SELF-DETERMINATION, OCCUPATION AND THE AUTHORITY TO EXPLOIT NATURAL RESOURCES: TRAJECTORIES FROM FOUR EUROPEAN JUDGMENTS ON WESTERN SAHARA

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In two recent cases before the Court of Justice of the European Union (CJEU), the General Court (at first instance), the High Court of Justice of England and Wales and the Grand Chamber of the CJEU found that a trade agreement and a fisheries agreement between Morocco and the European Union cannot be applied to occupied Western Sahara without the consent of its people. In spite of the fact that it is the general view that Western Sahara is under belligerent occupation, none of the three courts invoked the law of occupation but based themselves instead on the principle of self-determination and the law governing the administration of non-self-governing territories, including the principle of permanent sovereignty over natural resources. A possible implication of these judgments is that that law and the law of occupation are converging in certain respects, in particular as regards long-term occupation. This pertains not only to the substantive rules on the exercise of authority, which seem to require that the people are heard, but also to the basis for the establishment of that authority, namely bare control.

Keywords: occupation, self-determination, non-self-governing territories, Western Sahara

1. INTRODUCTION

What rules apply to the use of natural resources in non-self-governing and in occupied territories, respectively, and is there really a difference between these regimes? These questions were the subject of two recent cases before the Court of Justice of the European Union (CJEU), which was confronted with the issue of the status of Western Sahara, the powers of Morocco over the territory (if any), and whether third parties (including the EU) could enter into contracts with Morocco that apply to that territory. The cases concerned a web of bilateral agreements between the EU and Morocco (see below, Section 2.3), none of which specifies that Western Sahara is covered, although they had been applied as if it was.

In the first case, Frente Polisario (the liberation front for the people of Western Sahara) asked the Court to annul a liberalisation agreement on trade between the EU and Morocco in so far as it

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covered occupied Western Sahara. Partly echoing a legal opinion by former Legal Counsel of the United Nations, Hans Corell, the General Court of the CJEU (at first instance) annulled the agreement because the EU had not ascertained that ‘the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights’. In the second case, the High Court of Justice of England and Wales made a reference for a preliminary ruling to the CJEU. The High Court asked, inter alia, whether a Fisheries Partnership Agreement between the EU and Morocco is ‘valid, having regard to … the extent to which the … Agreement was concluded for the benefit of the Saharawi people [of Western Sahara], on their behalf, in accordance with their wishes and/or in consultation with their recognised representatives’.

The Court of Justice (the second and final instance) overturned the 2015 judgment of the General Court in the first case and rejected Polisario’s application on the ground that the agreements did not cover Western Sahara. In the second judgment, in 2018, it ruled, on the same grounds, that the challenged fisheries agreement is not invalid. The Court found that Western Sahara is a non-self-governing territory, which is not covered by Moroccan sovereignty and therefore does not fall within the treaties’ designation ‘Morocco’. Although the judgments explicitly dealt with obligations of third parties, such as the EU, I will focus here on what they say about the obligations of administering and occupying states.

The law of belligerent occupation was born during the second half of the nineteenth century as a way to manage affairs between civilised nations in a *jus publicum europeum* where military victory was becoming discredited as a sufficient justification for rule. The purpose of this regulation was to distinguish between occupation, as a temporary status, and conquest. The original recognised stakeholders of the law of occupation – as it came to be codified in the Hague

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1 Case T-512/12 *Council of the European Union v Front Populaire pour la liberation de la saguia-el hamra et du rio de oro (Front Polisario)* Judgment, 10 December 2015, ECLI:EU:T:2015:953, [228].
2 *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) (Western Sahara)*. The reference mechanism enables national courts to question the Court of Justice on the interpretation or validity of EU law.
3 As will be explained, both judgments were in fact favourable for Polisario, since they confirmed that Western Sahara is not a part of Morocco and that Morocco cannot contract freely on behalf of Western Sahara.
4 Case C-104/16 P *Council of the European Union v Front Populaire pour la liberation de la saguia-el hamra et du rio de oro (Front Polisario)*, Judgment, 21 December 2016, ECLI:EU:C:2016:973 (Polisario 2016); Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty’s Revenue and Customs, and Secretary of State for Environment, Food and Rural Affairs*, Judgment, 27 February 2018, ECLI:EU:C:2018:118 (Polisario 2018).
6 Arai-Takahashi, ibid 56 and *passim*; see also Benvenisti, ibid 21ff.
Regulations annexed to the Fourth Hague Convention of 1907—were the occupying power and the sovereign. Over time—and, in particular, after the adoption of the Fourth Geneva Convention in 1949—the interests of the inhabitants of the occupied territory came to be acknowledged. However, it is important to note that those interests are the individual (though often parallel) interests of those inhabitants, not their collective, political interests. Since the creation of the United Nations (UN), the principle of self-determination has developed into a legal norm, challenging the title and right of colonial powers to their overseas acquisitions, often acquired through peaceful occupation of \textit{terra nullius}. According to some commentators, this principle has also come to suggest that the collective will of the occupied population should be given increasing importance (see below).

These questions on occupation and self-determination lead to another, more basic, question: what is the factual basis for the authority to rule over people and economic resources? If the traditional law of occupation suggested that it was the fact of effective control, invocations of the law of self-determination suggest that legitimate authority is based on another fact: the will of the people.

I will first present the Western Sahara issue from an international law perspective. Since the purpose of this article is not to analyse that situation per se, I will give only as much of a background as is necessary to understand the cases. Thereafter, I will present the two cases. Lastly, I will offer my reflections on what they might say about international law. The judgments by the CJEU, in particular that from 2018, are significant also from an EU law perspective, but that is not the focus of this article.

2. \textsc{International Law and Western Sahara}

2.1. \textsc{Western Sahara}

In 1963 the Spanish colony of Western Sahara was listed as a non-self-governing territory (NSGT) by the UN. Three years later, the General Assembly urged Spain to organise a referendum on the territory’s right to exercise its right to self-determination, to which Spain agreed in 1974, but never carried out. The UN General Assembly, in the same year, asked the International

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\textsuperscript{7} Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) \textit{Martens Nouveau Recueil} (ser 3) 461 (Hague IV).

\textsuperscript{8} Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV).

\textsuperscript{9} There are several good recounts of this history. A recent, and very thorough example, is Ben Saul, ‘The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of \textit{Natural Resources}’ (2015) 27 \textit{Global Change, Peace and Security} 301, which can serve as a default reference for this brief history: see, in particular, 305–07; see also Stephen Zunes, ‘Western Sahara, Resources, and International Accountability’ (2015) 27 \textit{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 \textit{Global Change, Peace \& Security} 263. Smith is a prolific writer on the Western Sahara issue. The cited issue of \textit{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), \textit{Statehood and Self-Determination} (Cambridge University Press 2013) 250.

\textsuperscript{10} UNGA Res 2229 (XXI), Question of Ifni and Spanish Sahara (20 December 1966).
Court of Justice (ICJ) for an advisory opinion on the pre-colonial status of Western Sahara. The resolution had been supported by Morocco, which had hoped to find a basis for its claim to sovereignty. However, 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’. Hence, by implication, the Sahrawis had the right to form an independent state, if they so wished.

Shortly thereafter, on 6 November 1975, King Hassan II of Morocco ordered the ‘Green March’ of civilians into Western Sahara, accompanied by military action. On the same day, the UN Security Council, in Resolution 380, called upon Morocco ‘immediately to withdraw … all the participants in the march’. On 14 November, under military pressure, Spain agreed to cede administration of the territory to Morocco and Mauritania (which renounced its claims in 1979). On 26 February 1976, Spain notified the UN Secretary-General that it was withdrawing and that it considered itself free from any responsibility for the territory. Morocco annexed Western Sahara in two steps in 1976 and 1979. Armed conflict ensued between Morocco and the Sahrawi 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 Western Sahara.

In 1991, following 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. Mainly because of a 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’.

No state has recognised Moroccan sovereignty over Western Sahara, but non-recognition has been less consistent than in some other comparable conflicts, like the Middle East or Crimea.

11 UNGA Res 3292 (XXIX), Question of Spanish Sahara (13 December 1974).
14 UNGA Res 34/37 (21 November 1979), Question of Western Sahara, UN Doc A/RES/34/37.
17 Zunes (n 9) 297.
Sahara is a member of the African Union. A very large part of the Sahrawi population fled to refugee camps in Algeria, while Moroccan settlers have moved in, investors have been allocated land, concessions have been granted and new infrastructure has been built for the needs of the newcomers and their exploitation of phosphates, fish and other natural resources.20

2.2. INTERNATIONAL LAW: OCCUPATION, ANNEXATION, NON-SELF-GOVERNING TERRITORIES

As mentioned above, Western Sahara is included in the UN’s list of NSGTs.21 For such territories, the principle of self-determination and the law relating to NSGTs apply. Under modern international law, it is a violation of the principle of self-determination to keep such territories under colonial or ‘alien’ control.22 Common Article 1 of the two 1966 UN human rights covenants23 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’. The Friendly Relations Declaration reiterates this 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’.24 Hence, such a territory is not a part of the state that administers it.25

A colonial power is generally referred to as the ‘administering power’, and such a power has the responsibility to assist the people in the colony to reach full self-determination, which usually means independence.26 It is slightly controversial whether Spain is still the de jure administering power over Western Sahara (although I think it is),27 but for the purpose of this discussion it is not necessary to determine that issue. What is relevant here is that Morocco has not claimed to have taken over that role, and it has not been recognised by anyone to have done so.

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20 See further, Karen Arts and Pedro Leite (eds), *International Law and the Question of Western Sahara* (International Platform of Jurists for East Timor 2007).
21 For the latest annual report see Report of the 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 (11 July 2017), UN Doc A/72/23.
24 UNGA Res 2625 (XXV) (n 22).
26 The UN Charter also mentions self-government as an option, but in practice the goal has generally been independence: Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI, art 76.
27 The UN list of non-self-governing territories 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 henceforth 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 and Decolonization: Non-Self-Governing Territories’, http://www.un.org/en/decolonization/nonselfgovterritories.shtml. It is highly doubtful that Spain could avoid responsibility in this way.
It is clear that Western Sahara was occupied in 1975 against the will of the administering power, Spain, and certainly against the will of the people concerned. 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. The Friendly Relations Declaration states that ‘the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force’ and ‘no territorial acquisition resulting from the threat or use of force shall be recognized as legal’. An illegally annexed territory is, for the purpose of international law, still occupied. The status of Western Sahara is therefore that of occupied territory, as concluded by the UN General Assembly, which in 1979 and 1980 urged Morocco to terminate the occupation. It is therefore logical that the prevailing view among international lawyers is that Western Sahara is not a part of Morocco and that the annexation was without effect, and most also find the territory to be occupied.

International humanitarian law (IHL) limits the authority of an occupying power and balances between the interests of the occupying power, the ousted sovereign and the civilian population. Occupation is supposed to be a temporary affair. Article 43 of the Hague Regulations 1907 provides that ‘the occupant … shall … unless absolutely prevented, [respect] the laws in force in the country’. This conservationist preference was modified a little in 1949 through Article 64(3) of the Fourth Geneva Convention. Hence, an occupying power should, as a 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.

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28 Saul (n 9) 315–16.
29 Zunes (n 9) 288.
30 Saul (n 9) 309–15. 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 under art 1(4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (entered into force 7 December 1978) 1125 UNTS 3. Morocco became a party to the Protocol in 2011 and Polisario filed a declaration under art 96(3) Additional Protocol I in 2015, bringing the Conventions and the Protocol into immediate effect: Saul (n 9) 304. However, I strongly doubt that that can have a retroactive effect in so far as the initiation of a state of occupation is concerned. It is not necessary to settle that issue here, since the status of Western Sahara as an occupied territory is clear in my mind.
31 UNGA Res 2625 (XXV) (n 22).
32 See GC IV (n 8) art 47.
33 UNGA Res 34/37 (n 14), and UNGA Res 35/19 (11 November 1980), Question of Western Sahara, UN Doc A/RES/35/19.
34 Neither the fact that Spain stopped resisting the armed activities of Morocco nor the fact that the territory is claimed by no state other than Morocco prevents that conclusion: see Polisario 2018 (n 4) Opinion of the Advocate General, 10 January 2018, ECLI:EU:C:2018:1, 67, and the magnificent footnote 223 (Advocate General 2018).
35 Additional Protocol I (n 30) does not contain an end date but the application of some of the provisions of GC IV ends after one year according to GC IV (n 8) art 6.
36 Hague IV (n 7). The Convention was drafted in French, which is its only official language. The most common English translation uses the expression ‘public order and safety’, which is a rather poor translation of ‘l’ordre et la vie publics’. I subscribe to the expression ‘public order and civil life’, which is the expression used by Benvenisti (n 5).
and human rights (see below).\textsuperscript{37} For all types of status – occupation, annexation, non-self-governing – human rights apply (as always),\textsuperscript{38} even though the precise relationship between human rights law and the law of occupation is not settled.\textsuperscript{39}

A particularly debated question for both non-self-governing and occupied territories is the use of natural resources. Under the law of self-determination, a people has a right to permanent sovereignty over its natural resources and the right to ‘freely dispose of their natural wealth and resources’, as provided in Article 1(2) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The rules governing the administration of non-self-governing territories, including Article 73 of the UN Charter, point in the same direction. This was developed in 2002 in a legal opinion by the then UN Legal Counsel, Hans Corell.\textsuperscript{40} The opinion, which will be discussed below, concluded, with regard to oil exploration in the waters outside Western Sahara, that if ‘activities were to proceed in disregard of the interests and wishes of the people of the occupied territory, they would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing Territories’.\textsuperscript{41}

Under the law of occupation, an occupying power cannot use natural resources arbitrarily for its own purposes.\textsuperscript{42} Nevertheless, it has the limited right of usufruct to such resources under

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\item \textsuperscript{37} The debate on so-called transformative occupation, prompted by the US-led coalition’s occupation of Iraq, has been intense, but will not be visited here. Suffice it to say that there is overwhelming scholarly support for the position that the old rules remain.
\item \textsuperscript{38} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion [2004] ICJ Rep 136 (Wall), [106].
\item \textsuperscript{39} In the authoritative – but not unchallenged – view of the ICJ, IHL is \textit{lex specialis}, meaning that IHL trumps human rights in cases of conflict: \textit{Legality of the Threat or Use of Nuclear Weapons}, Advisory Opinion [1996] ICJ Rep 226, [25]–[26]. See also Yoram Dinstein, \textit{The International Law of Belligerent Occupation} (Cambridge University Press 2009) 85–86. However, it is also possible to see them as complementary: Yutaka Arai-Takahashi, \textit{The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law} (Martinus Nijhoff 2009) 419–22. Some states – like the US and Israel – do not agree that human rights apply outside a state’s territory: see generally, Arai-Takahashi, ibid 551–82. While the scope of application varies between different conventions, the established majority view – including that of the ICJ – is that human rights in principle do apply globally: \textit{Wall} (n 38) [108]–[113]. This is also the view adopted by the European Court of Human Rights: ECtHR, \textit{Al-Skeini v United Kingdom}, App no 55721/07, 7 July 2011. For my own view, see Pål Wrangle, ‘Intervention in National and Private Cyber Space and International Law’, in Jonas Ebbesson and others (eds), \textit{International Law and Changing Perceptions of Security: Liber Amicorum Said Mahmoudi} (Brill-Nijhoff 2014) 307, 324–25.
\item \textsuperscript{40} Hans Corell, Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council (29 January 2002), UN Doc S/2002/161.
\item \textsuperscript{41} Emphasis added. It should also be noted that since 1995 the General Assembly has affirmed ‘the value of foreign economic investment undertaken in collaboration with the peoples of Non-Self-Governing Territories and in accordance with their wishes in order to make a valid contribution to the socio-economic development of the Territories’: UNGA Res 50/33 (6 December 1995), Activities of Foreign Economic and Other Interests which Impede the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Territories under Colonial Domination, UN Doc A/RES/50/33, para 2. That resolution has been renewed annually.
\item \textsuperscript{42} As Crawford says, ‘[i]t is … generally accepted that the occupier may not use the resources of the occupied territory for its own domestic purposes, but rather must use them “to the extent necessary for the current administration of the territory and to meet the essential needs of the population”’: James Crawford, ‘Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories’, 24 January 2012, 25,
Article 55 of the Hague Regulations.\textsuperscript{43} Further, as mentioned, an occupying power has a responsibility to uphold public order and civil life and to care for the civilian population.\textsuperscript{44} This means that an occupying power must provide basic public goods to the population of the occupied territory, which means that there must be income to pay for these goods. Consequently, the occupying power may use the resources of the occupied territory, but only if that benefits the people of that territory or covers other legitimate costs of the occupation.\textsuperscript{45}

Hence, as will be discussed further below, there are similarities between the law relating to NSGTs and the law of occupation, in that the force in power cannot use natural resources for its own good; it must consider the interests of the people under its command, and possibly also their wishes.

The applicable primary rules therefore do not seem to be employed here. However, since the four judgments concern the acts of a third party (the EU), its role must be considered briefly to set the background to the cases. In a situation of illegality, third states have a number of duties.\textsuperscript{46} They shall not recognise an illegal annexation and shall not assist in the continued occupation and annexation, and they should cooperate to bring an end to the illegal situation.\textsuperscript{47} It is therefore illegal to enter into an agreement with an occupying power if that agreement explicitly or implicitly recognises the annexation of the occupied territory or if it otherwise assists in upholding an illegal situation.\textsuperscript{48} Nevertheless, it is not a given that non-recognition should affect all decisions

\textsuperscript{43} Dinstein (n 39) 213–18; see also the extensive discussion in Guy Harpaz and others, ‘Expert Legal Opinion: HCJ 2164/09 Yesh Din – Volunteers for Human Rights v Commander of IDF Forces in West Bank et al (December 26, 2011)’, January 2012, 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 questionable 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.

\textsuperscript{44} Hague IV (n 7) art 43, as well as a number of provisions in GC IV (n 8) indicate positive obligations for the occupying power, such as arts 50, 55 and 56.

\textsuperscript{45} See also Dinstein (n 39) 210.

\textsuperscript{46} See ICJ Wall (n 38) [159]. Although I believe that the opinion was right (in addition to being authoritative), it should be mentioned that it has been criticised. See also International Law Commission, Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res 56/83 (12 December 2001), UN Doc A/RES/56/83 (Draft Articles on State Responsibility), art 41.


\textsuperscript{48} Talmon appears to be even more categorical: Talmon, ibid 119. See also Tristan Ferraro, ‘Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory’, International Committee of the Red Cross, Expert Meeting Report, 11 June 2012, 59.
made by the relevant illegal authorities. In its seminal advisory opinion on Namibia, the ICJ stated that ‘the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation’.49

2.3. EU-MOROCCO RELATIONS

The EU and Morocco have very close ties, which are based on an Association Agreement, in force since 2000. In 2008 Morocco became the first country in the southern Mediterranean region to be granted so-called ‘advanced status’, marking a new phase of ‘privileged relations’.50 In addition to the Association Agreement and a 2012 agreement on the liberalisation of trade in agriculture and fisheries products (the liberalisation agreement), there is also a Fisheries Partnership Agreement (FPA). The FPA entered into force in 2007, but the implementing protocol to the FPA expired in February 2011. A new Protocol was negotiated and adopted by a divided EU Council of ministers in 2011,51 but was rejected by the European Parliament, partly as a result of the controversy over the alleged reach of the agreement into Western Sahara. The European Commission then renegotiated the Protocol, which was adopted by the Council and Parliament in 2013.

Unfortunately, the relevant changes to the Protocol compared with the 2011 version were cosmetic, at best, and did not cure the problem related to the effect on Western Sahara (see below).52 While the FPA does not say so explicitly, it was intended to cover, and has indeed been applied to, the waters outside Western Sahara, which provide the major part of the total fisheries allocated to the EU.53 The same seems to apply, at least to some extent, to the other economic agreements

49 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]. The ICJ went on to say: ‘In particular, while official acts performed by the Government of South Africa … after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory’. Cases in American and British courts suggest likewise, so as not to complicate the life of the current population, as has case law in the European Court of Human Rights: see ECtHR, Cyprus v Turkey, App no 25781/94, 10 May 2001, paras 82–102. See further Enrico Milano, ‘The Doctrine(s) of Non-Recognition: Theoretical Underpinnings and Policy Implications in Dealing with De Facto Regimes’, European Society of International Law, 2nd ESIL Research Forum Conference Paper, 28–29 September 2007; Ralph Wilde, Andrew Cannon and Elizabeth Wilmshurst, ‘Recognition of States: The Consequences of Recognition or Non-Recognition in UK and International Law’, Chatham House, Summary of the International Law Discussion Group Meeting, 4 February 2010; Stefan Talmon, ‘The Cyprus Question before the European Court of Justice’ (2001) 12 European Journal of International Law 727. GC IV (n 8) art 47 sets out the important principle that ‘[p]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced … by any annexation’.


51 The UK, Austria, Sweden, Finland, Denmark, Cyprus and the Netherlands voted against or abstained.


53 See ‘Legal Opinion: Re Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Declaration by the Sharawi Arab Democratic Republic (SADR) of 21 January 2009 of Jurisdiction
between the EU and Morocco. Furthermore, there is no indication that the agreements are for the
benefit of the people of Western Sahara or in accordance with their wishes, as will be discussed
below. None of these documents mentions that Western Sahara is being occupied and illegally
annexed. In fact, as stated above, the territory is not mentioned explicitly at all.

3. THE CASES

As indicated, the ever closer relations between the EU and Morocco are highly dubious in so far
as they relate to Western Sahara. In this section I will discuss how the four judgments in the two
cases deal with international law questions relating to the use of natural resources. I will first pre-
sent the Polisario and the Western Sahara Campaign cases, as they were dealt with by the
General Court (the first instance of the CJEU) and the High Court of England and Wales, respect-
ively, and then present their treatment at second instance, the Court of Justice. I will not summar-
ise the views of the Advocate General (the legal adviser to the Court), but his views will be
referred to later. Before that, however, it is necessary to discuss a legal opinion that played a
great role in the proceedings.

3.1. AN OPINION BY THE UN LEGAL COUNSEL

As mentioned earlier, in 2002 the Legal Counsel to the United Nations at the time, Hans Corell,
provided an opinion at the request of the Security Council on the legality – in the context of inter-
national law, including relevant resolutions of the Security Council and the General Assembly of
the United Nations, and agreements concerning Western Sahara – of actions allegedly taken by
the Moroccan authorities consisting of the offering and signing of contracts with foreign compa-

nies for the exploration of mineral resources in Western Sahara. Corell found that a response to
the question required an analysis of both the status of Western Sahara in itself and the status of
Morocco’s relationship with that territory. The opinion did not use words like ‘occupation’, but
nevertheless noted that Spain had not, and could not, transfer sovereignty to Morocco, and that

Over an Exclusive Economic Zone of 200 Nautical Miles off the Western Sahara – Catches Taken by EU-flagged
See Wrange and Helaoui (n 19).

23 June 2014, 198, it is stated, euphemistically, that ‘Western Sahara is a territory contested by Morocco and the
Polisario Front’ (emphasis added). That expression, however, had disappeared in the 2015 report: Council of the
Regional Issues’, 20 September 2016, 59. By some contrast, the United States has made it clear, regarding its bilat-
eral free trade agreement, that the designation ‘Morocco’ does not include Western Sahara: Letter of 20 July 2004
from the US Trade Representative, Robert Zoellick, to Congressman Pitt. The letter is no longer available on the
website of the US House of Representatives but can be retrieved at: https://web.archive.org/web/20070906234744/

Corell (n 40) para 1.
Morocco was not listed as an administering power. This might suggest that Morocco has no title to administer the territory and is a mere occupant. However, Corell concluded:

Notwithstanding the foregoing, and 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 that is ‘for the benefit of the peoples of those territories, on their behalf, or in consultation with their representatives’ is in line with the relevant obligations and the principle of permanent sovereignty over natural resources. Hence, any exploration must be in line with ‘the interests and wishes of the people of Western Sahara’. This opinion has been referred to frequently by parties, on both sides of the argument, regarding all forms of economic relations with Morocco over Western Sahara. Corell himself has interpreted this requirement to apply also to fishing and to be taken as a restriction rather than as a licence. I will refer to this opinion both in the reviews of the proceedings and in the succeeding discussion.

3.2. THE POLISARIO CASE IN THE GENERAL COURT

In December 2012, Polisario asked the CJEU to annul the EU Council’s decision of the same year to adopt the liberalisation agreement on trade in agricultural and fishery products in so far as it covered Western Sahara.

As a preliminary matter, the CJEU had to deal with the question of whether Polisario had standing. Here the General Court held that ‘the applicant is one of the parties to a dispute concerning the fate of that non-self-governing territory’ and, as such, ‘may be directly and individually concerned by the contested act’. Hence, the standing of Polisario hinged on whether or not the agreement does apply to Western Sahara. Polisario held that Morocco ‘does not

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57 ibid para 6.
58 ibid para 8.
59 ibid paras 24, 25. A terminological note: In most discourse on occupation, the collective of individuals living under occupation is referred to as a ‘population’. In some situations, where there is a considerable number of colonial settlers from the occupying power, it is necessary to make a distinction between the people and the population; see further n 109.
61 Polisario (n 1). See also n 3.
62 Before that, the Court found that Polisario must be regarded as a ‘legal person’ within the meaning of relevant EU law and therefore had such capacity: ibid [60].
63 ibid [57].
64 ibid [73].
65 ibid [72].
administer Western Sahara under Article 73 of the United Nations Charter, but occupies it militarily’. The Court did not settle the question of whether Western Sahara was occupied. However, it did find that the agreement applied also to Western Sahara, the framework association agreement had in fact been applied to that territory, and there was no explicit exception clause. Consequently, there was ‘no doubt as to the admissibility of [Polisario’s] action’, since it was affected by the agreement. As we will see (in 4.4 below), the second instance court drew a different conclusion in that respect.

Moving on to the substance, the General Court found that the application essentially concerned two questions. First, is it categorically prohibited for the EU to conclude an international agreement ‘which may be applied to a territory in fact controlled by a non-member State’, even though the sovereignty of that state over that territory has not been recognised by the EU and its member states? Second, if there is no such categorical prohibition, and the EU institutions therefore have discretion in that regard, have they respected ‘the limits of that discretion and the conditions for its exercise’?

The Court found that the application of the agreement to Western Sahara does not amount to recognition of sovereignty over that territory, and that it is not absolutely prohibited to conclude agreements that relate to such territories. Consequently, the sticking point was how the Council had exercised its discretion. The Court related – without questioning – the aforementioned finding by Corell that ‘resource exploitation activities [must be] conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf or in consultation with their representatives’. It then noted that Morocco has no mandate from the UN or any other international body to administer the territory, and its failure to comply with the reporting obligation under Article 73(e) of the UN Charter ‘is, at the very least, likely to give rise to doubt as to whether [it] recognises the principle of the primacy of the interests of the inhabitants of that territory and the obligation to promote to the utmost their wellbeing’. Further, the Court noted that it is clear that Morocco considers ‘Western Sahara to be part of its territory’.

Accordingly, if it were the case that the Kingdom of Morocco was exploiting the resources of Western Sahara to the detriment of its inhabitants, that exploitation could be indirectly encouraged by the conclusion of the agreement approved by the contested decision.
Hence, while it was not clear whether the Court held that Morocco was an administering power, it clearly found that Morocco had to comply with the obligations incumbent upon such a power, and that it had not done so. Therefore, in the exercise of its discretion:

[the Council] should have satisfied itself that there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights.

Since the Council had failed in that respect, the Court annulled the decision ‘in so far as it approves the application of that agreement to Western Sahara’.78

The Council appealed against the judgment; this appeal was supported by the Commission (as intervener) and a number of states (see Section 3.4).

3.3. THE WESTERN SAHARA CAMPAIGN CASE IN THE BRITISH HIGH COURT

In the British case,79 the claimants, Western Sahara Campaign UK, contended that the defendant – the Secretary of State for Environment, Food and Rural Affairs – was acting unlawfully by applying the Fisheries Partnership Agreement to Western Sahara.80 The judge, Justice Blake, found that it was clear that fishing, licensed under the agreement, had taken place ‘within the territorial waters of the Western Sahara’.81 Thus, in order to determine whether the UK authorities in question had acted unlawfully, it was necessary first to determine what the agreements actually meant. Since they had been concluded by the EU, Justice Blake needed to obtain a preliminary ruling from the CJEU about the agreements and submitted, inter alia, the following question to the CJEU:

Is the Fisheries Partnership Agreement between the EU and the Kingdom of Morocco82 … valid, [having regard to the requirement under Article 3(5) of the Treaty on European Union to contribute

77 ibid [241].
78 ibid [247].
79 Western Sahara (n 2).
80 The UK proceedings also involved a claim against the Commissioners for Her Majesty’s Revenue and Customs regarding the application of the liberalisation agreement. The original reference from 2016 also covered that agreement, but those questions were withdrawn as they had been answered in the Polisario judgment in 2016. In order to simplify the already complex review, I decided to omit any references to that part of the case. Further, there was a fourth question concerning the standing of Polisario, which is less relevant for the current discussion.
81 Western Sahara (n 2) [28]–[29].
to the observance of any relevant principle of international law and respect for the principles of the United Nations Charter …?

Justice Blake found that Morocco’s presence constitutes ‘belligerent occupation’. He noted that the UN recognises ‘that Morocco de facto administers the territory but neither the UN, the OAU [Organization of African Unity], the Member States of the EU, nor the Union itself recognise that Morocco has a de jure claim to sovereignty or rights of occupation’. Justice Blake then reviewed Morocco’s claim to the territory and dismissed all possible bases: ‘A colonial power cannot gift an occupied territory to a neighbouring state … Equally, unauthorised military occupation cannot found the basis for legitimate territorial claims’. He concluded that the sovereign territory of Morocco does not include Western Sahara. Before moving on in the argument, one should note – as will be discussed below in Section 4.1 – that Justice Blake did not discuss whether the law of occupation should apply; the only hint in this respect is his taking note of the fact that no ‘rights of occupation’ had been recognised. Instead, it was the law relating to NSGTs that seemed to guide the judgment.

The next step in the reasoning was Justice Blake’s query of what is ‘legitimate for a body respecting the principles of the UN Charter’. He found that ‘it would not be a manifest error’ for the Commission to hold that it could enter into an agreement for the exploitation of natural resources, in spite of the ‘continued occupation of the territory of the Western Sahara’. However, he found that some conditions would have to be fulfilled for such agreements to be made:

It may be that the benefits need to be directed specifically to the indigenous population. If this cannot be achieved as a matter of political practicality then no agreement should be entered with an administering power that:

i) does not recognise that this is its status and

ii) does not act in accordance with all the obligations imposed by Article 73 of the Charter,

iii) and in particular does not acknowledge the obligation to promote the self-determination of the people of Western Sahara.

Justice Blake then 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

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83 He here referred to the article by Dawidowicz (n 9).
84 Western Sahara (n 2) [18].
85 ibid [40].
86 ibid [40].
87 ibid [18].
88 ibid [40].
89 ibid [43].
90 ibid [47].
91 Draft Articles on State Responsibility (n 46).
serious breaches of customary international law.\textsuperscript{92} He also quoted a paper by Corell from 2008\textsuperscript{93} in which the 2002 opinion is applied to the Fisheries Partnership Agreement.\textsuperscript{94}

I find it incomprehensible that the Commission could find any such support in the legal opinion, unless, of course, it had established that the people of Western Sahara had been consulted, had accepted the agreement, and the manner in which the profits from the activity were to benefit them.

The conclusion was ‘that there is an arguable case of a manifest error by the Commission in understanding and applying international law relevant to these agreements’.\textsuperscript{95}

3.4. THE \textit{POLISARIO} CASE AND THE \textit{WESTERN SAHARA CAMPAIGN} CASE IN THE GRAND CHAMBER OF THE COURT OF JUSTICE

The Grand Chamber of the CJEU dealt with the two cases in 2016 and 2018, respectively, with essentially the same line of reasoning.\textsuperscript{96} In 2016 it dismissed Polisario’s claim, not for substantive reasons but because the claimant lacked standing: in the Court’s reading Polisario was not affected by the agreements since they did not cover Western Sahara. In 2018 it found that the FPA was not invalid as it, too, did not cover Western Sahara.

The Court based these conclusions on a line of reasoning around the rules in the Vienna Convention on the Law of Treaties,\textsuperscript{97} including Article 31 on the interpretation of treaties.\textsuperscript{98} It first set out to interpret the words ‘territory of the Kingdom of Morocco’ in Article 94 of the Association Agreement, on which the challenged liberalisation agreement was based.\textsuperscript{99} Referring to the rule in Article 29 of the Vienna Convention,\textsuperscript{100} the Court found:\textsuperscript{101}

A treaty is generally binding on a State in the ordinary meaning to be given to the term ‘territory’ … in respect of the geographical space over which that State exercises the fullness of the powers granted to sovereign entities by international law.

Having said that, the Court found that the words ‘territory of the Kingdom of Morocco’ could not be interpreted to mean that Western Sahara was included within the territorial scope of that

\begin{footnotesize}
\textsuperscript{92} Western Sahara (n 2) [49].
\textsuperscript{93} Corell (n 60) 242.
\textsuperscript{94} Western Sahara (n 2) [51]-[53].
\textsuperscript{95} ibid [55].
\textsuperscript{96} Polisario 2016 and Polisario 2018 (n 4).
\textsuperscript{97} Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT). Even if that treaty is not binding on all members of the EU (France is a famous non-party), the relevant rules express customary international law, in the view of the Court. The Court therefore uses terms like ‘the rule expressed in article X’.
\textsuperscript{98} Polisario 2016 (n 4) [81], [86], [94], [100].
\textsuperscript{99} ibid [92].
\textsuperscript{100} VCLT (n 97) art 29: ‘Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory’.
\textsuperscript{101} Polisario 2016 (n 4) [95].
\end{footnotesize}
agreement. This finding was based, inter alia, on a review of the customary principle of self-determination, which is ‘a legally enforceable right *erga omnes* and one of the essential principles of international law’. In particular, with reference to the Friendly Relations Declaration, ‘the territory of a colony or other Non-Self-Governing Territory has, under the [UN] Charter, a … separate and distinct [status]’. Hence, while the Court did not state that Western Sahara was under occupation, its finding that this territory was not a part of Morocco, but had a separate status, must mean that the Court treated the annexation as null and void.

However, the Court also 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’. In the subsequent inquiry into the ‘intentions’ of the parties the Court felt that it needed to determine the state of the law in order to ascertain what could possibly have been their intentions and, in particular, the intentions of the EU. With reference to the ICJ advisory opinion on Western Sahara and General Assembly Resolution 34/37, the Court found that the people of Western Sahara represented a third party to the agreement and, as such, they had not consented to be affected by it. By reference to Article 34 of the Vienna Convention, 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’.

The Court then discussed the fact that the system of tariff preferences in the trade agreement had been ‘applied “de facto” to products originating in Western Sahara’. However, if this subsequent practice had reflected the intention that the agreements be applicable to Western Sahara, that would mean ‘that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties’. That would ‘necessarily be incompatible with the principle that Treaty obligations must be performed in good faith’. Therefore, there could be no such intention. With a similar line of

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102 ibid [97]; *Polisario* 2018 (n 4) [64].
103 *Polisario* 2016 (n 4) [88].
104 ibid [90].
105 The Advocate General of the Court had even suggested that Spain is still the administering power: *Polisario* 2016 (n 4) Opinion of the Advocate General, 13 September 2016, ECLI:EU:C:2016:677, 22 (Advocate General 2016).
106 *Polisario* 2016 (n 4) [98].
107 UNGA Res 34/37 (n 14).
108 *Polisario* 2016 (n 4) [100], [106].
109 ibid [107]. There is an important distinction between people and population. A ‘people’ is a political unit, with a right of self-determination. It is thus distinct from a population or ‘the inhabitants of a territory’. A population is a group of people who happen to live at the same place. It may consist of a people in the legal sense, but it may also consist of colonialists and settlers. This nomenclature was of some relevance to the cases, but I have omitted that discussion.
110 *Polisario* 2016 (n 4) [118].
111 ibid [123]. The Advocate General was even more explicit: ‘It is settled case law that the Union must respect international law in the exercise of its powers … “all States are under an obligation not to recognise”’ or “render aid or assistance in maintaining the situation created by” an infringement of a *jus cogens* norm, including the right to self-determination: Advocate General 2016 (n 105) [256]–[258].
112 *Polisario* 2016 (n 4) [124].
reasoning, the Court dismissed the argument that prior or subsequent practice regarding the FPA would change the geographical scope of that agreement.\(^{113}\)

In 2018 the Court of Justice also considered the possibility that Morocco might be a ‘de facto administrative power’ or an occupying power. The Court did not bother to determine whether that would have been ‘compatible with the rules of international law’ because there could have been no such common intention, ‘since the Kingdom of Morocco has categorically denied that it is an occupying power or an administrative power’.\(^{114}\)

Hence, the Court concluded in 2016 and 2018 that none of the agreements covered Western Sahara, and therefore, none of them should be invalidated. Consequently, Polisario is a third party, not affected by the treaty, and has no standing to seek annulment of the decision. Hence, Polisario’s action was dismissed\(^{115}\) (although the reasoning in fact brought a victory to the claimants), and the question raised by the UK High Court was answered affirmatively.

To summarise, at both instances before the CJEU it was held that the presumption must be that an agreement does not apply beyond the recognised border of a state and that Western Sahara is not a part of Morocco, and the UK High Court reached a similar conclusion. Further, the three courts held that nevertheless it may be possible for two parties to conclude an agreement which covers their actions on such territory, but only under certain conditions. In this case, those conditions were not fulfilled, and therefore such an agreement could not be allowed. The General Court found that it (the agreement) had nevertheless happened (and therefore should be annulled), while the Court of Justice – perhaps tongue in cheek – asserted that since that would be unthinkable, it could not have happened. The Court of Justice did not state the precise conditions for a legally sound agreement other than that the principle of self-determination has to be satisfied,\(^{116}\) including the ‘consent of such a third party’.\(^{117}\) However, both the General Court in the first case and the UK High Court referred quite extensively to the legal opinion of 2002 by the UN Legal Counsel, as did the Advocate General in the two cases.

4. IMPLICATIONS

The outcomes of the four judicial proceedings were politically favourable for Polisario, in that they confirmed that Western Sahara is not a part of Morocco and that Morocco cannot contract freely on behalf of Western Sahara. What concerns us here, however, are the implications for the law. While it is certainly possible to argue for a position that differs from that of these legal institutions, I find it more interesting to take them at face value. By way of distinction from the de lege lata discussion in Section 2.2 above, this one is conjectural and speculative – almost a thought experiment. Could one fuse the two regimes?

\(^{113}\) Polisario 2018 (n 4) [80]–[83].
\(^{114}\) ibid [72].
\(^{115}\) Polisario 2016 (n 4) [131]–[134].
\(^{116}\) ibid [123].
\(^{117}\) ibid [106].
4.1. THE RELATION BETWEEN THE TWO REGIMES

To recount briefly the review of the law in Section 2.2, both the law relating to NSGTs and the law of occupation provide that the force in power cannot use natural resources for its own good, and must consider the interests of the people concerned and possibly also their wishes. However, the two regimes are distinct and built on different legal sources, and these sources do not state how substantive differences between the two should be dealt with in situations where both may be applied.

How did the four legal institutions (the UN Legal Counsel, the UK High Court and the two instances of the CJEU) think of the relation between the regimes? The claimants in the four proceedings explicitly assumed that Western Sahara was occupied and the High Court (as well as the Advocate General\(^\text{118}\)) clearly agreed. While neither of the two instances of the CJEU used the term ‘occupation’, they both held that Western Sahara was not a part of Morocco and, as developed above, that strongly suggests that Western Sahara is occupied. Hence, the courts could have applied the law of occupation, which has a treaty-based and fairly detailed regime, which includes highly relevant rules on the right of usufruct and a prohibition of colonial settlements, but no explicit obligation to consult the population concerned.\(^\text{119}\)

Nevertheless, neither the UN Legal Counsel nor the three courts discussed the law of occupation. The Court of Justice clearly saw no need for this, since it did not consider the treaties to be applicable to Western Sahara.\(^\text{120}\) However, the opinions of the other three legal institutions suggest some interesting conclusions about the relation between the law of occupation and the law relating to NSGTs. Since the UN Legal Counsel, the UK High Court and the General Court did not apply the law of occupation, they must have thought either that NSGT law trumps the law of occupation,\(^\text{121}\) probably as *lex specialis*, or that the two regimes say essentially the same thing.\(^\text{122}\) If any of these two applies, it is unnecessary to refer to the law of occupation.

\(^{118}\) Advocate General 2018 (n 34) [245]–[250].

\(^{119}\) See the Advocate General’s invocation of art 49 of CG IV (n 8); Advocate General 2018 (n 34) [283]. Neither the Hague Conventions nor the Geneva Conventions and their Additional Protocols mention any such obligation; nor does the ICRC list of rules under customary IHL: Jean-Marie Henckaerts, ‘Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict’ (2005) 87 International Review of the Red Cross 175, 198–212.

\(^{120}\) However, if new treaties covering Western Sahara were to be negotiated, the CJEU would have to pronounce itself on that issue. The Commission has received mandates to renegotiate all the relevant agreements.

\(^{121}\) There were certainly arguments available for that position; there are fairly well-established rules developed for the governance of the natural resources of an NSGT and, further, the courts could have held that a non-self-governing people is in such a vulnerable position that the more benign rule should apply in any event. Please note that I find that in this instance the law relating to NSGTs is more advantageous for the people of Western Sahara. For a useful discussion of the relation between the law of occupation and the law relating to NSGTs, see Eugene Kontorovich, ‘Economic Dealings with Occupied Territories’ (2015) 53 Columbia Journal of Transnational Law 584, 610–15.

\(^{122}\) It is possible that the High Court thought that the rights of an occupying force can be exercised only if it has been recognised as such or has some other sound legal basis, but if so, that opinion was just alluded to, and not developed: Western Sahara (n 2) [18].
or even to determine whether it applies.\textsuperscript{123} Therefore, it seems that these three bodies thought either that the two regimes are very similar or that the NSGT regime prevails.

Hans Corell confirmed this in a circumscribed way in 2008 when he recalled, in his private capacity, that in the deliberations before his 2002 opinion, the law of occupation was considered but that he had found the best way forward was to ‘make an analysis by analogy’ to the law applicable to NSGTs. ‘Any limitation of the powers of such an entity acting in good faith would certainly apply \textit{a fortiori} to an entity that did not qualify as an administering power but \textit{de facto} administered the territory’.\textsuperscript{124} This more than suggests at least that the law of occupation – even if applicable – could not have changed the application of NSGT rules. The Advocate General was more explicit about the relation between the two regimes, and found that they ‘are not mutually exclusive’. Further, he stated, there is a point of convergence between Article 55 of the 1907 Hague Regulations and the principle of permanent sovereignty over natural resources: ‘namely that the exploitation of the natural resources of Western Sahara … must be carried out for the benefit of the people of Western Sahara’.\textsuperscript{125} Since I find it difficult to argue that the NSGT regime in general trumps the law of occupation (which is an extraordinary regime, a \textit{lex specialis}), I will proceed from the assumption that the two regimes are similar, or at least blend easily.\textsuperscript{126}

4.2. MERGER OR MIXING OF THE TWO REGIMES?

As mentioned in Section 2.2, the law of occupation in the 1907 Hague Regulations emphasised the rights of the ousted government, while the Fourth Geneva Convention made the occupied population the primary beneficiaries.\textsuperscript{127} Further, over time it has come to be widely recognised that human rights law, too, is binding on an occupying power.\textsuperscript{128} Hence, in an occupation situation there are three recognised paradigmatic concerns: (i) the sovereign authority of the ousted government; (ii) the protection of the civilians of the territory; and (iii) the human rights of each individual. The law relating to NSGTs is not so different: the ‘well-being of the inhabitants’ is

\textsuperscript{123} While the High Court explicitly stated that Western Sahara was occupied, neither the UN Legal Counsel nor the General Court could have dismissed the law of occupation without analysis, had it been relevant.

\textsuperscript{124} Corell (n 60) 238.

\textsuperscript{125} Advocate General 2018 (n 34) [268] (‘The legal regimes applicable to non-self-governing territories and to occupied territories are not mutually exclusive’).


\textsuperscript{127} See Arai-Takahashi (n 5) 68.

\textsuperscript{128} Of course, this is not without exception: the US and Israel are two prominent dissidents.
paramount\textsuperscript{129} and, of course, human rights for individuals apply universally today.\textsuperscript{130} There is no ousted sovereign for an NSGT, but instead there is the political right of self-determination of the people.\textsuperscript{131}

As noted, the UN Legal Counsel and the three European courts demanded that the people of Western Sahara not only be well treated but also consulted,\textsuperscript{132} thus adding a fourth concern to the three of the law of occupation – the self-determination of the people as a collective unit.\textsuperscript{133} This concern is central to the law relating to NSGTs, of course. Is it a feature also of the law of occupation?

Self-determination has an external aspect – the right to determine the political future of the territory – and an internal one – the right to participate in governance.\textsuperscript{134} The external aspect supports the ‘conservatism’ tendency in occupation law. The internal aspect could be used to justify violations of the conservatistion principle – as was suggested regarding the constitutional changes made in Iraq – but one could also relate it to the management of the occupied territory. In the \textit{Wall} advisory opinion, the ICJ held that the construction of the wall (or barrier), ‘along with measures taken previously … severely impedes the exercise by the Palestinian people of its right to self-determination’.\textsuperscript{135} This passage is obscure, but it seems to me that it related not just to the final status of the occupied Palestinian territories (the external aspect) but also to the day-to-day management of the affairs of the Palestinian people – the internal aspect of self-determination.\textsuperscript{136}

The ICJ linked the right of self-determination to the concept of a sacred trust as a limitation of the authority of an administrator.\textsuperscript{137} That concept is taken from Article 22 of the League Covenant\textsuperscript{138} as well as from the chapeau of Article 73 of the UN Charter, which speaks of a

\begin{itemize}
\item \textsuperscript{129} UN Charter (n 26) art 73.
\item \textsuperscript{130} As for the human rights treaties, their territorial scope of application may be limited, but the presumption is that they are not: Sarah Joseph and Melissa Castan, \textit{The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary} (3rd edn, Oxford University Press 2013) 93. However, customary human rights apply universally.
\item \textsuperscript{131} cf the discussion at n 146.
\item \textsuperscript{132} The High Court, the General Court and the Legal Counsel said so explicitly, while the Court of Justice found that the agreements did not cover Western Sahara because the people had not consented to that: \textit{Polisario} 2016 (n 4) [106].
\item \textsuperscript{133} For sure, one can categorise self-determination as a human right, and its inclusion in the 1966 Covenants (ICCPR and ICESCR (n 23)) certainly suggests that. However, it has not been conceptualised as an individual right, so the difference is relevant.
\item \textsuperscript{134} Some scholars have transformed this into an entitlement to democracy: see Gregory H Fox and Brad R Roth (eds), \textit{Democratic Governance and International Law} (Cambridge University Press 2000) and, in particular, Thomas M Franck’s seminal ‘Legitimacy and the Democratic Entitlement’, in Fox and Roth, ibid 25–47; Antonio Cassese, \textit{Self-Determination of Peoples: A Legal Reappraisal} (Cambridge University Press 1995) 53, 310 and passim. See also Hurst Hannum, ‘Rethinking Self-Determination’ (1993) 34 \textit{Virginia Journal of International Law} 1, 34 and passim.
\item \textsuperscript{135} See \textit{Wall} (n 38) [122], cf with [118]. See also Daniel Thürer and Thomas Burri, ‘Self-Determination’, \textit{Max Planck Encyclopedia of Public International Law}, December 2008, para 34.
\item \textsuperscript{136} Hence, I am not sure that the interpretation given by Judge Higgins in her separate opinion is the most plausible one: \textit{Wall} (n 38) Separate Opinion of Judge Higgins, [30].
\item \textsuperscript{137} \textit{Wall} (n 38) [88].
\item \textsuperscript{138} Covenant of the League of Nations (entered into force 10 January 1920) (1920) 1 \textit{League of Nations Official Journal} 3.
\end{itemize}
'sacred trust’ ‘to promote to the utmost … the well-being of the inhabitants’ of the NSGT. In the Namibia opinion, the ICJ used this term in relation to the South African administration of the former mandate of South West Africa, which South Africa ‘occupied’ ‘illegally’.139 Gross comments that ‘[t]he Court thus seems to be constructing a “sacred trust” concept … as the common denominator of all situations where people are not self-governing, including occupation’.140 This is echoed by Benvenisti, who says that ‘the occupant’s status is conceived to be that of a trustee’ and that ‘contemporary attention is paid more to the indigenous community under occupation rather than to the wishes of the ousted government’.141 Hence, both an occupant and an administering power can be thought of as trustees on behalf of a community. Indeed, while it used to be the idea that for occupied sovereign territory it is the ousted sovereign that retains sovereignty, a more modern expression is to say that ‘in light of the principle of self-determination, sovereignty and title in an occupied territory … remain with the population under occupation’.142

Thus, the concept of ‘trustee’, a key term in the law relating to NSGTs, is now established in discourse on occupation.143 Perhaps the idea that the people should be consulted has travelled the same route. Benvenisti finds that ‘the emerging expectation that states offer effective opportunities for participation of individuals in shaping public policies’ should ‘arguably inform the interpretation of Article 43’ of the Hague Regulations,144 and an ICRC expert meeting held that ‘long-term occupation required the occupying power to take into consideration the will of the local population’.145 One might conclude that until a people can (again) exercise their right of external self-determination, the power in force has to let them exercise internal self-determination

139 The Court went on to state that ‘[t]hese developments leave little doubt that the ultimate objective of the sacred trust’ referred to in the Covenant of the League of Nations, ibid art 22, para 1, ‘was the self-determination … of the peoples concerned’: Namibia (n 49) [53]. The Court used the word ‘occupation’ to characterise the South African presence ([118]–[119]) as well as in the dispositif. See also Wall (n 38) [172].
141 Benvenisti (n 5) 6–7.
142 Crawford (n 42) 12. See also Gross (n 140) 18 (‘Sovereignty is vested in the population under occupation’); Arai-Takahashi (n 5) 68.
143 On the concept of trusteeship in these two contexts, see Wilde (n 126). The genealogy of the use of the word ‘trust’ in occupation discourse would be an interesting project in itself. While it was a crucial concept from the start in the law relating to NSGTs, it seems to have seeped gradually into the law on occupation. Dinstein (n 39) 36 opposes the use of the concept, but it is used by Roberts (Adam Roberts, ‘What is a Military Occupation’)(1985) 55 British Yearbook of International Law 249, 259). One of the earliest uses is no doubt that of Arnold Wilson, who even used the term ‘sacred trust’ – although in the context of the occupation of Iraq after the First World War, which preceded the creation of the Mandate of Iraq under the League of Nations regime: Arnold Wilson, ‘The Laws of War in Occupied Territory’(1932) 18 Transactions of the Grotius Society 17, 29. Note that there is a difference between being a trustee of public property, as provided for in art 55 of the Hague IV Regulations (n 7), and being a trustee of the political and legal order, as provided for in, eg, art 43, and that usage of the word ‘trustee’ in the context of occupation may not necessarily cover both aspects.
144 Benvenisti (n 5) 79–80. Cassese wrote in 1992 that the notion of permanent sovereignty over natural resources ‘tends to support a restrictive interpretation of the occupant’s powers to exploit and dispose of immovable property’: Antonio Cassese, ‘Powers and Duties of an Occupant in relation to Land and Natural Resources’ in Emma Playfair (ed), International Law and the Administration of Occupied Territories (Clarendon Press 1992) 419, 426.
145 Ferraro (n 48) 75–76. For a different but slightly ambiguous view, see Malcolm Shaw, ‘Territorial Administration by Non-territorial Sovereigns’ in Tomer Broude and Yuval Shany (eds), The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity (Bloomsbury 2008)
by taking part in the governance of the territory. If that is correct, the legal situation appears to be rather harmonious: two bodies of law (occupation and self-determination) may apply, and they now both exhort the controlling power to take into account the will of people.\footnote{One may ask whether the existence of an intact ousted government would mean that there would be no reason to consult the people. Are consultations with an occupied people just a substitute, when there is no government to consult, or do such consultations have an independent value even if there is an ousted government? In those situations that have prompted most of the recent discussion on occupation – Iraq and the Middle East – there has been no ousted authority that could credibly be consulted. In cases like occupied Kuwait (1990–91), the government would be a legitimate representative, while the situation is more complex in Northern Cyprus and Crimea, where large parts of the population sympathise with the occupiers and feel that they had grievances against the previously effective government (which is not at all to legitimise the interventions in 1974 and 2014, respectively).}

4.3. \textbf{What Is the Basis of Each Regime?}

So, it appears that the two regimes to a significant degree coincide, or at least interact congenially, and three legal institutions (the UK High Court, the General Court and the UN Legal Counsel) did not find it necessary to sort out the relation between them. What is even more interesting is that none of the three bothered to make a substantive distinction based on whether the (de facto) authority of Morocco had been established in accordance with or in violation of international law.

This brings me to the question of the bases for each regime – the trigger, if you will. Different rules apply in different situations and each rule is, directly or indirectly, connected with a rule of application, a rule that refers to a certain ‘fact’. If a certain set of facts are at hand, a certain set of rules are to be applied by a certain authority. I will call this the factual basis.

However, my question goes further. What is it that justifies that one fact rather than another is the precondition for an authority’s application of a regime to an individual? Why should we provide an occupying or an administrative power with a certain authority? I will call this the political basis.

Even though Morocco’s authority is severely circumscribed, it may nevertheless use the resources of that territory, under certain conditions. This right seems to be based on ‘a fact’ (the General Court) or ‘de facto control’ (the High Court) or ‘de facto administered’ (Corell).\footnote{Corell (n 60) 238.} How does this relate to the bases for the application of the law of occupation or the law relating to NSGTs?

Article 43 of the Hague Regulations speaks of ‘the authority … having in fact passed into the hands of the occupant’, and it is generally held that the powers of an occupant arise out of a ‘fact’, namely effective control\footnote{Benvenisti (n 5) 43.} or, in Dinstein’s words, ‘the power of the bayonet’.\footnote{Dinstein (n 39) 35.}
Oppenheim famously said that authority is ‘not by right’\textsuperscript{150} but ‘the martial law of the occupying power ipso facto’.\textsuperscript{151}

It is more difficult to find a generally agreed factual basis for the authority of ‘administering powers’ of NSGTs (colonial powers). While the colonial states have invoked intertemporal law and claimed that their takings were legal at the time and that their remaining titles are still good,\textsuperscript{152} many developing states have attacked and tried to delegitimise colonial claims to sovereignty.\textsuperscript{153} Perhaps administration of a non-self-governing territory can most plausibly be based on control as a fact, too. Effective control is the most important basis for title to territory, including \textit{terra nullius},\textsuperscript{154} and continued occupation is necessary in order not to lose such title. However, in distinction to ‘full’ sovereignty, the authority of an administering power of a non-self-governing territory is now limited, as recounted in Section 2.2. If so, not only has the substance of the two regimes converged, so has the political basis, meaning that the (limited) right to administer (temporarily) flows out of the fact of control.\textsuperscript{155}

Does this also apply to control that is the result of a manifest violation of international law? One could certainly argue that even the quite limited rights of an occupying power should be denied to an aggressor\textsuperscript{156} – that is, an alleged ‘illegal’ occupier like Morocco should have no right to administer at all. Yet, the courts did not attach much significance to the origin of the Moroccan control of Western Sahara. Although the General Court and the High Court noted that Morocco was only ‘de facto’ administering Western Sahara, they still applied the rules

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\item \textsuperscript{150} Oppenheim (n 5) 364. See further Michael Bothe’s report to the ICRC expert meeting: ‘The power exercised by the occupant is its own original power limited by international law; it is not a power delegated or derived from the State whose territory is occupied’: Michael Bothe, “Effective Control”: A Situation Triggering the Application of the Law of Belligerent Occupation” in Ferraro (n 48) 36. cf also Bhuta (n 5) 727.
\item \textsuperscript{151} Oppenheim (n 5) 368.
\item \textsuperscript{152} See James Crawford, \textit{The Creation of States in International Law} (Oxford University Press 2006) 613–15. See also Arai-Takahashi (n 5) 74–77.
\item \textsuperscript{154} Seokwoo Lee, ‘Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal’ (2000) 16 \textit{Connecticut Journal of International Law} 1. Of the four traditional modes of acquisition of territory, only cession does not necessarily involve effective control. However, if a rare case were to occur in which the ceded territory would not be effectively taken over by the recipient state, the lack of control would surely be an important aspect. For the history of colonial acquisitions, see Antony Anghie, \textit{Imperialism, Sovereignty and the Making of International Law} (Cambridge University Press 2007) 82ff, and Martti Koskenniemi, \textit{The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960} (Cambridge University Press 2002) 98ff.
\item \textsuperscript{155} Max Radin made a similar remark regarding the Roman concepts of possession and dominium: Max Radin, ‘Fundamental Concepts of the Roman Law’ (1925) 13 \textit{California Law Review} 207, 218–19.
\item \textsuperscript{156} Talmon suggests that ‘[s]tates may, for example, refuse to recognize and enforce laws enacted by the aggressor for the occupied territory or may deny recognition to title to property even if the acquisition of property was within the 1907 Hague Regulations on Land Warfare’: Talmon (n 47) 117. See also the discussion in Yaël Ronen, ‘Illegal Occupation and Its Consequences’ (2008) 41 \textit{Israel Law Review} 201. For a general discussion on the relation between the \textit{jus ad bellum} and the law of occupation, see Rotem Giladi, ‘The \textit{Jus Ad Bellum/Jus In Bello} Distinction and the Law of Occupation’ (2008) 41 \textit{Israel Law Review} 246.
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applicable to the administration of an NSGT. Hence, the illegal origin of Moroccan control (a use of force, if not an act of aggression) meant that it did not have title to sovereignty, but that did not affect the application of the regime of NSGTs. This is well in line with the law of occupation, which – as a part of the *jus in bello* – applies regardless of whether the occupant achieved control over the territory in violation of international law. In Benvenisti’s words:

The emphasis is thus put not on the course through which the territory came under the foreign state’s control … but rather on the phenomenon of occupation: the exceptional exercise of public power by one state in a foreign territory and over its inhabitants.

This explains why the various legal institutions were not concerned with the origin of Moroccan control. Both the law of occupation and the law relating to NSGTs apply *erga omnes*, to whoever is in control.

One reasonable conclusion is that if there is no title then the basic rule must be that administration should be carried out so as to not prejudice a future settlement regarding the permanent sovereignty over the territory, regardless of whether the situation is one of occupation or of (colonial) administration of an NSGT, and regardless of whether the taking of control was legal. If it does not matter whether the act that put the governing state in control was in agreement with international law, perhaps that is so because the authority of both an occupant and an administering power is now so circumscribed that there appears to be little need for a stricter governing regime for *mala fide* than for *bona fide* possessors.

5. AN AFTERTHOUGHT: SOVEREIGN, OCCUPIED, NON-SELF-GOVERNING – DOES IT MATTER?

Occupation and rule over an NSGT are both abnormal forms of authority in a Westphalian system of sovereign states. However, the laws of occupation and NSGT are both dependent on that of sovereignty – they are sovereignty in suspense or sovereignty as a promise.

Philosophers find the political basis for sovereignty in the people – popular self-rule (Rousseau) or consent (Hobbes, Locke). Still, the legal recognition of concrete instances of sovereignty – new independent states, acquisition of territory – has usually hinged on the same

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157 Even the Advocate General did that, although he refused to assign the designation ‘de facto administering authority’ to Morocco: Advocate General (2018) (n 34) [232].

158 Shaw (n 145) 409. See also Dinstein (n 39) 3, and Knut Dörmann, ‘Foreword’ in Ferraro (n 48) 4. See also Ronen (n 156) 237.


160 Of course, this does not change the fact that the manner in which the state obtained possession might be a violation of the *jus contra bellum*, and that there is therefore a *jus ad bellum* obligation to withdraw.

161 cf Benvenisti’s characterisation of the concept of occupation as the ‘mirror image’ of the concept of sovereignty: Benvenisti (n 5) 21.
sort of fact as that on which occupation rests, namely effective control. Crawford finds that even though ‘norms that are non-derogable and peremptory cannot be violated by State-creation’, the principle of effectiveness ‘[n]o doubt … remains a major consideration’. Further, just like the authority of an occupier or an administrator, the exercise of sovereign authority is circumscribed by numerous obligations like human rights law, including the right to participate in governance.

Perhaps the differences between various ‘forms of territorial rule’ are not that great. Perhaps dealings in natural resources by a sovereign, an administrator or an occupier are legitimate only if it is for the good of the people and with their consent. Perhaps it is better to think of all of this in terms of different bundles of rights and obligations attached to various forms of governance, each bundle being exercised by one group of people over another group, and from time to time regulated by a particular constellation of international legal regimes. If so, could not the principles of permanent sovereignty over natural resources apply to any exercise of authority over people? If we ask about the interests and wishes of the people of Western Sahara, why not ask the people of Morocco how they wish to use their natural resources?

However, that is to simplify things too much. As shown by the legal practice at hand, internal self-determination can to some extent be enforced before external self-determination has been exercised, but hardly thereafter. The same goes for the limitations incumbent upon an occupant. For sure, in principle the right of self-determination requires that the people are allowed to ‘freely pursue their economic, social and cultural development’ and there is the human right to ‘take part in the conduct of public affairs, directly or through freely chosen representatives’. Furthermore, in the recognition of new states, the will of the people in the territory is sometimes taken into account, and sometimes that is the case also in the ‘recognition’ of governments. However, once a state has been established and its government is in place, no court will declare a treaty or a concession contract invalid because it was not concluded with democratic pedigree.

162 Crawford (n 152) 107.
164 One could also think of it as a sliding scale of rules, rights and obligations: cf Koskenniemi, ibid 170. As mentioned, Benvenisti refers to the two concepts of occupation and sovereignty as ‘mirror-images’, which is, of course, a metaphor with different connotations: Benvenisti (n 5) 21. cf also Gross: ‘it is necessary to shift from a binary approach to the existence of occupation to one that considers that duties follow from the exercise of control, regardless of whether the situation is conceptualised as falling into the category of occupation or of sovereignty’; Gross (n 140) 130. For Gross, this perspective entails that ‘the responsibility of an occupier is as great as its power’: Gross, ibid 133. It should be pointed out that this view – which focuses on the responsibilities rather than the rights of the governing party – is not necessarily incompatible with the non- (or even anti-) functionalist view of the relation between occupation and sovereignty espoused by Koskenniemi, to which I also subscribe (but in a more equivocal way).
165 Cassese (n 134) 73.
166 ICCPR (n 23) art 1.
167 ibid art 25.
168 Except in the rare case that the consent to be bound by a treaty was in violation of a domestic law on competence and that violation was ‘manifest and concerned a rule of its internal law of fundamental importance’: VCLT (n 97) art 46.
In fact, one can even argue that an occupied people may be better off than a sovereign people in some respects. In a non-self-governing or occupied territory, the power is accountable under the UN Charter as a trustee and/or under IHL as an occupant, but in a sovereign state, legitimate authority is presumed. Schrijver finds that apart from Resolution 1803 and a few other UN Resolutions,

only cursory evidence can be found that under international law States have a duty to exercise their right to permanent sovereignty over natural resources in the interest of national development and to ensure that their inhabitants benefit from resource exploitation.

Even less, presumably, would there be evidence of an obligation to consult the people when natural resources are being used. If you think about it this way, the status of independence seems a slightly less attractive goal for a people.

Yet, that is not how leaders of colonised peoples have thought about it. ‘We have awakened. We will not sleep anymore’, said Nkrumah of Ghana in 1957. ‘We are going to ensure that the lands of our fatherland truly profit to its children,’ said Lumumba of the Congo three years later. Sovereignty entails the potential to pursue development ‘without external interference’. Upon independence, the inhabitants of a territory become citizens of a sovereign state, a population becomes a polity, an administrator gives way to representatives. Under the regime of sovereignty, the government is presumably ‘representing the whole people belonging to the territory without distinction as to race, creed or colour’.

There are good principled reasons to be asking the government of Morocco hard questions for the people of Western Sahara, but give them the benefit of the doubt regarding the people of Morocco. We can pierce the sovereign veil to some extent and demand compliance with human rights, but if we second-guess every decision or prescribe the details for a good system.

169 cf Koskenniemi (n 163) 164.
170 Nico Schrijver, Sovereignty over Natural Resources: Balancing Rights and Duties (Cambridge University Press 1997) 311. Duruijobo, evidently arguing in a de sententia ferenda mode, says that governments should be responsible towards their citizens, being in ‘a position of trust in relation to their countries’ natural resources’; Emeka Duruijobo, ‘Permanent Sovereignty and Peoples’ Ownership of Natural Resources in International Law’ (2006) 38 George Washington International Law Review 33, 67. See also Okowa (n 126) 246 and 258 (the latter being more of a de sententia ferenda statement, I assume).
171 UNGA Res 1803 (XVII), Permanent Sovereignty over Natural Resources (14 December 1962).
174 Emphasis added. UNGA Res 2625 (XXV) (n 22); ICCPR (n 23) art 1. cf also FH Hinsley, Sovereignty (2nd edn, Cambridge University Press 1968) 223 (sovereignty is ‘the pre-condition of effective action in and for the community’).
175 The quotation is from the development of the principle of equal rights and self-determination of peoples in the Friendly Relations Declaration, attached to UNGA Res 2625 (XXV) (n 22).
of governance, there is not much left of pluralism.\textsuperscript{176} After all, there is no neutral ground from which to judge – just the one or the other particularist claim that may (or may not) have been elevated to universality.

To return to my doubts, that presumption cannot be unrebuttable,\textsuperscript{177} because that group of people who have been given the authority to rule under the principle of sovereignty can abuse their powers; and if they do, they undermine the political basis for our distinction between full sovereignty and other forms of authority. In 1958 Nkrumah introduced the Preventive Detention Act to curb his opposition. In 1965, as Congo emerged out of civil war and foreign intervention, Lumumba’s former secretary Mobuto took power, depleting the country’s resources until 1997, when he was exiled to Morocco and his old friend, Hassan II, who in the meantime had not only occupied Western Sahara but also extracted a fortune from phosphates and other Moroccan and Sahrawi resources. Distinctions of status established by law (sovereign, occupied, non-self-governing, etc) may be worthy of protection, but they are nevertheless arbitrary, and whether or not they serve justice cannot be determined in the abstract.
