:

Though the Western Saharan population cannot be neatly divided into groups with specific backgrounds, there are signs that economic activity generated by exports to the EU creates local jobs and thus helps all parts of the population, regardless of background, to a greater or lesser extent. These benefits would be compromised if exports to the EU did not enjoy the same tariff preferences as those granted to Morocco.¹¹⁴

4.2.3 Expression of will – consent?

Having concluded this, COM needed to address the express conditions of the CJEU: consent by the people of Western Sahara. By substituting the phrase 'adequately involve [the] people concerned' for the Court's 'consent of the people of Western Sahara', the Council gave more leeway for itself and for COM, but it also opened up

¹¹² Consultation Report (n 2), p 18.

¹¹³ See for example Explanatory Memorandum, attached to Amendment of Protocols 1 and 4 (n 2) p 6-7.

¹¹⁴ Consultation Report (n 2), 3.

a new debate. What did 'adequately' mean? And how did 'involved' relate to the Court's term 'consent'? Even more fundamentally, who were the 'people concerned' – a question which may refer to some very fundamental debates about democracy.¹¹⁵ Nevertheless, as we will see, COM never involved itself in such debates. Instead, it partly reverted to the Court's conditions (which, of course, could inform the interpretation of the Council's formula);¹¹⁶ the report discusses 'people', as will be noted below, but it does not address the requirement of consent, and this is the third move.

Consent is a legal term of art. It may be express or implied, but it must be ascertained in some way. Still, the report does not use the term consent; in fact, in the document it appears only once, in an unrelated context. Instead of looking for 'consent' of the people, COM exchanged 'views and comments on the potential benefits' and then noted whether their interlocutors thought that the measures would be beneficial and whether their interlocutors were 'in favour of extending the tariff preferences'¹¹⁷ It is not reported whether those consulted believed that the best way of attaining these benefits was through an agreement with Morocco or whether they perhaps had preferred some other way.¹¹⁸ At any rate, the consultations do not appear to have resulted in consent in the formal, legal sense (at least not of the people of Western Sahara; see 4.2.5). And that leads us over to the next issue.

4.2.4 The object of the expression of will – the agreement?

The following move was to change the topic of the consent (or 'exchange of views'). Instead of asking the interlocutors about their views of the agreements in their entirety, they focused on the economic consequences:

A major argument by those opposed to extending the Association Agreement to cover Western Sahara is the fact that Morocco will be increasing structural investment in the territory many times over, with a political view to annexing it by changing its identity. It has allegedly implemented an overall administrative and economic policy to this end. The Polisario Front describes the exploitation of natural resources in Western Sahara under Moroccan control as 'economic plunder aimed at altering the structure of Sahrawi society'.¹¹⁹

... That said, these criticisms were not motivated by specific negative effects on the people concerned in Western Sahara from the application

¹¹⁵ Until we have a democratic world government, every democracy will be bounded, inevitably inviting questions about who is included and who is excluded.

¹¹⁶ This wording is possible to interpret in line with the judgment, in particular given that the intention of the formula presumably would have been to address the Court's conditions. Hence 'adequate involvement' could have meant 'consent' and the 'people concerned' could have been held to mean 'the people of Western Sahara'.

¹¹⁷ Consultation Report (n 2), p 32.

¹¹⁸ One may think that an offer is beneficial in the sense that one gains something, and at the same reject it, perhaps because one believes that one could have gotten a better deal, because one holds that the deal is illegal or for some other reason.

¹¹⁹ Consultation Report (n 2), 14.

of the planned tariff preferences, but by a fear that the preferences would maintain the status quo in Western Sahara, which they consider to be under Moroccan occupation.’¹²⁰

Hence, this line of criticism was dismissed by COM because it ‘does not concern the subject of this report: it deals with an aspect of general policy, but not directly with the question of extending tariff preferences established in the EU-Morocco Association Agreement to products from Western Sahara.’¹²¹ COM’s perspective was based on the ‘essentially economic nature of the Agreement’, as well as the EU’s desire to avoid weakening ‘traditional trade flows’.¹²² Hence, some types of objections to the agreement – essentially related to frames 3 and 4 -- became irrelevant, since they did not target those aspects of the agreement that COM thought were important. COM thereby detached the political aspects from the economic ones and declared the former irrelevant.¹²³

Further, the respondents were not trusted to determine what was important for *them* about the agreement. Even more notably, it is not clear that this detachment from politics accords with how the relevant actors thought of the agreement. Polisario’s position has already been stated. As has also been mentioned, Morocco suspended contacts with the EU after the judgment in the General Court, which clearly testified to the political importance that they attached to the matter.¹²⁴ Even the EU thought of the agreement in political terms, as shown by Moghereini’s aforementioned reference in Rabat to the ‘strategic importance’ of this issue’.

4.2.5 The subject of the expression of will – the people?

Perhaps most fundamentally, the report has a particular view about who it is that is to give consent (or be ‘adequately involved’).

Recall that Corell in 2002 had asked for ‘the interests and wishes of the *people* of Western Sahara’ while the CJEU in 2016 said that the implementation/agreement ‘must receive the consent of ... the *people* of Western Sahara’.¹²⁵ The use of the term ‘people’ is crucial. A ‘people’ (as a *singular* count noun) is a political unit, with a right of self-determination, as set out in the Friendly Relations Declaration and common Article 1 of the 1966 Covenants. A population, by contrast, is a set of people (as a *plural* count noun) who happen to live in the same place. It may consist of a people in the legal sense, but it may also consist partly of colonialists and settlers. In present

¹²⁰ Explanatory Memorandum, attached to Amendment of Protocols 1 and 4 (n 2), p 5 of the Memorandum.

¹²¹ Consultation Report (n 2), 15. ‘[T]he question was not so much the territory’s final status, as whether the EU should apply tariff preferences under the EU-Morocco Association Agreement to products from Western Sahara.’ Consultation Report (n 102), 28.

¹²² The latter expression from the Consultation Report (n 102), 28.

¹²³ Whether economic and political issues can be separated is, of course, a question with ideological implications.

¹²⁴ El Yaakoubi (n 24) A further testament: According to the Council, ‘[t]he Kingdom of Morocco would never have accepted the agreement if the EU institutions had included in it a clause explicitly excluding its application to Western Sahara.’ *Front Polisario* (n 15), opinion by AG Whatelet, para 300.

¹²⁵ *Front Polisario* (n 15), para 106.

circumstances, ‘the people’ would refer to those Sahrawis that remain in the occupied areas as well as those that have fled to Algeria and other places.¹²⁶ By contrast, the ‘population’ in Western Sahara consists of those Sahrawis that remained *and* of settlers from Morocco (or other places), who, by some accounts, now constitute a majority of the population.¹²⁷

In earlier iterations of this debate, COM had, without comment, simply substituted ‘population’ for ‘people’, for instance in the explanatory memorandum to the proposal for the revised Fisheries Protocol in 2013, in which COM claimed that one of the reasons for why the 2011 Protocol was rejected was that it was not ensured that “...the local populations would benefit from the economic and social benefits of that Protocol.”¹²⁸ In 2017, this simple operation was no longer possible, due to the conscious use of the word ‘people’ in the CJEU’s judgment.

As already mentioned, the Council did not ask COM to involve ‘the people of Western Sahara’. Instead, in a probably deliberate – and clever -- play on ambiguity, the task related to the ‘the people concerned by the agreement’. Here, ‘people’ could refer to a collective unit (like in the law of self-determination; a *collective* count noun), but it could also be a set (in mathematical terms) of individuals in their individual capacities (a *plural* count noun). It is clearly in this latter way that COM uses the word ‘people’ in the phrase ‘most people now living in Western Sahara’¹²⁹ or ‘local people’.¹³⁰ ‘Most people’ here means most individuals. Read this way, as ‘a collection of individuals’, the expression ‘the affected people’ could reasonably cover employees and owners of the tomato farms, while perhaps excluding all those Sahrawis that are not employed in cash crop farming in Western Sahara and most certainly excluding those living in the refugee camps in Tindouf.¹³¹

Given its mandate from the Council, COM could have stopped here and claim that they had involved ‘the people concerned’. Nevertheless, the authors of the report must have felt that the choice of interpretation needed to be justified. In the agreement between Morocco and Polisario on the referendum for the self-determination of the people of Sahara, the constituency was defined as the

¹²⁶ To the Advocate General, this referred to the ‘Saharans originating in the Territory’ or the ‘Saharan populations originating in the Territory’. *Western Sahara Campaign UK* (n 15), opinion of AG Whatelet, para 283.

¹²⁷ A terminological note: In most discourse on occupation, the collective of individuals living under occupation is referred to as a ‘population’. For a random example, see Article 14 of the First Additional Protocol to the Geneva Conventions. This is logical, given that the purpose of IHL is to provide protection of human beings, not to deal with their political future.

¹²⁸ The Commission’s 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, Brussels, 23.9.2013 COM(2013) 648 final 2013/0315 (NLE), p. 2. As was clear from the legal opinion of the legal service of the European Parliament in 2013, it was the ‘people’ and not the ‘population’ that was relevant. See further n 100.

¹²⁹ Consultation Report (n 2), 31.

¹³⁰ Consultation Report (n 2), 8.

¹³¹ Even tomato importers in Perpignan and tomato consumers in The Hague could credibly be called ‘affected people’, or perhaps ‘stakeholders’ under prevailing corporate governance theories.

individuals identified in a census conducted by Spain in 1974.¹³² The consultation report did not refer to this definition, however, and to do so would have been politically inopportune, for the reasons explained above. Instead, the report first claimed that it was unclear whether ‘people’ meant the ‘people living in the territory’ or ‘a specific set of inhabitants, in particular on the basis of ethnicity or community (Sahrawis)’.¹³³ Secondly, the report found that it was difficult to know who the second meaning referred to in this context -- ‘the Commission ... has no precise, reliable way of deciding who to include in the (Sahrawi) ‘people concerned’.’¹³⁴ From these observations, COM concludes:

Keeping in mind these differences and the difficulty of assessing the impact of the amendment on a people which has yet to be defined, this analysis focuses on the benefits for the population of Western Sahara...¹³⁵

What COM meant by this is clear from the list of consulted entities (or ‘interested parties’¹³⁶), namely a ‘wide range of economic and political operators from the Western Saharan population’, which includes four politicians in Moroccan institutions, ten economic operators (including the gigantic phosphate company OCP) and four human rights associations, all liensed to operate under Moroccan law.¹³⁷ Even if these entities had been representative of the Western Saharan people, or its population, it would have been difficult to learn what they actually thought; as admitted by the report; it is illegal to question the integrity of Morocco, and Freedom

¹³² See UN Doc S/21360, 18 June 1990, paras 23 et seq.

¹³³ Consultation Report (n 2), 9

¹³⁴ Consultation Report (n 2), 9.

¹³⁵ Consultation Report (n 2), 7.

¹³⁶ Explanatory Memorandum, attached to Amendment of Protocols 1 and 4 (n 2), p 5 of the memorandum.

¹³⁷ This is not the place to go through all of the details, but it may be relevant to mention the following. As admitted in the report, any ‘threat to territorial integrity’, including advocating independence as the Polisario Front does, is punishable by fine or imprisonment’. Consultation Report (n 2) p. 10. In line with this policy, only groups that have been registered by the Moroccan government were invited to take part, which immediately rules out groups that advocate independence or that claim that Western Sahara is not a part of Morocco. Only two Saharawi groups are registered by Morocco, and both of them, ASVDH and Al Ghad, have stated that they do not want to participate in a consultation process that undermines the right to self-determination.

Further, the EEAS listed a great number of ‘stakeholders’ which did not want to participate or who ‘participated’ only by protesting the procedure (including Al Ghad). The list included Polisario, which in fact refused to consult on the basis of an agreement with Morocco but offered to negotiate a new agreement. It also included 93 organisations who either refused to consult or actively opposed the agreement. See Kassoti (n 90) 315; Western Sahara Resource Watch, ‘Exclusive: Here are the Moroccan groups that the EU consulted’ 24 May 2018, <<https://wsrw.org/a105x4165>> accessed 19 February 2019; Western Sahara Resource Watch, ‘Here, the EU Commission is lying about WSRW - and 93 other groups’, 14 June 2018, <<https://wsrw.org/a105x4180>>, accessed 19 March, 2019; Western Sahara Resource Watch, ‘Unison Condemnation of the EU Commission from Western Sahara groups’, 03 February 2018, <<https://www.wsrw.org/a105x4072>> accessed 19 March, 2019; ‘EU-Morocco Trade Agreement on Western Sahara: The Commission Ignoring the EU Court, Misleading Parliament and Member States and Undermining the UN’, 2 July 2018, <www.wsrw.org>, accessed 19 March, 2019. On the consultations and ‘people’, see also Juan Soroeta Licerias, ‘Current Validity of the External Dimension of the Self-Determination of Peoples. Pending Cases of Decolonization’ (2018) 22 Spanish YB of Intl L (SYbIL) 131, 144-145.

House ranks Western Sahara as the fifth most unfree country or territory in the world.¹³⁸

Hence, by putting the established definition of people in doubt and then explaining that the people in the established sense could not practically be consulted anyway, COM substituted the more manageable concept of population for the people, whereafter it asked some government approved operators and representatives from this set of individuals whether they liked the 'benefits' of the agreement.¹³⁹

4.3 Conclusions

The outcome of the report was satisfactory to COM, which in Recital 10 of its proposal for a Council Decision on the conclusion of the agreement, stated that '[t]he majority of these operators said they were in favour of extending the tariff preferences in the Association Agreement to Western Sahara.'¹⁴⁰ So, from 'consent of the people of Western Sahara', as required by the Court of Justice, COM moved to consultations with 'operators' which 'are in favour' of tariff preferences and which display 'signs' that 'all parts of the population' will benefit 'to a greater or lesser extent' (see 4.2.3). Essentially, COM sidelined the question of treaty-making capacity, downplayed or reformulated the importance of the consent or wishes of the people, and addressed not *the* people, but people and populations in Western Sahara about what they thought of the issue as defined by COM.

5 The result: successful strategic isolation, well received

The Legal Service of the European Parliament, which compared the outcome with the CJEU's requirement (perspective 1), was sceptical of the conclusions of the report:

25. ... It cannot be established with certainty whether the Union institutions are able in practice to secure the consent of the people of Western Sahara in order to meet the condition spelled out in the Court's judgment of 21 December 2016. ...

26. If, therefore, the Commission seems to have taken any steps that were available to obtain a consent and could find that 'most of those interviewed by the [Commission and the EEAS] were in favour of extending the tariff preferences' ... it seems difficult to confirm with a

¹³⁸ Freedom House, Freedom in the World: Western Sahara, <<https://freedomhouse.org/report/freedom-world/2019/western-sahara>>, accessed 19 March, 2019.

¹³⁹ Hence, this was essentially the same operation as in 2013, but this time explained. Cf text around n 128.

¹⁴⁰ Amendment of Protocols 1 and 4 (n 2) The next sentence reads: 'Those who rejected the idea did not identify any tangible negative consequences for the local population, but felt it essential that the Agreement should affirm Morocco's position on Western Sahara.' The word 'not' was clearly missing, but I find it highly unlikely that COM explicitly wanted to say that the agreement *should* affirm Morocco's position. A sarcastic person – which I am not -- might have called the omission a Freudian slip. The final version, from 6 February 2019, after the approval by the European Parliament, said: 'Those who rejected the idea felt essentially that such an Agreement should affirm Morocco's position on Western Sahara.' This expression is at least equally curious. It is likely that the 'should' was supposed to have been 'would'. The French version is much clearer: 'Ceux qui ont rejeté l'extension estimaient essentiellement qu'un tel accord entérinerait la position du Maroc sur le territoire du Sahara occidental.' What to make of that, I will not even try to suggest.

high degree of certainty whether these steps meet the Court's requirement of a consent by the people of Western Sahara, also taking into consideration that the conclusion of a positive consent is reached in spite of the negative opinion expressed by the Polisario Front.

Nevertheless, most members of the Council as well as the European Parliament chose to accept the conclusions. The reactions of some of the member states previously negative to these agreements are significant. In 2006, Sweden voted against the adoption of the Fisheries Partnership Agreement and Finland abstained. When the FPA was to be extended in 2013, Denmark and Sweden voted against, the Netherlands, Finland and the United Kingdom abstained and Germany, Ireland and Austria expressed reservations. All of these countries made statements.¹⁴¹ The Netherlands said this:

Morocco, as the administering power of the Western Sahara, may not disregard the interests and wishes of the people of the Western Sahara, when applying the protocol to such maritime areas.

Finland, which had the clearest position alongside Sweden, said:

In accordance with the principles of international law, including the right to self-determination, permanent sovereignty over natural resources and the protection of human rights and fundamental freedoms, Finland emphasizes the need to take into account the interests and opinion of the people in Western Sahara.

At the time of the passing of the amendments to the trade liberalisation agreement in 2018, three years after the refugee crisis, Morocco's geopolitical position had improved. Only Sweden voted against. Denmark, Finland, Germany, Ireland issued the following statement.

... Denmark, Finland, Germany and Ireland underline the importance of complying with EU law, of which international law may be considered an integral part when entering into bilateral agreements. We have taken careful note of [a Contribution by the Council Legal Service]. Denmark, Finland, Germany and Ireland have consistently emphasized that an agreement has to be consistent with the judgment of the Court of Justice handed down on 21 December 2016. ... *We take the content and form of the Contribution as evidence that the Council Legal Service considers that entering into the presented agreement is fully consistent with the judgment of the Court of Justice handed down on 21 December 2016 in Case C-104/16 P and does not prejudice the status of Western Sahara.*

¹⁴¹ See COREPER (part 1), Proposal for a Council Decision on the signing, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement in force between the two Parties, Brussels, 14 November 2013, 15723/13 ADD 1.

On the basis of the above, Denmark, Finland, Germany and Ireland support the adoption of the Council decision on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement. (my emph)

This was a very convoluted statement, even by diplomatic standards. The only reason given for the approval is that the Council's Legal Service found that the agreement, negotiated by COM, was consistent with the judgment. It appears that the four countries were not convinced but chose to defer to the Council's legal service rather than to rely on their own legal analyses.

We can only speculate about what went on behind closed doors. However, judging from my experience of negotiations of this nature, my guess is that the four countries were still skeptical but had to find a fig leaf in order to square their often-principled position on matters of international law with the political exigencies of the time. COM's consultation exercise and rhetorical moves might have been just enough to enable the Council legal service (in a secret document) to conclude that the legal requirements were fulfilled in a way which these four states could accept (though probably just barely).

Hence, I submit that a number of states were not convinced about the legal soundness of COMs (and the Council legal service's) arguments, but that geopolitics put the bar very low. Nevertheless, I think that there was a bar. At least those countries that had earlier expressed reservations or even opposition, would not have been willing to accept the deal had COM not conducted its consultations, even if flawed.

Out of the five main ways of framing the situation, COM would surely have preferred to remain in frame 5, which would have allowed the EU to not bother about the relation between Morocco and the Sahrawi. However, after the proceedings in the CJEU, that was no longer possible. The priority then became to avoid frames 3 and 4. The law of force might have asked whether Morocco had any valid ground at all for controlling Western Sahara or its exports, while the law of occupation – which might have empowered Morocco to some extent -- would have been very difficult politically. The CJEU judgments, though not easy to deal with, nevertheless provided a welcome indication that the annexation and occupation framework was not the right way to talk about the situation. Hence, COM could brush off the arguments that Morocco was an aggressor and illegal occupier of Western Sahara as irrelevant issues of 'general policy'. Further, the Court's phrase 'consent of the people of Western Sahara' provided an entry point, which allowed the Commission to move into the already familiar territory of NSGTs and create an argument which was not very convincing to many but which served the purpose of being a justification for the politically necessary decision at hand. While the separate status of an NSGT was the main reason for the Court's conclusion (frame 1), COM could use the regime of NSGT to bring in the law relating to the use of natural

resources, as laid out by the UN legal counsel in 2002 (frame 2), and thus avail itself of the established concepts of NSGT and administering power. This provided an opportunity to seize upon the concept of benefit, and to use the potential ambiguity of the word people. Consequently, this frame, which was invoked by Corell and others in order to *limit* Morocco's powers, and was indeed so perceived until 2018, was instead used by COM to *enhance* those powers.

Instead of systemic integration, COM opted for strategic isolation of (its particular reading of) frame 2, and member states and parliamentarians chose to go along. Hence, the strategy was successful: COM avoided frames 3 and 4, used frame 1 as an entry point to frame 2, transformed the dangerous definition of 'people' in both frames 1 and 2 and transformed the rules in the second regime to something which could – with rhetorical skills and a significant measure of good will -- be made to fit the facts.

The practice of international law is not a science but an art; still, while it is indeterminate, it is not unpredictable and not without standards. Certain lines of arguments are more acceptable in the profession than others, and to ignore accepted arguments without addressing them is generally seen as unprofessional. Judged by these criteria, COM's report and its argumentation in general seems to be utterly substandard. However, to say that misses the point of what they were supposed to do. The legal service – a highly qualified group of people, from what I know -- had clearly not been tasked by its masters to provide 'the better legal view', but to pursue a strategic argument for a predetermined political purpose. And in that, they clearly succeeded: it was a job well done, according to *that* remit and *those* standards.¹⁴²

¹⁴² A legal advisor to an international organisation or a state is a civil servant, tasked to do what the political masters require. (Morocco's most consistent supporter in the EU, as in the Security Council, is France.) It is an almost inevitable feature of the job to sometimes have to do things that are morally dubious, and one does it because the general service that one provides to the rule-based order or some other goal is deemed worth it. But a red line there is, somewhere, which can probably only be drawn in sand.