

## Israel's obligations as an occupying power under international law, its violations and implications for EU policy

### **I. WHY ISRAEL IS BOUND BY THE INTERNATIONAL INSTRUMENTS DEFINING THE OBLIGATIONS OF AN OCCUPYING POWER.**

The main international instruments defining the obligations of an occupying power are :

- the Regulations Respecting the Laws and Customs of War on Land, annexed to the Fourth Convention Respecting the Laws of War on Land signed in The Hague on 18 October 1907 (“the Hague Regulations”) ;
- the Fourth Convention Relative to the Protection of Civilian Persons in Time of War signed in Geneva on 12 August 1949 (“the Fourth Geneva Convention”).

It should be stressed at the outset that Article 47 of the Fourth Geneva Convention expressly provides that persons in the occupied area shall not be deprived of the benefits of the Convention by any agreement between the authorities of the occupied territory and the occupying authority. Accordingly, as long as the occupation endures, it is not possible to argue successfully that the conclusion of the Oslo agreements in any way diminished or affected the obligations of Israel towards the Palestinian population.

#### a. *The Hague Regulations.*

Israel is not a party to the Fourth Hague Convention, to which the Hague Regulations are annexed. However, as stated by the International Court of Justice (ICJ) in its advisory opinion of 9 July 2004 concerning the legal consequences of the construction of a wall in the Occupied Palestinian Territory (“the *Wall Opinion*”), the rules laid down in the Hague Regulations are part of international customary law.<sup>1</sup> This was recognized by all the participants in the proceedings before the Court in the *Wall* case, including Israel<sup>2</sup>. There is no doubt, therefore, that the Hague Regulations are binding on Israel.

#### b. *The Fourth Geneva Convention.*

Israel disputes the applicability of the Fourth Geneva Convention to the OPT, although that convention was ratified both by it and by Jordan. According to the Israeli interpretation, it would follow from the wording of Article 2(2) that the Convention applies only where the territory occupied fell previously under the sovereignty of another High Contracting Party.<sup>3</sup> Since the OPT did not fall under Jordanian sovereignty before being occupied by Israel, the Israeli government argues that the Convention does not apply to it.

This argument was rejected by the ICJ in the *Wall Opinion*. The Court found that, according to Article 2(1), the Convention is applicable whenever there exists an armed conflict between two contracting

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<sup>1</sup> *Wall Opinion*, para. 89. The relevance of the *Wall Opinion* is sometimes denied on the ground that it is “advisory” and therefore not legally binding. Those who maintain that view lose sight of the fact that an advisory opinion of the ICJ constitutes an authoritative statement of international law by the UN’s principal legal organ. It must be respected by all States of the international community to the extent the rules interpreted by the Court are themselves binding. Moreover it was adopted by a majority of fourteen out of fifteen judges ; on the core issue of the illegality of settlements the Court was unanimous. Finally it was approved by UN General Assembly resolution ES 10/15 on 20 July 2004 by a majority of 150 States in favour, six against (the United States, Canada, Israel and 3 Pacific islands) and 10 abstentions. ]

<sup>2</sup> *Wall Opinion*, *ibid.* : “The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all participants in the proceedings before the Court” (*italics supplied*).

<sup>3</sup> Text of Article 2(2) : “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.

parties<sup>4</sup>. If that condition is satisfied, the Convention applies to any territory occupied in the course of that conflict. The object of Article 2(2) is not to restrict the scope of application of the Convention but simply to make clear that, even if the occupation met no armed resistance, the Convention is applicable<sup>5</sup>. According to the Court, this interpretation reflects the intention of the drafters of the Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. It is also confirmed by the Convention's *travaux préparatoires* and was approved by the States parties to the Convention at a conference on 15 June 1999, in which they reaffirmed the applicability of the Fourth Convention to the OPT, including East Jerusalem.<sup>6</sup>

For its part, the UN Security Council stated on numerous occasions that the Fourth Geneva Convention applies to Israel's occupation of the OPT.<sup>7</sup>

The Supreme Court of Israel also found that, to the extent they affect civilians, the military operations of the Israeli Defence Forces (IDF) are governed by the Hague Regulations and the Fourth Geneva Convention.<sup>8</sup>

Those on the Israeli side who maintain that the Fourth Geneva Convention does not apply to the OPT therefore commit a serious error.

c. *Meaning of "occupation"*.

Article 42 of the Hague Regulations states that a "territory is considered occupied when it is actually placed under the authority of the hostile army".

This definition applies independently of the legality of the occupation. The only thing that matters is that there exists a situation in which a territory is actually placed under the authority of a hostile army. If that is the case, the law of occupation applies, whether or not the territory was subject to the sovereignty of the State occupying it previously, whether or not the occupation has received Security Council approval, whatever its aim is, whether or not it is the result of an aggression or of the exercise of the right to self-defence, whether or not it is motivated by humanitarian considerations, etc.

Contrary to what is sometimes asserted<sup>9</sup> "occupation" is not an accusation. It is simply the reflection of an objective state of fact. Those on the Israeli side who shun the term and prefer to speak of "disputed territories" in reality seek having to acknowledge the consequences deriving from that situation.

d. *Occupied areas*.

The occupied areas consist of the West Bank, the Gaza Strip and the Golan Heights. Part of the West Bank was annexed by Israel in 1980 and is now considered by it to be within the city of Jerusalem. For this reason we shall consider it separately, even though it is regarded internationally as being part of the West Bank.

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4 Text of Article 2(1) : « ... the present Convention shall apply to all cases of ... armed conflict which may arise between to or more of the High Contracting Parties ... »

5<sup>o</sup> *Wall Opinion*, para. 95.

6<sup>o</sup> *Wall Opinion*, para. 96.

7<sup>o</sup> Resolutions 237 (1967) ; 446(1979, 681(1990), 799(1992) and 904(1994)

8<sup>o</sup> Beit Sourik Village v. The Government of Israel and the Commander of the IDF Forces in the West Bank, HCJ 2056/04.

9 See *inter alia* : Dore Gold, "From 'Occupied Territories' to 'Disputed Territories'", Jerusalem Centre for Public Affairs, 16 April 2002, <http://www.jcpa.org/jl/vp470.htm>.

The West Bank was occupied by Israel in June 1967 in the course of the Six Days War. It remains occupied today. It had previously been occupied by Jordan. According to the UN Partition Plan of 1947 it had been designed to form part of the future Palestinian State. Although it is sometimes described on the Israeli side as being “disputed” rather than “occupied”,<sup>10</sup> its status as occupied territory within the meaning of international law is internationally recognized.<sup>11</sup> The Israeli Supreme Court also accepted that Israel holds the West Bank in belligerent occupation.<sup>12</sup>

The Oslo II agreement of 28 September 1995 divided the West Bank into three areas ; A, B and C, and gave to the Palestinian Authority “full civil and security control” over Area A. However the legal status of that area as “occupied territory” did not change. Israel continued to have the right to conduct military incursions into Area A without needing the consent of the Palestinian Authority and therefore maintained the potential to exercise full control over the area.<sup>13</sup> Israel also continued to have full security control over Area C and to have “overriding responsibility” for security for the purpose of protecting Israelis and confronting terrorism in Area B. Thus the entire territory of the West Bank remains under the authority of Israel.

The annexation of East Jerusalem was never recognized internationally. The UN Security Council censured it “in the strongest terms”, declared it “null and void”, adding that “it must be rescinded forthwith”.<sup>14</sup> Under international law it therefore continues to be part of the West Bank and must be considered as “occupied” by Israel.

The Golan Heights were also occupied during the Six Days War. They had been part of the territory of Syria.<sup>15</sup> In 1980 they were annexed by Israel who decided to impose on them its laws, jurisdiction and administration. The annexation of the Golan Heights was never recognized internationally. The UN Security Council called upon Israel to rescind it and declared that it was “null and void and without international legal effect”.<sup>16</sup> It cannot seriously be disputed that they are “occupied territory”.

As regards the Gaza Strip, the situation is at first sight more complex as a result of the Israeli disengagement of September 2005. The Israeli government maintains that, since that date, the Strip is no longer “occupied” within the meaning of international law. However numerous arguments show that the occupation did not in reality come to an end :

- Israel maintains full authority over the right to enter and exit from Gaza’s territorial waters and over the extent of these waters ;<sup>17</sup>
- Israel exercises total control over Gaza airspace ;

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<sup>10</sup> See preceding footnote.

<sup>11</sup> See : UN Security Council Resolution 237/1967, 271/69, 681/1990 and 799/1992. See also the *Wall Opinion*, paras. 93-101. As explained above, the ICJ did not accept Israel’s argument that, since the territories had not previously fallen under Jordanian sovereignty, Israel was not an “occupying power”.

<sup>12</sup> See among others : *Ajuri v. The Commander of IDF Forces in the West Bank*, HCJ 7015/02; *Beit Sourik Village v. The Government of Israel and the Commander of the IDF Forces in the West Bank*, HCJ 2056/04 : « The general point of departure of all parties – which is also our point of departure – is that Israel holds the area [of the West Bank] in belligerent occupation ».

<sup>13</sup> In July 2012 a military order authorized the Israeli immigration police to operate in the occupied territories, including Area A, to search Palestinians’ houses and detain any person the officer had “reasonable cause” to suspect of being there without a permit.

<sup>14</sup> UN Security Council Resolution 478/1980.

<sup>15</sup> For this reason it would be more accurate to refer to « Occupied Arab Territory » when referring to them. For simplicity’s sake, the expression “Occupied Palestinian Territory” (“OPT”) as used in this paper includes the Golan Heights.

<sup>16</sup> UN Security Council Resolution 497/1981.

- Israel controls the supply of essential products and services such as electricity, fuel, telecommunication frequencies, water...;
- Israel controls the population registry of Gaza inhabitants (thus allowing it to decide who qualifies for residency status) ;
- Israel collects the taxes owed to the Gaza authorities ;
- Israel imposes a terrestrial no-go (or “buffer”) zone over an area representing approximately 17 % of the Strip’s territory.

It should be added that the UN continues to consider that Israel occupies the Gaza Strip<sup>18</sup>.

It can therefore be concluded that the entire OPT is “occupied territory” within the meaning of international law and that Israel is therefore bound to respect the obligations international law imposes on an occupying power in respect of all these territories.

## II. ISRAEL’S VIOLATIONS OF ITS OBLIGATIONS AS AN OCCUPYING POWER

### a. *Israel’s continued occupation of the OPT.*

Occupation does not vest the occupying power with sovereignty over the occupied territory. The occupant is entrusted with the management of public order and civil life in the territory under control. He must exercise his powers in the interest of the inhabitants of that territory.<sup>19</sup>

It follows that occupation is necessarily a temporary occurrence. Were it otherwise, the distinction between occupation – in which the occupant acquires only limited prerogatives – and annexation – in which the annexing State acquires full sovereignty over the annexed territory - would disappear.

It will become apparent from the following description of the actions taken by Israel since 1967 that Israel no longer considers the occupation of Palestine as temporary. This has become clear not only from the increasing number of voices within the Israeli governmental polity who advocate the outright annexation of the West Bank but also from Israel’s actions themselves, such as the construction of settlements protected by a separation barrier and connected to Israel via reserved roads, the appropriation of Palestinian land, of natural resources (including water), and the destruction of Palestinian villages. And with respect to East Jerusalem and the Golan Heights, Israel has already crossed the line and officially annexed these areas.<sup>20</sup>

Israel has been called upon several times by the UN Security Council to evacuate the OPT. Resolution 242 of 22 November 1967 called for the “withdrawal of Israel armed forces from territories occupied in the recent conflict”. Israel’s argument that the resolution did not require the withdrawal from all

<sup>17</sup> Although the Oslo accords established access to the sea for Gaza within 20 nautical miles from the shore, Israel unilaterally reduced this zone to 12, then to 6, and finally to 3 miles, beyond which there is a no-go zone .

<sup>18</sup> Statement of the UN Chief Spokesman on 6 January 2012 : <http://blog.unwatch.org/index.php/2012/01/27/un-we-still-consider-gaza-occupied-by-israel/>. This was also the conclusion of the Special Rapporteur of the UN Commission on Human Rights Professor John Dugard : see “Report on the situation of human rights in the Palestinian Territories occupied by Israel since 1967”, 17 January 2006, paras. 8-10 : <http://www.refworld.org/docid/441182050.html>

<sup>19</sup> Article 43 of the Hague Regulations : “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” In a recent article, it has been argued that the occupant must act as “trustee” for the benefit of the occupied population : Ornaz Ben-Naftali, Aeyal M. Gross and Keren Michaeli, “Illegal Occupation : Framing the Occupied Palestinian Territory”, 23 Berkeley Journal of International Law, p. 551, 554-555. Without going so far, it must nevertheless be considered that the occupant must act in the interest of the occupied population.

<sup>20</sup> See above, I.d.

occupied territories but only from some of them, to be determined by negotiation between the parties within the context of a global peace agreement, cannot be accepted. The equally authentic French language version of the resolution states expressly that Israel must withdraw “des territoires occupés”. This clearly indicates that all the territories concerned should be evacuated.

Resolution 338 of 22 October 1973, calling on a cease-fire of the Yom Kippur war in October 1973, repeated that the parties must start to implement resolution 242 “immediately... in all of its parts”. Nevertheless Israel did not withdraw from a single square mile of occupied territory.

Resolution 476 of 30 January 1980 once again “reaffirmed the overriding necessity to end the prolonged occupation of Arab territories occupied by Israel since 1967 including East Jerusalem”.

It can therefore be concluded that Israel’ continued occupation, after more than 47 years, of the OPT constitutes in itself a breach of international law.

*b. Israel deliberately ignores its basic obligation to exercise its powers for the benefit of the occupied area.*

According to Article 43 of the Hague Regulations,<sup>21</sup> as generally interpreted - and notably by the Israeli Supreme Court - an occupying State has the duty to exercise its powers under all circumstances for the benefit of the occupied area and to refrain from taking into consideration its national economic and social interests inasmuch as such interests have no effect on its security or the interest of the local population.<sup>22</sup>

Israel’s conduct has been the exact opposite of this. Since the very beginning of the occupation it has introduced a wide variety of policies and measures that will be described in further detail hereafter. Taken together, these policies and measures have thwarted the socio-economic and industrial development of the OPT. By a combination of incentives in favour of its own nationals and restrictions on Palestinian firms and individuals it has created an uneven playing field in which Palestinians are systematically maintained in a subordinate role, unable to compete on an even footing with their Israeli counterparts. This has been documented in numerous reports of international governmental and non-governmental agencies, particularly the World Bank.<sup>23</sup>

The construction of a separation barrier going deep into Palestinian territory has led to the establishment of a closed area between the barrier and the 1967 border, cutting off the population living in that area from the remainder of Palestine, imposing substantial restrictions on their freedom of movement and leading to increasing difficulties regarding access to health services, educational establishments and primary sources of water.<sup>24</sup>

A recent example of the manner in which the Israeli authorities conceive their responsibility as occupying power is given by the Israeli administration’s refusal to allow operation of a landfill funded by the World Bank in Al-Minya (east of Bethlehem) for the express purpose of benefiting the Palestinian population. The administration is demanding that the Palestinians agree to let the Israeli

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21<sup>\*</sup> Cited at footnote 21 *supra*.

22<sup>\*</sup> HCJ 393/82, Jamit Askaan v. The Commander of the IDF Forces in the Area ; The Beit Surik Village Council v. The Government of Israel cited *supra*, footnote 14..

23 The World Bank’s Report No. AUS2922 is particularly instructive in this connection. See : “West Bank and Gaza – Area C and the Future of the Palestinian Economy”, Document of the World Bank, October 2, 2013 (cited hereafter “World Bank 2013 Report”).

24<sup>\*</sup> Wall Opinion, para. 133. See also hereafter, II.c.

settlements (built in violation of international law)<sup>25</sup> in the region use the site as well, which the Palestinians refuse.<sup>26</sup>

*c. Israel has brought changes to existing Palestinian legislation in violation of international law.*

Article 43 of the Hague Regulations obliges the occupying power to respect, unless absolutely prevented, the laws in force in the country.<sup>27</sup>

This obligation has been deliberately ignored by Israel. As shall be explained hereafter, Israel has introduced planning legislation requiring Palestinians in Area C to obtain the prior authorization for any new construction. Less than one percent of Area C, which is already built up, is designated for Palestinian use ; 68 % is reserved for Israeli settlements, 21 % for closed military zones and 9 % for nature reserves .<sup>28</sup> Needless to say, under such circumstances building permits are only exceptionally delivered to Palestinians.<sup>29</sup>

Nor can it be argued that under the Oslo II agreement Israel was to retain control during the initial stage over planning and zoning in Area C.<sup>30</sup> As recalled at the beginning of chapter I above, Article 47 of the Fourth Geneva Convention provides that protected persons may not be deprived of the benefits provided under the Convention by any agreement concluded between the authorities of the occupied territories and the occupying power. Thus the new restrictions on construction introduced by the Israeli authorities could not validly deprive the Palestinian population of the rights they enjoyed under the previous regime.

*d. Israel's settlement policy.*

Article 49(6) of the Fourth Geneva Convention states that :

“The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

Since 1968 the Israeli government engaged in a policy of settlement building in and around Jerusalem and throughout Area C. The settlements are connected with each other and with the territory of Israel by a network of roads specially reserved to the inhabitants of Israel and to settlers. The settlements themselves are protected by the Israeli military. Settlers benefit from tax and social advantages. They have preferential access to water resources. Although the built-in settlement areas only covered 3,25 % of the West Bank in 2010, the territory they

actually control far exceeds this, and according to Israeli sources amounts to fully 68 % of Area C. In addition to built-up areas, this includes the settlements' municipal boundaries, development master plan areas and road networks, all of which are usually off-limits to Palestinians. Reports by the Israeli Ministry of Defence in 2012 further state that an additional 10 % of Area C has been earmarked for

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<sup>25</sup> See hereafter, II.d..

<sup>26</sup> Amira Hass, “Israel defies World Bank, refuses to let Palestinians use landfill”, Haaretz, 9 January 2014, <http://www.haaretz.com/news/diplomacy-defense/.premium-1.567697>

<sup>27</sup> See text of Article 43 cited at footnote 21 *supra*.

<sup>28</sup> World Bank 2013 Report, para. 9.

<sup>29</sup> See also *infra*, II.g.

<sup>30</sup> Article XI.2.2 and 3.

settlement expansion.<sup>31</sup> By their sheer number and location the settlements put in danger the survival of the Palestinian State.

Israel's settlement policy constitutes a clear violation of the Fourth Geneva Convention. It has been condemned practically universally. In its *Wall Opinion* the ICJ unanimously<sup>32</sup> condemned it, noting that Article 49(6) of the Fourth Hague Convention "prohibits not only deportations and forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying power to organize or encourage transfers of parts of its own population into the occupied territory".

The argument is sometimes made on the Israeli side that Article 49 was drafted after the Second World War during which millions of people were deported, displaced and massacred, and that it does not apply to voluntary transfers.<sup>33</sup> There is nothing in the text of the Convention to support such a narrow construction. As the words "deport or transfer" make clear, the prohibition was meant to apply whether the movement of persons is voluntary or forcible. As we have seen, this was also the ICJ's conclusion in the *Wall Opinion*.<sup>34</sup> Whatever the means employed, the transfer of an occupying State's population into occupied territory is likely to entrench the occupation and worsen the economic situation of the local population, endangering its long-term existence as a nation.

Prior to the ICJ pronouncement, resolution 446 of 22 March 1979 of the UN Security Council had already stated "that the policy and practices of Israel of establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East". It called upon Israel "to rescind previous measures and to desist from taking any action which could result in changing the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, *not to transfer parts of its own civilian population into the occupied Arab territories*"<sup>35</sup>. It repeated this in resolution 452 of 20 July 1979. In resolution 465 of 1st March 1980 it added a call upon "all States not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories".

These pronouncements make clear that Israeli settlements in East Jerusalem are also condemned. Indeed East Jerusalem's unilateral annexation by Israel was never internationally recognized. UN Security Council resolutions 252 of 21 May 1968 and 298 of 25 September 1971 decree that Israel's attempts to change the status of the Holy City are "invalid" and "cannot affect that status". Resolution 298 of 25 September 1971 added that the legislative and administrative actions taken by Israel aiming at the incorporation of the occupied section of Jerusalem are "totally invalid" and urged Israel to rescind all previous measures and to take no further steps in attempting to change the status of the city.

In defiance of this resolution, on 30 July 1980 the Knesset enacted a "basic law" formally annexing East Jerusalem. The Security Council's reaction was quick : on 20 August 1980 it adopted resolution 478 affirming that the enactment of the basic law "does not affect the continued application" of the Fourth Geneva Convention in the occupied Arab territories "including Jerusalem" ; the law was "null

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31<sup>1</sup> World Bank 2013 Report, para. 10.

32<sup>2</sup> It is worthy of note that even the American judge, who was the only member of the Court to dissent from the main findings of the opinion, agreed that the Fourth Geneva Convention and international human rights law were applicable to the OPT (see para. 2 of the Declaration of Judge Buergenthal) and that the settlements violate Article 49(6) of the Fourth Geneva Convention (see para. 9 of the Declaration).

33 See *inter alia* : Rachel Avraham, "Why Israel Is Not Violating the Fourth Geneva Convention", <http://unitedwithisrael.org/why-israel-is-not-violating-fourth-geneva-convention/>

34<sup>3</sup> *Wall Opinion*, para. 120.

35<sup>4</sup> Italics supplied.

and void” and had to be rescinded forthwith. It also called upon third States to withdraw their diplomatic missions from the Holy City.<sup>36</sup>

The EU has taken the same line. One of the latest pronouncements of the Foreign Affairs Council on the question reads as follows :

“Settlements remain illegal under international law, irrespective of recent decisions by the government of Israel. The EU reiterates that it will not recognize any changes to the 1967 borders including with regard to Jerusalem, other than those agreed by the parties.”<sup>37</sup>

It can therefore be concluded without any hesitation that settlement building throughout the OPT, including East Jerusalem, infringes Article 49(6) of the Fourth Geneva Convention.

*e. The Wall.*

In April 2002 the Israeli government decided to build a security fence or wall (“the Wall”) with the stated purpose of preventing infiltration of Palestinian terrorists into the territory of Israel. The Wall does not follow the 1967 border ; it is built on Palestinian territory and frequently deviates from that border, sometimes by several kilometres, in such a way that it encompasses several settlements while encircling Palestinian areas<sup>38</sup>. The effect of these deviations is to cut off 16,6 % of the territory of the West Bank to include it in a “Closed Area” where Palestinian residents may no longer stay unless they hold an identity card or a permit issued by the Israeli authorities. Access to and exit from the Closed Area by Palestinians residing outside it can only be effected through special gates which are few in number and whose opening hours are few and unpredictably applied .

In the *Wall Opinion*, the ICJ held that construction of the Wall on Palestinian territory was contrary to international law for the following reasons :

- it impedes the exercise by the Palestinian people of its right to self-determination ;
- it creates a “fait accompli” on the ground that could well become permanent, notwithstanding the Israeli government’s assurance that it does not amount to annexation and is of a temporary nature ;
- the route of the Wall consolidates the situation of Israel’s illegal settlements ;
- its construction led to the destruction or requisition of properties under conditions that contravene Articles 46 and 52 of the 1907 Hague Regulations and Article 53 of the Fourth Geneva Convention ;
- the Wall and the establishment of a Closed Area impose substantial restrictions on the freedom of movement of Palestinians inhabiting the West Bank and their freedom to choose their residence. They entail serious repercussions for agricultural production, access to health services, educational establishments and sources of water by Palestinian residents of the Closed Area.<sup>39</sup>

As a result the Court called upon Israel to cease construction of the Wall forthwith, to dismantle those parts that had been built and to make reparation for the damage caused. It also called upon “all States”

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<sup>36</sup> See footnote 16 *supra*.

<sup>37</sup> See point 6 of the conclusions of the Foreign Affairs Council of 14 May 2012.

<sup>38</sup> This is notable in the area around the Palestinian city of Qalqiliya.

<sup>39</sup> Wall Opinion, paras. 117-122 and 132-137.

not to recognize the illegal situation resulting from construction of the Wall and not to render aid or assistance in maintaining the situation created thereby ; it added that all States parties to the Fourth Geneva Convention have the obligation to ensure compliance by Israel with international humanitarian law as embodied by that convention.<sup>40</sup>

Israel has not taken a single step to comply with this request, giving as a pretext that advisory opinions are not binding.<sup>41</sup>

*f. Destruction of real and personal property.*

Article 53 of the Fourth Geneva Convention states : “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

In the course of its occupation, Israel has destroyed and continues to destroy on a massive scale property belonging to Palestinians, without military justification.

One frequently invoked reason is punishment : it is common for the IDF, when arresting Palestinians accused of engaging in violent action against the occupation, to destroy the house in which they lived, thus depriving not only them but also their families, of a home. In such cases, the destruction contravenes not only Article 53 but also Article 33(1) of the Fourth Geneva Convention.<sup>42</sup>

Another frequently invoked motive is the absence of the required construction permit from the Israeli Civil Administration. However it is well-known that this administration hardly ever delivers permits to Palestinians living in Area C.<sup>43</sup> This contrasts with its conduct in respect of the illegal outposts established by Israeli settlers, which seldom give rise to actions against them.<sup>44</sup>

Other motives for demolition orders are the needs of the construction of the Wall, the intention to establish a natural or archaeological site, the desire to reserve space for the possible extension of a nearby Israeli settlement, plans to create a firing range for use by the army, etc. If these actions are violations of Article 53 of the Fourth Geneva Convention, since they cannot be justified as being “rendered absolutely necessary by military operations”.

The destructions concern not only houses but also tents, huts, sheep pens, latrines, water cisterns and wells, hothouses, solar panels, wind-and-sun-powered turbines, many of which were built with money provided by the EU or its Member States. The efforts of the Palestinian population to improve its lot are thereby frustrated, as are the attempts of third countries to improve it.

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<sup>40</sup> This includes the prohibition on the construction of settlements.

<sup>41</sup> This is not correct ; see *supra*, footnote 3.

<sup>42</sup> Article 33(1) of the Fourth Geneva Convention : « No protected person may be punished for an offense he or she has not personally committed ».

<sup>43</sup> The Civil administration does not prepare master plans for Area C communities and uses this failure as justification for prohibiting the construction of virtually all Area C construction. See World Bank 2013 Report, paras. 35-39.

<sup>44</sup> A recent example showing the discriminatory character of the Israeli authorities’ conduct is provided by these authorities’ rejection of a request to legalize a Palestinian house built too close to a road, whereas the day before the same authorities had approved the construction in a settlement of houses even closer to the road : see Haaretz, 12 December 2013 : “In West Bank, Arab home faces demolition”, [www.haaretz.com/news/middle.../premium-1](http://www.haaretz.com/news/middle.../premium-1)

It is evident that such destructions carried out by Israel contravene its international obligations.

*g. Confiscation of private property.*

Article 46(2) of the Hague Regulations states : “Private property cannot be confiscated”.

Since the 1967 war, Israel has seized over a million dunums<sup>45</sup> of Palestinian land through a selective application of Ottoman law. In particular, land has been confiscated through seizure for military needs, absentee property laws and declarations of State land. Seized land is placed within the jurisdictional boundaries of local and regional settlement councils and is used not only for urbanization but also as a buffer zone surrounding settlements or turned into recreational and nature areas which cannot be accessed by Palestinians.<sup>46</sup>

Less than 1 % of Area C in the West Bank is left for Palestinian use ; the remainder is heavily restricted or off-limits to Palestinians : 68 % is reserved for Israeli settlements ,<sup>47</sup> c. 21 % for closed military zones and c. 10 % for nature reserves.

In practice it is virtually impossible for Palestinians to obtain construction permits for residential or economic purposes.<sup>48</sup> Palestinians who, for want of alternative, build homes without permits on nearby land owned by them live under the constant threat of demolition. Moreover the shortage of space for construction has resulted in a steep rise in the price of land.

Once again it can only be concluded that Israel has acted, and continues to act, in blatant disregard of its international obligations.

*h. Exploitation/destruction of natural resources (including water).*

Article 55 of the 1907 of the Hague Regulations provides that an occupying State shall be regarded as an “administrator or usufructuary” of the property situated in the occupied country. According to generally recognized principles of civil law, a usufructuary has the right to use and enjoy the fruits of another’s property for a period without damaging or diminishing its substance. In the case of non-renewable resources such as mines and quarries, there is authority for the view that an occupying power may, as usufructuary, continue exploitation of existing sites but may not create new sites or extend existing ones.

Moreover Article 43 of the Hague Regulations has been interpreted as obliging the occupying State to exercise its powers for the benefit of the occupied area.<sup>49</sup>

It follows that the occupying power must use the proceeds of its usufruct exclusively to satisfy the needs of the local population.

In the case of Palestine, it is also necessary to take into account the principle of permanent sovereignty of peoples and nations over their natural resources. This principle, which was proclaimed by the UN General Assembly in 1962,<sup>50</sup> is now accepted as one of the main pillars of contemporary international law. Like other peoples and nations, Palestinians are entitled to have it respected. This was confirmed by the UN General Assembly’s resolution of 29 March 2012 on “the Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan over their Natural Resources”.<sup>51</sup> On 21 December 2013 the UN General Assembly reaffirmed the applicability of the principle to Palestine and demanded that Israel, the occupying power, cease the exploitation, damage, cause of loss or depletion and

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<sup>45</sup> One dunum = 1000 m2.

<sup>46</sup> Report of the UN Human Rights Council’s Independent Fact Finding Commission to Investigate the Implications of the Israeli Settlements on the Rights of the Palestinian People, paras. 63-64.

endangerment of natural resources in the OPT. All EU Member States voted in favour of this resolution.

Israeli actions under the occupation have repeatedly and seriously violated these international law principles. The following are a few examples of such Israeli actions :

- the up-rooting of a vast number of fruit-bearing trees and the destruction of farms and greenhouses ;
- the widespread destruction of vital infrastructure, including water pipelines and sewage networks ;
- the forced diversion, for the benefit of the Israeli settlements, of water resources, and the unavailability of permits for Palestinians to dig wells or build water conveyance and wastewater treatment and reuse infrastructure : it has been calculated that in 2007 the Palestinian population had access to only about one quarter of the ration of their Israeli counterparts ;<sup>52</sup>
- the right given to Israeli companies, such as Ahava Dead Sea Laboratories, to extract valuable mineral deposits from the Dead Sea ;
- stepping up the extraction of stone and gravel quarries by Israeli companies in the West Bank (where they were already being exploited at the beginning of the occupation) and the grant to Israeli companies of permits to exploit new sites, whereas no new permits have been issued to Palestinian firms since 1994 although the Oslo Accords provided for this ;<sup>53</sup>
- the grant to multinational companies of permits to operate quarries for cement production on the Palestinian side of the 1967 border ;<sup>54</sup>

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47<sup>o</sup> See above, *c*.

48<sup>o</sup> World Bank 2013 Report, paras. 9 and 34-36.

49<sup>o</sup> See above, para. II. *b*.

50<sup>o</sup> Resolution 1803 (XVII) of 14 December 1962.

51<sup>o</sup> The resolution was adopted by a majority of 167 affirmative votes, 6 abstentions and 7 votes against : those of the United States, Canada, Israel, and 4 Pacific Island States.

52<sup>o</sup> World Bank 2013 Report, para. 18.

53 World Bank 2013 Report, para. 30. In a case where the authorities' decision was challenged by a Palestinian association, the Supreme Court rejected the complaint on the dubious ground that the occupation of Palestine was "unique" in that it had lasted for such a long time that this required "an adjustment of the law to the reality on the ground" – thus justifying Israel's failure to comply with international law by its own breach of that law. The Court also noted with approval that the royalties paid for the operation of the quarries were used to finance the operations of the Israeli military (sic!) administration (Yesh Din v. The Commander of the IDF Forces in the West Bank and 11 others, December 2011).

54 *Haaretz*, 3 September 2010, « Digging up the dirt », concerning the Israeli State comptrollers' annual report for 2005 revealing that the royalties owed by the cement producers Heidelberger Cement and Cemex for exploitation of cement quarries in the West Bank were not used for the benefit of the Palestinian population but paid into the Israeli State treasury.

- the refusal to grant licences to use 3G telecommunications frequencies to Palestinian operators, and the various other restrictions on the construction of telecommunications infrastructure in Area C, placing the Palestinians at a competitive disadvantage vis-à-vis their Israeli competitors.<sup>55</sup>

All this shows, once again, that Israel deliberately ignores its obligations as an occupying power.

*i. Condoning settler violence.*

Article 43 of the Hague Regulations obliges an occupying power “to take all the measures in his power to restore, and ensure as far as possible, public order and safety”.<sup>56</sup>

Israeli settlers regularly engage in violence and intimidation with the aim of forcing Palestinians off their land. The occupation authorities seldom if ever intervene to put an end to these actions. Even though the identities of the perpetrators are well-known and they could easily be identified, few have been prosecuted.<sup>57</sup>

This is a clear breach of Israel’s obligation as an occupying power “to ensure as far as possible public order and safety”. It has been criticized by the Council of the EU:<sup>58</sup>:

“The EU condemns continuous settler violence and deliberate provocations against Palestinian civilians. It calls upon the government of Israel to bring the perpetrators to justice and to comply with its obligations under international law”.

*j. Appropriation of cultural property.*

According to Article 5(1) of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 :

“Any Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property”.

Both Israel and Palestine are parties to that convention. As a result, Israel as an occupying power is not entitled to conduct archaeological excavations in Palestine without the collaboration of the Palestinian authorities and to appropriate the results of these excavations and exhibit them in its own museums as it does today.

*k. Administrative detention and treatment of detainees.*

*i) Administrative detention.*

In order to discharge its responsibility under Article 43 of the Hague Regulations to maintain public order and safety, an occupying power may adopt various measures, of which internment is the most severe.<sup>59</sup> Internment may be imposed only if the security of the detaining power makes it “absolutely

<sup>55</sup> World Bank 2013 Report, para. 51-61.

<sup>56</sup> The official French text uses the words “l’ordre et la vie publics”, which is broader than the English translation “public order and safety”.

<sup>57</sup> Report of the UN Independent Fact-Finding Commission (cited *supra*, footnote 49, paras 50, 56.

<sup>58</sup> Conclusions of the Foreign Affairs Council of 14 May 2012, point 7.

<sup>59</sup> Article 41 of the Fourth Geneva Convention : “Should the Power in whose hands the protected person may be consider the measures of control mentioned in this Convention to be inadequate, it may not have resort to any

necessary”.<sup>60</sup> Anyone who is arrested shall be informed, at the time of arrest, of the reasons therefor and the charges against him.<sup>61</sup> Any internment decision shall be reviewed periodically and at least twice a year.<sup>62</sup> A right of appeal must be provided for. Any appeal must be decided with the least possible delay. If the decision is upheld, it must be subject to periodic review, if possible every six months.<sup>63</sup>

In practice, Israel routinely uses administrative detention. This by itself constitutes a violation of Article 78(1) of the Fourth Geneva Convention which makes it clear that detention constitutes a last remedy, to be resorted to only if required for imperative reasons of security if less extreme methods fail.<sup>64</sup>

In the West Bank administrative detention is regulated by Military Order 1651. Article 285 thereof empowers the military commander to detain an individual for up to six months renewable periods if he has reasonable grounds to presume that public security so requires. The arrest is often based on secret information to which neither the detainee nor his lawyer have access, thus violating the detainee’s right of due process. There is no limit on the number of times the six-month detention period may be renewed. The detainee must be brought before a judge within eight days. These delays contrast with those of detainees under Israeli law, where administrative detention may not exceed 48 hours and detention periods are of three months. Since according to Article 42 of the Fourth Geneva Convention control measures can be adopted only to the extent this is “absolutely necessary” for the security of the detaining power, it must be concluded that the delays provided for Palestinian detainees are of excessive duration. Indeed there is no rational explanation for the difference in treatment between detainees in the OPT and in Israel.

In the Gaza Strip, the Internment of Unlawful Combatants Law of 2002 has been applied since the 2005 Israeli disengagement. The law defines an “unlawful combatant” as someone who has participated either directly or indirectly in unlawful acts against the State and is not entitled to prisoner of war status under international law. The law allows for the detention without trial of foreign citizens and Palestinian residents in the Gaza Strip. Detainees may be held for up to 96 hours before the issuance of a permanent detention order, or up to seven days if the government declares the existence of wide-scale hostilities. Judicial review of the detention order must take place within 14 days. If the order is maintained, it must be reviewed every six months. The order will be cancelled if the judge finds that the release will not harm state security.

This law provides even less protection than Military Order 1651 : judicial review is conducted less quickly and the release of an “unlawful combatant” requires positive proof that it will not harm state security. It constitutes a clear violation of the relevant provisions of the Fourth Geneva Convention and of the International Covenant on Civil and Political Rights.

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measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.” See also Article 78(1) : “If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment”.

<sup>60</sup> Article 42 of the Fourth Geneva Convention.

<sup>61</sup> Article 9(2) of the International Covenant on Civil and Political Rights of 19 December 1966. Israel ratified the Covenant. In the *Wall Opinion* the ICJ opined that the protection offered by the Covenant does not cease in case of armed conflict and that it extends wherever the State exercises its jurisdiction, even if that is in foreign territory (*Wall Opinion*, paras. 106 and 109).

<sup>62</sup> Article 43 of the Fourth Geneva Convention.

<sup>63</sup> Article 78(2) of the Fourth Geneva Convention.

<sup>64</sup> See text of Article 78(1) of the Fourth Geneva Convention at footnote 62 above.

*ii) Treatment of detainees.*

Article 76 of the Fourth Geneva Convention states that “protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.”

Since the beginning of the occupation, Israel has infringed this provision. Indeed all but one of the localities in which Palestinians are detained are situated within its borders and not in the OPT.

*1. The Gaza closure.*

After the take-over of the Palestinian government in Gaza by Hamas in June 2007, Israel closed off the border crossings between its territory and the Gaza Strip. The great difficulties arising from this closure for the local population and the reactions of the international community caused Israel to alleviate these restrictions slightly so as to allow the import of limited quantities of essential goods including medical products, fuel and food. Israel has long prohibited the import of cement and construction materials on the pretext that these could also be used for military purposes. It also makes limited supplies of electricity. However these are notoriously insufficient and Gaza residents experience at least twelve hours of blackouts per day on average. The lack of sufficient fuel to sustain electricity supplies prevents water and sewage facilities from operating normally.

Israel does not seek to justify the extreme hardship inflicted on Gaza’s population by the existence of an imminent security risk. Rather, it uses its control over Gaza’s borders as a means of reprisal against rocket attacks from jihadist forces based in Gaza, closing the crossings following such incidents and punishing the entire Gaza population for acts committed by a few.

The fact that Egypt has also closed its border crossing with the Gaza Strip in no way diminishes Israel’s responsibility. As an occupying power Israel is under an obligation to ensure the welfare of the Gaza population ; Egypt is not.

Israel also prohibits the export of goods from the Gaza Strip towards the West Bank and Israel. Again, this restriction is not based on security considerations since Israel allows goods from Gaza to transit through its territory en route to other destinations. Rather, it reflects Israel’s policy of separating the Gaza Strip from the West Bank, disregarding the fact that both were supposed to form a single territorial unit under the Oslo II agreement.

Israel also limits travel by individuals between the West Bank and the Gaza Strip. Thus students in Gaza are denied the right to study in the West Bank. Here also it is difficult to see a connection between the restrictions and the security of Israel. Israeli authorities acknowledge that the purpose of the restrictions is to enforce Israel’s “separation policy” between the two areas.

Under the Oslo II agreement fishermen based in the Strip were allowed to fish at a distance of up to 20 nautical miles from the coast. After Israeli soldier Gilad Shalit was captured by Hamas in 2006 the fishing zone was reduced to six, then three miles. At the end of operation Pillar of Defence in November 2012 Israel again approved the expansion of the fishing zone to six miles, reduced it again to three in March 2013 after Qassam rockets were fired towards Israel and expanded it back to six miles again in May of that year. The constant back and forth on the fishing limit points to the fact that the restrictions do not arise from concrete security concerns but are designed to make life difficult for the civilian population.<sup>65</sup>

A recent example of the arbitrary character of these restrictions is given by the Israeli authorities’ refusal to allow members of the European Parliament delegation for relations with the Palestinian

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<sup>65</sup> June 2013 by Gisha, Gaza 2013 : A Snapshot : <http://www.gazagateway.org/2013/06/gaza-2013-snapshot/>

Legislative Council to enter Gaza. <sup>66</sup> Quite evidently, no genuine security concern could justify such refusal.

Article 50 of the Hague Regulations provides that :

“No general penalty, pecuniary or otherwise, shall be inflicted on the population on account of acts of individuals for which they cannot be regarded as jointly and severally responsible.”

Similarly Article 33(2) of the Fourth Geneva Convention states :

“Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”

By imposing a near total closure of its borders with the Gaza Strip the Israeli government is imposing a collective punishment on the Gaza population in violation of these two provisions of international humanitarian law.

*m. Non-compliance with UN Security Council resolutions.*

Article 25 of the UN Charter provides :

“ The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

Israel is a member of the UN. It is therefore obliged to accept and carry out the decisions of the Security Council.

Israel has systematically failed to comply with this obligation, as is apparent from what was said above.

### **III. WHAT THE EU MUST DO IN THE FACE OF ISRAEL'S VIOLATIONS**

*a. The duty to bring to an end and not recognize or render aid or assistance to Israel's violations.*

It is a well-established rule of international law that when a State commits a serious breach of a peremptory norm of international law, all other States have an obligation :

- to cooperate to bring the breach to an end ;
- to refrain from recognizing the breach as lawful ;
- to refrain from rendering aid or assistance in maintaining the situation created by the breach. <sup>67</sup>

A breach is considered serious if it involves a gross or systematic failure by the responsible State to fulfil its obligation. <sup>68</sup>

*b. Characterization of the breaches committed by Israel.*

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<sup>66</sup> European Parliament Delegation to Palestinian Territories calls for Palestinian Election and EU Action to Accelerate an End to Israeli Occupation  
[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/dplc/dv/dplc-statement\\_30-10-2013/dplc-statement\\_30-10-2013en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/dplc/dv/dplc-statement_30-10-2013/dplc-statement_30-10-2013en.pdf)

<sup>67</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Article 41.

<sup>68</sup> *Ibid.*, Article 40 (2).

There is no question that Israel's failure to comply with the fundamental norms of international humanitarian law is both gross and systematic and that these norms are "peremptory norms" with which all States have the obligation to ensure compliance.<sup>69</sup> The question we shall examine is what action the EU must take to live up to its international obligations and - as a result - with its own constitutive instrument.<sup>70</sup>

*c. Ineffectiveness of the EU's initial response.*

Until mid-2013 the EU's response was purely rhetorical. It made solemn declarations expressing its "deep concern" about the continued construction and expansion of settlements, "regretting" eviction and demolition orders, "condemning" the construction of the Wall on Palestinian territory as illegal under international law, "refusing to recognize" unilateral changes by Israel to its pre-1967 borders and calling for the "immediate, sustained and unconditional opening of crossings for the flow of humanitarian aid, commercial goods and persons to and from Gaza". Although ritually repeated over the years, none of these statements was accompanied by any corresponding action. It was as if these verbal condemnations served only to clear the EU's conscience and allow it to pursue its policy of "business as usual" with Israel.

In June 2008 the EU Council decided to upgrade its relations with Israel. Simultaneously it concluded a protocol with Israel allowing for closer participation in EU programmes.<sup>71</sup> Shortly thereafter, Israel launched operation "Cast Lead"; a few months later came the Gaza flotilla incident. The huge gap thus revealed between the EU's policy of "engaging" with Israel and the latter's behaviour on the ground led to such a public outcry that the European Parliament decided to defer its approval of the protocol and the Council froze the upgrade decision<sup>72</sup>.

By then, the failure of the EU's policy of verbal protests had become evident. More concrete measures were required if the EU was to respect its international obligations.

*d. First concrete measures.*

*i. The Brita ruling.*

The first sign that the EU might be roused from its apathy came with the European Court's *Brita* ruling of 2010<sup>73</sup> which removed all doubt concerning the fact that settlement products were not entitled to preferential treatment under the 1995 EU-Israel Association Agreement. The publicity given to the judgment forced the Commission to take more effective action<sup>74</sup> to facilitate detection by national customs authorities of cases where preferential treatment was wrongfully claimed. This was done by

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<sup>69</sup> *Wall Opinion*, point D of Operative Part.

<sup>70</sup> Article 3(5) TEU provides that the EU will contribute to "the strict observance of ... international law and the principles of the UN Charter".

<sup>71</sup> Protocol of 15 April 2008 on the General Principles Governing the State of Israel's Participation in Community Programmes.

<sup>72</sup> Statement of the European Union on the occasion of the 9<sup>th</sup> meeting of the EU-Israel Association Council, Luxembourg, 15 June 2009, points 2 and 3.

<sup>73</sup> Judgment of 25 February 2010, case C-386/08, *Firma Brita/Hauptzollamt Hamburg Hafent*.

<sup>74</sup> Hitherto the Commission had already informed importers in three official notices of its opinion that settlement goods were not entitled to preferential treatment under the Association Agreement and advised them to exercise caution in respect of import documents issued by the Israeli authorities : Notice to importers : Importations from Israel into the Community, O.J. C 338/13, 8.11.97, O.J. C 328/6, 23.11.2001 and O.J. C 20/2, 25.01.2005. However these notices remained largely ineffective.

requiring importers, as a condition for obtaining preferential treatment, to mention the place of production and its postal code in the import documents ; simultaneously, the Commission published on its website an up-to date list of uneligible locations (i.e. Israeli settlements) and their postal codes.<sup>75</sup> This facilitated the task of the Member States' customs authorities in avoiding unjustified claims to preferential treatment.

*ii. The grants guidelines.*

Another sign was given in July 2013 with the adoption of guidelines on the grant of financial assistance to Israeli entities established or active in the settlements.<sup>76</sup> These guidelines make clear that the Commission will not grant financial assistance under EU programmes to Israeli entities having their legal address outside Israel's 1967 borders or who, whilst established within Israel proper, carry out activities outside those borders. The guidelines aroused considerable emotion within Israel. The Israeli government exerted vehement but ultimately unsuccessful efforts to delay their application and, when that failed, tone down their consequences.

*iii. The certification of organic produce.*

It is reported that in June 2013 the UE issued new directives for quality control certification of organic produce. A senior official from the Israeli Foreign Ministry said the EU would no longer accept a stamp of approval by Israel's Plant Inspection and Protection Services for produce from the West Bank.<sup>77</sup>

*e. Further steps under consideration.*

*i. Labelling settlement products.*

Closely related but nevertheless distinct from the question of preferential treatment is the problem of labelling settlement products. In a variety of sectors EU law requires retailers to indicate the origin of the goods they offer for sale.<sup>78</sup> More generally, the Unfair Commercial Practices Directive of 11 May 2005 prohibits misleading indications of origin when they cause or are likely to cause a consumer to take a transactional decision he would not have taken otherwise.<sup>79</sup>

Nevertheless, most EU retailers continue to label settlement products as coming from "Israel", thereby concealing their true origin.

Some Member States have enacted guidelines to require the correct labelling of settlement goods.<sup>80</sup> On 12 April 2013 the foreign ministers of 13 Member States<sup>81</sup> are reported to have written to the EU

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<sup>75</sup> Notice to importers – Imports from Israel into the EU, O. J. C 232/5, 3.8.2012. This notice replaced the notice of 25 January 2005.

<sup>76</sup> Guidelines on the Eligibility of Israeli Entities and their Activities in the Territories Occupied by Israel Since June 1967 for Grants, Prizes and Financial Instruments Funded by the EU from 2014 Onwards, O.J. C 205/9, 19.07.2013.

<sup>77</sup> Barak Ravid, Swell of Boycotts Driving Israel into International Isolation, Haaretz <http://www.haaretz.com/news/diplomacy-defense/.premium-1.563242>

<sup>78</sup> This applies in the following sectors : fruits and vegetables, wine, olive oil, honey, fish, chicken and eggs, and cosmetics.

<sup>79</sup> Article 6(1)(b) of the Unfair Trade Practices Directive.

<sup>80</sup> Denmark, the United Kingdom.

<sup>81</sup> These include the United Kingdom, France, Spain and the Netherlands.

High Representative for Foreign Affairs Catherine Ashton to insist on firm enforcement of EU legislation regarding the labelling of settlement products.<sup>82</sup> The Commission is said to have prepared draft labelling guidelines. However before publishing guidelines it is waiting for the outcome of the peace negotiations between the Israeli and Palestinian governments.

This delay is clearly unjustified. There is no legal, logical or political link between applying existing EU legislation and negotiations between third countries. Indeed the guidelines are not a sanction against Israel but simply help Member States' authorities in ensuring compliance with EU consumer protection law. If the EU is to live up to its international obligations, the least it can do is to adopt without delay rules guaranteeing that the origin of products coming from settlements is readily apparent. This is required both to allow proper information of consumers and to comply with international law.

*ii. Business warning.*

The Commission is preparing a public message to raise awareness among EU citizens and businesses of the legal and economic risks of any involvement in financial and economic activities in the settlements. Such risks include, *inter alia*, the consequences of a future peace deal for the property they purchase or economic activities they pursue in those areas, as well as the difficulty that may arise for Member States to ensure national protection of their interests. In addition to potential reputational damage, the message hints at the possibility of prosecution for war crimes for complicity in violations of international humanitarian law and human rights stemming from the occupation.

Here too, it is reported that the Commission is waiting for the end of the peace negotiations before publishing the message. Again, this delay is incomprehensible. There is no reason not to inform EU citizens and businesses as soon as possible of the risks they run when engaging in activities in the OPT.

*f. What remains to be done.*

*i. Prohibiting imports of settlement products.*

Although subjecting settlement goods to the payment of full tariff duties and ensuring that their origin is clearly marked would go a long way towards ensuring the EU's compliance with its obligations, it nevertheless stops short of fully achieving this objective. Compliance with the EU's obligations requires it to impose an outright prohibition on imports of settlement products. Otherwise, even subject to payment of full tariff duties, settlement goods will continue to enter the EU, contributing to the prosperity of the settlements and their inhabitants and thereby perpetuating their existence. In this respect it should be borne in mind that the Israeli government compensates exporters of settlement products when they have to pay import duties to the customs authorities of the EU member States. Thus by allowing import of settlement products (whether or not under a preferential regime) the EU is in effect assisting Israel in the pursuit of its settlement policy.

Imposing an import ban would be possible by a qualified majority vote of the Council in accordance with Article 23 of Regulation n° 260/2009.<sup>83</sup> Such a decision would be in conformity with the rules of the World Trade Organization (WTO) since the settlements are not parties to the WTO and in any event the rules of the WTO may not themselves contravene the basic principles of international humanitarian law.

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<sup>82</sup> Akiva Eldar, EU Countries to Label Products from Israeli Settlements, Al-Monitor, <http://jfffp.com/?p=42260>.

<sup>83</sup> This allows the Council to adopt by qualified majority appropriate measures to allow the obligations of the EU and of all its Member States to be fulfilled at the international level.

*ii. Expanding the scope of the grants guidelines*

While important, the grants guidelines<sup>84</sup> do not fully bring the EU into compliance with international law. They concern only Israeli entities, whereas the EU is also obliged to prevent entities subject to its own jurisdiction from receiving financial assistance where this could imply recognition of the legality of the occupation of the OPT or the rendering of aid or assistance to the maintenance of that occupation. Similarly, international law obliges the EU to prevent its own enterprises from entering into business dealings that could have the same consequences. Examples of this include enterprises involved :

- in the construction/maintenance of the Wall,
- in the operation/monitoring of checkpoints in the Wall or in settlements,
- in the maintenance of security around the Wall, in checkpoints, in settlements or elsewhere in the OPT,
- in the maintenance and operation of prisons (whether inside or outside the OPT) where Palestinians are detained, and
- in the exploitation of natural resources (including water) or cultural resources of the OPT.

*iii. Prohibiting financial transactions supporting settlements.*

The EU and its Member States should apply restrictive measures to financial transactions from their residents, organizations and businesses that could support settlement activities in breach of international law, as recommended by the EU Heads of Mission in the OPT.<sup>85</sup> This can be done under Article 64(3) TFEU.

*iv. Excluding settlements products and companies from public procurement.*

In tendering for public contracts, EU institutions, Member State governments and State-funded bodies should specify that no settlement goods or services may be supplied under the contract and that companies operating in settlements are excluded.<sup>86</sup>

*v. Withholding the grant of visas to known violent settlers.*

The EU should devise a method to guarantee that known violent settlers are not permitted access to the territory of the Union.

*g. Additional measures in case the above measures fail.*

*i. Suspension of Association Agreement.*

Article 2 of the Association Agreement between the EU and Israel provides that :

“The relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.”

This provision goes beyond the requirement that each Party ensure that its own actions comply with human rights. It means that if one of the parties violates human rights in a serious and persistent manner and the other party fails to react appropriately, that party will itself be in breach of Article 2 (in addition to its other duties under general international law).

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<sup>84</sup> See *supra*, d.2.

<sup>85</sup> EU Heads of Mission Report, “Report East Jerusalem 2011”, January 2012.

<sup>86</sup> Trading Away Peace – How Europe Helps Sustain Illegal Israeli Settlements (30 October 2012) p. 30.

Thus, if Israel persists in its behaviour notwithstanding the adoption by the EU of the actions described above, the EU is under an international obligation to call for the suspension of the Agreement in accordance with Article 79(2) thereof.

*ii. Suspension of Financial Assistance by the EU to the Palestinian Authority.*

The EU is the largest contributor of financial assistance to the Palestinian Authority. As we have shown, under international humanitarian law Israel has the duty to ensure the welfare of the Palestinian population, including the maintenance of public order and safety.<sup>87</sup> Thus it is Israel, and not the EU, that should be providing the Palestinian Authority with the resources it needs to fulfil its responsibilities towards its population.

With a view to helping the peace negotiations to proceed, the EU agreed to take upon itself a large part of this burden. If contrary to expectations it becomes clear that the peace process is definitively stalled and that the Israeli occupation is not likely to come to an end within a reasonable time, there is no reason why the EU should continue to assume this burden in perpetuity.

#### **IV. CONCLUSION**

On the initiative of the United States, the governments of Israel and of Palestine resumed negotiations last summer to try to reach a final agreement. If the negotiations are successful, the agreement will put an end to the occupation of Palestine and the breaches of international law deriving from it. As a consequence, the EU will be able to continue to develop and intensify its relations with both parties. There will be no need for it to adopt the restrictive measures advocated above. The occupation of the OPT will have come to an end ; relations between the parties will have been normalised and Israel will no longer be in breach of its international obligations. Nor will the EU any longer be under the obligation to cooperate in bringing Israel's breaches to an end, to refrain from recognizing as lawful the situation they have created and to refrain from rendering aid or assistance to its maintenance.

It is by no means certain, however, that the negotiations will succeed. Israel's reluctance to put an end to the occupation and the many benefits it derives from it, its continuing violations of its obligations as an occupying power (including its insistence in carrying on with one of its most objectionable features : settlement construction), the tensions to which successive releases of Palestinian prisoners give rise and the increasing number of fatal incidents arising from the Palestinian side all point to the fragility of the present situation

It is encouraging to note that the EU has, during the last few weeks, started to play a more assertive role in pushing Israel to reach an agreement with Palestine. With that in view, on 16 December 2013 the Foreign Affairs Council offered "an unprecedented package of European political, economic and security support to both parties in the context of a final status agreement". In the event of a final peace agreement it "will offer Israel and the future state of Palestine a Special Privileged Partnership including increased access to the European markets, closer cultural and scientific links, facilitation of trade and investments as well as promotion of business to business relations. Enhanced political dialogue and security cooperation will also be offered to both States". Simultaneously, the Council warned Israel "against actions that undermine the negotiations" such as "the expansion of settlements, (...) incitement, incidents of violence in the occupied territory, house demolitions and the deteriorating humanitarian situation in Gaza", as well as "actions that undermine the status quo of the holy sites, including Jerusalem".

While this is an encouraging development, it does not detract from the need for the EU to adopt without further delay the measures currently being considered by it as well as the further measures detailed above concerning financial transactions, public procurement contracts and grant of visas. This

<sup>87</sup> Article 43 of the Hague Regulations. For the text, see *supra*, footnote 21.

would bring home to Israel, before it is too late, the fateful consequences that a failure of the negotiations would have..

The EU is Israel's largest trading partner. It is also the largest contributor to the Palestinian budget (thereby fulfilling an obligation normally incumbent on Israel). By adopting a firm position it is in a position to influence the outcome of the negotiations and achieve a just and balanced solution, in conformity with its interest in the stability of the region. A failure of the negotiations would harm not only the Palestinians and Israel but also the EU.

Brussels, 27 January 2014.

Michel Waelbroeck  
Emeritus Professor, Université libre de Bruxelles  
Emeritus Member, Institute of International Law.

Willem Aldershoff  
Adviser EU-policy Israel/Palestine.



