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Complicity and Conflict Minerals

How did and could the European Union respond to its complicity in third countries in the case of the Conflict Minerals Regulation?

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Abstract

For many years, the European Union has been aware that its trade with so-called "conflict minerals" has indirectly contributed to conflict and human rights abuses in third countries. In 2014, as a response to this contribution, the European Commission proposed a regulation aiming to control the products containing the minerals that enter the internal market. After three years of complex negotiations between the European Parliament and the Council of the EU the 'Conflicts Minerals Regulation' was agreed upon. In this thesis, a case study is conducted on the Conflict Minerals Regulation through a theoretical framework on *complicity*. The aim is to examine the way in which the EU is complicit to wrongdoing through its trade with conflict minerals, and whether the regulation succeeds in lessening this *complicity.* The analysis focuses on the way in which the EU was *complicit*, the *compromising institutional context* in which the regulation was created and finally an *on-balance assessment* on how the regulation helped balance the complicit act. The thesis finds that, even though the EU's has decreased its *complicity* after the implementation of the regulation, the EU is still, to some extent, complicit to the principal wrongdoing. Therefore, further revision is needed to make sure that the EU can better respond to this *complicity* in the future.

Key words: *complicity, territorial extension, due diligence, conflict minerals, EU regulatory power*

Word count: 19926

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Glossary

Below I will present the definitions and abbreviations of the terms relevant for understanding the thesis.

3TG: 3TG is the abbreviation for tin, tantalum, tungsten and gold, which are the minerals covered by the Conflict Minerals Regulation (European Commission 2014).

Conflict affected and high risk areas: These areas are defined as "areas in a state of armed conflict, fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses" (European Commission 2014).

Conflict minerals: The EU definition of conflict minerals is based on the OECD guidelines. The term is defined as minerals containing tin, tantalum, tungsten and gold that contribute to the financing of armed groups, fueling of forced labor, human rights abuses as well as supporting corruption and money laundering (European Commission 2021).

Downstream companies: Downstream companies are responsible for the process of the material into a final product, taking over after the upstream companies. For this case the downstream process contains the product from metal stage to final sold product (European Commission 2022).

Great Lakes Region: The term is referring to the region in Africa surrounding the great lakes area, consisting of the countries Democratic Republic of the Congo, Burundi, Rwanda and Uganda (European Commission 2014).

Supply chain: The supply chain describes the stages from when a raw material is turned into a final product, with focus on the upstream companies (University of Cambridge 2023).

Supply chain due diligence: In the context of this regulation, and as set out in the OECD guidance, supply chain due diligence is an ongoing, proactive and reactive process through which economic operators monitor and administer their purchases and sales to ensure that they do not contribute to conflict or the adverse impacts thereof (OECD 2016).

Upstream companies: Upstream companies are responsible for extracting processing and refining raw material. In the case of the Conflict Minerals Regulation these companies are mining companies, raw material traders, smelters and refiners (European Commission 2022).

Value chain: A value chain of a product is defined as the full life cycle of a product and its process, including both the upstream and downstream companies.

1 Introduction: A New Era of EU Legislation for Reduced Complicity Abroad

In 2014, the European Commission and the EU's High Representative for Foreign Affairs proposed an integrated approach to tackle the consequences of EU trade with conflict minerals. The goal was to stop the EU's indirect contribution to the financing of armed groups and human rights abuses in conflict- or high risk areas through its trade with the minerals tin, tantalum, tungsten and gold (henceforth "3TG"). The approach consisted of a joint communication, a development aid package, outreach to trading partners, support for small businesses in the EU and finally, a draft regulation to oversee the EU trade with conflict minerals (European Commission MEMO 2014). The Conflict Minerals Regulation entered into force the 1st of January 2021 and was seen as the main EU response to its contribution to conflict and abuses in other parts of the world (European Commission 2022).

In January 2023 the European Commission (henceforth "the Commission") started its first revision of the Conflict Minerals Regulation (European Commission 2022). This happened at the same time as negotiations were taking place between the Council of the EU (henceforth "the Council") and the European Parliament (henceforth "the EP") on the most wide ranging Directive on Human Rights and Environmental Due Diligence yet (Commission Proposal 2019/1937). These legislations are similar in that they both contain territorial extension, which is a legal instrument that helps the EU to impact third countries and actors by regulating its internal market. They also have due diligence requirements for companies, a measure to improve corporate responsibility and make sure that companies are not contributing to conflict, environmental destruction or human rights abuses abroad (Scott 2019).

The global system of complex value chains has created difficulties for both companies and states to ensure that their products do not contribute to human rights abuses, conflict or environmental destruction in third countries. An increased demand by EU consumers on sustainably sourced foods and materials has led to pressure on European companies to ensure sustainable value chains for their products, which is hard without stringent regulation (Scott 2019). Therefore, as a response to these challenges, the EU has taken initiatives to create due diligence legislation with territorial extension with the aim to decrease EU contribution to deforestation, environmental destruction and human rights abuses abroad (Commission Proposal 2019/1937). As this is a rather new approach, many of the proposed legislations are still being negotiated or await

implementation, but one of the few legislations that has been implemented is the Conflict Minerals Regulation, that will be the focus of this study.

The goal of the regulation is to stem the EU's contribution to human rights abuses and conflict. Mainly by creating a legislation containing mandatory due diligence for European companies importing conflict minerals (European Commission 2022). Thereby, the legislative instrument with due diligence and territorial extension can be seen as a response to the EU's contribution to wrongdoing abroad. Building on the above, this study aims to develop a theoretical understanding of this phenomena, by applying the *complicity framework* on the Conflict Minerals Regulation. By doing so, I hope to provide an in-depth understanding of this type of EU legislation and how it can be assessed and improved in the future. A case study on this specific regulation gives room for analytical generalization and significance both for the EU but also other global actors using the same approach for regulating their contribution to wrongdoing abroad. This thesis finds that, even though the EU's has decreased its *complicity* after the implementation of the Conflict Minerals Regulation, the EU is still, to some extent, complicit to the principal wrongdoing. Therefore, further revision and due diligence is needed to make sure that the EU can better respond to this *complicity* in the future.

1.1 Purpose and Research Question

This thesis has two main aims. Firstly it aims to understand the way that the EU is *complicit* in its contribution to human rights abuses and conflict by its trade with conflict minerals. Secondly, it aims to explain how the Conflict Minerals Regulation, as a tool to deal with EU *complicity,* can be assessed through a *complicity framework*.

The theoretical framework on *complicity*, created by Lepora and Goodin (2013), aims to understand how actors have indirect responsibility for wrongdoing conducted by others through their contribution to the wrongdoing. These contributions could be by different natures, but in this case it is the EU's trade with conflict minerals, and thereby financing of armed groups and contribution to human rights abuses, that is in focus. By conducting a case study on the Conflict Minerals Regulation, the goal is to examine how the EU's choice to address its contribution to wrongdoing, by creating a legislation with territorial extension and due diligence requirements, could be assessed through the *complicity framework*. Conflict minerals are particularly interesting as a case study due to the EU's dependency on foreign resources, overconsumption and historical responsibility in conflict areas such as the Great Lakes Region (European Commission 2014; Fisher-Onar 2021).

A qualitative case study with an analysis framed by Lepora and Goodin's concept of *complicity*, could contribute with cumulative knowledge on the EU's rationale behind these types of legislation. Additionally, we can obtain a deeper understanding of the phenomena as a whole and explain and evaluate the EU's moral responsibility in the revision of the Conflict Minerals Regulation as well as other similar legislations. The study thereby contains normative aspects, exploring how the EU could improve its response to *complicity* as well.

With this motivation in mind, this thesis will seek to answer the following research questions:

- *In what way is the EU complicit in its contribution to human rights abuses and conflict by its trade with conflict minerals?*
- *How can the Conflict Minerals Regulation, as a tool to deal with the complicity, be assessed through a complicity framework?*

Based on the theoretical assumptions and the context of the EU regulation, I will make the claim that the EU is complicit in contributing to conflict and human rights abuses in the countries affected by the Conflict Minerals Regulation. Therefore, this study aims to understand and explain the EU's reasoning behind the legislation, as a response to its contribution to human rights abuses and conflict, and also get a more nuanced and structured understanding of the way in which the EU is complicit and how the regulation is trying to compensate for this *complicity*.

The major contribution of this study will consist of additional knowledge on the Conflict Minerals Regulation, as well as further development of the theoretical framework on *complicity* to better suit research on EU action. The institutional framework of the EU is built upon compromise. Therefore, the *complicity* of EU action must be understood in the compromising context in which EU decisions are made. In order to do so, I have added the compromising approach developed by Lepora and Goodin to the *complicity framework.*

Finally, this study will also have an external relevance since this legislation is seen by many stakeholders as a major step towards changing the global system of value chains. The upcoming revision of the Conflict Minerals Regulation together with the new legislation on Corporate Due Diligence could, if well implemented, have a great impact on the global value chains to ensure both human rights and environmental protection in production globally. The current planetary crisis requires fundamental changes of our global market and a deeper understanding of this phenomena could help not only the EU but international organizations and other relevant actors on how to transform the global value chains for the better.

2 Background: The EU's Regulatory Power and the Conflict Minerals Regulation

The idea that the EU possesses unilateral regulatory power, and thereby can impact the global market, is a perspective that emerged as a response to the critical voices stating that the EU no longer matters on the international scene (Bradford 2020). The many crises that have struck the EU in the 21st century, with the Euro crisis, Migration crisis and Brexit, has led many scholars and other public actors to question the EU both as an entity on its own, but also as a relevant actor in global politics (Falkner 2017). Even though the Russian war in Ukraine has shown upon greater collaboration within the EU (ECFR 2022) the problems that the EU faces as a foreign policy actor are still present, with loss of support in the UN and competing interests with China and Russia in third countries (Schimmelfennig 2021, p. 130). The regulatory power of the EU, and its ability to impact the world through legislation, has therefore been seen by many scholars as one of the main paths to global EU influence (Bradford 2020; Damro 2021; Scott 2019).

When it comes to hindering human rights abuses in third countries, the EU recently started legislating company behavior contributing to immoral conduct abroad. This can be seen in legislations such as the Non-financial Reporting Directive and the proposals for a Regulation on Deforestation Free Supply Chains and a new Battery Regulation (Commission Proposal 2019/1937). In the EU Action Plan on Human Rights and Democracy for 2020-2024, it is clearly stated that the EU is increasing their focus on the business sector and human rights, with emphasis on increased due diligence and accountability for business conduct abroad (EEAS 2020, p. 24-25). A focus that is heavily encouraged by the OECD Guidelines for Multinational Enterprises (2011) and UN (2011) Guiding Principles for Human Rights.

The aim and emphasis of the EU to promote human rights and European values abroad is based on the Treaty on the European Union. Article 21 states that the Union's external action should be guided by the principles of its own creation, such as democracy, the rule of law, human rights and respect for the United Nations charter and international law (Article 21 TEU). Furthermore, the Conflict Minerals Regulation was based upon the formulation of article 207 in the Treaty of the Functioning of the European Union, stating that the Common Commercial Policy should be conducted in the context of the goals set out in the EU's external action, also here with focus on peace, respect for human rights and sustainable development (Article 207 TFEU). Finally, all EU institutions are bound by the EU Charter on Fundamental Rights, which means that they need to ensure that

EU policies and action will not facilitate human rights abuses nor curb the ability of third countries to improve their human rights situations (Macchi 2021, p. 279).

2.1 The Conflict Minerals Regulation

The Conflict Minerals Regulation entered into force on January 1st 2021. Through the regulation, EU companies are required to ensure that the minerals in their supply chains are sourced from responsible and conflict-free sources only. This is done mainly through due diligence, where companies create systems and processes to make sure to identify, manage and report on risks in their supply chain. The term due diligence is defined as "acting with reasonable care and investigating an issue before making a decision" (European Commission 2022). In the context of the Conflict Minerals Regulation, this relates to companies investigating whether their purchased 3TG is sourced responsibly and does not contribute to conflict, human rights abuses or other illegal activities.

When proposing the first draft of the regulation, the Commission presented three main problems being addressed. These were the **continued financing** of armed groups through the EU's trade with minerals in conflict-areas, the **implementation challenges** for EU downstream companies that tried to conduct legitimate trade with voluntary due diligence frameworks and finally, **the market distortion** with reduced demand and prices for the formal mining sector in the Great Lakes Region. When insufficient legislation and fear of contribution to conflict and human rights abuses led European and US companies to source and trade with minerals elsewhere, this created a situation that only worsened the underground trade, smuggling and abuses in these countries (European Commission 2014).

Conflict minerals are defined as minerals mined in politically unstable areas, where their trade "can be used to finance armed groups, fuel forced labor and other human rights abuses, and support corruption and money laundering" (European Commission 2022). The minerals are essential in everyday products such as technical equipment, cars or jewelry, and due to complex production chains, it is hard for consumers to know if their products have contributed to human rights abuses or conflict in third countries or not (European Commission 2022).

There are two criteria needed in order for a country to be defined as conflict-affected or high-risk according to the EU regulation. First, they need to possess natural resources which are in high demand locally, regionally or globally. Second, they need to suffer from some type of armed- or post-conflict and/or experience weak or non-existing governance with violations of human rights and international law. The regulation applies directly to companies that import either of the four minerals into the EU, which gives them mandatory due

diligence obligations (European Commission 2022). By regulating and promoting responsible sourcing of minerals for EU companies, the EU aims to regulate the source of income for armed groups or criminals in affected countries, this in order to hinder the continuation of their activities and tackle human rights abuses (European Commission 2022). Furthermore, the regulation is designed to meet international standards of responsible sourcing, by following the standards set out in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas (OECD 2016).

Based on the OECD guidelines, companies importing any of the targeted material or metals need to follow a five step framework which requires them to **establish** strong company management systems, **identify and assess** risk in the supply chain, **design and implement** a strategy to respond to identified risks, **carry out** an independent third-party audit of supply chain due diligence and **report annually** on supply chain due diligence (European Commission 2022). Depending on whether a company is involved in the upstream or downstream stage of a supply chain, it has different requirements in the regulation. Upstream companies, defined as "firms that extract, process and refine raw material" (European Commission 2022), are seen as handling the most risky part of the process, which means that they have mandatory rules on due diligence when importing the targeted minerals and metals. Downstream companies on the other hand, which are responsible for processing the metals produced in the first stage into final products, only have mandatory due diligence rules for metal stage products and not for those beyond the metal stage (European Commission 2022).

It is the member state authorities that are responsible for checking whether their national companies are complying with the regulation. They can require recurring audit reports and documents to examine the compliance, but they have, according to the regulation, no ability to sanction companies that are not following the legislation. From the 1st of January 2023 and every third year thereafter, the Commission will conduct a revision of the efficiency of the regulation and report the results to the EP and the Council. Based on the results they can present new legislative proposals that might include further mandatory measures if necessary (EU Regulation 2017/821).

2.2 Non-EU Initiatives Connected to Conflict Minerals Extraction

Apart from the EU there are other global actors that try to tackle human rights abuses and conflict connected to trade with conflict minerals. The already mentioned OECD Due Diligence Guidelines is one of them, providing guidelines for companies to conduct responsible sourcing. These guidelines have been referred to as the official international standard for companies carrying out human

rights due diligence connected to conflict minerals (OECD 2016). Another international guidance is the United Nations Guiding Principles for Business and Human Rights (UN 2011). These principles put emphasis on the responsibility of companies to make sure that their conduct doesn't contribute to harm and abuses. In the guidance, risk-based due diligence, as used in the regulation, is described as an efficient and feasible way to meet this responsibility.

Furthermore, the US has its own legislation in section 1502 of the Dodd Frank Act. The act requires US-listed companies to carry out due diligence on their imports of 3TG to examine if they originate from Congo or any of its neighboring countries (Global Witness 2017). The legislation that came into force in 2010, is more stringent than the EU legislation in some aspects since it extends the liability to downstream companies as well as the direct importers. However, it doesn't prohibit the use of 3TG from conflict areas, nor impose penalties on companies using it (Macchi 2021). The EU legislation, has a wider geographical scope and imposes broader due diligence requirements, which leads to that multinational companies often need to comply with both regulatory regimes, that in certain ways co-constitute each other, in order to achieve global compliance (Bradford 2020, p. 47). Finally, there are several African countries, such as Rwanda and Democratic Republic of Congo that have implemented laws of due diligence for companies. This is also the case for China, who has its own guidelines for responsible mineral supply chains (European Commission 2022).

3 Literature Review: From the Brussel's Effect to Territorial Extension and Complicity

The literature review for this study has been conducted in two parts - one theoretical review on the EU's regulatory power and the territorial extension of EU law connected to the theoretical framework on *complicity*, and one empirical review on the Conflict Minerals Regulation and connected human rights legislation. By applying a narrative review the aim has been to present an overview of previous research on the topic, including a comprehensive assessment as well as a critical interpretation of the field (Clark et al. 2021, p. 84).

3.1 The EU's Regulatory Power and the Complexity of Territorial Extension

One of the main theories discussing the EU's global regulatory influence is Anu Bradford and her work on the Brussel's effect. According to Bradford "The term the "Brussels Effect" is defined as the EU's unilateral ability to regulate the global marketplace." (Bradford 2020, p. 1). When the EU regulates, its market size and attractiveness forces large multinational companies to adapt to the new EU legislation on a global scale, which leads to externalization of the internal market regulations. This effect, arising from conditions enabled by markets, can be both unintentional and intentional on behalf of the EU (Bradford 2020, p. 2). However, while the Brussel's effect refers to the unilateral regulatory power that derives from the market, the same effect can also occur when using legislative techniques such as territorial extension or extraterritoriality. By using these techniques, the EU can apply internal regulations directly on foreign actors. Bradford makes a clear distinction between territorial extension, treaty-driven harmonization in international cooperation and the market-driven harmonization that comes with the Brussel's effect (Bradford 2020, pp. 67-68).

Ioanna Hadjiyianni (2021), argues that Bradford should have related the Brussel's effect more to other types of EU regulatory global influence, such as extraterritorial regulation and territorial extension. By doing so, one could examine the EU's global regulatory influence as a whole, taking into account both passive and active attempts by the EU to influence third countries. Many of Bradford's examples are in fact legislation with extraterritorial reach, which creates a confusion with her limitation of only market driven passive mechanism in the beginning of the book. This argument is used by Joanne Scott (2019) as well, who claims that even though there is no necessary relationship between the Brussel's effect and the EU's use of territorial extension, there is a need to

understand this type of regulatory technique in order to analyze and employ the Brussel's effect. Not all legal instruments designed with territorial extension will lead to the Brussel's effect, but they will nevertheless have regulatory impact outside of the EU borders. The design of legislation has a crucial impact on the emergence of the Brussel's effect, and the legal basis for the EU to adopt legislation with territorial extension can both enable and constrain this effect (Scott 2019, pp. 32-35).

Territorial extension of EU law, is defined by Scott as when " The application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad." (Scott 2014, p. 90). This technique is a way for the EU to unilaterally govern transactions that take place outside of its territory as well as impact the content of third countries and international law, which is the case of the Conflict Minerals Regulation.

Furthermore, Scott argues that the EU legislation containing territorial extension often is characterized by an international orientation. For example, territorial extension can be applied to enforce international standards or agreements agreed upon in the UN or OECD. This international orientation is an argument for why the EU is engaging in an action-enforcing unilateralism rather than norm-exportation. By assisting third countries and global action by tackling transboundary problems and enforcing internationally agreed objectives (Scott 2014, pp. 114-117). Scott therefore argues that it is inaccurate to claim that the EU is aiming to export its norms by legislating with territorial extension. This argument is, on the other hand, contested by scholars such as Manners, who claim that the EU always will be a normative power in world politics, partly because of the EU's aim to promote the normative principles agreed upon in the UN, which are claimed to be "universally applicable" (Manners 2008, p. 46).

3.2 Territorial Extension and Complicity

Scott (2019) continues her reasoning around the territorial extension of EU law by analyzing in what way the concept of *complicity* could explain EU's legislation on environmental protection. For example by showing how territorial extension is used as a way to mitigate the negative global impacts that the EU has contributed to. By creating a rationale on *complicity* one could get a deeper understanding of the morality behind the EU's actions and why they are creating these types of legislation. This framework can also, according to Scott, be used as a basis for justification and critique of global extension of EU law as well as present an on balance judgment of its actions (Scott 2019, p. 63).

The concept of *complicity* has also been used by Heupel in her study on indirect accountability for extraterritorial human rights violations, where she examined

how the indirect accountability mechanism can hold states and international organizations accountable for extraterritorial human rights violations (Heupel, 2020 pp. 172-176). This was also the case for Theuns, who in his critical examination of the political and economic response to democratic backsliding in the EU, considered that EU support to backsliding member states can make the EU *complicit* in that backsliding (Theuns 2020, p. 141). Same goes with Wolkenstein, that examined European Political Parties and their *complicity* in member states democratic backsliding (Wolkenstein 2022).

In previous works on EU legislation and *complicity*, the different concepts within the *complicity framework* have been used in innovative and successful ways. For example, when discussing the regulation of trade in Forest-Risk Commodities, Marín Dúran and Scott (2022) use the *complicity framework* to justify EU intervention as a moral duty in order to reduce its global deforestation and environmental footprint. Here the framework is presented as a way to "combine moral, legal and pragmatic aspects, showing how these interact in circumstances of shared responsibility for environmental harm" (Marín Dúran & Scott 2022, p. 258). However, the concepts are not thoroughly developed or explained to the reader, which makes it hard to understand the reasoning behind the findings. Therefore, this study aims to develop the theoretical part of the framework and apply it in a way that will increase the level of understanding and possibility of replicability in further research.

3.3 The Conflict Minerals Regulation and Human Rights in Global Value Chains

Previously, many legal scholars have conducted research on human rights in global value chains by doing reviews on for example the Enforcement of Corporate Human Rights Due Diligence (Fasciglione 2016), the integration of human rights and the environment in supply chain regulation (Schilling 2021) and Directors Duties and Human Rights Impacts (McCorquodale 2022). Previous research on the Conflict Minerals Regulation and human rights have discussed whether the regulation is in line with OECD and UN Guidelines on supply chain due diligence (Grado 2018), possible WTO concerns raised by the regulation (Partiti 2017) and whether transparency in companies supply chains can be one component in solving armed conflicts and human rights abuses, even though a multilevel approach with political and economic factors is needed as well (Härkönen 2018).

Macchi (2022) explains the concept of human rights and environmental due diligence and how international guidelines such as UN Guiding Principles of Business and Human Rights can and are being translated to legal instruments on a EU level. She also makes a first assessment on the proposed EU Directive on

Mandatory Human Rights and Environmental protection and its potential to implement the UN Guiding Principles into hard law (Macchi 2022, p. 101). Furthermore Macchi (2021) has made a critical analysis of the Conflict Mineral Regulation, reviewing its scope, consequences for third countries as well as strengths and weaknesses (Macchi 2021, p. 270).

Due to the legal aspect of previous research on the Conflict Minerals Regulation, there are often no theories applied to the analysis. Combining a legal approach with the field of political science could thereby be seen as an important contribution to the field. Furthermore, by applying the *complicity framework* already partially used by Scott and others in their research on similar legislation with territorial extension, this study will be able to expand the field and add cumulative theoretical knowledge on the EU's role as a moral actor on the global market. Scott explains in her research how applying the *complicity approach* to EU policy can be used both to identify shortcomings in the current approach, but also to present potential improvements of the practice of territorial extension by the EU. Since the concept of *complicity* can constitute a critical vantage point to evaluate EU policy, the *complicity approach* is an important part of future research in the field (Scott 2019, p. 57).

4 Theory: How to make an On-balance Assessment of a Complicit Act

Below I will outline the different concepts that lays the basis for the *complicity framework* and later on my analysis. Before presenting the theoretical framework, I will discuss the theoretical basis for *complicity* and give the reader an understanding of the ethical standpoint from which the framework emerges. Thereafter, I will move on to the theoretical framework and explain the four factors used to grade the *blameworthiness* of a complicit act, the template of *compromise* and lastly, how to make an *on-balance assessment* of an act of complicity. In my analysis, I will use the theoretical concepts below as a basis to structure the findings.

4.1 Theoretical Point of Emergence

Lepora and Goodin's work on *complicity* is based on non-ideal theory. This theoretical basis can be explained as a way to adapt moral methodology to the complexity that is the non-ideal world that we live in (Lepora & Goodin 2013, p. 1). In this study, the *complicity framework* will be used as a continuation of EU normative theory, a theory with the goal to articulate ideal conceptions and thereby explain how the EU can become a more democratic and just entity. Scholars argue that the EU normative theory, which operates between ideal and non-ideal theory, has its future in the non-ideal spectrum (Bellamy & Lacey 2019, p. 234). By developing the *complicity framework* with this in mind, the goal is to guide the EU as a moral actor when legislating outside of its borders in order to become a more just entity.

Furthermore, the theoretical framework by Lepora and Goodin is situated within the field of normative ethics, which normally is divided into three approaches - *virtue ethics, deontological ethics* and *consequentialist ethics*. *Virtue ethics* is based on the moral character of actors, while *deontology* focuses on duties and rules and *consequentialists* emphasizes the importance of the consequences of one's actions (Manners 2008, pp. 55-56).

The *complicity framework* is based on a mix of a *deontological* and *consequentialist* approach, arguing that the morality of a situation should be based upon both the intention and the consequences of a contributory act. This is a nuanced perspective, where one measures the good and bad intentions from an actor with the positive and negative outcomes of the actor's actions. By doing so, we can make an *on-balance* judgment on whether an act is the right thing to do or not (Lepora & Goodin 2013, p. 40). Connected to EU external action, this

approach can be seen as a combination of *deontological ethics*, highlighting the promotion of principles and establishment of law in support of the common good and *consequential ethics*, analyzing the impacts of EU actions and its implication for others in order to do least harm (Manners 2008, pp. 55-60). The *virtue ethics* connected to the EU's external action could also be added to the framework, discussing how the EU should lead by example, basing their actions on universal values from UN guidelines (Manners 2008, p. 55). Based on these assumptions, the framework and formula presented will not be seen as a way to find an objective correct answer to the complicity and moral judgment of the EU. Instead, the provided framework should be approached as a way to improve and facilitate the analysis and explain the moral aspects of a complex issue (Lepora & Goodin 2013, p. 171).

4.2 The Definition of an Act of Complicity

The first important definition needed in order to understand and develop the theoretical framework is the definition of an *act of complicity*. The definition is understood as "secondary acts that are at least potentially essential causal contributions to the wrongdoing of others" (Lepora & Goodin 2013, p. 99). For example, companies that overlook human rights abuses by their subcontractors are seen as complicit in those abuses. The *secondary agents* (the companies) are contributing to the human rights abuses by the *principal agents* (the subcontractors), which leads to the companies being complicit to the wrongdoing of the subcontractors. The aim of Lepora and Goodin's theory is to address secondary moral agents and help them by providing a framework to identify moral responsibilities and think through their decision before acting. By doing so, they can gain a better understanding of the moral discomfort that comes with *complicity* and the wrongdoing that it might entail (Lepora & Goodin 2013, p. 13).

In this study, the EU will be treated as a secondary agent. This take on the framework has already been used by Scott and Marín Duran in their analysis of the EU's territorial extension of environmental and forestry law (Marín Durán & Scott 2022; Scott 2019). As stated by Lepora and Goodin, "formal organizations, with internal authority structures and decision procedures,... are indisputably moral agents, albeit collective in form" (Lepora & Goodin 2013, p. 131). Furthermore, it is the armed and criminal groups that execute the human rights abuses and conflict in resource rich conflict regions that are treated as principal agents and wrongdoers. This, since they are the groups that the EU is funding by its trade with conflict minerals and who the EU thereby is trying to target through legislation (European Commision 2014, p. 8). Finally, since the assumption of this study is that the EU is *complicit* to human rights abuses and conflict when trading with 3TG in third countries, I will focus on the way in which the EU is

complicit, and thereby only use the parts of Lepora and Goodin's theoretical framework relevant for this approach.

4.3 Grading Complicity

In order to measure and understand in what way a secondary agent is complicit, Lepora and Goodin developed a formula to assess the *blameworthiness* of an act of complicity. The formula reads as follows:

> *Blameworthiness* for an act of complicity = function of (badness of principal wrongdoing, responsibility for contributory act, extent of contribution, extent of shared purpose with principal wrongdoer) (Lepora & Goodin 2013, p. 98).

4.3.1 The Badness Factor

Firstly, the *badness factor* or the badness of the principal wrongdoing is a term for understanding how bad the act to which the secondary agent contributed to is. In other words, the focus lies on how morally bad the principal wrongdoing is and not on the blame of the wrongdoer as a person. The aim is to treat badness as a graded concept in order to assess the contributory acts related to it (Lepora & Goodin 2013, p. 103). For example, murder is considered a morally worse wrongdoing than stealing, which leads to a higher badness factor of the principal wrongdoing. In the context of the EU, I will base the *badness factor* on how the wrongdoing is seen through the lens of international law and guidelines. For example, if the EU is contributing to wrongdoing leading to human rights abuses and killings condemned by international law, this will be considered as a high *badness factor.* A lower *badness factor* could for example be how EU legislation contributes to people losing their livelihood in third countries.

4.3.2 The Responsibility Factor

Secondly, the *responsibility factor* is based on three elements - voluntariness, knowledge of contribution and knowledge of wrongness of principal wrongdoing. The formula for the responsibility factor thereby reads:

> *Responsibility Factor* (Voluntariness, Knowledge of contribution, Knowledge of wrongness of principal wrongdoing) (Lepora & Goodin 2013, p. 104).

The element of voluntariness refers to that the contribution to the wrongdoing by the secondary agent needs to be done voluntarily and not under threat, by mistake or other involuntary circumstances. The second element on knowledge of contribution puts the emphasis on that the secondary agent could or should have known that their actions could or are contributing to the wrongdoing of the principal agent. The third element of knowledge of wrongness highlights that the secondary agent could or should have known what the wrongdoing of the principal agent was. When all these three conditions are met the secondary agent can be considered fulfilling the *responsibility factor*.

4.3.3 The Contribution Factor

Thirdly, the *contribution factor* is defined as to what extent the act by the secondary agent could contribute to the wrongdoing of the principal agent. As with the other factors, the assessment should be made based on what the secondary agent, here the EU, could have been expected to contribute at the time of the decision to legislate and respond to the contribution. The formula for the contribution factor contains six elements and reads:

> *Contribution Factor* (Centrality of contribution, Proximity of contribution, Reversibility of contribution, Temporality, Planning role, Responsiveness of contributors to principals) (Lepora & Goodin 2013, p. 106).

Centrality of contribution is defined as how central the secondary contribution is to the principal wrongdoing in terms of magnitude and essentiality. This is measured as a grading from definitely causally essential to potentially causally essential and inessential (Lepora & Goodin 2013, p. 106). Proximity of contribution to the principal wrongdoing is measured as how proximate the contribution is to the principal wrongdoing, ranging from causally and nearest in causal chain to temporally, last chance to avoid and tipping point (Lepora & Goodin 2013, p. 106). Reversibility of contribution examines whether the secondary contribution is irreversible or not, ranging from irreversible to more or less costly to reverse. Temporality examines whether the wrongdoing is a part of an ongoing pattern of similar actions. In other words, whether it is more or less repeated phenomena or a one time wrongdoing. The planning role refers to the role that the secondary agent held in the planning of the wrongdoing, whether they were a plan-maker or a plan-taker. Finally, the responsiveness of the secondary agent looks at how responsive the secondary agent is to the plan of the principal wrongdoing and others implementing it.

All these elements affect the extent to which the secondary agent contributes to the wrongdoing of the principal agent. However, not all of them need to be fulfilled in order for the *contribution factor* to occur. Instead, it can be seen as a weighted average of all elements above (Lepora & Goodin 2013, p. 106).

4.3.4 The Shared Purpose Factor

Finally, the shared purpose factor measures to what extent the secondary agent shares purpose with the principal wrongdoer. This is measured through the following formula:

> *Shared Purpose* (Extent of overlap, Strength of shared purpose, Action guidingness of shared purpose) (Lepora & Goodin 2013, p. 108).

Extent of overlap relates to how much the secondary agent's purpose of contributing to the wrongful act overlaps with the principal agent's purpose of wrongdoing. Strength of shared purpose examines how strong the purpose that the secondary and principal agent shares is compared to the other purposes that the principal agent has. Action guidingness of shared purpose examines to what extent the shared purpose guides the contributory action by the secondary agent.

Here as well, the greater any of these elements are, the greater is the force of the *shared purpose factor*. However, not sharing a purpose with the principal agent does not mean that you aren't complicit with the wrongdoing. It is only the grade of *complicity* that can be measured with this factor (Lepora & Goodin 2013, p. 109). In conclusion, by putting all four factors for the *blameworthiness* of a complicit act together, we can measure in what way the EU, through its trade with 3TG, is complicit to the conflict and human rights abuses conducted by the principal agents in third countries.

4.4 Complicity as a Result of Compromise

Due to the complex institutional context in which the EU acts, the *complicity* of EU action must be understood in the compromising context of which EU decisions are made. Lepora and Goodin use three different concepts to understand *complicity* as a result of compromise - *the agreeing and implementation of a plan*, the *inter- and intrapersonal aspects* of a compromise and the *type of contribution* the compromise leads to.

According to the theory, compromises occur when agents face a conflict of preferences and principles in decision making. Compromising often entails agents having to allow others to do something they believe is wrong or refraining partially from what they believe is the right thing to do. Lepora and Goodin refer to this phenomenon as being compromised. Even if it was the right thing to do *on-balance*, a compromise always means losing something in order to gain something else (Lepora & Goodin 2013, p. 18). A basic standpoint is that the wrongs presented in a compromise is from the point of view of the agent. Thereby, the analysis originates from the agent's subjective view of moral sacrifice and losing something of principal concern (Lepora & Goodin 2013, p. 28).

4.4.1 Agreeing on and Implementing a Plan

Firstly, as mentioned above, the act of compromising is divided into two moments - the act of *agreeing on a plan* and the act of *implementing a plan*. The first moment of *agreeing on a plan* consists of a joint action from at least two agents that compromise with one another. This means that these agents are all co-principals of the compromise and thereby are equally responsible for the final result and the formulation of the plan of action. The second moment of *implementing the plan* leads to different agents contributing in different ways, depending on the action plan and the terms of the compromise. These contributions could be either direct wrongdoing or contributions to wrongdoing, whereas the latter lead to the question of *complicity* discussed above (Lepora & Goodin 2013, p. 18). In this study, I will treat the EP and the Council as two agents that need to compromise in order to come to an agreement on how to respond to the EU's *complicity*. However, since the Commission is the institution that presents the first proposal of legislative documents and often leads negotiations and trilogues, I will consider it having its own preferences and agenda setting power and thereby being a third agent in the negotiations.

4.4.2 Inter- and Intra-Personal Aspects

Secondly, Lepora and Goodin claim that a compromise consists of one *inter-personal* and one *intra-personal* aspect. The *inter-personal* aspect refers to the act of compromising with another agent whereas the *intra-personal* aspect refers to the phenomenon of being compromised mentioned earlier. The *intra-personal* aspects can be explained as the internal compromise of giving up one's fundamental aims and values in order to achieve a compromise with a second agent. The theoretical framework is focused on the type of compromise where not all of agents' preferences or concerns could be realized. This could be due to for example resource constraints, different preferences or principals in opposition to each other (Lepora & Goodin 2013, p. 20).

4.4.3 Contribution by Compromise

Finally, the indirect wrong that the principals contributes to through a compromise is based on the hypothesis that "the other party would not have been able to do any of those wrongful things had it not been for what the first party is now doing or refraining from doing in consequence of the compromise" (Lepora & Goodin 2013, p. 25). Depending on the type of the compromise the indirect responsibility and contribution can be *permitting*, *inducing* or *enabling*. In conclusion, agents don't only hold responsibility for the direct commitments in a compromise, they also hold responsibility for their *enabling, inducing* or *permitting* of the principal agents' wrongdoing as a result of the compromise (Lepora & Goodin 2013, p. 27).

4.5 An On-Balance Assessment

Finally, an *on-balance assessment* is needed in order to correctly assess an act of *complicity*. For example, there might be circumstances where contributing to a wrongdoing is the right thing to do since actions avoiding complicity could result in even greater wrongdoing. Competing reasons for a secondary agent could lead to that a complicit act is seen as *on-balance* the right thing to do despite the wrongdoing coming from it. Therefore, when assessing the *blameworthiness* of a complicit act it is important to balance the wrongdoing with the good aspects and compromising context in which the contributory act was made (Lepora & Goodin 2013).

Lepora and Goodin define this exercise as a moral assessment of the act by weighing moral credit towards moral blame to get an *on-balance assessment* of the *blameworthiness* of the secondary contribution (Lepora & Goodin 2013, pp. 112-113). In this case, this means that the EU's *blameworthiness* of a complicit act should be judged based on the contribution itself but also on the positive aspects of the legislation trying to hinder future contribution and the contextual factors such as the internal compromises needed for the EU policy to be implemented. By putting all these factors together, one can get an overview of the EU's *complicity*, its regulatory response to the contribution and the final positive and negative impacts of the EU's action.

4.6 Critical Examination of the Theory

In order to examine and situate my chosen theory in a broader social science context, a critical examination of the theoretical approach is necessary. Firstly, in this study, the EU can be seen as both one actor in a global context but also a multi-level polity when it comes to internal decision-making (Schimmelfennig 2021, p. 117). The multi-level aspect of the EU is important to have in mind when conducting the analysis, especially regarding the concept of compromise, since

EU legislative procedures are based on compromise between different institutions within and not outside of the Union (Council of the EU, 2023). However, since the aim of my study is to examine the EU as a global actor, and its potential *complicity* to wrongdoing in third countries, I will treat the EU mainly as one entity, but with the multi-level decision making as one contextual factor explaining its behavior.

Secondly, previous criticism towards the theory has targeted mainly the measurement of the badness of a principal act as well as how to make an *on-balance assessment* of positive and negative impacts. According to Scott, the wrongness of an act by a principal agent should be assessed within its context and relevant circumstances (Scott 2019, p. 57). Taking into account the contextual factors of the country or situation of the wrongdoing helps when trying to measure the level of wrongdoing. Furthermore, Scott argues that the EU's way to connect their actions to international agreements within the UN, OECD or other international organizations help them when arguing for which measures to apply when trying to balance contribution to wrongdoing (Scott 2019, p. 57). The approach of analyzing the moral judgments from the point of view of the secondary agent is also important. It is how the EU presents and views the problem that is the perspective from which the analysis and the critics towards the secondary contribution takes place.

Finally, there are other theories that could be used to explain the EU's territorial extension and aim to impact third countries. These are for example the rational choice theory claiming that rational actors design institutions to maximize utility, and thereby shape and constrain decision-making in politics accordingly (Pollack 2019, p. 108). Or Market Power Europe, claiming that the EU uses its market power and institutional features to affect the international system and externalize internal market related policies (Damro 2021, p. 54) Also critical social theories such as postcolonial, global justice or post-structural theories could be applied to explain the EU's structural historical power in third countries and how the continuation of uneven power and trade relations keeps the hegemonic occidental world order (Diez 2019, p. 8). However, the normative moral approach in this thesis gives an additional perspective to the field, trying to explain the moral imperative behind EU actions and provide a framework for global actors on how to make moral judgments and legislation in the future.

5 Research Design: A Qualitative Single Case Study Through a Complicity Framework

As mentioned in the introductory chapter, the aim of this thesis is to conduct a qualitative single case study on the Conflict Minerals Regulation through a *complicity framework*. By applying an idiographic approach, I hope that my study can provide an in depth examination of the unique features of my chosen case. The chosen design is based on a critical case, where a well developed theoretical framework and holistic approach is applied to the analysis. This, in order to understand the circumstances in which the theoretical basis could give additional knowledge on the EU as a moral actor (Clark et al. 2021, p. 60).

The nature of this EU legislation, where current reviews and updates change the nature of the instruments, makes the case suitable for future longitudinal research, comparing how the moral approach changes over time. The goal of this study is to provide future analytical generalization by deductively testing the theoretical propositions on a critical case. If successful, the result can provide a functioning theoretical framework to use on different types of EU legislation and moral judgment for other international actors within the field of foreign affairs.

5.1 Ontological and Epistemological Stances

This study is based on an interpretivist epistemology, arguing that the social sciences are fundamentally different from natural sciences, and that they therefore need distinct methods that take into consideration the subjective experiences of social phenomena (Clark et al. 2021, p. 25). By taking an interpretative stance, the research aims to understand a social phenomena by examining how relevant actors interpret it. When conducting this type of research, the aim is to examine how actors in specific societal contexts interpret the world, but also to put these interpretations in a social-scientific context. This double hermeneutic process forces the researcher to explicitly motivate the decisions and preferences of the research. By motivating choices and critically approaching every step of the research process the researcher can also obtain a greater reflexivity (Clark et al. 2021, p. 25).

Furthermore, this study takes a ontological constructionist approach, claiming that documents should be analyzed in both their context, purpose and implied readership. Emphasizing the importance of intertextuality, documents should always be seen as linked to other documents and sources. With this approach, the context and background of a document is highlighted as a key to understand its meaning (Clark et al. 2021, p. 514). In this case, the Conflict Minerals Regulation is at the center of the analysis. However, other documents are needed in order to

understand its context and significance, and thereby be able to draw conclusions on the judgment behind the legislative document. By triangulating these different sources, I will increase the credibility and holistic approach of the study (Yin 2014, p. 119).

Finally, taking the standpoint that the EU is a moral actor on the international scene, we can assume that the legislation and official documents put forward can be interpreted as the EU's perspective on the issue. As the *complicity framework* departs from the point of view of the secondary agent, analyzing official documents can be seen as the most efficient way to interpret the way that the EU wants to be portrayed and act on the global arena. From my epistemological and ontological stances, this will not provide a reflection of the objective reality, but a contextual understanding of the EU as a moral global actor and the way it is approaching policy issues within a global context.

5.2 Sampling of Case and Material

In my research, I have conducted purposive sampling on two levels, the selection of the case and the selection of sample units within the case (Clark et al. 2021, pp. 377-380). Furthermore, by applying a research strategy relying on theoretical propositions, my chosen case and sample units were chosen based on the theoretical assumptions set out in the *complicity framework* (Yin 2014, p. 136).

The first level of sampling was the selection of the case, which was done based upon previous research in the field and feasibility of examining the legislation. Since the Conflict Minerals Regulation is one of the few due diligence legislations with territorial extension that has been fully implemented by the EU, it was a suitable case to study (Commission Proposal 2019/1937). Furthermore, the contents of the legislation, which is connected to the prevention of human rights violations, conflict and environmental destruction on a global scale, made it an interesting moral case for my applied theoretical framework that hasn't been tested before.

The second level is the selection of sample units within the case. The sample units of this case study is based on official documents from the EU and other organizations relating to the chosen case. When choosing documents as source of data I started with the regulation itself and found related documents from the EU putting the regulation in its international and legislative context. These documents are mainly impact assessments, official websites and press releases. Even though the documents derive from different institutions within the EU, mainly the Commission but also the Council and the EP, the EU will be treated mainly as one actor in the analysis. This is due to the international approach of the analysis and theoretical framework.

The chosen sample units, hereby referred to as source of data are:

Primary Official EU Sources:

- The Conflicts Mineral Regulation (EU Regulation 2017/821)
- The Impact assessment with appendixes (European Commision 2014)
- The Regulation Explained (European Commission 2022)
- Frequently asked questions memo regarding EU's work with conflict minerals (European Commission MEMO 2014)
- Press releases concerning the Conflict Minerals Regulation from the European Parliament (2017) and the Council of the EU (2017)

Secondary External Sources:

- Academic articles analyzing the regulation
- News articles examining the negotiations and implementation of the regulation
- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas.
- UN statements about the status in areas trading with conflict minerals
- Reports from NGO:s on the current status of the areas impacted by the regulation

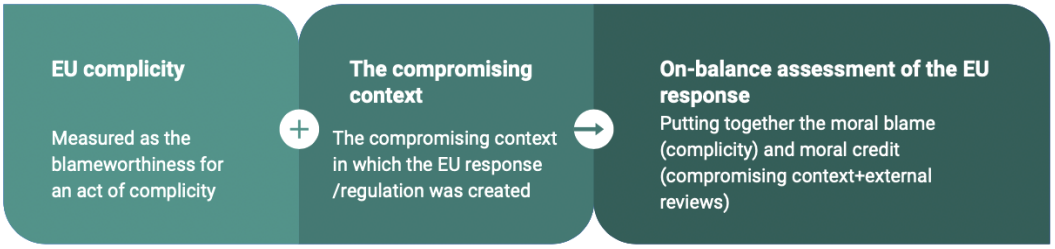
The divide between primary and secondary sources are based on two criteria. The primary sources are the untouched, primary focus of the study and secondary sources are the already interpreted, supportive sources to the study. Since the analysis focuses on the view of the secondary agent, in this case the EU, the official EU sources are the sources for interpretation, while the secondary sources can be seen as supporting material for the later stages of the analysis.

5.3 An Explanation Building Qualitative Analysis

By conducting a qualitative case study analysis, I will search for the different criteria and measurements for *complicity* in the official documents surrounding the Conflict Minerals Regulation (Clark et al. 2021, p. 516). This will be done by applying an explanation building technique and narrating the analysis based on the theoretical propositions set out in the theoretical framework (Yin 2014, p. 136). By aiming to find specific theoretical concepts and meanings in a relatively huge amount of data, I hope that this approach can help to reduce data according to the aim of the study. Furthermore, a common methodological approach that will be used in this study, is the use of quotations to exemplify the results of the analysis. The goal is that this deductive approach, with structured and systematic steps for analysis, will create a transparent research process and increase the credibility of the study (Clark et al. 2021, p. 516).

5.4 Steps of the Analysis

Since my analysis is guided by my theoretical framework, I will use the concepts set out in the theory to structure my analysis. By doing so I will find relevant contextual conditions to describe and theoretical explanations to be examined (Yin 2014, p. 136). The analysis will therefore be conducted in three steps, according to the criteria and framework described in the theory part. The three steps will be explained more thoroughly later on but can be visualized as follows:



(Constructed by the author, based on Lepora and Goodin (2013)).

In the analysis, the formulas for assessing the different parts of *complicity* will be presented in the beginning of each new section, this to remind the reader of the structure and the terms used in the framework. Since my thesis is based on the assumption that the EU is complicit to principal wrongdoing through its with 3TG, I will begin the analysis with the assumption that the EU is complicit. Thereafter, I will focus on in what way this complicity is expressed by the EU before the regulation was implemented, and how contextual factors, such as the negotiations behind the final legislative acts impact the final *on-balance assessment* of the EU's *complicity*.

In the first steps of the analysis, I will focus on the primary official EU sources before the implementation of the regulation, the regulation included. Since the theory is based on the premise of what the secondary agent knew before taking a decision to act, the grading of *complicity* should be examined from the point of view of the EU before implementing a legislation. The second and third step on the other hand, needs additional secondary sources to be examined. This is due to the more analytical and structural approach of the framework, where critical voices of the legislation and its implementation are needed together with information about the compromises behind the final legislative document.

In order to conduct my analysis in a transparent manner, I started reading through all of the primary and secondary sources, highlighting the aspects I found relevant for the research before conducting the analysis. To find the relevant parts, I searched for specific words and themes connected to the theory and case. These were human rights, foreign policy, ethical considerations and contributions by the EU to the conflicts and illegal activities in third countries. More technical

discussions about the legislation and conflict minerals not relevant for the theory were left out. This step helped me to systematically scan the material for proof of *complicity* and gave me an overview of the material with the analytical lens applied to it.

5.4.1 Grading Complicity - In what way is the EU Complicit?

Below I will describe the three steps in which the analysis will be conducted. In the first step of the analysis, the four factors needed to assess the *blameworthiness* of an complicit act will be examined. These are, as mentioned in the theory section:

1. *The badness of the principal wrongdoing,* defined as the potential violation of international law by the armed and criminal groups actions in conflict and high-risk regionstand as well as the related condemnation by the international community.
2. *The responsibility for the contributory act*, defined as the presence of three conditions examining whether the EU can be deemed responsible for its contribution to the wrongdoing or not.
3. *The extent of contribution*, defined by six elements examining to what extent the EU is contributing to the principal wrongdoing.
4. *The extent of shared purpose with principal wrongdoer,* defined by three elements examining whether and how the EU shares purpose with the principal wrongdoer.

I will go through the four different factors one by one, basing the analysis on their definitions and own formulas. Quotes and references to EU statements in and about the regulation will be used for transparency. By putting together the results of the different factors the aim is to receive an understanding of in what way the EU is complicit in this particular case.

5.4.2 Understanding the Compromises Behind the Complicit Act

In the second step of the analysis, I will apply the theoretical basis connected to compromise on the negotiations prior to the agreement on the Conflict Minerals Regulation. As EU legislation and foreign policy is a result of compromise between different EU institutions and actors, the concept of compromise provided by the framework is an important factor when discussing EU *complicity*. I will start with describing the concepts of *agreeing and implementing a plan* between relevant legislative EU bodies. Thereafter, I will examine the *inter- and intra-personal compromises* that the EU and its core bodies made when compromising on the final legislative act and finally the *type of contribution* that this has created to the principal wrongdoing.

The material used will be mainly secondary sources, such as academic articles, news articles and EU sources describing the negotiations as well as the views of the different actors relevant for the legislation. This to understand the steps and compromises made by different EU actors when drafting the regulation. By providing a theoretical contextual understanding on the compromises behind the legislative act, and the EU response to its *complicity*, the final step of the analysis and the *on-balance assessment* will be facilitated.

5.4.3 An On-Balance Assessment of EU Complicity

Finally, the third part of the analysis will consist of an *on-balance* assessment of the EU *complicity.* By putting together the *moral blame* and *moral credit* of the EU's action one can obtain a more nuanced view on the actual *complicity* of the EU in this particular case. The moral blame will be measured as the *blameworthiness* from the first step of the analysis, and the moral credit as a combination of the *compromising context* in which the regulation took place together with external assessments from scholars, NGOs and other international actors on the EU action and legislation itself. By understanding how efficient the EU response to its *complicity* is, we can create an *on-balance assessment* of whether the regulation as it stands now is enough, or if future revision is needed.

5.5 Quality of the Research Design

Yin has developed four criteria to test the research quality of empirical social research and case studies. These criteria are the construct validity, the internal and external validity as well as the reliability of the research (Yin 2014, p.45). The construct validity, which identifies the operational measures of the studied concepts (Yin 2014, p. 46), is in this study based on the predefined concepts of the *complicity framework* (Lepora & Goodin 2013) and the way its been used by other scholars working with similar EU legislation before (Scott 2019, Marín Dúran & Scott 2022). By using the already existing concepts and transferring them to an EU context I can, with the help of earlier research, identify operational measures that match the theoretical concepts (Yin 2014, p. 46). The construct validity is further increased by the use of multiple sources of evidence, in this case primary and secondary sources with different perspectives on the issue.

The internal validity of the study will be ensured by applying an explanation building approach and narrating the analysis from the conditions set out in the theoretical framework. Since this study aims to explain the EU's rationale behind a specific legislation based on the theoretical assumptions in the *complicity framework*, the causal relationships established are based on the specific perspective of *complicity*, ruling out other explanations and putting it into a specific theoretical context (Yin 2014, pp. 47-48). The external validity of the study, emphasizing the importance of generalization, is fulfilled through the possibility of analytical generalization. By applying a theoretical framework on a

single-case study, I aim to transfer these findings to other similar legislations and put the findings into a generalizable context (Yin 2014, p. 48). For example, this case study can be used to understand the EU's reasoning behind other due diligence legislations with territorial extension connected to human rights and environmental protection, a type of legislation that the EU are currently negotiating in many other policy fields as well (Commission Proposal 2019/1937*)*.

Finally, the reliability of the study, aiming to minimize errors and bias, will be ensured by motivations, explanations and narration of all the steps of the study. By being transparent of all decisions taken throughout the research, I will increase reliability and allow for others to replicate the same case study and receive the same results (Yin 2014, pp. 48-49). This will be facilitated by clear descriptions of each step of the process, as well as use of quotations and motivations behind my results.

6 Analysis: Towards an On-Balance Response to EU Complicity?

The analysis is, as mentioned in the methods section, an in depth case study divided into three steps. I will start with grading the *blameworthiness* of the complicit act by the EU, thereafter discuss the *compromising context* in which the legislation took place and finally, aim to make an *on-balance assessment* of the EU action when legislating trade with conflict minerals.

6.1 Grading Complicity - In what way is the EU Complicit?

In order to grade the *complicity* of the EU, I will use the function on the *blameworthiness* for an act of *complicity*. The function builds on four factors that will be presented one by one and finally put together for a holistic assessment of the EU's *blameworthiness*. The function reads as follows:

> *Blameworthiness* for an act of complicity = function of (badness of principal wrongdoing, responsibility for contributory act, extent of contribution, extent of shared purpose with principal wrongdoer) (Lepora & Goodin 2013, p. 98).

6.1.1 Badness of Principal Wrongdoing

The *badness factor* is defined by whether the principal agent is breaching international law and receiving condemnation from the international community when committing its wrongdoing. The documentation presented by the EU at the time of the regulation shows how its trade with 3TG contributed to different types of wrongdoing by the armed and criminal groups funded by the trade. The list of principal wrongdoings that the trade contributes to in conflict and high-risk areas was long, containing everything from undermining of development and rule of law, to serious human rights abuses, such as sexual violence, child labour and destruction of religious and cultural sites (EU Regulation 2017/821).

Furthermore, all of these violations are condemned by international actors and one of the reasons behind the international OECD Guidelines on how to break the patterns behind illicit trade and human rights abuses (OECD 2016, p. 3). For example, the G8 meeting in June 2013 referred to the extraction of natural resources in conflict zones as plundering (European Commission 2014, p. 8) and the UN Security Council Resolution 1952 (2010) discussed how trade with

conflict minerals in the Democratic Republic of the Congo is contributing to the funding of illegal armed groups and criminal networks. DRC is a good example to demonstrate the *badness factor* with, due to the country being one of the most affected by the principal wrongdoing, and the biggest target of other similar legislation such as the US Dodd Frank Act (European Commission 2014). In the resolution, the Security Council stated that they were:

"Noting with great concern the persistence of human rights and humanitarian law violations against civilians in the eastern part of the Democratic Republic of the Congo, including the killing and displacement of significant numbers of civilians, the recruitment and use of child soldiers, and widespread sexual violence, stressing that the perpetrators must be brought to justice, reiterating its firm condemnation of all violations of human rights and international humanitarian law in the country" (UN Security Council Resolution 1952, 2010)

The extreme nature of the above wrongdoings makes them hard to measure against each other, but due to the strong condemnation from the international community, and their breach of international law, a high *badness factor* is demonstrated.

6.1.2 Responsibility for a Contributory Act

The *responsibility factor*, which is measured by the presence of three conditions - voluntariness of contribution, knowledge of contribution and knowledge of wrongness of principal wrongdoing, will here be presented one by one.

> *Responsibility Factor* (Voluntariness, Knowledge of contribution, Knowledge of wrongness of principal wrongdoing) (Lepora & Goodin 2013, p. 104).

Firstly, the contribution by the EU to the principal wrongdoing can, as analyzed by official statements, not be seen as either accidental or involuntary. This due to the fact that at the time of the proposal of the regulation, the EU was aware of how its actions contributed to trade with conflict minerals, especially in the Democratic Republic of Congo, but also in the Great Lakes region and other parts of the world. Nonetheless, European companies continued trading with 3TG, without enough due diligence legislation in place to ensure that they could know whether the material had contributed to conflict or human rights abuses or not (European Commission 2014, pp. 18-21). The voluntary contribution to the principal wrongdoing can also be connected to the EU's dependency on 3TG for its economic growth and competitiveness (EU Regulation 2017/821). This was articulated in the Commission's 'Raw Materials Initiative', discussing the Unions

dependency and critical need of for example tungsten (European Commission 2014, p. 18). The EU's need of 3TG from third countries in combination with insufficient legislation led to the EU voluntarily contributing to the principal wrongdoing and fulfilling the first condition for the *responsibility factor*.

Secondly, at the time of the regulation, the EU had knowledge of its contribution to the principal wrongdoing, but was unaware of the extent of its contribution. Due to the lack of due diligence and the complex supply chains surrounding 3TG, the EU didn't have any exact numbers of how much the Union as whole contributed to the principal wrongdoing. However, the EU was aware of the fact that 880.000 EU companies were either trading, processing or creating components and products containing 3TG (European Commission 2014, pp. 20-21). Furthermore, in 2014, the EU accounted for 35% of the global imports of conflict related minerals (Macchi 2021, p. 274) and as stated in the assessment:

"As all of them potentially use tin, tantalum, tungsten and gold, they can be linked to the financing of armed groups. The volume of funds from EU companies reaching armed groups cannot be reliably estimated precisely because so little due diligence is currently performed on the sourcing and supply of the 3Ts and gold." (European Commission 2014, p. 20).

By admitting that the EU trade with 3TG to some extent is contributing to the funding of the principal agents and their wrongdoing, the condition of knowing about one's contributory role is fulfilled. Furthermore, according to the theory, the secondary agent should have invested enough time to know whether they are contributing to the wrongdoing or not. The lack of due diligence and research by the EU here therefore shows upon *complicity* and the second responsibility condition met, since this leads to an unsure level of the EU's contributory role in funding the principal agents.

Thirdly, at the time of the regulation, the EU was clearly aware of the wrongfulness of the principal act that their trade in 3TG could contribute to. The regulation stated that:

"Although they hold great potential for development, natural mineral resources can, in conflict-affected or high- risk areas, be a cause of dispute where their revenues fuel the outbreak or continuation of violent conflict, undermining endeavours towards development, good governance and the rule of law … Human rights abuses are common in resource-rich conflict-affected and high-risk areas and may include child labour, sexual violence, the disappearance of people, forced resettlement and the destruction of ritually or culturally significant sites." (EU Regulation 2017/821).

Furthermore, public consultations with EU citizens and civil society actors showed their awareness of how the lack of accountability towards Union economic operators led to an indirect link between EU consumers and human rights abuses in third countries. The public consultation especially highlighted the impact on women, as armed groups often use mass rape as a strategy for control (EU Regulation 2017/821). Therefore, we can draw the conclusion that the EU was well aware of the wrongfulness of the principal act at the time of the regulation.

To summarize, the three conditions for the *responsibility factor* are present in the case of the EU trade with 3TG. The EU is voluntarily trading with the minerals contributing to the principal wrongdoing, they are aware of how EU trade contributes to the wrongdoing and they know about the wrongfulness of the principal act. This means that the EU can be seen as responsible for its contribution to human rights abuses and conflict in third countries through its trade with 3TG.

6.1.3 Extent of Contribution

The *contribution factor*, which is measured by the presence of six conditions will here be presented one by one.

> *Contribution Factor* (Centrality of contribution, Proximity of contribution, Reversibility of contribution, Temporality, Planning role, Responsiveness of contributors to principals) (Lepora & Goodin 2013, p. 106).

The centrality of the contribution, defined as how central the EU's contribution to the principal wrongdoing is, will here be defined as potentially causally essential. This is due to the EU's large amount of import and trade with 3TG, and the fact that the EU is the world's largest market. In 2014, the EU accounted for 35% of the global imports of conflict related minerals and even though a large part of the imports came from other countries than the ones concerned with conflict, such as China and Malaysia, a large part of these countries imports come from conflicted related areas (European Commission MEMO 2014, p. 7). The uncertainty of centrality makes it very hard to measure the exact contribution by the EU, which makes the potentially causally essential definition suitable. This since the EU is only one of the global actors trading with conflict minerals, which means that its contribution is hard to be proven to be definitely causally essential to the principal wrongdoing, but its large market access and trade with the minerals makes its contribution essential and therefore not inessential to the situation in conflict areas.

The proximity of contribution by the EU, measured as how proximate the contribution is to the wrongdoing, will in this case be defined as nearest in causal chain. Since the armed groups defined as the principal wrongdoers are dependent on inter alia the funding from trade with 3TG (European Commission 2014, p. 8), the trade and import of these material by big traders such as the EU makes these actors the nearest in the causal chain. However, since the EU is not the only secondary agent contributing to these wrongdoings, it doesn't make its contributions causal to the wrongdoing but rather considered as nearest in the causal chain.

The reversibility of contribution examines whether the EU contribution to the principal wrongdoing is irreversible or not, ranging from irreversible to more or less costly to reverse. According to a study made by DG Trade, examining the costs connected to due diligence compliance for companies trading with 3TG: "The main finding of the survey was that a majority of the participants reported a relatively low level of cost for due diligence and reporting efforts" (European Commission 2014, p. 8). Overall, the costs of complying with due diligence on trade with 3TG for EU companies is relatively low, even though the relative burden of SME is higher than for bigger importers (European Commission 2014, p. 47).

As one of the biggest importers of 3TG, and heavily relying on these materials for economic growth and the green transition, the chance of the EU stopping the import of 3TG completely seems unlikely. Therefore, as discussed in the previous section, due to the complex global value chains and the EU:s dependency on 3TG, the contribution to the principal wrongdoing in its entirety can be deemed as irreversible, even though the cost for due diligence and an increased control over the contribution is estimated as relatively low.

The temporality of the wrongdoing examines whether it is an ongoing pattern of wrongdoing by the principal agent or a one time action. This criteria is in this case defined as an ongoing pattern of wrongdoing, due to the structural and repeated wrongdoing by armed groups trading with 3TG in conflict-affected areas. When the impact assessment was created in 2014, the problem of international trade contributing to the principal wrongdoing by armed groups in conflict-affected areas had been reported for several years (European Commission 2014, p. 13). This is therefore considered a long-term structural problem, where the funding of armed groups by European companies contributes to an ongoing pattern of principal wrongdoing.

The planning role that examines whether the EU is a plan-maker or a plan-taker to the principal wrongdoing, can here be considered as a plan-taker. Neither the EU, the European companies trading with 3TG or the European consumers using products containing 3TG, have the intent to take part or willingness to contribute

to the plans of the armed and criminal groups in conflict areas. This is certain when reading the impact assessment and the regulation, where the hopes of the EU legislating on this matter can stop its contribution to the principal wrongdoing and thereby stop the EU's role as a plan-taker (European Commission 2014, p. 8; EU Regulation 2017/821).

Finally, the responsiveness of the secondary agent looks at how responsive the secondary agent is to the plan of the principal wrongdoing and others implementing it. Here, we can see a clear response by the EU when trying to legislate the Conflict Minerals Regulation, and thereby regulate the way in which the EU is contributing to the principal wrongdoing (Council Regulation 2017/82). However, it can be discussed whether the response stands in proportion to the badness of the principal wrongdoing, with many critics arising about the efficiency of the response and the EU's continuation of trade with 3TG (The Parliament 2016).

To summarize, the six conditions to measure the contribution factor were all present, even though none of them possessed the highest measurement of contribution. According to the theory, not all factors need to be fulfilled for the contribution factor to be fulfilled. However, in this particular case, the irreversibility and structured pattern of EU contribution together with its proximity and potentially causally essential centrality to the principal wrongdoing makes the contribution factor to be present and relatively high.

6.1.4 Extent of Shared Purpose with Principal Wrongdoer

The extent of *shared purpose*, which is measured by the presence of three factors, will here be presented one by one.

> *Shared Purpose* (Extent of overlap, Strength of shared purpose, Action guidingness of shared purpose) (Lepora & Goodin 2013, p. 108).

The extent of overlap, which examines how much the secondary agent's purpose of contributing to the wrongful act overlaps with the purpose of the principal agent can in this case be understood as somewhat overlapping. Even though the EU doesn't actively share the purposes connected to human rights abuses and conflict, which is defined as the main wrongdoings by the armed and criminal groups, both agents still share the purpose of continued trade with 3TG. The EU due to its need for 3TG in its internal market and the green transition (European Commission 2014, pp. 20-21), and the armed and criminal groups for the funding

of their activities (EU Regulation 2017/821). The extent of overlap is therefore defined, not as by the outcome of the wrongdoing, but as shared on the reason for why the wrongdoing can continue.

The strength of the shared purpose between the EU and the armed forces is relatively strong compared to the other purposes of the principal wrongdoing. Even though wrongdoings in conflict areas can be considered to be fueled by a number of factors not connected to the financial contribution by the EU companies, the principal agents dependency on external funding and trade makes the purpose of continued trade a very important factor for these groups. The high international demand for 3TG, the lack of governance and weak governmental control together with the low level and difficulty of implementing efficient due diligence contributes to the continued financing and thereby wrongdoing by the principal agents (European Commission 2014, p. 16). However, it is important to keep in mind that even though the EU is one of the major importers of 3TG, other international actors such as China, the US and Kazakhstan also contribute to this financing, which are transactions that the EU cannot be considered to be responsible for. Despite this, the shared purpose between the principal and second agents will be defined as strong, since it allows for the armed groups to continue their exercise of power in affected areas.

Finally, the shared purpose between the EU and the armed and criminal groups can be considered as action guiding by the EU, since the purpose of continued trade in affected regions is the reason both for why the contribution to the principal wrongdoing continues, but also the reason for why the EU aims to regulate its trade and actions throughout the Conflict Minerals Regulation (EU Regulation 2017/821). Without the shared purpose, the contributions by the EU would probably have been different, if even present at all. It is the need of the 3TG minerals that forces the EU to keep trading with the minerals, and due to the lack of due diligence and clear guidelines for companies, this leads to a continued contributory action by the EU.

To summarize, even though the EU doesn't share the main purpose of the principal agent, with their continued illicit trade, human rights abuses and contribution to conflict in high-risk areas, the fact that both agents share the purpose of continued trade with the 3TG makes the EU to a certain extent share the purpose with the principal agents and thereby their wrongdoings.

6.2 The Compromises behind the Complicit Act

Moving on to the second step of the analysis, I will go through the three aspects to consider when examining a compromise behind a *complicit* act. The first one on how agents *agree and implement a plan* through compromise, the second on the *inter- and intra-personal aspects* of a compromise and the third on the *type of contribution* that this leads to.

6.2.1 Agreeing on and Implementing a Plan

According to the theory, a compromise between actors is divided into two steps - *the act of agreeing on a plan and the act of implementing a plan* (Lepora & Goodin 2013, p. 18). I will here use the two steps in order to explain how the EU is perceived as a multi-level and one-level polity depending on the step of the compromise. In the first step, when agreeing on a plan, the compromise is based on negotiations between three actors - the EP, the Council and the Commission. However, when implementing the plan, the EU is perceived as a one-level polity. Especially externally, when implementing legislation that impacts third countries. This even though the decision was based on negotiations between several institutions.

Since the establishment of the Lisbon Treaty, the general rule for passing legislation on EU-level is the Ordinary Legislative Procedure. This is a procedure that consists of an agreement between two legislative bodies, the EP and the Council, based on an initial proposal from the Commission (European Parliament 2023). This was the procedure used for the creation of the Conflict Minerals Regulation, and thereby the institutional context in which the compromise needed to be made.

In the first step of *agreeing on a plan*, all three institutions, hereby agents, had to agree on the actions needed to stop the EU's contribution to the principal wrongdoing when trading with conflict minerals. In the negotiations, all three agents had to compromise on their initial preferences for the legislative package, in a negotiation that took almost three years (European Commission 2022). According to the theory, the final result of a compromise leads to all agents being considered co-principals of the compromise, regardless of their initial standpoints. In this case, this leads to the EP, the Council and the Commission being equally responsible for the agreed legislation and its impact on complicit action in third countries.

However, in the second step of *implementing the plan*, the EU could be understood as one actor responsible for the implementation. As when analyzing EU *complicity,* it is the EU as one external agent that is examined when analyzing the functioning of its legislation. As soon as the regulation was agreed upon, the

discourse changed from three agents with different opinions agreeing on a plan to a united EU implementing the legislation as one entity (European Commission 2022). In the first step, the EU is a multi-level polity, and in the second step it is a one-level polity. When *agreeing on a plan*, there are three agents with different preferences who need to compromise, but when *implementing the plan* the EU is doing it with a united front as a one-level polity.

Theoretically, it is in the implementation part of the compromise where agents start contributing to the wrongdoing. In this case, however, the compromise made to create the Conflict Minerals Regulation is a response to a wrongdoing already taking place and being exercised by the EU. This means that the compromise is not leading to direct wrongdoing, but is rather an attempt to stop the indirect wrongdoing already taking place. The question therefore remains, whether the compromised legislation actually will stop the EU's contribution to the principal wrongdoing as described in the first part of the analysis.

6.2.2 Inter- and Intra-personal Aspects

Secondly, we need to understand the compromises made both between and within the institutions. Therefore, the *inter-personal* aspects, defined as the act of compromising with other agents and the *intra-personal* aspects, defined as giving up one's internal fundamental aims and values in order to achieve a compromise, will here be applied to the negotiations on trade with conflict minerals. I will present the negotiations through the lens of these concepts in order to understand which type of sacrifices and types of compromises were made in order to come up with the final legislative document.

When the Commission released its initial proposal for the regulation in March 2014, the focus of the legislation was to create a non-binding, opt-in, self-certification system that was limited to 3TG minerals only. After the release, the draft was sent to the Council and the EP for internal negotiations. The Council negotiations ended up with an approach similar to the Commission proposal, but with a stronger focus on voluntary due diligence for companies and a clear limitation of the scope of the legislation (Macchi 2021 p. 274).

The EP, on the other hand, started out with a different approach, encouraging mandatory rules for EU smelters and refiners. After an additional vote, they entered even more "radical amendments" (Barbière 2015), pushing for binding due diligence obligations for companies through the whole supply chain, which would have affected more than 800.000 European companies (Barbière 2015). In June 2016, after several internal discussions, a trilogue negotiation led by the Commission led to a political understanding between the EP and the Council. A compromise between the EP's more radical proposal and the prudent positions of the Council and the Commission was reached, and in April 2017 the final text

was adopted (Macchi 2021 p. 274). The *inter-personal* aspects of the negotiation was therefore present for all three institutions that needed to compromise with the others on their initial positions in order to reach a compromise and a final legislation on the trade with conflict minerals.

Furthermore, the *intra-personal* aspects of the compromise will also be considered present for all three institutions. In the end, all legislative bodies gave up some of their fundamental aims and values in the sake of compromise. The Council gave up their belief in voluntary obligations for companies and agreed on mandatory due diligence for smelters and refiners (Macchi 2021 p. 276). This despite their initial approach, that was even weaker than the Commission proposal in terms of obligations towards European companies. The *intra-personal* compromise could be explained by the sensitivity of the case. This since the Council as well as industry lobbyists, were very careful not to seem unbothered by the harm created by the illicit trade of minerals in conflict areas, but still keen to avoid a too big burden on European companies that could come from the proposal by the EP (De Ruyt 2016).

For the EP, their *intra-personal* aspect consisted of giving up their belief in mandatory obligations for companies throughout the whole supply chain of 3TG minerals, including the 800.000 downstream companies. This, with the aim to ensure complete compliance with the OECD guidelines. They also gave up on the member states duties to conduct penalties for smelters and refiners not complying with the obligations set out in the regulation. The amendments by the EP was considered a response to the civil society criticism of the initial proposal by the Commission, pushing for expansion of the scope as well as legally binding rules (Macchi 2021 p. 275). These were points of criticism that continued after the final compromise, much due to the sacrifices made by the EP in the negotiations (Barbière 2017; Banks 2016).

Since the Commission does not have legislative power, and mainly contributes through agenda-setting and mediation, it is harder to know about its fundamental aims and values in decision making. However, one could argue that they also made *intra-personal* concessions in the negotiations. This due to the fact that their initial proposal wasn't approved by any of the institutions, and that the proposal required three years of negotiations before a final compromise was made.

Furthermore, a discussion about how the EU action as one external actor is based on *intra-personal* aspects and sacrifices is in order. The goal of the EU legislation on conflict minerals is defined by the Commission as "to stem trade in four minerals – tin, tantalum, tungsten and gold – which sometimes finance armed conflict or are mined using forced labour" (European Commission 2022).

The final legislative proposal did, according to many experts, contain loopholes that made it hard for the regulation to reach this goal (Macchi 2021 p. 284; Davies 2017, p. 172; Amnesty 2016). The compromises made between the different institutions led to a EU regulation with loopholes that might undermine the aims of the legislation as well as EU fundamental values. The *intra-personal* aspects of these sacrifices could be related to the foundational treaties of the EU where the compromises required the EU to give up partially on the foundations set out in the EU Charter on Fundamental rights, stating that EU policies shouldn't facilitate human rights abuses or curb the ability of third countries to improve their human rights situations (Macchi 2021, p. 279). It also needs to be noted, however, that another fundamental aim and value of the EU, to ensure the competitiveness of European companies and the functioning of the internal market, was held as a contrast to the contribution to the principal wrongdoing by trade with 3TGs (De Ruyt 2016). It could therefore be argued that the EU needed to internally compromise between its market based and human rights values in order to come up with a final legislation.

To summarize, it is clear when examining the negotiations leading up to the Conflict Minerals Regulation, that there were both *inter-personal* and *intra-personal* aspects of compromising taking place within all three institutions. The *inter-personal* aspects were shown through the different initial standpoints from all three agents and the final result of the legislation. The need for compromise was especially present in the negotiations between the two legislative bodies, the EP and the Council, that held different positions. The *intra-personal* aspects could also be shown, both within each institution, but also within the EU as one entity.

6.2.3 Contribution by Compromise

In the third aspect the focus lies on what type of contribution the EU makes to the principal wrongdoing through its internal compromise. Since the indirect contribution by the EU to the principal wrongdoing already took place before the negotiations on the regulation started, one could argue that the EU was already both *permitting* and *enabling* the principal wrongdoing by its unsupervised trade with 3TG. However, the question remains if the final legislation could stop this *enabling* and *permitting* of the EU contribution to the principal wrongdoing.

As previously mentioned, according to several scholars and experts, the final legislation was too weak to completely stop the EU from permitting and enabling the wrongdoings by the principal agents. This due to the potential loopholes of the legislation that could have been prevented with the EP proposal (Macchi 2021 p. 284; Davies 2017, p. 172; Amnesty 2016). The compromises made between the EU institutions, did however, lead to a final text stronger than the initial proposal put forward by the Commission. Therefore, even though the final text

was weaker than what might be needed to stop the EU contribution to the principal wrongdoing, the compromise still contains elements that will hamper some of the EU contribution. For example, the mandatory due diligence for smelters and refiners, decided as a compromise between the EP and the Council, will decrease the chances of direct imports of conflict funded 3TG to the EU market. As stated by an OECD legal adviser, "the EU regulation would be an important step toward ensuring business avoids contributing to conflict and serious human rights impacts linked to the production and trade of minerals" (Lewis 2016).

The theoretical framework states that the principal agents would not have been able to do any wrongdoing if it hadn't been for what the EU is not doing as a consequence of the compromise (Lepora & Goodin 2013, p. 25). However, the complexity of international trade with 3TG and the fact that the EU is only one of the actors trading with these minerals, makes this assumption somewhat misleading. If the EU creates legislation to entirely stop the trade with these minerals and thereby stop contributing to the the actions by the principal agents, other international actors will still be able to keep trading and thereby keep up the contribution to the wrongful acts. However, the result of the compromise might lead to the EU moving towards a decreased level of contribution to the principal wrongdoing. The EU will probably still to some extent *enable* and *permit* the principal wrongdoing through its trade, but a higher level of due diligence and control will make the process more transparent and lead to a higher control of the origin and context in which the minerals were mined. Therefore, the legislation can therefore be seen as a step forward towards ending the EU contribution to human rights abuses and conflict through its trade with 3TG (Lewis 2016).

6.3 An On-Balance Assessment of EU Complicity

Finally, in order to make an *on-balance assessment* of the EU *complicity* I will put together the *moral blame*, measured as the *blameworthiness* from the first step of the analysis, with the *moral credit* of the EU, measured as the *compromising context* from step two together with the EU response to its contributory act. Thereafter, I will present external views on the positive and negative aspects of the regulation to finally be able to make an *on-balance assessment* of EU action. By doing so I will get a more nuanced view of the EUs action and explain its response to its contribution to the principal wrongdoing.

6.3.1 The Moral Blame

When putting all four factors for the grading of *complicity* together, one can see that the EU fulfills all four factors and can be considered to possess a high level of *blameworthiness* for its complicit act of trading with 3TG. The human rights abuses, armed conflicts and control over civilians exercised by the principal

agents, in combination with their breach of international law, makes the *badness factor* of the principal wrongdoing considered to be high. The three conditions for the *responsibility factor* were met and all conditions for the *contribution factor* were present and relatively high. Finally, even though the EU is not sharing the main purpose of the principal agents, they both shared the purpose of continued trade with 3TG, which makes them partially share purpose and thereby fulfilling the *shared purpose factor* as well. It is therefore clear that the EU, before the implementation of the Conflict Minerals Regulation, had a high level of *blameworthiness* in their complicit act of contributing to conflict and human rights abuses through its trade with 3TG.

6.3.2 The Moral Credit

As a response to its *complicity* through trade with 3TG, the EU decided to legislate on its trade with conflict minerals. This legislation was, as explained in the second step of the analysis, made in a context of negotiations and compromise under the Ordinary Legislative Procedure. After three years of negotiation the final legal text was, according to some, a step in the right direction (Macchi 2021; Barbière 2017). The final legislation aims to ensure that the EU importers buying 3TG from third countries follow the OECD mandatory due diligence obligations and only import from miners following the responsible sourcing standards. Smaller companies are excluded from the mandatory due diligence in order to spare them excessive burden, but nonetheless the EU aimed for 95% of the imported 3TG to be covered by the regulation (EU Regulation 2017/821).

After the compromise was made, the EU external communication stated that the Union aimed for the regulation to "help to break the link between conflict and the illegal exploitation of minerals, and; help put an end to the exploitation and abuse of local communities, including mine workers, and support local development" (European Commission 2022). This communication of the efficiency and aim of the regulation was also communicated by the Council and the EP in their press releases published in connection to their adoption of the regulation. The EP explained how the draft regulation can "prevent the minerals trade from funding conflict and human rights violation", with an overall positive approach to the efficiency of the regulation (European Parliament 2017). The same thing goes for the Council, who in their press release presented the regulation as a legislation "aimed at stopping the financing of armed groups through trade in conflict minerals (Council of the EU 2017).

Looking at the high level of *blameworthiness* of the EU and the external communication by the EU after the final draft of the Conflict Minerals Regulations was presented, one can get the impression that the EU after a long negotiation and internal compromises created a strong response to stop its contribution to the principal wrongdoing. This despite the different opinions on

the content of the legislation between the different institutions. However, it is important to look at external evaluations of the regulation, both positive and negative aspects, in order to see whether the response is strong enough to actually stop the EUs contribution to the principal wrongdoing.

6.3.3 External Views on the Regulation

Once the regulation was implemented, both positive and negative reactions were voiced on its ability to respond to its actual aim. In its impact assessment, the EU was aware that the EU regulation could only be one of several initiatives needed to tackle the problem in affected third countries. For example, the regulation cannot help tackle the underlying driver of conflict such as lack of governance or governmental control of its territory in countries trading with minerals (European Commission 2014, p. 21). Here, the need of other instruments such as foreign policy and development aid are necessary to complement the regulation.

Nonetheless, there are several positive aspects of the regulation that hopefully can contribute to a decreased *complicity* and *blameworthiness* of the EU. Firstly, the mandatory due diligence guidelines for companies falling under the scope of the regulation are aligned with the recommendations set out in the internationally recognized OECD Due Diligence Guidelines, and the United Nations Guiding Principles on Business and Human Rights. This means that the EU is basing its legislation on international guidelines created in collaboration not only with the OECD countries, but also affected countries in the Great Lakes Region and South America (OECD 2016, p. 3). These guidelines, on how to sustainably and ethically trade with conflict minerals, gives the content of the regulation an increased international recognition and sets the standard for future legislation in other countries.

Additionally, the increased awareness and ethical considerations, both for direct importers and others in the entire supply chain of 3TG, will improve the knowledge about potential contribution to wrongdoing in third countries and thereby force both producers and consumers to work against its contribution (European Commission 2014). Due diligence obligations for companies trading with potential damaging products has been recommended as a successful instrument both by the OECD and the UN in their guidelines for multinational enterprises (OECD 2011, 2016; UN 2011). The high level of pressure from EU consumers and the regulation complementing the US law on due diligence requirements puts a pressure on downstream companies operating in the internal market to follow the due diligence guidelines, even though they are not included in the scope of the regulation (European Commission 2014).

Finally, other parts of the regulation that received positive response from external actors were the global scope of the regulation. The previous US law on conflict

minerals only covered the Great Lakes Region while the EU regulation can cover all parts of the world as long as the region is defined as a conflict or high-risk area. This makes it possible for the EU to control its imports of 3TG from all areas impacted by conflict, lack of governance and human rights abuses (Macchi 2021 p. 274).

Despite the positive aspects of the regulation, negative criticism also emerged after its implementation, claiming that there were too many loopholes in legislation for it to be effective (Macchi 2021 p. 284; Davies 2017, p. 172; Amnesty 2016). One of the main critiques was the scope of the mandatory due diligence obligations for European companies, that in the end only covered the upstream companies. As mentioned above, even though the EP pushed for mandatory due diligence for the whole supply chain, the final compromise exempted the approximately 800.000 downstream companies from the mandatory obligations. This led to heavy criticism, especially from civil society, where 130 civil society organizations urged the EU to include the downstream companies in the mandatory obligations (Global Witness 2016; Lewis 2016). The biggest remark being that the few companies that are falling under the scope of regulation accounts for only 0.05% of the European companies trading or using 3TG on the internal market (Macchi 2021, p. 283).

Furthermore, the somewhat excessive annual thresholds for companies importing 3TG, exempting for example gold importers that import less than 100 kg from the mandatory due diligence obligations, could create loopholes that will invite circumvention of the legislation and thereby unfairly penalize the companies investing in conflict-free mining (Eurometaux 2017). The European Network for Central Africa and Amnesty, stated that this high minimum threshold would exempt 90% of the importers of the gold into the EU from the mandatory due diligence, and thereby fail to limit the financing of armed groups and human rights violations through minerals trade. Especially since gold is the metal most used by armed groups for illegal trade in the Great Lakes Region (EurAc 2016).

Finally, criticism arose on the scope of the regulation, both when it comes to the metals and minerals included as well as the definition of “conflict and high-risk areas”. Civil society heavily criticized the exclusion of other minerals originating from conflict such as cobalt, diamonds, gems and copper. The EU trade with these materials, conducted without enough due diligence, also contributes to human rights abuses and conflict in countries such as Afghanistan, Burma and the Central African Republic (Macchi 2021, p. 278). These limitations have been defended by the EU on the basis that the regulation is a complement to the US legislation that only concerns 3TG and the OECD guidelines that are focusing on the four minerals as well (European Commission 2022).

Furthermore, due to the definition of the scope of the regulation as 3TG "originating in conflict-affected and high-risk areas" and the non-exhaustive list of countries accompanied with the legislation, the hope is that the regulation can reach a wider scope and limit contribution to conflict and human rights outside of the Great Lakes Region as well (EU Regulation 2017/821). However, the definition of countries falling under the scope of the regulation, exempt some of the biggest exporters of 3TG that are not in a conflict and post- conflict state, but where serious human rights abuses and child labour takes place. Here, Ghana is a good example, as the seventh biggest gold producer, with evidence of child labour, but where the stability of the country exempt it from the mandatory due diligence in the regulation (Macchi 2021, p. 278).

In June 2021, the European NGO Coalition on Conflict Minerals (2021) conducted a report on the status of the implementation of the regulation on member state level. Other than the previously mentioned loopholes, they also criticized the lack of punitive sanctions in the regulation for companies not complying with the due diligence requirements. This has led to different member states having differing approaches for corrective measures in the case of non-compliance. These are for example conditional fines, import bans and "naming and shaming tactics". Furthermore, they condemned the lack of transparency from the MS on which companies that are importing 3TG and encouraged increased civil society consultation in the future revisions of the regulation.

6.3.4 An On-Balance Assessment

Finally, when putting together the *moral blame* and *credit* in an *on-balance assessment* of EU complicity one can conclude that the EU is still, to some extent, complicit in its trade with conflict minerals. The EU's response to its high level of *blameworthiness* led to its creation of the Conflict Minerals Regulation. The regulation can be seen as a positive step towards decreased EU *complicity* and funding of conflict and human rights abuses in third countries. It will help and increase control over the minerals entering the internal market through direct import and provide a standard for how to implement internationally agreed guidelines into hard law. However, the loopholes in the legislation and the focus on upstream companies as well as conflict and high-risk areas makes it hard to completely outrule continued *complicity* by the EU. The non-mandatory due diligence requirements for downstream companies makes it impossible to assess whether 3TG mined in illicit ways are still present in the final products entering the EU market. Furthermore, the high minimum thresholds for importers can lead to strategic circumventions of the legislation and an uneven playfield for the companies actually aiming for sustainable sourcing.

The content of the regulation can be explained partially by looking at the compromises made between the Council, the EP and the Commission. To reach a final agreement, all three institutions needed to make both *inter-personal* and *intra-personal* sacrifices of competing interests, mostly based on competition and *complicity* to human rights. This led to a final regulation where the EU as one entity made *intra-personal* sacrifices as well. This especially connected to the constitutional texts and fundamental values of the EU, where the treaties and charter for fundamental rights heavily promote the protection of human rights abroad.

In 2023, when the Commission is presenting their first evaluation and potential revision of the regulation, there are therefore some aspects needed to change in order for the EU *complicity* to decrease even further and hopefully lead to an *on-balance* response. Increased mandatory due diligence requirements and ethical awareness in all steps of the 3TG supply chain, would help both miners, importers and producers to act responsibly and sustainable when trading with the minerals. Furthermore, increased knowledge about the origin of 3TG will help European consumers to make ethical decisions on which type of products they are buying and thereby decrease the individual *complicity* to wrongdoing. Increased transparency, penalties for non-compliance and a wider scope of countries falling under the regulation should also be revisited. In the end, the aim by the EU to stop the linkage between European trade with conflict minerals through legislation had good intentions. However, the complexity of the issue and the differing internal preferences of the EU institutions led to a final legislation with loopholes that might undermine the purpose of the initiative.

Based on the above, the final assessment concludes that, even though the *on-balance assessment* is better than before the EU regulation was implemented, the EU is still, to some extent, complicit to the principal wrongdoing through its trade with conflict minerals. Therefore, continued revision of the regulation is necessary to make sure that EU contribution to human rights abuses and conflict decrease even more in the future, creating an on-balance response to its *complicity*.

7 Conclusion: Where do we go from here?

This thesis aimed to answer two research questions:

- *In what way is the EU complicit in its contribution to human rights abuses and conflict by its trade with conflict minerals?*
- *How can the Conflict Minerals Regulation, as a tool to deal with the EU's complicity, be assessed through a complicity framework?*

The first research question was mainly answered through the first step of the analysis, where the concept of *blameworthiness* provided criteria to assess in what way the EU was complicit through its trade with conflict minerals. The second question was answered through the second and third step of the analysis, where the *blameworthiness* and *compromising contex*t was put together with external reviews to create an *on-balance assessment* of the regulations ability to respond to the EU *complicity*. Thereby, the theoretical framework was used to explain how the EU used the Conflict Minerals Regulation as a tool to deal with its *complicity,* and whether it was in proportion to the contributory act by the EU.

After going through the analysis we can conclude that the EU possessed a high level of *blameworthiness* for its complicit act in trading with conflict minerals. To respond to this complicity the EU created the Conflict Minerals Regulation, aiming to stem its contribution to conflict and human rights abuses in third countries. However, putting together the aim of the regulation with the compromising context of the EU legislative process and external reviews of the regulation led to an *on-balance* assessment stating that the EU tried but somewhat failed to respond and compensate for its *complicity*. This means that either further revision of the regulation or complementary legislation is necessary for the EU to balance its complicity in its trade with 3TG.

The theoretical framework provided a way to understand the way in which the EU was complicit through its contribution (first research question), and assess how the Conflict Minerals Regulation worked as a response to this *complicity* (second research question). It also contained a normative aspect on how the EU could decrease its *complicity* in the future. With the *on-balance assessment* on the efficiency of the regulation I could provide the EU with arguments for how to improve the regulation to better respond to its initial aim. This research has therefore, not only provided an in depth-understanding on how the EU is using this type of legislation to respond to its *complicity* in third countries, but also provided analytical generalization by expanding the theoretical framework to facilitate evaluation and improvement of similar legislations in the future. Nonetheless, a broader discussion of the implications of these findings, and the context in which they were created is needed.

7.1 Putting the Findings into a Broader Context

Firstly, it is important to note that the integrated approach by the EU to handle its contribution to conflict and abuses was implemented in a very complex global trade scheme that both contain other global actors such as China and the US as well as complex conflicts in countries with unstable governments (European Commission 2014). Since the EU is only one of the actors contributing to the principal wrongdoing, they can only legislate and act on the behavior of European companies, which makes it hard to measure the actual impact on conflict and human rights abuses on the ground. This complex and contextual context creates limitations for the findings in this study connected to EU *complicity.* Nonetheless, I believe that in depth examinations like this are needed to grasp the problem from the point of view of the EU as a global actor and that it can be used to understand and improve policy approaches with similar implications in the future.

Furthermore, when the Commission presented its proposal for the regulation, it was viewed as a complement to the US legislation on trade with 3TG in the Great Lakes Region. It was also an implementation of the OECD guidelines on trade with 3TG into hard law. These points of departure can be connected to the literature review, where Bradford (2020) and Scott (2019) discussed how the EU is basing its legislation on already existing law packages or international guidelines, and how this path-dependency on earlier guidelines impacts the content of the legislation. Especially as a tool for the EU to gain recognition for the proposals and enforce and complement its unilateral regulatory power.

When looking at the Conflict Minerals Regulation we can see that this approach by the EU helped European companies that were affected by the US legislation to harmonize the market (Bradford 2020). Furthermore, the global scope of the regulation increased the number of countries falling under the legislation, thereby increasing the regulatory power from the EU and US together. Bradford referred to this phenomena as a co-constitutive Brussel's effect, where the EU and the US reinforced each other's legislation packages on a global level (Bradford 2020). However, this co-constitutive process and path-dependency also led to the EU only legislating on trade with 3TG, even though trade with other minerals are having the same types of impact on third countries (European Commission 2014). We could therefore see both positive and negative impacts of these types of co-constitutive phenomena, where the approaches could both enforce (increased global scope) and limit (only 3TG) the scope of legislation.

Furthermore, by implementing the OECD guidelines into hard law, the EU could get increased international recognition for its legislation, since many of the countries involved in creating those guidelines are also those countries affected by the legislation. By relying on internationally agreed guidelines, the EU aims to

export its internal legislation without being accused of exerting normative power on third countries (Scott 2014).

Furthermore, it could be argued that it is not only the current trade and contribution to principal wrongdoing that makes the EU complicit, but rather hundreds of years of structural oppression through colonial rule and uneven playing fields on the global market. An argument that can be connected to post-structural approaches and normative EU power. Due to this, it might be hard for the EU to say that they are only implementing agreed upon international guidelines without having a critical discussion for what that means when the legislation is impacting old colonial states. However, the focus in the regulation to help the formal mining sector, the involvement of third countries in the creation of the OECD guidelines and the many development packages in the Great Lakes Region (European Commission 2014) could be seen as a way to balance this structural post-colonial relationship.

Another dimension of EU *complicity* that hasn't been discussed in this study is the one regarding level of consumption. The large quantity of 3TG imported to the EU, is largely based upon the huge amount of individual consumption by EU citizens and societies. As with environmental legislation trying to combat EU *complicity*, the Conflict Minerals Regulation does not contain any dimension of diminished consumption as a factor for decreased EU contribution to conflict and human rights abuses abroad. Since the EU has become dependent on other regions for ecological resources, the environmental and human rights burdens needed for the high living standard of the EU citizens has been moved to third countries (Scott 2019, p. 62). Despite this, the territorial extension of EU law is based on the quality of the imported goods rather than quantity. This leads to a sustained high level of 3TG consumption by EU citizens, and thereby a continued *complicity* for individuals that continue their overconsumption of technical equipment, cars and jewelry. Especially, since these products are not necessarily covered by the regulation and thereby still can contain conflict minerals. A deeper discussion on the quantitative aspect of EU measures as well as the necessity of these minerals for the green transition would therefore be very interesting.

7.2 Limitations and Further Research

Looking back at the research process and the use of the theoretical framework, I can conclude that the *complicity framework* was suitable for this type of policy analysis. By thoroughly examining the *blameworthiness* of a complicit act by the EU one can thereafter make an assessment if the EU response is balancing up for its contribution to the principal wrongdoing. Furthermore, by diving deeper into the *complicity* of global actors it is easier to demand and argue for their accountability. The take in this study to add the *compromising context* to the *complicity framework* gave additional knowledge on the reasoning behind and the

institutional context for EU action, an important factor for understanding a complex democratic entity as the EU. The normative aspect of the analysis provided additional holistic knowledge on the pros and cons of the current approach as well as guidelines for improvement.

As other scholars that have used this framework before argue, I agree that the *complicity* approach can be useful for identifying shortcomings in policies and present potential improvements of EU legislation (Scott 2019, p. 57) However, there are limitations to the approach as well. The many complex theoretical concepts and formulas creates a big challenge, both for the researcher to present them in a pedagogical way, but also for the reader to understand the complicated dimensions and relationship between the different steps of the framework. For example, since the first step contains more formulas and theoretical concepts than the other two, it can appear like there is a discrepancy of complexity and importance between them, even though that is not the case. Furthermore, the added approach of compromise was in this study examined through official documents and articles, but for a more thorough analysis of the *intra-personal aspects* interviews or other internal sources could have been of good use. Finally, the often very technical nature of the legislations and policies containing territorial extension further complicates the analysis, since you have to balance a heavy theoretical framework with technical terms and complex legislative contexts.

It is also challenging to find an appropriate way to examine EU contributions in a field where the results and impacts are hard to measure. As mentioned in the analysis, the lack of due diligence and control by EU companies is the very reason for why the EU does not know the extent of its contribution to the principal wrongdoing. This means that it is hard to know the exact EU contribution, but it also means that due diligence and increased legislation is even more important. The discrepancy between the official EU discourse and the actual impact of legislation is an important aspect when examining these initiatives in the future. Furthermore, since due diligence means making ethical assessment on conduct, it's inherently a moral assessment. This is of course normally a tool for businesses, but by taking the ethical and moral assessment to a higher level this study could analyze the EU as an ethical actor and thereby create a framework for its moral assessments when creating legislation on due diligence.

As mentioned in the introduction, the EU did not only implement the Conflict Minerals Regulation to respond to their *complicity* in third countries. They had an integrated approach containing development aid, small business support and outreach as well. Therefore, further research on the entire effort by the EU could give a more holistic and broad understanding of the EU response. Furthermore, a case study on the impact in specific countries such as DRC or a longitudinal approach, studying the change of legislation content and impact over time would

be very interesting. Especially since the first evaluation and revision of the regulation will be presented in 2023. Even though I don't have enough space in this study to look at the post-colonial aspects of the EU's relationship with countries on the list covered by the legislation, the many historical ties between some of the bigger EU member states and countries trading with conflict minerals should be considered an important dimension in future research as well.

To conclude, despite the challenges with the theoretical approach, I believe that the *complicity framework* is an efficient theoretical tool to understand the EU's legislative response to its contribution to human rights abuses, environmental destruction and conflict in third countries. Due to the upcoming legislative proposals on due diligence with territorial extension, the need for critical examination of EU policy and further research in these fields is more relevant than ever. Further research could consist of applying the *complicity framework*, not only on other similar legislation, but also on integrated initiatives by the EU and other actors. Furthermore, broader discussions on *complicity* in other policy areas such as environmental-, migration-, and labor policy could provide a greater understanding of the EU as a moral actor making decisions that are impacting the world around us. Maybe a *complicity* chapter in all future impact assessments for EU legislation could help the EU and its institutions to reflect upon its power and make it a more just entity. This is, of course, if acting upon its *complicity* is something desirable for the EU and its member states, and with the premise that EU action abroad does matter on a global scale.

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