More Than Mere Bystanders

Responsibility of the EU for Israel's Illegal Presence in the OPT

Pedro R. Borges de Carvalho

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After two years since the International Court of Justice unequivocally declared Israel's presence in the Occupied Palestinian Territory (OPT) as unlawful, the European Commission is expected to finally propose measures to "restrict" EU trade with illegal Israeli settlements ahead of the next European Council meeting on 13 July.

While most proposals openly discussed so far explore suspending the EU-Israel Association Agreement, adopting targeted sanctions against Israeli officials and settlers, or imposing tariffs on settlement trade, these measures are not enough to dismantle a link of complicity where a complete embargo on Israeli colonies is required.

I argue that the Commission must correctly differentiate between the imposition of countermeasures (sanctions) and the discontinuance of complicity and effective recognition under international law. Sanctions (as countermeasures) constitute a discretionary and reversible suspension of a right, but trade with Israeli settlements is illegal to begin with, and the EU is under a *duty* of non-assistance and non-recognition to impose a full trade embargo on them.

Distinguishing between what is and what *is not* a countermeasure (sanction) under customary international law also bears relevance to the current debate on the correct legal basis and voting procedure for such trade restrictions under EU external relations law. Inasmuch as discontinuing economic cooperation with Israel is not a matter of political discretion but a *duty* under the peremptory rules of international law binding on the EU as a matter of EU law, it is not to be voted as a sanction under a unanimity voting requirement at the Council, but as a matter of trade policy requiring only a qualified majority.

On the same distinction, I argue that the EU may choose to adopt tariffs as compensatory countermeasures against Israel proper to fund the reconstruction of the OPT, mirroring its proposed policy of tariffs on Russia to reconstruct Ukraine, but only insofar as it can target lawful Israeli economic activity, *i.e. activity demonstrably extricable from its occupation enterprise*. Below this threshold, it is under a strict duty of non-assistance to cease all trade and economic cooperation with both settlements and Israel proper.

Legal Consequences for Third States Arising from Israel's Illegal Occupation

In its 2024 Advisory Opinion on Israel's policies and practices in the Occupied Palestinian Territory (OPT), the International Court of Justice found that Israel had sustainedly abused its position as an occupying power through several violations of peremptory rules of international law, rendering its presence in the OPT *unlawful* (para. 261).

The serious breaches making the occupation illegal as a whole – namely the prohibition of acquisition of territory through the use of force, of exploitation of natural resources, forced transfer of the occupied population and introduction of civilian settlers in the occupied territory (as well as a host of other serious breaches of IHL), of racial segregation or apartheid, and of suppression of Palestinians' right to self-determination – are opposable *erga omnes* to all States (para. 274).

Consequently, and mirroring language of Article 41 ARSIWA and its own 1971 Namibia Opinion, the Court found that all third States are under a duty to refrain from recognising the illegal situation as lawful, to abstain from rendering any aid and assistance to Israel that could entrench its illegal presence in the

OPT, and to cooperate to bring the occupation to an end (para. 279). While the Court found that it is now the competence of the General Assembly and the Security Council to pronounce on the concrete "modalities" required along these lines, and with which States are under a duty to cooperate to put into effect (para. 275), the ICJ already specifically held that:

> *"the duty of distinguishing dealings with Israel between its own territory and the Occupied Palestinian Territory encompasses, inter alia, the obligation to abstain from treaty relations with Israel in all cases in which it purports to act on behalf of the Occupied Palestinian Territory or a part thereof on matters concerning the Occupied Palestinian Territory or a part of its territory; to abstain from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory; to abstain, in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the Occupied Palestinian Territory; and to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory" (para. 278).*

Business as Usual

Since that groundbreaking opinion in 2024, Israel has not only refused to withdraw from the OPT, but also dramatically escalated its policies of segregation and creeping annexation, adopting a death penalty law that de facto targets Palestinians, and replicating its patterns of destructive occupation in Lebanon and Syria.

All the while, Israel's biggest trading partner, the European Union has largely failed to take a concerted stance for bringing itself and its members to compliance with the *jus cogens* obligations identified by the Advisory Opinion and competent United Nations bodies (para. 278), even where EU "exclusive competences" are concerned (the common commercial policy), and despite extensive expert legal opinions on what is expected of the EU as an international legal actor, as well as of its Member States individually.

Most embarrassingly for its European allies, Israel has accepted imports of plundered wheat from occupied Ukrainian territories by Russia, immediately prompting reactions from the EU that it otherwise failed to deliver in respect to the OPT.

The timid countermeasures that ensued, *i.e.* the EU Council's recent imposition of targeted sanctions on a handful of settler entities and individuals, amount to a small step in *cooperating to bring the occupation to an end*, measures required under the "cooperation" pillar of duties of third States under the law of aggravated responsibility. They do not, however, play any role in stopping a continuing rendering of aid and assistance (or "complicity") in and effective recognition of the principal breach – Israel's illegal presence in the OPT. Duties of cooperation are "positive" (Article 41(1) ARSIWA); they are distinct from the much more serious and definite "negative" duties of non-assistance and non-recognition (Article 41(2) ARSIWA).

Failing to cease all trade with illegal settlements entails both continued assistance to their entrenchment and *effective recognition* of the situation as lawful. As similarly articulated by Devers and Moerenhout:

> *"The fundamental prohibition of the transfer of the Occupying Power's own civilian population ipso facto implies an equally strong prohibition on the economic activity of transferred civilians for the benefit of the Occupying Power. (...) When the Occupying Power regulates the export of products from its illegal settlements, it takes a claim on that territory. And since the import of products from illegal settlements by Third States is a legal act, such trade constitutes implicit recognition because it recognises the Occupying Power's claim over the exportation of illegal settlement goods and services from illegal settlements from an annexed or occupied territory." (pp 227-228)*

Even where States may wish to target trade from settlements, they will be thwarted by Israel's misla-

belling policies of settlement goods. A June 2026 report by Global Echo has thoroughly evinced a systematic pattern of origin obfuscation, finding that one in five Israeli shipments to the EU are sourced from illegal colonies beyond the Green Line and misrepresented as produced in Israel proper.

Given the difficulty of assuring effective due diligence in distinguishing the provenance of goods between settlements in the OPT and Israel, ultimately even trade with Israel proper could be construed as assistance that entrenches its illegal presence in the OPT, because it enables the trade of illegal contraband under international law, and even further: it allows illegal exports from settlements to benefit from preferential tariff treatment in importing countries when passing as made in Israel.

This issue underpins current debates on the suspension of the EU-Israel Association Agreement.

EU-Israel Association Agreement

The EU-Israel Association Agreement is the framework for Israel's favoured economic partnership with the EU. It contains an "essential elements" clause in its Article 2, conditioning the treaty to continuous "respect for human rights and democratic principles". The European External Action Service (EEAS) found Israel to be in breach of this provision last year, which would allow the EU unilaterally to suspend the Agreement, consistent with the material breach rule under the law of treaties (Art 60(3)(b) VCLT). In spite of this finding, the European Council has hitherto failed to suspend the treaty, even as it meets against the backdrop of several EU (and most recently also EFTA) States enacting individual trade bans, and a European Citizen's Initiative calling for the suspension having become the fastest ever to reach the required threshold of one million signatures.

The question that ought to be asked is no longer whether the EU is entitled to unilaterally suspend the agreement. In fact, long before the official EEAS finding from last year, this was already posited by James Crawford in 2012, and it seems to have been officially clear internally to the European Commission since 2017 according to a recently leaked confidential legal opinion by then Legal Service DG Romero Pequena, drafted well before the 2018 massacre of peaceful Palestinian demonstrators by IDF snipers in Gaza. Rather, the question is whether the EU *must* do suspend this treaty in order to stave off continuing attribution of responsibility for Israel's illegal occupation.

More germanely still, even a full suspension of the Association Agreement may not attain what is required of EU States under international law, as it would merely entail a reversal to World Trade Organisation rules between the EU and Israel.

Where an outright embargo would be required under the law of responsibility, the debate must go beyond the suspension of this Association Agreement and earnestly address the question of banning all trade that benefits Israel's illegal presence in the OPT, encompassing all illegal settlements beyond the Green Line, but also including trade with Israel proper where demonstrably "inextricable" from its occupation enterprise. An embargo on Israeli settlements must logically include both trade in goods *and* services, hence covering companies such as Booking.com and AirBnB.

As the widespread origin obfuscation practices documented by Global Echo launder the provenance of goods sourced in the OPT by mislabelling them as made in Israel, the EU must clearly determine who bears the burden of assuring what goods and services are *not* inextricable from the illegal occupation of the OPT.

Even then, due to the severely limited efficacy of EU customs and traceability enforcement in respect of Israel and its settlements, in order to comply with the duties of non-recognition and non-assistance the EU may ultimately need to impose a precautionary trade embargo on Israel until such time as the latter heeds the ICJ's Opinion and complies with its peremptory obligation to "evacuate all settlers from the Occupied Palestinian Territory". Though this piece has focused on trade, other categories of economic cooperation as investment, research and public procurement may also qualify as assistance that entrenches the occupation, and must likewise be stopped.

EU Tariff Proposals as Compensatory Countermeasures

Having failed to achieve the unanimity incorrectly required to suspend the Association Agreement at Council meetings thus far, the EU started mulling other economic responses to Israel's OPT policies.

A proposal by France and Sweden would increase EU tariffs on goods from settlements in the OPT.

It is questionable whether this would constitute a meaningful response at all. It would arguably fall short from stopping a *lien* of assistance and still qualify a tacit recognition of the settlements as lawful. It is not a proper form of countermeasure either, because it does little to remove the EU from a mode of participation in the principal breach.

Such model of tariff as countermeasures makes more sense in recent EU proposals of tariffs on Russian goods as a sort of compensatory countermeasure in the "general or collective interest" (Art. 54 ARSIWA) to fund the reconstruction of Ukraine. The EU could apply the same measure against Israel to start funding the reconstruction of the OPT, but tariffs can only constitute a meaningful countermeasure where they represent a step beyond merely discontinuing assistance and recognition of Israel's illegal presence in the OPT.

Trade restrictions can only be properly regarded as a sanction (or countermeasure) under general international law insofar as they constitute a temporary suspension of a right, a permissible breach of an otherwise valid rule. Where trade is illegal to begin with, because it stems from territory illegally occupied or because it entrenches this occupation, the restriction of this trade is merely a matter of ceasing complicity and recognition – it is a duty, an act of removal from a mode of participation in a principal breach; it is not a discretionary measure.

Given contestation as to the existence of a Palestinian State, payments could be provisionally consigned to the UN Register of Damage for the Occupation of Palestinian Territory, drawing from analogous practice of the Council of Europe's Register of Damage Caused by the Aggression of the Russian Federation against Ukraine. Judge Tladi suggested this could be achieved by revitalising the expanding the mandate of the existing Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD).

Should the EU decide to collect tariffs on settlement trade, it will not be staving off continued complicity in Israel's illegal presence in the OPT and will accordingly need to account for its share of responsibility over a longer time span of participation. The tariffs it collects would neither stem from discretionary countermeasures, nor properly be "compensatory", because their source is spurious at origin. These funds would need to be consigned to the UN Register of Damage, but not as remedial, but because illegally perceived from the beginning, through an illegal presence in the OPT.

Tariffs are only a meaningful countermeasure against Israeli economic activity that does not "assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory" within the meaning of the ICJ's opinion.

Otherwise, a trade embargo is the policy required of assisting parties to cease continuing accruement of shared responsibility.

Conclusion

The main point of this contribution was to underline what policies can be discussed as being subject to some political discretion by the EU under the positive duty of cooperation, and what on the other hand is actually the bare minimum to cease illegal conduct on the part of the EU as a complicit party.

Targeted sanctions and economic countermeasures are adequate where they represent an effort to *cooperate* to bring Israel's occupation to the end. They may and should be adopted as well.

They are, however, only an incremental step to the urgent and basic negative duty to discontinue the robust trade that assists in the principal *jus cogens* breach by Israel. In this sense, suspending the Association Agreement is necessary to meet non-assistance and non-recognition, but not enough. In addition, trade must not be allowed to continue in any form with Israeli settlements in the OPT.

Moreover, because Israel is deeply enmeshed with the settlements as a matter of policy, an embargo on Israel proper is also required wherever dealings would contribute to the entrenchment of the occupation in the OPT, and may be required on a precautionary basis where allowing trade with Israel enables the widespread smuggling of settlement goods through deceptive obfuscation of origin.

ABOUT THE AUTHOR

Pedro R. Borges de Carvalho
Pedro R. Borges de Carvalho is a PhD candidate at KU Leuven, Institute for International Law.

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