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## **Economic Dealings with Occupied Territories**

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# Economic Dealings with Occupied Territories

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*In recent years, the international legality of economic activity in occupied territories has emerged as matter of significant debate, largely focused on Israeli-controlled territories. Some European officials, supported by prominent scholars and a wide range of NGOs, claim that international law requires limiting or prohibiting economic relations involving the Israeli-controlled West Bank and Golan Heights. Claims are increasingly being heard that international law requires a boycott of Israeli settlements, or at least the clear labeling of goods produced there.*

*The question of the lawfulness of such activity has even greater salience and urgency with Russia's annexation of Crimea and belligerent occupation of Eastern Ukraine. These areas have a significantly greater economic potential than most currently occupied territories, and Moscow is actively seeking foreign investment there.*

*Discussions of these legal issues have proceeded largely along theoretical lines, ignoring the rich trove of relevant state practice from other occupied territories such as Western Sahara, Northern Cyprus, Nagorno-Karabakh, and Abkhazia. The European Union, the United States, and other states have adopted a variety of formal positions regarding activities in these territories. Moreover, recent years have seen a proliferation of state practice and, for the*

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*first time, judicial decisions, involving these very questions.*

*This Article conducts a comprehensive survey of the relevant current state practice and judicial precedent regarding occupied territories, aside from the well-examined case of Israel. Much of this practice has never been considered by scholars, let alone examined holistically. Clear patterns emerge when state practice is examined globally, and the principles they suggest are in turn reaffirmed by recent path-breaking decisions of European national courts.*

*State practice and decisions of important national courts support a fully permissive approach to economic dealings by third-party states or nationals in territories under prolonged occupation or illegal annexation. There is no obligation on third-party states to block such activity, or to insist on particular language on product labels, or to ensure that their foreign aid funds do not cross into occupied territory. That does not mean that third countries are prohibited from taking such actions for diplomatic, rather than legal, reasons—though in the absence of a public law prohibition, WTO and other trade rules may actively bar third-country restrictions on such activity. Practice is most varied on the question of trade treaties extending to occupied territory, as this seems to depend more on the interpretation of the particular instruments, rather than general principles.*

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## INTRODUCTION

In recent years, the international legality of economic activity in occupied territories has emerged as a matter of significant debate. The public discussion has largely related to Israeli-controlled territories. Many European states, supported by prominent scholars and a wide range of NGOs, claim that international law requires limiting or prohibiting economic relations with Israelis when the relations involve the Israeli-controlled West Bank and the Golan Heights. Claims are increasingly being heard that international law requires an economic boycott of Israeli settlements and other activities in those areas as well as the inapplicability of commercial treaties with Israel to those territories, or at least the clear labeling of goods produced there.

Discussions of these legal issues have ignored the rich trove of relevant state practice from other occupied territories such as Western Sahara, Northern Cyprus, Nagorno-Karabakh, and Abkhazia. The European Union, the United States, and other states have adopted a variety of formal positions regarding activities in these territories, which have never been examined holistically. Indeed, recent years have seen a proliferation of state practice and, for the first time, judicial decisions involving these very questions. This Article attempts a systematic survey of the relevant current state practice.<sup>1</sup> It finds that surprisingly consistent patterns emerge, which are in turn reaffirmed by recent landmark decisions of European national courts.

The Article finds that state practice supports a fully permissive approach to economic dealings with occupying authorities and their nationals by third-party states or nationals in territories under prolonged occupation or illegal annexation. There is no obligation on third-party states to block such activity, to insist on particular language on product labels, or to ensure that their foreign aid funds do not cross into occupied territory. That does not mean that third countries are prohibited from taking such actions for diplomatic, rather than legal, reasons—though given the absence of a public law prohibition, World Trade Organization (WTO) and other trade rules may actively bar third-country restrictions on such activity.

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1. For more background on E.U. practice up until 2010, see Guy Harpaz & Eyal Rubinson, *The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita*, 35 *EUR. L. REV.* 551 (2010).

For a variety of reasons, this Article focuses in particular on the European Union and its member states. Much of the relevant practice and all of the cases come from Europe. The European Union is one of the world's most significant international economic actors.<sup>2</sup> Coincidentally, nearly all the relevant occupied territories are either in the European Union itself or in what it defines as its "neighbourhood."<sup>3</sup> Moreover, the European Union is a self-consciously "normative power," channeling its economic policies to reflect substantive legal norms.

The precise source of the purported prohibition relating to economic activity in occupied or illegally controlled territories is not obvious. Belligerent occupation itself is not illegal<sup>4</sup> and does not bar the occupying power or third countries from economic activity in the occupied territory. Indeed, an occupying power, having taken over the functions of government, is obligated to maintain civic life and economic well-being in the territory.<sup>5</sup> It serves as the interim sovereign, and allowing economic activity would seem well within its purview.<sup>6</sup>

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2. The European Union is the world's largest importer and second-largest exporter. See *Country Comparisons: Imports; Exports*, CENTRAL INTELLIGENCE AGENCY: WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2087rank.html> (last visited May 27, 2015).

3. *What is the European Neighbourhood Policy?*, EUROPEAN UNION: EXTERNAL ACTION, [http://eeas.europa.eu/enp/about-us/index\\_en.htm](http://eeas.europa.eu/enp/about-us/index_en.htm) (last visited May 27, 2015).

4. Belligerent occupation occurs when a territory is placed under the authority of a hostile army as a result of an international armed conflict. Cf. Regulations Respecting the Laws and Customs of War on Land art. 42, annexed to Convention Respecting the Laws and Customs of War on Land, Oct 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations] ("Territory is considered occupied when it is actually placed under the authority of the hostile army.").

5. See *id.*, art. 43; see also EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 14 (2d ed. 2012).

6. The Hague Regulations allow the exploitation of public property and resources on a limited basis, and contain no prohibition on private business transactions. See Hague Regulations, *supra* note 4, art. 55. Moreover, the Fourth Geneva Convention of 1949 countenances contracts between the occupying power and the occupied population. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 52, ¶ 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. The only prohibited economic measures suggested by the Geneva Conventions are those aimed at "creating unemployment" in order to coerce protected persons to work for or in the occupying power; this is essentially a safeguard for Article 51's restrictions on forced levies of labor. See *id.*, art. 52, ¶ 2. In other words, the Convention prohibits some measures restricting trade (the Commentaries mention as examples the creation monopolies and the closing of industries).

Perhaps a prohibition on economic activity could be part of a general duty of non-recognition of forcible conquest, famously suggested by the International Court of Justice (ICJ) in the *Namibia* case.<sup>7</sup> Presumably it would not apply to all occupations, but rather only to prolonged occupations accompanied by conduct tending towards annexation or conquest.<sup>8</sup> Thus, on this view, it would not matter if the underlying situation were, strictly speaking, a belligerent occupation within the meaning of the Hague and Geneva Conventions<sup>9</sup> (Namibia was not), or if the situation involved what one author has described as “unlawful territorial situations.”<sup>10</sup>

However, the actual contents and details of a non-recognition duty are also unclear.<sup>11</sup> In the simple understanding, non-recognition prohibits only formal governmental acts,<sup>12</sup> and applies only to recognizing the malefactor’s legal claim, rather than its *de facto* control.<sup>13</sup> To be sure, the *Namibia* opinion casts the obligation in sweeping terms, including an “obligation to abstain from entering into economic or other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.”<sup>14</sup> However, the ICJ derived this as much from the principle of non-recognition as from the express language of U.N. Security Council Resolution 276.<sup>15</sup> This resolution

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7. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 124 (June 21) [hereinafter *Namibia Advisory Op.*].

8. See BENVENISTI, *supra* note 5, at 143–47 (suggesting that economic integration with the occupant could promote annexation, and that close economic relations between the occupier and occupant should be forbidden except in situations of extreme need).

9. See Hague Regulations, *supra* note 4, art. 42 (“Territory is considered occupied when it is actually placed under the authority of the hostile army.”).

10. ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW: RECONCILING EFFECTIVENESS, LEGALITY AND LEGITIMACY 116–17, 136–39 (2006).

11. See Stefan Talmon, *The Duty Not to “Recognize as Lawful” a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: *JUS COGENS* AND OBLIGATIONS *ERGA OMNES* 99, 103–104 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

12. See, e.g., *Namibia Advisory Op.*, *supra* note 7, ¶ 123 (obligating Member States “to abstain from sending diplomatic or special missions to South Africa”).

13. See Talmon, *supra* note 11, at 112–13 (discussing “an understanding of the obligation of non-recognition as precluding only the formal admission of legality,” while noting that various states and the ICJ suggest the obligation entails a heavier burden).

14. *Namibia Advisory Op.*, *supra* note 7, ¶ 124.

15. See S.C. Res. 276, ¶ 5, U.N. Doc. S/RES/276 (Jan. 30, 1970).

was unusually broad, declaring the very “presence” of South Africa in Namibia to be “illegal and invalid.”<sup>16</sup> Thus, a broad prohibition on economic activity would be best viewed as a kind of all-purpose, customary sanctions regime for illegal territorial situations only where adopted by the Security Council as a matter of *lex specialis*.

It bears noting that a norm against economic activity in occupied territory does not appear to have deep historical roots. Indeed, the post-World War II origins of the European Union itself lie in economic exploitation of occupied territory. At the end of World War II, France occupied the Saar region of Germany, an area rich in coal and steel. France partitioned the occupied territory from the rest of Germany, creating the Saar Protectorate, administered by French civil servants and economically integrated into metropolitan France.<sup>17</sup> The principal purpose of the quasi-annexation was to divert German coal and steel production to France, whose production had collapsed.<sup>18</sup> Despite some British objections, the scheme was formalized in the Monnet Plan (1946–1950), which gave the French government complete control over German coal production in the Saar.<sup>19</sup> The Saar was returned to West Germany in 1957 under pressure from France’s allies, who were not concerned about the

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16. *Id.* ¶ 2. The Resolution called on States with “economic . . . interests in Namibia[] to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2.” *Id.* ¶ 5. By contrast, the Council’s most severe condemnation of Israeli activity found only “establishing settlements,” i.e., civilian population centers, to be illegal and not the occupation itself. *See* S.C. Res. 446, ¶ 1, U.N. Doc. S/RES/466 (Mar. 22, 1979) (“[T]he policy and practices of Israel in establishing settlements . . . have no legal validity.”).

17. O. R. Reischer, *Saar Coal After Two World Wars*, 64 POL. SCI. Q. 50 (1949); HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 394–99 (Rev. Ed. 1996).

18. *See generally* JACQUES FREYMOND, *THE SAAR CONFLICT, 1945–1955* (1960); STEFAN WOLFF, *DISPUTED TERRITORIES: THE TRANSNATIONAL DYNAMICS OF ETHNIC CONFLICT SETTLEMENT* 87–97 (2003).

19. *See* Directorate for Economic Affairs, France Diplomatie [Ministry of Foreign Affairs], Memorandum on the Detachment of the German Industrial Regions, (Sep. 8, 1945), translation available at [http://www.cvce.eu/en/obj/memorandum\\_on\\_the\\_detachment\\_of\\_the\\_german\\_industrial\\_regions\\_8\\_september\\_1945-en-65894711-44e5-4dc8-98e8-e9e7c8a25a65.html](http://www.cvce.eu/en/obj/memorandum_on_the_detachment_of_the_german_industrial_regions_8_september_1945-en-65894711-44e5-4dc8-98e8-e9e7c8a25a65.html). Under Jacques Monnet’s plan, which envisioned a customs union between France and the detached German territories, German coal production was nationalized under French control. *See id.* The plan preceded Monnet’s 1950 plan, which led to the establishment of the European Steel and Coal Community, a predecessor of the European Union. *See The European Communities*, CENTRE VIRTUEL DE LA CONNAISSANCE SUR L’EUROPE (CVCE) (Sept. 11, 2012), [http://www.cvce.eu/obj/the\\_european\\_communities-en-3940ef1d-7c10-4d0f-97fc-0cf1e86a32d4.html](http://www.cvce.eu/obj/the_european_communities-en-3940ef1d-7c10-4d0f-97fc-0cf1e86a32d4.html).



legality of the situation, but rather wanted to strengthen West Germany against the Communist East.<sup>20</sup>

This Article examines several distinct but interrelated contentions about economic activity with settlements in occupied territory that have recently been suggested by U.N. officials and Member States and supported by some scholars acting in a public capacity.<sup>21</sup> All of these claimed restrictions on third-country activity have been suggested in the context of Israel and the territories that came under its control in 1967—the West Bank, Gaza, and the Golan Heights. This Article takes legal claims made in this context as the hypotheses to be tested against the rest of existing state practice.

Any potential obligations of states to refrain from economic activity in occupied territory are not clearly delineated by treaty, and thus state practice is crucial to informing the precise scope of the relevant obligations.<sup>22</sup> As will be seen, state practice has overwhelmingly found the ICJ's advice to be inapplicable to other contexts, and suggests the *Namibia* decision did not state a general or correct rule.

This Article first describes a series of particular contentions about economic activities in occupied territories that have been made in recent years in relation to Israel. It also describes some tentative efforts, primarily in Europe, to translate these contentions into

20. Nonetheless, French rights to Saar coal lasted until 1981. Michael Berger, *Motives for the Foundation of the ECSC* 19 n.50 (Poznan Univ. of Econ., Working Paper No. 7, 2012), available at [ue.poznan.pl/data/upload/articles\\_download/5401/20131111/Working\\_Paper\\_No7\\_2012.pdf](http://ue.poznan.pl/data/upload/articles_download/5401/20131111/Working_Paper_No7_2012.pdf).

21. See JAMES CRAWFORD, TRADES UNION CONG., OPINION: THIRD PARTY OBLIGATIONS WITH RESPECT TO ISRAELI SETTLEMENTS IN THE OCCUPIED PALESTINIAN TERRITORIES (Jan. 24, 2012), available at <http://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> (last visited May 27, 2015); Special Rapporteur on the Situation of Human Rights in the Palestinian Territories, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, 67th Sess., U.N. Doc. A/67/369 (Sept. 19, 2012) (by Richard Falk).

22. If—as it would seem—the purported norm against economic dealings is customary in nature, state practice would be the primary evidence of its existence and scope. See *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, 1985 I.C.J. 13, ¶ 27 (June 3) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States . . .”). Even if the prohibition is a corollary of treaty norms, subsequent state practice is of great relevance in interpreting the meaning of the relevant treaties, which do not speak directly to these questions. See Report of the Special Rapporteur, *First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, Int'l Law Comm'n, U.N. Doc. A/CN.4/660 (Mar. 19, 2013) (by Georg Nolte); Report of the Special Rapporteur, *Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, Int'l Law Comm'n, U.N. Doc. A/CN.4/671 (Mar. 26, 2014) (by Georg Nolte).

practice. It then proceeds to test these contentions by examining state practice in relation to economic activity in currently occupied territories—Western Sahara and Northern Cyprus. It also examines Abkhazia and Nagorno-Karabakh, though the extremely limited scope of their economies means they provide relatively thin evidence. Finally, it will briefly consider the incipient practice regarding the occupation of Crimea. All of these situations meet the objective definition of occupation under international humanitarian law—a territory coming under the control and administration of a hostile army during an international armed conflict.<sup>23</sup> Moreover, these are not situations of temporary or even prolonged occupation, but rather of indefinite occupation seeking to permanently change borders through force. In several cases, such as Western Sahara and Crimea, the occupying power has formally annexed the territory, although the validity of the annexations has been near-universally rejected;<sup>24</sup> in the others, they have established unrecognized puppet states in the territory.<sup>25</sup> In all these cases the occupation authority has encouraged the transfer of settlers into the occupied territory, in some cases on a modest scale (Abkhazia), but more often on a massive one (Western Sahara and Northern Cyprus).<sup>26</sup>

To be sure, countries may be motivated by political and

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23. See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 3–44 (2009) (defining aspects of occupation as established in international treaties and custom).

24. See Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, N.Y. TIMES, Mar. 18 2014, available at [http://www.nytimes.com/2014/03/19/world/europe/ukraine.html?\\_r=0](http://www.nytimes.com/2014/03/19/world/europe/ukraine.html?_r=0) (“The speed of Mr. Putin’s annexation of Crimea, redrawing an international border that has been recognized as part of an independent Ukraine for 23 years, has been breathtaking and so far apparently unstoppable.”); see also BENVENISTI, *supra* note 5, at 171.

25. See Eur. Parl. Ass., *Colonisation by Turkish Settlers of the Occupied Part of Cyprus*, Recommendation No. 1608 (June 24, 2003), available at [http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/EREC1608.htm#\\_ftn1](http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/EREC1608.htm#_ftn1).

26. For the transfer of civilians into Abkhazia, see Eugene Kontorovich, *ICC Prosecutor Says Full Inquiry into Russian War Crimes Might Come Soon, But Omits Some Crimes*, EJIL: TALK! (Dec. 10, 2014), <http://www.ejiltalk.org/icc-prosecutor-says-full-inquiry-into-russian-war-crimes-might-come-soon-but-omits-some-crimes/>. For the transfer of civilians into Western Sahara, see Pablo San Martín, *Western Sahara: Road to Perdition?*, 103 AFR. AFF. 651, 652–53 (2004); METE HATAY, INT’L PEACE RESEARCH INST., *BEYOND NUMBERS: AN INQUIRY INTO THE POLITICAL INTEGRATION OF TURKISH ‘SETTLERS’ IN NORTHERN CYPRUS*, vii–viii (2005). While it is too early to tell if Russia will engage in settling civilians in Crimea, it has done nothing to prevent such movement, and indeed has offered incentives to companies to send their employees on vacations there. See, e.g., *Federal Agency Recommends State Companies Treat Employees to Crimean Vacation*, MOSCOW TIMES, June 4, 2014, <http://www.themoscowtimes.com/article/501537.html>.

pecuniary considerations when applying international law to economic activities. Some scholars might be tempted to dismiss permissive state practice as politically motivated and only look to restrictive acts for the “real” law. But both limiting and allowing trade can be politically motivated. Indeed, geopolitical considerations shadow state practice throughout international law. It is not news that politics and norms are intertwined in public international law practice. Yet international law takes state practice as both a source of law and a guide to its interpretation nonetheless.<sup>27</sup> Thus while all the actions discussed here have political explanations, this analysis abstracts from that to look at what counts for international law: what countries do.

## I. ISRAEL

The West Bank and Gaza were part of Mandatory Palestine, established by the League of Nations as a “national home” for the Jews in 1922. Upon the expiration of the Mandate in 1948, the Jewish government declared an independent state (“Israel”).<sup>28</sup> This entity was promptly invaded by numerous Arab countries, and parts of the mandated territory came under occupation, with the Gaza Strip held by Egypt and the territory that would come to be known as the West Bank under Jordanian control.<sup>29</sup> Armistice agreements between Israel, Egypt, and Jordan delineated lines of control in 1949, though these were by their terms not international borders.<sup>30</sup> In 1967, in the Six Day War (or June War) Israel took the formerly mandated territories from Egypt and Jordan, as well as the Golan Heights from Syria and the Sinai Peninsula, to which, unlike the other territories, it did not have a prior claim.<sup>31</sup> Israel subsequently effectively annexed the Golan and eastern Jerusalem, withdrew from the Sinai in accordance with a peace treaty with Egypt, and unilaterally withdrew from Gaza in 2005.

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27. See Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 3 Bevens 1153; Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

28. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 71 (July 9) [hereinafter Legal Consequences of the Construction of a Wall]; see also DINSTEIN, *supra* note 23, at 12–19.

29. See DINSTEIN, *supra* note 23, at 12–19.

30. See Legal Consequences of the Construction of a Wall, *supra* note 28, ¶ 72.

31. See Eugene Kontorovich, *Israel/Palestine—The ICC’s Uncharted Territory*, 11 J. INT’L CRIM. JUST. 979, 991, 991 n.53 (2013).

The European Union and much of the international community regard all these territories (other than the Sinai peninsula) as being under Israeli military occupation. The European Union, and the United Nations have on numerous occasions declared Israeli civilian presence in these areas (“settlements”) to violate the Geneva Conventions, and the more general fact of Israeli control to violate Palestinian rights of self-determination. However, under the Oslo Accords, Israel entered into an agreement with Palestine Liberation Organization (PLO) to place parts of the territories under the exclusive control of a newly created Palestinian Authority, while maintaining Israeli civil control over the sections sparsely populated by Palestinians (including areas containing settlements).<sup>32</sup>

The economic ties between foreign firms and Israeli concerns in the territories have been extensively documented by NGOs,<sup>33</sup> and need not be elaborated here. The European Union, for example, imports approximately \$300 million in goods from Israeli settlements a year.<sup>34</sup> In recent years, several contentions have been raised about the legality of this economic activity in the Golan and West Bank.

#### A. *Third-Country Public Funding of Activities in Occupied Territory*

The European Commission recently issued well-publicized spending guidelines restricting European relations with Israeli entities that operate across the pre-1967 lines of control (also known as the “Green Line”).<sup>35</sup> The guidelines maintain that international law prohibits third-party states from spending money that would flow to or support activities by private entities of an occupying power in

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32. See Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip [hereinafter Oslo II], Isr.-P.L.O., arts. XII.1, XVII.1.a, XVII.2.c, XVII.4, Sept. 28, 1995; Protocol Concerning Legal Matters, Annex IV to the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., art. II(2)(c), art. II.7, Sept. 28, 1995.

33. See, e.g., APRODEV ET AL., TRADING AWAY PEACE: HOW EUROPE HELPS SUSTAIN ILLEGAL ISRAELI SETTLEMENTS (2012), available at [http://www.christianaid.org.uk/Images/Trading%20Away%20Peace%20October%202012\\_tcm15-63607.pdf](http://www.christianaid.org.uk/Images/Trading%20Away%20Peace%20October%202012_tcm15-63607.pdf); PROFUNDO, U.K. ECONOMIC LINKS WITH ISRAELI SETTLEMENTS IN OCCUPIED PALESTINIAN TERRITORY, summary available at <http://electronicintifada.net/content/report-uk-economic-links-israeli-settlements/3423>; Jim Armitage, *G4S Contracts in Israeli Occupied Territories Face Major Investigation*, INDEPENDENT, Jan. 7, 2014, <http://www.independent.co.uk/news/business/news/g4s-contracts-in-israeli-occupied-territories-face-major-investigation-9042705.html>.

34. See TRADING AWAY PEACE, *supra* note 33, at 6.

35. Guidelines on the Eligibility of Israeli Entities and Their Activities in the Territories Occupied by Israel since June 1967 for Grants, Prizes and Financial Instruments Funded by the E.U. from 2014 Onwards, 2013 O.J. (C 205) 9–11 [hereinafter Guidelines].

an occupied territory with settlers.<sup>36</sup> The duty of non-recognition requires that “[n]ot one Euro” go to such activities, and that any grants or aid to the occupying power must be structured to ensure they are not spent in the occupied territory.<sup>37</sup> A fortiori, such activities cannot be funded directly. The restriction apparently applies only to *Israeli* entities, and not Palestinian or other entities in the territory.<sup>38</sup>

### *B. Rules of Origin and Territorial Scope of Agreements*

Many E.U. member states and Commission officials maintain, in relation to Israel, that products manufactured in an occupied territory cannot be labeled as originating from the occupying power when exported to the European Union.<sup>39</sup> They argue that allowing such products to be labeled “Made in Israel” improperly “recognizes” Israel control by third-countries, although it is not the third-countries applying the labeling. E.U. officials have announced plans to require separate labeling of settlement products.<sup>40</sup> As of this writing, the

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36. See *id.*, art. 1 (“[The Guidelines] aim is to ensure the respect of E.U. positions and commitments in conformity with international law on the non-recognition by the E.U. of Israel’s sovereignty over the territories occupied by Israel since June 1967.”). The E.U. guidelines are somewhat incoherent because they exempt from the restrictions funding for both activities of Israeli national public authorities, as well as any activities “promoting the Middle East peace process in line with E.U. policy.” *Id.*, arts. 11(b), 15 (internal footnote omitted). Surely the international law of non-recognition does not provide an exception for cases where recognition would promote the recognizers’ foreign policy. See AVI BELL & EUGENE KONTOROVICH, KOHELET POL’Y FORUM, E.U.’S ISRAEL GRANT GUIDELINES: A LEGAL AND POLICY ANALYSIS 9-12, (2013), available at [http://kohelet.org.il/uploads/file/EUs%20Israel%20Grants%20Guidelines%20A%20Legal%20and%20Policy%20Analysis%20-%20Kohelet%20Policy%20Forum%20-%20Final\(1\).pdf](http://kohelet.org.il/uploads/file/EUs%20Israel%20Grants%20Guidelines%20A%20Legal%20and%20Policy%20Analysis%20-%20Kohelet%20Policy%20Forum%20-%20Final(1).pdf).

37. Yossi Verter, *Israel-E.U. Settlement Compromise: When Funding at Stake, Heaven and Earth Can be Moved*, HAARETZ, Nov. 29, 2013, <http://www.haaretz.com/weekend/week-s-end/premium-1.560881>; Guidelines, *supra* note 35.

38. See Guidelines, *supra* note 35, ¶¶ 4, 12–15. There is an exception in Paragraph 15 for activities by Israeli entities that benefit Palestinians. In that section, Palestinians are referred to as “protected persons,” a phrase from the Fourth Geneva Convention that refers to the prior inhabitants of an occupied territory. See Geneva Convention IV, *supra* note 6, art. 4.

39. For background on the dispute, see Moshe Hirsch, *Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip*, 26 *FORD. INT’L L. J.* 572 (2002).

40. See Ben Lynfield, *E.U. to Label Products from Israeli Settlements*, TELEGRAPH, July 23, 2013, <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/10198109/eu-to-label-products-from-Israeli-settlements.html>; Christoph Schult, *Patience Runs Out: E.U.*

Commission has not yet imposed any labeling requirements on Israeli settlement products, though news reports suggest it is close to doing so. A few individual members, like Belgium and Denmark, have issued non-binding advice to retailers urging settlement products to be labeled as made in Israeli settlements, rather than “Made in Israel.”<sup>41</sup>

Related to the origin labeling issue is the territorial scope of trade and related agreements. Israel and the European Union signed an Association Agreement (a kind of free trade deal) in 1995.<sup>42</sup> Like most such treaties, it contains a territorial clause that provides they apply to the “territory of Israel” and the “territory” of the European Union.<sup>43</sup> Such a clause could either mean “sovereign territory” or “administered territory.” European states argue that such clauses in treaties with Israel mean, in effect, the *de jure* territory of Israel in accordance with the European view of the matter.<sup>44</sup> Thus, the European Union is increasingly seeking to restrict the application of its agreements with Israel to exclude areas where it contests Israel’s sovereignty.<sup>45</sup>

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*To Crack Down on Israeli Settlement Products*, DER SPIEGEL ONLINE (Feb. 13, 2013, 2:43 PM), <http://www.spiegel.de/international/europe/eu-to-crack-down-on-products-from-israeli-settlements-a-882623.html>.

41. See Robert-Jan Bartunek, *Belgium Advises Retailers to Label Products from Israeli Settlements*, HAARETZ, July 29, 2014, <http://www.haaretz.com/news/diplomacy-defense/1.607864>; Amira Hass et al., *Denmark to Ban Labeling West Bank Products as “Made in Israel,” Report Says*, HAARETZ, May 19, 2012, <http://www.haaretz.com/news/diplomacy-defense/denmark-to-ban-labeling-west-bank-products-as-made-in-israel-report-says-1.431372>.

42. See *Agreements*, DELEGATION OF THE EUROPEAN UNION TO ISRAEL, [http://eeas.europa.eu/delegations/israel/eu\\_israel/political\\_relations/agreements/index\\_en.htm](http://eeas.europa.eu/delegations/israel/eu_israel/political_relations/agreements/index_en.htm) (last visited May 27, 2015); 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, E.U.-Isr., Nov. 20, 1995, 2000 O.J. (L 147) 3 (entered into force June 1, 2000), available at [http://eeas.europa.eu/delegations/israel/documents/eu\\_israel/asso\\_agree\\_en.pdf](http://eeas.europa.eu/delegations/israel/documents/eu_israel/asso_agree_en.pdf) [hereinafter Euro-Mediterranean Agreement, E.U.-Isr.].

43. Euro-Mediterranean Agreement, E.U.-Isr., *supra* note 42, art. 83.

44. See Press Release, Council of the European Union, 3029th Council Meeting, 8 (Dec. 10, 2012), available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/EN/foraff/134152.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/134152.pdf) (holding that “all agreements between the State of Israel and the European Union must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967”).

45. For example, in 2014, the E.U. began blocking certain agricultural imports from Israel on the grounds that it could not accept Israeli veterinary and other certifications from the territories. See generally Ora Coren, *E.U. gives Israel Extra Month to Prepare for Ban on Settlement Farm Products*, HAARETZ, Sept. 3, 2014, <http://www.haaretz.com/business/premium-1.613722>.

With the Association Agreement, controversy arose over whether the Agreement applied to the territories under Israeli jurisdiction. After months of negotiation, Israel and the European Union reached an agreement whereby the former would identify products from across the Green Line by zip code when issuing certificates of origin for export.<sup>46</sup> The European Union uses this information to deny preferential tariff treatment required by the Association Agreement to such goods, while continuing to accept Israeli certificates of origin.

The question of the status of the West Bank under the Agreement came before the European Court of Justice in 2008, when a German company importing goods from an Israeli company in the West Bank sought the benefit of the Agreement's preferential tariff rules. The German authorities argued that the goods were not eligible for such treatment because they were, as a matter of public international law, not part of Israel. The ECJ ruled that the West Bank was excluded from the coverage of the Agreement.<sup>47</sup> It did not do so, however, on the basis that the West Bank was not a "sovereign" part of Israel;<sup>48</sup> that is, the Court did not base its holding on the meaning of "territory" in the Association Agreement or on the legal status of Israel's presence in the West Bank, despite an invitation by the E.U. Advocate-General to do so.<sup>49</sup> Rather, it concluded that a parallel customs agreement between the European Union and the Palestinian Authority in 1997 implicitly restricted the scope of the agreement with Israel:

Accordingly, to interpret Article 83 of the EC-Israel Association Agreement as meaning that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank would be tantamount to imposing on the Palestinian customs authorities an obligation to

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46. See e.g., Notice to Importers—Imports from Israel into the Community, 2005 O.J. (C 20) 2, available at [http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc\\_127720.pdf](http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127720.pdf); Notice to Imports—Imports from Israel into the E.U., 2012 O.J. (C 232) 5, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C.20.12.232.01.0005.01>. ENG.

47. Case C-386/08, Brita GmbH v. Hauptzollamt Hamburg-Hafen, 2010 E.C.R. I-01289, Ruling ¶¶ 1–2 [hereinafter Brita].

48. See *id.* ¶¶ 52–53, Ruling ¶¶ 1–2.

49. Itzhak Kornfeld, *ECJ Holds that West Bank Products are Outside Scope of the E.U.-Israel Association Agreement*, 14 AM. SOC'Y INT'L L. INSIGHTS (June 23, 2010), <http://www.asil.org/insights/volume/14/issue/17/ecj-holds-west-bank-products-are-outside-scope-E.U.-israel-association>.

refrain from exercising the competence conferred upon them by virtue of the abovementioned provisions of the EC-PLO Protocol. Such an interpretation, the effect of which would be to create an obligation for a third party without its consent, would thus be contrary to the principle of general international law, “*pacta tertiis nec nocent nec prosunt*,” as consolidated in Article 34 of the Vienna Convention.

It follows that Article 83 of the EC-Israel Association Agreement must be interpreted as meaning that products originating in the West Bank do not fall within the territorial scope of that agreement and do not therefore qualify for preferential treatment under that agreement.<sup>50</sup>

The European Union thus excludes Israeli products from Israeli-controlled territories from preferential customs treatment otherwise available to Israeli goods.<sup>51</sup> (By contrast, the U.S.-Israel Free Trade Agreement applies to goods produced under Israel jurisdiction in the West Bank.<sup>52</sup>) However, such goods are still marked as “Made in Israel” on their packaging and certificate of origin. The push by some countries to require a change in labeling (“Made in the West Bank,” for example) is based on the view that “Made in Israel” labels are fraudulent and misleading.<sup>53</sup>

### *C. Third Party Firms Doing Business in the Occupied Territory*

The European Union apparently does not maintain that international law bars its corporations from conducting business in occupied territory, even when such activities assist an illegal annexation or otherwise maintain an illegal situation, such as the implantation of

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50. See Brita, *supra* note 47, ¶¶ 52–53.

51. Brita would seem not to apply to Israeli products from the Golan Heights, as the European Union has no parallel customs treaties with Syria. Nonetheless, the European Union in practice excludes Golan Heights products from Israeli preferential treatment as well. See Nellie Munin, *Can Customs Rules Solve Difficulties Created by Public International Law? Thoughts on the ECJ’s Judgment in the Brita Case (C-386/08)*, 6 GLOBAL TRADE & CUSTOMS J. 193 (2011).

52. United States-Israel Free Trade Area Implementation Act, Pub. L. No. 99-47, 99 Stat. 82 (1985), amended by Pub. L. No. 104-234, § 1, 110 Stat. 3058 (1996).

53. See, e.g., U.K. DEP’T FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS, *Technical Advice: Labeling of Produce Grown in the Occupied Palestinian Territories* 4 (Dec. 10, 2009), available at <http://archive.defra.gov.uk/foodfarm/food/pdf/labelling-palestine.pdf>.



settlers. For example, the legal opinion by James Crawford, which expresses sympathy with a boycott of Israeli settlements as a policy matter,<sup>54</sup> nonetheless acknowledges that international law does not prohibit most economic activity with settlements:

It is not unlawful for the U.K. government to purchase settlement goods or otherwise engage with the settlements . . . . Moreover, a private sector entity or person does not bear any international legal responsibility for aiding or assisting the unlawful settlement program.<sup>55</sup>

However, numerous E.U. member states have in the recent months and years issued coordinated statements containing somewhat vague “warnings” about the legal consequences of doing business in Israeli occupied territories.<sup>56</sup> In recent years, at least one E.U. member state, the Netherlands, attempted to prosecute such economic activity as a war crime.<sup>57</sup> This is the strongest and most novel of the international law propositions examined here. Moreover, some European politicians have begun to call for a full economic boycott of Israeli settlements.<sup>58</sup> On the other hand, as this Article was going to press, some U.S. jurisdictions have passed or are considering laws that would themselves partially companies that boycott Israeli businesses with West Bank connections. For example, in May 2014, the Illinois legislatures passed a bill requiring its pension fund to divest from such boycotting companies.<sup>59</sup>

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54. See CRAWFORD, *supra* note 21, ¶ 137-39.

55. *Id.* ¶ 136.

56. See, for example, the Israel page of the Malta Ministry of Foreign Affairs under the headline “Common messages aimed at raising awareness among E.U. citizens and businesses regarding involvement in financial and economic activities in the settlements.” *Israel*, FOREIGNAFFAIRS.GOV.MT, <https://foreignaffairs.gov.mt/mt/Pages/Travel%20Advice/Israel.aspx> (last visited May 27, 2015).

57. See Valentina Azarov, *Investigative or Political Barriers?: Dutch Prosecutor Dismisses Criminal Complicity Case Against Riwal*, RIGHTSASUSUAL (May 29, 2013), <http://rightsasusual.com/?p=543> (posted by Nadia Bernaz).

58. See Barak Ravid, *Ireland Looks to Advance E.U. Ban on West Bank Settlement Products*, HAARETZ, Nov. 9, 2012, available at <http://www.haaretz.com/blogs/diplomania/ireland-looks-to-advance-E.U.-ban-on-west-bank-settlement-products-1.476425>.

59. Jacob Gershman, *Illinois Lawmakers Pass Divestment Bill to Counter Israel Boycotts*, WALL ST. J.: LAW BLOG (May 19, 2015, 1:13 PM), <http://blogs.wsj.com/law/2015/05/19/illinois-lawmakers-pass-divestment-bill-to-counter-israel-boycotts/>.

## II. WESTERN SAHARA (MOROCCO)

### A. Background

Western Sahara was formerly a Spanish colony. In 1974, Spanish authorities evacuated the territory, leading to competing claims by both Morocco and Mauritania.<sup>60</sup> The International Court of Justice ruled that neither neighboring state had a sovereign title to the territory, and instead called for the realization of the self-determination of the indigenous Sawahari people.<sup>61</sup> Morocco promptly invaded the sparsely occupied-territory with 20,000 troops, accompanied by 350,000 civilians.<sup>62</sup> After fighting with both Mauritania and the Sawahari guerrilla group called the Polisario, Morocco seized control of most of the territory, and it has maintained control since then.<sup>63</sup> Morocco regards the region as an integral part of its territory—its “Southern Provinces.”<sup>64</sup> (The Polisario-run Sawahari Arab Democratic Republic (SADR), recognized by several dozen nations, also claims sovereignty over the territory, but controls only roughly 15% of the territory, almost exclusively in remote and

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60. See Thomas M. Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694, 705–06 (1976) (noting Morocco's threat to mobilize to prevent Western Sahara's independence and “to recover the usurped territories”) (quoting the Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/9623/Add.4 (Part II), at 23; GAOR, 31st Sess., Supp. No. 23, U.N. Doc. A/31/23/Rev.1 (1974) and citing Letter dated 23 September 1974 from the Minister of Foreign Affairs of Morocco to the Minister for Foreign Affairs of Spain, U.N. Doc. A/9771, at Annex (1974)); see also Statement of the Minister for Foreign Affairs for the Islamic Republic of Mauritania to the General Assembly, ¶¶ 142–68, U.N. Doc. A/PV.2251 (Oct. 2, 1974).

61. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 24–74 (Oct. 16).

62. See DEON GELDENHUYS, *CONTESTED STATES IN WORLD POLITICS* 190, 193 (2009).

63. See UNITED NATIONS MISSION FOR THE REFERENDUM IN WESTERN SAHARA (MINURSO), *Milestones in the Western Sahara Conflict*, <http://minurso.unmissions.org/LinkClick.aspx?fileticket=b67SKR4JLk%3D&tabid=9540&language=en-US>.

64. For example, there is an Agency for the Promotion and Economic and Social Development of the Southern Provinces of the Kingdom of Morocco. *Programme de developpement*, PORTAIL DU SUD MAROCAIN: AGENCE POUR LA PROMOTION ET LE DEVELOPPEMENT ECONOMIQUE ET SOCIAL DES PROVINCES DU SUD ROYAUME, [http://www.agencedusud.gov.ma/programme\\_de\\_developpement.php](http://www.agencedusud.gov.ma/programme_de_developpement.php) (last visited May 27, 2015); see also *Polisario's Sinking Hopes*, ECONOMIST, Dec. 6, 2001, available at [http://www.economist.com/node/898185/print?Story\\_ID=898185](http://www.economist.com/node/898185/print?Story_ID=898185) (noting that “France's President, Jacques Chirac, delighted Morocco by naming Western Sahara ‘the southern provinces of Morocco’”).

desolate desert regions with little economic potential.)<sup>65</sup> The Security Council has demanded Morocco withdraw from the territory; the General Assembly has found the territory to be “occupied”; and no nation recognizes Moroccan sovereignty over the region.<sup>66</sup> Nonetheless, Morocco has established a significant settlement enterprise in the territory, combined with an expulsion of the indigenous population.<sup>67</sup> As a result, Moroccan settlers are now the majority of the territory’s population,<sup>68</sup> which greatly impairs the viability of Sawahri self-determination.<sup>69</sup>

Western Sahara has a significant endowment of natural resources—oil, phosphates, and fish—and has in recent decades seen significant economic activity by foreign firms, particularly from nearby Europe, which is by far Morocco’s largest trading partner.<sup>70</sup> The representatives of the Sawahri people vigorously object to all foreign economic activity in the territory done under Moroccan auspices.<sup>71</sup> While Moroccan-backed economic activity in the territory has never been subject to judicial challenge,<sup>72</sup> it has resulted in several formal legal discussions.

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65. See ALEXIS ARIEFF, CONG. RESEARCH SERV., RS20963, WESTERN SAHARA 1 (2014), available at <http://fas.org/sgp/crs/row/RS20962.pdf> (“Morocco then occupied Mauritania’s sector and, in 1981, began building a ‘berm,’ or sand wall, to separate the 85% of the Western Sahara that it occupied from the Polisario and the Sahrawi refugees . . .”).

66. See U.N. Secretary-General, *The Situation Concerning Western Sahara: Report of the Secretary-General*, ¶ 16, U.N. Doc. S/21360 (June 18, 1990); G.A. Res. 34/37, U.N. Doc. A/RES/34/37 (Nov. 21, 1979); *The Occupation of Western Sahara*, W. SAHARA RESOURCE WATCH (Sep. 11, 2007, 6:23 PM), <http://www.wsrw.org/a135x516>.

67. AKBARALI THOBHANI, WESTERN SAHARA SINCE 1975 UNDER MOROCCAN ADMINISTRATION 104 (2002).

68. Jacob Mundy, *Moroccan Settlers in the Western Sahara: Colonists or Fifth Column?*, 15 ARAB WORLD GEOGRAPHER 1, 1 (2012).

69. See Letter from Emhamed Khadad, Advisor to the SADR President, to John R. Kemp, III, Chairman of the Board of Directors, Kosmos Energy, Ltd. (Mar. 22, 2011), available at [http://www.wsrw.org/files/dated/2011-03-23/sadr\\_letter\\_to\\_kosmos\\_220311.pdf](http://www.wsrw.org/files/dated/2011-03-23/sadr_letter_to_kosmos_220311.pdf).

70. See *Africa: Morocco*, CENTRAL INTELLIGENCE AGENCY: WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/mo.html> (last visited May 27, 2015).

71. See Letter from Emhamed Khadad, *supra* note 69.

72. As this article was going to press, a Sawahri group brought an action in U.K. courts challenging the labeling of Western Saharan tomatoes, and the United Kingdom’s participation in the E.U.-Morocco Fisheries Agreement. Ian Black, *Western Sahara’s “Conflict Tomatoes” Highlight a Forgotten Occupation*, GUARDIAN, Mar. 4, 2015, <http://www.theguardian.com/world/2015/mar/04/western-sahara-conflict-tomatoes-occupation-morocco-labelling-tax>.

### B. The Security Council Legal Advisor's Opinion

Morocco's control of Western Sahara occasioned the first careful examination of the legality of economic undertakings by third party firms under the supervision of an occupying or administering power.<sup>73</sup> In 2002, the United Nations Security Council requested its legal advisor, Hans Corell, to write an opinion on the legality "under international law" of oil exploration contracts in Western Sahara issued by Morocco to the U.S.-based Kerr McGee and the French-based Total companies.<sup>74</sup> Corell approached the analysis from the perspective of Western Sahara's status as a non-self governing territory, a status it has retained since it was a Spanish colony.<sup>75</sup> He concluded that such a territory's inhabitants have "inalienable rights" to its mineral and other natural resources.<sup>76</sup> State practice, he concluded, establishes that the exploitation of such resources could only take place "for the benefit of the peoples of those [t]erritories, on their behalf or in consultation with their representatives."<sup>77</sup>

This rule principle based largely on the indigenous rights to scarce natural resources. For other kinds of economic activity, Corell concluded that state practice established a more forgiving rule, allowing the administering power to freely engage in economic activity that "do[es] not entail exploitation or the physical removal of the mineral resources" without any particular approval from or benefit to the local population.<sup>78</sup> The distinction between extractive and non-extractive activity was drawn quite finely: Corell concluded that even Morocco's contracts for oil *exploration*, as opposed to actual *extraction*, were not illegal.<sup>79</sup> By implication, economic activity unrelated to natural resources would be entirely legal.

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73. An earlier attempt to raise similar issues before the International Court of Justice involved the Timor Gap Treaty of 1989 between Indonesia and Australia. The treaty involved Canberra recognizing Jakarta's control over East Timor, which it had conquered in 1975, while establishing a framework for Australia to acquire oil concessions in the territory. The Court did not reach a decision on the merits because Indonesia, a necessary party, did not consent to jurisdiction. *See East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, 106 (June 30) [hereinafter *East Timor*].

74. Under-Secretary General for Legal Affairs, Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, U.N. Doc. S/2002/161 (2002).

75. *See id.* at 2.

76. *Id.* at 6.

77. *Id.*

78. *Id.*

79. *See id.*

Corell's opinion did not touch on Morocco's status as an occupying power,<sup>80</sup> though the usufructuary limitations<sup>81</sup> on a belligerent occupant largely parallel those of a territorial administrator, especially a de facto one.<sup>82</sup> The latter must treat the well-being of the administered peoples as "paramount," and acquires no sovereignty over the area, administering it only in a "sacred trust."<sup>83</sup> A belligerent occupying power, in comparison, "shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country."<sup>84</sup> It is hard to see much difference between the two principles, except that the belligerent occupier is *explicitly* authorized to use natural resources.

In the wake of the Corell opinion, numerous major companies from Ireland, the United Kingdom, Australia and other states became engaged in the oil exploration under Moroccan aegis, all over the protest of the Polisario (SADR).<sup>85</sup> (SADR has issued its own, competing oil exploration contracts.<sup>86</sup>) Eventually, even more extensive economic activity by foreign, and primarily European firms, would follow.<sup>87</sup> Ironically, most, but not all,<sup>88</sup> of the activity is extractive (fishing and mining) and thus potentially illegal even under the permissive view of the U.N. Security Council opinion, depending on whether it could be said to "benefit" the local population.

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80. See NEW YORK CITY BAR ASS'N, REPORT ON LEGAL ISSUES INVOLVED IN THE WESTERN SAHARA DISPUTE: USE OF NATURAL RESOURCES 10 (2011).

81. "Usufructuary" refers to the use, but not the alienation or despoliation, of resources by the occupying power (literally, to use the fruit but not the tree). See DINSTEIN, *supra* note 23, at 214–17.

82. See NEW YORK CITY BAR ASS'N, *supra* note 80, at 23, 32.

83. U.N. Charter art. 73.

84. Hague Regulations, *supra* note 4, art. 55.

85. See Letter from Emhamed Khadad, *supra* note 69.

86. See NEW YORK CITY BAR ASS'N, *supra* note 80, at 14–15.

87. For an example of economic activity by an American firm, see the discussion of Kosmos Energy in David Conrad, *Nowhere Land*, FOREIGN POL'Y, June 15, 2014, available at <http://foreignpolicy.com/2014/06/25/nowhere-land/>. For an example of economic activity by a European firm, see *Swiss Company to Construct Solar Plants in Occupied Western Sahara*, W. SAHARA RESOURCE WATCH (Nov. 27, 2014, 2:38 PM), <http://www.wsrw.org/a105x3074>.

88. Examples of projects undertaken by E.U. nations in Western Sahara include large wind farms. *Sixteen Firms Prequalified to Construct Wind Farms in Western Sahara*, W. SAHARA RESOURCE WATCH (July 3, 2013, 9:07 AM), <http://www.wsrw.org/a105x2614>.

### C. Recognition of Moroccan Control

Another question concerns whether third-party states can enter into treaties with Morocco concerning the economic exploitation of Saharan territory.<sup>89</sup> In recent years Morocco has concluded some major agreements that presumably extend to Western Sahara, and the trend seems to be in this direction.<sup>90</sup> Much of the action involves the European Union. The Association Agreement with Morocco, which entered into force in 2000, speaks simply of the “territory” of Morocco, but has in practice been interpreted as including Western Sahara.<sup>91</sup> Similarly, the E.U.-Morocco Agreement on agricultural, processed agricultural and fisheries products allows, in practice, Morocco to “register as geographical indications products originating in Western Sahara.”<sup>92</sup> Under these agreements Saharan territory was included *sub silentio*.<sup>93</sup> However, the Saharan question gained considerable attention and discussion in the negotiations over a series of Fisheries Protocols with Morocco.<sup>94</sup>

The European Union imports a great deal of its fish, and the waters off of Western Sahara represent an attractive nearby source.<sup>95</sup> In 2006, the European Union and Morocco signed a bilateral Fisheries Partnership Agreement that gives European ships access to the waters “falling within the sovereignty or jurisdiction of the Kingdom of Morocco.”<sup>96</sup> The reference to “jurisdiction” was

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89. In East Timor, *supra* note 73, Portugal contended that such treaties with Indonesia would violate the duty of recognition. Notably, it took the opposite position in regards to the factual parallel case of West Sahara.

90. See *International Cooperation and Development: Morocco*, EUROPEAN COMMISSION, [https://ec.europa.eu/europeaid/countries/morocco\\_en](https://ec.europa.eu/europeaid/countries/morocco_en) (last visited May 18, 2015).

91. See Parts II.C–D regarding the Euro-Mediterranean Agreement Establishing and Association Between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, E.U.-Morocco, art. 94, Jan. 24, 2000, 2000 O.J. (L 70) 2, available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2000:070:TOC> [hereinafter Euro-Mediterranean Agreement, E.U.-Morocco]

92. Parliamentary Questions, Joint Answer given by High Representative/Vice-President Ashton on behalf of the Commission, Parliamentary Question No. E-001004/11, P-001023/11, E-002315/11, June 14, 2011, 2011 O.J. (C 286 E) [hereinafter Joint Answer].

93. *Id.*

94. See Joint Answer, *supra* note 92.

95. See CIA WORLD FACTBOOK: WESTERN SAHARA (under Geography), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html>.

96. Protocol between the European Union and the Kingdom of Morocco Setting out the

understood as extending to Western Saharan fisheries, and various annexes specifically included Western Saharan ports.<sup>97</sup> The FPA led some within the European Union regarding its legality.<sup>98</sup> When it expired in 2011, it was not immediately renewed, though primarily due to other concerns.<sup>99</sup> The European Parliament voted against continuing the agreement, and the Commission began negotiations towards a new treaty.<sup>100</sup>

The new agreement, signed in 2013 and subsequently approved by the Commission and Parliament (the 2013 Protocol to the Fisheries Partnership Agreement) repeated the model set by its predecessor, with language inserted in the Council Decision saying the protocol would apply to all areas where Morocco exercises its jurisdiction as regarding fishing, with the understanding that this includes Western Sahara.<sup>101</sup> And, again in the new agreement the European Union pays Morocco for access to the Western Saharan

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Fishing Opportunities and Financial Contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, adopted by Council Regulation EC No 764/2006 of 22 May 2006 (OJ L141), arts. 2(a), 11, preamble.

97. Similarly, the E.U.'s aviation agreement with Morocco states that "territory" means, for Morocco, the land areas . . . a territorial sea under its sovereignty *or jurisdiction*." Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part, and the Kingdom of Morocco, of the other part, E.U.-Morocco, art. 1(15), 2006 O.J. (L 386) 57 (Dec. 29, 2006) (emphasis added). By contrast, a subsequent aviation agreement with Israel specifically provided:

"Territory" means, for Israel, the territory of the State of Israel . . . . The application of this Agreement is understood to be without prejudice to the status of the territories that came under Israeli administration after June 1967.

Euro-Mediterranean Aviation Agreement between the European Union and its Member States of the one part, and the Government of the State of Israel, of the other part, E.U.-Isr., art. 1(26), 2013 O.J. (L 208) 3 (Aug. 2, 2013). Despite the treaty language, it is widely known that Israel sometimes routes air traffic over the West Bank in accordance with agreements with the Palestinians. See Steven J. Rosen, *A European Boycott of Israel?*, 22 MIDDLE EAST Q. (Spring 2014).

98. See Resolution requesting an Opinion from the Court of Justice on the compatibility with the Treaties of the Protocol on the E.U.-Morocco Fisheries Partnership Agreement, EUR. PARL. DOC. B7-0519/2011 (2011).

99. Other concerns for the European Union included the productivity of the fisheries off the coast of Western Sahara and the potential environmental damage inflicted by the presence and operation of those fisheries. See *European Parliament Rejects E.U. Fisheries*, W. SAHARA RESOURCE WATCH (Dec. 14, 2011, 12:21 PM), <http://wsrw.org/a105x2187>.

100. See *id.*

101. See Council Decision 2013/784/EU, 2013 O.J. (L 349) 1. Whatever ambiguity existed in the documents, the Commission has since made clear that it understands the operation of the treaty will encompass Western Saharan waters.

fishery.<sup>102</sup>

The fisheries agreement has been severely criticized by some European officials and countries as violating international law,<sup>103</sup> and roundly denounced by the Polisario regime.<sup>104</sup> The international law objections received a full airing in Commission debates, and were ultimately rejected.<sup>105</sup> The E.U. Parliament approved the new Fisheries deal in 2013,<sup>106</sup> despite having shown reservations about the relevant provisions before.<sup>107</sup> In approving the deal, it acted on the advice of its legal service, which concluded that such exploitation is permitted, and there is no duty to prevent E.U. funds from flowing into such territories.<sup>108</sup> The E.U. Parliament's Legal Advisor's opinion relied largely on the Corell opinion, and thus found "a certain amount of the [European] financial contribution must be allocated by Morocco to the benefit of Western Sahara population to recompense [it]."<sup>109</sup> James Crawford has casually dismissed the E.U.-Morocco Fisheries agreements as mere "*realpolitik*."<sup>110</sup> However, given the

102. See Protocol between the European Union and the Kingdom of Morocco setting out the Fishing Opportunities and Financial Contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, E.U.-Morocco, art. 3, 2013 O.J. (L 328) 2 (Dec. 7, 2013) [hereinafter E.U.-Morocco Protocol].

103. See, e.g., E.U.-Morocco Fisheries Partnership Agreement, 2013-4, H.C. Early Day Motion No. 842 (U.K.), available at <http://www.parliament.uk/edm/2013-14/842>.

104. *POLISARIO Front Urges E.U. to Reconsider Fisheries Partnership Agreement with Morocco*, SAHARA PRESS SERVICE, Dec. 22, 2013, 9:01 PM, <http://www.spsrasd.info/en/content/polisario-front-urges-eu-reconsider-fisheries-partnership-agreement-morocco>.

105. See EURO. PARL. DEB. (Dec. 9, 2013), <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20131209&secondRef=ITEM-020&language=EN&ring=A7-2013-0417>.

106. See Press Release, European Parliament, MEPs Approve Renewed E.U.-Morocco Fisheries Agreement (Dec. 10, 2013), available at <http://www.europarl.europa.E.U./news/en/news-room/content/20131206IPR30021/html/MEPs-approve-renewed-E.U.-Morocco-Fisheries-agreement>.

107. See EUR. PARL. DOC. B7-0519/2011, *supra* note 98.

108. See Note for the Attention of Mr. Gabriel Mato Adrover, Chairman of the Committee on Fisheries, from Richard Passos, in Legal Opinion of Ricardo Passos, Director, Legal Service of the European Parliament, Opin. No. SJ-0665/13 (Nov. 4, 2013) [hereinafter Passos Opinion], available at [http://www.wshrw.org/Documentos/legal\\_opinion\\_2013-1.pdf](http://www.wshrw.org/Documentos/legal_opinion_2013-1.pdf).

109. Passos Opinion, *supra* note 108. This formulation is notable because a majority of the Western Sahara "population" is now composed of Moroccan settlers. By contrast, the E.U. guidelines for Israel administered-territories make a narrow exception for activities that "aim" at "benefiting protected persons," which would exclude settlers. See Guidelines, *supra* note 35, ¶ 15. Under the E.U. legal opinion, incidental benefit to settlers in Western Sahara would suffice to satisfy any obligations to the "local" population.

110. See CRAWFORD, *supra* note 21, ¶ 131. Notably, Crawford's opinion predates the



extensive legal discussion by member states, in the Commission, and the formal opinions obtained by Parliament, the result cannot be so easily dismissed.

Outside the European Union, state practice concerning Morocco is mixed. While some third-party states also explicitly include Western Sahara in agreements with Morocco,<sup>111</sup> the four-nation European Free Trade Association does not (thus requiring that Saharan exports be labeled as such).<sup>112</sup> Similarly, the United States interprets its free trade agreement with Morocco as not applying to Western Sahara.<sup>113</sup> However, the United States has not suggested this limitation is required by international law.

#### *D. Spending in Occupied Territory*

E.U. public funds flow both directly and indirectly to support Moroccan control of the territory.<sup>114</sup> The European Union directly pays Morocco for the exploitation of Western Sahara's natural resources.<sup>115</sup> Under the new E.U.-Morocco Fisheries Agreement concluded in November 2013 and subsequently approved by the Commission and Parliament, the European Union pays Morocco €40 million per year as a "financial contribution" for access to Moroccan fishing waters, which the agreement defines as including Western Saharan fisheries.<sup>116</sup>

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2013 Parliamentary Legal Service Opinion and subsequent re-approval of the fisheries treaty, which involved explicit international legal debate, where all the relevant issues were raised and considered. It is hard to discern the basis for Crawford's distinction between the "political" action towards Western Sahara and the assumedly purely legal considerations behind policies relating to Israel.

111. The Morocco-Russia fisheries agreement also extends to Western Saharan waters. See Passos Opinion, *supra* note 108, ¶ 19.

112. *Western Sahara not Part of EFTA-Morocco Free Trade Agreement*, W. SAHARA RESOURCE WATCH (May 12, 2010, 5:26 PM), <http://www.wsrw.org/a105x1410>.

113. H.R. REP. NO. 108-627, at 4 (July 21, 2004), to accompany H.R. 4842, 108th Cong. (2004) (signed into law as Pub. L. No. 108-302, 108th Cong. (2004)); Letter from U.S. Trade Representative Robert B. Zoellick to Rep. Joseph R. Pitts, (July 22, 2004), *available at* 150 CONG. REC. H6627 (daily ed. July 22, 2004).

114. See Council Decision 2013/720/EU, 2013 O.J. (L 328) 1 (on the signing of the new "[p]rotocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco") and Council Decision 2013/785/EU, 2013 O.J. (L 349) 1–3 (on its conclusion).

115. Council Decision 2013/720/EU, *supra* note 114.

116. E.U.-Morocco Protocol, *supra* note 102, art. 3.

Moreover, the European Union provides Morocco with hundreds of millions of euros in direct aid annually, making it the biggest recipient in the region.<sup>117</sup> Its Association Agreement with the European Union does not require Rabat to ensure the funds will not reach Western Sahara.<sup>118</sup> Because Morocco views Western Sahara as part of its own territory, it has no internal restrictions on the flow of money between Morocco and Western Sahara.<sup>119</sup> Thus European foreign aid can in practice support Morocco's control of Western Sahara. Certainly the European Union has not taken any measures to guarantee its funds do not enter the occupied territory.

In major recent development, in 2014 the United States explicitly authorized foreign aid to Morocco to be spent in Western Sahara. The Consolidated Appropriations Act of 2014 states that funds "that are available for assistance for Morocco should also be available for assistance for the territory of the Western Sahara," and "Western Sahara" is listed in the annual foreign aid legislation as a subheading specifying where funds supporting Morocco may be spent.<sup>120</sup> Movement in this direction began in 2012, when the legislative statement accompanying the spending bill provided that "funds provided in title III of this Act for Morocco may be used in regions and territories administered by Morocco."<sup>121</sup> Previously, United States excluded Western Sahara from bilateral assistance to avoid seeming to endorse Moroccan control, but had not suggested that this was required by international law.<sup>122</sup> Both the direct and indirect financial support of the European Union and the United States to the Moroccan administration of Western Sahara suggest they do not believe that international law prohibits foreign funding to institutions of the controlling power in such territories.<sup>123</sup>

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117. See *International Cooperation and Development: Morocco*, *supra* note 90.

118. See Euro-Mediterranean Agreement E.U.-Morocco, *supra* note 91.

119. See, e.g., *supra* notes 64, 70, 71.

120. A provision in the Consolidated Appropriations Act, 2014, provides: "MOROCCO—Funds appropriated under title III of this Act [dealing with bilateral economic assistance] that are available for assistance for Morocco should also be available for assistance for the territory of the Western Sahara." Pub. L. No. 113-76, § 7041(h), 128 Stat. 5, 522.

121. ALEXIS ARIEFF, CONG. RESEARCH SERV., RS21579, MOROCCO: CURRENT ISSUES 16 (2013), available at <http://fas.org/sgp/crs/row/RS21579.pdf>.

122. See ARIEFF, *supra* note 65.

123. *But cf.* Namibia Advisory Op., *supra* note 7 (ICJ's suggestion of prohibiting economic activity as a part of a general duty of non-recognition of forcible conquest.)

### E. Rules of Origin

Well over fifty percent of Morocco's exports go to the European Union.<sup>124</sup> Among them are products from Moroccan-controlled enterprises in Western Sahara, which are labeled "Made in Morocco."<sup>125</sup> Some NGOs, European parliamentarians,<sup>126</sup> and member states<sup>127</sup> have protested the importation of Western Saharan tomatoes and other agricultural products into the European Union, and some stores have voluntarily insisted on relabeling or excluding such products.<sup>128</sup> Sweden, for example, has insisted that the Agriculture Agreement does not apply to Western Saharan products because "no E.U. Member State considers Western Sahara to be part of Morocco."<sup>129</sup>

They have argued that such labeling violates international law and the relevant bilateral agreements.<sup>130</sup> Indeed, the allegations over Western Saharan imports directly echo the arguments over Israeli-administered territories. As one E.U. parliamentarian put it in question to the Committee:

The plundering of natural resources by Morocco in the territories of the Western Sahara cannot be tolerated by the European public. Allowing all Moroccan products access to European markets

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124. See DIRECTORATE GENERAL FOR TRADE, EUROPEAN COMM'N, EUROPEAN UNION, TRADE IN GOODS WITH MOROCCO (2014), [http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_113421.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113421.pdf).

125. See *Swiss Grocery Chain Will Re-label Western Sahara Melons*, W. SAHARA RESOURCE WATCH (Apr. 9, 2013, 8:27 AM), <http://www.wsrw.org/a115x2555>; see also *Coop Switzerland Introducing "Western Sahara" Label on Tomatoes*, W. SAHARA RESOURCE WATCH (Nov. 17, 2013, 2:50 PM), <http://www.wsrw.org/a106x2706> [hereinafter *W. Sahara Tomatoes*].

126. See *European Parliament examines latest developments in Western Sahara*, SAHARA PRESS SERVICE, Aug. 10, 2014, <http://www.spsrasd.info/en/content/european-parliament-examines-latest-developments-western-sahara>.

127. See *Dutch government repeats: Western Sahara Products Are Not from Morocco*, W. SAHARA RESOURCE WATCH (Mar. 13, 2013, 2:54 PM), <http://www.wsrw.org/a105x2541>.

128. See *W. Sahara Tomatoes*, *supra* note 125.

129. Parliamentary Questions, Question for Written Answer to the Commission, Subject: Label and Liability—Stolen Tomatoes from Western Sahara, Asa Westlund, Parliamentary Question No. E-006205/2012, June 21, 2012, 2013 O.J. (C 183 E) 1, 32.

130. See *id.*; see also W. SAHARA RESOURCE WATCH & EMMAUS STOCKHOLM, REPORT: LABEL AND LIABILITY—HOW THE E.U. TURNS A BLIND EYE TO FALSELY STAMPED AGRICULTURAL PRODUCTS MADE BY MOROCCO IN OCCUPIED WESTERN SAHARA (2012), available at [http://www.vastsaharaaktionen.se/files/Label%20and%20Liability%20%20WSRW%20June%202012\\_1.pdf](http://www.vastsaharaaktionen.se/files/Label%20and%20Liability%20%20WSRW%20June%202012_1.pdf).

also allows goods produced in the Western Sahara to be imported. Can the Commission ensure that, of all the ‘Made in Morocco’ products available on the European market, none is produced in the occupied territories of the Western Sahara and falsely labelled as Moroccan?<sup>131</sup>

Despite these efforts, the European Union insists the issue of product labeling falls outside its Association and other agreements.<sup>132</sup> According to the European Union, these agreements do not provide a basis for differentiating Moroccan imports “on a territorial basis.”<sup>133</sup> Indeed, the Commission maintains that the only basis for requiring particular labeling would be if “its omission would mislead consumers.”<sup>134</sup> The Commission maintains that no such deception arises from the labeling of Western Saharan products as Moroccan, despite not recognizing Western Sahara as in any way part of Morocco.<sup>135</sup>

#### *F. Is Western Sahara Occupied?*

Some members of the European Parliament have questioned the Commission about the difference in treatment between Moroccan enterprises in Western Sahara and Israeli enterprises in the West Bank.<sup>136</sup> In response, the Commission’s External Action Service placed great emphasis on Western Sahara’s status as a “non-self-governing territory to be decolonized.”<sup>137</sup> More strikingly, the Commission rejected the notion that Western Sahara is under

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131. Parliamentary Questions, Question for Written Answer to the Commission, Subject: Export of Moroccan-labelled Products from the Western Sahara, Willy Meyer, Parliamentary Question No. E-003971-13, Apr. 9, 2013, 2014 O.J. (C 20 E) 1, 137.

132. The Commission’s position has not changed since the ECJ *Brita* case, and indeed, most of its explicit statements post-date that decision. See Parliamentary Questions, Answer Given by Mr. Çioloş on behalf of the Commission, Parliamentary Question No. E-003971/2013, June 11, 2013, 2014 O.J. (C 20 E) 1, 137.

133. *Id.*

134. *Id.*

135. *See id.*

136. See Parliamentary Questions, Question for Written Answer to the Commission, Subject: VP/HR—Implications of the Moroccan Fisheries Deal for E.U. Policy with Regard to Israel, Fiorello Provera, Parliamentary Question No. E-000235-14, Jan. 10, 2014, 2014 O.J. (C 288) 1, 197.

137. See Answer Given by High Representative/Vice-President Ashton on behalf of the Commission, Parliamentary Question No. E-000235-14, Mar. 13, 2014, 2014 O.J. (C 288) 1, 197 (internal quotations omitted).

occupation at all.<sup>138</sup> The Commission responded that the situation regarding Israel is “different” because those territories are “occupied” according to the United Nations and thus governed by the Fourth Geneva Convention.<sup>139</sup> Western Sahara has since 1963 been listed by U.N. Special Committee on Decolonization as a “non-self governing territory” (NSGT), and since 1976 Morocco has been the *de facto* administrator.<sup>140</sup> Apparently, the Commission considers non-self-governing (NSG) status and occupied status to be mutually exclusive, a notion with no support in international law or practice.<sup>141</sup>

Thus the Commission’s position, as briefly sketched in its parliamentary response, is surprising and difficult to understand.<sup>142</sup> For one, the West Bank is not “different” from Western Sahara in being labeled as “occupied” by the United Nations. The United Nations has listed Western Sahara as occupied as well,<sup>143</sup> undermining the notion that the United Nations’ treatment can be the basis of the distinction. Moreover, Morocco’s presence in the territory is in violation of a Security Council demand for a withdrawal.<sup>144</sup>

The Commission’s emphasis on the NSG status of Western Sahara is doubtless inspired by the analytic frame adopted by the 2002 Corell opinion. But that document, which dealt particularly with natural resources, did not even discuss the question of occupation, let alone its interaction with the NSG status.<sup>145</sup> (Thus Corell may have framed the discussion in terms of the duties of an administrator because those may be *more* restrictive than a belligerent occupant.) The overwhelming weight of academic

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138. *See id.*

139. *Id.*

140. The U.N. has never listed Morocco as an administering power, nor has it ever transmitted information pursuant to U.N. Charter art. 73(e). Thus it can have no legal privileges as an administering power.

141. *See* Answer Given by High Representative, *supra* note 137.

142. At least some E.U. parliamentarians are not convinced, continuing to insist that the situations in Western Sahara and Palestine are “essentially similar” and that the European Union must pursue similar policies in relation to them. *See* Parliamentary Questions, Question to the Commission for Written Answer, Subject: VP/HR–Self-determination and statehood in Western Sahara, Lidia Senra Rodríguez, Parliamentary Question No. E-0101296-14, Dec. 5, 2014.

143. G.A. Res. 34/37, *supra* note 66; G.A. Res. 35/19, ¶ 3, U.N. Doc. A/RES/35/19 (Nov. 11, 1980). Notably, almost all members of the European Union at the time, as well as the United States, abstained in these votes.

144. S.C. Res. 380, U.N. Doc. S/RES/380 (Nov. 6, 1975).

145. *See* Letter dated 29 January 2002, *supra* note 74.

opinion has long regarded Western Sahara as occupied.<sup>146</sup> Many, if not most, E.U. states describe it as occupied, and none appear to claim that international humanitarian law (IHL) does not apply.<sup>147</sup> Indeed, Morocco itself has at times invoked the protections of the Geneva Conventions for its POWs held by the Polisario.<sup>148</sup>

Furthermore, the Commission's position assumes that non-self governing territory status somehow trumps or suspends the application of the Geneva Conventions, and so that an NSGT cannot fall under belligerent occupation. From both formal and functional perspectives, this seems unwarranted, and if anything, the opposite should be the case. There is no reason a territory cannot be both non-self governing and occupied. If occupation occurs whenever a state takes effective control of territory in an international armed conflict, then it would seem a state that takes control of an NSGT would be occupying it, without terminating its NSG status.<sup>149</sup> This is especially the case with Morocco, which is only a *de facto* administrator, that is, one whose legal presence in the territory is not even recognized.<sup>150</sup> It is hard to see why it would not also be subject to the restrictions placed on occupiers by the Fourth Geneva Convention, as well as any particular rules for administering powers. There is nothing in the General Assembly's loose definition of an

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146. See BENVENISTI, *supra* note 5, at 171–72; Christine Chinkin, *Laws of Occupation*, International Conference on Multilateralism and International Law, with Western Sahara as a Case Study, Dec. 4–5, 2008, Pretoria, S. Afr., available at <http://www.arso.org/ChinkinPretoria2008.htm>; Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT'L L. 695, 700 (2005); Hans-Peter Gasser, *The Conflict in Western Sahara—An Unresolved Issue from the Decolonization Period*, 2002 Y.B. INT'L HUMANITARIAN L. 375, 379 (“Yet there can be hardly any doubt that the Moroccan Armed Forces did indeed invade Western Sahara and that the territory has been under Moroccan control and administration ever since 1976. This constitutes an occupation of foreign territory.”).

147. For examples of European state practice toward Western Sahara and their descriptions of that region's status, see *Four Nordic Governments Agree that Western Sahara Natural Resources Must Not Be Exploited Without the Consent of the Sahrawi People and if it is Not for Their Benefit*, <http://www.ft.dk/samling/20091/almdel/uru/bilag/215/865575.pdf> (last visited May 26, 2015).

148. See Jacob Mundy, *The Legal Status of Western Sahara and the Laws of War and Occupation*, STRATEGIC STUDIES GROUP (GEES) (June 26, 2007), available at [http://www.gees.org/articulos/el\\_estatus\\_juridico\\_del\\_sahara\\_occidental\\_y\\_las\\_leyes\\_de\\_la\\_guerra\\_y\\_la\\_ocupacion\\_4185](http://www.gees.org/articulos/el_estatus_juridico_del_sahara_occidental_y_las_leyes_de_la_guerra_y_la_ocupacion_4185).

149. See ICRC definition at INT'L COMM. OF THE RED CROSS, OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 7 n.1 (2012), available at <http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>.

150. See G.A. Res. 34/37, *supra* note 66.

NSGT that is inconsistent with it being subject to a belligerent occupation.<sup>151</sup>

NSG is not a formal legal status; its treaty basis is simply a vague reference in the U.N. Charter.<sup>152</sup> The “list” of NSGTs is maintained and decided on by the U.N. Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples (also known as the Special Committee on Decolonization).<sup>153</sup> It would be exceedingly odd if decisions of this monitoring group could override or suspend the obligations and remove the protections of The Hague Conventions, the Fourth Geneva Convention, and the First Additional Protocol to the Geneva Conventions. Indeed, state practice suggests NSG status is no bar to the application of IHL, as Argentina’s invasion of the Falklands, and—in a murkier way—India’s invasion of Goa, indicate.<sup>154</sup> Indeed, the Commission’s position would mean that if Spain invaded Gibraltar, or the United States snapped up the British Virgin Islands, they would not be subject to the IHL rules regarding occupation. Indeed, it would mean that any place could be stripped of the protections of the relevant IHL treaties by a decision of the twenty-four members of the Decolonization Committee.

Moreover, Morocco’s status as “*de facto*” administrator is itself not a legally protected one, and is itself the consequence of its ongoing violation of international law.<sup>155</sup> It is particularly strange to base Morocco’s privileged status on it being a “*de facto* administrator” since Rabat itself does not acknowledge this status.<sup>156</sup> Rather, it maintains that the area lies fully and permanently under its sovereignty.<sup>157</sup> Thus whatever duties of non-recognition that might

151. See G.A. Res. 1514, U.N. Doc. A/RES/15/1514 (Dec. 14, 1960).

152. U.N. Charter art. 73(e).

153. *The United Nations and Decolonization: Committee of 24 (Special Committee on Decolonization)*, UNITED NATIONS, <http://www.un.org/en/decolonization/specialcommittee.shtml> (last visited May 26, 2015).

154. See DINSTEIN, *supra* note 23, at 10; Adam Roberts, *What is a Military Occupation?*, 1984 BRIT. Y.B. INT’L L. 240, 279–83 (describing Western Sahara, the West Bank, and the Falklands as “[o]ccupation[s] of territory whose status is disputed or uncertain,” and noting there was no question that IHL applied in the case of the Falklands).

155. Spain formally terminated its role as Administrator in February 1976, “in view of the cessation of its participation in the temporary administration established for the Territory.” *The United Nations and Decolonization: Non-Self-Governing Territories*, UNITED NATIONS, <http://www.un.org/en/decolonization/nonselvgovterritories.shtml> (last visited May 26, 2015).

156. Cf. Euro-Mediterranean Agreement, E.U.-Morocco, *supra* note 91.

157. See PABLO SAN MARTIN, WESTERN SAHARA: THE REFUGEE NATION 6–7 (2010).

arise from a *de facto* annexation would surely arise from the *de jure* one at issue here.<sup>158</sup> Indeed, the *Namibia* advisory opinion, the high point of non-recognition rhetoric, dealt specifically with a non-self-governing territory which quite clearly was not under belligerent occupation, but whose rights of self-determination were being denied quite similarly to the Western Sahara situation.<sup>159</sup>

Then there is Morocco's massive settlement enterprise in Western Sahara. Regardless of the status of such population transfer into non-sovereign territory under IHL, it would seem in breach of an Administering Power's obligations towards an NSGT.<sup>160</sup> To the extent that the economic contracts promote, abet, or give recognition to such transfer, its illegality would surely be relevant regardless of the formal existence of a belligerent occupation.

Thus, there is no support for the supposed distinction between NSGs and occupied territories suggested by the European Commission. Indeed, the rather strange explanation offered by the Commission of its conduct regarding Western Sahara seems like a shockingly thin *post-hoc* rationalization.<sup>161</sup> Perhaps even more disturbing, when confronted with the inconsistency between its treatments of the two cases, the Commission's reaction is to deny the occupation of Western Sahara so as to not have to apply the principles it claims apply in the case of the West Bank.<sup>162</sup>

On the other hand, the European Union's explanation could be understood as suggesting that because Western Sahara was not a sovereign state, IHL would not apply to Morocco's presence there. This would be consistent with Israel's long-held position that the law of occupation applies only to the territory of sovereign states, but would not be consistent with the European Union's position on the issue as it relates to the West Bank and Gaza, which also were

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158. See Talmon, *supra* note 11, at 119–20.

159. See Berger, *supra* note 20.

160. See Letter Dated 29 January 2002, *supra* note 74, ¶ 10 (outlining administrators' obligations to NSGTs, including to "assist them in the exercise of their right to self-determination"). In addition, NSG and occupied territories are treated under the same legal framework and the responsibilities of corporate entities are similarly strict. See *Business Near Occupied and Non-Self Governing Territories*, ATLAS COPCO, <http://www.atlascopco.com/corporateresponsibility/complexmarkets/occupiedterritories/> (last visited May 26, 2015).

161. See Rahpael Ahren, *Why Is This Occupation Different from All Other Occupations?*, TIMES OF ISRAEL (Dec. 25, 2013, 7:26 AM), <http://www.timesofisrael.com/why-is-this-occupation-different-from-all-other-occupations/>.

162. See *supra* notes 136–39.



territories under special international regimes when they fell under Israeli control.

### III. NORTHERN CYPRUS (TURKEY)

Cyprus's population has historically consisted of a Greek majority and a significant Turkish minority.<sup>163</sup> In 1960, the island achieved its independence from the United Kingdom.<sup>164</sup> Pursuant to treaty, Greece, Turkey, and the United Kingdom specifically guaranteed the independence, territorial integrity, security and constitutional order of the Republic of Cyprus.<sup>165</sup> On July 20, 1974, the Turkish Army invaded and occupied the northern third of the Cyprus.<sup>166</sup> Nearly 230,000 Greek Cypriots fled or were expelled from their homes and business in the area of Turkish control, while 40,000 Turkish Cypriots came to the north.<sup>167</sup> Turkish troops have remained ever since, and the northern part of the island remains under Turkish control.<sup>168</sup>

In 1983, Turkey purported to declare the independence of a "Turkish Republic of Northern Cyprus" (TRNC) in the section of Cyprus that it controls.<sup>169</sup> No country besides Turkey recognizes the TRNC.<sup>170</sup> The United Nations Security Council has found the formation of the Turkish Republic of Northern Cyprus to be illegal and re-affirmed the legal status of the government of Cyprus as the sole legitimate government of the island.<sup>171</sup> The Council has adopted dozens of resolutions on Cyprus calling for non-recognition of the TRNC and an end to the occupation.<sup>172</sup> The TRNC is regarded as an

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163. See *Europe: Cyprus*, CENTRAL INTELLIGENCE AGENCY: WORLD FACTBOOK. <https://www.cia.gov/library/publications/the-world-factbook/geos/cy.html> (last visited May 26, 2015).

164. See *id.*

165. See Treaty of Guarantee of Cyprus arts. I–II, Aug 16, 1960, 382 U.N.T.S. 5475.

166. See FRANK HOFFMEISTER, LEGAL ASPECTS OF THE CYPRUS PROBLEM: ANNAN PLAN & EU ACCESSION 36, 37 (2006).

167. See Artur Adamczyk, *Cypriot Presidency in the Context of the Cyprus Question and E.U.-Turkey Relations*, 2012 Y.B. POLISH EUR. STUD. 107, 109.

168. See *id.* at 110.

169. *Turkey Blamed for Cyprus Crisis*, PHILADELPHIA INQUIRER, Nov. 18, 1983, at B15.

170. See *Europe: Cyprus*, *supra* note 163.

171. See S.C. Res. 541, U.N. Doc S/RES/541 (Nov. 18, 1983).

172. See, e.g., S.C. Res. 550, ¶ 3, U.N. Doc. S/RES/550 (May 11, 1984) (calling on all states to "not to facilitate or in any way assist" the TRNC).

agent of Turkey.<sup>173</sup> During its occupation, Turkey has had a large number of settlers move from the mainland to the TRNC.<sup>174</sup> Today, settlers compose half or more of the territory's population, and their rate of migration has accelerated in the past decade.<sup>175</sup>

#### A. Economic Activity in Occupied Territory

Neither the European Union nor its member states has ever suggested that European companies should not engage in commercial activities with Turkish firms involved in the occupation of northern Cyprus.<sup>176</sup> Northern Cyprus's economy is dominated by Turkish firms, and its trade is conducted mostly with Turkey and a few other countries, such as Lebanon.<sup>177</sup> Major Turkish industrial concerns are

173. Turkey v. Cyprus, App. No. 25781/94, 23 Eur. H.R. Rep. 244, 275 (1997) (Eur. Comm'n on H.R.).

174. See METE HATAY, BEYOND NUMBERS: AN INQUIRY INTO THE POLITICAL INTEGRATION OF THE TURKISH "SETTLERS" IN NORTHERN CYPRUS 14 (2005), available at [http://www.prio.no/Global/upload/Cyprus/beyond\\_numbers\\_reduced.pdf](http://www.prio.no/Global/upload/Cyprus/beyond_numbers_reduced.pdf). As further evidence of its financial dependence, the TRNC has adopted the Turkish lira and placed a Turkish national at the head of its central bank.

175. See Ahmet Atasoy, *Population Geography of the Turkish Republic of Northern Cyprus*, 16 MUSTAFA KEMAL U. J. SOC. SCI. INST. 29, 38 (2011); Ambassador Ronald L. Schlicher, *Turkish Cypriot Census Debate Focuses On Natives Versus "Settlers,"* May 18, 2007, available at [http://www.wikileaks.org/plusd/cables/07NICOSIA434\\_a.html](http://www.wikileaks.org/plusd/cables/07NICOSIA434_a.html).

176. The British Foreign Office, for example, does not warn its nationals about international law risks of doing business in the occupied Cyprus, as it does regarding Israeli territories. The United Kingdom does warn of property law dangers relating to the purchase of land in Northern Cyprus whose ownership is disputed. See *Guidance: How to Buy Property in Cyprus*, GOV.UK (Mar 25, 2013), <https://www.gov.uk/how-to-property-in-cyprus>. By contrast, the Foreign Office warns of a wide and unspecified range of "clear risks related to economic and financial activities in the [Israeli settlements]":

Financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements, entail legal and economic risks stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognised as a legitimate part of Israel's territory.

UK Foreign & Commonwealth Office, *Guidance: Overseas Business Risk—the Occupied Palestinian Territories*, GOV.UK (July 22, 2014), <https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-palestinian-territories>.

177. For a profile of trade between the TRNC and Turkey, see *Turkish Republic of Northern Cyprus*, TURKIYE CUMHURİYETİ: EKONOMİ BAKANLIĞI, [http://www.economy.gov.tr/portal/faces/oracle/webcenter/portalapp/pages/content/htmlView.erUlkeler.jsp?contentId=UCM%23dDocName%3AEK-175265&countryName=Turkish%20Republic%20of%20Northern%20Cyprus&\\_afzLoop=42603288082672&\\_afzWindowM](http://www.economy.gov.tr/portal/faces/oracle/webcenter/portalapp/pages/content/htmlView.erUlkeler.jsp?contentId=UCM%23dDocName%3AEK-175265&countryName=Turkish%20Republic%20of%20Northern%20Cyprus&_afzLoop=42603288082672&_afzWindowM)

quite active on the island.<sup>178</sup> For example, Turkey's Ministry of Forest and Water Affairs has undertaken the "TRNC Potable Water Supply Project."<sup>179</sup> This project will build a massive pipeline to supply the occupied North with water from Alaköprü Dam, presently under construction in Turkey.<sup>180</sup> The Turkish government's hydrocarbon company, TPAO, has exclusive rights to develop the energy sector in the occupied area and is actively drilling for natural gas there.<sup>181</sup> TPAO conducts numerous projects around the world, and there has never been any suggestion that it should face any restriction because of its work in occupied territory. Indeed, TPAO has numerous European and international partners, such as BP, Schlumberger, Halliburton, Vitol Group (Swiss/Dutch), and Trafigura Beheer (Dutch).<sup>182</sup>

Numerous foreign businesses maintain a visible retail presence in the occupied territory. Firms with visible street-level retail presences in the territory include banks such as HSBC, automotive firms such as Toyota, Honda, Michelin, Goodyear; food franchises, such as Johnny Rockets, Kentucky Fried Chicken, Gloria Jean's (an Australian coffee shop chain), and Domino's Pizza, which opened just last year.<sup>183</sup> Indeed, the U.S. State Department advises American firms on developing business opportunities in the territory (particularly in the tourism and retail franchise areas) and encourages

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ode=0&\_afWindowId=13imulr0zp\_170#!%40%40%3FcountryName%3DTurkish%2BRepublic%2Bof%2BNorthern%2BCyprus%26\_afWindowId%3D13imulr0zp\_170%26\_afLoop%3D42603288082672%26contentId%3DUCM%2523dDocName%253AEK-175265%26\_afWindowMode%3D0%26\_adf.ctrl-state%3D13imulr0zp\_214 (last updated Sept. 2013).

178. See *Success Stories: Cyprus is Supplied with Water by Firat*, FIRAT, <http://www.firat.com/en-us/success-stories/cyprus-water-supply-project> (last visited May 26, 2015).

179. *Id.*

180. *See id.*

181. *Turkey to Launch Oil Drilling in KKTC*, CIHAN NEWS AGENCY, Apr. 3, 2012, 5:43 PM, <http://en.cihan.com.tr/news/Turkey-to-launch-oil-drilling-in-KKTC-CHNjcxMDkzLzM=>.

182. TPIC, ANNUAL REPORT 58 (2012), available at <http://www.tpic.com.tr/storage/catalogs/0285751001390994465.pdf>.

183. See U.S. & FOREIGN COMMERCIAL SERVICE, U.S. DEP'T OF COMM. & U.S. DEP'T OF STATE, DOING BUSINESS IN CYPRUS: 2014 COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES, available at [http://www.buyusainfo.net/docs/x\\_2755011.pdf](http://www.buyusainfo.net/docs/x_2755011.pdf) Also present are apparel stores like Adidas and U.S. Polo Association, and other franchises such as Orkin Pest Control and GNC vitamin stores. Some of this information was provided by an in-person visit to TRNC by my research assistant, Wilson Shirley. Photographic documentation on file with the author.

them to do so, while acknowledging that the United States does not recognize Turkish control.<sup>184</sup>

The European Union also has substantial links with northern Cyprus in the tourism and education fields, the largest sectors of the TRNC's economy. Many Europeans, particularly from Britain, have purchased vacation or retirement properties in the occupied territory.<sup>185</sup> British newspapers commonly advertise holiday tours of the occupied territory.<sup>186</sup> While foreigners have been subject to successful property suits in European courts by Greek Cypriots in cases where they took over land belonging to particular private persons, the European Union has not sought to restrict or punish the consensual purchase of properties in the occupied territory.<sup>187</sup>

Turkey has also established numerous universities on the island, which attract both Turkish settlers and foreign students.<sup>188</sup> In recent years, enrollment has surged to 64,000, and higher education has become the most significant economic sector in the territory.<sup>189</sup> Some of the Northern Cypriot universities have exchange or other cooperative programs with major British public institutions.<sup>190</sup> Many of the TRNC universities are actually branches or campuses of mainland Turkish institutions, or accredited by them.<sup>191</sup> This has not

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184. *See id.*

185. *See* Dore Gold, *European Settlements and Double Standards*, JERUSALEM CTR. FOR PUB. AFF. (Jan. 4, 2013), <http://jcpa.org/article/european-settlements-and-double-standards/>. The British government also provides advice to its citizens who are interested in purchasing property in the north of Cyprus. *See Guidance: How to Buy Property in Cyprus*, GOV.UK (Mar 25, 2013), <https://www.gov.uk/how-to-property-in-cyprus> (scroll down to "Buying property in the north of Cyprus").

186. Janet McMahon, *Cyprus: E.U. Member Finds Reunification Still Elusive*, 28 WASH. REP. ON MIDDLE EAST AFF. 30 (Dec. 2009), *available at* <http://www.wrmea.org/2009-december/cyprus-E.U.-member-finds-reunification-still-elusive.html>.

187. For example, see the practices of the British government described in Part III.A.

188. *See* Susanne Gusten, *Students Flock to Universities in North Cyprus*, N.Y. TIMES, Feb. 17, 2014, <http://www.nytimes.com/2014/02/17/world/europe/students-flock-to-universities-in-northern-cyprus.html>.

189. *See id.* ("With students spending not only on tuition but also on food, transport, travel and entertainment, the universities have become the leading sector of the Northern Cypriot economy.")

190. For example, the University of Portsmouth has exchange programs with universities in Northern Cyprus that grant students B.A./B.Sc. and M.A./M.Sc. *See International Students: Cyprus*, UNIV. OF PORTSMOUTH, <http://www.port.ac.uk/international-students/your-country/cyprus/> (last visited May 26, 2015).

191. *See* Eugene Kontorovich, *A Tale of Two Green Lines*, CHRON. HIGHER EDUC.: THE CONVERSATION (Nov. 17, 2014), <http://chronicle.com/blogs/conversation/2014/11/17/a-tale->

lead to the exclusion of the mainland universities from any international academic programs.<sup>192</sup> As for the Northern Cypriot universities themselves, they are “accepted as members by educational organizations like the European Association of Universities and the International Association of Universities, but they are blocked from participation in programs based on intergovernmental agreements, like the Bologna Process or the Erasmus Program.”<sup>193</sup>

### *B. Direct and Indirect Aid to Turkish Activities in the Territory*

The European Union provides significant foreign aid to Turkey, but does not attempt to ensure that those funds will not reach occupied Northern Cyprus. The Northern Cypriot economy is entirely dominated by Turkish firms and the TRNC government is sustained largely by direct aid from Turkey, making it likely that funded entities have Northern Cypriot operations.<sup>194</sup> Perhaps most strikingly, the European Commission admitted Turkey into the Horizon 2020 scientific research program just a few months after concluding tense negotiations with Israel about the Horizon 2020 collaborative research program to ensure that no scientific research grants to Israel would be spent on projects or entities across the Green Line.<sup>195</sup> However, the European Union’s agreement with Turkey under Horizon 2020 in no way restricts funds based on location.<sup>196</sup> This is particularly significant given that some of the major Turkish universities likely to receive funding under the program have campuses in northern Cyprus.

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of-two-green-lines/ (“Half of the universities are public, state-run institutions, and several are campuses of major Turkish institutions on the mainland.”).

192. *See id.* By contrast, Israel’s establishment of Ariel University in the West Bank drew earnest condemnation from academics and even foreign ministries around the world. *See Lazar Berman & Raphael Ahren, In Breakthrough, Israel and E.U. to Sign Science Cooperation Deal*, *TIMES OF ISRAEL* (Nov. 26, 2013, 8:56 PM), <http://www.timesofisrael.com/in-breakthrough-israel-and-eu-to-sign-science-cooperation-deal/>.

193. *Gusten, supra* note 188.

194. *See Europe: Cyprus, supra* note 163 (click on “Economy”; then scroll down to “Economy of the Area Administered by Turkish Cypriots”) (last visited May 26, 2015).

195. *See* Press Release, European Commission, Turkey joins Horizon 2020 Research and Innovation Programme (June 4, 2014), *available at* [http://europa.eu/rapid/press-release\\_IP-14-631\\_en.htm](http://europa.eu/rapid/press-release_IP-14-631_en.htm).

196. *See id.*

Moreover, the European Union knowingly and purposefully provides direct funding to the Turkish Cypriot community in Turkish-occupied Northern Cyprus.<sup>197</sup> This E.U. assistance is not channeled through the Republic of Cyprus.<sup>198</sup> The European Union also has many separate programs for Cyprus that also apply to Northern Cyprus territory.<sup>199</sup>

The E.U. Aid Programme for the Turkish Cypriot community was established in 2006 by a regulation adopted to “end the isolation of the Turkish Cypriot community.”<sup>200</sup> In its first five years, it allocated €259 million to the North, and since allocates €28 million a year.<sup>201</sup> According to a 2012 brochure issued by the European Commissioner for Enlargement and European Neighbourhood Policy,<sup>202</sup> the European Union gives Turkish Cypriots (including Turkish settlers) a wide variety of benefits.<sup>203</sup> Students receive scholarships to study in E.U. universities.<sup>204</sup> Businesses receive technical assistance to facilitate trade with the European Union, and small businesses receive grants to help their competitiveness.<sup>205</sup> The European Union has a road safety program that includes working with Northern Cypriot municipalities (i.e., Turkish settlements) regarding matters like driver education and vehicle inspections.<sup>206</sup>

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197. See *Aid Program for the Turkish Cypriot Community*, EUROPEAN COMMISSION, [http://ec.europa.eu/regional\\_policy/index.cfm/en/policy/themes/turkish-cypriot-community/](http://ec.europa.eu/regional_policy/index.cfm/en/policy/themes/turkish-cypriot-community/) (last visited May 26, 2015).

198. See *id.*

199. For an example of an E.U. project that serves both the occupied and unoccupied areas of Cyprus, see Press Release, European Commission, New Nicosia Wastewater Treatment Plant enters in full operation serving both communities (Apr. 4, 2014), available at <http://www.cy.undp.org/content/cyprus/en/home/presscenter/pressreleases/2014/04/04/new-nicosia-wastewater-treatment-plant-enters-in-full-operation-serving-both-communities.html>.

200. *Aid Program for the Turkish Cypriot Community*, *supra* note 197.

201. See *How the E.U. funds Turkey's Occupation of Cyprus*, HELLENIC ANTIDOTE (Oct. 15, 2013), <http://hellenicantidote.blogspot.com/2013/10/how-eu-funds-turkeys-occupation-of.html>. This amounts to 0.8 percent of the TRNC's GDP.

202. See European Commission, *Closer to the European Union: E.U. Assistance to the Turkish Cypriot Community* (2012), available at [http://ec.europa.eu/cyprus/documents/2012/eu\\_assistance\\_to\\_tcc\\_brochure.pdf](http://ec.europa.eu/cyprus/documents/2012/eu_assistance_to_tcc_brochure.pdf).

203. See *id.*

204. See *id.* at 4.

205. See *id.* at 7.

206. *Instrument of Financial Support to Encourage the Economic Development of the Turkish Cypriot Community, Standard Summary Project Fiche 2006*, EUROPEAN COMMISSION, available at [http://ec.europa.eu/enlargement/pdf/turkish\\_cypriot\\_community/objective\\_1\\_traffic\\_safety\\_improvements\\_programme\\_en.pdf](http://ec.europa.eu/enlargement/pdf/turkish_cypriot_community/objective_1_traffic_safety_improvements_programme_en.pdf).

Farmers have received aid in getting certified “organic.”<sup>207</sup> The European Union has also helped Turkish settlers in their exploitation of natural resources, and developing water treatment facilities,<sup>208</sup> and “even puts on a musical concert.”<sup>209</sup>

Thus, not only does the European Union not restrict any assistance or activity with Turkey to exclude Northern Cyprus, it specifically carries on a dedicated program for funding occupation activities. Interestingly, the relevant resolutions, regulations and reports about the Northern Cyprus program make no mention of the international legal issues arising from this policy, though they do note the “difficult” and “unique” political context.<sup>210</sup> To the extent E.U. documents seek to justify the activity, they mention a desire to “prepare” the Turkish population for possible reunification.<sup>211</sup> It is hard to see how such policies could override obligations derived from IHL. But even this is explicitly only one, and not the primary one, of several stated goals of the program, the rest of which are simple welfare-improvement purposes common to most foreign aid.<sup>212</sup>

While it is true that many of the infrastructure projects would be consistent with an occupier’s rights and responsibilities under the Hague Conventions, they also help cement the settler regime and further the de facto annexation of the territory. In the presence of a substantial settler population, E.U. states have, in relation to Israel, suggested that funding such projects would violate IHL and duties of non-recognition.<sup>213</sup> To be sure, perhaps half of the population in Northern Cyprus are E.U. citizens.<sup>214</sup> But the aid program does

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207. *Closer to the European Union*, *supra* note 202, at 8.

208. *See id.* at 20.

209. *How the E.U. funds Turkey’s Occupation of Cyprus*, *supra* note 201.

210. *Report from the Commission to the Council and the European Parliament, Seventh Annual Report 2012 on the Implementation of Community Assistance under Council Regulation (EC) No 389/2006 of 27 February 2006 Establishing an Instrument of Financial Support for Encouraging the Economic Development of the Turkish Cypriot Community*, at 2, 3, COM (2013) 332 final (June 4, 2013), available at [http://ec.europa.eu/enlargement/pdf/turkish\\_cypriot\\_community/20130604\\_seventh\\_annual\\_report\\_impl\\_community\\_assistance\\_en.pdf](http://ec.europa.eu/enlargement/pdf/turkish_cypriot_community/20130604_seventh_annual_report_impl_community_assistance_en.pdf).

211. *Closer to the European Union*, *supra* note 202.

212. *See* EUROPEAN COURT OF AUDITORS, EUROPEAN UNION ASSISTANCE TO THE TURKISH CYPRIOT COMMUNITY (Special Report No. 6, 2012), available at [http://ec.europa.eu/enlargement/pdf/turkish\\_cypriot\\_community/14650788\\_en.pdf](http://ec.europa.eu/enlargement/pdf/turkish_cypriot_community/14650788_en.pdf). Most of the funding was shifted to infrastructure-building rather than reconciliation projects in accord with the request of TRNC authorities. *See id.* ¶ 16.

213. *See* Guidelines, *supra* note 35.

214. *See* Schlicher, *supra* note 175.

nothing to limit beneficiaries to this subgroup, or to exclude settlers, or to pick projects that would not substantially benefit settlers. Indeed, some major projects, like the desalinization plant, were carried on in cooperation and consultation with TRNC political leaders.<sup>215</sup> None of the Commission's grant or contracting documents screens out Turkish settlers.<sup>216</sup> Thus, the Commission directly and knowingly funds Turkish settler activities. Indeed, some of the aid programs seek to promote construction and tourism in the north, all of which would stabilize Turkish control.<sup>217</sup> Remarkably, the planning documents for these programs do not even mention the existence of settlers in the territory.<sup>218</sup>

### C. Rules of Origin

The European Union, like almost all the rest of the world, does not recognize the TRNC and has no trade arrangements with it. The European Court of Justice (ECJ) has ruled that under European Union's agreements with Cyprus, products from the TRNC that are exported through Turkey cannot bear a Turkish certificate of origin or phytosanitary certifications.<sup>219</sup> Instead, they must be certified by the Cypriot authorities, who are obviously unwilling to do so.<sup>220</sup> This ruling is not so much about labeling as it is about origin certification, and in practice makes the export of Northern Cyprus products into the European Union impossible.<sup>221</sup> The ECJ did not base its ruling on a duty of non-recognition, but rather on an interpretation of the relevant treaties between the European Union and Cyprus, which were interpreted as applying to the entire island and thus precluded alternate certifications.<sup>222</sup> This suggests that the scope of trade

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215. See Press Release, *supra* note 195.

216. See *id.*

217. See E.U. Aid Programme for Turkish Cypriot Community, *Karpaz Area: Local Development Strategy* 56–64 (Dec. 14, 2010), available at [http://www.cy.undp.org/content/dam/cyprus/docs/PFF%20Publications/local\\_development\\_strategy\\_karpaz\\_area.pdf](http://www.cy.undp.org/content/dam/cyprus/docs/PFF%20Publications/local_development_strategy_karpaz_area.pdf).

218. See *id.*

219. Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food ex parte S.P. Anastasiou (Pissouri) Ltd.*, 1994 E.C.R. I-3087, I-3120–21 [hereinafter *Anastasiou I*]; see Stefan Talmon, *The Cyprus Question Before the European Court of Justice*, 12 *Eur. J. Int'l L.* 727, 731–32, 736, 742–43 (2001).

220. See *Anastasiou I*, *supra* note 219, at I-3137. The Republic of Cyprus objects to the existence of the TRNC and believes it is the sole legitimate authority over the island.

221. See *id.* at I-3137–39.

222. See *id.* at I-3119–21.



agreements with unrecognized territorial regimes does not depend as much on general principles of public international law as it does on the specific parameters of any relevant bilateral agreements. If there were a *jus cogens* non-recognition norm,<sup>223</sup> the content of bilateral trade treaties would have been irrelevant, since they could not preempt the general norm.

#### IV. OCCUPATIONS IN THE FORMER SOVIET UNION

The former Soviet Union is the site of several occupations, typically involving remote, poor and inaccessible areas with little economic potential or significance. Thus the state practice here is relatively thin, but some aspects bear noting. Of course, Russia's recent invasion and annexation of Crimea, a large and heavily populated peninsula with strategic significance, presents a major test of the international regime on economic activities in occupied territories—one whose result is still unclear.

##### A. Nagorno-Karabakh & Surrounding Regions (Armenia)

Following the collapse of the Soviet Union, Armenia and Azerbaijan fought a bloody war over the control of Nagorno-Karabakh, an enclave within Azerbaijan's borders that had a predominantly Armenian population, and enjoyed a special degree of autonomy within the "Azerbaijani Soviet Socialist Republic."<sup>224</sup> By 1994, Armenia had prevailed, occupying not only Nagorno-Karabakh, but also a ring of territory surrounding it, and the Lachin Corridor, which connects the enclave to Armenia.<sup>225</sup> While the Armenian army remains in control of the territory, it is nominally under the authority of the Nagorno-Karabakh Republic, an entity not recognized by any U.N. member states.<sup>226</sup> Indeed, the U.N. General Assembly has invoked the duty of non-recognition in regards to the Armenian-occupied territories.<sup>227</sup> Moreover, Armenia has promoted

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223. See Talmon, *supra* note 11, at 99–101 (discussing ICJ suggestions that non-recognition is *jus cogens*).

224. HEIKO KRUGER, *THE NAGORNO-KARABAKH CONFLICT: A LEGAL ANALYSIS* 1 (2010).

225. See NICU POPESCU, *E.U. FOREIGN POLICY AND POST-SOVIET CONFLICTS: STEALTH INTERVENTION* 96 (2011).

226. See KRUGER, *supra* note 224, at 23.

227. See G.A. Res. 62/243, ¶5, U.N. Doc. A/RES/62/243 (Mar. 14, 2008) ("Reaffirms that no State shall recognize as lawful the situation resulting from the occupation of the

a settlement program to bring even more Armenians there.<sup>228</sup> The United Nations regards Nagorno-Karabakh and the surrounding region (amounting to approximately sixteen percent of Azerbaijan) as Armenian-occupied territory,<sup>229</sup> a view shared by the United States.<sup>230</sup>

The economy of Armenia itself is limited, with exports greatly restricted by the Azeri-Turkish blockade of the landlocked country.<sup>231</sup> Nagorno-Karabakh's economy is even more limited, and there has always been very little foreign trade.<sup>232</sup> Thus, the question of economic activity in these occupied territories has not been very salient. However, even with the limited Nagorno-Karabakh economy, exports do play a role. As with Armenia, gold and copper mining are the principal industries, and their products presumably go to foreign markets.<sup>233</sup>

Yet Nagorno-Karabakh does involve state practice on the question of governmental funding and spending in occupied territories. The United States has long provided direct foreign aid to Nagorno-Karabakh.<sup>234</sup> Since 1998, the United States has had an annual foreign aid appropriation earmarked directly for Nagorno-Karabakh, despite opposition from Baku.<sup>235</sup> Congress created a

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territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining this situation;”).

228. See Zaur Shiriyev, *Challenges for the E.U. in the Resolution of the Nagorno-Karabakh Conflict: An Azerbaijani Perspective*, EUROPEAN POLICY CENTRE: POLICY BRIEF (June 17, 2013), [http://www.epc.eu/documents/uploads/pub\\_3587\\_an\\_azerbaijani\\_perspective.pdf](http://www.epc.eu/documents/uploads/pub_3587_an_azerbaijani_perspective.pdf).

229. See G.A. Res. 62/243, *supra* note 227, ¶ 5; *The Nagorno-Karabakh Conflict: Still Just About Frozen*, ECONOMIST: EASTERN APPROACHES (Mar. 7, 2011, 5:00 PM), [http://www.economist.com/blogs/easternapproaches/2011/03/nagorno-karabakh\\_conflict](http://www.economist.com/blogs/easternapproaches/2011/03/nagorno-karabakh_conflict).

230. See *Middle East: Azerbaijan*, CENTRAL INTELLIGENCE AGENCY: WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/aj.html> (last updated May 18, 2015).

231. ANCA: *No New Trade Deals While Turkey Blockades Armenia, Occupies Cyprus*, ASBAREZ (May 30, 2013), <http://asbarez.com/110332/anca-no-new-trade-deals-while-turkey-blockades-armenia-occupies-cyprus/>.

232. See discussion of trade in *An Uncommon Market in the Caucasus*, ECONOMIST, June 1, 2000, <http://www.economist.com/node/314037>.

233. See Farhad Mammadov, *Armenia Exploiting the Natural Resources in Occupied Lands*, VISIONS OF AZERBAIJAN, MAR.–JUNE 2012, [http://www.visions.az/nagorno-karabagh\\_con,383/](http://www.visions.az/nagorno-karabagh_con,383/).

234. See POPESCU *supra* note 225, at 97.

235. See JIM NICHOL, CONG. RESEARCH SERV., RL33453, ARMENIA, AZERBAIJAN, AND GEORGIA: POLITICAL DEVELOPMENTS AND IMPLICATIONS FOR U.S. INTERESTS 65 (2014); *Senate Appropriators Reaffirm Support for Artsakh Aid Program*, ASBAREZ (June 19, 2014),

specific budget item for Nagorno-Karabakh to ensure that it does not lose out on aid due to its contested status.<sup>236</sup> The aid goes to general development and humanitarian purposes such as infrastructure, agriculture and medical projects.<sup>237</sup> As with E.U. aid to the TRNC, there is no effort to limit such aid to “protected persons” or exclude settlers. Indeed, some of it may even go to settlement building, that is, residential housing in the occupied territory utilized by Armenian citizens.<sup>238</sup> The aid is spent entirely within the areas under Armenian control, and does not in any way exclude Armenian settlers, despite Azerbaijan’s request that some be allocated to Azeri refugees from Nagorno-Karabakh.<sup>239</sup>

Notably, the United States does not regard the direct aid as constituting an act of recognition.<sup>240</sup> Aside from this direct aid to the occupied territory, the United States is also by far Armenia’s largest bilateral aid donor.<sup>241</sup> None of that aid contains restrictions on its being spent in occupied territory, despite Armenia essentially propping up the economy of Nagorno-Karabakh.<sup>242</sup> Fifty percent of the N.K. state budget deficit comes from a direct Armenian appropriation.<sup>243</sup>

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<http://asbarez.com/124277/senate-appropriators-reaffirm-support-for-artsakh-aid-program/>.

236. See NICHOL, *supra* note 235, at 42–43. Annual allocations typically ranged from two to eight million dollars and did not include separate funds for demining and promoting interethnic dialogue. See *id.* at 65.

237. See *id.* at 43.

238. See *U.S. Direct Assistance to Nagorno-Karabakh*, OFFICE OF THE NAGORNO KARABAKH REPUBLIC (June 2002), [http://www.nkrusa.org/position\\_papers/us\\_assistance.shtml](http://www.nkrusa.org/position_papers/us_assistance.shtml).

239. See *Outside Witness Testimony for FY2014 Before the United States House of Representatives Committee on Appropriations, Subcomm. On State, Foreign Operations, and Related Programs*, 113th Cong. 3 (2013) (statement of Adil Baguirov, Ph.D., Managing Director and co-founder, U.S. Azeris Network (USAN), available at <http://docs.house.gov/meetings/AP/AP04/20130314/100434/HMTG-113-AP04-Wstate-BaguirovA-20130314.pdf>).

240. H.R. REP. NO. 107-142, at 53–54 (2002) (noting that direct funding of NK does not involve any judgment about its “political status”).

241. See NICHOL, *supra* note 235, at 42.

242. See *U.S. Congress Held Hearings on Financial Assistance to Armenia and Azerbaijan*, CONTACT (Mar. 27, 2015, 12:31 PM), <http://www.contact.az/docs/2015/Politics/032700110783en.htm#.VRnXKcZaQ5g>.

243. See Naira Hayrumyan, *NKR meets the Global Crisis: Economy of Karabakh in Need of Assistance*, ARMENIA NOW (Mar. 31 2010, 11:50 AM), [http://www.armenianow.com/karabakh/21968/global\\_crisis\\_karabakh\\_economy](http://www.armenianow.com/karabakh/21968/global_crisis_karabakh_economy).

## B. Russian Occupied Territories: Abkhazia and Crimea

### 1. Occupied Georgian Territory

Russia's conquest in its 2008 war with Georgia of the mountainous provinces of Abkhazia and South Ossetia (where Russia had long maintained a military presence), provoked significant international condemnation, but did not lead to any immediate change in trade between the European Union and Russia.<sup>244</sup> For example, E.U. aid and involvement with Russian companies has not been conditioned on their forgoing activities in these territories.<sup>245</sup> The economies of Abkhazia and South Ossetia are quite small, and almost entirely dependent on Russian aid.<sup>246</sup> Moreover, Russian-controlled Abkhazia is also under Georgian blockade, and thus the vast bulk of its trade is with Russia, though Turkey has also been developing significant economic ties even at the risk of running the blockade.<sup>247</sup> (Georgia, like Ukraine, has passed municipal legislation prohibiting or restricting third-party economic activity by foreign nationals in its occupied territories.<sup>248</sup>) Thus economic activity in

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244. See James G. Neuger, *EU, Dependent on Russian Energy, Balks at Georgia War Sanctions*, BLOOMBERG (Sept. 1, 2008, 6:01 AM), available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aOEc0FqqXxHg&refer=uk> ("European Union leaders refused to impose sanctions on Russia over the invasion of Georgia, acknowledging their reliance on Russian oil and gas at a time of faltering economic growth.").

245. See Commission Implementing Decision C (2011) 4966, of 13/07/2011 on the Annual Action Programme 2011 in Favour of Georgia to be Financed under Article 19 08 01 03 of the General Budget of the European Union (July 13, 2011) (EC), available at [http://ec.europa.eu/europeaid/sites/devco/files/aap-financing-georgia-commission-decision-20110713\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/aap-financing-georgia-commission-decision-20110713_en.pdf).

246. INT'L CRISIS GROUP, *ABKHAZIA: THE LONG ROAD TO RECONCILIATION* 6–8 (Europe Report No. 224, Apr. 10, 2013), available at <http://www.crisisgroup.org/~media/Files/europe/caucasus/georgia/224-abkhazia-the-long-road-to-reconciliation.pdf>; INT'L CRISIS GROUP, *SOUTH OSSETIA: THE BURDEN OF RECOGNITION* 6–7 (Europe Report No. 205, June 7, 2010), available at <http://www.crisisgroup.org/~media/Files/europe/205%20South%20Ossetia%20-%20The%20Burden%20of%20Recognition.pdf>.

247. See Nick Clayton, *What is Turkey Doing in Abkhazia?*, HEINRICH BOLL STIFTUNG (Jan. 16, 2014), <http://ge.boell.org/en/2014/01/16/what-turkey-doing-abkhazia>.

248. See *Special Regulations for Entering the Occupied Regions of Georgia—Autonomous Republic of Abkhazia and the Tskhinvali Region (former South Ossetia Autonomous District)*, MISSION OF GEORGIA TO THE EUROPEAN UNION AND EMBASSY OF GEORGIA TO THE KINGDOM OF BELGIUM, [http://belgium.mfa.gov.ge/index.php?lang\\_id=ENG&sec\\_id=1227](http://belgium.mfa.gov.ge/index.php?lang_id=ENG&sec_id=1227) (last visited May 26, 2015); On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine, Law No. 1237-VII, LAW OF UKRAINE, May 6,

these territories has not been much of an issue, as there is simply little economic activity there.

However, the European Union does provide direct aid to Abkhazia, and is the largest donor there.<sup>249</sup> Funded projects include groups and enterprises organized under the occupation authorities.<sup>250</sup> The funding documents note that funding programs require “a pragmatic and flexible programme approach” given the occupied status of the region.<sup>251</sup>

## 2. Crimea and other Occupied Ukrainian Territory

Russia’s occupation and annexation of Crimea in the spring of 2014, and subsequent invasion of other parts of Ukraine, have given renewed prominence to these issues. Numerous international businesses have a presence in Crimea.<sup>252</sup> While some left immediately after the invasion, others have stayed and will pay taxes to Moscow, though the taxation scheme in Crimea remains in flux.<sup>253</sup>

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2014), available at [http://usa.mfa.gov.ua/mediafiles/sites/usa/files/2014.05.26\\_Law\\_on\\_occupied\\_Crimea.pdf](http://usa.mfa.gov.ua/mediafiles/sites/usa/files/2014.05.26_Law_on_occupied_Crimea.pdf). Notably, neither country suggested that a restriction on economic activity was imposed by international law.

249. See Commission Implementing Decision C (2011) 4966, *supra* note 245, Annex 4. For a discussion suggesting that Abkhazia and South Ossetia can be characterized as under belligerent occupation, see INDEPENDENT INTERNATIONAL FACT-FINDING ON THE CONFLICT IN GEORGIA, REPORT: VOL. II, at 304–11, available at [http://web.archive.org/web/20110706223037/http://www.ceiig.ch/pdf/IIFMCG\\_Volume\\_II.pdf](http://web.archive.org/web/20110706223037/http://www.ceiig.ch/pdf/IIFMCG_Volume_II.pdf).

250. See Commission Implementing Decision C (2011) 4966, *supra* note 245, Annex 4.

251. *Annex 4: Action Fiche for Georgia AAP 2011*, in EURAID 2011 Georgia Annual Action Programme 32–34, available at [http://ec.europa.eu/europeaid/documents/aap/2011/af\\_aap\\_2011\\_geo.pdf](http://ec.europa.eu/europeaid/documents/aap/2011/af_aap_2011_geo.pdf).

252. See, e.g., Eugene Kontorovich, *Europeans Cruise to Occupied Territory*, WASH. POST.: VOLOKH CONSPIRACY (Sept. 22, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/22/europeans-cruise-to-occupied-territory/> (“A German-owned [*sic*], Portuguese-flagged, Greek-based cruise ship, the Ocean Majesty, paid a port call to Yalta this week, in Russian-occupied Crimea.”).

253. See Delphine d’Amora, *Russian Stampede into Crimean Real Estate Hits Legal Buffers*, MOSCOW TIMES, Mar. 25, 2014, <http://www.themoscowtimes.com/business/article/russian-stampede-into-crimean-real-estate-hits-legal-buffers/496764.html>; Gvozdiy & Oberkovych, *Russia Imposes Its Tax Regulations in Crimea*, MSI GLOBAL ALLIANCE (June 24, 2014), <http://www.msiglobal.org/news/2014/7/russia-imposes-its-tax-regulations-in-crimea/>; Elizabeth Piper, *Tourism Hotspot, Gas Giant, Cash Drain? What’s Crimea to Russia?*, REUTERS, Mar. 17, 2014, 11:42 AM, <http://www.reuters.com/article/2014/03/17/us-ukraine-crisis-crimea-russia-idUSBREA2G15Z20140317>.

The European Union responded to Russia's annexation and ongoing aggression with a series of sanctions, implemented in several stages.<sup>254</sup> These included asset freezes on key allies of President Putin, an arms embargo, restrictions on access to capital markets, and several other targeted measures,<sup>255</sup> none of which were limited to, or principally focused on the occupied territory. Rather, they were explicitly adopted as diplomatic tools to pressure Russia.<sup>256</sup>

The European Union continues to forbid the import of goods from Crimea without a Ukrainian certification of origin.<sup>257</sup> Similarly, the United States Customs Service regulations state that products from Crimea must still be marked "Made in Ukraine."<sup>258</sup> In a second round of sanctions, the European Union implemented additional restrictions on trade, this time specifically with Crimea.<sup>259</sup> It banned trade with certain key industries, such as infrastructure, telecommunications, and extractive industries.<sup>260</sup> A final round of sanctions in December 2014 barred almost all E.U. business ties with Crimea, with notable bans on real estate investments, cruise ship

stops, and all investment activity.<sup>261</sup> The United States has imposed

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254. See *E.U. Sanctions Against Russia Over Ukraine Crisis*, EUROPEAN UNION NEWSROOM: HIGHLIGHTS, [http://europa.eu/newsroom/highlights/special-coverage/eu-sanctions/index\\_en.htm](http://europa.eu/newsroom/highlights/special-coverage/eu-sanctions/index_en.htm) (last visited May 26, 2015).

255. See *id.*

256. See *id.*

257. See Press Release, Council of the European Union, E.U. restrictive measures in view of the situation in Eastern Ukraine and the illegal annexation of Crimea (July 29, 2014), available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/144159.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/144159.pdf). However, the enforcement of these rules remains in doubt. Jan Strupczewski, *Exclusive: E.U. considers ban on deals with banks in Crimea*, REUTERS, Apr. 24, 2014, 9:33 AM, <http://www.reuters.com/article/2014/04/24/us-ukraine-crisis-eu-crimea-idUSBREA3N15O20140424> (reporting "the Commission document noted that there was practically no way to prevent Crimean products from being exported to the EU via Russia, unless they were clearly of Crimean origin, like wine.").

258. *Marking Requirements for Ukraine: Cargo Systems Managing Service #14-000236*, U.S. CUSTOMS AND BORDER PROTECTION (Apr. 23, 2014), available at [http://apps.cbp.gov/csms/viewmssg.asp?Recid=20019&page=1&srch\\_argv=customs&srchtype=&btype=&sortby=&sby=](http://apps.cbp.gov/csms/viewmssg.asp?Recid=20019&page=1&srch_argv=customs&srchtype=&btype=&sortby=&sby=).

259. See Council Regulation 825/2014, Amending Regulation 692/2014 Concerning Restrictions on the Import into the Union of Goods Originating in Crimea or Sevastopol, in Response to the Illegal Annexation of Crimea and Sevastopol, 2014 O.J. (L 226) 2.

260. See *id.*

261. See Press Release, Council of the European Union, Crimea and Sevastopol:

similar investment restrictions.<sup>262</sup>

The measures in regard to Crimea are clearly the strongest to date in relation to the other occupation scenarios surveyed in this Article.<sup>263</sup> Yet they have not inspired the European Union or other actors to revisit their approach to other occupied territories, including Russian-occupied Abkhazia and South Ossetia. There does not seem to be a principled reason for distinguishing Crimea in this regard. To be sure, Russia took the unusual step of formally annexing the territory, but that does not distinguish it from Western Sahara, which Morocco has fully incorporated. Moreover, the unrecognized regimes like the TRNC have not saved the occupying power from accusations of *de facto* annexation. In short, the international community's approach to Crimea is the exception that proves the rule. This is what a robust non-recognition regime looks like, and it is conspicuously absent anywhere else in the world. Thus, while international law allows for such sanctions (assuming they are otherwise consistent with international trade law), it does not require them.

## V. RECENT DECISIONS BY NATIONAL COURTS

While vast amounts of political and scholarly attention have been devoted to the legal consequences of Israeli "settlements" in

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Further E.U. sanctions approved (Dec. 18, 2014), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/146392.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/146392.pdf); *see also* Andrew Rettman, *E.U. Sanctions add to Putin's Crimea Headache*, EUOBSERVER (Dec. 18, 2014, 1:33 PM), <http://euobserver.com/foreign/126986>.

262. *See* Peter Baker, *U.S. Tightens Crimea Embargo to Pressure Russia*, N.Y. TIMES, Dec. 19, 2014, <http://www.nytimes.com/2014/12/20/world/europe/us-tightens-crimea-embargo-to-pressure-russia.html>. On the other hand, China is in discussions with Russia to build a US\$10 billion dollar port, railroad, and other infrastructure projects on the peninsula. *China to Resume Investment Talks on \$10Bln Port in Crimea*, MOSCOW TIMES, May 29, 2014, *available at* <http://www.themoscowtimes.com/business/article/china-to-resume-investment-talks-on-10bln-port-in-crimea/501167.html>.

263. The effects of E.U. sanctions have already hit Crimea's trade, investment, and tourism sectors. The European Union recently imposed a ban on cruise ships making port in occupied Crimea, a stronger sanction than has ever been applied to the E.U. tourist frequented occupied north of Cyprus. *See* Laurence Norman, *E.U. imposes tougher sanctions over Crimea*, WALL ST. J., Dec. 18, 2014, <http://www.marketwatch.com/story/eu-imposes-tougher-sanctions-over-crimea-2014-12-18>. Similarly, the European Union bans real estate investment in Crimea, but such investment by E.U. nationals is common in northern Cyprus. *See Northern Cyprus: How the Other Half Lives*, INDEPENDENT, July 2, 2008, <http://www.independent.co.uk/property/house-and-home/northern-cyprus-how-the-other-half-lives-859843.html>.

potential contravention of Art. 49(6) of the Fourth Geneva Convention,<sup>264</sup> until the past few years, there has been no judicial decision at all applying these provisions.<sup>265</sup> However, a series of lawsuits against Israeli and third-country businesses in the West Bank has resulted in a quick succession of precedents from important European national courts. National court decisions on questions of international law may serve as evidence of customary international law norms.<sup>266</sup> Moreover, national case law itself serves as both affirmative state practice and the required *opinio juris* for establishing a customary norm.<sup>267</sup> These first cases on economic activities in occupied territory strongly support the proposition that international law neither prohibits business with enterprises in occupied territories, nor requires that products from such areas bear any particular identifying label.

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264. For example, the ICRC's guide to customary international humanitarian law contains an extensive account of national and U.N. practice relating to art. 49(6), roughly 95% of the entries deal with Israel. See *Practice Relating to Rule 130: Transfer of Own Civilian Population Into Occupied Territory*, INT'L COMM. OF THE RED CROSS: CUSTOMARY IHL, [https://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule130#\\_VIOtNaPr](https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule130#_VIOtNaPr) (last visited May 27, 2015); Geneva Convention IV, *supra* note 6, art. 49(6).

265. The ICRC's customary IHL database reports no national case law on the prohibition. See *id.*

266. Norms of customary international law are formed on the basis of the general practice of states when states accept that such practice is required as a matter of international law. Decisions of national courts may serve as evidence of state practice, or may simply serve as cogent analysis of international law. See LORI F. DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW: CASES AND MATERIALS* 60–61, 243 (6<sup>th</sup> ed. 2014); see also Report of the International Law Commission, 2d Sess., June 5–July 29, 1950, U.N. Doc A/1316, GAOR, 5th Sess., Supp. No. 12 (1950), reprinted in [1950] 2 Y.B. INT'L L. COMM'N (VOL. II) 364, 367, U.N. Doc. A/CN.4/34.

267. See *Introduction: Assessment of Customary International Law*, INT'L COMM. OF THE RED CROSS: CUSTOMARY IHL, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_in\\_asofcuin](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin) (last visited May 27, 2015); Ingrid Wuerth, *International Law in Domestic Courts and the Jurisdictional Immunities of the State Case*, 13 MELBOURNE J. INT'L L. 819.



A. *U.K. Supreme Court: Richardson v. Director of Public Prosecutions*

The newly created Supreme Court of the United Kingdom delivered a ruling that held that the economic activities of a shopkeeper in London selling Dead Sea products produced by a separate company in the West Bank does not violate IHL, finding that selling these products does not amount to aiding and abetting the unlawful transfer of Israeli settlers to occupied territory.<sup>268</sup> The case involved a prosecution for trespass of protesters outside a shop selling Dead Sea products.<sup>269</sup> Illegal activity on the premises by its occupant is a defense to trespass, and the defendants argued that the sale of Israeli products from the West Bank violated international and national law in several ways.<sup>270</sup> In particular, they claimed the actions involved aiding and abetting of Israeli settlement activity, and fraudulent labeling of products.<sup>271</sup> The Court decisively rejected both contentions.

The defendants argued that an Israeli company's production of goods in the West Bank violated the War Crimes Act, which, following the language of the Rome Statute, bans the direct or indirect transfer of civilian population into occupied territory.<sup>272</sup> Moreover, they argued, the sale of such goods by foreign companies abroad constituted a war crime by "aiding and abetting" such population transfer.<sup>273</sup> The Court rejected both arguments.

Even though the company was located near a settlement, the Court concluded that the company did not help *cause* the movement of settlers to the location.<sup>274</sup> The settlers could have lived there and worked across the Green Line; or the company could have been located there and employed people from inside the Green Line, or local Palestinians. Any causal links between the existence of the enterprise and the transfer of population were far too indirect and speculative to make out a war crime.<sup>275</sup> As the Court put it:

It is very doubtful that to employ such people could amount to counselling or procuring or aiding

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268. *Richardson v. Director of Public Prosecutions*, [2014] UKSC 8 (Eng.).

269. *See id.* ¶ 5.

270. *See id.* ¶ 7.

271. *See id.* ¶ 7(i)–(iv).

272. *See id.* ¶ 7(i).

273. *Id.* ¶ 17.

274. *See id.*

275. *See id.*

or abetting the Government of Israel in any unlawful transfer of population. Such an employer might be taking advantage of such a transfer, but that is not the same as encouraging or assisting it.<sup>276</sup>

Finally, even if the manufacturing activities were a crime, the sale of these products abroad was far too remote from the underlying violation, and was “perfectly lawful.”<sup>277</sup>

The defendants further argued that the products violated British consumer protection law, which itself was derived from the E.U. Unfair Commercial Practices Directive 2005/29/EC.<sup>278</sup> These regulations prevent “misleading” commercial practices, which are “false” or presented in a way “likely to deceive the average consumer.”<sup>279</sup> The products were labeled as coming from “Dead Sea, Israel,” which the defendants argued was a misrepresentation because they came from Occupied Palestinian Territory (OPT).<sup>280</sup> The Court rejected the argument, saying “[t]here was no basis for saying that the average consumer would be misled into making a transactional decision . . . simply because the source was described as being constitutionally or politically Israel when actually it was the OPT: the source was after all correctly labelled as the Dead Sea.”<sup>281</sup> As the district judge put it, some consumers would buy Israeli products no matter what their provenance; others boycott Israel entirely.<sup>282</sup> The information could only influence the subset of consumers who do not boycott Israel but boycott Israeli products from across the Green Line, and this does not meet the “average” consumer test.<sup>283</sup> In making their argument, the plaintiffs also invoked an E.U. directive on cosmetics, which requires “the country of origin [to] be specified.”<sup>284</sup> The Court concluded that the purpose of such rules is safety and producer identification, not determining the “political status of the . . . area from which they are identified as coming.”<sup>285</sup>

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276. *Id.*

277. *Id.*

278. *See id.* ¶ 20.

279. *Id.* (internal quotation marks omitted).

280. *Id.* ¶ 7.

281. *Id.* ¶ 22.

282. *See id.*

283. *See id.*

284. *Id.* ¶ 23.

285. *Id.*

The Dead Sea case is perhaps the strongest one for the possibility of consumer confusion because the Dead Sea straddles the Green Line, with some Israeli Dead Sea enterprises inside the line and others just across it.<sup>286</sup> Thus the “Dead Sea” designation could suggest a specifically pre-1967 Israel location. However, for products manufactured in other areas, such as the Golan Heights or Mishor Adumim industrial zone, there is no risk of such confusion at all; their location is clearly stated and only its political characterization would be at issue.<sup>287</sup> Thus given that “Dead Sea” labeling has been held not to be confusing, other settlement labels would be even less so.

### *B. French Decisions*

The British decision was consistent with a French case involving a boycott of the SodaStream company, a large manufacturer of home-carbonation devices that had a factory in West Bank.<sup>288</sup> A pro-Palestinian group had been encouraging a boycott of the firm’s products on the grounds that they were fraudulently and illegally labeled “Made in Israel.”<sup>289</sup> The French court concluded that while the knowledge of the national location of origin could be of interest to some consumers, the labeling was not fraudulent and would not deceive a typical consumer.<sup>290</sup> It went on to conclude that the products and their manufacture are not themselves illegal.<sup>291</sup> Thus under France’s rather strong anti-discrimination and anti-boycott law, the pro-Palestinian group would have to cease claiming that the labeling is deceptive or that SodaStream commits “fraud on the origin,” because whatever inaccuracy there may be in the labeling, it is more than outweighed by the effect of such claims in promoting a boycott of the products.<sup>292</sup>

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286. See map attached to David Newman, *Borderline Views: Putting the Green Line on a Map*, JERUSALEM POST, Feb. 24, 2014, <http://www.jpost.com/Opinion/Columnists/Borderline-views-Putting-the-Green-Line-on-the-map-342434>.

287. See Schult, *supra* note 40.

288. See Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 4 ch., 2d sec., Jan. 23, 2014, No. 13/06023, available at <http://www.intjewishlawyers.org/main/files/Decision%20Sodastream%20%28anglais%29.pdf>.

289. *Id.* at 2.

290. *See id.* at 6.

291. *See id.* at 7.

292. *Id.* at 5.

Other French decisions in recent years have had a similar tenor. In *France-Palestine Solidarite v. Alstom*, the Cour d'Appel d'Versailles dismissed a suit against French industrial concerns Alstom and Veolia, both of which had worked on the Jerusalem light rail project, part of which crosses the 1949 Armistice Line.<sup>293</sup> The Court held that the Geneva Conventions do not apply to private companies at all, and thus any prohibitions on settlements do not translate into bans on third-country economic activity in the area.<sup>294</sup>

### C. Summary

These judicial decisions clearly support two broad propositions. First, as was held in *Richardson*, a company does not violate the Geneva Conventions by doing business in occupied territory, or in areas of "settlements." Second, the cases also show that consumer deception is not an adequate basis for requiring particular origin labeling in products coming from an occupied territory.

### CONCLUSION

State practice unambiguously shows that there is no basis in public international law for limiting private economic activity by third-party states in territories under occupation, annexation, or populated by civilians transferred in violation of Art. 49(6) of the Fourth Geneva Convention. Thus recent European warnings regarding the risks of doing business in Israeli-controlled territories were wise to avoid stating directly (though they insinuated) that such activity is illegal under international law. Indeed, state practice broadly supports the view that third-party companies face no restrictions as a result of such situations, except perhaps when it comes to the extraction of natural resources, and even that limitation seems quite thin in practice. Moreover, recent national court decisions from the United Kingdom and France reaffirm the absence of any prohibition on private economic activity.

With the recent exception of Crimea, every occupied territory of any economic significance enjoys both foreign investment and exports without any suggestion of legal liability for those involved.

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293. See Cour d'Appel [CA] [regional court of appeal] Versailles, Mar. 22, 2013, No. 11/05331 (Fr.), available at <http://www.intjewishlawyers.org/main/files/Versailles%20Court%20of%20Appeals%20ruling%20doc%20English%20.pdf>.

294. See *id.* at 23.

Crimea has, to be sure, received, in a series of escalating sanctions, far stricter treatment. But this seems to be voluntary and discretionary. It does not apparently reflect any effort to change the customary law, as the relevant actors (particularly, the European Union and the United States) have not changed their approach to any other situations to match their treatment of Crimea.

Nor does state practice reveal any prohibition on the related issue of third-party states providing financial assistance to entities of an occupation regime, as claimed by the European Commission in their guidelines relating to funding Israel. Here, there is abundant permissive practice. First, nations do not limit financial support to occupying countries on condition that it not flow to occupied territory. Moreover, there are numerous examples of direct subsidies to settler regimes, such as E.U. foreign aid to Moroccan-controlled Western Sahara, Turkish-controlled Cyprus, and Russian controlled Abkhazia, and U.S. foreign aid to Western Sahara and Nagorno-Karabakh.

Practice appears divided on entering into treaties with occupying/settler states regarding the territory they control, which includes the issue of preferential trade treatment for exports. The United States does not consider Western Sahara to be within the scope of its treaties with Morocco;<sup>295</sup> the European Union, at least implicitly, does.<sup>296</sup> The European Union, on the other hand, does not regard the West Bank as falling within the scope of its treaties with Israel,<sup>297</sup> while the United States does.<sup>298</sup> The practice regarding Crimea has thus far been uniformly restrictive.<sup>299</sup>

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295. See H.R. REP. NO. 108-627, at 4, 24–25 (2004).

296. See Fisheries Partnership Agreement, *supra* note 96 (noting that “The [European] Community and the Kingdom of Morocco have negotiated and initialled a Fisheries Partnership Agreement providing Community fishermen with fishing opportunities in the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco.”). The waters off Western Sahara are included within the scope of this agreement. See Adam Green, *Western Sahara: E.U.-Morocco Deal in Uncertain Territory*, FIN. TIMES: BEYONDBRICS (Dec. 12, 2013, 4:29 PM), <http://blogs.ft.com/beyondbrics/2013/12/12/western-sahara-E.U.-morocco-deal-in-uncertain-territory/>.

297. See *e.g.*, *supra* notes 41, 51.

298. See *e.g.*, *supra* note 52; JEREMY SHARP, CONG. RESEARCH SERV., RL33222, U.S. FOREIGN AID TO ISRAEL (2014).

299. The question does not apply to Nagorno-Karabakh, Abkhazia, and Northern Cyprus, which are claimed by the occupying powers to be independent countries. Thus the occupying state would naturally not have power to enter into treaties regarding the territory.

This divided practice may be more coherent than it seems. Whether treaties apply to non-sovereign territory controlled by one of the parties does not appear to be a general question of public international law, but rather simply one of treaty interpretation and intent. Thus the United States' free trade agreement with Morocco does not extend to Western Sahara because of parties' specific understandings at the time of signing, as attested to by contemporaneous statements.<sup>300</sup> The European Union simply interprets its treaties differently, and now uses treaty language to make its understanding more explicit. Thus, whether generally worded territorial clauses apply to occupied territories is simply a question of treaty interpretation, which is why the same words might be given different scope in different treaties.<sup>301</sup> However, the lack of any prohibition on such arrangements in international law is relevant to interpreting particular provisions, along with other evidence.

Finally, state practice, strongly supported by the decisions of national courts, does not show any requirement related to non-recognition or the Geneva Conventions to label products from territories as such. Thus efforts in Europe to require such labeling on Israeli products from the West Bank or Golan Heights cannot be justified on grounds of consumer deception or public international law. The European Union allows Moroccan products from Western Sahara to be labeled "Made in Morocco"<sup>302</sup> but does not allow such imports from the "Turkish Republic of Northern Cyprus."<sup>303</sup> This is less instructive as it has no formal relations at all with that entity the TRNC (and Turkey claims no formal authority). Indeed, both the United States and the European Union have long allowed Israeli products from the West Bank and Golan Heights to be labeled "Made in Israel," despite significant debate and opposition to this policy in Europe.<sup>304</sup> While there have been prominent calls for changing the

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300. H.R. REP. NO. 108-627, *supra* note 295, at 4 ("The Committee notes that the FTA will cover trade with and investment in the territory of Morocco as recognized by the United States, which does not currently include the Western Sahara.").

301. *See* Vienna Convention, *supra* note 27, art. 29 ("Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.").

302. *See* Parliamentary Questions, Answer Given by Mr Çioloş on behalf of the Commission, Parliamentary Question No. E-006205/2012, Aug. 29, 2012, 2013 O.J. (C 183 E) 32, 32.

303. The TRNC has been under a "de facto E.U. embargo . . . that began with a 1994 European Court ruling." CAROL MIGDALOVITZ, CONG. RESEARCH SERV., RL 33497, CYPRUS: STATUS OF U.N. NEGOTIATIONS AND RELATED ISSUES 18 (2007).

304. The European Commission has proposed labeling guidelines, but has not yet enforced them. *See supra* notes 40–41.

labeling of these products, the several decades of contrary E.U. practice are themselves important state practice on what international law requires in this regard.