



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES  
POLICY DEPARTMENT



**Occupation/annexation  
of a territory:  
Respect for  
international  
humanitarian law and  
human rights  
and consistent EU policy**

DROI



STUDY

# **Occupation/annexation of a territory: Respect for international humanitarian law and human rights and consistent EU policy**

## ABSTRACT

Situations of occupation are often among the most difficult conflicts to resolve, in particular if the occupied territory is also illegally annexed. Legally speaking, an illegally annexed territory is occupied. Third parties (like the EU) have an obligation to not recognise an illegal annexation and to not assist in the continued occupation and annexation. An occupying power has limited authority over the occupied territory under international humanitarian law (IHL), but has nevertheless an obligation to respect not only IHL but also international human rights law. The EU has so far not adopted a consistent policy in these cases, but there are elements of good practice that can be used. A future EU policy should be based on non-recognition – as has been the case with regard to Crimea. The EU and its member states should refuse to recognise legislative and other changes in the occupied territory, they should refrain from engaging in economic and other activities that sustain the occupation and they should seriously consider sanctions against the responsible government.

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This paper was requested by the European Parliament's Committee on Subcommittee on Human Rights.

English-language manuscript was completed on 30 June 2015.

Printed in Belgium.

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This paper will be published on the European Parliament's online database, '[Think tank](#)'.

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ISBN 978-92-823-7550-1(PDF) doi:10.2861/80851(PDF)

ISBN 978-92-823-7549-5(print) doi:10.2861/039912(print)

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## 1 ABBREVIATIONS

ACAA	Agreement on Conformity Assessment and Acceptance of Industrial Products
AIDA	Association of International Development Agencies
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
CERD	UN Committee on the Elimination of Racial Discrimination
CFSP	Common Foreign and Security Policy
COJUR	Public International Law Working Party of the Council
ECCP	European Coordination of Committees and Associations for Palestine
ECHO	The European Commission's Directorate General for Humanitarian Aid
EEAS	European External Action Service
EEZ	Exclusive Economic Zone
ENI	European Neighbourhood Instrument
FPA	Fisheries Partnership Agreement
GCIV	Fourth Geneva Convention relative to the Protection of Civilian persons in Time of War
GRM	Gaza Reconstruction Mechanism
HIVR	The Land Regulations of the IV Hague Convention of 1907
HRC	UN Human Rights Council
ICCPR	International Covenant of Civil and Political Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IEA	International Energy Agency
IHL	International Humanitarian Law
IHRL	International Human Rights Law
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OP	The occupying power
OPT	Occupied Palestinian Territory
OT	Occupied territory
TRNC	Turkish Republic of Northern Cyprus
UN	United Nations

UNGA	United Nations General Assembly
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNSC	United Nations Security Council

## 2 EXECUTIVE SUMMARY

### Introduction

Situations of occupation are often among the most difficult conflicts to resolve, in particular if the occupied territory (OT) is also illegally annexed. Some of the most important conflicts from the EU point of view involve an occupation – the Middle East conflict and the conflict between Russia and Ukraine – and there is one situation of occupation ongoing within the European Union – Northern Cyprus, and yet another situation on the doorstep of Europe – the occupation of Western Sahara. While each situation has its own characteristics, the international law governing them is the same.

This report covers both international humanitarian law and human rights, but since there is little in human rights law that is particular for occupied and annexed territories, human rights will be covered only to the extent relevant for these situations. The report will further provide an overview of the relevant legal instruments and policies of the EU. The report will conclude with some recommendations for further action, in particular in order to make EU policy and action more coherent, consistent and effective.

### Legal framework

Territory over which a foreign power state has taken control is occupied. An occupation is supposed to be a temporary status, but current reality shows that it may last for decades. A state of occupation is not necessarily illegal in and of itself, and the occupying power (OP) has a certain authority under international law.

An occupied territory may also be illegally annexed. Annexation means that the territory is incorporated into another state and is being regarded by that state as a part of its territory, like the Golan Heights, East Jerusalem, Western Sahara and Crimea. Under current international law, annexation may only be carried out after a peace treaty, preferably after a referendum.<sup>1</sup> Annexations which do not correspond to these requirements are illegal. A similar situation is when the OP in occupied territory behaves in a way which suggests that it is trying to create facts on the ground that make a settlement impossible – a de facto annexation. For the purpose of international law, illegally annexed territories are still occupied, that is, the international law regime pertaining to occupation applies to these territories.

A number of different legal regimes (sets of rules) are applicable to occupied territories. International humanitarian law (IHL), and in particular the Land Regulations of the IV Hague Convention of 1907 (HIVR) and the IV Geneva Convention (GCIV) as well as the 1st Additional Protocol (API) contain rules specially designed for occupation. They limit the authority of the occupying power and balance the interests between the occupying power, the ousted sovereign and the civilian population. Although all states recognise these rules, the concrete applicability may be denied, in particular by a state that has illegally annexed the territory in question.

The law of occupation is supposed to apply only on a temporary basis. Therefore, the occupying state may not introduce its own laws, except to the extent that is necessary in order to protect security, public order and civil life. This means that, in principle, the law of the occupied state shall generally remain in force. However, it may be modified under some circumstances, for instance in order to enable the occupying power to fulfil its obligations under the IV Geneva Convention.

<sup>1</sup> In some rare cases, the right to self-determination may favour of a right of a certain group to join another existing state even in the absence of acquiescence of the territorial state. This will be discussed briefly with regard to Crimea in section 3.1.



In addition, human rights apply during occupation, as always, even though the precise relation between human rights law and IHL is not settled. Another important body of law is the right of self-determination – provided for in both the UN Charter and the two UN human rights covenants of 1966 – and the related right to permanent sovereignty over national resources.

Private property rights shall be respected, and this includes foreign investments. Under economic, social and cultural rights, it is the duty of the occupying power to provide for education, health care, etc. The population of the occupying power cannot be transferred to the occupied territory, according to article 49, GCIV. This means that settlements in occupied territories are illegal.

Third states like the EU and its member states may not recognise an illegal annexation and may not assist in the continued occupation and annexation. Hence, it is illegal to enter into an agreement with an OP, which explicitly or implicitly recognises the annexation of the OT. Further, any such agreement should not strengthen the occupation, and should hence not support measures that strengthen the OP's control or facilitate the transfer of settlers into the territory.

Nevertheless, non-recognition should not go so far as to deprive the people in the occupied territory of all advantages derived from international co-operation. While official acts of an illegal occupying power are generally illegal and invalid, this invalidity cannot be extended to acts that affect people's daily lives, such as the registration of births, deaths and marriages or legitimate business activities.

A particularly debated question is whether an OP can use the natural resources of an OT. An occupying power may not dispose of the resources of OT for her own good. An OP may however use natural resources in its capacity as an occupying power, provided that it is for the benefit of the people of an OT *and* according to the wishes of that people.

### **Case studies**

The Russian occupation of **Crimea** from the end of February 2014 is a serious violation of Ukraine's sovereignty and constitutes an act of aggression. Therefore, the subsequent annexation of 18 March 2014 is null and void, and the continued occupation of Crimea is illegal. Consequently, third states must not recognise the Russian annexation of Crimea and must not assist the Russian government in maintaining this illegal situation. Since the annexation constitutes a violation of a basic, peremptory norm of international law, third states also have the right to impose sanctions.

The EU has been intensely engaged in the situation ever since the Russian takeover and has focused on efforts to reverse the annexation. On 20 March, the European Council declared that it 'strongly condemns the illegal annexation of Crimea and Sevastopol to the Russian Federation and will not recognise it'. The Council thus set the framework for continued EU action. Within that framework, a number of different measures have been taken, including diplomatic sanctions (like the cancelling of an EU Russia summit), asset freeze and visa ban for individuals and entities that have supported or benefitted from the annexation, an embargo on trade and investment in Crimea and an embargo on certain financial transactions with a number of Russian banks.

The **Occupied Palestinian Territory** (OPT) is governed by the IHL of occupation, including the Hague Regulations and the IV Geneva Convention, although Israel denies *de jure* applicability of the Geneva Convention. Since 1967, Israel has engaged in the planning, constructing and developing of settlements in the OPT, and there are now 150 'formal' settlements in the West Bank, including East Jerusalem, in addition to some 100 'outposts' in the West Bank. The whole structure of settlements dominates more than 40 percent of the territory, making the exercise of the Palestinian people's right to self-determination very difficult. Because settlements are scattered all across the West Bank, including East Jerusalem, the territory of the Palestinian people is divided into enclaves with little or no territorial contiguity. Israel's construction of settlements is a clear violation of article 49 (6) of the GCIV. As a direct or indirect result of the construction of settlements and the construction of the wall in the West Bank, many

Palestinian are forcibly displaced from their homes and lands after house demolitions, forced evictions of families/communities and land confiscation.

At the diplomatic level, the EU has repeatedly underlined its position that it does not recognise Israel's sovereignty over the occupied Palestinian territory (including East Jerusalem) and has condemned Israel's violations of IHL concerning the establishment and development of settlements. However, the implementation of diverse EU policies has not been consistent. For example, settlements have been eligible for funding or other forms of economic benefits through various EU programmes. In July 2013, the Commission adopted guidelines which exclude Israeli entities which are based or have activities in settlements of EU financial support (grant and loans). The aim of the Guidelines is 'to ensure respect of EU positions and commitments in conformity with international law on the non-recognition by the EU of Israel's sovereignty over the territories occupied by Israel since June 1967'.

Still there are concerns as to the legality of the continuing trade under the EU-Israel Association Agreement, which entered into force in 2000. Products which originate from the West Bank are not entitled to preferential treatment, but in practice, products are often marked as originating in Israel, even when the place of manufacture is in OPT. Moreover, the import itself to the EU is not prohibited even if the products are clearly identified as originating in settlements.

The EU fails to restrict the territorial scope of other cooperation agreements with Israel to territory within Israel's pre-1967 borders. The EU has not discouraged European companies to invest in businesses with links to settlements.

The EU is the biggest donor of financial assistance to the Palestinian authority as well as to Palestinian refugees through the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). By contacts with Israeli authorities donors engage with the unlawful planning regime of the occupying power and, in general, submit to the Israeli permit regimes for e.g. movement/aid delivery and construction.

In 1966 the General Assembly urged Spain to organise a referendum on **Western Sahara's** right to exercise its right to self-determination. On 6 November 1975, Morocco occupied and later annexed the territory. The Moroccan aggression, occupation and annexation of the territory constitutes a serious violation of international law, and the people of Western Sahara retain their right to self-determination. Hence, the status of Western Sahara is that of occupied territory, as determined by the UN in res 34/37 of 1979. Since the annexation is illegal, the relationship between Morocco and Western Sahara is occupation, and Morocco can only make such alterations of laws, property relations, etc, as are allowed under the law of occupation.

Despite that, very considerable social and political changes affect the lives of the Sahrawi. A very large part of the population has fled to refugee camps, while settlers have moved in, Moroccan and foreign investors have been allowed in and new infrastructure has been built to suit the needs of these newcomers.

The EU and Morocco have very close ties, based on the Association Agreements of 2000. Morocco is the largest recipient of European Union funds under the European Neighbourhood Policy and in 2008, Morocco became the first country in the southern Mediterranean region to be granted the Advanced Status.

The exploitation of natural resources has been a recurring issue of debate for a number of years, including fishing under the Fisheries Partnership Agreement (FPA). While the FPA does not say so explicitly, it was meant to cover, and has indeed been applied to, the waters outside of Western Sahara. There have been no serious efforts on part of the EU to ensure that the arrangement benefits the people of Western Sahara or is in accordance with their wishes.

The EU has, from time to time and in different ways, expressed concerns about the situation, including human rights, but its language is rather muted. The EP has been a bit more outspoken, including reaffirming 'the right of the Sahrawi people to self-determination, which should be decided through a democratic referendum, in accordance with the relevant UN resolutions'.

### **Existing EU policies**

What is particular about a situation of occupation (and illegal annexation) is that the territory in question is controlled by a foreign power. Although the EU has no policy on occupied or annexed territories, there is practice developing on non-recognition and the consequences thereof, not least after the case of Crimea:

- an unequivocal statement that the annexation will not be recognised
- prohibition of measures like investment that might support the annexation, including support for economic activity in the occupied territory under the aegis of the occupying power
- sanctions against the occupying state, in case the occupation (or annexation) is in violation of international law
- sanctions amounting to asset freeze and visa ban against those individuals who are responsible for the annexation, or who benefit from it.

As has been explained in the case studies, there have been sanctions against private parties benefitting from the annexation of Crimea, but none against private parties benefitting from the annexation of Western Sahara or the situation in the OPT. The same applies to sanctions against the responsible states and individuals; while there are sanctions in place against the Russian state and Russian private entities – restrictions of investments and trade, asset freeze, visa ban and various diplomatic sanctions - there are no similar measures against Israel or Morocco.

Among the existing guidelines that may be applicable in a situation of occupation, the most relevant guidelines are the Guidelines on Promoting Compliance with International Humanitarian Law. It is often important to point out that the IHL rules of occupation apply. In all of the cases mentioned in this report, the occupying power refuses to admit the *de jure* application of IHL relevant to occupation.

All of the principles on human rights are also relevant. Occupying powers need to be reminded that human rights apply also in cases of occupation and that an occupying power needs to comply with both its own human rights obligations (including treaties to which it is a party) and those applicable to the occupied territory (including treaties binding on the lawful sovereign).

According to article 21 of the Treaty on European Union, the EU 'shall ensure consistency between the different areas of its external action and between these and its other policies'. For issue areas where there are no guidelines, consistency is harder to reach. That has been particularly clear regarding issues related to non-recognition. The inconsistencies have been pointed out by many commentators who have compared the EU's policy with regard to Crimea, the OPT, the TRNC and Western Sahara.

### **Recommendations**

EU policy on illegal annexation should be governed by non-recognition. Such a policy can be gleaned and amalgamated from existing instruments and best practices – in particular from the Crimea crisis but also from policy with regard to the OPT.

- Whenever an illegal annexation or occupation occurs (including creeping annexation), the EU should clearly state that the annexation/occupation is illegal, and that the EU will never recognise it.

## Occupation/annexation of a territory: International humanitarian law and human rights and consistent EU policy

- The EU should explicitly limit the application of any bilateral treaty with an occupying power to its internationally recognised territory. Any occupied/annexed territory must be excluded from the scope of the treaty, including products and entities in illegal settlements in occupied territory. Effective control mechanisms, such as rigid rules-of-origin or labelling requirements, must be set up to guarantee that products or entities originating in the occupied/annexed territory do not benefit from EU trade or financial support. Already existing legal mechanism to this end must be fully implemented in practice. Exceptions can be made for agreements that aim to assist the legitimate local population.
- As for treaties involving economic cooperation, the EU should allow local non-settler populations to benefit from the arrangements, provided that any such arrangement is both in the interests of such peoples and in accordance with their wishes.
- As a general rule, the EU and its member states should not recognise legal acts including new laws introduced by an illegal OP. However, exceptions should be made to protect the good faith interests of private parties, in particular the legitimate local population. The legal effect of quotidian acts should as a rule be recognised, for instance birth certificates and contracts which have no repercussions on the occupied people's permanent sovereignty over their natural resources and which do not affect existing property arrangements or other protected rights of the original inhabitants.
- In line with the duty of non-recognition, the EU should never place its diplomatic missions to the occupying power on occupied territory. The EU should adopt a systematic policy of no official visits with representatives of an occupying power in occupied or annexed territory, unless, as appropriate, the purpose is to hold the occupying power to account (for instance by monitoring respect for human rights and IHL), to assist EU citizens in distress or for the purpose of supporting the legitimate local population (excluding settlers). At all times, the non-recognition must be made clear<sup>2</sup>
- The EU should discourage EU businesses/enterprises from commercial and investment links with settlements by means of formal advice or a prohibition.
- The EU should continue to support the legitimate local populations in occupied territories through development assistance and similar activities, but should be careful to not support illegal settlements and other projects that reinforce the occupation.
- As regards development aid, the EU should provide clear guidance on the cooperation approach with the occupying power regarding breaches of international law, human rights violations and demolition of EU-financed infrastructure. The EU should initiate a legal review of the possibility to demand compensation, if EU-funded projects are destroyed by an occupying power.
- The EU should continue to promote the application of IHL. Relevant EEAS missions should be fully informed of IHL and guarantee the obligations of an occupying power under IHL whenever relevant. In its communications with responsible authorities, EU representatives should make specific references to the rules applicable to occupation, whenever relevant.
- The EU should also continue to promote international human rights standards and hold OPs to account for their behaviour in occupied territories, regardless of whether the OP in question holds human rights obligations to be applicable or not. In particular, the EU should note that the exercise of

<sup>2</sup> This means, for instance, that missions to Israel shall remain in Tel Aviv and that visits shall not be made to Western Sahara for the purpose of exploring economic investments in collaboration with the Moroccan government.

the freedom of expression and the right of peaceful assembly will often be limited by an occupying power.

- In order to help protecting human rights of the population concerned, the EU should support human rights defenders and civil society organisations.
- Restrictive measures (sanctions) should be applied to illegal occupants and to individuals and private parties that contribute to an illegal occupation. Measures may also be applied to individuals and private parties that merely benefit from such an illegal occupation, at least to such an extent that the benefit is extinguished. Such decisions must clarify the reasons for the introduction of sanctions against each target.
- The EU and its member states should, whenever possible, prosecute officers of an illegal occupant as well as other parties involved for war crimes and other crimes, including the crime of pillaging.
- In its political and diplomatic efforts to resolve conflicts involving illegal annexation, the EU should make it a paramount consideration that such situations are conflicts between an aggressor and a victim, in which the victim is usually the weaker party. The EU should not support a solution that has not been agreed freely and without coercion.
- Whenever a situation of occupation is on the Union's agenda (be it the Council and its working parties, the Commission or Parliament), a legal assessment should be available to policy makers. That should be provided by the respective Legal Services and, in the case of the Council and its working parties, preferably by the Public International Law Working Party (COJUR).
- The European Parliament should refuse to give its assent to treaties and other agreements and measures which violate the obligation of non-recognition and/or which support an ongoing illegal occupation or annexation.
- In its resolutions on country situations that involve occupation and annexation, the European Parliament should clarify its view on the status of the territory in question, and should state that both human rights law and IHL apply to the occupied territory and that an illegal annexation will never be recognised.
- The European Parliament and its members should regularly ask the Commission and other responsible EU bodies about information regarding the implementation of agreements with and projects in occupying states, in order to ensure that no illegal occupation or annexation is recognised or supported.
- Members of the European Parliament should ask the relevant national authorities of their home states, such as customs authorities, about the implementation of agreements with and projects in occupying states, in order to ensure that no illegal occupation or annexation is recognised or supported.

### 3 INTRODUCTION

Situations of occupation are often among the most difficult conflicts to resolve, in particular if the occupied territory (OT) is also illegally annexed. Third states, which may have political and legal interests in the situation, need to take international law into account in many ways: in order to not support an illegal situation, in order to protect the rights of the populations concerned and in order to look after their own legally protected interests.

Some of the most important conflicts from the EU's point of view involve an occupation – the Middle East conflict and the conflict between Russia and Ukraine – and there is one situation of occupation ongoing within the European Union – Northern Cyprus. Yet another situation of occupation on the doorstep of Europe is the occupation of Western Sahara. Around the Black Sea, there are four frozen conflicts involving occupation, or situations similar to occupation – Transnistria, Abkhazia, South Ossetia and Nagorno Karabakh.

While each situation has its own characteristics, the international law governing them is the same. For keeping the European Union's credibility, it is crucial, and therefore necessary, to treat like cases alike.

It is difficult for an external actor – an organisation, a third state or a group of third states – to reverse an occupation. With the exception of the occupation of Crimea, all of the examples mentioned above have persisted for decades. However, there are also contrary examples. The Indonesian illegal annexation and occupation of East Timor was reversed around the turn of the millennium, at least partly due to external pressure, the Iraqi annexation of Kuwait in 1990 was halted after little more than six months and the occupied territory of South-West Africa became the independent country of Namibia in 1990. It is submitted that a more consistent and effective policy of third parties, including the EU, may have both a remedying and a deterrent effect. In addition, it is always necessary to make the rights and interests of the victims of an occupation a primary consideration.

This report will explain the legal regimes applicable to situations of occupation, and it will provide case studies of Western Sahara, Palestine and Crimea. This overview includes human rights, but since there is little in human rights law that is particular for occupied and annexed territories, this report will cover human rights only to the extent relevant for these situations. The report will further provide an overview on the relevant legal instruments and policies of the EU. While there is no normative EU instrument focusing on occupation as such, a number of instruments are relevant, including the guidelines on human rights and on international humanitarian law (IHL) as well as the basic principles and guidelines on restrictive measures (sanctions). Furthermore there is practice – unfortunately not very consistent – from which a policy can be constructed. The report will conclude with some recommendations for further action, in particular in order to make EU policy and action more coherent, consistent and effective.

## 4 LEGAL FRAMEWORK

### 4.1 Occupation and annexation

The normal state for any piece of territory is to be under the control of a lawful sovereign. Territory that is not under the control of the lawful sovereign could have any of the following status:

- Territory over which a foreign power has taken control is occupied. That is the case regardless of whether that power has declared that it is an occupation or not, and regardless of whether the occupation has met with armed resistance or not<sup>3</sup> An occupying power (OP)<sup>4</sup> has legal responsibility for the occupied territory, including the responsibility to respect, protect and promote human rights<sup>5</sup>. An occupation will cease only when the occupying power ends the occupation (as happened in Iraq in 2004)<sup>6</sup> or when the territory is ceded lawfully from the original sovereign to the OP. An occupation is supposed to be a temporary status<sup>7</sup>, but current reality shows that territory may be occupied for decades; the West Bank and Gaza have been occupied for 48 years. Occupation is not necessarily illegal as such, as will be discussed below; territory may be occupied by a state that is involved in a defensive war, as happened in Iraq in 1991. An occupation is illegal if it is the result of an armed attack (aggression) or if the occupation has evolved into an illegal annexation. Nevertheless international humanitarian law, including the rules pertaining to occupation, applies equally to all parties, both victims and aggressors. Therefore, an occupying power has both rights and obligations under international humanitarian law, in addition to the obligation to comply with human rights obligations.
- An occupied territory may also be illegally annexed, as will be explained in section 2.4. Annexation means that the territory is incorporated into another state and is being regarded by that state as a part of its territory. Among contemporary examples, one finds the Golan Heights, East Jerusalem, Western Sahara and Crimea. Under current international law, annexation can only be carried out after a peace treaty, and preferably after a referendum<sup>8</sup>. Annexations which do not correspond to this requirement – like those just mentioned – are illegal. For the purpose of international law, they are therefore still occupied. This means that the IHL rules pertaining to occupation apply to these territories. In order to be precise, it is useful to call such territories ‘occupied and illegally annexed’.
- Territory may also be under the temporary control of a foreign sovereign during an ongoing armed conflict when the tides of war are shifting. It is controversial whether this situation is to be considered occupation under the Geneva Conventions. At any rate, as will be explained below, a state is bound to respect civilians and its human rights obligations even in such a fluid situation<sup>9</sup>. At least some of the responsibility for events taking place in such territory will have turned from the lawful sovereign to the party in temporary control of the territory.

<sup>3</sup> Articles 42 and 43, HVR; article 2(2), GCIV. See also Benvenisti, E., *The International Law of Occupation*, 2 ed., OUP, Oxford, 2012, p. 50.

<sup>4</sup> The conventions use the word ‘occupying power’ rather than ‘occupying state’ and I will conform with that usage.

<sup>5</sup> Legal Consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports, 1971, p. 16 at p. 54, para.118; Draft Articles on State Responsibility with Commentaries, YBILC, 2001, Volume II (Part Two), p. 68.

<sup>6</sup> Some commentators claim that the occupation lasted longer, since the coalition retained control over Iraq even after that date.

<sup>7</sup> The IV Geneva Convention from 1949 envisaged that occupation last no more than a year, but the First Additional Protocol does not contain an end date.

<sup>8</sup> As will be explained below, the right to self-determination is a paramount consideration in this context.

<sup>9</sup> As for obligations under IHL see, for instance Part III, Sections I and II of GCIV.

- Territory may further be controlled by an armed group. This could be a rebel group which wants to take over control of the government of the state in question or it could be a group that wants to secede from the state and form a new state or have the territory transferred to another state. The latter form of groups is often called national liberation movement; this term suggests that the group has an amount of legitimacy, which may often be the case. There is no term in international law for such territory. One of the most important consequences of this situation is that the lawful sovereign may not be responsible in general for such areas, including for the respect for human rights, as it would if it had control. The group in control will have such responsibility under IHL while it is controversial whether international human rights law obligations bind non-state actors<sup>10</sup>. In some cases, the armed group in power in such a territory may be under the control of or under the influence of a foreign power. As has been held by the European Court of Human Rights, Turkey is legally responsible for human rights violations committed in the non-recognised 'Turkish Republic of Northern Cyprus' (TRNC)<sup>11</sup>. It is possible that the situation is similar in the self-proclaimed peoples' republics in Donetsk and Lugansk.
- Colonies are under a special regime. There was no unambiguous prohibition of the acquisition of territory by force at the time when the colonies were acquired. However, under modern international law, it is a violation of the right to self-determination to keep such territories under colonial control (see below). A colonial power is generally referred to as 'administering power' and has the responsibility to assist the people in the colony to reach full self-determination, which usually means independence. The vast majority of colonies have now reached independence, with Western Sahara as a notable exception.
- In addition, there is also the category of territory under international administration, like Kosovo 1999-2008 or East Timor, 1999-2002<sup>12</sup>.

## 4.2 Applicable regimes in general

A number of different legal regimes (sets of rules) are applicable to occupied territories.

International humanitarian law (IHL), and in particular the Land Regulations of the IV Hague Convention of 1907 (HIVR) and the IV Geneva Convention (GCIV) as well as the 1st Additional Protocol (API) contain rules specially designed for occupation. They limit the authority of the occupying power and they balance the interests between the occupying power, the ousted sovereign and the civilian population. The IHL rules on occupation apply in addition to human rights law (see below) and protect many interests which are also protected by human rights, including civil rights like the prohibition of torture.

Whereas all states recognise these rules, the applicability of IHL rules on occupation in a concrete situation may be denied, in particular by a state that has illegally annexed the territory in question, like Western Sahara or Crimea. Morocco and Russia believe that the occupied territory in question is not occupied but a part of their respective sovereign territory.

Of course, IHL applies also during armed conflict, i.e. during actual combat, and it is therefore relevant whenever fighting erupts, as has been the case from time to time in the occupied Palestinian territory

<sup>10</sup> The prevailing — but not unchallenged — view is that only states are responsible for human rights violations. Nevertheless, non-state actors can be criticised for 'human rights abuses', which is the term generally used for acts which contravene human rights standards but which are carried out by actors that, strictly speaking, are not bound by such obligations.

<sup>11</sup> *Loizidou v. Turkey*, Application no. 15318/89, Judgment, 18 December 1996, European Court of Human Rights.

<sup>12</sup> East Timor is a UN member since 2002 under the name Timor Leste, while Kosovo has been recognized as a sovereign state by most but not all EU members. It is not a member of the United Nations.



(OPT), including during Operation Protective Edge in Gaza in 2014. However, the law of occupation continues to apply, in order to cater for the needs of the civilian population<sup>13</sup>.

A crucial aspect of the law of occupation is that occupation is supposed to be a temporary affair. This entails that the occupying state may not introduce its own laws, except to the extent that is necessary for certain legitimate purposes. Article 43 of HVR provides that 'the occupant ... shall take all the measures in his power to restore, and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country'<sup>14</sup>. This strong preference for the conservation of domestic law was modified a bit in 1949. Article 64 (3) of GCIV reads:

*The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.*

This means that the law of the occupied state may be modified in order to enable the occupying power to fulfil its obligations under the IV Geneva Convention. In practice, it has not always been possible to maintain laws in force, which can be outdated, and, worse, may be in violation of human rights<sup>15</sup>.

In addition, human rights apply during occupation, as always<sup>16</sup>, even though the precise relation between human rights law and IHL is not settled. In the authoritative view of the International Court of Justice, IHL is *lex specialis*, meaning that IHL trumps human rights in cases of conflict<sup>17</sup>. However, it is also possible to see them as complementary<sup>18</sup>. At any rate, from a practical perspective, it is clear that it is lawful for an occupying power to introduce certain measures to protect its own security. Further, with a few notable exceptions, human rights are never unlimited. These exceptions include the right to be free from torture and other inhumane or degrading treatment or punishment, the right to life, the right to be free from slavery or servitude and the right to be free from retroactive application of penal laws<sup>19</sup>. Apart from these, human rights can be restricted for certain legitimate purposes, such as public order and security. In time of war or other emergency, a state may formally derogate from its human rights obligations<sup>20</sup>. These limitations have to be applied under international law, which restricts the right to introduce limitations or to derogate. By contrast, no derogations can be made from IHL<sup>21</sup>. For the purpose of this report, it is not

<sup>13</sup> See Dinstein, Y., *The international law of belligerent occupation*, Cambridge University Press, Cambridge, 2009, p. 100.

<sup>14</sup> The convention was drafted in French, which is the only official language of the convention. The most common English translation uses the expression 'public order and safety', which is a quite poor translation of '*l'ordre et la vie publics*'. I subscribe to the expression 'public order and civil life', which is the expression used by Benvenisti. Benvenisti, E., *The International Law of Occupation*, 2 ed., OUP, Oxford, 2012.

<sup>15</sup> During the occupation of Iraq, the occupying powers introduced a number of new laws in many fields. While this assumption of power was controversial, it was still generally recognised that it was at least necessary to change laws that were not in conformity with international human rights standards.

<sup>16</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136; 178, para. 106.

<sup>17</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, 1996, p. 226, at p. 240. See also Dinstein, supra, note 13, pp. 85-86.

<sup>18</sup> Arai-Takahashi, Y., *The law of occupation: continuity and change of international humanitarian law, and its interaction with international human rights law*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 419-422.

<sup>19</sup> The lists of non-derogable rights vary between the conventions, but these rights are non-derogable in both the European Convention on Human Rights and the UN Covenant on Civil and Political Rights.

<sup>20</sup> For instance, article 4 of the International Covenant on Civil and Political Rights provides that, under some stated conditions, a state may 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, [...] take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation [...]'.  
<sup>21</sup> See Dinstein, supra, note 13, p. 83.

necessary to settle the question whether IHL has priority or whether the two bodies of law apply concurrently.

Another difficulty is that it is controversial if and to what extent human rights apply outside a state's territory<sup>22</sup>. The US and Israel take the general view that human rights obligations only apply within the state's borders. While the scope of application differs between different conventions, the established majority view – including by the International Court of Justice (ICJ)<sup>23</sup> – is that human rights do apply globally, but that the concrete extraterritorial obligations of states depend on the particular situation and may differ for different rights<sup>24</sup>. This is also the view adopted by the European Court of Human Rights<sup>25</sup> as well as most if not all EU member states. This means the following: Whereas the prohibition of torture will apply universally, the obligation to guarantee the right to best attainable health can only apply fully to a state that is in full control over a piece of territory, such as an occupying power. For territory that has been illegally annexed, however, the state in question will consider such territory to be under its sovereignty, and therefore it should consider itself fully responsible for all human rights<sup>26</sup>.

As mentioned, human rights apply in general during occupation. International conventions on human rights cover many aspects, such as freedom from torture (protected by the UN Convention against Torture), the right to take part in government, freedom of expression, the right to a fair trial, liberty of movement, freedom from discrimination, the right to education and the right to health-care. It is beyond the scope of this report to elaborate on all these rights. However, some particular aspects will be mentioned in the next section.

An added difficulty in some situations is that a part of a territory may be under the effective control of a non-state actor, such as Hamas in Gaza, the Palestinian authority on the West Bank and Polisario in parts of Western Sahara and in the Tindouf refugee camp. It is the established view that only states have human rights obligations. Arguably, a well-organised administration, like the Palestinian authority, has at least some human rights obligations under international law, regardless of whether one holds Palestine to be a state or not. At any rate, it is always possible to hold non-state actors politically responsible for the human rights situation. For non-state actors the term 'abuse' is often used to denote acts which contravene human rights but which may not be 'violations' in a strict legal sense.

Other norms of international law may also be applicable, for instance refugee law. Typically, the rules on internally displaced persons (internal 'refugees'; IDPs) may be more relevant, but with the exception of the Kampala Convention of the African Union, there is no body of law designed to address this particular situation; whatever legal norms apply to IDPs are the general rules of IHL and international human rights law (IHRL).

<sup>22</sup> See generally, Arai-Takahashi, *supra*, note 18, pp. 551-582.

<sup>23</sup> In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, at 180, para. 111.

<sup>24</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, paras. 108-113.

<sup>25</sup> *Al-Skeini v. United Kingdom*, App. No. 55721/07, Judgment, 7 July 2011, European Court of Human Rights.

<sup>26</sup> This may seem to produce the counterintuitive conclusion that human rights may be better protected if an illegal annexation is accepted. In practice, that is not the case, however, an effective occupation will mean that the occupying state has such an amount of control that it will need to guarantee almost all human rights obligations, anyway.

In addition to its own obligations, the OP – as the party responsible for the occupied territory – also has the obligation to respect the human rights binding upon the sovereign state of that territory, including human treaties to which that state is a party. The same applies also to human rights obligations under customary international law. Since customary international law is in most cases is of less practical relevance, this report will not explain that concept.

Another important body of law that needs to be mentioned is the right of self-determination – provided for in both the UN Charter and the two UN human rights covenants of 1966. Common article 1 of the two UN covenants provides that ‘[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’ In addition, ‘[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources [...]’ This right to permanent sovereignty over natural resources applies also during occupation, as will be discussed below. Lastly, article 1 provides that all state parties shall respect and promote that right, which suggests that there is an obligation also for third states, not only a state that denies a people its self-determination. In addition, the authoritative Friendly Relations Declaration of the UN General Assembly states that ‘[e]very State has the duty to refrain from any forcible action which deprives peoples [...] of their right to self-determination and freedom and independence<sup>27</sup>. This means that a state that uses force against a people that seeks independence is violating international law.

The right of self-determination clearly applied to former colonies, as well as to trust territories under the UN Charter and, arguably, also to mandates under Article 22 of the Covenant of the League of Nations<sup>28</sup>. The Friendly Relations Declaration states that ‘[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the state administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination [...]’ This means that colonies that have not gained full independence, like Western Sahara and like East Timor until 2002, retain their separate status, and the same applies to former mandates, such as the occupied Palestinian territories (see section 5.2). For other territories, the right of self-determination has to be balanced with the right to territorial integrity. The Declaration appears to preclude independence for a people that is ‘possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour’. This means that as long as the government represents the people in a reasonable way, there is no right to secede. Therefore, there is a clear preference in international law for other arrangements, such as federalism, autonomy, minority rights, etc., rather than secession. As will be discussed in section 3.1, it is for that reason that the right of self-determination cannot provide a legal basis for secession of Crimea from Ukraine, neither to independence nor to annexation to another state.

## 4.3 Applicable rules

### 4.3.1 Basic rules of occupation

Occupation is a temporary status, even if it may last for several years. Therefore, an occupying power shall, as a main rule, respect the laws of the occupied territory. This rule is subject to the above-mentioned exceptions of changes necessary for the security of the OP as well as for public order and civil life, as well as changes necessary to respect other provisions of IHL and human rights. Further, it follows from the temporary nature of occupation that all treaties and other international obligations of the legal sovereign continue to apply, now under the responsibility of the occupying power, which is also bound by its own obligations, to the extent that they apply beyond their territory (as is the case for human rights).

There are a number of rules under IHL that specifically aim to protect the civilians under the control of a belligerent, including under occupation. These rules come from the Fourth Hague Convention (HIVR), the

<sup>27</sup> UNGA Res 2625(XXV) 1970.

<sup>28</sup> The Covenant never uses the term ‘self-determination’, but it was held by many that the ultimate purpose of the mandate system was to facilitate independence. As for the mandate of Palestine, which is relevant for section 3.2, it is clear that the UN General Assembly decided for a two-state solution, with one Jewish and one Arab state. See the Plan of Partition, attached to Resolution 181(III), 29 November, 1947.

Fourth Geneva Convention (GCIV) and from the First Additional Protocol to the Geneva Conventions (API), as well as from international customary law<sup>29</sup>. They frequently cover issues that are also addressed more generally by human rights. A few aspects will be mentioned here:

Private property rights shall be respected, and this includes foreign investments<sup>30</sup> (article 46, HIVR)<sup>31</sup>. Destruction of private property is prohibited, unless 'rendered absolutely necessary by military operations' (article 53, GCIV).

It is also, in principle, the obligation of the OP to respect the civil and political rights of all inhabitants of the occupied territory, including freedom of expression, freedom of assembly, liberty of movement, and the right to participate in political decisions. It is, however, clear that an OP has a right to limit these rights, in particular when its security may be threatened. In addition to the right to derogate, for instance under article 4 of the International Covenant on Civil and Political Rights (ICCPR), most human rights can be limited for purposes of security or other legitimate reasons.

During occupation, including illegal annexation, there will likely be discontent among the population. As indicated, the OP has a right to derogate or limit the freedom of expression and the right to peaceful assembly if it genuinely believes that to be necessary in order to protect its security. Such limitations have to be proportionate and carefully circumscribed<sup>32</sup>. However, the prohibition of torture and basic fair trial rights still apply. These rights are also protected by IHL: article 32, GCIV, regarding torture and Articles 65-77 GCIV regarding fair trial guarantees. The freedom from arbitrary detention in human rights law (Article 9, ICCPR) can be limited and derogated from; there are safeguards in IHL on the deprivation of liberty (Article 78, GCIV). It is also pertinent to mention that the right to remedy is without exceptions<sup>33</sup>.

The obligation to respect human rights also includes economic, social and cultural rights<sup>34</sup>. This means that it is the duty of the occupying power to provide for education, health care, etc. Again, these rights can be limited or difficult to provide when the security situation is uncertain. In practice, these services may be provided by international organisations, such as the UN agency UNRWA in the Occupied Palestinian Territory (OPT) (see 5.2), though the responsibility remains that of the occupier. IHL also provides that the OP has responsibilities regarding the provision of food, medical services and shelter (Articles 55 and 56, GCIV, Articles 14 and 69, API).

The population of the occupying power cannot be transferred to the occupied territory (article 49, GCIV). To do so is a violation of international law, for which the OP is responsible<sup>35</sup>. This means that settlements

<sup>29</sup> International customary law is formed from state practice and the legal conviction (*opinion juris*) of states.

<sup>30</sup> Foreign investments can be expropriated under certain circumstances.

<sup>31</sup> It may be disputed, what private and public property is. In particular regarding land that has been used as commons by a community.

<sup>32</sup> It is very difficult to set out any precise borders for the authority to limit these rights, and a case by case assessment has to be made. This is a case in which human rights law will be relevant. According to the practice of the European Court of Human Rights, there it is generally not justified to limit the right to peacefully call for self-determination, unless there is incitement to violence. See Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies, p 21.

<http://www.coe.int/t/dghl/cooperation/media/publications/Guidelines%20crisis-20080828160132en.pdf>.

<sup>33</sup> See Arai-Takahashi, *supra*, note 18, p. 478.

<sup>34</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136: 181, para. 112.

<sup>35</sup> It can be argued that there is a distinction between settlements which have been planned or facilitated by the government and those that take place at the sole initiative of the settlers. See Dinstein, *supra*, note 13, p. 241. For a different view, see Arai-Takahashi, *supra*, note 18, p. 347; Crawford, J., *Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories*, Opinion, 24 January 2012, available at:

<https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>, p. 5.

in occupied territories are illegal<sup>36</sup>. Likewise, the population of the OT cannot be transferred from the OT (Article 49(1), GCIV). If the territory is illegally annexed, that shall not affect their right to remain, regardless of whether they become citizens (by choice or otherwise) of the OP. Hence, such deportations are violations of international law.

Whenever combat erupts between the occupying power and armed forces in the occupied territories, be they the defence forces of an occupied state or irregular forces, IHL becomes applicable. It is beyond the scope of this paper to set out the details of these rules, but it is nevertheless relevant to mention the most important principles.

First of all, a distinction between combatants and civilians has to be made. The main rule is that combatants but not civilians may be targeted. Combatants are members of regular armed forces or organised armed groups (guerrilla groups). Combatants have to distinguish themselves from civilians; otherwise they act perfidiously<sup>37</sup>. Civilians are generally not lawful targets, unless, and for such time as, they take a direct part in hostilities (article 51, API). In fluid situations, the distinction between a protected civilian and a lawful target is not easy to make, as has been evidenced in discussion on 'eliminations' or 'targeted killings' in the OPT. Whenever there is a risk that civilians or civilian property might be affected in attacks directed at legitimate targets, a proportionality judgment has to be made (article 51(5)(b), API). This means that 'collateral damage' may not be 'excessive in relation to the concrete and direct military advantage anticipated'. It is the duty of every commander to make such an assessment, though difficult. Furthermore, even the defending party has an obligation to not subject civilians to dangers (article 58 API), and the use of 'human shields' is prohibited (article 51(7), API) and constitutes a war crime. Nevertheless, an attacking power has to take the presence of civilians into account, even if they have been used as human shields in violation of IHL.

During occupation, civilians who rise up against the OP can be prosecuted, under laws introduced by the OP, for taking part in hostilities. This does not mean, however, that resistance to an occupation is unlawful under international law. On the contrary, resistance is lawful against an unlawful occupation, if it results from illegal use of force or if an illegal annexation has been made<sup>38</sup>.

### 4.3.2 Use of natural resources

A particularly debated question is whether an OP can use the natural resources of an OT. As mentioned, private property is protected during occupation, but resource extraction often takes place on public land. Since an OP does not have sovereignty over the occupied territory, the OP cannot use such natural resources arbitrarily for her own purposes<sup>39</sup>. As pointed out above, a basic premise of occupation is that the occupation is temporary and that the occupying power may not introduce permanent changes into the occupied territory. Furthermore, an OT is often a self-determination unit (a territory with a people that has the right of self-determination), and its people has a right to permanent sovereignty over its

<sup>36</sup> This does not necessarily mean that those who have moved there are culpable in a legal or even moral sense. Settlers in occupied Palestinian territory have full access to information and can make informed choices, but that may not be the case for settlers in other occupied territories. Cf also Benvenisti, E, *The International Law of Occupation*, 2 ed., OUP, Oxford, 2012, p. 313.

<sup>37</sup> Perfidy is a war crime under Article 8(2)(b)(xi) of the Rome Statute of the International Criminal Court.

<sup>38</sup> This applies to the collective, i.e., the people under occupation, and not necessarily to the individual. For individuals, international law prohibits war crimes and other crimes against international law. For instance, a person may be liable for the war crime of perfidy if he or she attacks under civilian guise.

Under certain circumstances, a party may bargain away the right to resistance. The so-called Oslo Agreements applied between the PLO and Israel contained relevant provisions in that regard. It is highly doubtful whether they are still fully applicable.

<sup>39</sup> 'It is also generally accepted that the occupier may not use the resources of the occupied territory for its own domestic purposes, but rather must use them "to the extent necessary for the current administration of the territory and to meet the essential needs of the population".' Crawford, *supra*, note 35, p. 25.

natural resources and the right to 'freely dispose of their natural wealth and resources', as provided in article 1(2) of the two UN Covenants on Human Rights. It is also pertinent here to point out that pillage is prohibited and may constitute a war crime<sup>40</sup>.

Nevertheless, an OP may under some circumstances use the natural resources of the territory. Article 55 of the Hague Regulations provides that '[t]he occupying State 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. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct'<sup>41</sup>. Further, under the law of occupation, an OP has a responsibility to uphold public order and civil life (article 43, HVR)<sup>42</sup>. This means that an OP must offer basic public goods to the population of OT, which entails that there must be income to pay for these goods. Consequently, the OP may use the resources of the occupied territory, provided that this benefit the people of that territory. This would be particularly appropriate with regard to renewable resources, like sustainable fishing.

The principle of self-determination requires that the people of OT should be able to influence how this is done. The rules governing the administration of non-self-governing territories ('colonies'), including Article 73 of the UN Charter, point in the same direction<sup>43</sup>, and so does the above-quoted right of a people to freely dispose of their natural wealth and resources. This was developed in 2002 in a legal opinion by the then UN Legal Counsel, Hans Corell<sup>44</sup>. The opinion concluded, with regard to oil exploration in the waters outside Western Sahara, that if 'further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of the occupied territory, they would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing Territories'<sup>45</sup>.

To summarise: An occupying power may not dispose of the resources of OT for her own good. However, an OP may enter into agreements regarding the use of natural resources of an OT as an occupying or de facto administering power, under the condition that this must be for the benefit of the people of the OT *and* that it must be in accordance with the wishes of that people. As will be discussed in the case study on Western Sahara, it is important that this last criterion not be distorted to 'benefit the local population'. 'Local population' excludes a very large proportion of the people of an OT, who may live in refugee camps beyond the control of the OP, and it may further include illegal settlers, introduced into an OT in violation of article 49 of the IV Geneva Convention. Original inhabitants of the local population are legitimate, but settlers are not.

<sup>40</sup> See article 47 of the Hague Regulations of 1907 and article 33 of the Fourth Geneva Convention of 1949 as well as Article 8(2)(b)(xvi) of the Rome Statute of the International Criminal Court.

<sup>41</sup> Dinstein, *supra*, note 13, pp. 213-218. This report takes a more restrictive view than Dinstein's to an occupant's right of usufruct, in particular as regards occupations that have developed into illegal annexations, *de jure* or *de facto*.

<sup>42</sup> See also a number of provisions in the GCIV which indicate positive obligations for the occupying power, such as Articles 50, 55 and 56.

<sup>43</sup> See Kontorovich, E., *Non-recognition and Economic Dealings With Occupied Territories*, Northwestern University School of Law Public Law and Legal Theory Series, NO. 14-46, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2494964](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494964), p. 9.

<sup>44</sup> UN Doc S/2002/161.

<sup>45</sup> It should also be noted that since 1995, the General Assembly has affirmed 'the value of foreign economic investment undertaken in collaboration with the peoples of Non-Self-Governing Territories and in accordance with their wishes in order to make a valid contribution to the socio-economic development of the Territories', Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories, UNGA Res. 50/33 of 6 December 1995, par. 2, annually reiterated.

## 4.4 Illegal annexation and occupation

### 4.4.1 Illegal annexation, secession and occupation

The UN Friendly Relations Declaration, which is a consensus interpretation of the UN Charter, declares that '[t]he territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force.' Such an annexation is a serious violation of international law and, as will be explained in the next subsection, it shall not be recognised. A similar situation is when the OP in occupied territory behaves in a way which suggests that it is trying to create facts on the ground that make a settlement impossible – a de facto annexation. Several commentators suggest that the Israeli settlements in the occupied West Bank amount to such illegal activities<sup>46</sup>.

Illegality attaches also to a new state which has come about as a result of illegal use of force by a state. The TRNC was the result of an illegal Turkish occupation of Northern Cyprus<sup>47</sup>. An illegal state can be democratic and respect the human rights of its inhabitants, and its existence can correspond to the will of the people. Such features may influence the attitude of third states, but they do not change the illegality of the creation of the new state.

As mentioned, temporary occupation is not necessarily illegal as such. However, occupation is illegal if it is the result of an illegal use of force, such as an armed attack<sup>48</sup>. It is also illegal if the OP has acted contrary to the basic principle that an occupation shall be a temporary affair, by annexing the territory as well as – arguably – if it pursues a policy aiming at its annexation.

### 4.4.2 Consequences of illegality, including for third states

As stated in the Friendly Relations Declarations, '[n]o territorial acquisition resulting from the threat or use of force shall be recognised as legal'<sup>49</sup>. Hence, states shall adopt a policy of non-recognition<sup>50</sup>. What is recognition? Recognition can pertain to the existence of a new state or the sovereignty of a state over a particular piece of territory, i.e., annexation. Recognition is a political act which, however, has legal implications, namely that the recognising state undertakes to treat the recognised entity as a state. Recognition can be done through a declaration or through an agreement with the new state, or – in case of annexation – through the conclusion of a treaty which includes the 'new' territory. In this context, it is pertinent to note that recognition by the European Union – which has its own legal personality – arguably does not constitute recognition by all of its member states<sup>51</sup>.

<sup>46</sup> See, for instance, UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 (John Dugard), 8 September 2003, E/CN.4/2004/6, par. 6; Talmon, *infra* note 50, p. 110.

<sup>47</sup> It may well be argued that the initial invasion in 1974 was a legal response to the military coup in Cyprus, but the ensuing occupation of a large part of the island cannot be justified.

<sup>48</sup> The Friendly Relations Declaration states that '[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter'. UNGA RES 2625 (XXV). The distinction between this passage and the one quoted above is that an occupation is illegal only if it is the result of illegal use of force, whereas any annexation resulting from the use of force is illegal, regardless of whether that use of force was legal or not. Hence, if the Six-Day War of 1967 was a legal war of self-defence (which is a controversial proposition), then Israel had a right to occupy the territories while in good faith pursuing a peace process.

<sup>49</sup> UNGA RES 2625 (XXV).

<sup>50</sup> See in general, Talmon, S., 'The Duty Not to "Recognise 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*, Tomuschat, Christian and Thouvenin, Jean-Marc, Brill, Leiden, 2005, 99–126; Turns, D., 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law', *Chinese Journal of International Law*, vol. 2, 2003, pp. 105–143; pp. 130–143.

<sup>51</sup> Wilde, R; Cannon, A.; Wilmshurst, E., *Recognition of States: the Consequences of Recognition or Non- Recognition in UK and International Law*, Summary of the International Law Discussion Group meeting held at Chatham House on 4 February 2010.

What constitutes recognition? Recognition is often explicit, but not always. In particular when it comes to territorial changes, recognition is often implicit. Nevertheless, not all contacts with a particular entity entail recognition. There are numerous examples of states (entities) which have negotiated, participated in multilateral organisations and agreements and even concluded bilateral agreements with each other without that having been perceived as recognition, and the same applies to recognition of territory. If an EU citizen is under duress at Crimea, it is necessary for the EU and/or the home state of that person to deal with the Russian authorities, and that need not, and should not, imply recognition of Russian sovereignty over Crimea. In order to avoid misunderstandings, it is often useful to state explicitly that one does not recognise an illegal annexation<sup>52</sup>. The EU's position regarding some illegal annexations – most recently Crimea – has been set out very clearly, as will be explained in section 3.1.

Since a state that has illegally annexed a piece of territory is an occupying power, it is bound by the law of occupation (in addition to international human rights law, of course). Since the authority of an OP is limited, third states should treat legal acts carried out by the OP as null and void, unless they can be justified under IHL or international human rights law or under the 'Namibia exception' (see below).

In case of an illegal situation, third states have a number of duties, usefully summed up by the ICJ in the advisory opinion regarding the wall (or barrier) in Occupied Palestinian Territory (which will be quoted in section 3.2). These duties entail that the EU and its member states shall not recognise an illegal annexation and that they shall not assist in the continued occupation and annexation. Further, they should cooperate to bring an end to the illegal situation. Hence, it is illegal to enter into an agreement with an OP, which explicitly or implicitly recognises the annexation of the OT; any such agreement that covers OT would have to clarify that the territory is not under the sovereignty of the OP. Further, any such agreement should not strengthen the occupation, and should therefore not support measures that strengthen the OP's control or that facilitate its transfer of settlers into the occupied territory. As averred by Professor Crawford, trade in 'settlement agricultural produce by a State – where the purchaser is aware that no benefit accrues to the local population and intends that this be the case – [...] at least [arguably...] aids and assists in an ongoing breach of Article 55<sup>53</sup>. The same may apply to the building of infrastructure within settlements<sup>54</sup>. However, this does probably not prohibit all dealings. It is likely that commercial and investment activities 'might be permitted as long as they do not serve to "entrench" authority over the territory' if they 'can be considered as routine government administration; or serve to benefit the local (i.e. Palestinian) population<sup>55</sup>. At any rate, third states may go further and impose sanction (see further section 5.4)<sup>56</sup>.

It is difficult to convince a state that has illegally annexed territory to admit that the law of occupation applies to that territory. Such an acknowledgement would logically mean that the state accepts that the annexation is null and void. However, it may still be possible to convince such a state to apply some of those principles *sine obliquo*, that is, without admitting that it is legally bound to do so. For instance, while

<sup>52</sup> 'More generally, active non-recognition—i.e. not just failing to recognise, but actively rejecting the validity of that which is being claimed—can have a constitutive effect in de-legitimising claims to statehood or alterations in the territorial entitlements of existing states'. Wilde, Cannon, Wilmschurst, *Recognition of States the Consequences of Recognition or Non-Recognition in UK and International Law*, 2010.

<sup>53</sup> Crawford, *supra*, note 35, p. 37.

<sup>54</sup> Crawford, *supra*, note 35, p. 59.

<sup>55</sup> Crawford, *supra*, note 35, p. 20.

<sup>56</sup> As mentioned by Crawford, a complete ban on trade with products from settlements would not contravene GATT or other trade obligations, since they only cover trade in goods from the territory of the state in question. Crawford, *supra*, note 35, p. 57.



Israel does not accept that it is obliged to apply the Geneva Conventions in the OPT, it nevertheless does apply these provisions *de facto* to some extent<sup>57</sup>.

The obligation to not recognise or support an illegal situation follows directly from international law, and it is not necessary for there to be a decision by the UN Security Council or any other organ, although such decisions are not infrequent and are generally helpful in clarifying a situation<sup>58</sup>.

#### 4.4.3 Effects of non-recognition on individuals

The Fourth Geneva Convention sets out the important principle that '[p]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced [...] by any annexation by the latter of the whole or part of the occupied territory' (article 47). This means that a person should not be put in a worse position because a territory has been illegally annexed.

Nevertheless, it is not a given that a non-recognition should affect all decisions made by the relevant 'illegal' authorities. There is important court practice which modifies the effects of non-recognition on the lives of individuals. In its seminal advisory opinion on Namibia, the International Court of Justice (ICJ) stated that

*The non-recognition of South Africa's administration of the Territory should not result in the depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.*

This has been called the 'Namibia exception'<sup>59</sup>. Cases in American and British courts suggest likewise, so as not to complicate the life of the current population<sup>60</sup>, as has case law in the European Court of Human Rights<sup>61</sup>.

<sup>57</sup> These territories have not been annexed, so the example is not perfect. However, it does show that a state can be convinced to apply rules that it does not feel bound to apply.

<sup>58</sup> Examples include Security Council resolution 478 (1980), 2 August 1980, para. 5 (non-recognition of the Israeli annexation of East Jerusalem) and Security Council resolution 662 (1990), 9 August 1990, para. 2 (non-recognition of the Iraqi annexation of Kuwait).

<sup>59</sup> Milano, E., The doctrine(s) of non-recognition theoretical underpinnings and policy implications in dealing with *de facto* regime.

<sup>60</sup> Wilde, R; Cannon, A.; Wilmschurst, E., *Recognition of States: the Consequences of Recognition or Non- Recognition in UK and International Law*.

<sup>61</sup> *Cyprus v Turkey* 2571/94 (2001) 96, 98. In a case before the European Court of Justice (C-439/92, 5 July 1994), the ECJ ruled that it could not accept import and phytosanitary certificates issued by authorities of the Turkish Republic of Northern Cyprus. That judgment should not be interpreted too far as regards the effects of non-recognition under international law. See further Stefan Talmon, *The Cyprus Question before the European Court of Justice*, *European Journal of International Law*, vol. 12, 2001, p. 727.

## 5 CASE STUDIES

### 5.1 Crimea<sup>62</sup>

#### 5.1.1 Background and legal status

The Russian occupation of Crimea from the end of February, 2014, constitutes a grave violation of Ukraine's sovereignty and constitutes an act of aggression, which is a serious violation of the UN Charter, of the bilateral treaty between Ukraine and Russia and a violation of the Helsinki Act of 1975. The subsequent annexation of 18 March, 2014, is null and void, as has been confirmed in UN General Assembly Resolution A/RES/68/262, in which the General Assembly

*6. Calls upon all States, international organisations and specialised agencies not to recognise any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognising any such altered status.*

The illegality of the annexation is generally acknowledged in the EU. The most credible argument for the annexation is the right of self-determination of the people of Crimea, allegedly expressed in a referendum of 16 March, 2014. However, two crucial factors are missing for that claim to be successful. First, the referendum was not free and fair, as confirmed by the UN General Assembly, which found that it had no validity. Second, as explained in section 2.2, the international community has generally endorsed secession only in circumstances where there is severe oppression, which was not the case in Crimea<sup>63</sup>.

It should be mentioned that the territory that is now under the control of rebels in Eastern Ukraine may also be thought of as being under Russian occupation, since the rebels may be acting under the control of Russia. If they are not under the control of the Russian government, the support given to the rebels will still constitute an illegal intervention into the internal affairs of Ukraine; however, under that condition, the Russian government will not be directly responsible for their actions.

#### 5.1.2 The implications of the occupation for the civilian population

There are numerous reports of human rights violations in Crimea, most of them directly related to the annexation. The latest report of the Office of the United Nations High Commissioner for Human Rights states that '[t]he situation in the Autonomous Republic of Crimea continues to be characterised by systematic human rights violations affecting mostly Crimean Tatars and those who opposed the March "referendum"'. Among the violations, one finds arrests and detention of Crimean Tatar activists, disruption of their civil society organisations and media outlets. Further '[t]he exercise of the rights to freedom of opinion and expression and of peaceful assembly continued to be curtailed, particularly for

<sup>62</sup> Under both Russian and Ukrainian law, Crimea and the city of Sevastopol are treated as different entities, but for the purpose of this report no distinction will be made.

<sup>63</sup> Further: Some Russian troop movements on the Crimean Peninsula, were in accordance with the bilateral agreement between Russia and Ukraine on the Russian naval base in Sevastopol, but many measures clearly went beyond that. Russia cannot rely on the controversial principle of the responsibility to protect, since no credible threat to the Russian-speaking population in the Crimea and elsewhere has been reported. Furthermore, Russia cannot rely on an invitation to intervene. Regardless of the circumstances surrounding former President Yanukovich's departure from Kiev, there was no invitation by Yanukovich to annex Crimea, and neither would Yanukovich had the right to cede Ukrainian territory to Russia.

Crimean Tatars'. In addition, there are limitations on the freedom of religion coupled with instances of police raids on places of worship<sup>64</sup>.

### 5.1.3 Obligations of third states and EU policy

Third states have two obligations in this context – not to recognise the Russian annexation of Crimea and not to assist the Russian government in maintaining this illegal situation. Since the annexation constitutes a violation of a fundamental norm of international law, third states also have the right to impose sanctions. And, in principle, there is a right to come to the assistance of the government of Ukraine if it decides to put up armed resistance, even if that does not seem very likely in the current situation. The main perpetrators also bear criminal responsibility, and may be prosecuted in any country for the crime of aggression, unless they are immune.

EU has been intensely engaged in the situation ever since the Russian takeover and has focused on efforts to reverse the annexation<sup>65</sup>. Until mid-April, when the situation worsened in Eastern Ukraine, EU measures were focused on Crimea, but after that many measures could be relevant for either of the two related situations. On 20 March, two days after the annexation, the European Council declared that it *'remains committed to uphold the sovereignty and territorial integrity of Ukraine. The European Council does not recognise the illegal referendum in Crimea, which is in clear violation of the Ukrainian Constitution. It strongly condemns the illegal annexation of Crimea and Sevastopol to the Russian Federation and will not recognise it. The European Council asks the Commission to evaluate the legal consequences of the annexation of Crimea and to propose economic, trade and financial restrictions regarding Crimea for rapid implementation.'* Hence, the Council set the framework for continued EU action regarding the Crimea crisis. Within that framework, a number of different measures have been taken.

All throughout the crisis, the EU has also been heavily involved in diplomatic efforts to influence the Russian government and other parties and to assist political negotiations. To review these efforts is, however, beyond the scope of this report.

#### **Diplomatic measures**

Already on 6 March, the EU suspended preparations for the G8 meeting in Sochi (eventually a G7 meeting was held in Brussels in June, instead). Further, discussions on the new EU-Russia agreement were suspended. Two weeks later, the European Council, on 20 March decided to cancel the upcoming EU-Russia summit. In addition, EU states supported the suspension of negotiations with Russia on future membership of the OECD and IEA. Among further diplomatic measures and similar steps, the EU requested the European Investment Bank to suspend new financing operations in Russia. EU member states acted to see to it that the European Bank for Reconstruction and Development suspended the financing of new operations in Russia. Further, there was a suspension of talks with Russia on visa matters as well as on a new EU-Russia agreement between the two parties. In addition, the implementation of EU bilateral and regional cooperation programmes was being suspended with the exception of projects dealing exclusively with cross-border cooperation and civil society.

<sup>64</sup> Office of the United Nations High Commissioner for Human Rights, Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015, available at:

<http://www.ohchr.org/Documents/Countries/UA/9thOHCHRreportUkraine.pdf>, p. 7, see also pp. 23-25.

<sup>65</sup> Most of the facts in this account have been taken from Factsheet: EU-Ukraine relations, Brussels, 17 February 2015 150217/02, available at: [http://eeas.europa.eu/statements/docs/2014/140514\\_02\\_en.pdf](http://eeas.europa.eu/statements/docs/2014/140514_02_en.pdf).

### **Economic sanctions against individuals**

Restrictive measures amounting to asset freeze and visa ban (prohibition of entry to the EU) have been adopted already from 17 March, 'against persons responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine as well as persons and entities associated with them'. This group of targeted persons has subsequently been enlarged in a series of decisions. At the time of writing, it comprises 151 persons and 37 entities, including '140 persons and 24 entities responsible for action against Ukraine's territorial integrity, eleven persons providing support to or benefitting Russian decision-makers and 13 entities in Crimea and Sevastopol that were confiscated or that have benefitted from a transfer of ownership contrary to Ukrainian law'<sup>66</sup>.

### **Measures following from the non-recognition policy regarding Crimea and Sevastopol**

The EU has also, in steps, imposed substantial restrictions on economic exchanges with Crimea, which includes an import ban of goods from Crimea, unless they have Ukrainian certificates; a prohibition of investing in Crimea; a ban on providing tourism services in Crimea; and an export ban on goods, technology and services for the transport, telecommunications and energy sectors or the exploration of oil, gas and mineral resources to Crimean companies or for use in Crimea. There have been exceptions based on concern for the civilian population, related to projects exclusively in support of public health institutions or civilian education establishments or for maintaining existing infrastructure for safety reasons<sup>67</sup>.

### **Economic sanctions against Russia**

From 29 July, the EU has also imposed measures directly targeting Russia as a state. This has included bans on trade with financial instruments related to some Russian banks, energy and defence companies; bans on loans to five major Russian state-owned banks; embargo on the import and export of arms as well as on the trade in dual use goods for military use from/to Russia; ban on the export of certain products and on services for deep water oil, arctic oil and shale oil projects.

### **Information note to business**

A useful part of this battery of measures is the joint staff working document 'Information Note to EU business operating and/or investing in Crimea/Sevastopol', which includes not only an explication of the various measures in force, but also the principled EU stance of non-recognition<sup>68</sup>.

## **5.2 Palestine (Occupied Palestinian Territory)**

### **5.2.1 Background and legal status**

Palestine (the West Bank, including East Jerusalem, and the Gaza Strip) is henceforth referred to as 'the occupied Palestinian territory' (OPT or oPt).

Israel gained effective control over the territory during the international armed conflict between Israel and a number of Arab States in June 1967, also known as the Six-Day-War. Since the '1967 war', the UNSC,

<sup>66</sup> Factsheet: EU-Ukraine relations, Brussels, 17 February 2015 150217/02, available at: [http://eeas.europa.eu/statements/docs/2014/140514\\_02\\_en.pdf](http://eeas.europa.eu/statements/docs/2014/140514_02_en.pdf).

<sup>67</sup> Controls, Developments in U.S. and EU Sanctions Against Russia and the Occupied Crimea Region of Ukraine, 2014.

<sup>68</sup> Information Note to EU business operating and/or investing in Crimea/Sevastopol, Brussels, 11.8.2014 SWD(2014) 300 final/2, available at: [http://eeas.europa.eu/ukraine/pdf/swd\\_2014\\_300\\_f2\\_joint\\_staff\\_working\\_paper\\_en\\_v8\\_p1\\_776932.pdf](http://eeas.europa.eu/ukraine/pdf/swd_2014_300_f2_joint_staff_working_paper_en_v8_p1_776932.pdf).

the UNGA and the EU consider the West Bank, including East Jerusalem, and the Gaza Strip as territory occupied by Israel in legal terms<sup>69</sup>.

Israel denies that the territory is occupied, instead referring to the West Bank and the Gaza Strip as 'disputed territories'. The Israeli Ministry for Foreign Affairs argues that as the West Bank and the Gaza Strip were not under the legitimate and recognised sovereignty of any state prior to the '1967 war', they should not be considered occupied. With the same line of reasoning, Israel rejects the *de jure* applicability of the Fourth Geneva Convention relative to the Protection of Civilian persons in Time of War (GCIV) to the occupied Palestinian territory<sup>70</sup>. In its *Advisory Opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory* (2004), the ICJ clarified that the GCIV is applicable in the West Bank, including East Jerusalem<sup>71</sup>. The UNSC, the UNGA and the EU, as well as the International Committee of the Red Cross (ICRC) have all affirmed that the GCIV is *de jure* applicable in the occupied Palestinian territory<sup>72</sup>.

Although Israel has consistently rejected the formal applicability of the GCIV, it has referred extensively to some of its provisions to validate the conduct of its administration in the occupied Palestinian territory. It is also important to note that Israel has accepted the formal applicability of the Hague Regulations. The Israeli Supreme Court has played an increasing role over recent years in reviewing the conduct of the Israeli government in the occupied territory by referring to provisions of the GCIV<sup>73</sup>.

In addition to its obligations under the GCIV, Israel is bound to the provisions of the international human rights treaties it has ratified<sup>74</sup>. The UN treaty bodies, which monitor the implementation of applicable human rights treaties, have consistently concluded that the treaties to which Israel is a party are

<sup>69</sup> See e.g. UNSC resolutions 242 (1967), 338 (1973), 1860 (2009); UNGA resolutions 43/179 of 15 December 1988, 66/17 of 30 November 2011 and 67/19 of 4 December 2012; EU 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 EU from 2014 onward, OJ C 205/9, 19.7. 2013; Council of the European Union, Conclusions on the Middle East Peace Process, 3166th Foreign Affairs Council Meeting, 14 May 2012, available at: [http://eu-un.europa.eu/article\\_s/en/article\\_12170\\_en.htm](http://eu-un.europa.eu/article_s/en/article_12170_en.htm).

<sup>70</sup> Israeli Ministry of Foreign Affairs, 'Disputed Territories: Forgotten Facts about the West Bank and Gaza Strip', February 2013, available at: <http://mfa.gov.il/MFA/MFA-Archive/2003/Pages/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We.aspx>.

<sup>71</sup> The ICJ found that GCIV applies 'in any occupied territory in the event of an armed conflict arising between two or more Contracting Parties'. As Israel and Jordan were parties to the Convention at the outbreak of the '1967 war', the Court accordingly found that the GCIV is applicable. Reaching that conclusion, the Court underlined that there was 'no need for any enquiry into the precise prior status of those territories.' International Court of Justice, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', Advisory Opinion of 9 July 2004, paras. 94-101.

Regarding the question of the right to the territories, it should be pointed out that the fact that Gaza and West Bank were not under the undisputed sovereignty of another state before 1967 does not mean that these territories are or were terra nullius or "up for grabs". As explained in section 4.4, the use of force or military control does not create legal title to territory, and the right to self-determination of the Palestinian people is almost universally recognized.

<sup>72</sup> See e.g. UNSC resolutions 271 (1969), 446 (1979), 1322 (2000) and 1435 (2002); UNGA resolutions 2546 of 11 December 1969, 66/225 of 29 March 2012 and 67/19 of 4 December 2012. See also Declaration at the Conference of the High Contracting Parties to the Fourth Geneva Convention, 17 December 2014, available at:

<http://www.news.admin.ch/NSBSubscriber/message/attachments/37764.pdf>, and the statement by the EU representative at that conference, available at:

[http://www.eeas.europa.eu/delegations/un\\_geneva/press\\_corner/all\\_news/news/2014/geneva\\_convention\\_en.htm](http://www.eeas.europa.eu/delegations/un_geneva/press_corner/all_news/news/2014/geneva_convention_en.htm).

<sup>73</sup> See e.g. Beit Sourik Village Council v. The Government of Israel, HCJ 2056/04, Israeli Supreme Court, 30 May 2004, available at: <http://www.refworld.org/docid/4374ac594.html>.

<sup>74</sup> See Office of the High Commissioner for Human Rights website for ratification status, available at: <http://indicators.ohchr.org>.

applicable in respect of acts carried out by Israel in the occupied territory<sup>75</sup>. This has also been confirmed by the ICJ<sup>76</sup>.

From 1967 onwards, Israel has taken a number of measures with the purpose of changing the legal status of East Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied part of the city. On 30 July 1980 Israel adopted 'the Basic Law' making Jerusalem the 'complete and united capital of Israel'<sup>77</sup>. In 2000, the Israeli legislature made amendments in the 1980 Basic Law, confirming the boundaries of the city to include East Jerusalem, and stipulating exclusive Israeli control. Israel, hence, considers East Jerusalem as annexed, and applies its own domestic laws to the entire city.

Israel's annexation of East Jerusalem has been repeatedly rejected by the international community through a series of UNSC and UNGA resolutions, reaffirming that all actions taken by Israel which tend to change the legal status of Jerusalem are null and void and cannot alter its status<sup>78</sup>. EU policy regarding East Jerusalem is based on the principle of the inadmissibility of acquisition of territory by force, and EU has never recognised the annexation of East Jerusalem<sup>79</sup>.

The 1995 Oslo Accords between Israel and the Palestinian National Authority divided the West Bank (excluding East Jerusalem) into three separate areas: Area A under civil and security control of the Palestinian Authority (18 percent); Area B under Palestinian civil and joint Palestinian-Israeli security control (20 percent) and Area C under full Israeli civil administrative and military control (62 percent)<sup>80</sup>. The delegation by Israel of some aspects of authority/control to the Palestinian Authority under the Oslo Accords has not altered Israel's *de facto* effective control over the entire West Bank.

In 2005, the Israeli military withdrew its military forces from and dismantled all previous settlements in the Gaza Strip. Since then, Israel has, however, continued to retain *de facto* effective control over *inter alia* airspace and territorial waters, land borders and residency and citizenship affairs<sup>81</sup>.

Despite these subsequent events, international consensus remains as to the legal status of the entire Palestinian territory as occupied<sup>82</sup>.

The UN and the ICJ, amongst others, have also since long confirmed the right to self-determination of the Palestinian people, including the right to an independent State of Palestine<sup>83</sup>.

<sup>75</sup> Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, Human Rights Council, A/HRC/22/63, 7 February 2013, paras. 10-12, and the references cited therein.

<sup>76</sup> See ICJ Advisory opinion, *supra*, note 71, paras. 102-113.

<sup>77</sup> 'Basic Law: Jerusalem, Capital of Israel', available at: [http://www.knesset.gov.il/laws/special/eng/basic10\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic10_eng.htm).

<sup>78</sup> See e.g. UNSC resolutions 252 (1968), 267 (1969), 471 (1980), 478 (1980) and 1850 (2008); UNGA resolutions 66/18 of 30 November 2011, 67/19 of 4 December 2012 and 69/24 of 10 November 2014.

<sup>79</sup> Council of the European Union, Conclusions on the Middle East Peace Process, 2985th Foreign Affairs Council Meeting, 8 December 2009, available at:

[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/wgme/dv/200/200912/20091216councilcon081209\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/wgme/dv/200/200912/20091216councilcon081209_en.pdf).

See also EU Heads of Mission in Jerusalem and Ramallah report on East Jerusalem, January 2012 and March 2014.

<sup>80</sup> See European Parliament Directorate-General for External Policies Policy Briefing 'Area C: More than 60 % of the occupied West Bank threatened by Israeli annexation', April 2013, p. 4.

<sup>81</sup> See e.g. Diakonia International Humanitarian Law (IHL) Resource Centre, 'The Gaza Strip: Status under international humanitarian law', September 2014, available at <http://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl-briefs/status-of-the-gaza-strip-final.30.9.2014.pdf>.

<sup>82</sup> See e.g. UNSC resolution 1860 (2009); UNGA resolutions 63/96 and 63/98 of 18 December 2008 and 69/24 of 25 November 2014; Statement by the EU representative at the Conference of the High Contracting Parties to the Fourth Geneva Convention, 17 December 2014, *supra*, note 72.

Voting by an overwhelming majority — 138 in favour to 9 against<sup>84</sup>, with 41 abstentions — the UNGA on 29 November 2012 accorded *Palestine* non-Member Observer State status in the United Nations<sup>85</sup>. The UN has declared that the designation of 'State of Palestine' shall be used in all official UN documents, thus recognising the title 'State of Palestine' as the state's official name for all UN purposes. The vote is an implicit recognition of Palestine as a sovereign state.

As of 1 April 2015, 135 of the 193 member states of the United Nations have recognised the State of Palestine. On 17 December 2014, the European Parliament adopted a resolution supporting Palestinian statehood 'in principle'<sup>86</sup>.

## 5.2.2 The implications of the occupation for the civilian population

The occupation creates enormous hardship for the civilian population in the West Bank, including East Jerusalem, and the Gaza Strip. Israel has since the outset of the occupation pursued policies in sharp contrast with international law, and has to a large extent ignored its responsibilities as an occupying power.

The main areas of concern from an international law perspective are briefly described below, with a special focus on Israel's construction of settlements in the West Bank. Several violations activate obligations *erga omnes* – for all states, including the denial of the Palestinian people of their right to self-determination and certain violations under IHL that amounts to grave breaches under article 147 of the GCIV.

### Israeli settlements and the construction of the wall in occupied territory

Since 1967, Israel has engaged in the planning, constructing and developing of settlements in the occupied Palestinian territory. According to statistics from the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) in the Occupied Palestinian Territory, there are 150 'formal' settlements (residential and others) in the West Bank, including East Jerusalem, in addition to some 100 'outposts'<sup>87</sup>. The number of settlers is estimated at 540,000 (whereof 200,000 in East Jerusalem)<sup>88</sup>. The settler population over the past decade has grown at a much higher rate than the population in Israel itself, with a yearly average growth of 5.3 per cent (excluding East Jerusalem), compared with 1.8 per cent in Israel<sup>89</sup>. From the beginning of 2009 until the beginning of 2014 — Netanyahu returned to office in March 2009 — the Jewish settler population in the West Bank grew 23 percent, in comparison with the overall population growth at 9.6 percent during the same period<sup>90</sup>.

While the fenced areas of the settlements in reality cover only 3 percent of the West Bank, the whole structure of settlements dominates more than 40 percent of the territory<sup>91</sup>. The settlement structures

<sup>83</sup> See e.g. UNSC resolution 1860 (2009); UNGA resolutions 58/292 of 6 May 2004 and 67/19 of 4 December 2012. See also ICJ Advisory Opinion, *supra*, note 71, paras. 115-122.

<sup>84</sup> Canada, Czech Republic, Israel, Marshall Islands, Micronesia, Nauru, Panama, Palau and United States.

<sup>85</sup> UNGA resolution 67/19 of 29 November 2012, available at:

<http://unispal.un.org/UNISPAL.NSF/0/19862D03C564FA2C85257ACB004EE69B>.

<sup>86</sup> See European Parliament resolution of 17 December 2014 on recognition of Palestine statehood 2014/2964 (RSP), available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2014-0103+0+DOC+XML+V0//EN&language=EN>.

<sup>87</sup> UNOCHA, 'The humanitarian impact of Israeli settlement policies', December 2012, available at: [http://www.ochaopt.org/documents/ocha\\_opt\\_settlements\\_factsheet\\_december\\_2012\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_settlements_factsheet_december_2012_english.pdf).

<sup>88</sup> See EU Heads of mission in Jerusalem and Ramallah report on Jerusalem, 18 March 2014, p. 2.

<sup>89</sup> Report of the independent international fact-finding mission, *supra*, note 75, para. 28.

<sup>90</sup> See article in Israeli newspaper Haaretz, *West Banks settlement expansion surged under Netanyahu*, 15 December 2014, available at: <http://www.haaretz.com/news/diplomacy-defense/1.631924>.

<sup>91</sup> UNOCHA, *supra*, note 87.

include settler-only roads, a wide regime of check-points and crossings, impediments created by the wall and its gate and permit regime, as well as administrative restrictions<sup>92</sup>. The settlement areas have been declared closed military zones by military orders and are off limits to Palestinians, except by special permit. Palestinians are also generally prohibited from construction or development in these areas. Less than 1 percent of Area C land, and 13 percent of East Jerusalem land, has been approved for Palestinian development, much of which is already heavily built up<sup>93</sup>.

As settlements are scattered all across the West Bank, including East Jerusalem, the territory is divided into enclaves with little or no territorial contiguity, undermining the possibility for the Palestinian people to realise their right to self-determination. Moreover, major settlement infrastructure has been built around Jerusalem, enveloping the city and severing social and economic ties with the rest of the West Bank, while at the same time linking these settlements to territory annexed by Israel<sup>94</sup>. Particularly worrying is the so called 'E1-project', aimed at creating an urban continuum between Jerusalem and the settlement Ma'ale Adumim, practically cutting off the Palestinians in East Jerusalem from the rest of the West bank<sup>95</sup>. The UN and the EU has expressed great concern in this respect<sup>96</sup>.

Israel's construction of settlements, including 'outposts', in the occupied Palestinian territory is a clear violation of article 49 (6) of the GCIV, which prohibits the occupying power from transferring parts of its own civilian population into the territory that it occupies. Concerns have been raised that the developments in Area C in the West Bank are in fact laying the demographic and physical foundations for Israel's unilateral annexation of territory<sup>97</sup>. The position of the international community on the illegality of the settlements under IHL is very clear and has been repeatedly reaffirmed by, amongst others, the ICJ, the UNSC, the UNGA and the EU<sup>98</sup>.

Another key feature of the Israeli occupation is the wall, which is closely linked with the settlements, and adds to the regime of movement restrictions in the West Bank. The length of the wall (constructed and projected) is approximately 708 kilometres – more than twice the length of the 'Green line'. Some 85 percent of the route runs inside the West Bank, and nearly half of the Israeli settlements and over 85 percent of the settler population are located in the area between the 'Green line' and the wall<sup>99</sup>. In its Advisory opinion in 2004, the ICJ concluded that the construction of the wall violates several provisions of international law, and referred to it as 'a *fait accompli* on the ground that could very well become

<sup>92</sup> See Report of the independent international fact-finding mission, *supra*, note 75, para. 72.

<sup>93</sup> See Diakonia IHL Resource Center, 'Planning to Fail - The planning regime in Area C of the West Bank: An International Law Perspective', September 2013, p. 13.

<sup>94</sup> See Report of the independent international fact-finding mission, *supra*, note 75, para. 58.

<sup>95</sup> *Ibid*, para. 65.

<sup>96</sup> See UNGA resolution 69/24 of 25 November 2014 and Council of the European Union, Conclusions on the Middle East Peace Process, 3209<sup>th</sup> Foreign Affairs Council Meeting, 10 December 2012, available at: [http://eeas.europa.eu/delegations/israel/press\\_corner/all\\_news/news/2012/20121210\\_02\\_en.htm](http://eeas.europa.eu/delegations/israel/press_corner/all_news/news/2012/20121210_02_en.htm).

<sup>97</sup> See European Parliament Directorate-General for External Policies Policy Briefing, *supra*, note 80 and Report of the independent international fact-finding mission, *supra*, note 75, para. 101.

<sup>98</sup> See e.g. ICJ Advisory Opinion, *supra*, note 71, para. 120; UNSC resolutions 471 (1980) and 1860 (2009); General Assembly resolutions 3092 (XXVIII) of 7 December 1973, 47/172 of 22 December 1992 and 66/225 of 29 March 2012; Council of the European Union, Conclusions on the Middle East Peace Process, *supra*, note 69, and European Parliament resolution of 17 December 2014 on recognition of Palestine statehood (2014/2964[RSP]).

<sup>99</sup> See Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (Richard Falk), 13 January 2014, A/HRC/25/67, paras. 13-14, and UNOCHA in the occupied Palestinian territory, 'The humanitarian impact of the barrier', Fact Sheet, July 2013.



permanent, in which case, and notwithstanding the formal characterisation of the wall by Israel, it would be tantamount to *de facto* annexation' of West Bank territory<sup>100</sup>.

The construction of the wall, coupled with the settlements (and their associated restrictions), make it impossible for Palestinians to access and control their natural resources, and severely restrict their ability to work and earn a livelihood, to reach education and health institutions and to visit family and religious places. As much as 86 percent of the Jordan Valley and the Dead Sea (located in Area C), where the richest lands, water and natural resources are found, is under the *de facto* jurisdiction of settler regional councils<sup>101</sup>.

The right to self-determination of the Palestinian people, the right to have a demographic and territorial presence in the occupied territory and the right to permanent sovereignty over natural resources, is clearly being violated by Israel through the existence and ongoing expansion of the settlements, as well as the construction of the wall in occupied territory<sup>102</sup>. Furthermore, a large number of IHRL provisions are set aside by Israel's policies, e.g. the freedom of movement and religion, the right to education and health care, and the right not to be discriminated against<sup>103</sup>.

In the latter respect, the UN Committee on the Elimination of Racial Discrimination stated that the Committee is:

*[...] extremely concerned at the consequences of policies and practices which amount to de facto segregation ... The Committee is particularly appalled at the hermetic character of the separation of two groups, who live on the same territory but do not enjoy either equal use of roads and infrastructure or equal access to basic services and water resources<sup>104</sup>.*

Despite the fact that the establishment of settlements and the construction of the wall in occupied territory bring about serious breaches of IHL, many private enterprises, including European business, have directly or indirectly enabled, facilitated and profited from the construction<sup>105</sup>. Israel is encouraging both national and foreign investment in settlement businesses by offering a wide range of incentives and benefits to the investors. Israel has set up industrial zones within some of the major settlements, which today host hundreds of companies, ranging from small businesses serving local Israeli settlers to large factories that export their products worldwide. Production in these industrial zones benefits from low rent, special tax incentives, lax enforcement of environmental and labour protection laws and other governmental support. Many of the industries/factories are built on Palestinian private land. Furthermore, Palestinian workers in the industries are submitted to severe restrictions of movement and organisation in violation of their labour rights<sup>106</sup>.

### **Forced displacement and destruction of property**

As a direct or indirect result of the construction of settlements and the construction of the wall in the West Bank, many Palestinians are forcibly displaced from their homes and lands. Primary causes of

<sup>100</sup> ICJ advisory opinion, *supra*, note 71, para. 121.

<sup>101</sup> See Report of the independent international fact-finding mission, *supra*, note 75, para. 36.

<sup>102</sup> *Ibid.* para. 38. See also, ICJ Advisory Opinion, *supra*, note 71, paras. 115-122.

<sup>103</sup> See e.g. Report of the Special Rapporteur, *supra*, note 99 and UN Human Rights Committee, Concluding observations on the fourth periodic report of Israel, CCPR/C/ISR/CO/4, 21 November 2014.

<sup>104</sup> UN Committee on the Elimination of Racial Discrimination (CERD), Consideration of reports submitted by State parties under article 9 of the Convention: Concluding observations of CERD, Israel, 9 March 2012, CERD/C/ISR/CO/14-16, paras. 24-25.

<sup>105</sup> See Report of the independent international fact-finding mission, *supra*, note 75, paras. 96-99 and Report of the Special Rapporteur, *supra*, note 99, paras. 39-44.

<sup>106</sup> Diakonia/Church of Sweden/SwedWatch report 'Illegal Ground: Assa Abloy's business in occupied Palestinian territory', October 2008.

displacement include house demolitions, forced evictions of families/communities and land confiscation, which take place in the context of the construction of settlements and the wall and/or military incursions. Secondary causes include movement restrictions, loss of livelihoods, lack of access to basic services, revocation of residency rights and safety concerns as a result of settler violence and Israeli military actions<sup>107</sup>.

Since 1967, the Israeli government has demolished over 27 000 Palestinian homes in the occupied territory, counting 160 000 displaced Palestinians<sup>108</sup>. Closely linked with the forced displacement of the Palestinian population in the occupied territory is the wide-scale destruction of property in Area C and East Jerusalem for reasons of enforcement of planning and constructions laws. Many of the structures demolished are funded by international donors, often in response to prior demolitions of Palestinian owned homes and other structures<sup>109</sup>. In a number of cases emergency shelters, usually tents, and other items provided as a form of emergency response have also been demolished and/or confiscated by Israeli authorities. The reason given for the demolition of donor-funded structures is commonly the lack of Israeli-issued building permits<sup>110</sup>. In addition, punitive house demolitions take place as response to alleged terrorist attacks<sup>111</sup>.

Article 53 of the GCIV states that any destruction by the occupying power of real or personal property, belonging to the occupied population individually or collectively, is prohibited unless it is rendered absolutely necessary by military operations. Punitive house demolitions are a clear violation of the prohibition of collective punishment under article 33 of the GCIV.

The Rome Statute article 8 (2) (b) (viii) establishes the jurisdiction of the International Criminal Court over both the deportation or transfer, directly or indirectly, by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory. Under article 8(2)(a)(iv) of the Rome Statute 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' is a war crime in international armed conflicts.

On 1 January 2015, Palestine lodged a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the International Criminal Court (ICC) over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014". On 2 January 2015, Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. The Rome Statute entered into force for Palestine on 1 April 2015<sup>112</sup>.

Upon receipt of a referral or a valid declaration made pursuant to article 12(3) of the Rome Statute, the Prosecutor as a matter of policy and practice, opens a preliminary examination of the situation at hand. Accordingly, on 16 January 2015, the Prosecutor announced the opening of a preliminary examination

<sup>107</sup> See Save the Children UK, 'Forced Displacement in the occupied Palestinian territory', Briefing paper, October 2009.

<sup>108</sup> See European Parliament Directorate-General for External Policies Policy Briefing, *supra*, note 80, p. 6, and Diakonia IHL Resource Center, September 2013, *supra*, note 93, p. 11.

<sup>109</sup> See UNOCHA in the occupied Palestinian territory, Annual Review, 'Fragmented Lives – Humanitarian overview 2013, March 2014, p. 67.

<sup>110</sup> *Ibidem*.

<sup>111</sup> UN Human Rights Committee, November 2014, *supra*, note 103, para. 9.

<sup>112</sup> See website of the International Criminal Court, available at: [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/asian%20states/Pages/Palestine.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/Palestine.aspx).

into the situation in Palestine in order to establish whether the Rome Statute criteria for opening an investigation are met<sup>113</sup>.

The recent ratification of the Statute by Palestine may very well lead to a future investigation as to whether the Israeli construction of settlements and policies of forced displacement of the Palestinians in the West Bank fall under the notion of a 'war crime'.

### **The Gaza blockade**

The long-standing blockade of the Gaza Strip imposed by Israel is also a clear violation of the inhabitants freedom of movement, with only limited categories of persons being able to leave the strip, for example certain medical referrals. The blockade affects all aspects of life for the civilian population, including access to food, health, electricity, water and sanitation<sup>114</sup>. The blockade stands in sharp contrast to Israel's obligations as an occupying power under article 55 of the GCIV to ensure for the provision of basic needs and objects essential for the survival of the population. In the Gaza Strip, there are about 3,700 fishermen who supply food for approximately 50,000 inhabitants. The fishing industry has been hit hard by Israeli restrictions and interference with fishing operations. Fishing had been restricted to three nautical miles, which limits productive activity severely, as most edible fish are mostly found between 12 and 20 nautical miles from shore<sup>115</sup>.

Moreover, Israel systematically prevents the Palestinian population from developing their natural gas resources along the coast of the Gaza Strip, by upholding a lethal naval closure<sup>116</sup>.

As the whole of Gaza's civilian population is being punished for acts for which they bear no responsibility, the blockade constitutes a collective punishment against the Palestinian population imposed in clear violations of article 33 of the GCIV, wherefore its policies also in this respect stand in contrast with IHL<sup>117</sup>.

### **Access restrictions on humanitarian aid**

Humanitarian aid organisations in the occupied territory are continually facing a range of obstacles set up by the occupying power, which hamper their ability to provide assistance and protection to Palestinians in need in the West Bank and the Gaza Strip. These obstacles include physical and administrative restrictions on the access and movement of Non-Governmental Organisations and UN personnel, restrictions on the delivery of materials needed for humanitarian projects and limitations on the implementation of projects that involve building, expanding or rehabilitating infrastructure in the Gaza Strip and in Area C<sup>118</sup>. Israel has the duty to agree to relief schemes on behalf of the occupied population, and to facilitate them by all the means at its disposal under article 59 of the GCIV.

### **Military operations and use of firearms**

<sup>113</sup> ICC press release of 16 January 2015, 'The Prosecutor of the ICC, Fatou Bensouda, opens a preliminary examination of the situation in Palestine', available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx).

<sup>114</sup> Ibid, para 12, and Diakonia IHL Resource Center, 'Gaza Blockade land & Sea', available at: <http://www.diakonia.se/en/IHL/Occupied-Palestinian-Territory/Administration-of-Occupation/Gaza-Blockade-Land-Sea>. See also 'Joint statement by 30 International aid agencies: 'We must not fail in Gaza'', 26 February 2015, available at: <http://unispal.un.org/unispal.nsf/47d4e277b48d9d3685256ddc00612265/18243939aac02eb685257df8005173ce?OpenDocument>.

<sup>115</sup> Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, 3 June 2013, A/HRC/23/21, para. 14.

<sup>116</sup> There are potentially eight gas fields off the coast of the Gaza Strip according to a US Geographical survey, see Al-Haq Report 'Preventing the development of Palestinian natural gas resources in the Mediterranean Sea', 2014.

<sup>117</sup> International Committee of the Red Cross (ICRC) news release 'Gaza: Not another year!' of 14 June 2010, available at: <https://www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm>.

<sup>118</sup> See UNOCHA, March 2014, supra, note 109, p. 69.

Israel has repeatedly been accused for grave breaches of IHL and IHRL in the context of its military operations in the Gaza Strip. The violations include indiscriminate attacks on the civilian population, intentional attacks on hospitals and ambulances, the forcible use of Palestinian civilians as 'human shields,' etc., all clear violations of the GCIV<sup>119</sup>.

A further serious concern is the Israeli security forces' excessive use of lethal force during law enforcement operations against Palestinian civilians, including children, in the West Bank<sup>120</sup>.

Other human rights violations by Israel in the occupied Palestinian territory that raise grave concerns is the continuing practice of administrative detention of Palestinians, the use of torture and ill-treatment, and violations relating to the protection of the family<sup>121</sup>.

### 5.2.3 Obligations of third states and EU policy

The ICJ concluded in its Advisory Opinion on the Wall (2004) that:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction<sup>122</sup>.

At the diplomatic level, the EU has repeatedly underlined its position that it does not recognise Israel's sovereignty over the occupied Palestinian territory. In particular, the EU has condemned Israel's violations of IHL in connection to the establishment and development of settlements in East Jerusalem and Area C<sup>123</sup>.

#### **Funding, economic benefits, cooperation**

The implementation of diverse EU policies has, however, rather indicated appeasement in relation to some of the most serious breaches of international law, for example by trading with settlement products<sup>124</sup>.

In July 2013, the Commission adopted 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 EU from 2014 onward<sup>125</sup>. The Guidelines apply only to EU policies (not to the member states) and exclude from EU financial support (grants and loans) Israeli entities which are based or have activities in settlements in the occupied Palestinian territory. The aim of the Guidelines is 'to ensure respect of EU

<sup>119</sup> See e.g. Human Rights Council Report of the United Nations Fact Finding Mission on the Gaza Conflict, A/HRC/12/48, 23 September 2009; ICRC new release 'Gaza-Israel conflict: Disregard for humanitarian law led to unacceptable toll on civilians' of 8 August 2014, available at: <https://www.icrc.org/eng/resources/documents/news-release/2014/08-08-gaza-israel-palestine-maurer-civilians.htm>, and Diakonia IHL Resource Center 'Hostilities between Israel and Palestinian Militants', available at: <http://www.diakonia.se/en/IHL/Occupied-Palestinian-Territory/Conduct-of-Hostilities>.

<sup>120</sup> See e.g. B'Tselem – The Israeli Information Center on Human Rights in the Occupied Territories, 'Use of Firearms', available at: <http://www.btselem.org/firearms>.

<sup>121</sup> UN Human Rights Committee, November 2014, *supra*, note 103.

<sup>122</sup> ICJ Advisory Opinion, *supra*, note 71, para. 159.

<sup>123</sup> Council of the European Union, Conclusions on the Middle East Peace Process, 3166th Foreign Affairs Council Meeting, *supra*, note 1, and 3209th Foreign Affairs Council Meeting, *supra*, note 96. See also European Parliament resolution of 5 July 2012 on EU policy on the West Bank and East Jerusalem (2012/2694[RSP]).

<sup>124</sup> Francois Dubuisson, Centre de droit international de l'Université libre de Bruxelles, 'The international obligations of the European Union and its member states with regard to economic relations with Israeli settlements', February 2014, p. 33.

<sup>125</sup> EU Guidelines on the eligibility of Israeli entities, *supra*, note 69.

positions and commitments in conformity with international law on the non-recognition by the EU of Israel's sovereignty over the territories occupied by Israel since June 1967<sup>126</sup>. The guidelines merely put this long-held position into practice by limiting the application of agreements between the EU and Israel to its internationally recognised, pre-1967, borders.

Recipients of grants and loans will have to declare that money will not be spent in the settlements. If a recipient breaks this commitment, the guidelines give the European Commission the tool it needs to stop the project and recover the grant money, thereby preventing EU public funds from sustaining the illegal settlements. Simply, the guidelines are a way to ensure that European public money will not be used to contribute to the illegal settlement project.

The 2013 Guidelines were subject to much debate when Israel signed up to be part of Horizon 2020, the biggest EU research and Innovation programme ever with nearly € 80 billion of funding available over 7 years (2012-2020). Israel, which is the only non-European country to participate in Horizon2020 as a full partner, refused to participate in the programme unless EU funding to Israeli projects were exempted from the application of the 2013 Guidelines with the argument that Israel 'will not accept any external dictates regarding its borders.'

After months of negotiations and much pressure, inter alia from the European Parliament and former high-ranking EU officials<sup>127</sup> a compromise was reached and Israel joined the programme. The 2013 Guidelines was referred to only in an appendix to the deal so that Israel could add its own appendix stating that it does not recognise the Guidelines. Israeli companies and organisations that have operations on occupied land will be able to request funds, provided that the money does not cross the pre-1967 border. 'The agreement fully respects the EU's financial requirements while at the same time respecting Israel's political sensitivities and preserving its principled positions,' said a joint statement by EU High Commissioner Catherine Ashton and Israeli Justice Minister Tzipi Livni<sup>128</sup>.

### **Trade and other types of economic exchange**

While the Guidelines are a significant milestone in progress made by the EU in fulfilling its obligations under international law and the principle of non-recognition, there are still grave concerns as to the legality of the continuing trade under the EU-Israel Association Agreement<sup>129</sup>.

Trade between the EU member states and Israel is mainly governed by an Association Agreement, signed on 20 November 1995 and entered into force in June 2000<sup>130</sup>. The Agreement inter alia stipulates that 'products originating in Israel benefit from preferential tariffs and customs conditions. The origin of the Israeli products is established through a so called 'EUR.1 movement certificate', which is issued by the Israeli customs authorities at the request of the importer or by an invoice declaration. By a 'technical arrangement' set up in 2005, the documents must reveal the precise place of the production in order to make it easier for the European custom authorities to verify whether Israeli products are eligible for preferential treatment.

The EU, as well as the European Court of Justice (ECJ), has made it clear that products which originate from the West Bank do not fall within the territorial scope of the EU-Israel Association Agreement and are

<sup>126</sup> Ibid. para. 1.

<sup>127</sup> See letter to EU Foreign Ministers, 16 September 2013, available at: <https://s3.eu-central-1.amazonaws.com/euobs-media/4c40b1978f20e2f5d0e0aadfca89e13d.pdf>.

<sup>128</sup> See Joint Statement, 26 November 2013, available at: [http://eeas.europa.eu/statements/docs/2013/131126\\_05\\_en.pdf](http://eeas.europa.eu/statements/docs/2013/131126_05_en.pdf).

<sup>129</sup> See e.g. European Coordination of Committees and Associations for Palestine (ECCP), 'EU's and duty to end Israeli policies of forced transfer, colonialism and apartheid in occupied East Jerusalem', September 2014 and Dubuisson, *supra*, note 46.

<sup>130</sup> 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, OJ L 147/3, 21.6.2000.

not entitled to preferential treatment<sup>131</sup>. In 2005, the EU published a notice to importers reminding them that products coming from places brought under Israeli Administration since 1967 are not entitled to benefit from preferential tariff treatment under the EU-Israel Association Agreement<sup>132</sup>. In 2012, another notice to the importers informed that the up-to-date list of non-eligible locations and their postal codes was available on the Commission's thematic website on customs union<sup>133</sup>. Despite these efforts products are, in practice, many times marked as originating in Israel, even when the place of manufacture is located in occupied territory<sup>134</sup>. A 2012 joint NGO report estimated the value of EU imports from settlements to fifteen times the annual value of EU imports from Palestine<sup>135</sup>. In order to further counter the difficulties in clearly identifying the origin of settlement products, the EU in 2013 announced the adoption of Guidelines on labelling of products from the settlements, but this notice has not been published yet<sup>136</sup>.

Moreover, although theoretical safeguards have been set up to deny the benefits of preferential treatment to products made in settlements, the import itself to the EU is not prohibited even if the products are clearly identified as originating in settlements<sup>137</sup>. Considering the fact that the EU remains one of the most important trading partners for the settlements, with annual exports worth 300 million USD, a clear ban - both theoretical and practical - on settlements produce would have a significant impact<sup>138</sup>.

A number of international and EU-based companies operate in settlements, including through the provision of services and support to associated infrastructure. Business involved in violations of international law risks facing legal action, as well as being held accountable to international frameworks of corporate social responsibility (CSR). The EU has failed to take action in respect of discouraging European companies to invest in businesses with links to settlements. Some individual European states have, however, adopted measures specifically to avoid providing any form of assistance to Israeli entities actively involved in the settlement process. On 1 June 2014, the United Kingdom issued guidelines for businesses, outlining the risks of trading with Israeli settlement. The Guidelines state:

*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. This may*

<sup>131</sup> Judgment of 25 February 2010 in Case C-386/08: Firma Brita GmbH/Hauptzollamt Hamburg-Hafen, reference for a preliminary ruling, para. 58.

<sup>132</sup> See also 'Notice to Importers – Imports from Israel into the EU', OJ C 232/5, 3.8.2012.

<sup>133</sup> 'Notice to Importers – Imports from Israel into the EU', OJ C 232/5, 3.8.2012.

<sup>134</sup> See e.g. European Parliament resolution of 16 February 2012 on the proposal for a Council decision on the conclusion of the regional Convention on pan-Euro-Mediterranean preferential rules of origin (2012/2519[RSP]), and Report of the independent international fact-finding mission, supra, note 75, para. 99.

<sup>135</sup> Joint NGO Report 'Trading Away Peace: How Europe helps sustain illegal Israeli settlements', October 2012.

<sup>136</sup> Diakonia IHL Resource Center, 'Rule of Law: A Veil of Compliance in Israel and the oPt 2010-2013', March 2014, p. 31. See also Answer on Parliamentary Question given by Vice-President Mogherini on behalf of the Commission, 27 January 2015, available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-007743&language=EN>.

<sup>137</sup> European Commission: Frequently asked questions on: 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 EU from 2014 onwards, see Question 2, available at:

[http://eeas.europa.eu/delegations/israel/documents/press\\_corner/20130719\\_faq\\_guidelines\\_eu\\_grants\\_en.pdf](http://eeas.europa.eu/delegations/israel/documents/press_corner/20130719_faq_guidelines_eu_grants_en.pdf).

<sup>138</sup> Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (Richard Falk), 13 January 2014, A/HRC/25/67, para. 46.

*result in disputed titles to the land, water, mineral or other natural resources which might be the subject of purchase or investment*<sup>139</sup>.

Moreover, a number of individual companies have taken action to avoid rendering aid or assistance in maintaining the occupation. For example, the Dutch company, Royal Haskoning DHV, decided in September 2013 to terminate its contract with the Jerusalem Municipality to build a wastewater treatment plant in East Jerusalem and in August 2013, the Swedish-Norwegian bank Nordea excluded Cemex from its investment portfolio, due to its extraction of non-renewable natural resources from occupied Palestinian territory<sup>140</sup>.

### **EU development aid to the occupied Palestinian territory**

The European Commission is the biggest donor of financial assistance to the Palestinian people. Funds are allocated for 'Direct Financial Support to the Palestinian Authority' (through a mechanism called PEGASE) for development programmes<sup>141</sup>. Moreover, the EU is – together with its member states – the largest donor of aid to Palestinian refugees through the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Humanitarian aid is also channelled through the European Commission's Directorate General for Humanitarian Aid (DG ECHO)<sup>142</sup>. Furthermore, the EU directs aid to a larger number of development programmes, focusing on the rule of law, including support to justice and security and local governance, private sector and trade and water infrastructures and land development<sup>143</sup>.

The European Neighbourhood Instrument (ENI) is the main EU financial instrument when it comes to financial assistance to the Palestinians during the financial period of 2014-2020. It replaces the European Neighbourhood and Partnership Instrument (ENPI) of 2007-2013.

In contacts with Israeli authorities donors engage with the unlawful planning regime of the occupying power and, in general, submit to the Israeli permit regimes for e.g. movement/aid delivery and construction. In a position paper titled 'Development Principles in the occupied Palestinian territory' by the Association of International Development Agencies (AIDA), an association of more than 80 international development and humanitarian agencies, suggests a review of donor's current modalities of engagement with the Israeli planning regime 'in order for third states to avoid legitimising illegal policies or practices'<sup>144</sup>. Recent reports tell that the EU, in coordination with local Palestinian communities, is constructing hundreds of structures in Area C within the framework of its humanitarian assistance programmes, *without* Israeli building permits<sup>145</sup>.

<sup>139</sup> Guidance – Overseas Business Risks – Israel, available at: <https://www.gov.uk/government/publications/overseas-business-risk-israel/overseas-business-risk-israel>.

<sup>140</sup> See e.g. Report of the Special Rapporteur, *supra*, note 99, paras. 39-44.

<sup>141</sup> Launched in February 2008, PEGASE backs the three-year Palestinian Reform and Development Plan (PRDP) outlined by Prime Minister Salaam Fayyad at the Paris Donor Conference in December 2007. Assistance through PEGASE is helping to meet the recurrent costs of the Palestinian Authority (salaries and pensions, assistance to vulnerable Palestinian families) and the delivery of public services, as well providing longer-term assistance for development in line with the Palestinian National Development Plan.

<sup>142</sup> See European Union External Action website, available at:

[http://eeas.europa.eu/delegations/westbank/eu\\_westbank/humanitarian\\_aid/index\\_en.htm](http://eeas.europa.eu/delegations/westbank/eu_westbank/humanitarian_aid/index_en.htm).

<sup>143</sup> See European Commission's International Development and Cooperation, Europeaid's website, available at: [http://ec.europa.eu/europeaid/countries/palestine\\_en](http://ec.europa.eu/europeaid/countries/palestine_en).

<sup>144</sup> *Ibidem*.

<sup>145</sup> See reports in media; and Diakonia IHL Resource Center 'Hostilities between Israel and Palestinian Militants', available at: <http://www.irinnews.org/report/95954/opt-eu-pressure-for-aid-change-in-area-c> and, <http://www.dailymail.co.uk/news/article-2874883/EU-funding-illegal-building-West-Bank-says-report.html>.

According to the European Commission Israel has destroyed development projects worth EUR 49.14 million, with the estimated EU-funded share in the loss amounting to EUR 29.37 million<sup>146</sup>. In April 2014, it was reported in media that Israel dismantled three EU-funded humanitarian aid shelters in Ras-a-Baba, in the so called E1-corridor of the West Bank, linking the Ma'ale Adumim settlement to Jerusalem. The shelters were funded by DG ECHO and a French development agency in order to support families made homeless after severe storms in the region. EU has launched official protests with Israeli authorities in respect of the demolitions and calls are growing – also within the EU – for compensation claims when EU-funded projects are destroyed<sup>147</sup>.

The European Commission evaluation report recommends the EU to 'provide clear guidance on cooperation approach and links to dialogue with Israel regarding breaches of international law, human rights violations and demolition of EU-financed infrastructure'<sup>148</sup>.

## 5.3 Western Sahara

### 5.3.1 Background and legal status

In 1963, the Spanish colony of Western Sahara was listed as a non-self-governing territory by the United Nations, and three years later, the General Assembly urged Spain to organise a referendum on the territory's right to exercise its right to self-determination<sup>149</sup>. In 1975, the International Court of Justice (ICJ), in an advisory opinion on the Western Sahara question, concluded that while there had been pre-colonial ties between the territory of Western Sahara and Morocco, these ties did not imply sovereignty. The Court found no legal ties of such a nature as might affect the application of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory<sup>150</sup>. Hence, by implication, Western Sahara had the right to form an independent state.

Shortly thereafter, on 6 November, Morocco occupied and later annexed Western Sahara, through the famous 'Green march'. The same day, the UN Security Council, in Resolution 380, called upon Morocco 'immediately to withdraw all the participants in the march'<sup>151</sup>. Armed conflict ensued between Morocco and the Saharawi liberation front Polisario, and the latter became recognised by the UN as the legitimate international legal representative of the Saharawi people<sup>152</sup>. A cease-fire was reached in 1988 and in 1991, after UN led negotiations; a settlement plan – endorsed by the UN Security Council in resolution 658 – was signed. Under that plan, a referendum on independence was to be held. Mostly due to lack of

<sup>146</sup> <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-000053&language=PL>.

<sup>147</sup> <http://www.euractiv.com/sections/development-policy/compensation-calls-israel-seizes-eu-funded-aid-projects-301501>, <http://www.jpost.com/National-News/Report-EU-officials-demand-compensation-for-demolition-of-E1-structures-348317>.

<sup>148</sup> Ibid. p. 107.

<sup>149</sup> UN General Assembly, 1966, Resolution 2229 (XXI).

<sup>150</sup> ICJ Reports, 1975, p. 68, para. 162.

<sup>151</sup> Shortly thereafter, Morocco, Mauritania and the colonial power, Spain, entered into an agreement which in convoluted terms transferred the administration of the territory to Morocco and Mauritania. The agreement did not, however, transfer sovereignty explicitly. (Mauritania later rescinded and left the whole territory to Morocco.). The agreement should not be accepted as a transfer of responsibility from Spain to Morocco and Mauritania, since Spain had not fulfilled its duty to 'promote [...] realization of the principle of equal rights and self-determination' (Friendly Relations Declaration, Resolution 2625(XXV)). The UN list of non-self-governing territories does not indicate an administering power but notes the following: 'On 26 February 1976, Spain informed the Secretary-General that as of that date it had terminated its presence in the Territory of the Sahara and deemed it necessary to place on record that Spain considered itself thenceforth exempt from any responsibility of any international nature in connection with the administration of the Territory, in view of the cessation of its participation in the temporary administration established for the Territory. In 1990, the General Assembly reaffirmed that the question of Western Sahara was a question of decolonization which remained to be completed by the people of Western Sahara.'

<sup>152</sup> UN General Assembly resolution 34/37.



cooperation by Morocco (according to most observers<sup>153</sup>, the plan was never implemented, and a few years later Morocco declared that independence for Western Sahara was no longer an option. A very fledgling peace process is still going on under UN aegis. No state has recognised Moroccan sovereignty over Western Sahara, but the degree of active non-recognition has been lower than in the other conflicts dealt with in this report.

The Moroccan aggression, occupation and annexation of the territory constitute a serious breach of international law. Western Sahara is not a part of Morocco and Morocco has no legal title or claim on the territory. The people of Western Sahara have a right of self-determination, which, in this case, could be fulfilled by the creation of a fully sovereign state, if they so choose. Consequently, not only does Morocco have the obligation to respect the right of self-determination of Western Sahara, but Morocco must also revert from its illegal annexation and occupation of Western Sahara. The status of Western Sahara is therefore that of occupied territory, as determined by the UNGA, which in 1979 urged Morocco to terminate the occupation<sup>154</sup>.

Western Sahara is also a non-self-governing territory, akin to colonies<sup>155</sup>, but that does not change its status as occupied. For colonies as well as trust territories, the administering authority (Spain)<sup>156</sup> has a duty to progress towards independence<sup>157</sup>.

### 5.3.2 The implications of the occupation for the civilian population

#### General and human rights development

As explained in Section 4.3.3, Morocco should not be able to take any advantage of its illegal occupation and annexation and its capacity to enter into agreements regarding Western Sahara shall not be recognised. Further, since the annexation is illegal, the relationship between Morocco and the Western Sahara is qualified as occupation, and Morocco can only make such alterations of laws, property relations, etc., as are allowed under the law of occupation, essentially only to the benefit of the people of Western Sahara.

In spite of that, very considerable changes in the social and political life due the conflict and to the annexation affect the lives of the people of Western Sahara. A very large part of the population has fled to refugee camps in Algeria<sup>158</sup>, while settlers have moved in, domestic and foreign investors have been allotted land and concessions and new infrastructure has been built for the needs of these newcomers.

Morocco has not denied the applicability of its human rights obligations to Western Sahara, but there have nevertheless been problems<sup>159</sup>. According to the latest of the Secretary-General's annual reports on

<sup>153</sup> Benabdallah, K, 'The Position of the European Union on the Western Sahara Conflict', *Journal of Contemporary European Studies*, vol. 17, 2009, pp. 417–435; p. 420.

<sup>154</sup> UNGA RES 34/37.

<sup>155</sup> This misunderstanding is sometimes referred to the legal opinion of the then legal counsel of the UN, Hans Corell; see *infra*, note 163. Corell, however, merely stated that Morocco is a *de facto* administering power (para 6), and he has consistently upheld that distinction.

<sup>156</sup> Spain informed the UN in 1976 that it no longer considered itself responsible for Western Sahara. See footnote 151. It is highly doubtful that Spain could avoid responsibility in this way.

<sup>157</sup> Article 76 of the UN Charter also mentions self-government as an option, but in practice the goal has generally been independence.

<sup>158</sup> The exact numbers are controversial.

<sup>159</sup> During the latest universal periodic review of Morocco in the UN Human Rights Council, Morocco supported the following recommendations from other states and claimed that they had already been implemented:

130.3 Take measures to protect human rights defenders, particularly in the Western Sahara, against harassment, repression, arrest or detention, including by granting an official accreditation to the associations working in this field (Canada); 130.11 Give particular attention to all measures to improve the human rights situation in Western Sahara, in particular develop and implement independent and credible measures to ensure full respect for human rights and guaranteeing such basic rights as

the situation in Western Sahara to the UN Security Council, there are continuing allegations of abuses of civil and political rights in Western Sahara, 'particularly in the form of arrests without warrants, cruel, inhuman and degrading treatment in detention, limitations on family and advocate access to detainees, confessions extracted under torture, violation of the right to a fair trial, conditions that may amount to enforced disappearance and infringement of the rights of freedom of speech, association and assembly.' There were also 'reports that several individuals, including children, had been arrested for participating in demonstrations'<sup>160</sup>. The Working Group on Arbitrary Detention found that '[i]n cases related to State security, such as those involving terrorism, membership in Islamist movements or supporters of independence for Western Sahara, [...] there is a pattern of torture and ill-treatment by police officers [...] Many individuals have been coerced into making a confession and sentenced to prison on the sole basis of that confession'<sup>161</sup>.

### **Exploitation of natural resources**

The exploitation of natural resources in the territory of Western Sahara has been a recurring issue of debate for a number of years. Exploitation of phosphates has been ongoing for decades and lately contracts for exploration of oil have been awarded, including to the US firm Kosmos<sup>162</sup>. Another issue is that of fishing, due to the Fisheries Partnership Agreement concluded between the government of Morocco and the EU (see below).

It follows from the review of international law above (4.3.3) that Morocco cannot give concessions for the extraction of minerals for its own benefits. Still, the obligation to be concerned about public order and civil life suggests that normal business must be able to proceed, unless this prejudices the situation after the occupation has ended. This of course also applies to fishing. At the same time, a treaty partner with Morocco must make it absolutely clear that it does not regard Morocco as the lawful sovereign over Western Sahara, and that any competence that Morocco may have is based on its status as an occupier. As mentioned above, the then legal counsel of the UN, Hans Corell, was asked in 2002 for his opinion on oil exploration:

*The conclusion is, therefore, that, while the specific contracts which are the subject of the Security Council's request are not in themselves illegal, if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories<sup>163</sup>.*

Hence, any exploration must 1) benefit the people of the territory and 2) be concluded on their behalf or in consultation with their representatives. This opinion has been referred to frequently by parties on both sides of the argument regarding all forms of economic relations with Morocco over Western Sahara.

freedom of association and expression (Ireland); 130.12. Take measures to ensure the adequate protection of human rights in the Western Sahara in light of the reported cases of enforced disappearances, torture and ill-treatment, restrictions on freedom of expression, association and assembly by Moroccan security forces (Spain). Report of the Working Group on the Universal Periodic Review\* Morocco, 6 July 2012, UN Doc A/HRC/21/3, p. 24.

<sup>160</sup> Report of the Secretary-General on the situation concerning Western Sahara, 10 April 2014, S/2014/258, p. 17.

<sup>161</sup> Report of the Working Group on Arbitrary Detention, Mission to Morocco, 4 August 2014, A/HRC/27/48/Add.5, p. 2. See also the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Juan Mendez), 28 February 2013, A/HRC/22/53/Add.2.

<sup>162</sup> For two different sides of the issue, see <http://www.kosmosenergy.com/operations-western-sahara.php> and FN: <http://www.wsrw.org/a105x2608>.

<sup>163</sup> Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, S/2002/161, p. 6.

Corell himself has interpreted this requirement to apply also to fishing and to be taken as a restriction rather than a license<sup>164</sup>, and that is certainly the better view.

### 5.3.3 Obligations of third states and EU policy

#### Obligations in general

As has been stated above with regard to Palestine, all States are under an obligation not to recognise an illegal situation resulting from annexation. They are also under an obligation not to render aid or assistance in maintaining this illegal situation. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the annexation, to the exercise by the people of Western Sahara of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Morocco with international humanitarian law as embodied in that Convention.

#### EU policy in general

The EU and Morocco have very close ties. According to the EEAS, '[t]he European Union - Morocco relationship is based on a mutual commitment to promote common values, among which are: the respect for the rule of law, good governance, respect for human rights, and the promotion of peaceful relations with neighbours'<sup>165</sup>. As recounted by the EEAS website, Morocco is the largest recipient of European Union funds under the European Neighbourhood Policy. The Association Agreement, in force since 2000, represents the legal basis for relations between the European Union and Morocco, and with the launch of the European Neighbourhood Policy in 2004, Morocco gradually became a privileged partner of the European Union in the field of political and economic cooperation as well as trade and technical and development cooperation. In fact, in 2008, Morocco became the first country in the southern Mediterranean region to be granted the Advanced Status, marking a new phase of privileged relations<sup>166</sup>. In 2013, a 103 page action plan to implement this advanced status was adopted<sup>167</sup>. The first EU-Morocco summit was held on March 7, 2010, it being the first of its kind between the EU and an Arab or African country. Additionally, Morocco is among the pilot countries of the EU Agenda for Action on Democracy<sup>168</sup>.

In none of these documents is provision made for the status of Western Sahara as being occupied and illegally annexed. In the latest EU Human Rights report, it is stated, with a euphemism, that 'Western Sahara is a territory *contested* by Morocco and the Polisario Front' (emphasis added)<sup>169</sup>.

<sup>164</sup> FN, *The legality of exploring and exploiting natural resources in Western Sahara*, available at: <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>. In this presentation, Corell confirmed that this applies also to fishing. He has objected to the FPA.

<sup>165</sup> [http://ec.europa.eu/europeaid/countries/morocco\\_en](http://ec.europa.eu/europeaid/countries/morocco_en).

<sup>166</sup> [http://ec.europa.eu/europeaid/countries/morocco\\_en](http://ec.europa.eu/europeaid/countries/morocco_en).

<sup>167</sup> Relations avec le Maroc: projet de plan d'action Maroc pour la mise en œuvre du statut avancé (20132017), available at: [http://www.eeas.europa.eu/enp/pdf/pdf/action\\_plans/morocco\\_enp\\_ap\\_final\\_en.pdf](http://www.eeas.europa.eu/enp/pdf/pdf/action_plans/morocco_enp_ap_final_en.pdf).

<sup>168</sup> See Annex 2 of the Commission Implementing Decision on the adoption of a special measure for the financing of the Work Programme 2014 for the European Instrument for Democracy and Human Rights (EIDHR), 'Action Document for Supporting 101 Calls for Proposals targeting local civil society through Country Based Support Schemes' and Annex 3, 'Action Document for Supporting democracy – A citizens' organisations', including domestic observer groups' Programme', available at: <http://www.eidhr.eu/files/dmfile/AAP2014-AD1-11.pdf>.

<sup>169</sup> EU Annual Report on Human Rights and Democracy in the World in 2013, 11107/14, available at: [http://eeas.europa.eu/human\\_rights/docs/2013\\_hr\\_report\\_en.pdf](http://eeas.europa.eu/human_rights/docs/2013_hr_report_en.pdf). For sure, this indicates that the final status of Western Sahara might not be settled, but it is neutral about who the offender is and who the victim is.

## Concerns expressed by the EU

The EU has, from time to time and in different ways, expressed concerns about the situation, including human rights, but the language is rather muted. The latest human rights report notes that 'the EU has repeatedly expressed concern about the long duration of the Western Sahara conflict and the implications for security, respect of human rights and cooperation in the region' and 'has addressed critical issues in meetings of the joint bodies established under the EU-Morocco Association Agreement'. The EU further 'called on *all parties* to refrain from violence and to respect human rights' (emphasis added) which included concern about 24 Saharawi activists in prison in relation to events in Laayoune on 8-9 November 2010<sup>170</sup>.

The Annual report from the High Representative of the European Union says that

*[o]n Western Sahara, as in previous years, the EU expressed its support to the efforts of the UN Secretary-General and of his personal envoy Ambassador Christopher Ross to achieve a just, lasting and mutually acceptable political solution. The EU has also actively raised Human rights issues in Western Sahara<sup>171</sup>.*

It is to be noted here that this omits reference to self-determination (although that term is regularly used by the EU in statements on Western Sahara before the UN General Assembly)<sup>172</sup>. The 'active' raising of human rights issues which the report references is the European Parliament's resolution on Human Rights in the Sahel region (see below). As noted by one commentator, the EU has restricted itself to support the UN. 'This can be considered a very minimal approach compared to the positions adopted towards very similar situations such as Palestine and Cyprus'<sup>173</sup>.

In some contrast to the position of the Council, the EP has been more outspoken. For instance, in 2014, it reaffirmed 'the right of the Sahrawi people to self-determination, which should be decided through a democratic referendum, in accordance with the relevant UN resolutions'<sup>174</sup>. The EP has also in other contexts drawn attention to the Western Sahara conflict, regarding both human rights and decolonisation, for instance in its considerations of the annual report on human rights<sup>175</sup>, on the annual CFSP report from the Council<sup>176</sup>, on the Barcelona process<sup>177</sup>, on the issue of human rights in the Sahel region<sup>178</sup>, and in resolutions focusing on the human rights situation in Western Sahara<sup>179</sup>. In those resolutions directly focusing on the political conflict – like the most recent resolution from 2010 -- the

<sup>170</sup> EU Annual Report on Human Rights and Democracy in the World in 2013

11107/14, available at: [http://eeas.europa.eu/human\\_rights/docs/2013\\_hr\\_report\\_en.pdf](http://eeas.europa.eu/human_rights/docs/2013_hr_report_en.pdf).

<sup>171</sup> Annual report from the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament', as endorsed by the Council on 22 July 2014, available at: <http://data.consilium.europa.eu/doc/document/ST-12094-2014-INIT/en/pdf>.

<sup>172</sup> Statement by the European Union at the United Nations 68th General Assembly Fourth Committee, 8th meeting - Agenda item 60: Question on Western Sahara, 14 October 2013, available at: [http://eu-un.europa.eu/articles/en/article\\_14104\\_en.htm](http://eu-un.europa.eu/articles/en/article_14104_en.htm).

<sup>173</sup> Marco Balboni, The EU's Approach Towards Western Sahara, Paper presented at the Conference organised by the South African Department of Foreign Affairs, on Multilateralism and International Law with Western Sahara as a Case Study, Pretoria, South Africa, 4-5 December, 2008, p 1, available at: <http://www.saharawi.org/oldsite/tesi/saharaocc1.pdf>.

<sup>174</sup> European Parliament resolution of 13 March 2014 on EU priorities for the 25th session of the UN Human Rights Council (2014/2612(RSP) P7\_TA(2014)0252, para. 18.

<sup>175</sup> European Parliament resolution of 11 December 2013 on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union's policy on the matter (2013/2152(INI)).

<sup>176</sup> European Parliament resolution of 24 October 2013 on the Annual Report from the Council to the European Parliament on the Common Foreign and Security Policy (2013/2081(INI)).

<sup>177</sup> European Parliament resolution of 19 February 2009 on the Barcelona Process: Union for the Mediterranean (2008/2231(INI)).

<sup>178</sup> European Parliament resolution of 22 October 2013 on the situation of human rights in the Sahel region (2013/2020(INI)).

<sup>179</sup> European Parliament resolution on human rights in Western Sahara, 27 October 2005, P6\_TA(2005)0414.

term self-determination has been used in most cases<sup>180</sup>. In 2014, a so-called Intergroup has been formed on Western Sahara.

### **Economic Agreements**

As has already been indicated, the EU has strong economic ties with Morocco. In addition to the Association Agreement and an agriculture agreement, there is also a Fisheries Partnership Agreement (FPA), which has been especially controversial, partly because of the Western Sahara issue. The FPA entered into force on 2007 (after a negative vote by Sweden and an abstention by Finland), but the relevant protocol to the FPA expired in February 2011. A new protocol was negotiated and adopted by a divided Council of Ministers in 2011 (the UK, Austria, Sweden, Finland, Denmark, Cyprus and the Netherlands voted against or abstained) but was rejected by Parliament, partly due to the problems mentioned above. The Commission then renegotiated the Protocol, which was adopted by the Council and Parliament in 2013. Unfortunately, the relevant changes in the protocol compared to 2011 were cosmetic, at best<sup>181</sup>.

It follows from this analysis that the agreement between the European Union and Morocco should only apply to the territory and waters adjacent to Morocco proper. Any agreement with Morocco regarding the waters and territory properly belonging to Western Sahara should be the subject of an arrangement, in which Morocco acts in its capacity as an occupying power. As additional conditions, it should be clear that the agreement would benefit the people of Western Sahara (as defined under international law) and be in accordance with the wishes of that people.

Nevertheless, while the FPA does not say so explicitly, it was meant to cover, and has indeed covered, also the waters outside of Western Sahara, which provide an important part of the total fisheries allocated to the EU<sup>182</sup>. The same seems to apply to the other economic agreements<sup>183</sup>. By contrast, the US has made it clear, regarding their bilateral free trade agreement, that the designation 'Morocco' does not include Western Sahara<sup>184</sup>.

Furthermore, there is no indication that the agreement is for the benefit of the people of Western Sahara or in accordance with their wishes. The explanatory memorandum to the proposal for a Council decision in 2013 claims that one of the reasons for why the 2011 Protocol was rejected was 'that it did not respect international law insofar as it did not prove that the local populations would benefit from the economic

<sup>180</sup> See, for instance, European Parliament resolution of 25 November 2010 on the situation in Western Sahara P7\_TA(2010)0443.

<sup>181</sup> See Western Sahara and the Protocol to the EU-Morocco Fisheries Partnership Agreement (FPA) of 2013 – a Legal Analysis, available at: [http://www.wsrw.org/files/dated/2013-12-05/western\\_sahara\\_fisheries\\_legal\\_analysis\\_2013.pdf](http://www.wsrw.org/files/dated/2013-12-05/western_sahara_fisheries_legal_analysis_2013.pdf).

<sup>182</sup> See the Opinion of the European Parliaments Legal Service, 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 in force between the two parties (2013/0315 (NLE)), paragraph 29. It has been difficult for parliamentarians to get information regarding the catches in the waters of Western Sahara. In 2008, incomplete figures were released as a result of a written question. E-1073/08EN, Answer given by Mr Borg on behalf of the Commission (9.4.2008) to a written question by Caroline Lucas (Verts/ALE), Raül Romeva i Rueda (Verts/ALE) and Karin Scheele (PSE) to the Commission. The table with the figures is not reproduced on the European Parliaments website, but can be found on the website 'Fish elsewhere'. 'EU Commission admits fishing in occupied Western Sahara', 31.01.2009, available at: <http://fishelsewhere.eu/a167x964>.

<sup>183</sup> The Netherlands Minister for Foreign Affairs has, however, stated that "[t]he agricultural agreement between the EU and Morocco, which will enter into force this autumn, is solely applicable to the territory of Morocco. Therefore, Morocco cannot claim tariff preferences for products from Western Sahara on the basis of said agreement. The Dutch customs will monitor this.' The statement can be found in the original here: [http://www.wsrw.org/files/dated/2012-08-29/dutch\\_statement\\_20.08.2012.pdf](http://www.wsrw.org/files/dated/2012-08-29/dutch_statement_20.08.2012.pdf). That statement is made only on behalf of the Netherlands government.

<sup>184</sup> In a letter of 20 July 2004 to Congressman Pitt, written in conjunction with the conclusion of the Free Trade Agreement between Morocco and the United States, the US Trade Representative, Robert Zoellick, explains that in the United States' view that agreement does not cover Western Sahara.

and social benefits of that Protocol.’ As explained above, this is a misrepresentation of the problem, since international law requires that the agreement is to the benefit of *and in accordance with the wishes of the people* (not ‘the local population’)<sup>185</sup>.

According to the memorandum, there were two alleged remedies to this (misrepresented) problem: First, the new Protocol requires Morocco to provide regular and detailed reports on the use of the financial contribution for the fisheries sector, including the economic and social benefits on a geographical basis. Second, the Protocol provides a mechanism for suspension in the event of violations of human rights<sup>186</sup>. The concrete provisions which the memorandum alludes to are set out in Articles 6 and 8. However, neither of these provisions does anything to ensure that the exploitation of fish is carried out to the benefit of and in accordance with the wishes of the people. With respect to human rights, the Protocol adds nothing to what was already in place. The clause on general principles in article 1 and the suspension clause (article 8) refer to the human rights clause in the Association agreement and the suspension clause in the FPA. There are no reports of this clause ever having been used for the protection of the rights of the people of Western Sahara during the teen years that have passed since the Agreement entered into force in 2000.

<sup>185</sup> As pointed out in section 2.3, original inhabitants of the local population are legitimate, whereas settlers are not. The term ‘the people’ covers both the legitimate local population and those original inhabitants who are in exile.

<sup>186</sup> See Opinion of the Committee on Development (5.11.2013) for the Committee on Fisheries on the proposal for a Council Decision on the conclusion of the 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 in force between the two Parties (COM (2013)0648 - C7 - 2013/0315(NLE)).

## 6 EXISTING POLICIES

### 6.1 General considerations

The basis for the EU's external actions is article 21 of the Treaty on European Union (which will be cited in Section 5). Within that framework, the EU has developed a number of policies. None of them concerns policy specifically on occupied or annexed territories, but a number of existing guidelines, etc, are relevant, some of them more than others.

What is particular about a situation of occupation (and illegal annexation) is that the territory in question is controlled by a foreign power. This means that

- a) the occupying power is not the recognised government and does not have sovereign authority;
- b) the territory is in one sense or the other disputed, and that there is a conflict over that territory; and
- c) the population in the territory is particularly vulnerable.

While the conflictual character of the situation and the vulnerability of the population can be dealt with under existing policies, there is no EU policy that directly addresses non-recognition.

This section will map existing guidelines, etc., as well as existing non-codified practice, such as that related in the three case studies. Although the EU's many and multidimensional efforts at crisis management, conflict prevention, peacebuilding and prevention are also relevant, they are beyond the scope of this report. In addition, development policy has also been referred to only in passing, although also highly relevant.

### 6.2 Non-recognition

There is developing practice on non-recognition and the consequences thereof. While there is no clear EU policy of non-recognition with regard to Western Sahara, such a policy has developed over time regarding the OPT and is quite clear and consequential in the case of Crimea. On 20 March 2014, the European Council asked the Commission to evaluate the legal consequences of the annexation of Crimea and to propose economic, trade and financial restrictions regarding Crimea for rapid implementation. While no comprehensive document to that effect is known to have been published, one can still induce a number of items from the subsequent measures taken:

- An unequivocal statement that the annexation will not be recognised.
- Prohibition of measures like investment that might support the annexation, directly or indirectly, including support for economic activity in the occupied territory under the aegis of the occupying power. It is to be noted here that the sanctions that have been introduced against export to Crimea are not comprehensive, but only target certain key sectors. It is not clear whether this means that the Council believes that such investment and trade is not necessarily illegal as such.
- Sanctions against the occupying state, in case the occupation (or annexation) is in violation of international law.
- Sanctions amounting to asset freeze and visa ban against those who are responsible for an illegal annexation, or who benefit from it.
- Information for private parties (the information note on business and Crimea referred to above).

In addition, the following element from the OPT case may be added:

- Measures to prevent EU funding from grants, prizes and financial instruments and cooperation which benefit settlements and other structures that maintain an illegal situation.

There are no comprehensive public guidelines as to how to apply non-recognition, including to what extent legislation and other acts of the occupying power should be recognised and given legal effect. The Information Note to EU business operating and/or investing in Crimea/Sevastopol gives some guidance, including by stating that 'non-recognition by the EU and its member states of the illegal Russian annexation of Crimea/Sevastopol also means that the EU and its member states do not recognise new Russian legislation on Crimean issues as valid'<sup>187</sup>. However, domestic courts and authorities in EU member states may find that legal issue less straight-forward<sup>188</sup>.

EU states have usually dealt with non-recognition through common positions, and have thus applied the same policies, at least since the 1980's. However, the practical implementation of such policies has, to a large extent, fallen on the individual member states, some of which have been more vigilant than others. For instance, the Brita case, referenced above (section 5.2.3), was the result of the refusal by German customs authorities to grant preferential treatment under the EC-Israel Association Agreement to products originating in the West Bank. By contrast, it is alleged that tomatoes from Western Sahara are being imported into Europe as 'Moroccan' through one member state<sup>189</sup>.

In the field of development, practice does not appear to be based on principles relating to occupation and annexation. There are development projects in the TRNC, and with regard to Morocco, there are no known restrictions relating to their implementation in Western Sahara. In the field of development, the right balance must be struck between on the one hand the need to alleviate poverty and on the other hand the necessity of not sustaining illegal occupation or annexation.

There appear to be no guidelines or established practices regarding cultural or sporting events. Sports are in principle not handled by political bodies, although political bodies may influence how national sports associations act. Regarding exchange in culture and academia, practice suggests a liberal approach. There is ongoing EU cooperation with universities in TRNC, while cooperation with Israeli academic institutions in the OPT have recently been restricted.

### 6.3 Sanctions

An important instrument related to non-recognition (but still distinct), is sanctions (also called restrictive measures), which the EU has resorted to on a number of occasions since around 1980<sup>190</sup>. Sanctions can be defined as 'an instrument of a diplomatic or economic nature which seeks to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles'<sup>191</sup>. It is sometimes difficult to ascertain the ultimate purpose of a certain measure: Is it a logical consequence of a policy of non-recognition (and hence required by international law), is it intended to 'bring about a change' or is it intended to serve both purposes? In situations of occupation/annexation, it is often appropriate to use the sanctions instrument. However, whenever such a measure cannot be subsumed under non-recognition, it may need a separate justification under international law.

<sup>187</sup> Information Note to EU business operating and/or investing in Crimea/Sevastopol, Brussels, 11.8.2014 SWD(2014) 300 final/2, available at: [http://eeas.europa.eu/ukraine/pdf/swd\\_2014\\_300\\_f2\\_joint\\_staff\\_working\\_paper\\_en\\_v8\\_p1\\_776932.pdf](http://eeas.europa.eu/ukraine/pdf/swd_2014_300_f2_joint_staff_working_paper_en_v8_p1_776932.pdf).

<sup>188</sup> See section 2.4.3.

<sup>189</sup> Western Sahara Resource Watch, 'Report: Conflict Tomatoes: The Moroccan agriculture industry in occupied Western Sahara and the controversial exports to the EU market', February 2012, available at: [http://www.vastsaharaaktionen.se/files/Conflict\\_Tomatoes\\_14.02.2012.pdf](http://www.vastsaharaaktionen.se/files/Conflict_Tomatoes_14.02.2012.pdf).

<sup>190</sup> Before the creation of the EU, such measures were usually decided within the framework of the European Political Cooperation of EC Member States.

<sup>191</sup> European Commission – Restrictive measures, 'Sanctions or restrictive measures', 2008, available at: [http://eeas.europa.eu/cfsp/sanctions/docs/index\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf).



Many sanctions are unproblematic from a legal point of view, since they are within the freedom of action of sovereign states (and other actors). For instance, states are free to have or not to have diplomatic relations with one another, so they are therefore also free to introduce diplomatic sanctions for whatever reasons<sup>192</sup>. The same goes for visa restrictions<sup>193</sup> and interruption of development assistance or trade, provided that there are no contrary treaty obligations<sup>194</sup>.

However, other typical sanctions, like freeze of assets, are illegal as such. Such measures may be rendered legal only by being countermeasures (reprisals) to a prior illegal act committed by the other state<sup>195</sup>. Since traditional international law essentially was a 'horizontal' system of self-help, a reprisal could be lawful only if it was imposed by an injured state against the state that violated international law. Therefore, a state not directly concerned by the wrongdoing was not entitled to resort to reprisals. From at least the 1980's there have been a growing number of international lawyers considering that grave breaches of human rights or unlawful use of force entitle countries not directly injured to impose sanctions, since these norms are the concern of all states<sup>196</sup>, and it is usually under that assumption that the EU introduces sanctions.

In addition a number of other factors need to be taken into account, including: Countermeasures may only be taken in order to induce a State to comply with its obligations<sup>197</sup>, not to 'punish' that state; countermeasures must be commensurate with the injury suffered<sup>198</sup>, and countermeasures shall not affect obligations for the protection of fundamental human rights<sup>199</sup>.

The last item is relevant to sanctions directed at individuals, particularly as concerns human rights (or 'fundamental' human rights, if the distinction can be made). The sanctions instrument started to be used against groups and individuals as 'targeted sanctions' from the 1990s, either because there was a need to avoid affecting the population as a whole or because it was necessary to address individuals (as in the case of terrorism). However, a freeze of asset violates the right of peaceful enjoyment of possessions and the right to a fair trial. Hence, such an act must be justified, for instance by stating that the person has contributed to the violation of an essential rule of international law or that there are other important considerations that override human rights considerations.

<sup>192</sup> Of course, diplomatic sanctions may still have political or diplomatic repercussions.

<sup>193</sup> According to international law including human rights law, a country may restrict entry with respect to non-nationals into its territory for any reason, in the absence of contrary treaty-obligations. Therefore, the EU does not have to find a legal justification for such measures.

<sup>194</sup> However, since most states are now bound by GATT and other trade agreements, the freedom to introduce trade sanctions at will, without further justification, is now quite limited.

<sup>195</sup> See article 22 of the International Law Commission's draft articles on 'Responsibility of States for international wrongful acts' (adopted in December 2001 by the General Assembly as resolution 56/83): 'The wrongfulness of an act of a State not in conformity with an international obligation towards another state is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three'.

<sup>196</sup> Article 48 of the UN International Law Commission's articles on state responsibility provide that states other than the injured the right to invoke the responsibility of another state if;

(a) the obligation breached is owed to a group of States established for the protection of a collective interest of the group, or (b) the obligation breached is owed to the international community as a whole.

The right to take countermeasures is not spelt out in the Draft Articles, but neither is it precluded with regard to these erga omnes obligations: Such states may 'take lawful measures [...] to ensure the cessation of the breach and reparation in the interest of the injured state or of the beneficiaries of the obligation breached. Article 54. It is submitted that customary law allows autonomous countermeasures in such cases, at least as concerns gross and well-testified violations, as the ILC's Special Rapporteur concluded in 2000, largely building on practice from the EU and EU member states. A/CN.4/507/Add.4, pp. 12-21.

The right to resort to reprisals against an aggressor state can also be covered by the right to collective self-defence, which is provided already in customary international law and in the UN Charter.

<sup>197</sup> Article 49 paragraph 1 of the ILC draft articles.

<sup>198</sup> Article 51, op.cit.

<sup>199</sup> Article 50 paragraph 1, op.cit.

As has been explained in the case studies, there have been sanctions against private parties benefitting from the annexation of Crimea, but none against private parties benefitting from the annexation of Western Sahara or the situation in the OPT<sup>200</sup>. The same applies to the sanctions against the responsible states and individuals; while there are sanctions in place against the Russian state and Russian private entities – restrictions of investments and trade, asset freeze, visa ban and various diplomatic sanctions – there are no similar measures against Israel or Morocco. It should be noted in this respect that the various instruments relating to sanctions regulate how sanctions shall be introduced, but do not in any way make this mandatory in certain types of situations<sup>201</sup>.

## 6.4 EU Guidelines on international humanitarian law

Among the existing guidelines that may be applicable in a situation of occupation, the most relevant guidelines are the 2005 Guidelines on Promoting Compliance with International Humanitarian Law, updated in 2009<sup>202</sup>. As mentioned above (Sections 4.2 and 4.3), IHL contains rules specifically designed to address occupation. The EU guidelines are supposed to give quite practical guidance on compliance with IHL to any relevant officer in the foreign services of the EU, including its member states. All provisions of the guidelines leave considerable scope for political guidance and practical considerations, and the final decision, if and how action is to be taken, has to be a matter of practical judgment.

The guidelines are divided into three parts: 'Purpose', 'International Humanitarian Law' and 'Operational Guidelines'. In the second part, on IHL, it is stated that the EU is 'founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law', which 'includes the goal of promoting compliance with IHL.' The guidelines do not, however, state that it is the duty of each state to ensure compliance by or in third states, even though it is a wide-spread interpretation view that common article 1 of the Geneva Conventions does provide such an obligation<sup>203</sup>. The ensuing explanations of the content of IHL are brief and quite adequate for the purpose of the guidelines.

The operational guidelines are more important from the practical perspective. Paragraph 15 is essentially about how to ensure that the necessary information is available at the relevant places. The guidelines can be implemented only with the primary and active participation of the various EU missions around the world and the geographical Council working-groups in Brussels. There is therefore a real need for more systematic inclusion of IHL aspects. Firstly, 'responsible EU bodies ... should monitor situations within their areas of responsibility where IHL may be applicable' and 'identify and recommend action'. For that purpose, advice regarding IHL and its applicability is necessary, and such advice can be attained through consultations and exchange of information with the Red Cross (the ICRC) and other actors<sup>204</sup>. Reports by EU Heads of Missions, Commanders of EU Military Operations and others 'should include an assessment of the IHL situation' 'whenever relevant', and this may include 'suggestions of possible measures'. Further, '[b]ackground papers for EU meetings should include, where appropriate, an analysis on the applicability of IHL', but it is also the responsibility of 'Member States participating in such meetings' to ensure that they have the necessary advice. In addition, if there is an armed conflict, the most expert

<sup>200</sup> The non-application of the Association Agreement with Israel to the OPT does not amount to a sanction.

<sup>201</sup> Basic Principles on the Use of Restrictive Measures (Sanctions), 10198/1/04 REV 1 PESC 450, 7 June 2004; Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, 15 June 2012, 11205/1.

<sup>202</sup> Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL) 2009/C 303/06, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XG1215\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XG1215(01)).

<sup>203</sup> See Boisson de Chazournes, L., and Condorelli, L., 'Common Article 1 of the Geneva Conventions revisited: Protecting collective interests', *International Review of the Red Cross*, vol. 82, 2000, pp. 67-87.

<sup>204</sup> The Common Foreign and Security Policy pillar of the EU has functional working groups – COJUR (the Public International Law Working Party) being one of them.

body on these matters, COJUR, should be informed and could be asked to make suggestions of future action.

Paragraph 16 provides an open list of actions at the disposal of the EU: Political dialogue with third countries; general public statements; demarches and public statements; sanctions, or 'restrictive measures'; cooperation with other international bodies; drafting of mandates of EU crisis-management operations' which 'may include collecting information which may be of use' in 'investigations of war crimes'. The following sub-paragraph covers individual responsibility, the need for training in IHL, and a reference to the European Code of Conduct on Arms Export<sup>205</sup>, which provides 'that an importing country's compliance with IHL should be considered before licenses to export to that country are granted.'

In 2009, the ICRC conducted a mapping of the number of references to IHL in public EU documents since the adoption of the guidelines in 2005 to January 2009. 200 references were found in Council documents, 70 in Commission documents and 40 in documents from the European Parliament. It is interesting that the number of IHL references differed quite considerably between the various conflicts, from frequent in the Israel-Lebanon conflict to largely absent in others like Colombia, and that IHL was prevalent in certain themes, like the fight against terrorism, but not in equally relevant themes, like the question of missing persons<sup>206</sup>.

At the Annual NGO Forum in 2011, NGOs identified three main obstacles to boosting implementation of the EU Guidelines on IHL: 'the lack of political will, the EU's lack of consistency in its approach with countries that violate IHL (double standards), and the failure to back up words with action on the ground.' Further, as NGOs have complained, 'there is little knowledge of how the EU is implementing the Guidelines, through which mechanisms or who is responsible' and there needs to 'be better coordination between all of the EU actors involved,' including 'different parts of the EEAS and the Commission, and both geographical and thematic working groups of the Council'. NGOs further held that '[t]he EU should condition its approach to third states by ensuring that respect for IHL is included in key documents such as agreements, ENP Action Plans, and human rights country strategies. IHL concerns should also be better integrated into all political dialogues, including human rights dialogues and consultations<sup>207</sup>. Other proposals included 'improving links between IHL Guidelines and human rights guidelines (particularly the Guidelines on children in armed conflict) and supporting the functioning of the International Humanitarian Fact Finding Commission<sup>208</sup>.

It should be noted in this context, that since occupying states often deny that they are occupying powers, it may be important to point out that the IHL rules of occupation apply. In all of the cases mentioned in this report, the occupying power refuses to admit the de jure application of IHL relevant to occupation.

<sup>205</sup> In December 2008, the EU Code was converted into the legally binding Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment.

<sup>206</sup> The report is referenced briefly in Pål Wrange, 'The EU Guidelines on Promoting Compliance with International Humanitarian Law', 78 *Nordic Journal of International Law* 541-552 (2009).

<sup>207</sup> 13th Annual EU-NGO Forum on Human Rights on Boosting the Implementation of the EU Guidelines on International Humanitarian Law, 8 - 9 December 2011, Brussels, Report, available at: [http://ec.europa.eu/europeaid/sites/devco/files/report-13th-eu-ngo-forum-human-rights-guidelines-maff-201112\\_en\\_1.pdf](http://ec.europa.eu/europeaid/sites/devco/files/report-13th-eu-ngo-forum-human-rights-guidelines-maff-201112_en_1.pdf), p. 12.

<sup>208</sup> 13th Annual EU-NGO Forum on Human Rights on Boosting the Implementation of the EU Guidelines on International Humanitarian Law, 8 - 9 December 2011, Brussels, Report, available at: [http://ec.europa.eu/europeaid/sites/devco/files/report-13th-eu-ngo-forum-human-rights-guidelines-maff-201112\\_en\\_1.pdf](http://ec.europa.eu/europeaid/sites/devco/files/report-13th-eu-ngo-forum-human-rights-guidelines-maff-201112_en_1.pdf), p. 15.

## 6.5 EU guidelines on human rights

The EU has a great number of guidelines on human rights<sup>209</sup>. As in all situations, all of the guidelines on human rights are relevant in principle. Since situations of occupation are often highly conflictual, the guidelines on Torture and other cruel, inhuman or degrading treatment or punishment (2012) and on Children and armed conflict (2008) may be particularly relevant, but depending on the situation, all of the guidelines should be considered. The guidelines on Human Rights dialogues with third countries (2009) and on Human Rights defenders (2008) are always important as tools to enhance compliance with all human rights.

It is important to state in this context that occupying powers need to be reminded that human rights apply also in cases of occupation (which is relevant particularly for the OPT) and that an occupying power needs to comply with both its own human rights obligations (including treaties to which it is a party) and those applicable to the occupied territory (including treaties entered into by the lawful sovereign).

## 6.6 Consistency

According to article 21 of the Treaty on European Union, the EU 'shall ensure consistency between the different areas of its external action and between these and its other policies.' Whether that is achieved or not depends, of course, ultimately on political will and on the exigencies of the various situations. However, guidelines play an important role. For the guidelines the application is usually discretionary, 'as appropriate'<sup>210</sup>, but the existence of guidelines will often help ensure that an aspect is being considered. For issue areas where there are no guidelines, consistency is even harder to reach. That has been particularly clear regarding issues related to non-recognition, as has been pointed out by many commentators who have compared the EU's policy with regard to Crimea, the OPT, the TRNC and Western Sahara. To a number of observers, '[t]his inconsistent approach ... represents a major blow for the EU's international credibility'<sup>211</sup>.

# 7 RECOMMENDATIONS

The basis for the EU's external actions is article 21 of the Treaty on European Union, which says that '[t]he Union's action on the international scene shall be guided by the [following] principles [...]: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.

<sup>209</sup> See 'Human Rights Guidelines', available at: [http://eeas.europa.eu/human\\_rights/guidelines/index\\_en.htm](http://eeas.europa.eu/human_rights/guidelines/index_en.htm).

<sup>210</sup> For instance, the word "appropriate" appears seven times in the action oriented paragraph 16 of the IHL Guidelines.

<sup>211</sup> 'This inconsistent approach plays in the hands of some of the most active supporters of the occupation of the Palestinian Territory and represents a major blow for the EU's international credibility.' Kamel, L, 'Is the EU adopting a double-standards approach toward Israel and the Palestinian Territories? (Part 1)', Blogpost at Opinio Juris, 2014, available at: <http://opiniojuris.org/2014/01/09/eu-adopting-double-standards-approach-toward-israel-palestinian-territories-part-1/>.

See also: 'The EU says it cannot spend a cent on Israeli-sponsored activities in the occupied territories, while in Western Sahara, Europe will actually pay Morocco for its exploitation of natural resources there.' Kontorovic, E, 'The EU is right about Western Sahara – which means it is wrong about Israel', Blogpost on Globalpost, Nov 21, 2013, <http://www.globalpost.com/dispatches/globalpost-blogs/commentary/eu-holds-contradictory-view-settlements-west-bank-and-western>. See further Balboni, M, 'The EU's Approach Towards Western Sahara', Paper presented at the Conference organised by the South African Department of Foreign Affairs, on Multilateralism and International Law with Western Sahara as a Case Study, Pretoria, South Africa, 4-5 December, 2008, p. 1, available at: <http://www.saharawi.org/oldsite/tesi/saharaocc1.pdf>, p 1; Benabdallah, K, 'The Position of the European Union on the Western Sahara Conflict', Journal of Contemporary European Studies, vol. 17, 2009, pp. 417–435, at p. 434. The inconsistency was also noted by Professor Crawford. Crawford, supra, note 35, pp. 56-57.

Further, 'the EU shall define and pursue common policies and actions, and shall work on a high degree of cooperation in all fields of international relations, in order to

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders [...];
- (h) promote an international system based on stronger multilateral cooperation and good global governance.

In addition, as mentioned above, '[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies'.

Hence, the Treaty on European Union provides that a number of values and principles should be promoted in a consistent way.

Furthermore, an EU policy must be effective. This means that countermeasures and other actions must be applied in a well-measured and steadfast way. In addition, effectiveness must not be construed narrowly. A principled policy that has no immediate noticeable effects may nevertheless have a long-term effect on the situation at hand, and will have a positive impact on the global effectiveness of EU external action, since it will enhance the legitimacy and credibility of the Union's policy.

What sets the situation of illegal annexation apart from other conflicts and situations is that EU policy should be governed by non-recognition. Given the fairly low number of illegally annexed territories at any given time, it may not be realistic to expect the Union to adopt an official policy on this matter. Nevertheless, such guidelines can be gleaned and amalgamated from existing instruments and best practices, in particular from the Crimea crisis but also from the OPT.

- Whenever an illegal annexation or occupation occurs (including creeping annexation), the EU should clearly establish that the annexation/occupation is illegal, and that the EU will never recognise it.
- The EU should explicitly limit the application of any bilateral treaty with an occupying power to its internationally recognised territory. Any occupied/annexed territory must be excluded from the scope of the treaty, including products and entities in illegal settlements in occupied territory. Effective control mechanisms, such as rigid rules-of-origin or labelling requirements, must be set up to guarantee that products or entities originating in the occupied/annexed territory do not benefit from EU trade or financial support. Already existing legal mechanism to this end must be fully implemented in practice. Exceptions can be made for agreements that aim to assist the legitimate local population.
- As for treaties involving economic cooperation, the EU should allow local non-settler populations to benefit from the arrangements, provided that any such arrangement is both in the interests of such peoples and in accordance with their wishes.
- As a general rule, the EU and its member states should not recognise legal acts including new laws introduced by an illegal OP. However, exceptions should be made to protect the good faith interests of private parties, in particular the legitimate local population. The legal effect of quotidian administrative acts should as a rule be recognised, for instance birth certificates and contracts which have no repercussions on the occupied people's permanent sovereignty over their natural resources and which do not affect existing property arrangements or other protected rights of the original inhabitants.

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- In line with the duty of non-recognition, the EU should never place its diplomatic missions to the occupying power on occupied territory. The EU should adopt a systematic policy of no official visits with representatives of an occupying power in occupied or annexed territory, unless, as appropriate, the purpose is to hold the occupying power to account (for instance by monitoring respect for human rights and IHL), the purpose is to assist EU citizens in distress or for the purpose of supporting the legitimate local population (excluding settlers). At all times, the non-recognition must be made clear<sup>212</sup>.
- The EU should discourage EU businesses/enterprises from commercial and investment links with settlements by means of formal advice or a prohibition.
- The EU should continue to support the legitimate local populations in occupied territories through development assistance and similar activities, but should be careful to not support illegal settlements and other projects that reinforce the occupation.
- As regards development aid, the EU should provide clear guidance on the cooperation approach with the occupying power regarding breaches of international law, human rights violations and demolition of EU-financed infrastructure. The EU should initiate a legal review of the possibility to demand compensation when EU-funded projects are destroyed by an occupying power.
- The EU should continue to promote the application of IHL. Relevant EEAS missions should be fully informed of IHL and bring up the obligations of an occupying power under IHL whenever relevant. In its communications with responsible authorities, EU representatives should make specific references to the rules applicable to occupation, whenever relevant.
- The EU should also continue to promote international human rights standards, and hold OPs to account for their behaviour in occupied territories, regardless of whether the OP in question holds human rights obligations to be applicable or not. In particular, the EU should note that the exercise of the freedom of expression and the right of peaceful assembly will often be limited by an occupying power.
- In order to help protecting the human rights of the population concerned, the EU should support human rights defenders and civil society organisations.
- Restrictive measures (sanctions) should be applied to illegal occupants and to individuals and private parties that contribute to an illegal occupation. Measures may also be applied to individuals and private parties that merely benefit from such an illegal occupation, at least to such an extent that the benefit is extinguished. Such decisions must clarify the reasons for the introductions of sanctions against each target.
- The EU and its member states should, whenever possible, prosecute officers of an illegal occupant as well as other parties involved, for war crimes and other crimes, including the crime of pillaging.
- In its political and diplomatic efforts to resolve conflicts involving illegal annexation, the EU should make it a paramount consideration that such situations are conflicts between an aggressor and a victim, in which the victim is usually the weaker party. The EU should not support a solution that has not been agreed freely and without coercion.

<sup>212</sup> This means, for instance, that missions to Israel shall remain in Tel Aviv and that visits shall not be made to Western Sahara for the purpose of exploring economic investments in collaboration with the Moroccan government.

- Whenever a situation of occupation is on the Union's agenda (be it that of the Council and its working parties, the Commission or Parliament), a legal assessment should be available to policy makers. That should be provided by the respective Legal Services and, in the case of the Council and its working parties, preferably by the Public International Law Working Party (COJUR).
- The European Parliament should refuse to give its assent to treaties and other agreements and measures which violate the obligation of non-recognition and/or which support an ongoing illegal occupation or annexation.
- In its resolutions on country situations that involve occupation and annexation, the European Parliament should clarify its view on the status of the territory in question, and should state that both human rights law and IHL apply to the occupied territory and that an illegal annexation will never be recognised.
- The European Parliament and its Members should regularly ask the Commission and other responsible EU bodies about information regarding the implementation of agreements with – and projects in – occupying states, in order to ensure that no illegal occupation or annexation is recognised or supported.
- Members of the European Parliament should ask the relevant national authorities of their home states, such as customs authorities, about the implementation of agreements with and projects in occupying states, in order to ensure that no illegal occupation or annexation is recognised or supported.

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ISBN 978-92-823-7549-5 (print)

ISBN 978-92-823-7550-1 (pdf)

doi: 10.2861/039912 (print)

doi: 10.2861/80851 (pdf)