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Summary

The word ‘occupation’ was used twice specifically to the Saharan Provinces in UN General Assembly resolutions in 1979 and 1980. Though the word has not been used by the General Assembly since, it has appeared in court rulings in the EU, the UK and South in a detrimental conclusion regarding Morocco’s sovereignty over the Saharan Provinces. This paper shall start with a consideration of international law in order: to differentiate occupation of a non-self-governing territory from occupation of a territory under the sovereignty of a State. The conclusion of no ‘military occupation’ in the Saharan Provinces shall, however, remain the same.

Then, the context within which the word ‘occupation’ was used in General Assembly resolutions shall be considered. This paper shall also examine why the courts had no choice but to use the extraordinary word. Drawing on examples including imprudent use of the word in 2016 by former UN Secretary-General Ban Ki-moon and a controversy in 2020 over South Africa’s use of the word, it shall be concluded that the word was not used as a legal term, but rather abused for political or ideological purposes.

No 'Military Occupation' in Saharan Provinces

1. Introduction

The word 'occupation' has been used frequently by Polisario[1] to deny Morocco's sovereignty over natural resources in the Saharan Provinces territory. Under the law of occupation, "the extraction and export of natural resources from an occupied territory, which both damages and diminishes the 'capital' of the property", is prohibited[2].

For the purpose of restricting Morocco's exploitation of natural resources in the territory of the Saharan Provinces, Polisario has arbitrarily engaged in 'lawfare'[3], a parody of warfare, aggressively weaponizing laws and judicial courts in the EU, the UK, Panama, and South Africa. Thus, the phrase "[Morocco's] military occupation in December 1975", was referred to in a British court in 2015[4]. The phrase has been repeated by other courts, leading to a conclusion in favor of Polisario's claims, which shall be discussed later. The objective of these judicial tactics may well be to strike fear into the heart of foreign importers of Saharan natural resources.

Before considering the international legal problems involved in the use of the word 'occupation', Morocco's positions on the Sahara Issue should be outlined as a starting point. The Wisemen's Ad Hoc Committee of the Organization of African Unity (OAU), met in 1980 in Freetown, Sierra Leone, at a meeting referred to as 'Freetown II'[5]. Tony Hodges properly lists Morocco's positions reported by the Wisemen's Ad Hoc Committee. They include the following points[6]: Polisario did not exist and was a creation of Algeria; the conflict was between Morocco and Algeria which was committing aggression against Morocco; and there was no need to hold a referendum since the people of Western Sahara had

1. Ferente Popular de Liberación de Saguía ei Hamra y Río de Oro (Polisario) is an Algeria-backed separatist rebel movement, based in the Tindouf Camps, Algeria. Polisario has been attacking Morocco since the mid-1970s for its unilaterally declared independence. Abdallah Zbir, «Western Sahara: History and the Algerian Fallacy», Morocco World News, 2016, https://www.moroccoworldnews.com/2016/04/183508/western-sahara-history-and-the-algerian-fallacy/. 'Occupation', also called 'military occupation' or 'belligerent occupation', is different from the concept of occupation as an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession. The word 'occupation' used in the context of the Sahara Issue signifies 'military or belligerent occupation' under the laws of war or international humanitarian law.
2. Glynn Torres-Spelliscy, "The Use and Development of Natural Resources in Non-Self-Governing Territories", in Anouar Boukhars and Jacques Roussellier (eds.), Perspectives on Western Sahara: Myth, Nationalisms, and Geopolitics, Rowman & Littlefield, 2014, p.247.
3. Orde F. Kittrie, Lawfare: Law as a Weapon of War, 1st edition, Oxford Scholarship Online, 2016, pp. 4-7. See Shoji Matsumoto, "Morocco's Sovereignty over Natural Resources in Saharan Provinces: Taking Cherry Blossom Case as an Example", Policy Center for the New South, Policy Paper, 2020, pp. 9, 38.
4. The Queen on the Application of Western Sahara Campaign UK v the Commissioners for Her Majesty's Revenue and Customs, the Secretary of State for the Environment Food and Rural Area, High Court of England and Wales (EWHC) 2898 (Admin), 2015. Hereinafter cited as 'R v Revenue Commissioners', paras. 40, 43, 48 and 49.
5. Report of the 5th session of the Ad Hoc Committee of Heads of State on Western Sahara, Freetown, Sierra Leone, 9-11 September 1980, OAU Doc AHG/103 (XVIII) B, 1981, Preamble.
6. Tony Hodges, Western Sahara: The Roots of a Desert War, Lawrence Hill & Company, 1983, p. 311.

already expressed their wish to be integrated with Morocco in the traditional manner[7]. A brief survey of the historical developments leading to the use of the word 'occupation' is required to understand the true background.

The Wisemen's Ad Hoc Committee was set up at the 15th OAU Assembly of Heads of State and Government (OAU summit) in 1978[8], accelerated by the intensified fighting and a coup d'état in Mauritania, with a view to solving the Sahara Issue. Freetown II was the first gathering attended by all of the parties to the Issue, i.e. Morocco, Mauritania, Algeria, Polisario, and ten other Saharan nationalist organizations supporting Morocco's positions[9] However, because Morocco refused to recognize Polisario as a partner for negotiation and Algeria refused in turn to negotiate on behalf of Polisario, Freetown II was not highly successful[10]. Morocco and Senegal also walked out of the 16th OAU summit where the report of the Wisemen's Ad Hoc Committee had been presented, accusing the OAU of "sabotage orchestrated by Algeria and its clients"[11]. The division thus deepened and threatened to paralyze the OAU. It was against this backdrop that the UN General Assembly adopted a resolution including the word 'occupation' in 1979, calling on Morocco to enter into negotiations with Polisario. This was the first time the General Assembly had used the word 'occupation'[12].

The law of occupation is an integral part of the laws of war which apply to armed conflicts[13]. Occupation is defined as effective non-consensual provisional control by a certain ruling power over a territory that is not under the sovereignty of the ruling State. Therefore, when the territory is under Moroccan sovereignty or when consent is given by Polisario to Moroccan presence in the non-self-governing territory of Sahara, by means of concluding a ceasefire agreement for example, the law of occupation is not applicable. In either case, Moroccan presence in the territory of the Saharan Provinces can never be called occupation.

7. Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania (UN Treaty Series No. 14450), hereinafter called as the 'Madrid Accord', calls for consideration of "the views of the Saharan population, expressed through the Djemaa". The traditional parliamentary body, the 'Djemaa', has unanimously declared to integrate the territory of Saharan Provinces into Morocco and Mauritania on February 26, 1976. See Abdelhamid El Ouali, Saharan Conflict: Towards Territorial Autonomy as a Right to Democratic Self-Determination, Stacey International, 2008, p. 103. Also, T. Hodges, op. cit., supra note 6, pp. 235-238. Although Polisario has declared the Madrid Accord null and void, it has implied its validity in the 1979 Mauritano-Sahraoui Agreement in which, Mauritania's administration is only enabled if based on the Madrid Accord. On the Madrid Accord in general, see Andreu Solà-Martín, The United Nations Mission for the Referendum in Western Sahara, Edwin Mellen Press, 2006, pp. 26-29. Against the conclusion of Madrid Accord, T. Hodges notes that Polisario attempted to forcibly make Spain renounce the agreement by attacking Spanish fishing vessels off the Saharan coast, whilist Algeria put additional pressure on Spain through the unsuccessful campaign for the independence of the Canary Islands. Idem., op. cit., supra note 7, p. 350.
8. OAU Doc AHG/Res 92 (XV), 1978, para. 3.
9. OAU Doc AHG/Res 103 (XVIII) B, 1981, para. 6. See John Damis, "The OAU and Western Sahara", in Yassin El-Ayouty and I. W. Zartman (eds.), The OAU after Twenty Years, Praeger, 1984, p. 278. Also, C. C. C. Amate, Inside the OAU, St. Martin's, 1986, pp. 349-350.
10. Erik Jensen, Western Sahara: Anatomy of a Stalemate, Rienner, 2005, p. 32.
11. Stephen Zunes and Jacob Mundy, Western Sahara: War, Nationalism, and Conflict Irresolution, Syracuse University Press, 2010, p. 175.
12. UN Doc A/RES/34/37, 1979.
13. Second paragraph of Article 2 common to the 1949 Geneva Conventions.

2. No Occupation

According to Article 42 of the 1907 Hague Regulations, "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army"[14]. Tristan Ferrano criticizes this article, since "the determination as to whether a situation amounts to an occupation is not easy to make". Ferrano explains that "[t]his is mainly because the definition of occupation contained in Article 42 of the 1907 Hague Regulations is somewhat vague"[15]. Also, the International Committee of the Red Cross (ICRC) points out in a report in 2012 that not only is the definition of occupation vague under international humanitarian law, but also "other factual elements – such as the continuation of hostilities and/or the continued exercise of some degree of authority by local authorities, or by the foreign forces during and after the phase out period – may render the legal classification of a particular situation quite complex"[16]. "As the above-mentioned ICRC report states", explains Marten Zwanenburg, "practice has demonstrated that many states put forward claims of inapplicability of occupation law even as they maintain effective control over foreign territory or a part thereof, owing to a reluctance to be perceived as an Occupying Power"[17].

Whatever its detailed definition may be, the law of occupation is not applicable to the territory of the ruling State itself, because the deployment of military forces within its own territory is held to be an ordinary exercise of sovereignty. Hence, In Lassa Oppenheim's classic book, the relevant chapter is entitled "Occupation of Enemy Territory"[18]. And Georg Schwarzenberger discusses, under the title "Immunity of the Occupying Power from the Local Law"[19], presupposing that the territory, where the local law is applied, is not the occupying power's territory. Likewise, I. A. Shearer referred to the phrase "belligerent occupation of enemy territory"[20]. In order for occupation to exist for the purposes of international law, the UN Human Rights Office of the High Commissioner (OHCHR) states that there must be control by hostile troops "over a foreign territory"[21]. Thus, Eva Kassoti is partially correct when stating that "Western Sahara is an occupied territory since Morocco's presence therein meets the objective threshold of occupation under international humanitarian law, i.e. the demonstration of effective authority and control over a territory to which the occupying State holds no sovereign title"[22]. Kassoti's statement presupposes that occupation cannot exist where the occupying State assumes sovereignty. From a different perspective, Michael Bothe explains: "occupation is generally seen as a

14. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Annex to the Convention: Regulations respecting the Laws and Customs of War on Land – Section III: Military Authority over the Territory of the Hostile State – Regulations, Article 42. The Convention is called '1907 Hague Regulations' in short.
15. Tristan Ferraro, "Determining the Beginning and End of an Occupation under International Humanitarian Law", International Review of the Red Cross, Vol. 94, 2012, p. 134.
16. ICRC, Report to the 31st International Conference of the Red Cross and Red Crescent, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", 2011, http://www.rcrcconference.org/docs_upl/en/31IC_IHL_challenges_report._EN.pdf.
17. Marten Zwanenburg, "Challenging the Pictet Theory", in Marten Zwanenburg, Michael Bothe and Marco Sassòli, "Is the Law of Occupation Applicable to the Invasion Phase?", International Review of the Red Cross, Vol. 94, 2012, p. 36.
18. Lassa Oppenheim, "Chapter XII Occupation of Enemy Territory", International Law: A Treatise, Vol. II. War and Neutrality, Longmans, Green, and Co., 1906, p. 167.
19. Georg Schwarzenberger, International Law as applied by International Courts and Tribunals, Vol. 2: The Law of Armed Conflict, Stevens & Sons, 1968, p. 183.
20. I. A. Shearer, Starke's International Law, 11th edition, Butterworth, 1994, p. 510.
21. OHCHR, "Determining the Existence of a Belligerent Occupation for the Purposes of International Law", Belligerent Occupation, 2017,https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/ohchr_syria_-_belligerent_occupation_-_legal_note_en.pdf.
22. Eva Kassoti, "The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)", European Papers, Vol. 12, 2017, p. 352.

situation that arises after an invasion, or that is the result of an invasion"[23]. This relationship between occupation and invasion is in conformity with the UN Definition of Aggression which contains the phrase "military occupation ... resulting from invasion"[24]. Since military presence in a State's own territory is not called invasion, neither the word 'occupation' nor the word 'invasion' can be applied to the territory under the sovereignty of Morocco.

Historically, Morocco has consistently asserted its sovereignty over the territory of the Saharan Provinces. The International Court of Justice (ICJ) holds that no rule of international law requires the structure of a State to follow any particular pattern[25]. On the Sharifian State of Morocco, the ICJ continues, "[i]ts special character consisted in the fact that it was founded on the common religious bond of Islam existing among the peoples and on the allegiance of various tribes to the Sultan, through their caids or sheikhs, rather than on the notion of territory"[26]. According to Jurgen Brauer and Robert Haywoo, "religions exercise authority over the faithful based on their beliefs, not their geographic home". In particular, "nomadic tribes used family relationships to establish … societies without a fixed relationship to territory"[27]. Moreover, nomads need wider territory to live than settled people. In this way, Morocco has assumed territorial jurisdiction over the territory of the Saharan Provinces. As Samir Bennis explains, "[f]or centuries, Morocco's sovereignty was extended over the Sahara. Its sovereignty over the territory was only terminated when the Spanish and French divided the Kingdom into zones of influence"[28].

How does the legal status of the Saharan Provinces as a non-self-governing territory matter as regards the concept of occupation? As Ian Brownlie emphasizes, in international law, the sovereignty of a non-self-governing territory should be divorced from its administration[29]. Sovereignty and administration of a territory may be assumed by different international entities. Thus, it is not accurate to insist, in the case of Morocco, that "[i]ts claim to sovereignty ... is incompatible with the status of Western Sahara as a non-self-governing territory"[30]. There is no problem with Morocco's sovereignty over the Saharan non-self-governing territory. Within the UN framework of non-self-governing territory, what matters is not sovereignty as such but administration.

In research conducted by the OHCHR, "the unconsented-to presence of foreign forces" is one of the elements identified as necessary for the existence of an occupation[31]. The ICRC Expert Meeting in 2007 discussed the need to ascertain whether the presence of foreign forces is non-consensual in order

23. Michael Bothe, "Effective Control During Invasion: A Practical View on the Application Threshold of the Law of Occupation", in Zwanenburg, Bothe and Sassòli, loc. cit., supra note 17, p. 37.
24. UN General Assembly Resolution 3314 (XXIX), UN Doc A/RES/29/3314, 1974, Annex, Art. 3 (a).
25. Western Sahara Opinion, Advisory Opinion, ICJ Rep 1975, para. 94.
26. Ibid., para. 95.
27. Jurgen Brauer and Robert Haywoo, "Non-State Sovereign Entrepreneurs and Non-Territorial Sovereign Organizations", UNU-WIDER Working Paper No. 2010/09, UN University, 2010, pp. 4-5. Similarly, Louis Henkin has emphasized that elements long identified with 'sovereignty', such as territory, are inevitably only "metaphors, fictions, fictions upon fictions". Idem., International Law: Politics and Values, Martinus Nijhoff, 1995, pp. 8-10. Recently, the concept of non-territorial sovereignty was discussed in relation to cyberspace in particular. See David Furnues, The Rise of Non-Territorial Sovereignties and Micronations, UNU-CRIS Working Paper Series W-2018/10, UN University, 2018.
28. Samir Bennis, "Morocco Has Never Annexed the Sahara (Part IV)", Morocco World News, 2011, https://www.moroccoworldnews.com/2011/11/15760/morocco-green-march-western-sahara/.
29. Administration is divorced from sovereignty in international law. Ian Brownlie, Principles of Public International law, 6th edition, Oxford University Press, 2003, pp. 106-108. I. Brownlie illustrates that, even after the defeat of Nazi Germany, the German State continued to exist, and the legal basis of the occupation by the four major Allied powers depended on its continued existence. Ibid., pp. 106-107.
30. Polisario v NM Cherry Blossom, High Court of South Africa, Eastern Cape Local Division, Port Elizabeth, 2017, hereinafter cited as 'Cherry Blossom case', para. 40. Cf.
31. OHCHR, loc. cit., supra note 21.

to invoke the application of occupation law. It was argued on the relations between consent under article 47 of the Fourth Geneva Convention and consent for the purposes of ending occupation that they would lead to the very same situation: the inapplicability of occupation law and, by implication, the suspension of the protections granted by International Humanitarian Law to the population of the occupied area"[32].

In this way, if consent is given by one party to another party's presence in a non-self-governing territory, for instance in a ceasefire agreement like the Sahara Issue, any problem of international responsibility would not arise with respect to the presence[33]. Therefore, the use of the word 'occupation' cannot be justified in respect of the Saharan non-self-governing territory, under the UN-brokered ceasefire agreement concluded between Morocco and Polisario in 1991, monitored since then by MINURSO[34].

Accordingly, while the territory is Moroccan for the purpose of sovereignty, it is a 'non-colonial' non-self-governing territory within the UN system of non-self-governing territories[35]. Consequently, it is not legitimate to call the territory of the Saharan Provinces 'an occupied territory' and attempt to apply the law of occupation.

Because the law of occupation is thus inapplicable to the Saharan non-self-governing territory under Morocco's sovereignty, examination of the background to the use of the word 'occupation' for this territory is required, from both a legal and political perspective. The next section shall therefore begin by clarifying the background to the adoption of the UN General Assembly resolutions which referred to "the continued occupation" by Morocco.

3. UN General Assembly Resolutions

It is true that the phrase 'continued occupation' of the territory of the Saharan Provinces was referred to twice in UN General Assembly resolutions in 1979 and 1980. It must not be forgotten that a ceasefire agreement between Morocco and Polisario had not yet been concluded at that time, and that armed conflicts still continued in the territory. Andreu Solà-Martín notes that "the Moroccan army was present in the area even before the Mauritanian troops withdrew, because Mauritania had previously requested assistance from the Moroccan army to counteract POLISARIO's attacks"[36], because "Mauritania's military was no match even for the smaller guerrilla forces"[37]. From 1977 to 1980, Algeria-backed Polisario directed all its efforts against Morocco, and "scored a series of politically significant military successes, targeting not only positions within Western Sahara

32. Tristan Ferraro (ed.), Occupation and Other Forms of Administration of Foreign Territory, ICRC, 2012, pp. 30.
33. Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/CN.4/SER.A/2001, Add. 1 (Part 2), 2001, Art. 20.
34. UN Security Council Resolution 690 of 29 April 1991, para. 4.
35. It is 'non-colonial' based on the interpretation of the phrase "[t]he territory of a colony or other Non-Self-Governing Territory" in the Declaration of the Principles on Friendly Relations and Co-operation among States in accordance with the Charter of the UN (UN GA Res 2625 (XXV), 1970, Annex). Because the phrase "A or other B" involves that "A is included in B", leaving room for "B other than A", i.e. "non-self-governing territories other than a colony". The phrase "A or other B" signifies, as a legal term, extension, not limitation. As such, there may be a "non-colonial" non-self-governing territory when its colonial power or administering State does not exist.
36. Andreu Solà-Martín, op. cit., supra note 7, p. 32, n. 84.
37. Federal Research Division of the Library of Congress, "Mauritania-History", Country Studies Series, Mongabay.com, Published 1988-1999, https://data.mongabay.com/reference/country_studies/mauritania/HISTORY.html.

(Dakhla in August 1979, Samara and Mahbés in October 1979), but also conducting raids on Moroccan soils, as in the attacks on the southern towns of Tan-Tan in January 1979 and Labourial in September 1979". As a countermeasure to Polisario's attacks, Morocco initiated the construction of 'berms' to defend the territory of the Saharan Provinces from Polisario's armed invasions[38].

In resolution number 34/37 adopted in 1979, the General Assembly deplored "the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco and the extension of that occupation to the territory recently evacuated by Mauritania". This paragraph was quoted by the EU General Court in the decision Polisario v EU Council in 2015[39].

In the preceding paragraph, the General Assembly resolution welcomed the peace agreement concluded between Mauritania and Polisario in 1979[40], and considered that the agreement constituted "an important contribution to the process of achieving peace and a definitive, just and lasting settlement of the question of Western Sahara". And in the following paragraph, the General Assembly urged Morocco to join in the peace process and "to terminate the occupation of the Territory of Western Sahara"[41].

In the following year, the General Assembly adopted resolution 35/19, recalling the above-mentioned 1979 resolution. The 1980 resolution recorded deep concern "at the aggravation of the situation prevailing in Western Sahara because of the continued occupation of that Territory by Morocco". In this resolution, the General Assembly once again deplored "the aggravation at the situation deriving from the continued occupation of Western Sahara by Morocco and from the extension of the occupation to the part of Western Sahara which was the subject of the peace agreement" concluded on August 10, 1979 between Mauritania and Polisario. Then, the resolution reiterated "the appeal contained in its resolution 34/37 whereby it urged Morocco to join in the peace process and to terminate the occupation of the Territory of Western Sahara[42].

The relevant paragraphs in these two General Assembly resolutions may be construed as suggesting that the use of the word 'occupation' was deeply connected with the peace agreement concluded in 1979 between Mauritania and Polisario[43]. The political context of these resolutions suggest that the General Assembly desired to somehow break the Sahara Issue deadlock by means of urging Morocco "to join the peace process", quickly taking advantage of the Mauritano-Sahrawi Agreement concluded just before the adoption of the General Assembly resolution in 1979. The General Assembly's strategy involved in these resolutions may have been to expand the peace process from a bilateral process between Mauritania and Polisario alone to a trilateral one including Morocco, Mauritania and Polisario, i.e. all parties to the Sahara Issue at that time[44]. In this regard, the situation of 'no peace' would have

38. Osama Abi-Mershed and Adam Farrar, "A History of the Conflict in Western Sahara", in A. Boukhars and J. Roussellier (eds.), op. cit., supra note 2, p. 18.
39. Case T-512/12, 2015, para. 14.
40. Letter dated 13 August 1979 from the Permanent Representative of Mauritania to the United Nations addressed to the Secretary-General, UN Doc A/34/427 S/13503, 1979, Annex II.
41. UN Doc A/RES/34/37, 1979.
42. UN Doc A/RES/35/19, November 1980.
43. Mauritano-Sahraoui Agreement, included in the Declaration of 14 August 1979 by the Prime Minister of the Islamic Republic of Mauritania, UN Doc A/34/427 S/13503, 1979, Annex II.
44. In the Mauritano-Sahraoui Agreement, Mauritania has withdrawn its territorial claims over the Saharan Provinces. In the roundtable process launched in 2018, however, not only Morocco and Polisario but also Algeria and Mauritania have been put on equal footing with each other as far as the UN-sponsored negotiations to achieve a political solution are concerned. See S. Matsumoto, "2019 Secretary-General Report on Sahara: What's New-'Neighbouring States as Parties' in Roundtable", Policy Center for the New South, Policy Brief, PB-19/22, 2019, p. 2.

been a political prerequisite for urging Morocco to join in the 'peace' process. Otherwise, there would have been no logical reason for urging Morocco to join the peace process.

In this way, the true meaning of 'occupation' in these resolutions may, for political purposes, simply be 'no peace'. Then, the phrase 'occupied territory' may be reworded as 'no-peace territory', regardless of how occupation is defined in international law. In short, the word was not used as a legal term under the laws of war, but used politically[45]. This kind of political wording is not unusual, for the General Assembly, the main deliberative, policy-making, and representative UN body.

Generally speaking, a word may have different meanings for different purposes[46]. Thus, the word 'occupation' may be used for the purposes other than legal purposes. Marco Sassòli submits that "the concept of occupation could be different for different rules"[47]. On the contrary, in order for the word to be taken as a legal term, the legal requirements for invoking occupation must be met. Without relevant finding of facts, arguments cannot be legal. In the General Assembly resolutions, however, the facts were not found. Instead, their paragraphs were merely circular. Nonetheless, this political term has been used so frequently as a starting point for denying Morocco's sovereignty over the territory, and for applying the laws of war there, that it has already become an ideological dogma in favor of Polisario. Now, the term is, as it were, a hallmark indicating a pro-Polisario position. Consequently, it is not legitimate for public institutions, whether national or international, to use the words 'Moroccan occupation', neither from a legal perspective nor from political one.

In 2020, rebutting allegations of "Morocco's occupation" made by the South African Department of International Relations and Cooperation (DIRCO), a South African public institution, the Moroccan Embassy in South Africa protested[48]:

> *"On the legal level, the embassy recalled that nearly 70 Security Council resolutions and no less than 120 reports of the various UN Secretaries General on the issue do not include any reference to Moroccan Sahara as an 'occupied territory' or Morocco as an 'occupying force', noting that DIRCO's allegations on this point clearly represent a political and ideological opinion devoid of any legal basis".*

In response to Morocco's protest, South African DIRCO stated an unusual interpretation that "the International Court of Justice (ICJ) has made findings to the effect that the Western Sahara is an occupied territory and the Morocco is an occupying force in that territory", without citing any specific paragraphs from the 1975 Advisory Opinion on Western Sahara. At the same time, DIRCO explains that, arguably due to its influential positions in the African Union and the UN Security Council[49]:

45. C. C. C. Amate, op. cit., supra note 9, p. 350.
46. For example, Morgan Greenwald, "30 Words that Have Different Meanings throughout the U. S.", Bestlife, 2018, https://bestlifeonline.com/words-with-different-meanings/.
47. Marco Sassòli, "A Plea in Defence of Pictet and the Inhabitants of Territories under Invasion: The Case for the Applicability of the Fourth Geneva Convention During the Invasion Phase", in M. Zwanenburg, M. Bothe and M. Sassòli, loc. cit., supra note 17, p. 47.
48. The Moroccan Embassy in South Africa, "Moroccan Embassy in South Africa Deconstructs Pretoria Allegations about Morocco's Territorial Integrity", Map News, 2020, https://www.mapnews.ma/en/actualites/politics/moroccan-embassy-south-africa-deconstructs-pretoria-allegations-about-moroccos.
49. DIRCO, "South Africa Reiterates its Position on the Recognised Right to Self-Determination of the People of Western Sahara", 2020, http://www.dirco.gov.za/dircoenewsletter/newsflash423-16-04-2020.html.

> *"Its approach on Western Sahara is guided by the position of the African Union ... in line with the relevant AU decisions and UN Security Council resolutions. The African Union has also consistently appealed to the parties to the conflict to urgently resume negotiations without pre-conditions and in good faith, under the auspices of the Secretary General of the United Nations, whose Security Council is seized of the matter".*

Polisario's response has relied heavily on the archaic General Assembly resolutions from 1979 and 1980[50], examined above.

If we look back on the historical context when the General Assembly resolutions using the word 'occupation' were adopted, it was more than 10 years before the UN brokered a ceasefire between Morocco and Polisario in 1991, as mentioned above. Furthermore, from 1980 onwards, the General Assembly did not use the word 'occupation' in connection with the territory of the Saharan Provinces[51]. The Security Council has never called the territory 'occupied'[52], as pointed out by the Moroccan Embassy.

Although Ben Saul advocates the application of international humanitarian law to the alleged 'occupied territory' of the Saharan Provinces, he had to admit that Morocco has been "rarely described as an occupying power", commenting that "most sources do not provide detailed legal analyses"[53]. According to Saul, "[t]he principal active hostilities, between Polisario and Morocco, likely constituted a non-international conflict, from 1975 to 2011"[54]. But, he has not taken seriously the ceasefire agreement effectively monitored by MINURSO, as authorized by the Security Council. The ceasefire agreement, to which Polisario also agreed as a matter of course, should not be disregarded. Then, B. Saul relies on the norms of jus cogens which may invalidate conflicting agreements, including a ceasefire agreement[55]. However, given the existing ambiguity in tests to identify norms as jus cogens, which leaves room for abuse[56], arguments based on jus cogens would greatly deprive cogency. Jus cogens has been fundamentally criticized, "[i]ts practical usefulness has been burdened by lack of a clear definition, lack of a procedure for its determination and doctrinal weaknesses"[57]. If the validity

50. Sidi M. Omar, "Dr. Sidi Omar: Deconstructing the Claims of Moroccan Propaganda on Western Sahara", Sahara Press Service, 2020, https://www.spsrasd.info/news/en/articles/2020/04/17/25585.html.
51. Ben Saul, "The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources", Sydney Law School, Legal Studies Research Paper, No. 15/81, 2015, pp. 1-2, http://ssrn.com/abstract=2663843. See also Marcel Brus, "The Legality of Exploring and Exploiting Mineral Resources in Western Sahara", in Karin Arts and Pedro P. Leite (eds.), International Law and the Question of Western Sahara, International Platform of Jurists for East Timor, 2007, p. 206. Therefore, the use of the word 'several' by Alan Baker is not always cogent: "Several General Assembly resolutions have deplored the continued occupation of the territory by Morocco". Idem., "Hijacking the Laws of Occupation", Jerusalem Center for Public Affairs, 2017, No. 613, https://jcpa.org/article/hijacking-laws-occupation/.
52. B. Saul, ibid., p. 1.
53. Ibid., p. 2. As one of the reasons for "the relative inattention" to international humanitarian law, Saul points out the prevailing attention to "the international law principles applicable to mineral resource activities in Non-Self-Governing Territories". Ibid.
54. Ibid., p. 6.
55. Article 53, Vienna Convention on the Law of Treaties. On the ineligibility of the right to self-determination to be identified as a norm of jus cogens, because of its lack of non-derogability under Articles 1 and 4 of the International Covenant on Civil and Political Rights, see Shoji Matsumoto, "Jus Cogens and the Right to Self-Determination: Falsifiability of Tests", Policy Center for the New South, Research Paper, RP-20/12, 2020, pp. 27-32.
56. Yearbook of the International Law Commission, 1966, Vol. II, pp. 247-248.
57. Alred Mwenedata and Joseph Seorana, "The Determination and Enforcement of Jus Cogens for Effective Human Rights Protection", IOSR Journal of Humanities and Social Science, Vol. 21, 2016, p. 80.

of a ceasefire agreement is not recognized[58], the most commonly provided first aid for an armed conflict would be lost[59].

4. Regret of UN Secretary-General Ban Ki-moon

In 2016, a serious problem was caused by the use of the word 'occupation' by the then UN Secretary-General Ban Ki-moon. The controversy over Ban Ki-moon's use of the word was considered to be Morocco's worst dispute with the UN since 1991[60]. Ironically, however, it should be appreciated that the problem has resulted in reconfirmation by the UN of the non-existence of occupation in the territory of the Saharan Provinces.

Ban Ki-moon described Morocco's presence in the territory as 'occupation', during his visit to Polisario's Tindouf camps in southwestern Algeria[61]. The statement prompted large anti-UN demonstrations in Morocco[62]. "The Kingdom of Morocco has noticed", said the Moroccan government, "the Secretary General has dropped his neutrality and impartiality". Then, the Moroccan government pointed out that "[t]he use of such terminology has no legal nor political basis and it is an insult to the Moroccan government and people"[63].

As a countermeasure, the Moroccan Foreign Ministry announced it had decided to significantly reduce its contribution to MINURSO. The Foreign Minister also suggested that the Foreign Ministry was "examining the ways and means of withdrawing Moroccan contingents engaged in peacekeeping operations" all over the world[64]. Morocco also ordered the UN to pull out dozens of civilian staffers and to close a MINURSO military liaison office[65].

In response to Morocco's countermeasures, Ban Ki-moon expressed regret over a "misunderstanding" in his use of the word 'occupation'[66]. "The position of the United Nations has not changed", said UN spokesperson Stephane Dujarric, and "[h]e has not and will not take sides on the issue of Western

58. In 2018, Morocco told the UN Secretary-General Antonio Guterres that it was considering "all options" if the UN does not address its accusations that the Polisario separatist movement is threatening the ceasefire agreement. Michelle Nicholas, "Morocco Mulls 'All Options' over its Western Sahara Truce Threat Claim: Minister", Reuters, 2018, https://www.reuters.com/article/us-westernsahara-morocco-un-idUSKCN1HB32W.
59. To put an end to massive violence may be normally better than to be completely dedicated to protecting international humanitarian rights of the residents exposed to violence.
60. M. Nicholas, "U.N. Chief Regrets Morocco 'Misunderstanding' over Western Sahara Remark", Reuters, 2016, https://www.reuters.com/article/us-morocco-westernsahara-un-idUSKCNOWU1N9.
61. "Moroccans to Rally in Protest at UN Chief's 'Biased' Western Sahara Remarks", Sputnik, 2016, https://sputniknews.com/africa/201603131036195118-marocco-rally-indigenous-bias/.
62. Conor Gaffey, "Western Sahara: Ban Ki-moon Regrets 'Misunderstandings' Over Occupation Comment", Newsweek, 2016, https://www.newsweek.com/western-sahara-ban-ki-moon-regrets-misunderstanding-over-occupation-comment-441552. The Secretary-General expressed his deep disappointment and anger regarding the demonstration which targeted him in person, and stressed that such attacks are disrespectful to him and to the UN. See Stéphane Dujarric, Spokesperson for the Secretary-General, "Daily Press Briefing by the Office of the Spokesperson for the Secretary-General", UN, Meeting Coverage and Press Releases, 15 March 2016, https://www.un.org/press/en/2016/db160315.doc.htm.
63. Aziz El Yaakoubi, "Morocco Accuses UN's Ban of Dropping Neutral Tone in Western Sahara Dispute", Reuters, 2016. http://af.reuter.com/article/topNews/idAFKCNOWB17L?pageNumber=1&virtualbrandChanne=0.
64. Reportedly, about 2,300 Moroccan soldiers and police were then deployed as part of the UN peacekeeping missions. C. Gaffey, "Morocco Threatens to Pull U.N. Peacekeepers in Western Sahara Row", Newsweek, 2016, https://www.newsweek.com/ban-ki-moon-western-sahara-morocco-437821.
65. "UNSC Calls for Return of All Expelled Western Sahara Mission Staff", Sputnik, 2016, https://sputniknews.com/africa/201603251036939061-unsc-calls-sahara-return/.
66. Abdeljalil Bounhar, "UN Chief Regrets Western Sahara 'Occupation' Comment", Aljazeera, 2016, https://www.aljazeera.com/news/2016/03/chief-regrets-western-sahara-occupation-comment-160328201619417.html.

Sahara"[67]. Ban Ki-moon's spokesperson added[68]:

> *"We regret the misunderstandings and consequences that this personal expression of solicitude provoked, especially since the main purpose of the Secretary-General's trip was to focus on the need for a mutually acceptable way forward that would, among other things, end the tribulation of the refugees".*

As a result, it is reconfirmed that "the unchanged position" of the UN, referred to by Dujarric, is non-existence of 'occupation' in the territory of the Saharan Provinces, because the UN cannot take the side of Polisario.

In accordance with the ongoing UN-sponsored negotiations to reach a just, lasting and mutually acceptable political solution to the Sahara Issue, based on compromise, the UN must refrain from taking the side of Polisario on issues such as the occupation of and sovereignty over the territory of the Saharan Provinces.

5. British, EU and South African Courts

The word 'occupation' was used again in a British court[69], a year before the regrettable misuse of the word by Ban Ki-moon in 2016. In the R v Revenue Commissioners, the decision of the British High Court was mainly based on the concept of 'military occupation' in the territory of the Saharan Provinces, so as to deny Morocco's sovereignty over the territory, quoting paragraphs from an article written by Martin Dawidowicz[70]. The court decision held that "unauthorized military occupation cannot be found as the basis for legitimate territorial claims"[71]. This paragraph of the British court decision was later quoted by the South African court in the Cherry Blossom case in 2017[72].

As regards the EU courts, El Ouali expounds that they have moved in the opposite direction to earlier positions[73]. Thus, in the case of Polisario v EU Council in 2015, the General Court of the EU quotes the relevant paragraphs of UN General Assembly resolution 34/37 from 1979 which refers to Morocco's 'continued occupation', and holds that "[a]s the 'occupying power', the Kingdom of Morocco should exercise the rights of the people of Western Sahara observing the principle of the primacy of their interests"[74], though ultimately the court denied the locus standi of Polisario before the court. The following year, however, this decision was overruled by the Grand Chamber of the EU Court. The Grand

67. M. Nicolas, loc. cit., supra note 60.
68. "Morocco-UN: Ban Ki-moon 'Regrets Misunderstanding' Caused by Use of 'Occupation'", Morocco World News, 2016, https://www.moroccoworldnews.com/2016/03/183139/morocco-un-ban-ki-moon-regrets-misunderstanding-caused-by-his-use-of-occupation/. Reportedly, S. Dujaricc pointed out that Ban Ki-moon was not intentional, and that he used it on only one occasion after he was "moved and saddened" by the conditions in which the Saharawis in the Tindouf camps have been living for decades. Ibid.
69. R v Revenue Commissioners, para. 40, iii).
70. Ibid., para. 18. See Martin Dawidowicz, "Trading Fish or Human Rights in Western Sahara?", in Duncan French (ed.), Statehood and Self-Determination, Cambridge University Press, 2013, p. 272.
71. R v Revenue Commissioners, para. 40.
72. Cherry Blossom case, para. 41. Generally see S. Matsumoto, loc. cit., supra note 3.
73. A. El Ouali, "L'Union européenne et la question du Sahara: entre la reconnaissance de la souveraineté du Maroc et les errements de la justice européenne", European Papers, Vol. 2, 2017, pp. 923-951.
74. Case T-512/12, 2015, para. 190.

Chamber repeated the relevant phrases in the General Assembly resolution 34/37[75], concluding that the EU-Morocco trade agreement does not apply to the territory of Saharan Provinces.

It is expounded by Cedric Ryngaert, in a case review of Polisario v EU Council in the General Court in 2015, that "[a]pplying the law of occupation … instead could have opened a window for EU-Morocco trade in natural resources from the Western Sahara insofar as Moroccan exploitation benefits the indigenous inhabitants"[76]. With regard to the exclusion of the Saharan territorial waters from the scope of the EFTA-Morocco Agreement, Norway and Switzerland were of the view that Morocco did not assume sovereignty over the territory of Saharan Provinces[77]. In M. Dawidowicz's opinion, unless the Court finds that Morocco acted as 'a de facto administering State' or 'an occupying State', it would be illogical to deny that an approval of the EU-Morocco agreement is equivalent to recognition of Morocco's sovereignty over the territory of the Saharan Provinces[78].

The legal basis provided for rejecting Morocco's sovereignty over the territory of the Saharan Provinces in these court decisions was only paragraph 162 of the ICJ's non-binding 1975 advisory opinion on the Sahara[79]. The ICJ, however, had been asked about "legal ties", not territorial sovereignty. According to Judge Mohammed Bedjaoui, even in the case of a formally requested question, if a request for an advisory opinion risks "prejudicing the integrity of its judicial function", the court should not be obliged to comply with the request[80]. In this vein, because any legal process would be subject to misuse by the parties, Paul C. Szasz submits, the ICJ can counter any threat of abuse by declining to render an opinion requested[81]. The ICJ also can render a narrow opinion restricted to the terms of the submission[82]. In this regard, Michla Pomerance is critical of viewing a request for an advisory opinion as if it were "client–lawyer" consultation[83]. The term "client–lawyer" would underestimate the uniqueness of the ICJ as the principal judicial organ of the UN and would imply that "the court may be ready to sacrifice its judicial character for the sake of assisting the UN in reaching whatever conclusions the UN wants the court to provide". In the "client–lawyer" relations, the ICJ would be inevitably changed from an independent judicial body into a legitimizing political body for the UN political organs[84]. With regard to the reasons of the absence of an ICJ philosophy of "judicial restraint' in those days, M. Pomerance interestingly suggests, it was linked to the then dearth of cases with which the ICJ was seized[85]. Consequently, Mahasen M. Aljaghoub recalls, "the ICJ always emphasizes that its opinion is given not to the States, but to the organ which is entitled to request it"[86]. From a legal point

75. EU Council v Polisario, Judgment of the Court (Grand Chamber), Case C-104/16 P, 2016, para. 35.
76. Cedric Ryngaert, "The Polisario Front Judgment of the EU Court of Justice: a Reset of EU Morocco Trade Relations in the Offing", Reinforce Blog, 2017, blog.renforce.eu/.../the-polisario-front-judgment-of-the-eu-court.
77. Western Sahara Resource Watch, "Western Sahara not part of EFTA-Morocco free trade agreement", 2010, http://www.wsrw.org/a105x1410.
78. M. Dawidowicz, loc. cit., supra note 70, pp. 267-274.
79. R v Revenue Commissioners, para. 40. Cherry Blossom case, para. 41. Polisario v EU Council, para. 8, EU Council v Polisario, para. 104.
80. Mohammed Bedjaui, "Expediency in the Decisions of the International Court of Justice", British Yearbook of International Law, Vol. 71, 2000, p. 18.
81. Paul C. Szasz, "Enhancing the Advisory Competence of the World Court", in Leo Gross (ed.), The Future of the International Court of Justice, Oceana, 1976, p. 521.
82. The Statute of the ICJ, articles 66, 34 (2)-(3).
83. Michla Pomerance, The Advisory Function of the International Court in the League and UN Eras, John Hopkins University Press, 1973, pp. 292-296.
84. Mahasen M. Aljaghoub, The Advisory Function of the International Court of Justice, 1946-2005, Springer, 2006. pp. 239-240.
85. M. Pomerance, "The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms", in A. S. Muller, et al. (eds.), The International Court of Justice: Its Future Role After Fifty Years, Martinus Nijhoff, 1997, pp. 290 ff.
86. M. M. Aljaghoub, "The Absence of State Consent to Advisory Opinions of the International Court of Justice: Judicial and Political Restraints Reflections on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004", Arab Law Quarterly, Vol. 24, 2010, p. 206.

of view, advisory opinions should not be quoted by public institutions, national or international, other than the organs that had requested them.

In fact, the reference to 'occupation' in the court's decisions raises several problems. First, the use of the word 'occupation' regarding the territory of the Saharan Provinces is archaic and regrettable. The General Assembly has, therefore, not used the word since, as discussed above. Second, the exceptional references to 'occupation' in 1979 and 1980 were made for the sole purpose of urging Morocco to enter into negotiations with Polisario, in light of the conclusion of the Mauritano-Saharawi Agreement between Mauritania and Polisario. But this historical background was not duly taken into account in the court decisions. Third, the courts would deviate from their original role to hand down neutral and fair judgments, by taking sides with Polisario. In fact, the decision in the Cherry Blossom case begins with the surprisingly biased paragraph "[t]he territory of Western Sahara is said to be the only African territory still subject to colonial rule"[87], suggestive of pro-Polisario propaganda on the web[88].

Moreover, from a political perspective, the General Assembly in 2015 is not the same as it was in 1979. The political effect of a non-binding General Assembly resolution is not always expected to persist for decades. As such, the courts should have taken into account the actual position of the General Assembly, the Security Council and the Secretary-General on the Sahara Issue in 2015. For example, unlike the 1979 resolution, a 2015 General Assembly resolution on the Sahara Issue supports the negotiation process aiming to achieving "a just, lasting and mutually acceptable political solution", and welcomes "the commitment of the parties to continue to show political will and work in an atmosphere propitious for dialogue, in order to enter into a more intensive phase of negotiations, in good faith and without preconditions"[89].

Returning to the General Assembly resolutions in 1979 and 1980, after reconfirming no repetition of the word 'occupation', M. Dawidowicz submits, "this is not decisive as belligerent occupation is largely a matter of fact dependent on effective authority and control over a territory to which the occupying state holds no legal ties"[90], notwithstanding that Morocco's legal ties with the territory of the Saharan Provinces are recognized in the Western Sahara Opinion[91], and that Morocco is entitled to exercise "effective authority and control" over the territory based on its sovereignty.

Though the law of occupation may be applicable to the matter of fact involving an armed conflict, when it comes to the territory of the Saharan Provinces, the relevant fact of an armed conflict cannot be found in the subsequent UN Secretary-General's reports on MINURSO activities, only small scale skirmishes are mentioned. Thus, the phrase 'an illegal military occupation' included in the Secretary-General's 2019 report is not the result of the Secretary-General's legal analysis, but rather a direct

87. Cherry Blossom case, para. 1.
88. "Western Sahara: Africa's Last Colony", Western Sahara Resource Watch, 2020, https://www.wsrw.org/a265x4752. To denounce the trade of Saharan natural resources, "the Polisario Front has been relying on an international network, Western Sahara Resource Watch", according to Khadija Mohsen-Finan, "The Polisario Opens a Front in the Battle for the Resources of Western Sahara", OrientXXI, 2019, https://orientxxi.info/magazine/the-polisario-opens-a-front-in-the-battle-for-the-resources-of-western-sahara,3507.
89. UN Doc A/RES/70/98, 2015, paras. 2, 3. The reason why the General Assembly resolution 34/37 from 1979 is still quoted in courts today may not be because the word 'occupation' was inductively introduced when investigating relevant precedents, but rather determined deductively to apply the laws of occupation to the territory of the Sahara Provinces for the purposes other than legal purposes. In this sense, the courts were politically or ideologically biased.
90. M. Dawidowicz, loc. cit., supra note 70, p. 272.
91. ICJ Rep 1975, para. 129.

quotation of Polisario's remarks[92]. Besides, the Security Council, charged with ensuring international peace and security, has never characterized the territory of the Saharan Provinces as 'occupied'[93].

Then, according to M. Dawidowicz, "[s]ubsequent reports and resolutions from the UN recognise that Morocco de facto administers the territory but neither the UN, the OAU, the Member States of the EU, nor the Union itself recognise that Morocco has a de jure claim to sovereignty or rights of occupation". In respect of the de jure administering State over the non-self-governing territory of Saharan Provinces, he inaccurately insists, "as late as 2011 the UN still regarded Spain as the sole administering power for the purpose of the UN Charter"[94], allegedly on the basis of a report of the Secretary-General. The report may be a document entitled "Dates of Transmission of Information under Article 73 e of the Charter of the United Nations and Period Covered"[95]. But, no description suggesting that "the UN still regarded Spain as the sole administering power" can be found in the Secretary-General's report.

While the General Assembly is empowered to decide which territory is a non-self-governing territory, it is not entitled to unilaterally impose responsibilities on a Member State as an administering State under Article 73 e of the UN Charter. The status as an administering State cannot be imposed, and the General Assembly cannot forcibly keep on imposing the responsibilities on Spain. Under international customary law, on the other hand, Spain is legally bound by its own unilateral statement in public of its clear intention to withdraw[96]. Because the transmission of technical and statistical information on the territory in conformity with Article 73 e is "voluntary transmission"[97], the list of administering States that is included in the UN list of non-self-governing territories is a kind of archives. Hence, as a past record, Spain is still included in the relevant UN lists as an administering State[98], as a historical fact. However, the lists do not have any normative implications[99]. As such, the documentary basis of Dawidowicz's above-mentioned assertion is nothing but a remnant of Spain's past record as an administering State before 1976.

92. UN Doc S/2019/282, 2019, hereinafter cited as "2019 Secretary-General Report", para. 10. The quotation may have been made for the sole purpose of warning Polisario of its imprudent and unproductive acts.
93. Christine Chinkin, 'Laws of Occupation', Conference Proceedings, Conference on Multilateralism and International Law with Western Sahara as a Case Study, hosted by the South African Department of Foreign Affairs and the University of Pretoria, 4-5 December 2008, Pretoria, cited in B. Saul, loc. cit., supra note 45, p. 1.
94. R v Revenue Commissioners, para 18. Also, Hans M. Haugen similarly argued, "Spain formally withdrew from the territories on 26 February 1976. Spain however, according to the UN Under-Secretary-General on Legal Affairs, never did in a legal way '… transfer sovereignty over the territory…', as this can only be done in accordance with the procedures set down by the United Nations. Hence, Spain is still the 'administering power' of Western Sahara". Idem., "The Right to Self-determination and Natural Resources: The Case of Western Sahara", LEAD, Vol. 3, 2007, p. 73. Then, it is added, "in order to be truly free from its responsibilities in the international order, Spain needed approval from the UN General Assembly. As Administering Power, Spain had no sovereignty over Western Sahara. It simply acted as a delegate from the international community. Consequently, it could never dispose of the non-self-governing territory without the authorization of the United Nations". See also Eduardo Trillo de Martín-Pinillos, "Spain as Administering Power of Western Sahara", in K. Arts and P. Leite (eds.), op. cit., supra note 51, p. 81. It is added, however, that a "Non-Self-Governing Territory will not be amenable to provisions, in case there is an absence of voluntary adherence to the administrating power", Ibid.
95. Report of Secretary-General, Information from Non-Self-Governing Territories transmitted under Article 73 (e) of the Charter of the United Nations (8 March 2011), UN Doc A/66/65, 2011, Annex.
96. Nuclear Test cases (Australia v France; New Zealand v France) (Merits), ICJ Rep 1974, paras. 43-51.
97. UN Doc A/RES/637, 1952, preamble.
98. Report of the Secretary General of the 1 February 2016, Information from Non-Self-Governing Territories transmitted under Article 73 e of the Charter of the United Nations, UN Doc A/71/68, Annex. It is noted that, "[o]n 26 February 1976, the Permanent Representative of Spain to the United Nations informed the Secretary-General that 'the Spanish Government, as of today, definitely terminates its presence in the Territory of the Sahara and deems it necessary to place the following on record: … (a) Spain considers itself henceforth exempt from any responsibility of an international nature in connection with the administration of the said Territory, in view of the cessation of its participation in the temporary administration established for the Territory …' (A/31/56-S/11997)".
99. Although Eva Kassoti also argues that "[t]he UN still recognizes Spain as the de jure administering power of Western Sahara, and Spain relies on this status in order to extend its international jurisdiction in criminal matters to crimes committed in Western Sahara", it would be thus inaccurate. Idem., loc. cit., supra note 22, p. 33.

In this regard, the UN Under-Secretary-General for Legal Affairs, Hans Corell, correctly explained[100]:

> *"The Madrid Agreement did not transfer sovereignty over the Territory, nor did it confer upon any of the signatories the status of an administering Power, a status which Spain alone could not have unilaterally transferred. The transfer of administrative authority over the Territory to Morocco and Mauritania in 1975 did not affect the international status of Western Sahara as a Non-Self-Governing Territory".*

Indeed, Spain could not transfer sovereignty over the territory of Saharan Provinces because Spain did not assume the sovereignty, in conformity with the fundamental principle of nemo dat quod non habet, or 'nobody gives what he does not have'[101]. Also, Spain could neither confer nor transfer the status of administering State, because responsibilities due to the status should be voluntarily assumed by a Member State in accordance with the UN Charter. Therefore the consequence is, exceptionally, that there is no administering State for the non-self-governing territory of Saharan Provinces. It is exceptional but not illegitimate. It is institutionally supposed from the beginning. While the competent entity that can decide a territory as a non-self-governing territory is the General Assembly, the competent entity that decides to assume responsibilities as an administering State is a Member State. Therefore, a non-self-governing territory without an administering State is within expectations and legitimate. As is well known, in practice, Morocco has not declared that it assumes responsibilities as an administering State.

6. De Facto Administrating State and Occupation

Alternatively, the concept of 'de facto administering State' was newly introduced. M. Dawidowicz submits that the UN and EU treat Morocco as a de facto administering State[102]. Likewise, in the Legal Opinion of the European Parliament Legal Service, Western Sahara is a non-self-governing territory and Morocco is its de facto administrator[103], though the EU is not in a position to decide on behalf of Morocco to assume responsibilities as an administering State, whether de jure or de facto, under the UN Charter. Besides, as a general rule of law, a Member State is not entitled to unilaterally impose responsibilities on another Member State without the consent of the latter. The only possible way to overcome this difficulty, if at all, is to establish that it is an international customary law that derives from the general practice of States and the existence of an opinio juris[104].

100. 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, 2002, Hereinafter cited as 'Corell Letter', para. 6.
101. Case Concerning the land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), ICJ Rep 2002, para. 204. Island of Palmas (Netherlands v US), RIAA, 1928 II, pp. 842-843.
102. M. Dawidowicz, loc. cit., supra note 70, p. 250-276, cited in R v Revenue Commissioners, para. 18.
103. Legal Opinion of the Legal Service in European Parliament on the Proposal for a Council Regulation on the Conclusion of the Fisheries Partnership Agreement between the EC and Morocco – Compatibility with the Principles of International Law, SJ0085/06, 2006, para. 37.
104. North Sea Continental Shelf cases (Germany v Denmark; Germany v the Netherlands), ICJ Rep 1969, paras. 75-83.

The Corell Letter suggests a new international customary law of de facto administering State as below[105]:

> *"The recent State practice, though limited, is illustrative of an opinio juris on the part of both administering Powers and third States: where resource exploitation activities are conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf or in consultation with their representatives, they are considered compatible with the Charter obligations".*

In the Corell Letter, the responsibilities of an administering State and those of other Member States seem to have come close to establishing a new international customary law on non-self-governing territories. If the Corell Letter is taken as the basis, virtually all UN Member States would be treated as de facto administering States. In practice, however, responsibilities under the Corell Letter would not be welcomed by not only Morocco, but a majority of the UN Member States.

Instead of the concept of de facto administering State, the European Court of Justice Advocate General, Melchior Wathelet, took note of another concept, 'the occupied territory'. He described the territory of the Saharan Provinces as 'the occupied territory' and Morocco as 'the occupying power', complaining that "the manner in which the Fisheries Agreement was concluded does not comply with the rules of international humanitarian law applicable to the conclusion, by an occupying power, of international agreements applicable on the occupied territory"[106]. As regards the EU institutions, it is pointed out in Wathelet Opinion that there is "a significant difference" between the positions adopted by the Council and the Commission: "The Council categorically denies that the rules of international law on military occupations are applicable to Western Sahara, whereas the Commission does not preclude the applicability of those rules and maintains that the legal regimes applicable to administering powers and to occupying powers are not mutually exclusive"[107].

A British court holds that, despite the above difference, "the Council and the Commission considered, among a number of possibilities, that the Kingdom of Morocco might be regarded as a 'de facto administrative power' or as an occupying power of the territory of Western Sahara", though it acknowledges that "the Kingdom of Morocco has categorically denied that it is an occupying power or an administrative power with respect to the territory of Western Sahara"[108].

To that effect, B. Saul submits, a territory is held as 'occupied' where the local authority is displaced and "it is placed under the authority of the hostile army"[109]. In fact, however, there have been 'civilian' local authorities in the Saharan Provinces under the sovereignty of Morocco, though the authorities may be considered 'hostile' by Polisario.

105. Corell Letter, para. 24.
106. Opinion of Advocate General Wathelet, delivered on 10 January 2018 (1), R v Revenue Commissioners, hereinafter cited as 'Wathelet Opinion', paras. 234-287. Also, the Office of the Legal Council and Directorate for legal Affairs of the African Union Commission, Legal Opinion, para. 68.
107. Wathelet Opinion, para. 235.
108. Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs, Judgment of the Court (Grand Chamber), Case C-266/16, 2018, para. 72.
109. B. Saul, loc. cit., supra note 51, p. 5.

That kind of argument had already been propounded by Gerald del Caz in 2008, albeit inaccurately, for the political purpose of applying international humanitarian law to the alleged 'military occupation' in the territory of the Saharan Provinces. And then, it was submitted by G. del Caz that certain commercial dealings with natural resources originating in the territory should be prohibited by the law of occupation, extending even to individual criminal responsibility as war crimes[110]. However, the proposition was criticized because a ban on commercial dealings in Saharan natural resource, including criminal sanctions, would be in contravention to "the obligation to promote to the utmost ... the well-being of the inhabitants of these territories" under Article 73 of the UN Charter. When the obligations under international humanitarian law conflict with obligations under the UN Charter, the Charter shall prevail in conformity with Article 103 thereof. Here again, the ineligibility of the right to self-determination to be identified as a norm of jus cogens, mentioned above, would be important.

Meanwhile, as regards the legal concept of 'military occupation', it must imply a "definite end" and cannot continue indefinitely, according to Peter M. R. Stirk[111]. That is why it is stipulated in the Geneva Convention that its application to the occupied territory "shall cease one year after the general close of military operations"[112]. Without a "definite end", Morocco has consistently insisted on its sovereignty over the territory.

Moreover, the argument of 'military occupation' does not correspond to the reality of the territory of Saharan Provinces. The UN Secretary-General reported on the situation in the territory saying that it "remained generally calm"[113]. And in the Secretary-General's 2019 Report, "both parties continued to abide by military agreement No. 1 and other related agreements, and the ceasefire between the parties was respected"[114], though the Secretary-General condemns Polisario's armed military presence in the buffer[115]. Since MINURSO's inception in 1991, the Secretary-General's 2019 Report continues, "no exchange of fire between the parties has taken place". And, MINURSO's "efforts have been successful in de-escalating tensions, in resolving violations of the military agreements and in maintaining the parties' confidence in the ceasefire arrangements"[116]. On analysis, the Secretary-General's 2019 Report concludes, "[t]he overall security environment in Sahara regions remains relatively stable"[117]. In this way, to term the territory as 'an occupied territory' is definitely inappropriate, as if it were intended to bring in a war in secret to the relatively stable territory as a verbal strategy, instead of making efforts to find a political compromise in conformity with the subsequent UN Security Council resolutions. Similarly, for Israel it is argued that "continuing to refer to it as the occupying power in the Gaza Strip would compel Israel, in order to fulfill its duties under the law of occupation, to re-assume a military presence in the area"[118].

In practice, in 2019 the EU agreed with Morocco to revise an agriculture agreement in January and a fisheries agreement in March, urged by a group of Sahrawis in a petition to the EU to adopt

110. Gerald del Caz, "The Legal Status of Western Sahara and the Laws of War and Occupation", GEES, 2008, http://gees.org/articulos/the-legal-status-of-western-sahara-and-the-laws-of-war-and-occupation.
111. Peter M. R. Stirk, Politics of Military Occupation, Edinburgh University Press, 2009, p. 44.
112. Geneva IV Convention, art. 6.
113. Report of the Secretary-General on the Situation concerning Western Sahara, UN Doc S/2018/277, 2018, para. 3.
114. 2019 Secretary-General Report, para. 2.
115. The military nature of Polisario is revealed and apprehended in the Secretary-General's 2019 Report as below: "an armed presence inside the buffer strip at Guerguerat (2019 Secretary-General Report, para. 5); "a military presence of the Frente POLISARIO at 'Waypoint 6', located inside the buffer strip" consisted of two tents (ibid., para. 36); and "military activities east of the berm" (ibid., para. 40).
116. UN Doc S/RES/2468, 2019, para. 77.
117. Ibid., para. 49.
118. T. Ferrano, op. cit., supra note 32, p. 29, n.25.

the agreements, writing that they are beneficial for the development of the territory of the Saharan Provinces[119]. Both of these agreements reaffirmed Morocco's sovereignty over the territory[120], despite separatist Polisario's lobbying in the EU Parliament[121]. Consequently, trade with Morocco in natural resources from the territory of Saharan Provinces is not only legal, but is actually strongly encouraged by the EU as a source of prosperity for the territory and its residents in the long term. Moreover, foreign importers are expected to not succumb to fear of Polisario, in light of its 'lawfare', but rather to cooperate with the populations in the Saharan provinces by importing more natural resources from the region[122].

7. Conclusion

Generally speaking, international law serves not only a normative function in regulating international relations by identifying the values and goals to be pursued, but also an operative function, providing the framework to establish procedures and forms for resolving disputes over compromises[123]. Both have been equally proper functions of international law.

Each party to the Sahara Issue has its own values and goals, such as democracy, sovereignty, territorial integrity, and self-determination. The normative concerns, which may cause a dispute like the Sahara Issue, can be well addressed by bringing the operative function into full capacity[124]. From the perspective of the normative function, the immodest argument of 'occupation' for applying the laws of war to the territory of the Saharan Provinces presupposes taking Polisario's side, raising questions about the most fundamental issue, namely Morocco's sovereignty over the territory.

While Polisario has frequently used the word 'occupation' to challenge Morocco's sovereignty over the territory of the Saharan Provinces, the UN General Assembly used the word in the past to push forward the peace negotiations, as demonstrated above. However, the General Assembly strategy was not only unsuccessful but misleading. Thus, former UN Secretary-General Ban Ki-moon regretted using the word in 2016. The same mistake should have never been repeated. Indeed, the use of the word by the third parties would transform third parties into conflicting parties, as in the South African defamation case in 2020 which led to escalation of the Sahara Issue and a deterioration in the situation.

Moreover, in terms of the operative function, the 'occupation' argument would be detrimental to achieving "a just, lasting, and mutually acceptable political solution", based on compromise, to the Sahara Issue in conformity with the Security Council resolutions[125]. The eccentric application of the laws of war to the peaceful territory of the Saharan Provinces would transform the non-belligerent parties in the peaceful dispute into belligerents. Moreover, under the laws of war, all States in the

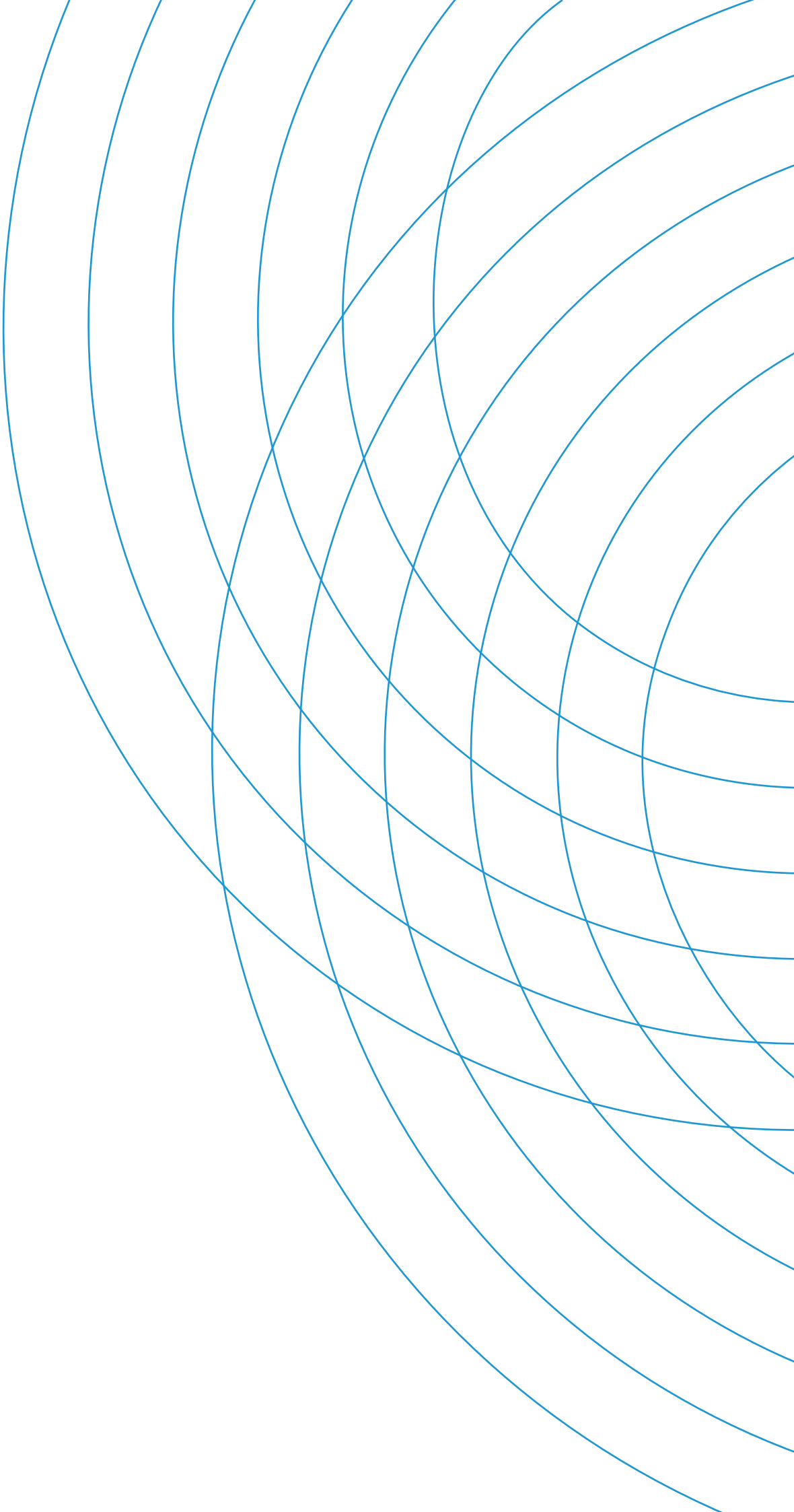
119. "European Parliament Passes EU-Morocco Agriculture Agreement", Morocco World News, 2019, https://www.moroccoworldnews.com/2019/01/263509/european-parliament-passes-eu-morocco-agriculture-agreement/.
120. "Key Developments in 2019", Freedom House, 2020, https://freedomhouse.org/country/western-sahara/freedom-world/2020.
121. Safaa Kasraoui, "Polisario, Algeria Frustrated over EU-Morocco Partnership Agreements", Morocco World News, 2019, https://www.moroccoworldnews.com/2019/01/263628/polisario-algeria-eu-morocco-partnership/.
122. S. Matsumoto, loc. cit., supra note 4, p. 38.
123. Charlotte Ku and Paul F. Diehl, "International Law as Operating and Normative Systems: An Overview", in idem. (eds.), International Law: Classic and Contemporary Readings, 3rd edition, Rienner, 2009, p. 3.
124. Ibid., p. 17.
125. UN Doc S/RES/2494, 2019, Preamble.

world are categorized as belligerents, involving allies and enemy States, or neutral States. Antagonism would thus be institutionalized, making negotiations based on compromise more difficult. The Sahara Issue would be increasingly aggravated by a process of mutual invoking of rights and duties under the laws of war. The laws of war are fundamentally premised on the outbreak and continuation of armed conflicts. However, one intrinsic role of international law and domestic or international courts is to help settle disputes peacefully, while containing violence[126].

The best possible way to promote the well-being of the residents in the non-self-governing territory of the Saharan Provinces should be through a political solution based on compromise, instead of the repeated use of the word 'occupation'. That is why Morocco proposed the Autonomy Initiative in 2007[127], a move that has been repeatedly welcomed by the Security Council as "serious and credible Moroccan efforts to move the process forward towards resolution"[128]. The African Union also supports the ongoing UN process to find a mutually acceptable political solution to the Sahara Issue[129].

A political solution through negotiations between the Moroccan government and the residents of the Saharan Provinces on the basis of the Autonomy Initiative will make it possible to integrate North Africa and promote peace, human security, and economic development across the Maghreb region.

126. As regards academic activities, then, the use of the word 'occupation' under the pretext of academic freedom or freedom of expression may go beyond the scope of due activities to be protected under the freedom. In accordance with Article 20 of the International Covenant on Civil and Political Rights, any advocacy of national hatred that constitutes incitement to hostility shall be prohibited by law. At the same time, such an act would remind us of ethical problems usually associated with military research contributing to war.
127. 'Autonomy Initiative' stands for the Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara Region, UN Doc S/2007/206, 2007.
128. UN Doc S/RES/2414, 2018, Preamble. Following the failure of various solutions proposed by the UN organs to solve the Sahara Issue, such as the Settlement Plan in 1988, Peace Settlement Proposals in 1998, Baker I Framework Agreement in 2000 and Baker II Peace Plan in 2003, the Moroccan Autonomy Initiative has received support from the Security Council. Besides, it is reported that the United Nations Human Rights Council (UNHRC) reiterated its support for the Moroccan Autonomy Initiative. See Rami Almeghari, "Support for Morocco's Western Sahara Autonomy Proposal Reiterated at UNHRC", Citizen Truth, 2019, https://citizentruth.org/support-for-moroccos-western-sahara-autonomy-proposal-reiterated-at-unhrc/.
129. "AU Decision 693 Puts Moroccan Sahara Issue in its Appropriate Framework, Says FM", Morocco World News, 2018, https://sahara-question.com/en/news/18671.



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