2 EU trade relations with occupied territories

Third party obligations flowing from the application of occupation law in relation to natural resources exploitation

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With perhaps the exception of Russian-occupied Crimea,[1] there is substantial international trade in goods originating in, or assembled with resources originating in occupied territories.[2] In some cases, these goods can even access foreign markets under preferential trade tariffs.[3] Some imports may, however, concern products that have been produced or have been derived from natural resources exploited by occupying regimes in violation of international occupation law. The international trade in products tainted by violations of occupation law elicits the question whether third parties, such as states and regional organizations, which import such products, violate secondary international obligations flowing from the application of occupation law.

This contribution focuses specifically on the obligations of the European Union (EU) in this respect. The focus lies on the EU for three reasons: (1) 28 EU Member States have conferred on it the exclusive competence to regulate

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1 For example, Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78/16. Council Regulation 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78/6.

2 For example, the EU External Action Service reported that there are 'several estimates' according to which 'these products represent a fraction of the total Israeli exports to the EU and less than 1% of the total trade'. European External Action Service, 'Indication of Origin: Fact Sheet' (European External Action Service 2015) <https://eeas.europa.eu/sites/eeas/files/20151111_fact_sheet_indication_of_origin_final_en.pdf> accessed 16 December 2017, 4. This would mean that the EU's annual import of products originating in the Israeli settlements would amount to an estimated €34.4 million.

3 For example, Council Regulation 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco [2006] OJ L 141/1.

external commercial policy,[4] (2) the EU has the second-largest share of imports in the world,[5] and (3) EU courts have recently subjected EU trade agreements to legal review, in relation to imports from occupied territories.[6] However, this contribution's analysis, which used public international law as the standard of legality review, has broader purchase: it could equally be applied to any other third state (or regional organization) engaging in trade relations with respect to products from occupied territories.

The legal review conducted in this contribution is a rather narrow, and perhaps truncated one. The contribution examines the compatibility of third parties' trade relations concerning products from occupied territories with *international occupation law*, i.e. a branch of international humanitarian law (the law of armed conflict).[7] The analysis extends to obligations arising under the *law of international responsibility*, which provides for a 'secondary' legal obligation of non-assistance incumbent on third parties in relation to breaches of primary obligations under international law such as occupation law.[8]

The contribution does not examine the compatibility of these relations with international trade law, the international duty of non-recognition, or international human rights law, while obviously not denying the relevance of a review in light of these respective legal regimes. Also, this contribution only addresses obligations in the context of *trade relations between states and regional organizations,* in particular the imports of products stemming from economic activities in occupied territories. It does not address direct obligations of private actors which carry out economic activities in occupied territory, nor does it address duties of states or regional organizations to regulate the activities of such private actors under principles of home state control and due diligence. Many of these perspectives feature elsewhere in this volume. Our perspective should be considered as a complement to these analyses.

4 Articles 3 and 207 of the Treaty on the Functioning of the European Union, Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

5 'Share of EU in World Trade' (Eurostat 2018), <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ext_lt_introle&lang=en> accessed on 17 January 2019.

6 Case T-512/12 *Front Polisario v Council of the European Union* [2015] ECLI:EU:T:2015:953 and Case C-104/16 *Council of the European Union v Front Polisario* [2016] ECLI:EU:C:2016:973; Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* [2018] ECLI:EU:C:2018:118.

7 See for the main treaty on occupation law: Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) (Fourth Geneva Convention).

8 We have already touched on these issues in Cedric Ryngaert and Rutger Fransen, 'EU extraterritorial obligations with respect to trade with occupied territories: Reflections after the case of Front Polisario before EU courts' [2018] 2 *Europe and the World: A Law Review* 7. However, in that contribution, the emphasis was laid on the EU courts' judgements in *Front Polisario*. As a result, the general analysis of third party obligations under occupation law and the law of responsibility was relatively basic. Our contribution to *this* volume allows us to engage more in-depth with those obligations. In particular, it allows us to develop various complicity-based scenarios that could be subsumed under the duty of non-assistance.

Section 1 of this contribution starts out by explaining the occupation law-based rules governing the exploitation of natural resources by the occupying regime. Based on an empirical analysis of practices of resource exploitation as they currently occur in various occupied territories, it is argued that some of these practices may well violate the occupant's obligations under occupation law. As these resources, or products derived from them, are traded internationally, this invites the question what obligations rest on third parties which engage in such trade relations, in our case the EU. This question, i.e. the main research question for this contribution, is addressed in Section 2. Section 2 examines international obligations arising under 'primary' norms of occupation law (Section 2.1), as well as 'secondary' obligations arising under the law of state responsibility (Section 2.2). Section 3 concludes.

1 The exploitation of natural resources under occupation law

Under international occupation law, the legal power of the occupying regime is considered as mere 'de facto capability, [and] not [as] a legal authority'.[9] Occupation does not change the legal status of the territory or its inhabitants; it merely seeks to fill a temporary legal vacuum that has arisen as a result of the factual situation of occupation. The law of occupation thus reflects the reality that the occupier has merely gained temporary control and has not been granted any sovereign rights over the occupied territory.

This means that, even if occupying regimes may have gained *de facto* effective control over occupied territories, they have not gained any sovereign rights or legal titles in relation to these territories. Such rights and titles remain with the local population of the occupied territory, e.g. the Palestinian population in the case of the Gaza Strip and West Bank territory or the Saharawi population in the case of Western Sahara.[10] Alternatively, they remain with the internationally recognized governments which have a recognized sovereign claim to the occupied territory, e.g. the governmental authorities of Syria (in relation to the Golan Heights), Cyprus (in relation to Northern Cyprus) or Ukraine (in relation to the Crimean Peninsula). The local population is subject to the law of occupation and

9 Michael Bothe, 'Effective Control: A Situation Triggering the Application of the Law of Belligerent Occupation' in Tristan Ferraro (ed), *Occupation and Other Forms of Administration of Foreign Territory: Expert Meeting* (International Committee of the Red Cross 2012) <https://www.icrc.org/en/publication/4094-occupation-and-other-forms-administration-foreign-territory-expert-meeting> accessed 27 December 2017, 38. As Bothe notes, the original French formulation of Article 43 of The 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, 18 October 1907 also reflects this idea: 'un territoire est considére comme occupé lorsqu'il se trouve placé *de fait* sous l'autorité de l'armée ennemie'.

10 See also more extensively in the context of the Israeli occupied territories: Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' [2005] 23 *Berkeley Journal of International Law* 551, 614, especially 554.

not to the domestic jurisdiction of the occupying regime, unless occupation law provides for explicit exceptions to this general rule.[11]

Occupation law stipulates that the occupying power cannot 'exercise its authority in order to further its own interests, or to meet the needs of its own population'.[12] For natural resource exploitation, this implies that resources in occupied territory can only be exploited provided that the exploitation would benefit the (occupied) local population.[13] After all, the occupying power may only administer occupied public property in accordance with the principle of usufruct.[14] Thus, James Crawford has argued that 'the sale of settlement produce where no proceeds are returned to the local population (and in fact, directly compete with local produce) is contrary to the principle of usufruct'.[15]

A distinction could be made between renewable and non-renewable natural resources.[16] The exploitation of renewable natural resources, e.g. fish caught off the coast of Western Saharan and traded under the EU-Moroccan Fisheries

11 Christopher Greenwood, 'The Administration of Occupied Territory in International Law' in Emma Playfair (ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press 1992).

12 Antonio Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in Emma Playfair (ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press 1992).

13 See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, 253, para 248. There are some exceptions to this principle, notably a distinction is made between public and private property. Private property is in principle protected from confiscation, whereas the occupying power can only make use of public property for specific purposes, e.g. for military needs. See also Antonio Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in Antonio Cassese, Paola Gaeta and Salvatore Zappala (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press 2008).

14 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 (adopted 18 October 1907, entry into force 26 January 1910) art 55. Such property may consist of 'public buildings, real estate, forests, and agricultural estates'. This means that the occupying power 'may use, but does not own the property'. James Crawford, 'Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories' (Report for the Trade Unions Congress 2012) <www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 17 January 2019. This arguably implies a prohibition of 'wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation'. Eyal Benvenisti, 'Belligerent Occupation' (Encyclopedia entry in Max Planck Encyclopedia of Public International Law 2009).

15 James Crawford, 'Opinion: Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories' (Report for the Trade Unions Congress 2012) <www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> accessed 17 January 2019, 25.

16 Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009), 215; Ben Saul, 'The status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' [2015] 27 *Global Change, Peace & Security* 301, 317; Iain Scobbie, 'Natural Resources and Belligerent Occupation: Mutation through Permanent Sovereignty' in Stephen Bowen (ed), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories* (Martinus Nijhoff Publishers 2009).

Partnership, should not result in a permanent depletion of these resources.[17] The rules regarding non-renewable resources (e.g. minerals, phosphate, timber, oil, natural gas) are somewhat stricter: while exploitation is possible, it should not exceed the levels of exploitation existing prior to the occupation.[18] The occupying regime might thus – legally – be barred from exploiting newly discovered non-renewable resources.[19] In any event, an occupying regime may not exploit resources to the detriment of their substance.[20]

It seems safe to argue that in various instances of belligerent occupation, at least some of the economic exploitation of resources of occupied territories – either by the occupying regime itself, or by private companies – is in violation of the usufruct requirements. Especially when the occupying regime denies its status as an occupying power and thus does not recognize the application of occupation law, it seems unlikely that the authorities of the occupying regime will abide by the principle of usufruct. When denying the application of occupation law altogether, it may be assumed that the occupying power will treat the occupied territory as its own. Several examples of such economic exploitation that is *prima facie* in violation of occupation law may be highlighted here. With regard to the case of the Israeli occupied territories, mention can be made of the recent licencing of Israeli oil companies for the exploitation of oil resources in the occupied (Syrian) Golan Heights,[21] as well as '[t]he use of

17 Instead, it should be 'sustainable and not abusive, consistent with the inter-generational dimension of the trusteeship principle'. Saul (n 16) 319.

18 In the context of the Moroccan occupation of Western Sahara, it has on this basis been suggested that Morocco's production levels cannot exceed those of 1975 (when Western Sahara was still under Spanish authority); see furthermore Saul (n 16) 319. See also arguing similarly in relation to Israeli oil exploitation activities in occupied territories: Brice Clagett and O. Thomas Johnson, 'May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?' [1978] 72 *American Journal of International Law* 558, 574–575.

19 For example by issuing licences for the exploitation of new mines. *Contra* Dinstein (n 16) 216. Also Gerhard von Glahn, *Law among Nations: An Introduction to Public International Law* (Allyn and Bacon 1996), 687–688.

20 Arguably, this renders the exploitation of non-renewable resources problematic. In the language of the UN Secretary-General: 'Extraction of minerals is in fact a depletion of capital and a detriment to the substance', see UN Secretary General (1983), Report of the Secretary-General, 'Implications, under international law, of the United Nations resolutions on permanent sovereignty over natural resources, on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories' (1983) UN Doc A/38/265-E/1983/85, para 39.

21 See for instance Creede Newton, Patrick Strickland, 'Israel's Oil Drilling in Golan Criticised' (*Al Jazeera*, 30 December 2014) <www.aljazeera.com/news/middleeast/2014/12/israel-oil-drilling-golan-criticised-201412147575950087 4.html> accessed 27 December 2017 and Claire Bernish, 'Drilling for Oil in the Israeli-Occupied Region of Syria's Golan Heights, A Violation of International Law' (*Global Research* 25 June 2016) <www.globalresearch.ca/drilling-for-oil-in-the-israeli-occupied-region-of-syrias-golan-heights-a-violation-of-international-law/5532455> accessed 27 December 2017. For an analysis of the (historical) question of oil exploitation of the Gulf of Suez: Brice Clagett and O. Thomas Johnson, 'May Israel as a Belligerent Occupant

natural resources, in particular water and land, for business purposes […] [and p]ollution, and the dumping of waste in or its transfer to Palestinian villages'.[22] With regard to the Moroccan occupied Western Saharan territory, civil society organizations have extensively documented the existence of and ongoing activities at several 'export-oriented' agricultural sites on the occupied Western Saharan territory. They have highlighted that firms engaged in resource exploitation are 'either owned by the Moroccan king, powerful Moroccan conglomerates or by French multinational firms', and that no such firms 'are owned by the local Saharawi and not even by small-scale Moroccan settlers in the territory'.[23] Also Ben Saul has described and criticized the ongoing Moroccan exploitation of natural resources on the occupied territory such as minerals, phosphate and timber.[24] In relation to the Russian occupation of the Crimean Peninsula, there have been reports that Russia plans to extract gas within the Ukrainian Exclusive Economic Zone in the Black Sea.[25] The maritime zone connected to the Crimean Peninsula is three times larger than the Peninsula itself and has

Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?' [1978] 72 *American Journal of International Law* 558.

22 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' (7 February 2013) UN Doc A/HRC/22/63, 20. See regarding the Israeli exploitation of water on the West Bank territory also UN Human Rights Council, 'Report of the Secretary-General on the Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan' (16 March 2017) UN Doc A/HRC/34/39, 11, para 22.

24 'Conflict Tomatoes: The Moroccan Agriculture Industry in Occupied Western Sahara and the Controversial Exports to the EU Market' (*Western Sahara Resource Watch* February 2012) <http://www.wsrw.org/files/dated/2012-02-13/conflict_tomatoes_14.02.2012.pdf> accessed 18 December 2017, 4.

24 Saul (n 16). See similarly providing an extensive analysis of these issues: Robert F Kennedy Human Rights and others, 'Report on the Kingdom of Morocco's Violations of the International Covenant on Civil and Political Rights in the Western Sahara on the Occasion of the Kingdom of Morocco's Fourth Periodic Report to the Committee on Economic, Social and Cultural Rights' (August 2015) <http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MAR/INT_CESCR_CSS_MAR_21582_E.pdf> accessed 27 December 2017, 15.

25 'Is Russia Extracting Ukrainian Gas?' (*Radio Free Europe: Radio Liberty*, 4 October 2017) <www.rferl.org/a/is-russia-extracting-ukrainian-gas/28773734.html> accessed 27 December 2017. See also on the disputed Sea of Azov and the Kerch Strait, which connects the Black Sea with the Sea of Azov: Dmytro Koval and Valentin J Schatz, 'Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov: Part I: The Legal Status of Kerch Strait and the Sea of Azov' (*Völkerrechtsblog*, 10 January 2018) <https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov/> accessed 17 January 2019. See for a recent incident between Russia and Ukraine in the Kerch Strait: Matthew Bodner and Patrick Greenfield, 'Ukraine President Proposes Martial Law after Russia Seizes Ships' (*The Guardian*, 26 November 2018). See for a legal appreciation of that incident: David B Larter, 'Experts Say Russia's Actions in the Kerch Strait Were Illegal' (*Defensenews.com*, 30 November 2018) <https://www.defensenews.com/naval/2018/11/30/even-if-you-believe-russias-story-its-actions-in-the-kerch-strait-were-illegal-experts-say/> accessed 17 January 2019.

been estimated to contain a potential 'trillions of dollars' of underwater natural resources.[26] The UN Human Rights Monitoring Mission in Ukraine has furthermore reported 'infringements of the right to property in Crimea […] amount[ing] to the confiscation of property without reparation'.[27] Regarding Turkish-occupied Northern Cypriot territory, mention can be made of 'the unlawful issue of titles of ownership of property' of Greek-Cypriot inhabitants of the occupied Northern Cypriot territory to Turkish Cypriot inhabitants and to the (estimated) 120.000 Turkish settlers that are currently living in the occupied territory.[28]

2 Obligations for third parties flowing from occupation law and the law of responsibility

Some EU imports may pertain to products that have been produced, or are derived from natural resources exploited in violation of the principles of occupation law. This begs the question whether international law bars or at least conditions such imports, or put differently, what obligations rest on third parties that engage in trade in said products.

The starting point of the analysis is that it is the *occupying regime* (such as Israel, Morocco, Turkey or Russia) which breaches occupation law. After all, occupation law sets out the legal obligations of the occupying power vis-à-vis the occupied population and territory. Importing states or regional organizations such as the EU are only a third party to this legal relationship. It is argued, however, that the legal responsibility of third parties could be engaged on the basis of third parties' duty to ensure respect for occupation law (Section 2.1). It could also be engaged on the basis of the duty of non-assistance arising under the law of international responsibility. This duty prohibits third parties from facilitating another state's violations of international law, including occupation law (Section 2.2). The question here is obviously whether the duty of non-assistance can ground third party obligations to condition or bar the import of the relevant

26 William Broad, 'In Taking Crimea, Putin Gains a Sea of Fuel Reserves' (*New York Times*, 17 May 2014) <https://www.nytimes.com/2014/05/18/world/europe/in-taking-crimea-putin-gains-a-sea-of-fuel-reserves.html> accessed on 2 December 2017. As Broad states, the Russians had already 'tried, unsuccessfully, to gain access to energy resources in the same territory in a pact with Ukraine less than two years earlier'.

27 Office of the United Nations High Commissioner for Human Rights, 'Report on the human rights situation in Ukraine: 16 May to 15 August 2017' (2017) <www.ohchr.org/Documents/Countries/UA/UAReport19th_EN.pdf> accessed 27 December 2017, 3, para 19.

28 This has also been condemned by the UN General Assembly; see UNGA Res 253 (16 May 1983). Many EU citizens have purchased private properties on the occupied 'TRNC' territory, which has triggered several law suits before domestic European courts and before the European Court of Human Rights initiated by Greek Cypriot individuals to whom the property allegedly belonged before the Turkish invasion. See for instance *Loizidou v Turkey* (1995) Series A no 310, Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others* [1994] ECLI:EU:C:1994:277.

products. It will be seen that the elements of intent and knowledge, as put forward by the legal regime of non-assistance, may prove problematic in this respect.

2.1 Duty to ensure respect for occupation law

The responsibility of a third state for its trade with occupying regimes acting in violation of occupation law may possibly be engaged on the basis of a breach of the obligation to ensure respect for international humanitarian law. While, in principle, the law of occupation lays down legal obligations for the occupying power vis-à-vis the occupied population,[29] all State parties to the Fourth Geneva Convention are required to 'ensure respect' for the Convention.[30] This has been explicitly confirmed by the International Court of Justice (ICJ) in the *Wall Advisory Opinion*, in which it held that all States are 'under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by [the occupying power] with international humanitarian law as embodied in that Convention'.[31] A similar position has been taken by both the UN Security Council and the UN General Assembly.[32]

Obviously, the EU itself is not a party to the Geneva Conventions; accordingly, the obligation to ensure respect may only apply to EU Member States and not directly to the EU as an international organization. Thus, Breslin argued that even though the EU has published guidelines on the promotion of compliance with international humanitarian law, this would represent merely a 'commitment' or 'goal' of the EU and it 'appear[s] that both the EU and its Member States perceive international humanitarian law obligations as the primary responsibility of Member States, rather than of the EU itself independently'.[33] Still, it is of note that the duty to ensure respect has been recognized by the International Committee of the Red Cross (ICRC) as a customary rule of international humanitarian law, which may apply to *any* third party to an armed conflict.[34] It is generally recognized that international organizations, such as the

29 Crawford (n 14) 26.

30 Common Article 1 of the Geneva Conventions stipulates indeed that States parties undertake to 'ensure respect for the present Convention'.

31 See also *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 135, para 159.

32 See for instance UNSC Res 681 (20 December 1990) UN Doc S/RES/68 and UNGA Res 32/91 (13 December 1997) UN Doc A/RES/32/91.

33 Andrea Breslin, 'Ensuring Respect: The European Union's Guidelines on Promoting Compliance with International Humanitarian Law' [2010] 43 *Israel Law Review* 381, 384. See similarly also Frederik Naert, 'International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights' (Intersentia 2010), 512. See furthermore Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL) [2009] OJ C 303/12.

34 Rule 144 (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144#Fn_77_1> accessed 27 December 2017. 'States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law'.

EU, are bound by rules of customary international law, at least in so far as they concern the exercise of competences of the international organization.[35] Since the Treaty on the European Union has conferred upon the EU the exclusive competence to regulate the EU Common Commercial Policy,[36] it might be argued that also the EU, apart from just the EU Member States individually, has a legal obligation to ensure respect for occupation law.

It is not clear, however, what such an obligation means in the context of trade relations with occupying regimes.[37] Most interpreters have construed this obligation in rather general terms. Thus, for Pictet, the obligation to ensure respect means that States 'should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underpinning the Conventions are respected universally'.[38] The ICRC, for its part, provided in its study on customary international humanitarian law that 'States may not encourage violations of international humanitarian law by parties to an armed conflict', and that 'they must exert their influence, to the degree possible, to stop violations of international humanitarian law'.[39] The International Criminal Tribunal for the former Yugoslavia, in *Furundžija* (1998) and *Kupreškić* (2000), held in similarly vague terms that third parties have a 'legal interest' in the observance of international humanitarian law and would thus have a 'right to require respect' for these norms.[40] The latter statement certainly speaks to the *erga omnes* character of norms of international humanitarian law. However, this character may only yield third parties' *entitlement to invoke* the wrongdoer's responsibility for a violation of the Geneva Conventions,[41] rather

35 Indeed, in the language of the ICJ, the relevant criteria are the 'purposes and functions as specified or implied in [the international organization's] constituent documents and developed in practice'; see furthermore *Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174, 180. See furthermore Naert (n 33) 391–392.

36 Articles 3 and 207 of the Treaty on the Functioning of the European Union.

37 The scholarly discussion on the EU's primary legal duty to ensure respect for customary rules of international humanitarian law has until now mainly focused on issues relating to EU-led military operations; see for instance Marten Zwanenburg, 'Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations' in Steven Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (TMC Asser Press 2008) 400–-402; Frederik Naert, 'Observance of International Humanitarian Law by Forces under the Command of the European Union' [2013] 9 *International Review of the Red Cross* 637, 639.

38 Jean Pictet, 'Commentary to Article 1 of the 4th Geneva Convention' in Jean Pictet (ed), *The Geneva Conventions of 12 August 1949 Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958), 16. Also cited in François Dubuisson, 'The International Obligations of the European Union and Its Member States with Regard to Economic Relations with Israeli Settlements' (Made in Illegality 2014).

39 Rule 144 (n 34).

40 *Prosecutor v. Furundžija,* ICTY [1998] Case No. IT-95-17/1 and *Prosecutor v. Kupreškić*, ICTY [2000] Case No. IT-95-16-T.

41 Crawford (n 14) 15–16, especially para 41 ('Law does not compel those concerned to seek a remedy, even if they are entitled to do so'). It might be noted that this position has been disputed

than a more far-reaching prohibition of importing products that originate in violations of occupation law.

2.2 Duty of non-assistance

Alternatively, third party legal obligations and responsibility in respect of trading in products produced in violation of occupation law could be grounded on the so-called duty of non-assistance. This duty of non-assistance has been codified in Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[42] and Article 14 of the Articles on the Responsibility of International Organizations (ARIO).[43] In the *Bosnian Genocide* case, the ICJ furthermore considered the duty of non-assistance to represent a rule of customary international law.[44]

The duty of non-assistance can be understood as a secondary rule of *attribution of responsibility*, prohibiting what in domestic law systems would be referred to as 'complicity'.[45] In relation to the EU – an international organization – the relevant provision is Article 14 ARIO, which stipulates that

> [a]n international organization which aids or assists a State […] in the commission of an internationally wrongful act by the State […] is internationally responsible for doing so if: (a) the […] organization does so with knowledge

by Dubuisson (n 38) 62. However, Dubuisson's argument seems untenable, since he states that Crawford's position would be accurate

> 'for the purposes of article 16 of the articles on the International Responsibility of States (complicity) to which he refers, [but that] this statement [would not] consider the responsibility of the State towards its obligation to ensure respect for humanitarian law'
>
> (see Dubuisson on 62)

Dubuisson indeed refers to Crawford's argumentation regarding economic and commercial dealings with a view to the duty of non-assistance under Article 16 of the Articles on State Responsibility (paras 84–92); however Dubuisson seems to overlook Crawford's extensive argumentation regarding the duty to ensure respect (paras 34–45).

42 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries: Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session', UN Doc A/56/10.

43 ILC, 'Draft articles on the responsibility of international organizations, with commentaries: Text adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session' (2011) UN Doc A/66/10, *Yearbook of the International Law Commission* Vol II, Part 2.

44 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43, 217, para 420.

45 In the context of the ARSIWA Crawford has noted that Articles 16 (aid or assistance), 17 (assumed powers) and 18 (coercion) jointly form the exception to the general principle of individual state responsibility as enshrined in Article 2 ARSIWA. See furthermore James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 395.

> of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization.[46]

This formulation raises, first of all, the question whether the EU's trade in products originating in occupied territories – which have been produced in violation of occupation law – would qualify as such an act of aid or assistance to the principal wrongdoer (the occupying regime in question). Crawford has interpreted the duty of non-assistance to contain three requirements in this respect:

> First, the complicit state must make some contribution to the wrongful act, though it need not be essential. Second, the contribution must be in the form of a positive act: neither active incitement nor a mere omission will suffice to ground responsibility. Third, … the assistance rendered must be 'significant'.[47]

The EU's opening up of its markets to the relevant products can be considered as a 'positive' act.[48] Given the economic significance of trade relations with the EU and the different occupying regimes, the EU's trade in these products arguably also facilitates these violations significantly enough so as to be considered as assistance in the sense of Article 14 ARIO.[49] In addition, the EU's imposition of restrictions on trade relations seems to have – at least in some cases – a (potential) significant negative impact on production in violation of occupation law.[50] In this context, it might for instance be recalled that when the EU Commission

46 The text of this article closely tracks the text of Article 16 of the Articles of ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc A/56/10.

47 Crawford (n 45) 405.

48 See on the requirement of positive act also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43. Compare with the more permissive approach in international criminal law, which also allows for negative action (non-action) to constitute complicity, Andrea Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' [2007] 5 *Journal of International Criminal Justice* 875, 883–884. See *Prosecutor v. Furundžija,* ICTY [1998] Case No. IT-95-17/1, para 207 and *The Prosecutor v. Jean-Paul Akeyesu*, ICTR [1998] Case No ICTR-96-4-T, para 704–705.

49 Aust has furthermore observed that violations can also be 'ongoing', which implies that '[a]ssistance which is given only after the initial breach of international law by another State could therefore also fall within the scope of [the duty of non-assistance]', see Helmut Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 253. The fact that the EU – at the end of the economic chain – would thus assist or facilitate the violation of occupation law only after the violation took place (at least the violations for the specific products that have been traded) would thus also not block the qualification of the EU's trade in products originating in occupied territories as a violation of the EU's duty of non-assistance.

50 UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk' (13 January 2014) UN Doc A/HRC/25/67, para 46.

published an interpretative notice containing labelling requirements, which was aimed at products originating in the Israeli settlements,[51] the Israeli Ministry of the Economy estimated a negative economic impact of circa '$50 million a year'.[52]

Article 14 ARIO not only contains a material element (conduct) but also a mental one: 'knowledge' of the circumstance of the international wrongful act. In the context of the EU's trade relations with occupied territories, such as the Israeli occupied territories and the Moroccan occupied Western Sahara, the EU cannot maintain to be completely unaware of the circumstances in which its aid or assistance is intended to be used.[53] While the text of Article 14 ARIO only requires 'knowledge of the circumstances of the internationally wrongful act', the Commentary of the International Law Commission (ILC) to the article adds a considerably stricter requirement, stating that 'the relevant State organ [should also have] *intended*, by the aid or assistance given, *to facilitate* the occurrence of the wrongful conduct'.[54]

It is difficult to adduce proof of such intent to facilitate in the context of the EU's trade relations with occupied territories. Sure enough, preferential trade arrangements concluded between the EU and different occupying regimes, as well as the extensive trade relations with a number of occupied territories, *de facto* facilitate the trade in goods that are potentially produced in violation of the law of occupation. However, the EU arguably has not *intended* to facilitate these violations; it only sought to improve trade relations with the countries in question. Even if there were such intent, there may be no evidence that establishes the intention.[55]

51 Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967 [2015] OJ C 375/4.

52 'EU Defends Decision to Label Goods Made in Israeli Settlements' (*EURACTIV*, 19 January 2016) <www.euractiv.com/section/agriculture-food/news/eu-defends-decision-to-label-goods-made-in-israeli-settlements/> accessed 16 December 2017.

53 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries: Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session' (2001) UN Doc A/56/10, 66, para 4.

54 Commentary (4) to Article 14 ILC, 'Draft articles on the responsibility of international organizations' with commentaries' (n 43). This text is in fact copied from the Commentary to Article 16 of ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (n 53). See also Crawford (n 14) 32: Crawford notes that

> the assisting act should be 'specifically directed toward assisting the crime [and there should be] actual knowledge of the circumstances […] [and] the State concerned must have intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct).,

55 Compare ILC, Statement at the 1518th Meeting of the International Law Commission (1978) UN Doc A/CN.4/SER.A/1978, para 28. Also cited in Aust (n 49) 233 (ILC member stating that '[n]o State would admit that it was helping another State to commit a wrongful act').

Some authors have argued that the ILC's requirement of intent renders the article 'unworkable'.[56] Others, however, have strongly defended it.[57] Crawford, for instance, held that the duty of non-assistance as enshrined in Article 14 ARIO is 'a substantial advance of the concept in international law', and that the inclusion of the strict requirement of 'intent' is 'sensible', especially in view of the 'potentially detrimental [effect on] state sovereignty in its broadest form'[58] that could flow from only requiring knowledge.

Eva Kassoti has recently attempted to reinterpret the required standard of 'intent', arguing that it is in fact 'akin to knowledge of the purpose for which the State receiving assistance intends to use it'.[59] She cites both the work of Helmut Aust on complicity and the ICJ judgement in the *Bosnia Genocide* case.[60] The ICJ has indeed stated that

> there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless *at the least* that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.[61]

Aust, however, reads the *Bosnia Genocide* case in a far more restrictive manner than Kassoti, arguing explicitly that 'the ILC wants [the article on the duty of non-assistance] to be interpreted narrowly so that the 'knowledge' element turns into something more akin to a requirement of wrongful intent'.[62] Aust states furthermore that the language used by the ICJ in the *Bosnian Genocide* case ('at the least') would 'suggest that, as a general rule, more than mere knowledge is required'.[63]

56 See for instance Bernhard Graefrath, 'Complicity in the Law of International Responsibility' [1996] 29 *Revue Belge de Droit International* 371, 375 and John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' [1986] 57 *British Yearbook of International Law 77*; Alexander Orakhelashvili, 'Division of Reparation between Responsible Entities' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010), 647–665 as also cited in Aust (n 49) 235–237.

57 See for instance Maya Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law' [2007] 12 *Journal of Conflict and Security Law* 359 and Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 282–289. As also cited in Aust (n 49) 237.

58 Crawford (n 45) 408.

59 E Kassoti, 'The Legality under International Law of the EU's Trade Agreements Covering Occupied Territories: A Comparative Study of Palestine and Western Sahara' (2017) CLEER Working Paper No 2017/3, 32.

60 Ibid., 32.

61 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43, para 421.

62 Aust (n 49) 235.

63 Ibid., 236.

Still, it is of note that Crawford himself held that 'if aid is given with certain or near-certain knowledge as to the outcome, intent may be imputed'.[64] On that basis, it could be argued that the EU's continued trade relations with occupied territories despite reported violations of occupation law could constitute such 'certain or near-certain knowledge as to the outcome'. The intent requirement could be fulfilled on the basis of the EU's knowledge of the possible illicit outcome. The mere fact that the EU continues its trade despite reports of the adverse effects for the local population of such economic exploitation could thus be construed as the necessary 'intent'. Thus, it is arguable that the EU, by continuing its trade relations with Morocco in relation to products from Western Sahara, in spite of reports highlighting that such trade does not benefit the local population,[65] aids or assists Morocco in the commission of an internationally wrongful act in the sense of Article 14 ARIO. That the EU is of the view that 'the extension of tariff preferences to products originating in Western Sahara will have a positive overall effect for the people concerned' does not change this'.[66]

This construction of intent in fact sails close to *dolus eventualis*, a notion that is used in the context of some domestic criminal law interpretations of accomplice liability. Under the *dolus eventualis* standard, a person's liability is engaged in relation to an unlawful circumstance, where he foresaw the possibility of this circumstance occurring and nonetheless proceeded with his conduct.[67]

64 Crawford (n 45) 408.

65 See notably the statement of 93 NGOs concerned with the people of Western Sahara, 'EU-Morocco Trade Agreement on Western Sahara: The Commission Ignoring the EU Court, Misleading Parliament and Member States and Undermining the UN' (2 July 2018) <www.wsrw.org/files/dated/2018-07-03/02072018-sahrcivilsocietyappeal.pdf> accessed 17 January 2019 ('We don't see how the agreement is benefitting Saharawis living in the occupied territories of Western Sahara, and how it will benefit the people of Western Sahara living in the refugee camps and neighbouring countries who are totally excluded in all aspects of this matter, from the consultations, negotiations and future implementation of the agreement'.). See also Valentina Azarova, Antal Berkes, 'The Commission's Proposals to Correct EU-Morocco Relations and the EU's Obligation Not to Recognise as Lawful the "Illegal Situation" in Western Sahara' (*EJIL:Talk!* 2018) <https://www.ejiltalk.org/author/vazarov/> accessed 17 January 2019 (stating that 'the Commission is seeking participation and consultation without the need for Sahrawi consent').

66 Council Decision 2018/1893 of 16 July 2018 regarding the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2018] OJ L 301/1, consideration 9.

67 See for an application in Dutch criminal law pertaining to 'extraterritorial' complicity in war crimes: *Van Anraat* District Court The Hague [2005] ECLI:NL:RBSGR:2005:AU8685, affirmed on appeal by Court of Appeal The Hague [2007] ECLI:NL:GHSGR:2007:BA4676; *Kouwenhoven* Court of Appeal's-Hertogenbosch (referral by Supreme Court) [2017] ECLI:NL:GHSHE:2017:1760. However, the relation between, on the one hand, the application of the prohibition of aid or assistance in the commission of an internationally wrongful act (in the sense of article 16 of ARSIWA) and, on the other hand, the notion of complicity as known within international criminal law remains difficult. Cassese has expressed his doubts on the

Intent/knowledge could be given an even more liberal interpretation by accepting mere *negligence* as the relevant standard for the assessment of possible violations of the EU's duty of non-assistance. The exact difference between *dolus eventualis* and negligence remains a topic of debate among legal scholars, as both notions are used in domestic criminal law to establish 'fault', the necessary element to establish legal liability.[68] Still, 'fault' can consist of either *dolus* (e.g. intention) or *culpa* (e.g. negligence): the former indicates various degrees of 'deliberate criminal conduct', whereas the latter is understood to consist of 'accidental criminal conduct'.[69] While both the notion of *dolus eventualis* and (conscious) negligence thus involve foreseeability (i.e. knowledge), the essential difference between the two is the extent to which the agent in question has reconciled himself with the foreseen eventuality: in the case of *dolus eventualis* there is at least some degree of intention (the acceptance of the possible illicit outcome), while in the case of mere negligence there is no intention at all. Accepting negligence as the relevant standard in relation to the duty of non-assistance would mean that the EU could be held legally responsible for a violation of the duty of non-assistance, even if the EU did not positively intend to facilitate the violations of occupation law, provided that the EU could have foreseen the possible facilitating effect of EU trade on violations of occupation law.

One could even go as far as to accept 'unconscious negligence' as the relevant standard. This would mean that the EU could be held responsible for negligently assisting the wrongdoer, even if it was in fact not aware of the circumstances, but could (and thus should) have been aware. These ideas are not entirely new. Some have argued in favour of the requirement of 'possible knowledge' of the illicit outcome as the requirement for complicity,[70] some have presented it as a question of 'due diligence'[71] and others have focused on the notion of foreseeability.[72] The issue also came up during the reading of the ARSIWA, when the Dutch delegation suggested to hold a State responsible for a violation of the duty of non-assistance 'when it knows or should have known the circumstances

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appropriateness of the transposition of 'criminal law categories to the corpus of international law of state responsibility'; see Cassese (n 48).

68 Contrary to many continental domestic law systems, the Anglosaxon law systems generally know only 'direct and oblique intention, recklessness, and inadvertent negligence'; see Dan Morkel, 'On the Distinction between Recklessness and Conscious Negligence' [1982] 30 *American Journal of Comparative Law* 329. See furthermore Paul Smith, 'Recklessness in *Dolus Eventualis*' (1979) 96 *South African Law* 81 for a specific analysis of the notion 'recklessness' in relation to *dolus eventualis*.

69 See for an extensive discussion E Kayitana, 'The Form of Intention Known as Dolus Eventualis in Criminal Law' (2008) SSRN Working Paper <https://ssrn.com/abstract=1191502> accessed 27 December 2017.

70 See for an overview of this debate Aust (n 49) 236.

71 Ibid., 236. See for instance Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in Philip Shiner and Andrew Williams (eds), *The Iraq War and International Law* (Hart Publishing 2008) 219.

72 Ibid., 236.

of the internationally wrongful act'.[73] In so doing, the delegation circumvented not only the requirement of positive intent but also the requirement of actual knowledge. However, the Dutch proposal did not make it to the final version of the ARSIWA.[74]

These arguments bring home the fact that the contours of the duty of non-assistance may not yet be clearly drawn. Still, intent may not have to be construed as strictly as one may think. Domestic standards of accomplice liability such as *dolus eventualis,* negligence or even unconscious negligence may inform the interpretation of Article 14 ARIO and Article 16 ARSIWA. On that basis, the responsibility of the EU and third countries may possibly be engaged for allowing trade with occupying states which violate occupation law: in line with Crawford's earlier suggestion, insofar as the former have near-certain knowledge of the commission of internationally wrongful acts by the occupying state, intent may be imputed to the EU and third countries.

3 Concluding observations

We have demonstrated that under dominant understandings of the duty to ensure respect for international humanitarian law and the duty of non-assistance (Article 14 ARIO and Article 16 ARSIWA), the responsibility of bystander states and the EU is unlikely to be engaged. The duty to ensure respect is too vaguely worded, whereas the duty of non-assistance requires intent to facilitate a violation, i.e. a high complicity threshold that is not normally met. Still, drawing on the constructive ambiguity of the requirement of knowledge in the relevant ILC articles, and bearing in mind that the requirement of 'intent' only features in the ILC Commentary, we have drawn attention to 'progressive' interpretations of the standards of intent and knowledge in the context of the duty of non-assistance. The complicity requirement of 'knowledge' is semantically rather capacious and unstable. Such notions as knowledge short of intention, risk-based *dolus eventualis*, negligence and due diligence could all be subsumed under the label of 'knowledge', especially if one accepts the openness of the law of responsibility to domestic liability doctrines.[75] This may allow the responsibility of third parties, such as the EU, to be engaged for maintaining trade relations in respect of products derived from natural resources exploited in violation of occupation law.

73 ILC, 'State Responsibility: Comments and observations received from Governments' (2001) UN Doc A/CN.4/515, 52.

74 Crawford (n 45) 406.

75 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Archeon 1927); Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' [2015] 26 *EJIL* 471, 471–476 (highlighting the private law aspect of state responsibility, and arguing, although in the specific context of causation, that 'private law might be helpful in cases where international law does not provide guidance or clear answers').

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