The Consequence of the UN Resolution on Israeli Settlements for the EU: Stop Trade with Settlements

The recent UN Security Council Resolution 2334 (2016) reaffirmed that the establishment of Israeli settlements in the occupied Palestinian territory has no legal validity and that Israel's settlement enterprise is a flagrant violation of international law. The resolution also calls upon all States "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967". This part of the resolution is of great significance with regard to the question of trading with settlements.

While the content of the resolution might seem novel, Secretary of State John Kerry was right to remind us in his landmark speech on the Israeli-Palestinian conflict at the end of 2016 that:

> this resolution simply reaffirms statements made by the Security Council on the legality of settlements over several decades. It does not break new ground". In 1980 UN Security Council Resolution 465 had called upon all States "not to provide Israel with any assistance to be used specifically in connection with settlements in occupied territories.

Trading with settlements offers an economic lifeline that allows the settlement enterprise to survive and develop. This reality and the aforementioned UN Security Council Resolutions make a good case not to trade with settlements. But is the withholding of such settlement trade truly an obligation under international law?

In an earlier piece I argued that there is indeed such an obligation, and the lack of state compliance does not seriously shake the legal foundations of this argument. Just last year in an open letter, 40 legal experts (myself included) called upon the European Parliament, and the office of the High Representative and the Trade Commissioner to stop trade with settlements in compliance with the EU's international legal obligations. Signatories included two former UN rapporteurs, a former President of the International Law Commission, a former judge on the ICTY, and dozens of professors in international law.

Our main argument was that the EU has the obligation to end trade with Israeli settlements based on the duties of non-recognition and non-assistance. This post will describe the legal argumentation underlying these duties. As this obligation is mainly triggered by a violation of *jus cogens* norms, I will assess whether Israel's settlement enterprise violates any peremptory norms. I will then assess what the duties of non-recognition and non-assistance entail specifically.

Israel's violation of *jus cogens* and the duty of non-recognition

According to the International Law Commission's Articles on State Responsibility (Art 41.2), the duty not to recognize a situation as lawful nor aid or assist in maintaining that situation arises for third states when there is a *jus cogens* violation. In its Advisory

Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice concluded (Para. 159) that third states had the duties of non-recognition and non-assistance:

> 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 recognize 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.

This was only the second time in its history that the ICJ explicitly concluded that states had the duty not to recognize and not aid or assist in maintaining a situation. Whereas the ICJ did not go as far as calling specific violations *jus cogens* violations, its conclusion that the duties of non-recognition and non-assistance apply to third states seems to *ipso facto* confirm that either individual violations or their cumulative impact indeed constituted a violation of *jus cogens*.

Another interpretation can be that the duties of non-recognition and non-assistance can apply to non-*jus cogens* breaches as well. In his Separate Opinion in the *Wall Advisory Opinion*, Judge Kooijmans argued that the consequences of the breach are identical - whether or not violations are of *a jus cogens* nature. In its *Wall Opinion*, the Court emphasized the *erga omnes* character of the obligation involved (Para. 155-157), the intransgressible (a term not used lightly) principles of international customary law (Para. 157) and the nature of the Israeli-Palestinian conflict as a threat to international peace and security (Para. 161). It might be that this together is sufficient for the Court to affirm the existence of the duties of non-recognition and non-assistance. However, this combination of findings suggests that it is politically and legally relevant to assess whether Israeli violations in Palestine are *jus cogens* violations or not. That the ICJ did not draw this conclusion explicitly was probably for reasons of judicial economy (read: political carefulness).

Israeli settlements and specific *jus cogens* violations?

Three key considerations are of significance in arguing for the existence of Israeli *jus cogens* violations. The first two are considerations developed by the ICJ in its *Wall* Opinion, prior to affirming the duty of non-recognition. First, there is the obstruction of Palestinians' right to self-determination, among others by the *de facto* acquisition of territory by the use of force (emphasized again in the recent UNSC Resolution on settlements). The peremptory character of these norms was suggested by some states in the International Law Commission's development of the ILC Articles on the Law of Treaties (p248) and affirmed by the ILC when drafting the Articles on State Responsibility (P85, 112, 113, 114, 115). In its discussion, the Commission emphasized the essence (p115) of this principle for contemporary international law, a similar assessment provided by Judge Elaraby in his separate *Wall* opinion (Para. 31).

Second, the ILC Articles on State Responsibility also refer to fundamental norms of international humanitarian law as potential *jus cogens*. To do so, they rely on the ICJ's use of the term 'intransgressible' (p113), which some scholars believe is a way to avoid using *jus cogens*. Fundamental norms are argued (among others by Judge Nieto-Navia (P24) and Hannikainen (P605-606)) to include the Fourth Geneva Convention. The applicability of the Convention to Israel's occupation and its settlements - including the transfer of population to occupied territories as a flagrant violation of the Fourth Geneva Convention - is referred to in numerous UNSC Resolutions (including UNSC Resolutions 446, 465, 469, 471, and the recent 2334) by the ICRC and in the ICJ *Wall* Opinion (Para. 75, 120, 126, 135).

On several occasions, including in the *Wall Opinion*, the ICJ confirmed that fundamental humanitarian norms had an *erga omnes* character and were to "be observed by all States" because "they constitute intransgressible principles of international customary law", and are "fundamental to the respect of humanity" and "elementary considerations of humanity". Like the ILC, many legal scholars including Cassese and Chetail, as well as ICJ judges such as Judge Bedjaoui, Judge Weeramantry and Judge Koroma have explicitly concluded these norms are either *jus cogens in statu nascendi* or *jus cogens*.

Third, in the European Journal of International Law, Dugard and Reynolds scrupulously set forward the argumentation and legal evidence that the situation in the West Bank, including Israel's settlement enterprise, constitutes Apartheid. Again, the draft ILC Articles on State Responsibility have noted the widespread agreement that the prohibition of Apartheid constitutes a *jus cogens* norm (p112). Recently, Professors Falk and Tilley also concluded that Israeli practices constitute Apartheid in a report commissioned by the UN Economic and Social Commission for West Asia (ESCWA). Upon release, however, Israel and the U.S. pushed for its censorship, which ultimately lead to the resignation of the head of ESCWA and the subsequent withdrawal of the report, all without any discussion of its substantial content.

The three violations taken individually (1. right to self determination and prohibition on the acquisition of territory by force; 2. the violation of core humanitarian norms; 3. the prohibition on apartheid) seem to constitute *jus cogens* violations in the case of Israel's settlement enterprise in Palestine, even if this remains untested. However, that in itself is not of primary importance here. The key consideration, however, is that the combined violations represented a sufficient breach that the ICJ concluded on the applicability of the duties of non-recognition and non-assistance.

Trade as part of the Duties of Non-Recognition and Non-Assistance

The duties of non-recognition and non-assistance (laid out in Art. 41(2) of the ILC Article on State Responsibility) require that states shall neither recognize as lawful a situation created by a serious breach of a peremptory norm of international law, nor render aid or assistance in maintaining the situation created by the breach. What exactly the duties entail is widely debated, but it is generally understood that it does not require

positive obligations on third states. Stopping trade with settlements, however, should not be considered a positive obligation (for example a sanction), but a negative one: states should withhold from trading with settlements, as this type of trade should have not existed in the first place and represents, in a consistent reading of international public law, an error in international economic relations.

Trading with settlements is a violation of both duties, which complement each other despite having different substance. On the side of non-assistance, the agreement establishing the World Trade Organization explicitly refers to the economic benefits of liberalized trade: "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services". Trading with legally invalid settlements gives those settlements economic support. This seems to constitute concrete help to the maintenance of the unlawful situation, as discussed by Aust (p339). Indicative of the fact that trade helps to maintain Israeli violations is for example UN Office of the High Commission for Human Rights' recognition of the encouragement of economic activity in settlements as a reason for settlement expansion (p3). This was also confirmed in the Human Right Council (Para. 20), which even decided to gather a list of companies operating in settlements. More detailed assessments of how settlement businesses and trade assist the maintaining and developing of settlements are provided by NGOs such as 'Who Profits' and Human Rights Watch.

Trading with settlements also breaches the duty of non-recognition. The only legal text directly addressing the content of the duty of non-recognition is the ICJ Advisory Opinion on Namibia in which the ICJ indicates that non-recognition "should not result in depriving the people of Namibia of any advantages derived from international co-operation" (Para. 125). This, however, is no ground to exclude settlement trade from the duties of non-recognition and non-assistance.

The Hague Convention and the Fourth Geneva Convention confirm that the fundamental prohibition of the transfer of civilian population *ipso facto* implies an equally strong prohibition on the economic activity of transferred civilians for the benefit of the occupying state. This prohibition is not only recognized in international law, but also in Israeli domestic law. In the *Beth El Case*, the Israeli Supreme Court argued that Settlements were acceptable if they were temporary and served the military and security needs of the Israeli State. In the *Elon Moreh and Cooperative Society Case*, the Supreme Court ruled that the security needs of the army in occupation (the main legitimization for the existence of settlements) could never include national, economic or social interests.

The ICJ Namibia Opinion (Para. 124) also addresses economic relations, when it argues that:

> the restraints which are implicit in the non-recognition of South Africa's presence in Namibia [...] impose upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South

> Africa on behalf of or concerning Namibia which may entrench its authority over the Territory?

Can trade between two private parties of which one is a settlement enterprise be considered as an economic dealing between the third party and Israel? From one side, economic activity and enterprises in settlements are regulated by Israeli economic law. Exportation of products represents a claim of Israel on the territory of Palestine. From another side, the custom authorities of a third party validate trade entries. Even if no preferential access is given, the act of importation remains a legal act, which requires the stamp of approval from the importing state, which holds a sovereign power over its trade policy. Having the knowledge that settlements, among others through trade, make a claim on the territory of Palestine, makes such an act of importation implicit recognition.

Conclusion

The EU's settlement trade policy is inconsistent. The EU explicitly does not grant preferential access to settlement produce because "it does not consider them to be part of Israel's territory, irrespective of their status under domestic Israeli law". It recognizes that settlements, in their trading activity, are regulated by domestic Israeli law, and it does not give them preferential access because they do not agree with this unlawful claim. This is exactly what constitutes implicit recognition.

The duty of non-recognition is a customary obligation, which does not require UN action to trigger it. Moreover, if the EU violates international law by not complying with its duty of non-recognition, it is the international obligation of EU Member States to make sure they do comply as individual, sovereign states.

In another context, the EU has acted on its obligations of non-recognition. In June 2014, the European Union formally decided to prohibit imports from Crimea or Sevastopol. The Council Decision and Regulation formally stated that an import ban is an integral part of the EU's non-recognition policy. In this case, non-recognition was related to the illegal annexation of these territories by Russia. The legal basis for this import ban was the European Council Conclusions of 20/21 March, which explicitly condemned the illegal annexation and confirmed the EU's obligation of non-recognition.

Banning trade with Israeli settlements is simply too controversial, hence the EU's non-compliance. Trade measures were an important tool in bringing down Apartheid South Africa. Like the Apartheid regime, Israel realizes the potential of trade measures and tries to undermine them before they materialize. As such, they have enacted a controversial law blocking freedom of speech to call for boycotts. Just a few weeks ago, about 200 legal experts confirmed that there was no question of the legality of settlement boycott calls. The EU has also confirmed the inalienable right to freedom of expression with regards to boycotts.