



EU-Israel Trade:

PROMOTING INTERNATIONAL LAW VIOLATIONS

بديل
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BADIL

Resource Center for Palestinian

Residency and Refugee Rights

مصدر حقوق المواطنة واللاجئين

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Research: Amaya al-Orzza, Granye Tiernan and Shaina Rose Low

Copy-edit: Shaina Rose Low and Lubnah Shomali

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Credit and Notations

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BADIL Resource Center for Palestinian Residency and Refugee Rights

Karkafa St.

PO Box 728, Bethlehem, West Bank; Palestine

Tel.: +970-2-277-7086; Fax: +970-2-274-7346

Website: www.badil.org



BADIL Resource Center for Palestinian Residency and Refugee Rights is an independent, non-profit human rights organization working to defend and promote the rights of Palestinian refugees and Internally Displaced Persons (IDPs). Our vision, mission, programs and relationships are defined by our Palestinian identity and the principles of international humanitarian and human rights law. We seek to advance the individual and collective rights of the Palestinian people on this basis.

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1. Introduction

On the subject of corporate complicity in the oPt, this constitutes BADIL Resource Center’s third paper, following [*Corporate Complicity in Violations of International Law in Palestine*](#) (2014) and [*Pursuing Accountability for Corporate Complicity in Population Transfer in Palestine*](#) (2015). In these reports BADIL highlighted Israeli and foreign companies’ complicity in international crimes — including in the war crime of forcible transfer — as a result of operating in the occupied Palestinian territory (oPt). However, this paper differs from its predecessors in that rather than focusing on specific companies, it addresses trade relations between the EU and Israeli colonies in the oPt as a whole, and therefore, is an analytical tool applicable to the activities of all companies incorporated in the EU.

This paper analyzes the legality, or lack thereof, of the trade relationship between the European Union (EU) and Israel - including its colonies¹ - under international law. This is an issue of significant relevance for European countries considering that the EU has become Israel’s largest trading partner, and as such, a source of economic and financial gains for both Israeli companies and the state of Israel itself. In light of Israel’s ongoing systematic violations of international law, it is of the utmost importance to determine the legality of this trade relationship. An overview of the current contractual framework governing trade relations between the EU and Israel is followed by an examination of the international legal framework applicable to the oPt and the main international crimes taking place in the oPt due to the colonies and their associated regime. The next section analyzes the international rules regarding corporate complicity. The paper then highlights the illegality of EU trade with these colonies from three different perspectives: breach of the duty of non-recognition; corporate complicity of EU companies; and finally, breach of the agreement regulating trade between the EU and Israel. Having

1 For the purposes of this paper the word colony here refers to unlawful Israeli settlements in the West Bank, both officially recognized and unrecognized by the Israeli government.

concluded the illegality of trading with Israeli colonies, the lawfulness of EU trade with Israel proper is analyzed, taking into consideration Israel's failure to comply with its trade agreement with the EU, as well as with basic tenets of international law, and its support for and expansion of its colonial enterprise. Finally, the paper explores potential avenues for the EU to act in order to put an end to this unlawful trade relationship by examining the case of Crimea and providing a set of recommendations.

2. General Context of the EU-Israel trade relations

HISTORICAL BACKGROUND OF THE ECONOMIC RELATIONSHIP BETWEEN ISRAEL AND THE EU

The European Union (EU) is an economic and political union of 28 European countries.² It was established under the assumption that the risk of conflict is reduced when countries trade with one another. The European Economic Community (EEC), which preceded the EU, was created in 1958 and composed of Belgium, Germany, France, Italy, Luxembourg and the Netherlands. Since then, more than 20 countries have joined, creating a more permanent and developed union, characterized as a single economic market. Over the years this group evolved to acquire a more political character. The transition from the EEC to the EU in 1993 illustrates the evolution of the Union into a complex organization covering issues ranging from climate, justice, migration or security.³

This single European market established commercial relationships with different countries over the years, primarily other Western and neighboring states. Israel is one such country, being an important trading partner for the EU in the Mediterranean area.⁴

FRAMEWORK GOVERNING EU-ISRAEL TRADE

The diplomatic relationship between Israel and the European Communities

2 European Union, *The EU in brief*, n.d., available at: https://europa.eu/european-union/about-eu/eu-in-brief_en [accessed 10 January 2018].

3 *Ibid.*

4 European Commission, *Countries and regions – Israel*, n.d., <http://ec.europa.eu/trade/policy/countries-and-regions/countries/israel/> [hereinafter European Commission, *Israel*] [accessed 10 January 2018].

(EC),⁵ the EU's predecessor, dates back to 1958 when Israel first formulated relations with the newly formed economic and political union. In 1964, the first trade agreement between Israel and the EC was concluded in which the EC gave reduced tariffs and customs duties on approximately 20 Israeli products, and Israel committed to import EC products. In the early 1970s, the EC began to further develop its economic policy towards the South Mediterranean countries as it saw potential for a wide market and the possibility to promote peace and stability in the region.⁶ This resulted in the first Free Trade Agreement between the EC and Israel in 1975, and closer business and economic relations began developing thereafter.

Today, the relations between the Union and Israel are governed by the Euro-Mediterranean Partnership,⁷ the European Neighborhood Policy (ENP),⁸ and the Union for the Mediterranean.⁹ The specific details and legal aspects of this relationship are enumerated in the EU-Israel Association Agreement; although additional agreements exist that cover different issues between both international actors.¹⁰ Signed in 1995 and implemented in 2000, the EU-Israel Association Agreement aimed

5 The 'European Communities' comprised three international organizations governed by the same institutions. These organizations were: the European Economic Community (EEC), the European Coal and Steel Community (ECSC, dissolved in 2002), and the European Atomic Energy Community (Euratom). In 1993 the three communities were subsumed under the European Union (EU). For more information, see Encyclopedia Britannica, *European Community*, available at: <https://www.britannica.com/topic/European-Community-European-economic-association> [accessed 10 January 2018].

6 Christian Hauswaldt, "Problems under the EC-Israel Association Agreement, The Export of Goods Produced in the West Bank and the Gaza Strip under the EC-Israel Association Agreement", EJIL 2003, available at: <http://www.ejil.org/pdfs/14/3/433.pdf>

7 The key objective of the trade partnership is the creation of a deep Euro-Mediterranean Free Trade Area. For more information, see European Commission, *Countries and regions - Euro-Mediterranean partnership*, n.d., available at: http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/index_en.htm [accessed 10 January 2018].

8 EU policy aiming to foster stabilization, security and prosperity with its Southern and Eastern Neighbors. For more information, see European External Action Service (EEAS), *European Neighbourhood Policy (ENP)*, 21 December 2016, available at: https://eeas.europa.eu/headquarters/headquarters-homepage/330/european-neighbourhood-policy-enp_en [accessed 10 January 2018].

9 Intergovernmental organization bringing together the 28 European Union member states and 15 countries from the Southern and Eastern shores of the Mediterranean. For more information, see Union for the Mediterranean, *Main Website*, n.d., available at: <http://ufmsecretariat.org/> [accessed 10 January 2018].

10 European External Action Service (EEAS), *Israel and the EU*, 12 May 2016, available at: https://eeas.europa.eu/headquarters/headquarters-homepage_en/1337/Israel%20and%20the%20EU [accessed 10 January 2018].

to achieve the broad objectives of the Euro-Mediterranean Partnership known as the Barcelona Declaration.¹¹

The Association Agreement forms the current framework for economic relations between Israel and the EU and gives Israel preferential treatment within the EU. The main components of the EU-Israel Association Agreement address diverse areas of common interest and include regular political dialogue, provisions regarding the liberalization of trade and services, in addition to a strengthening of economic, social, and cultural cooperation. As part of the Barcelona Declaration, the EU also signed an Interim Association Agreement with the Palestine Liberation Organization (PLO), on behalf of the Palestinian Authority, in February 1997.¹² This Association Agreement is significant because the West Bank and Gaza Strip were recognized as a separate and sovereign customs territory, confirming that the EU-Israel Association Agreement does not extend to Israeli companies operating in those areas.

CURRENT CONTEXT

The EU-Israel Association Agreement has transformed the EU into Israel's primary trade partner, with total trade amounting to approximately €34.3 billion in 2016.¹³

The long established relationship between Israel and the EU has also been contentious owing to the EU's determination to develop a beneficial trading relationship, while at the same time denouncing Israel's non-compliance with international law. Historically, the EU has preferred political dialogue and engagement rather than confrontation or coercion, and, in this line, has abstained from applying sanctions against Israel.¹⁴ This failure to issue punitive measures, nonetheless, has been the subject of growing controversy, in light of the seriousness of Israeli violations of international law. In recent years,

11 The Barcelona Declaration or Process is the founding act of a comprehensive partnership between the European Union and twelve countries in the Southern Mediterranean, including Israel. This partnership aimed to turn the Mediterranean into a common area of peace, stability and prosperity through the reinforcement of political dialogue, security, and economic, financial, social and cultural cooperation.

12 European Commission, Countries and regions – Palestine, n.d., <http://ec.europa.eu/trade/policy/countries-and-regions/countries/palestine/> [accessed 10 January 2018].

13 European Commission, *Israel*, *supra* note 4.

14 Taylan Özgür Kaya, *The Middle East Peace Process and the EU: Foreign Policy and Security Strategy in International Politics* (I.B.Tauris, 2013), 150, available at: <http://goo.gl/3fjmZi>

a growing number of legal experts,¹⁵ activists and organizations, Palestinian and international,¹⁶ have called on the EU to take a stronger stance regarding Israel to pressure the country to comply with international obligations. Demands range from only banning Israeli goods originating in colonies to banning all Israeli goods.¹⁷

While the EU is not a sovereign political unit, and member states run their own foreign policy, the EU does act on behalf of its members in pursuance of some common objectives. In recent years it acquired a more influential role in the international sphere, especially in the Middle East. The EU — together with the UN, the USA and the Russian Federation — is a member of the Quartet, which in 2002 launched an initiative to resolve the “conflict” between Palestinians and Israelis.¹⁸ This membership illustrates the EU’s willingness to engage politically in the oPt and Israel. Moreover, the EU has on numerous occasions denounced Israeli violations of international law, and it has established official EU positions regarding different issues. One such position that the EU upholds is that all Israeli colonies in the oPt, including East Jerusalem, are unlawful under international law.¹⁹

Based on the EU’s past behavior and stated positions, the question that bears asking is: if the EU considers all Israeli colonies in the oPt illegal, and has clearly shown interest over the past decade to put an end to the military occupation of the oPt, why does it continue to import Israeli goods produced

15 European Coordination of Committees and Associations for Palestine, *European Legal Experts call on the EU to ban settlement products*, 16 December 2015, available at: <http://www.eccpalestine.org/european-legal-experts-call-on-the-eu-to-stop-trading-with-settlements/> [accessed 10 January 2018].

16 Some of the organizations that have called for a ban on all goods produced in Israeli colonies are: Trocaire, Diakonia, Al Haq, Christian Aid and the International Federation for Human Rights (FIDH). See, International Federation for Human Rights, *Trading Away Peace: How Europe helps sustain illegal Israeli settlements*, 30 October 2012, available at: <https://www.fidh.org/en/region/north-africa-middle-east/israel-palestine/Trading-Away-Peace-How-Europe-12343> [accessed 10 January 2018]; Al Haq, *New Al-Haq Report, “Feasting on the Occupation”, Highlights EU Obligation to Ban Settlement Produce*, 14 January 2013, available at: <http://www.alhaq.org/advocacy/targets/european-union/662-new-al-haq-report-feasting-on-the-occupation-highlights-eu-obligation-to-ban-settlement-produce> [accessed 10 January 2018].

17 BDS Movement, *Main Website*, n.d., available at: <https://bdsmovement.net/news-listing-author/European%20Coordination%20of%20Committees%20and%20Associations%20for%20Palestine%20%28ECCP%29> [accessed 10 January 2018].

18 European External Action Service (EEAS), *Middle East Peace process*, 15 June 2016, available at: https://eeas.europa.eu/headquarters/headquarters-homepage_en/337/Middle%20East%20Peace%20process#EU+positions+on+the+Middle+East+peace+process [accessed 10 January 2018].

19 *Ibid.*

in those same colonies? Are not the EU's trade activities with colonies contradictory with its official stance on this issue? Or is this position limited to the EU's activities as an official institution, and not extended to private corporations operating within its borders? The following sections analyze the EU's trade relationship with Israel through the lens of international law.

3. Israeli Violations of International Law

While Israeli colonies are often discussed in the media and political spheres, their magnitude and impact on the Palestinian residents of the West Bank and their lands is often underplayed. Since it began its military occupation in 1967, Israel has built over 200 Israeli colonies (both residential and industrial) in the West Bank, including East Jerusalem. The colonizer population is estimated to be 600,000 as of 2017.²⁰ The colonies' impact is not limited to their built-up areas but rather actually affects the entire West Bank. Public and private Palestinian land is appropriated in order to develop the infrastructure — roads, barriers, water systems, telecommunication towers — upon which the colonies rely. The specific crimes connected to colonies and their associated regime are explored below, after the legal framework.

LEGAL FRAMEWORK

This paper will not provide a comprehensive overview of the legal framework governing the oPt, as this has been well detailed in other BADIL publications.²¹ Instead, it will focus on the most relevant laws to provide a basic context for the legal analysis that follows.

20 B'Tselem, *Settlements*, n.d., <http://www.btselem.org/topic/settlements> [accessed 10 January 2018].

21 BADIL Resource Center, *Forced Population Transfer: The Case of Palestine, Introduction*, March 2014, available at: http://www.badil.org/phocadownloadpap/Badil_docs/publications/wp15-introduction.pdf [accessed 10 January 2018].

International Humanitarian Law

Prohibition on Population Transfer

Article 49 of the Fourth Geneva Convention prohibits the transfer of an Occupying Power's civilian population into occupied territory.²² Article 49 also prohibits the forcible transfer of protected persons, in this case the occupied Palestinian population, within their territory.²³

This provision is robust and unequivocal, prohibiting individual or mass forcible transfer regardless of motive, with contravention constituting a grave breach under Article 147 of the Fourth Geneva Convention, and thus also a war crime under the Rome Statute of the International Criminal Court (ICC).²⁴

Prohibition on Exploitation of Natural Resources

International Humanitarian Law (IHL) also prohibits the exploitation of natural resources. Article 55 of the 1907 Hague Regulations states that “[t]he occupying state shall be regarded only as an administrator and usufructuary of public buildings, real estate, forests, agricultural estates belonging to the hostile state and situation in occupied territory. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.” Consequently, the Occupying Power cannot acquire title to the territory's natural resources, nor can it exploit the natural resources in an occupied territory to increase its own material wealth,²⁵ or for the benefit of the colonizers residing in the territory. These acts amount to the crime of pillage – extensive exploitation – which is also prohibited under the Fourth Geneva Convention.²⁶ Under the Rome Statute of the ICC pillage constitutes a war crime.²⁷

22 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 49, 12 August 1949, available at: <https://ihl-databases.icrc.org/ihl/WebART/380-600056> [hereinafter GCIV] [accessed 10 January 2018].

23 *Ibid.*

24 UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998, art. 8(2)(a)(vii), available at: <http://www.refworld.org/docid/3ae6b3a84.html> [hereinafter ICC Statute] [accessed 10 January 2018].

25 Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Request for the Indication of Provisional Measures, 2000 ICJ (July 1).

26 GCIV, art. 33 second paragraph, *supra* note 22, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=72728B6DE56C7A68C12563CD0051BC40>; see also, International Committee of the Red Cross (ICRC) IHL Database - Customary IHL, Rule 52. Pillage is prohibited, n.d., available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule52#Fn_5496F01E_00004 [hereinafter ICRC Customary IHL] [accessed 10 January 2018].

27 ICC Statute, art. 8(2)(e)(v), *supra* note 24.

Prohibition on Land Confiscation

The obligations and prohibitions of the Occupying Power concerning land in occupied territory are clearly addressed in IHL. The seizure of property is only permissible in extenuating circumstances, and the seizure must be absolutely necessary for military operations.²⁸ Under Article 23(g) of the 1907 Hague Regulations, it is forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” Likewise, Article 46 of the aforementioned Regulations affirms that private property must be respected and that it cannot be confiscated.²⁹ Additionally, the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” constitutes a grave breach under the Fourth Geneva Convention,³⁰ and is also considered a war crime under the Rome Statute.³¹

International Human Rights Law

The main human rights instruments including the 1948 Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are all applicable in the oPt. Israel is also a signatory to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Below are some of the rights Palestinians are entitled to under the framework of International Human Rights Law (IHRL).

Right to Self-Determination

The Palestinian people have a right to self-determination, which is a *jus cogens* entitlement.³² Self-determination is an inalienable right under

28 GCIV, art. 53, *supra note 22*, available at <https://ihl-databases.icrc.org/ihl/WebART/380-600060?OpenDocument>; ICRC Customary IHL, Rule 50 and 51, *supra note 26*, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule50, and, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule51 [accessed 10 January 2018].

29 International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 46, 18 October 1907, available at: <http://www.refworld.org/docid/4374cae64.html> [accessed 10 January 2018].

30 GCIV, art. 147 and art. 149, *supra note 22*.

31 ICC Statute, art. 8(2)(a)(iv), *supra note 24*.

32 The term *jus cogens* refers to the fundamental principles of International Law which can never be derogated from. See, International Court of Justice, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2014, available at: <http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> [hereinafter ICJ Advisory Opinion][accessed 10 January 2018].

international law, enumerated in Common Article 1 to both the ICCPR and the ICESCR.³³

The Declaration on the Granting of Independence to Colonial Countries and Peoples describes colonization as “the subjection of peoples to alien subjugation, domination and exploitation which denies them their fundamental human rights”, and in particular, that of self-determination.³⁴ The Declaration thus considers that colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and infringes upon the inalienable right of all people to freedom, and sovereignty and integrity over their national territory. As such, colonization involves unlawful annexation or retention of control over territory, which has the effect of denying the indigenous population their right to self-determination. Colonialism is considered to be a particularly serious breach of international law because it is fundamentally contrary to core values of the international legal order.

In 1973, the United Nations General Assembly (UNGA) passed a resolution addressing the “Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights,” specifically referring to both the South African and Palestinian people.³⁵ This right has also been confirmed by the International Criminal Court (ICC) in its 2004 advisory opinion, as well as several other UNGA resolutions.³⁶

Right to Non-Discrimination and Equality

Discrimination on the “basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”

33 UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, Article 1; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, 16 December 1966, Article 1.

34 UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1969, A/RES/1514(XV), paras 1, 2, available at: <http://www.un.org/en/events/decolonization50/docs.shtml>

35 United Nations General Assembly (UNGA) Resolution A/RES/3070 (XXVIII), 30 November 1973, operative para. 2

36 Some of them are: UNGA Resolution A/RES/3246 (XXIX; 29 November 1974), UNGA Resolution A/RES/33/24 (29 November 1978), UNGA Resolution A/RES/34/44 (23 November 1979), UNGA Resolution A/RES/35/35 (14 November 1980), and UNGA Resolution A/RES/36/9 (28 October 1981).

in the enjoyment of these rights as well as other fundamental freedoms encompassed in the ICESCR and the ICCPR is prohibited.³⁷ Article 7 of the UDHR states that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration.”

Signatories to the ICERD must “engage in no act or practice of racial discrimination against persons, groups of persons or institutions” and agree “not to sponsor, defend or support racial discrimination by any persons or organizations.” Under Article 3, signatories must “particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”

Right to Protection of Property

Article 17 of the UDHR states that “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.” Article 17 of the ICCPR protects against incidents of “unlawful interference with [...] privacy, family, [and] home”, and states that everyone should be afforded protection “against such interference or attacks.”

Furthermore, the ability to exercise many other rights, which are explicitly protected by various treaties, is dependent upon exercising the rights associated with property. These fundamental rights include, for example, the rights to an adequate standard of living, family life, freedom of movement, food, work, and even life. The protection against arbitrary deprivation of property, therefore, is a requirement to ensure human dignity that is established by exercising the aforementioned rights.

MAIN VIOLATIONS RESULTING FROM ISRAEL’S COLONIAL REGIME

Israel continuously and consistently violates rights and protections afforded to Palestinians under both IHL and IHRL. While the range of international law violations is broad and widespread, this section will focus on providing an overview of some of the main Israeli crimes in relation to its colonial enterprise in the oPt.

³⁷ UNGA, ICESCR, art. 2.2, *supra note 1.*; UNGA, ICCPR, art. 26, *supra note 1.*; UNGA, Universal Declaration, art. 7.

IHL Violations

The unlawful forced displacement of protected persons within the oPt by the Israeli occupying forces often serves as a precursor to the construction and expansion of Israeli colonies. The 1967 War transitioned into a deeply entrenched military occupation of the oPt characterized by unlawful and systematic policies of forcible transfer of Palestinians. This forcible transfer most often is the result of Israeli policies aimed at creating coercive environments that pressure Palestinians out of their homes. Although these policies take different forms, they share one goal, acquiring and colonizing the maximum amount of land with the minimum number of Palestinians on that land. Thus, in order to establish and expand colonies in the oPt, forcible transfer of Palestinians from their homes and lands is essential.

In the same manner, forcible transfer is inherently intertwined with colonial transfer as Israel aims at not only controlling land, but imposing a Jewish-Israeli majority in the oPt. As mentioned above, the transfer of the civilian population of the occupier into the occupied territory is defined as an international crime per the Rome Statute and the Fourth Geneva Convention.

A number of attendant unlawful practices are carried out in conjunction with acts of forcible transfer and colonial transfer. Such acts include the unlawful destruction and confiscation, or appropriation, of occupied Palestinian property and land – both private and public;³⁸ the de facto annexation of occupied Palestinian land;³⁹ the confiscation, destruction, exploitation and pillage of Palestinian natural resources;⁴⁰ the denial of the Palestinians' inalienable right to self-determination,⁴¹ and a host of additional human rights violations. When forcible transfer occurs, it is often preceded by, and indeed is the result of, the aforementioned violations and others.

Forcible transfer and the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly are grave breaches of the Fourth Geneva Convention, and also amount to war crimes as per Article 8 of the Rome Statute of the ICC. Moreover, under the

38 ICJ Advisory Opinion, paras, 126 and 135, *supra* note 32.

39 *Id.*, para 121, where it was concluded that “the construction of the wall and its associated regime [including settlements] create a “fait accompli” on the ground that could well become permanent, in which case... it would be tantamount to de facto annexation,” *supra* note 32.

40 *Id.*, para 133, *supra* note 32; UN General Assembly, Resolution ES-10/14 (2003), 12 December 2003.

41 ICJ Advisory Opinion, para. 122, *supra* note 32.

Rome Statute, when committed as part of a widespread or systematic attack against a civilian population, forcible transfer can also constitute a crime against humanity either in its own right,⁴² or as an underpinning inhumane act for the specific crimes of persecution or apartheid.⁴³

Specific instances and case studies of forcible transfer in the oPt can be found in *Coercive Environments: Israel's Forcible Transfer of Palestinians in the Occupied Territory* and the series on *Forced Population Transfer: The Case of Palestine*, both produced by BADIL.

IHRL Violations

In addition to its violations of IHL, Israel also violates the rights guaranteed to the Palestinians under IHRL. In 2013, the independent international fact-finding mission to investigate the implications of Israeli colonies on the civil, political, economic, social and cultural rights of the Palestinian people throughout the oPt, including East Jerusalem concluded that,⁴⁴

the right to self-determination of the Palestinian people, including the right to determine how to implement self-determination, the right to have a demographic and territorial presence in the oPt and the right to permanent sovereignty over natural resources, is clearly being violated by Israel through the existence and ongoing expansion of the settlements. The transfer of Israeli citizens into the Occupied Palestinian Territory, prohibited under international humanitarian law and international criminal law, is a central feature of the practices and policies of Israel.

The Palestinians' right to equality and non-discrimination is also being violated through the various practices associated with population transfer, as recognized by the independent fact-finding mission.⁴⁵ The mission also recognized the existence of the following various discriminatory practices, conducted by Israel that relate to the acts of population transfer: inequality and discrimination in the application of the law; colonizer violence and intimidation; dispossession and

42 ICC Statute, art.7(1)(d), *supra note 24*.

43 *Id.*, arts. 7(1)(h) and 7(1)(j), *supra note 24*.

44 UN Human Rights Council, Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, A/ HRC/22/63, 7 February 2013.

45 *Ibid.*

displacement; restrictions on freedom of movement; restrictions on freedom of expression and assembly; restrictions on the right to water; and impediments to economic rights.⁴⁶

The confiscation of occupied land for the construction and expansion of colonies cannot be justified and is also prohibited. Israel often times manipulates or outright ignores the rights connected to ownership without actually being the legal owners, preventing Palestinians from exercising their ownership rights.

Economic support to these colonies, including trade, facilitates their expansion and permanence, as well as the commission of the aforementioned crimes. For example, agricultural colonies in the Jordan Valley that exploit Palestinian natural resources would be unsustainable if not for fruit and vegetable exports and trade.

EU OBLIGATIONS ARISING FROM INTERNATIONAL LAW VIOLATIONS

IHL Obligations

All states have a clear obligation to ensure respect for IHL. They must also not recognize or assist in any manner the illegal situation that Israel's colonial policy has created and, in fact, they should use their influence to stop such violations.⁴⁷

On 1 March 1980 the UN Security Council issued Resolution 465, which determined,

that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity and that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a

⁴⁶ *Ibid.*

⁴⁷ ICRC, *Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations*, 719, available at: <https://www.icrc.org/en/international-review/article/common-article-1> [accessed 10 January 2018].

serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East;

and strongly deplored,

the continuation and persistence of Israel in pursuing those policies and practices and calls upon the Government and people of Israel to rescind those measures, to dismantle the existing settlements and in particular to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem.

Further, paragraph 7 of UN Security Council Resolution 465 called on all states “not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories.”

More recently, in December 2016 the UN Security Council passed Resolution 2334, which reaffirmed “the obligation of Israel, the Occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention and the 2004 advisory opinion by the International Court of Justice.” It also condemned,

all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, inter alia, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions.

and reaffirmed,

that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law.

Based on these affirmations, the UN Security Council underlined that “it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations,” and called on all States to “distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.”

Duty of non-recognition

All states have an obligation not to recognize a situation that results from a serious breach by a state of an obligation arising under a peremptory norm of general international law, as stipulated in Article 40 of the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts. Article 41(2) adds that, “No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.”⁴⁸ The duty of non-recognition is not limited to abstaining from formal acts of recognition, but also acts which would imply recognition.⁴⁹

In its advisory opinion on Israel’s Separation and Annexation Wall, the ICJ declared that “...all States are under an obligation not to recognize the illegal situation resulting from the construction of the Wall in the oPt, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.”⁵⁰ Although the ICJ did not explicitly mention Israeli colonies in this portion of its decision, it may be presumed that the court intended to extend the duty of non-recognition to Israeli colonies.⁵¹

In addition to third party states’ obligations not to recognize or render aid or assistance to Israel’s illegal actions, states also have an obligation to ensure Israel’s compliance with IHL. Common Article 1 of the Geneva Convention clearly states that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Moreover, Article 146 of the Fourth Geneva Convention states that “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention” and “Each High Contracting

48 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf [accessed 10 January 2018].

49 Tom Moerenhout, “The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories,” *International Humanitarian Legal Studies* 3 (2012), 344–385, available at: http://www.eccpalestine.org/wp-content/uploads/2015/02/IHLS_Moerenhout-Final-1.pdf [hereinafter Moerenhout, “Obligation to Withhold”].

50 ICJ Advisory Opinion, paras. 136, 159, 183, *supra note* 32.

51 James Crawford, Opinion: *Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories* (James Crawford, 2012), 10, para 24. [hereinafter Crawford, *Third Party Obligations*].

Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches.”

Obligations arising from IHRL

The EU has an obligation to ensure the respect and implementation of Customary International Law.⁵² Whether human rights have the status of Customary Law or not and if so, which ones, continues to be a debate among legal scholars. Generally, however, it is agreed that the entire UDHR would have such status and would therefore be binding on all states. More specifically, certain rights have been recognized by the ICJ to be part of Customary International Law.⁵³ These include *inter alia* the right to self-determination; the prohibition on genocide; freedom from racial discrimination, including apartheid; and protection against denial of justice.⁵⁴ Moreover, the ICJ has established that the “rules concerning the basic rights of the human person” are considered to be the concern of all States and are *erga omnes*.⁵⁵ This means that these basic rights are not only Customary Law but they are also “obligations held by each State towards every other State, and their breach gives rise to a right on any State to invoke the responsibility of the violating party.”⁵⁶

UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

In 2008, the United Nations Human Rights Council (UNHRC) unanimously endorsed the “Protect, Respect and Remedy Framework”, which was developed by Professor John Ruggie to address the roles of states and businesses in promoting human rights. Following the endorsement, Professor Ruggie’s tenure as Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises was extended in order to develop recommendations and

52 E.g., CJEU, Case C-308/06, Intertanko [2008] ECR I-4057, para. 51.

53 UN Human Rights Office of the High Commissioner (OHCHR), The European Union and International Human Rights Law, Regional Office for Europe, February 2011, 23, available at: http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf

54 *Ibid.*

55 *Ibid.*

56 See Article 48(1)(b) and accompanying commentary: ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), [2001] Yearbook of the International Law Commission, Vol. II, Part Two, 126-128.

guidance for states, businesses, and other actors on how to best implement the Framework. The result was the UN Guiding Principles on Business and Human Rights that were unanimously endorsed by the UNHRC in 2011.

While the UN Guiding Principles do not create new international legal obligations for states, corporations, and other actors, they “elaborate[] the existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.”⁵⁷ The Principles are organized in three parts: 1) The State Duty to Protect Human Rights; 2) The Corporate Responsibility to Respect Human Rights; and 3) Access to Remedy.

Most relevant in the context of the European Union and Israel and the oPt is Guideline 7, “Supporting Business Respect for Human Rights in Conflict Affected Areas,” which stipulates that,

because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved in such abuses, including by: (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; and (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.⁵⁸

Although the UN Guiding Principles do not create any new obligations, they reaffirm state and corporate actors’ obligations not to contribute to human rights abuses and to ensure that legislation, regulations and enforcement measures are adequate to prevent complicity in human rights violations.

57 John Ruggie, Presentation of Report to United Nations Human Rights Council, Geneva, May 30 2011, available at: <https://business-humanrights.org/sites/default/files/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf>

58 OHCHR, *Guiding Principles on Business and Human Rights*, UN, 2011, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter *Guiding Principles*].

4. Illegality of EU trade with colonies

Previous sections provide a concise overview of the main international laws governing the oPt, Israel's violations of these laws, and the EU's obligations arising from these violations. The question here is, does the reality on the ground and the applicable legal framework trigger the aforementioned obligations for the EU vis-à-vis Israeli colonies? Do applicable norms combined with Israeli violations create an obligation for the EU to end trade with colonies in the oPt?

This section explores EU obligations vis-à-vis trade with Israeli colonies in the oPt and argues that such trade is illegal under international law. This illegality results from three different yet interrelated obligations: the duty of non-recognition, the obligation to end corporate complicity in international crimes, and obligations arising from the breach of the Association Agreement by Israel and Israeli companies.

ILLEGALITY ARISING FROM THE OBLIGATION OF NON-RECOGNITION

The duty of non-recognition establishes that states shall not recognize as lawful a situation created by a serious breach by a state of an obligation arising under a peremptory norm of international law, nor render aid or assistance in maintaining that situation. Therefore, for the purposes of this section it must be proven, firstly, that colonies represent a serious breach of an obligation arising under a peremptory, and secondly, that trade between the EU and Israeli colonies constitutes either recognition and/or rendering aid or assistance in maintaining those colonies.

Colonies as serious breach of an obligation arising under a peremptory norm of international law

The academic Tom Moerenhout lists three considerations to determine

the peremptory nature of the obligations breached by Israeli colonies and related infrastructure. The first two are based on the 2004 ICJ advisory opinion, which took into consideration the denial of the Palestinian right to self-determination as well as the breach of fundamental norms of IHL to call on states to uphold their duty of non-recognition regarding the Wall. Several scholars have reaffirmed that the Fourth Geneva Convention is one of these “fundamental norms” and that as such, it is a peremptory norm.⁵⁹

Based on the above it can be said that acts preventing the exercise of the right to self-determination, or acts that constitute a grave breach of the Fourth Geneva Convention can be considered a serious breach of an obligation arising under a peremptory norm of general international law. Israeli policies triggering the forcible transfer of Palestinians or the extensive destruction and appropriation of property, among others, when they are not justified by military necessity and carried out unlawfully and wantonly, constitute grave breaches. This means that if colonies prevent the Palestinian right to self-determination, or if they constitute a grave breach, then States have a duty of non-recognition vis-à-vis these colonies. Both kinds of acts, the denial of self-determination and grave breaches, have been thoroughly documented in different BADIL reports,⁶⁰ as well as reports from other organizations,⁶¹ and therefore, they will not be covered in this section.

The third act carried out by Israel that could constitute a serious breach would be the crime of Apartheid. The draft ILC Articles on State Responsibility note

59 Tom Moerenhout, “The Consequence of the UN Resolution on Israeli Settlements for the EU: Stop Trade with Settlements,” *Blog of the European Journal of International Law*, 4 April 2017, available at: <https://www.ejiltalk.org/the-consequence-of-the-un-settlements-resolution-for-the-eu-stop-trade-with-settlements/> [hereinafter Moerenhout, “Consequence of UN Resolution”][accessed 10 January 2018].

60 BADIL, *Forced Population Transfer: The Case of Palestine - Suppression of Resistance*, December 2016, available at: <http://www.badil.org/phocadownloadpap/badil-new/publications/research/working-papers/wp19-Suppression-of-Resistance.pdf>; BADIL, *Forced Population Transfer: The Case of Palestine - Denial of Access to Natural Resources and Services*, September 2017, available at: <http://www.badil.org/phocadownloadpap/badil-new/publications/research/working-papers/wp20-DANRS.pdf>; BADIL, *Forced Population Transfer: The Case of Palestine - Land Confiscation and Denial of Use*, October 2017; BADIL, *Survey of Palestinian Refugees and Internally Displaced Persons, 2010-2012*.

61 Among others, “Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem”, *Human Rights Council*, Twenty-second session, Agenda item 7, 7 February 2013, available at: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/FFM/FFMSettlements.pdf>; General Assembly Resolution 2649 (30 November 1970); General Assembly Resolution 48/94 (20 December 1993).

widespread agreement regarding the *jus cogens* nature of the prohibition on Apartheid.⁶² Consideration of Israeli practices in the oPt as amounting to Apartheid has been developed by Professors John Dugard and John Reynolds,⁶³ as well as Professors Falk and Tilley in the report commissioned by the UN Economic and Social Commission for West Asia (ESCWA) that was withdrawn shortly after its release due to political pressure.⁶⁴ A finding of the crime of Apartheid in the oPt would also give rise to an obligation not to recognize any acts related to such a crime for the EU.

EU trade as recognition, aid or assistance

There is not yet consensus among legal scholars about whether trade with Israeli colonies violates third party states' duties of non-recognition and not to aid or assist in maintaining a violation of international law.⁶⁵ Professor James Crawford, an expert on state responsibility and currently a judge serving on the ICJ, believes that trade, itself, may not be a violation, because the nexus between the third party state and Israel's illegal actions is insufficient. Other scholars⁶⁶ believe there is a sufficient nexus between third parties' trade with Israeli colonies and Israel's illegal actions, arguing that the trade of products manufactured or produced in Israeli colonies further entrenches Israel's authority over the territory. They argue that third party states are violating their duties merely by trading with colonies because they are implicitly "recognizing, aiding and assisting [colonies]."⁶⁷ Companies located in colonies pay municipal

62 Moerenhout, "Consequence of UN Resolution," *supra* note 59.

63 John Dugard and John Reynolds, Apartheid, "International Law, and the Occupied Palestinian Territory," *The European Journal of International Law* Vol. 24 no. 3, 2013, available at: <http://ejil.oxfordjournals.org/content/24/3/867.full.pdf+html> [accessed 10 January 2018].

64 BADIL Resource Center, BADIL welcomes the UN report on Israeli Regime of Apartheid, 16 March 2017, available at: <http://www.badil.org/en/publication/press-releases/86-2017/4743-pr-en-160317-19.html> [accessed 10 January 2018].

65 Christian Aid, Trocaire & others, *Trading Away Peace: How Europe helps sustain illegal Israeli settlements*, October 2012, 16, available at: https://www.fidh.org/IMG/pdf/trading_away_peace_-_embargoed_copy_of_designed_report.pdf [hereinafter *Trading Away Peace*].

66 Moerenhout, "Obligation to Withhold," *supra* note 49; Moerenhout, "Consequence of UN Resolution," *supra* note 59.

67 *Trading Away Peace*, 16, *supra* note 65; "Letter to Policy Makers in the European Union and its member states Calling for Compliance with International Legal Obligations Related to Withholding Trade from and Toward Israeli Settlements," 13 January 2016, available at: <http://www.eccpalestine.org/wp-content/uploads/2015/12/Letter-on-settlement-trade-FINAL-.pdf>

taxes which provide for the development, building and maintenance of infrastructure, thereby creating and maintaining a permanent colonial presence on the ground.

Professor Crawford concedes that some trade may by its nature breach third party states' duty of non-recognition should their actions entrench the occupier's authority over the territory and cannot be "considered as routine government administration; or serve to benefit the local (i.e. Palestinian) population."⁶⁸ Under IHL, Israel is obligated to respect the laws in force prior to its occupation, unless absolutely prevented.⁶⁹ IHL also requires Israel to respect Palestinian sovereignty over natural resources, which includes water.⁷⁰ However, Israel has enacted legislation that redistributes water resources directly in violation of the Jordanian laws that were in place when the occupation began and that is implemented to the detriment of the Palestinian population.⁷¹ Israel restricts Palestinian access to water, and Palestinian average water consumption in the West Bank is 73 liters per day (well below the World Health Organization's recommendation of 100 liters per day). Israelis, including colonizers, consume more than three times as much water as Palestinians, averaging 240 liters per day.⁷² Crawford notes that because the colonies' agricultural industry is directly linked to this illegal water regime, the international community is aiding and assisting in the ongoing commission of an unlawful act by purchasing produce from the colonies.⁷³

By continuing to help colonies flourish economically, the EU and its member states are blatantly undermining their international obligations and the very policies they have agreed to respect. It is a state's duty under international law to ensure that their actions and those of their corporations do not recognize or aid illegal situations or acts.

68 Crawford, *Third Party Obligations*, 20, para 49, *supra* note 51.

69 International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 43, 18 October 1907, available at: <http://www.refworld.org/docid/4374cae64.html> [accessed 10 January 2018].

70 *Id.*, art. 55.

71 Crawford, *Third Party Obligations*, 35, para 86, *supra* note 51.

72 EWASH, *EWASH concerned by water restrictions in the West Bank resulting from Israeli discriminatory policies*, Press Release, 21 June 2016, available at: <https://reliefweb.int/report/occupied-palestinian-territory/ewash-concerned-water-restrictions-west-bank-resulting-israeli>

73 *Trading Away Peace*, 16, *supra* note 65.

ILLEGALITY ARISING FROM CORPORATE COMPLICITY PRINCIPLES

Corporations, both Israeli and international, play a substantial role in profiting from, enabling and facilitating the act of forcible transfer, through their business relationships in the oPt.⁷⁴ Such actions, conducted with direct and indirect support from the state of Israel, remain in clear violation of internationally established frameworks that place obligations on corporations and States to operate in accordance with international law, including the UN Guiding Principles.

According to Who Profits, the primary forms of complicity, of both Israeli and international companies, include: involvement in the industry and agriculture of colonies; construction on occupied land; provision of services to colonies; exploitation of occupied production and resources; and control of the occupied population through private security companies functioning in an occupied territory; the construction of the Annexation Wall; and the provision of other specialized equipment and services.⁷⁵ Numerous EU companies are involved in trade with Israeli companies and facilitate the import of colonial products and natural resources to Europe.

Regarding State responsibility over corporate complicity, the UN Guiding Principles establish that States should provide “adequate assistance to business enterprises to assess and address the heightened risks of abuses” in conflict areas. States are also urged not to provide services and to withdraw support from companies that are involved in human rights violations in a persistent manner.⁷⁶ In September 2012, the UN General Assembly adopted a report by Professor Richard Falk on corporate complicity in the context of Israeli colonies that urges states to “take steps to end business involvement in illegal Israeli settlements.”⁷⁷

74 BADIL Resource Center, *Pursuing Accountability for Corporate Complicity in Population Transfer in Palestine*, December 2015, available at: <http://www.badil.org/phocadownloadpap/badil-new/publications/research/in-focus/Complicit%20CompaniesII-en.pdf> [hereinafter BADIL, *Pursuing Accountability*].

75 Who Profits, *Financing the Israeli Occupation*, October 2010, available at: <https://whoprofits.org/reports?page=1>

76 *Guiding Principles*, *supra* note 58.

77 UN News Centre, “UN independent expert calls for boycott of businesses profiting from Israeli settlements,” 25 October 2012, available at: <http://www.un.org/apps/news/story.asp?NewsID=43376#.WjgBprT1VAZ>

Complicity in Forcible Transfer

The UN Secretary General and the UN-mandated Working Group on the issue of human rights and transnational corporations and other business enterprises, have recognized that Israeli colonial practices and policies involved in the acts of population transfer at hand - such as the construction of colonies, land confiscation, the Israeli implemented zoning and planning regime, forced evictions of Palestinians, demolitions of Palestinian structures, and the lack of accountability for colonizer violence - result in adverse human rights impacts to the Palestinians population.⁷⁸ The human rights which are negatively impacted include, “rights and freedoms of non-discrimination, liberty, security of person and fair trial, freedom of movement, adequate housing, health, education, work and an adequate standard of living.”⁷⁹

Corporations play a substantial role in profiting from, enabling and facilitating the act of forced population transfer, through their business relationships, in the oPt including East Jerusalem. Such actions, conducted with direct and indirect support from the state of Israel, remain in clear violation of internationally established frameworks that place obligations on corporations and states to operate in accordance with international law.

The specific corporations involved in the aforementioned crimes and the exact way in which they are complicit with such crimes has been covered in other reports,⁸⁰ and as such, this report will not repeat what has already been discussed previously.

78 UN OHCHR, Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises: Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory, 6 June 2014, p. 11; UN Human Rights Council, Report of the Secretary General on Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, 12 February 2014, A/HRC/25/38, sections IV and V.

79 *Ibid.*

80 Caterpillar and Volvo in BADIL, *Pursuing Accountability*, *supra note 74*; Kardan NV and Kardan Yazamut Ltd in BADIL, *Corporate Complicity in Violations of International Law in Palestine*, December 2014, available at: <http://www.badil.org/phocadownloadpap/badil-new/publications/research/in-focus/complicit-companies-en.pdf>; Riwal in Al Haq, *The Case Against Riwal: Corporate Complicity in International Crimes*, 16 October 2010, available at: <http://www.alhaq.org/advocacy/targets/accountability/71-riwal/307-the-case-against-riwal-corporate-complicity-in-international-crimes->; several other European businesses in ECCP, *The contribution of European businesses to the existence and expansion of illegal Israeli settlements*, 29 November 2013, available at: <http://www.eccpalestine.org/the-contribution-of-european-businesses-to-the-existence-and-expansion-of-illegal-israeli-settlements/> [accessed 10 January 2018].

ILLEGALITY ARISING FROM BREACH OF AGREEMENT

While the illegality of the EU trade with colonies has already been established, both on the basis of the duty of non-recognition as well as on the basis of corporate complicity, it is also relevant to highlight how the current trade practices between the EU and Israel are also in breach of the Association Agreement that is meant to govern this relationship.

Treaty of the European Union

Title V of the Treaty of the European Union addresses the EU's foreign policy approach and its guiding values and principles. The EU, through its foreign policy, seeks to advance "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."⁸¹ Additionally, member states are intended to actively support and comply with the EU's foreign policy.⁸²

Rules of Origins & Labeling of Colony Products

Preferential rules of origin are technical rules and tests which establish whether a product is sufficiently linked to that country for the purpose of receiving the EU tariff preference granted to that country. These rules have however also been the source of political friction when such rules have been applied to occupied territory, as in the case of Israel.

The current system for administering rules of origin in Israel is the pan-Euro-Mediterranean centralized system of origin which was created in 2005 to establish a common system of rules of origin between EU, Israel, and other partners in Europe and the Mediterranean to support regional integration. The EU preferential rules of origin vary from country to country, however the following basic principles should always be applied:

- If a product is wholly obtained or produced or sufficiently worked or processed in one country, it is considered to have origin in that country (and can be called an 'originating product').

81 European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01, Title V, art. 21.1, available at: <http://www.refworld.org/docid/4b179f222.html> [accessed 10 January 2018].

82 *Id.*, art. 24.3

- If a product has been produced in more than one country, it is considered to have origin in the country where the last substantial transformation took place.⁸³

Protocol 4 of the EU-Israel Association Agreement defines what is considered by the EU as “wholly obtained” and “sufficiently worked or processed product” in order for Israel to avail of the preferential tariffs. Protocol 4 provides an extensive list of what is considered “wholly obtained products” which includes mineral products extracted from the soil or seabed, vegetable products harvested and products from livestock raised in Israel.⁸⁴ It also describes “insufficient working or processing operations” which would render products ineligible for preferential treatment. These include simple packaging, preservation, labeling or mixing operations, meaning that products obtained outside of Israel and simply packed or labeled in Israel, for example, would not qualify.⁸⁵

Under the Technical Agreement between Israel and EU, it is mandatory that all movement certificates EUR1⁸⁶ and invoice declarations bear the name of the city, village or industrial zone where production conferring originating status has taken place.⁸⁷

It has also been declared that any products from regions brought under Israeli Administration since 1967, referring to the West Bank including

83 European Commission, “Customs: Council approves new European-Mediterranean cumulation of origin zone”, Brussels, 12 October 2005, available at: http://europa.eu/rapid/press-release_IP-05-1256_en.htm?locale=EN; European Commission, “The pan-Euro-Mediterranean cumulation and the PEM Convention”, n.d., available at: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/paneuromediterranean-cumulation-pem-convention_en [accessed 10 January 2018].

84 Official Journal of the European Communities, “Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part,” Protocol 4, 21 June 2000, available at: http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146089.pdf

85 *Ibid.*

86 An EUR1, also known as a ‘movement certificate’, enables importers in certain countries to import goods at a reduced or nil rate of import duty under trade agreements between the EU and beneficiary countries.

87 Official Journal of the European Union, “Notice to importers, Imports from Israel into the EU,” 3 August 2012, OJ C 232, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2012.232.01.0005.01.ENG&toc=OJ:C:2012:232:TOC; and Official Journal of the European Union, “Notice to importers, Imports from Israel into the EU,” 21 January 2005, 2005/C 20/02, available at: <http://trade.ec.europa.eu/doclib/html/127720.htm> [accessed 10 January 2018].

East Jerusalem, the Gaza Strip, and the Golan Heights, are not entitled to preferential treatment under the provisions of the EU-Israel Association Agreement.⁸⁸ This position was also confirmed in 2010 by the European Court of Justice (ECJ) in the case, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*.

Firma Brita GmbH v Hauptzollamt Hamburg-Hafen (The Brita Case)⁸⁹

This section references a significant case concerning Brita; a German company that was importing drink makers and accessories for sparkling water, manufactured by Soda Club Ltd. Soda Club Ltd. is an Israeli company which was operating in Mishor Adumim, an Israeli colony in the oPt.

Brita was certifying that the products were of Israeli origin and were therefore benefiting from preferential tariffs under the EU-Israel Association Agreement. In 2003, German customs authorities requested additional information in order to confirm that the products did not originate in the oPt. Israel refused to provide additional information and attested that the products were produced within the Israeli customs jurisdiction. The German customs authorities refused to authorize the products as Israeli origin and consequently, no preferential tariffs were granted. Brita brought a court action against this refusal and the matter was given hearing at the ECJ, the highest court to hear matters of European Union law.

The ECJ reaffirmed the generally accepted legal position that Israel's customs jurisdiction does not extend beyond the 1967 borders, and therefore, any products originating from the regions brought under Israeli administration since 1967 are not entitled to preferential tariffs under the EU-Israel Association Agreement.

It also referred to the principle of customary international law, *pacta tertiis nec nocent nec prosunt*, meaning that a "treaty does not create either obligations or rights for a third State without its consent." This reflected the legitimacy and authority of the Interim Association Agreement on Trade and Cooperation concluded between the EU and the PLO in 1997, which applies a customs jurisdiction to the "territories of the West Bank and the Gaza Strip." The ECJ therefore affirmed that Israeli goods can only receive preferential treatment under the EU-Israel Association Agreement, provided that they originate from Israel and that only the Palestinian Authority can certify products originating from the West Bank.

⁸⁸ *Ibid.*

⁸⁹ See CJEU judgment of 25 February 2010, Case C-368/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, ECLI:EU:C:2010:91, available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-386/08>

EU Labeling Guidelines

In November 2015, the European External Action Service (EEAS), an EU department which manages general foreign relations, issued an interpretative notice clarifying EU policy in its trade with Israel.⁹⁰ The interpretative notice did not create a new policy, but merely clarified and restated existing policy.⁹¹ Prior to the notice's issuance, three EU member states –Denmark, Belgium, and the United Kingdom—had issued voluntary guidelines distinguishing West Bank produce made in Israeli colonies from Palestinian produce.⁹²

This notice, commonly known as the EU Labeling Guidelines, has been the subject of much controversy and debate regarding products originating in Israeli colonies in the oPt being labeled as of Israeli origin. The interpretative notice clarifies that the West Bank, including East Jerusalem, and the Gaza Strip are not part of Israel's territory, under international law and thereby, labeling Israeli products produced in those areas, as such is "incorrect" and "misleading."⁹³ Trade with Israeli colonies is in direct violation of the terms of the EU-Israel Association Agreement and the Barcelona Declaration. The former provides that "relations between the Parties... shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement." The latter states that the partners "respect human rights and fundamental principles by applying the principles of the United Nations Charter and the Universal Declaration of Human Rights, and international law." Trade with the colonies also conflicts with the ECJ decision in the *Brita* case which affirmed that Israeli goods can only receive preferential treatment provided that they originate from Israel and not the oPt.

Despite the clear rules on this issue, lack of enforcement and monitoring has resulted in an almost complete lack of compliance on the ground. Companies based in colonies have adopted two strategies vis-à-vis the Guidelines. On the one hand, some businesses have not made any changes to the way they operate or label their products, keeping the 'Made in Israel' labels. One example is the Psagot Winery, located in the Psagot colony, near Ramallah.

90 "Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967," Official Journal of the European Union, C 375, Volume 58, 12 November 2015, 4, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2015:375:FULL&from=EN> [hereinafter EU, "Interpretative Notice"].

91 *Ibid.*

92 EEAS, *Fact Sheet*, n.d., available at: https://eeas.europa.eu/sites/eeas/files/20151111_fact_sheet_indication_of_origin_final_en.pdf

93 EU, "Interpretative Notice," *supra* note 90.

The company has continued to produce and label their wine in the same way. The owner of the winery, Yaakov Berg, stated a year after the Guidelines were issued that he had not changed a single label and in spite of the Guidelines, he had actually increased his exports to Europe.⁹⁴ “We are selling much more. To Europe and to the States, we increased exports by almost 80 percent” he claimed, pointing at solidarity against the Guidelines as being one of the reasons behind the increase in sales.⁹⁵ He even added that, “This is motivation for us to sell much more. We will come up with a new campaign.”

Other companies have also continued to export using the ‘Made in Israel’ label while establishing offices inside Israel in order to circumvent the regulations in the Guidelines. Ahava is one such business. The company manufactures Dead Sea cosmetics which are an illegal appropriation of Palestinian natural resources. Ahava rents an office in Ben Gurion airport that it declares as its official address, despite most of its operations still taking place in illegal colonies in the West Bank.

Overall, the Guidelines have not affected the industrial production of colony-based companies. The foreign envoy of Yesha Council, an umbrella organization for West Bank colonizers, said that the Guidelines were “frightening” initially, but that they had learned that “it is not such an obstacle” and that they have had an “almost non-existent” impact in practice.⁹⁶ These claims were corroborated by the Israel/Palestine project coordinator at the European Council on Foreign Relations, Hugh Lovatt, who pointed out to the lack of “follow up on the guidelines” and “monitoring and enforcement on the national level” as the root causes.⁹⁷

These practices demonstrate an utter lack of respect for the Association Agreement with the EU, and a systematic lack of compliance resulting in goods from Israeli colonies entering the EU under preferential tariffs. Israeli corporations are actively choosing to ignore EU regulations on this issue, and Israel’s lack of implementation of such rules, or even its role in facilitating non-compliance, make the current trade practices with Israeli colonies illegal.

It must be clarified that these Guidelines do not come from the EU’s intention to exert political pressure on Israel vis-à-vis its colonial regime, or to highlight

94 Nigel Wilson, “Israel: EU labelling rules have ‘non-existent impact’”, *Al Jazeera*, 12 December 2016, available at: <http://www.aljazeera.com/news/2016/12/israel-eu-labelling-rules-existent-impact-161204140008993.html>

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

the unlawfulness of colonies. The Guidelines are simply a complement of the Association Agreement and aim to clarify which goods fall under the preferential treatment and which ones do not. Therefore, labeling and importing goods from Israeli colonies as 'Made in Israel', as far as it concerns the Association Agreement, is a violation of the terms of the Agreement, customs regulations, and other rules and decisions mentioned above, but it does not have further implications as neither the Agreement nor the EU have deemed trade with colonies illegal.

5. What is next?

So far it has been established that Israeli colonies in the oPt and their associated regime are responsible for some of the most serious violations and grave breaches of international law. It has also been established that by trading with colonies European corporations are involved in such violations, as they help support the colonies and their expansion. Consequently, trade with Israeli colonies is illegal under international law, and under the EU-Israel Association Agreement, and such trade should be stopped.

In order to further explore how a potential ban on all Israeli colony products might be implemented and on what grounds, it is relevant to look into the case of Crimea.

CASE OF CRIMEA

There are no definite EU guidelines on how restrictive economic measures should be to enforce the duty of non-recognition; however, the case of Crimea can act as a precedent of the more rigid approach that could be adopted when reprimanding third states for occupying or annexing territories. Israel's ongoing policies of appropriation of Palestinian property, forcible transfer of Palestinians, and transfer of colonizers into the oPt, all which result in the de facto annexation of Palestinians lands in the oPt by Israel, could potentially fall within the parameters of this precedent.

The Ukrainian territory of Crimea was annexed by the Russian Federation on 18 March 2014. On 27 March 2014, the UN General Assembly adopted Resolution 68/262 on the 'Territorial integrity of Ukraine' affirming its commitment to the territorial sovereignty of Ukraine and called on states "to refrain from any action or dealing that might be interpreted as recognizing any

such altered status.”⁹⁸ The European Council⁹⁹ also responded by declaring its unequivocal refusal to recognize the annexation of Crimea and Sevastopol and requested that “economic, trade and financial restrictions” be put into effect.¹⁰⁰

In response, the EU imposed substantial restrictions on both the annexed territory and Russia as follows:

1. A complete ban on imports from Crimea unless a Ukrainian certificate of origin could be produced;
2. A complete ban on investment by EU companies in Crimea;
3. A complete ban on exports to Crimea for products or technology related to transport, telecoms or the energy sectors; or the exploration of oil, gas and mineral resources;
4. A complete ban on EU tourism services in Crimea;
5. Asset freezes and visa bans applied to 150 persons, while 37 entities are subject to a freeze of their assets in the EU;
6. Measures targeting sectorial and economic cooperation and exchanges with Russia such as restrictions on financial transactions with certain Russian banks and companies, an export and import ban on arms trade, an export ban for dual-use goods for military use, curtailed Russian access to certain technologies that can be used for oil production and the suspension of certain EU bilateral and regional cooperation programs with Russia;
7. Certain diplomatic measures were also taken such as the cancellation of the G8 summit in Sochi and the cancellation of the EU-Russia summit.¹⁰¹

The policies implemented by the EU following Russia’s annexation of Crimea were an effort to adhere to the duty of non-recognition. The effects of these policies were significant, and it is estimated that the sanctions imposed

98 UN General Assembly, Territorial Integrity of Ukraine : resolution / adopted by the General Assembly, 1 April 2014, A/RES/68/262, available at: <http://www.refworld.org/docid/534502a14.html> [accessed 10 January 2018].

99 EU institution that defines the general political direction and priorities of the European Union. See, The European Council, *Main Website*, n.d., available at: <http://www.consilium.europa.eu/en/european-council/> [accessed 10 January 2018].

100 European Council, *Conclusions* (20/21 March 2014), EUCO 7/1/14 REV 1, Brussels, 21 March 2014, available at: <http://www.consilium.europa.eu/media/29198/141749.pdf>

101 European Council, EU restrictive measures in response to the crisis in Ukraine, n.d., available at: <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/> [accessed 10 January 2018].

have had a serious economic impact on Russia (in the range of 1-2% of GDP per year). While the political situation in Crimea is far from resolved, the sanctions and economic restrictions have likely deterred Russia from making further territorial gains.¹⁰²

The contrast between the EU's treatment of Russia and Israel is notable. In the case of Crimea, extensive economic sanctions were imposed, not limited to the annexed territory but also to Russia as the power responsible for such violations of international law. In the case of Israel, not only have no sanctions been imposed – economic or otherwise – but Israeli products originating from colonies in the oPt often benefit from EU preferential tariffs by circumventing the system and ultimately being labeled as being of Israeli origin. In addition, the import of colonial products is not prohibited even if they are clearly marked as originating from colonies. After the Russian annexation of Crimea, the EU explicitly prohibited the import of goods originating in Crimea or Sevastopol into the EU, showing clear inconsistencies between their approach towards Crimea and Russia, and the oPt and Israel. In the case of the oPt, the EU has failed to honor the obligations of non-recognition and non-assistance, and to cooperate to bring to the violation to an end. Conversely, the ineffective approach of reprimanding the colonial industry in the oPt is arguably prolonging and assisting serious violations and grave breaches of international law.

If the EU, rightfully, considers colonies unlawful, and this colonial enterprise is contributing to human rights violations and international crimes, including forcible transfer, then the question is how is it possible that the EU continues to import goods produced in this context from Israeli colonies in the oPt? It is imperative for the EU to contribute to the isolation of all the colony-related economy, and to cut all ties with these businesses by banning all goods produced in colonies while putting pressure on the state of Israel, as the power responsible for serious violations and breaches of international law.

POTENTIAL CHALLENGES

However, an EU implemented complete ban on all Israeli colonial products would still fail to adapt to the reality of the existing economic system in Israel. The state of Israel treats colonies with the same standing as any other municipality inside Israel, and companies and industries operating there

¹⁰² European Parliamentary Research Service, *Briefing: Sanctions over Ukraine Impact on Russia*, March 2016, 11, available at: <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-579084-Sanctions-over-Ukraine-impact-Russia-FINAL.pdf>

receive the same treatment as companies inside Israel, or, if anything, they receive incentives aimed at promoting businesses in colonies. As reported by Human Rights Watch,¹⁰³

Settlement companies contribute to Israel's discriminatory policies by facilitating the presence of settlements, but they also directly benefit from discriminatory economic policies that, on the one hand, encourage settlement business by, for example, providing subsidies and low tax rates, while on the other hand stifle Palestinian businesses and the Palestinian economy by imposing discriminatory restrictions on them.

In the case of the EU-Israel Agreement, if products produced in colonies are not granted preferential treatment, the Israeli government subsidizes and reimburses the companies for the difference in export costs. This compensation makes the preferential treatment *de facto* applicable to all Israeli companies, including those in colonies.

In reality, there is no separation between the economy of the colonies in the oPt and the Israeli economy. As such, in practice, it would be almost impossible to completely avoid the entry of colonial goods into the EU. It is very easy for colony-based companies to claim an official address in Israel by simply renting an office space or even a post office box there. Also, a ban would not have an impact on companies that operate on both sides of the Green Line, or that export goods produced in colonies but packaged or processed by the mother company inside Israel.

When analyzing the situation on the ground, it can be concluded that there is no difference between a company based in Tel Aviv and one based in Mishor Adumim in the oPt — subsidies aside — and there is always the possibility that the company in Tel Aviv might engage in activities inside the oPt. So how can the EU effectively ban these products, when the colonial economy is completely intertwined with the Israeli economy?

POTENTIAL AVENUES

One way to address this issue could be, on the one hand, to establish a thorough monitoring system that would analyze the activities of different Israeli companies exporting goods to the EU, investigate whether they have any activities in colonies, including those that benefit from partnership

103 Human Rights Watch, *Occupation, Inc.*, 19 January 2016, available at: <https://www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations-palestinian> [accessed 10 January 2018].

with companies there and if so, ban any products that directly or indirectly originate from the oPt.

Even with more rigorous enforcement of the origin of products, it would still be relatively easy for companies to circumvent the restrictions. They can simply rent an office somewhere in Israel, utilizing it as their official address but still keep producing goods inside the colonies. This is the case of Ahava, whose only production plant is in the colony of Mitzpe Shalem yet their official address is Ben Gurion Airport City, allowing them to label their products as 'Made in Israel'. If the EU wanted to address these loopholes, they could demand that companies declare that they have no activities in the oPt.¹⁰⁴ But with this requirement comes the need to define what 'activities' means. Would this apply to short-term contracts, a specific percentage of ownership, percentage of staff based in the oPt, the origin of the goods... what about parent and subsidiary companies?¹⁰⁵ What if a company has no plants or permanent staff based in the oPt but regularly carries out activities there? Most national Israeli companies operate in colonies, and considering the lack of differentiation between the economy of the colonies in the oPt, and that of Israel, enforcement of such a requirement might prove difficult. Therefore, the 'no activities in the oPt' requirement should be coupled with the introduction of sanctions for companies that abuse this united economy to disguise their unlawful activities in the oPt.

This situation, moreover, must be assessed in light of a probable lack of compliance by Israel, and the use of state resources to conceal activities by companies in Israeli colonies. Non-compliance in differentiating goods from colonies and goods from Israel is a practice that dates back decades. Until 2003 Israel refused to distinguish between products produced inside Israel proper and those produced by Israeli manufacturers in colonies in the oPt. One of the main arguments used to justify the lack of differentiation was the Paris Agreement, which created a Customs Union between Israel and the PA.¹⁰⁶ Israel claimed that the Agreement establishes that products from Israel and the oPt must be treated equally. However, following pressure from the EU, and in order to strengthen commercial relations, Israel finally agreed to the differentiation in November 2003.¹⁰⁷

104 Elia, Moran and Saadi, "EU guidelines will have little effect", *supra note* 103.

105 *Ibid.*

106 *The EU and the Israel-Palestine conflict (Chapter 6)*, Haim Yacobi and David Newman, "The European Union and Border Conflicts: The Power of Integration and Association", Ed. Thomas Diez, Mathias Albert, Stephan Stetter (Cambridge University Press, 2008), 186, available at: https://books.google.ps/books?id=9iz9QCl1keUC&dq=eu+sanctions+israel&lr=&source=gbs_navlinks_s

107 *Ibid.*

Taking into consideration the fact that Israeli colonies are completely connected to the rest of the Israeli economy, demanding this differentiation would present Israel with the real dilemma of whether to continue supporting the colonization of the oPt and exploitation of its natural resources, or continuing trade with the EU under the current framework.¹⁰⁸ Ideally, this would put the EU on the path of adopting a stricter position regarding these ongoing violations and breaches of international law and a more clear stance vis-à-vis Israel and trade relations. Moreover, such a ban would be one of the most effective political tools at the disposal of the EU to put political pressure on Israel regarding its military occupation and colonies.

Israel's lack of compliance to the proposed measures should lead to the annulment of the Association Agreement and the end of the preferential treatment for all Israeli goods in the EU. If non-cooperation continued, the EU should consider sanctions as a measure to pressuring Israel into compliance. These steps are legal responsibilities of the EU under its duty of non-recognition, according to the Guiding Principles of business and human rights, and as a breach of the current Agreement between the EU and Israel.

Finally, it is relevant to briefly analyze the standing of such a ban under the General Agreement on Tariffs and Trade (GATT).¹⁰⁹ Since all EU member states and Israel are members of the World Trade Organization (WTO), they have all accepted the obligations entailed in the GATT, which aim to promote international trade through the reduction or elimination of trade barriers.¹¹⁰ A ban on colony products would not challenge the GATT as this is only applicable to the territory of member states, and the colonies in the oPt are not considered part of the territory of Israel.¹¹¹ But even if they were considered as such, the fact that colonies constitute a serious breach of a peremptory norm could be raised as a justification before the WTO.¹¹² Failing that, there is an additional recourse offered by Articles XX and XXI of the GATT, which allow respectively moral restrictions and security exceptions to justify a ban of a specific group of products into a country.¹¹³ Therefore, it can

108 Hugh Lovatt and Mattia Toaldo, "EU Differentiation and Israeli Settlements," *European Council on Foreign Relations*, July 2015, available at: <http://www.ecfr.eu/page/-/EuDifferentiation-final3.pdf>

109 General Agreement on Tariffs and Trade (GATT), 1947, 55 U.N.T.S. 194, available at: https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf

110 World Trade Organization (WTO), *Members and Observers*, n.d., available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [accessed 11 January 2018].

111 Moerenhout, "Obligation to Withhold", 362, *supra* note 49.

112 *Id.*, 376

113 *Id.*, 377

be concluded that a ban on goods produced in colonies does not contradict the GATT, and even a ban on companies incorporated in Israel proper but with activities in the oPt could be justified under Articles XX and XXI of the GATT. The measure could also be directly justified as responding to a serious breach of a peremptory norm.

In light of the EU's inaction, it is important to also emphasize the responsibility of individual EU states. These states have the legal obligation to respect the duty of non-recognition if the central authority for trade (the European Commission) does not comply. The Commission itself has stated that enforcement is the responsibility of the individual member states but at the same time that it is Commission's responsibility to ensure that member states comply with EU obligations.¹¹⁴ Whether it is the Commission or States that take the first step, it must be clear that simply condemning Israel's ongoing colonial enterprise is not enough. It is time for the EU, and failing that, for individual states, to take concrete international action to generate compliance of Israel with international law.

As seen in the case of Crimea, the measures to be taken must be aimed at addressing the violations of international law and ensuring no further violations. For this latter purpose, the EU combined measures based on the duty of non-recognition of the annexation of Crimea with sanctions directed at pressuring Russia to withdraw, and deterring it from committing further violations. This case should serve as illustration not only for potential measures the EU could adopt vis-à-vis Israel's colonial enterprise in the oPt, but also to support calls for imposing political pressure on Israel itself, both to comply with international law and to deter it from carrying out colonial activities.

RECOMMENDATIONS

The following recommendations are founded on the fact that Israel's violations and crimes of international law trigger obligations for the EU. These legal obligations are not only limited to the duty of non-recognition or other negative duties, but also entail positive obligations to act in order to put an end to the breaches of international law. It is based on the duality of these obligations that BADIL makes recommendations to the EU and all its institutions, as well as its individual member states that also have their own obligations. Finally, BADIL also calls on third party states to uphold their obligations under international law.

¹¹⁴ EEAS, *Fact Sheet*, *supra* note 92.

BADIL Resource Center calls on the EU to:

- Ban all imports from and exports to colonies in compliance with the duty of non-recognition;
- Ban all imports from companies based in Israel who have activities in or profit from production in the oPt;
- Annul the Association Agreement so long as Israel continues to be responsible for serious, ongoing and widespread violations of international law;
- Pressure Israel to clearly differentiate between goods produced in colonies and those produced in officially recognized Israel, and ensure compliance with regulations and international law;
- Provide implementable procedures to ensure compliance;
- In case of non-compliance by Israel, adopt economic and other sanctions to pressure Israel into compliance;
- More generally, adopt a rights-based approach in all its regulations, directives and activities, including trade.

EU member states' duty to protect human rights in the context of economic activities includes: enforcing laws aimed at requiring businesses incorporated in the EU to respect human rights; ensuring that their laws governing business operations enable respect for human rights; providing effective guidance to businesses; and encouraging businesses to communicate how they address human rights impacts. Based on this, BADIL Resource Center calls on the EU member states to:

- Take appropriate legislative and administrative measures to protect human rights and ensure that businesses operating in or domiciled in their territory and/or under their jurisdiction, including those owned or controlled by them, respect human rights and are not facilitating violations through their trade operations and business activities;
- Develop and adopt National Action Plans in conformity with the UN Guiding Principles to be incorporated into national laws;
- Ensure that there are sufficient remedies available and readily accessible to victims of corporate violations of international and domestic law;
- Cooperate to bring to an end any breaches of peremptory norms of international law and neither recognize as lawful a situation created by such serious breaches, nor render aid or assistance in maintaining that situation;

- Based on the above recommendation, ban businesses incorporated in the EU from not only trading with Israeli colonies, but also from investing in or profiting from Israeli activities in the oPt.

Finally, regarding third states, BADIL Resource Center calls on them to:

- Not recognize a situation that results from a serious breach of an obligation arising under a peremptory norm of general international law, nor to render aid or assistance in maintaining that situation;
- Abide by their obligation under Article 146 of the Fourth Geneva Convention stating that “Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches,” understanding this Article as both a negative obligation not to recognize nor render aid or assistance to those acts; but also, as a positive duty that obliges states to take any “measures necessary” – including sanctions – to put an end to those acts.

An aerial photograph of an Israeli settlement built on a rocky hillside. The houses are uniform in style, with light-colored walls and red-tiled roofs. In the foreground, there is a dirt road, a white building, and an orange excavator. The background shows a hazy mountain range.

“ Israeli colonies in the oPt and their associated regime are responsible for some of the most serious violations and grave breaches of international law. It has also been established that by trading with colonies European corporations are involved in such violations, as they help support the colonies and their expansion. Consequently, trade with Israeli colonies is illegal under international law, and under the EU-Israel Association Agreement, and such trade should be banned.

Such a ban would be one of the most effective political tools at the disposal of the EU to put political pressure on Israel regarding its military occupation and colonies. ”