

THE INTERNATIONAL OBLIGATIONS OF THE EUROPEAN UNION AND ITS MEMBER STATES WITH REGARD TO ECONOMIC RELATIONS WITH ISRAELI SETTLEMENTS /

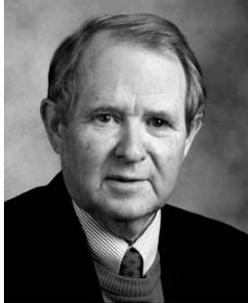
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FOREWORD

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François Dubuisson's study on the international legal obligations of EU Member States in respect of doing business with Israeli settlements comes at an important time as there is confusion among EU states as to their obligations on this subject. Professor Dubuisson makes it clear that settlements are unlawful under international law and that states are obliged not to assist the settlement enterprise by doing business with settlements or by permitting their products to be sold in EU countries. He stresses that the obligation not to assist applies to activities that both directly and indirectly assist the settlement enterprise. The EU claims to be an upholder of the Rule of Law but unfortunately, under the influence of the United States, it has adopted a policy of exceptionalism in respect of Israel's violations of international law. The commitment of the EU to international law will be judged by its response to Israel's manifestly illegal settlements in Palestine. Professor Dubuisson's study serves as a guideline to EU states as to how they ought to behave.

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BIOGRAPHY



François Dubuisson is Professor of International Law at the Université libre de Bruxelles (ULB), in the Center of International Law.

He is the author of numerous studies published in national and international journals on the legal aspects of the Israeli-Palestinian conflict, the use of force, new technology and general international law.

He took actively part in two legal proceedings before the International Court of Justice, namely the case on Armed activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda) and the case concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

Introduction

Subsequent to the occupation of East Jerusalem, the West Bank and Gaza in June 1967, Israel developed a settlement policy for these territories. Since the signing of the Oslo Accords in 1993, this policy has been applied at an even faster rate. Currently there are between 500,000 and 650,000 settlers living in 150 settlements; 200,000 of these live in East Jerusalem.¹ Various industries, including agricultural production, and the use of natural resources have contributed to the development of strong economies in the settlements.

The European Union and its member states maintain preferential economic and trading relations with the State of Israel, namely through an association agreement that provides for preferential customs tariffs for goods imported from Israel to the EU. Part of EU-Israel trade relations involve goods sold by entities established in settlements located on occupied Palestinian territory.

The current paper will demonstrate that under existing international law the EU and its member states have the obligation to refrain from any form of trade or economic relations with Israeli companies established or conducting activities in Palestinian territories. This obligation arises from customary principles that govern States' international responsibilities and set out the consequences, for third States, of serious breaches of peremptory norms of international law. We will first describe how the Israeli government's settlement policy in the occupied Palestinian territory implies serious and systematic breaches of obligations that stem from fundamental norms of international law (I).

Breaches of international law by Israel imply legal consequences for third States, namely the obligations to "ensure respect" for international law, "to not recognise" an illegal situation arising from such breaches, and to not render "aid or assistance" to maintaining the situation (II).

The EU and its member states are, therefore, under the obligation to cease all economic relations with Israeli entities which could contribute to maintaining the illegal situation arising from settlements, including the importation of goods. (III). The modalities for the application of the obligation to prohibit, in the EU, the trade of goods from Israeli settlements will be analysed, and in particular, with respect to EU and WTO law (IV).

Lastly, the paper will analyse the scope of States' obligation to adopt measures for business entities registered on their soil which are aimed at inducing them to refrain from any economic activity that can contribute to perpetuating settlements (V).

¹ United Nations General Assembly, Report of the Secretary General, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan* A/67/375, 12 September 2012, (A/67/375). Available at <http://unispal.un.org>.

I. Israeli settlement policy in occupied territories constitutes serious and systematic breaches of international law

Settlement of the occupied territories, itself, (A) constitutes a violation of international humanitarian law and of the right of Palestinians to self-determination. (B) Measures that are a consequence of the settlement of occupied territories also lead to a multiplicity of breaches of international law, be they those adopted previously, to allow the building of housing (requisitioning of land, destruction of property, etc.), or those adopted subsequently, for the purposes of security and development (the building of the wall, the appropriation of natural resources, restrictions on free movement, the creation of discriminatory legal regimes, etc.). (C) The settlement of the West Bank has led to the creation of a discriminatory legal regime that is favourable to settlers but detrimental to Palestinians.

A. Israeli settlement of occupied Palestinian territories constitutes a breach of international law

It is well established that the settlement of its citizens by Israel in the occupied territories is a breach of international laws, in many respects.

Firstly, the settlement policy is a violation of the Fourth Geneva Convention Relative to the Protection of Civilian Populations in Time of War, dated 12 August 1949, to which Israel and all EU Member States are parties.² Israel's transfer of its population to the territory that it occupies is prohibited under article 49 paragraph 6 of the Fourth Geneva Convention:

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

According to the ICRC:

"[...] this clause [...] is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race".³

Consequently, Israel's settlement policy for the occupied territories is in breach of article 49 paragraph 6 of the Fourth Geneva Convention. The UN Security Council has reached this

² See Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', 23 *Berkley Journal of International Law*. 551 (2005),

³ Jean S. Pictet, ed., 'Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War' (Geneva: International Committee of the Red Cross, 1958), paragraph 6, available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf.

conclusion on many occasions.⁴ In resolution 465 (1980), dated 1 March 1980, the Security Council:

*“5. Determines [...] that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East;
6. Strongly deplores the continuation and persistence of Israel in pursuing those policies and practices and calls upon the Government and people of Israel to rescind those measures, to dismantle the existing settlements and in particular to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem [...]”.*

The same conclusion is drawn in the Declaration of the High Contracting Parties to the Fourth Geneva Convention dated 5 December 2001, in which the Parties: “reaffirm the illegality of the settlements in the said territories and of the extension thereof.”⁵

This analysis was confirmed yet again by the International Court of Justice in its Advisory opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory⁶:

As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

[...]

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”⁷

Israel’s policy of settlement of the occupied territories can also be seen as constituting a violation of the Palestinian people’s right to self-determination. In Resolution 465 cited above, the UN Security Council: “[...] Determines that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity [...]”. Israel's settlement policy changes the status of occupied

⁴ See United Nations Security Council Resolutions 298 (1971), 446 (1979), 452 (1979), 465 (1980), 471 (1980), and 476 (1980).

⁵ Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December 2001, Yearbook of International Humanitarian Law -2001, page 664, available on line at <http://unispal.un.org/UNISPAL.NSF/0/8FC4F064B9BE5BAD85256C1400722951>. See also Pierre-Yves Fux and Mirko Zambelli, ‘*Mise en oeuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: historique d'un processus multilatéral* (1997–2001), Annex 1: Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, *International Review of the Red Cross*, Vol. 84, No. 847, 2002, pages 661 and ff.

⁶ Advisory Opinion, *Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, 9 July 2004, *Reports 2004*, page 136.

⁷ *Id.*, para 120.

Palestinian territories through the consolidation of the annexation of East Jerusalem and by fragmenting West bank territories into small enclaves.⁸ The policy has also upset the composition of the population in large portions of the Palestinian territory to create a fait accompli that prejudices any potential peace agreement. These different aspects of colonisation aim to hinder the effective exercise of the right of the Palestinian people to establish an independent and internationally recognised state. In a report released in September 2012, *Israeli Settlements in the Occupied Palestinian Territory*, the Secretary General of the United Nations explains:

*“One of the ways in which self-determination is implemented is through the establishment of a sovereign and independent state (see General Assembly resolution 2625 (XXV), annex, principle 5). One of the main characteristics of a state is territory. However, the current configuration and attribution of control over land in the Occupied Palestinian Territory severely impedes the possibility of the Palestinian people expressing their right to self-determination in the Occupied Palestinian Territory. In addition to large areas which have been declared closed military zones, some 43 per cent of the West Bank has been allocated to local and regional settlement councils, with the result that those areas are off-limits to Palestinians. In addition, because settlements are scattered all across the West Bank, including East Jerusalem, the territory of the Palestinian people is divided into enclaves with little or no territorial contiguity. [...] The fragmentation of the West Bank undermines the possibility of the Palestinian people realizing their right to self-determination through the creation of a viable state”.*⁹

It is, therefore, widely recognised that Israeli settlements breach international law, in particular the Fourth Geneva Convention and the right to exercise self-determination. Moreover, measures supporting the Israeli settlement of occupied territories also constitute violations of international law.

B. Measures for the construction and development of settlements lead to a multiplicity of international law violations

The implementation of the policy to settle the occupied territories has led Israel to adopt a large number of settlement-related measures aimed at authorising the construction and expansion of settlements (1), either by securing day-to-day life and economic development, or by providing protection (2). These measures lead to the violation of the rights of the Palestinian population.

⁸ UN Human Rights Council, *Report of the independent international factfinding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, 7 February 2013, A/HRC/22/63, para 34

⁹ See A/677/375 *supra* note 1, para 11.

1. Violations related to the building and expansion of Israeli settlements

The construction of housing and infrastructure in Israeli settlements is based on a policy of appropriation of Palestinian land in the West Bank and in East Jerusalem. This policy is implemented in various ways: the registration of land as “State land”; the requisitioning of land for military purposes; expropriation for public purposes; and the reporting of land as “abandoned property”.¹⁰ The way these legislative regimes are applied to encourage the expansion of settlements was described by the Independent International Fact-finding Mission:

“Since the beginning of the occupation, Palestinians have seen over 1 million dunams of their land seized, enabled by a combination of military orders and selective interpretation of the Ottoman Land Code that ruled land tenure throughout the Ottoman, Mandatory and Jordanian periods. In particular, land has been lost through seizure for military needs, absentee property laws and the declaration of State lands”.

*“Seized lands are placed within the jurisdictional boundaries of local and regional settlement councils, used not only for urbanization but also as buffer zones surrounding settlements or turned into recreational and nature areas to which Palestinians have no access”.*¹¹

The building of infrastructure (roads, public transportation, etc.) related to life in the settlements also requires the requisitioning of land and the destruction of Palestinian property. Without entering here into a detailed legal analysis of the specificities of each of the methods used to appropriate land;¹² suffice it to state that jointly they deprive the Palestinian population of the use of a significant portion of Palestinian land and that as they are aimed at allowing settlement, which is prohibited by international law, and cannot be seen as being in line with Israel’s international obligations as an Occupying Power.¹³ Furthermore, the law relative to occupation forbids the confiscation of private property (article 46 of the Hague Regulations of 1907) and the destruction of private or state property “except where such destruction is rendered absolutely necessary by military operations” (article 53 of the Fourth Geneva Convention).¹⁴

In East Jerusalem, a territory which was formally annexed by Israel, Palestinians are kept from owning property and from housing by regulations that restrict residency rights and that

¹⁰ See Orna Ben-Naftali, *supra* note 2, pages 582-583; B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, ‘Land Grab: Israel’s Settlement Policy in the West Bank’, May 2002, page 47; B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, ‘By Hook and By Crook – Israeli Settlement Policy in the West Bank’, July 2010, pages 21-35.

¹¹ See A/HRC/22/63, *supra* note 8, paras 63-64.

¹² See B’tselem, The Israeli Information Center for Human Rights in the Occupied Territories, ‘Land Grab: Israel’s Settlement Policy in the West Bank’, May 2002, pages 47-63.

¹³ See Al-Haq, ‘Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law’, 2013, pages 21 and ff., available at <http://www.alhaq.org/publications/Feasting-on-the-occupation.pdf>

¹⁴ See Eric David, *Principes de droit des conflits armés*, 5^{ème} éd., Bruxelles, Bruylant, 2012, pages 601 and ff; B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, ‘By Hook and By Crook – Israeli Settlement Policy in the West Bank’, July 2010, page 51.

allow for an almost systematic denial of requests for construction permits, ultimately leading to orders to demolish housing built without a permit.¹⁵

2. Violations related to measures for economic development and security in the settlements

The establishment of settlements leads to the implementation of additional measures related to the day-to-day life of settlers, to economic development and to security conditions. Thus, settlement policy is accompanied by the confiscation of the land and of the natural resources required to meet the settlers' economic needs (a). The existence of settlements is also used to justify a long series of security measures (b): check points, the delimitation of roads and areas to which only settlers have access, the building of the wall, etc. Collectively these measures constitute a large number of breaches of the rights of the Palestinian population.

a) The appropriation of natural resources for the benefit of the settlements

The economic activity generated by the settlements also leads to the confiscation of land and of natural resources which has catastrophic consequences for the Palestinian economy, a situation described by the independent international fact-finding mission:

"The agricultural sector, considered the cornerstone of Palestinian economic development, has not been able to play its strategic role because of dispossession of land and the denial of access for farmers to agricultural areas, water resources and domestic and external markets. This has led to a continuous decline in the share of agricultural production in GDP and employment since 1967".¹⁶

Water resources in the West bank are harnessed and used by the occupying power mainly for the needs of the settlements. A report issued by the Secretary General of the United Nations states:

"Palestinians have virtually no control over the water resources in the West Bank. The route of the wall, which renders 9.4 per cent of West Bank territory inaccessible to Palestinians, except for those who receive a permit, has severe impacts on the control of Palestinians over water resources in the West Bank. The limitation of access to natural resources, in this case water, is directly connected to the existence of settlements".¹⁷

The methods used by the occupying power to control water resources are described in a recent study published by the NGO Al-Haq:

"Since 1967, Israel has exerted considerable military and political efforts, including the establishment of settlements, to illegally exercise sovereign rights over Palestinian water

¹⁵ See A/HRC/22/63 *supra* note 11, paras 68 and 71.

¹⁶ *Id.* para 89. See also World Bank, *West Bank and Gaza - Area C and the future of the Palestinian economy*, Washington DC, Report n° AUS 2922, October 2013, available at <http://documents.worldbank.org/curated/en/2013/10/18344690/west-bank-gaza-area-c-future-palestinian-economy>.

¹⁷ See A/67/375 *supra* note 1, para 14, emphasis added.

resources. A series of military orders – still in force and applicable only to Palestinians – integrated the water system of the OPT into the Israeli system, while at the same time denying Palestinian control over this vital resource.

This integration was significantly advanced in 1982 by the transfer of ownership of Palestinian water infrastructure in the West Bank to Israel's national water company 'Mekorot,' which has forced Palestinians to rely on the company to meet their annual water needs. The company supplies almost half the domestic water consumed by Palestinian communities in the West Bank, making it the largest single supplier in the West Bank. In addition to Israel's exclusive control over water resources, 'Mekorot' directly extracts water from the Palestinian share of the water resources in order to supply copious amounts to Israeli settlements."¹⁸

The study also establishes that Israeli settlements use six times more water than the entire Palestinian population in the West Bank:

*"Israeli per capita consumption of water for domestic use is four to five times higher than that of the Palestinian population of the Occupied Palestinian Territory (OPT). In the West Bank, the Israeli settler population, numbering more than 500,000, consumes approximately six times the amount of water used by the Palestinian population of almost 2.6 million; this discrepancy is even greater when water used for agricultural purposes is taken into account".*¹⁹

The case of the Jordan River Valley is particularly emblematic of the policy of appropriating natural resources for the benefit of the settlements.²⁰ The situation is described in the Secretary General's report cited above:

*"Settlements and the associated restrictions on the access of Palestinians to large portions of the West Bank do not allow the Palestinian people to exercise permanent control over natural resources. As previously mentioned, some 43 per cent of the West Bank is under the de facto jurisdiction of local or regional settlement councils, thereby serving to prohibit the Palestinian people from controlling the natural resources located in those areas. For example, 37 Israeli settlements are located in the Jordan Valley, the most fertile and resource-rich area in the West Bank. In respect of the Jordan Valley and the Dead Sea area, 86 per cent is under the de facto jurisdiction of the regional councils of settlements, which prohibit Palestinian use, thus denying Palestinians access to their natural resources".*²¹

The Israeli NGO Kerem Navot published a detailed report which describes how the settlement of the West Bank is mainly accomplished by the expansion of agricultural land for the benefit of the settlements and to the detriment of the Palestinian population:

"The last decades have seen a decline of about one third in cultivated Palestinian agricultural lands in the West Bank. This survey shows that one of the factors behind the drastic drop in the agricultural area cultivated by Palestinians in the West Bank is the ongoing expansion of Israeli agricultural areas. This expansion includes de facto appropriation of actively cultivated private lands whose Palestinian owners (individuals or entire communities) have been expelled, whether by the settlers or by the Israeli military. Israeli agricultural lands in the West

¹⁸ Al-Haq, 'Water for One People Only', 2013, page 17, available at <http://www.alhaq.org/publications/Water-For-One-People-Only.pdf>.

¹⁹ *Id.*, p. 16.

²⁰ See B'tselem, 'Dispossession and Exploitation. Israel's Policy in the Jordan Valley and the Northern Dead Sea', May 2011, page 59; B'tselem, 'Acting the Landlord: Israel's Policy in Area C, the West Bank', *supra* note 11, pages 58-76; Oxfam, 'On The Brink Israeli Settlements and Their Impact on Palestinians in the Jordan Valley' *Oxfam Briefing Paper*, No. 160, 5 July 2012, available at http://www.oxfam.org/sites/www.oxfam.org/files/bp160-jordan-valley-settlements-050712-ar_0.pdf.

²¹ See A/67/375, *supra* note 1, para 13.

*Bank, which today cover about 93,000 dunam (about one and a half times the total built-up area of the settlements, not including East Jerusalem), are a central and growing factor in the array of land-grab methods in the civilian reality that Israel has created over the decades in the West Bank. Since 1997, settlers have taken over about 24,000 dunam of land through agricultural activity, of which about 10,000 dunam are on privately owned Palestinian land, mostly around the settlements and outposts in the West Bank hill country”.*²²

The policy of confiscating natural resources and impeding access to arable lands is undeniably a breach of the rights of the Palestinian population.²³ The policy is a breach of international humanitarian law, which forbids the use of natural resources to the benefit of a civilian population that has been transferred to the occupied territory²⁴, of everyone’s right to an adequate standard of living (article 11 of the International Covenant on Economic, Social and Cultural Rights)²⁵, and of the right of peoples to permanent sovereignty over their natural resources²⁶, which has been recognized by numerous United Nations resolutions.²⁷ In resolution A/RES/68/235 of 20 December 2013²⁸, adopted by 168 votes in favour, 6 against and 9 abstentions, the General Assembly declares:

“Aware of the detrimental impact of the Israeli settlements on Palestinian and other Arab natural resources, especially as a result of the confiscation of land and the forced diversion of water resources, including the destruction of orchards and crops and the seizure of water wells by Israeli settlers, and of the dire socioeconomic consequences in this regard”.

²² Kerem Navot, ‘Israeli Settler Agriculture as a Means of Land Takeover in the West Bank’, Report, August 2013, page 87, available at <http://rhr.org.il/eng/wp-content/uploads/Kerem-Navot.pdf>.

²³ Eric David, *supra* note 14, pages 605-606.

²⁴ See Ian Scobbie, ‘Natural Resources and Belligerent Occupation: Perspectives from International Humanitarian and Human Rights Law’, in Susan Akram, Michael Dumper, Michael Lynk, and Iain Scobbie (Editors), *International Law and the Israeli-Palestinian Conflict. A Rights-Based Approach to Middle East Peace*, London, New York, Routledge, 2011, pages 229 and ff.; James Crawford, ‘Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories’, *Trades Union Congress*, 24 January 2012, pages 25-26, available at <http://www.tuc.org.uk/tucfiles/342/LegalOpinionIsraeliSettlements.pdf>.

²⁵ See UN Committee on Economic, Social and Cultural Rights, General Comment 15 (2002), ‘The right to water’ (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11.

²⁶ United Nations General Assembly Resolution 1803 (XVII) 14 December 1962, Permanent sovereignty over natural resources; articles 1 and 2 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The International Court of Justice has recognized ‘the importance of this principle, which is a principle of customary international law’ (ICJ, *Case Concerning Armed Activities On The Territory Of The Congo, Democratic Republic Of The Congo v. Uganda*), Judgment of 19 December 2005, Reports of Judgments, para 244, page 251. See also Crawford *supra* note 24, pages 26-28.

²⁷ See specifically United Nations General Assembly resolutions A/RES/51/90 (19 December 1996), A/RES/52/207 (9 March 1998), A/RES/54/230 (22 December 1999); A/RES/55/209 (20 December 2000), A/RES/56/204 (21 December 2001), A/RES/57/269 (20 December 2002), A/RES/58/229 (23 December 2003), A/RES/59/251 (22 December 2004), A/RES/60/183 (22 December 2005), A/RES/61/184 (20 December 2006), A/RES/62/181 (19 December 2007), A/RES/63/201 (19 December 2008), A/RES/64/185 (21 December 2009), A/RES/65/179 (20 December 2010), A/RES/66/225 (22 December 2011) and A/RES/67/229 (21 December 2012). In this regard Crawford (*supra* note 24, page 27) is mistaken when he declares ‘Moreover, following the Camp David agreements [1978] and the more general move towards a focus on the political settlement of the conflict, no further resolutions or reports dealing with this issue [right of Palestinian people to their natural resources] have been issued by the General Assembly or any other UN organs’. Since 1983, which according to Crawford is the date of the last resolution, the General Assembly has adopted at least 15 resolutions on this issue.

²⁸ United Nations General Assembly Resolution, *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*, A/RES/68/235 (20 December 2013). All EU Member States voted in favour of this resolution.

Consequently the General Assembly:

“Reaffirms the inalienable rights of the Palestinian people and of the population of the occupied Syrian Golan over their natural resources, including land, water and energy resources;

Demands that Israel, the occupying Power, cease the exploitation, damage, cause of loss or depletion, and endangerment of the natural resources in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan”.

The appropriation of natural resources for the benefit of the settlements constitutes a serious and undeniable violation of international law.

b) Measures adopted to protect the settlements and preserve the safety of the settlers

The preservation of security in settlements and settlers’ safety is used to justify the adoption of a range of structural measures that breach the rights of Palestinians. Prominent among these measures are the construction of the wall and of separate roads for the settlers, and the creation of check points.

The construction of the wall

The construction of the wall was declared illegal by the United Nations General Assembly²⁹ and the International Court of Justice³⁰ because most of the wall encroaches on Palestinian territory. The location of the wall was determined with a view to protect the main sections of the settlements located in the West Bank and East Jerusalem. The fact that the location of the wall was plotted on the basis of the situation created by the establishment of settlements in occupied territory was one of the one the reasons that led the ICJ to deem the wall illegal:

“The Court notes that the route of the wall as fixed by the Israeli Government includes within the ‘Closed Area’ ... some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the wall’s sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

[...]

*In other terms, the route chosen for the wall gives expression in loci to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council [...] That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right”.*³¹

²⁹ United Nations General Assembly Resolution, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, ES-10/13, 21 October 2003.

³⁰ See I.C.J. *supra* note 6.

³¹ *Id.* paras 119 and 122.

Consequently, there is a close connection between the illegality of the situation created by the establishment of settlements in occupied Palestinian territory and the illegality of the building of a wall to provide structural protection to these same settlements. The wall has also contributed to the appropriation of natural resources for the benefit of the settlements (see above) because large portions of arable land and water resources have been placed on the “Israeli side”, leaving most of the Palestinian population without access to them.³² The Independent International Fact-Finding Mission noted that: “The wall has divided villages, cut off farmers from their lands and water and curtailed trade with traditional markets, stifling the local economy”.³³

The building of roads reserved for the settlers and the establishment of checkpoints

The expansion of settlements is coupled with the building of roads to which only settlers have access; this entails the setting up of checkpoints, fences, and military patrols.³⁴ The UN Secretary General's Report of 12 September 2012 reads:

11. [...] The network of settler roads and military checkpoints, which in many cases are there only to protect settlements, and settlers using the roads throughout the West Bank compound the problem by denying the Palestinians territorial contiguity while occupying a significant area of land.[...]

[...]

41. The Israel Defense Forces impose a range of limitations on the freedom of movement of Palestinians. The vast majority of those limitations are due to the presence of settlements, or they are imposed to ensure the security of settlers and to facilitate their travel throughout the West Bank. There are more than 500 internal checkpoints, roadblocks and other physical barriers that impede the movement of Palestinians inside the West Bank. Most of those obstacles to freedom of movement are located in the vicinity of settlements or are intended to restrict or limit the access of Palestinians to roads that are used by Israeli settlers. [...].³⁵

This policy infringes on Palestinians' right to liberty of movement, as provided for in article 12 paragraph 11 of the International Pact on Civil and Political Rights of 19 December 1966 because of the restrictions it places on access to work, hospitals, and schools and universities. The policy also hinders the exercise of the Palestinian population's rights to work, to an adequate standard of living, to health, and to education which are enshrined in the International Covenant on Economic, Social and Political Rights of 19 December 1966 (articles 6, 11, 12, and 13) and in United Nations Convention on the Rights of the Child of 20 November 1989 (articles 24, 27 and 28).³⁶

³² See *supra* note 1, para 14.

³³ See A/HRC/22/63, *supra* note 8, para 91.

³⁴ See Orna Ben-Naftali, *supra* note 2, pages 588-590; B'tselem, *Forbidden Roads. Israel's Discriminatory Road Regime in the West Bank*, August 2004, p. 10.

³⁵ *Supra* note 1, paras 11 and 41. See also UN Human Rights Council, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, 22 August 2013, A/HRC/24/30, page 11.

³⁶ B'tselem, 'By Hook and by Crook: Israeli Settlement Policy in the West Bank', *supra* note 10, pages 52-54.

C. The instauration of a discriminatory regime in the West Bank that favours Israeli settlers to the detriment of the Palestinian population

The establishment of settlements on occupied Palestinian territory has led to the creation of two distinct legal systems which discriminate between Palestinians and Israeli settlers.³⁷ The policy applied by Israel in occupied Palestinian territory was denounced by Human Rights Watch in a report published in December 2010. The substance of the report is summarized as follows:

*“This report consists of a series of case studies that compare Israel’s different treatment of Jewish settlements to nearby Palestinian communities throughout the West Bank, including East Jerusalem. It describes the two-tier system of laws, rules, and services that Israel operates for the two populations in areas in the West Bank under its exclusive control, which provide preferential services, development, and benefits for Jewish settlers while imposing harsh conditions on Palestinians. The report highlights Israeli practices the only discernable purposes of which appear to be promoting life in the settlements while in many instances stifling growth in Palestinian communities and even forcibly displacing Palestinian residents. Such different treatment, on the basis of race, ethnicity, and national origin and not narrowly tailored to meet security or other justifiable goals, violates the fundamental prohibition against discrimination under human rights law”.*³⁸

A similar observation was made by the United Nations special rapporteurs on the human rights situation in occupied Palestinian territory.³⁹ In a report published in 2007, John Dugard describes the following practices:

*50. “[...]Israelis are entitled to enter the closed zone between the Wall and the Green Line without permits while Palestinians require permits to enter the closed zone; house demolitions in the West Bank and East Jerusalem are carried out in a manner that discriminates against Palestinians; throughout the West Bank, and particularly in Hebron, settlers are given preferential treatment over Palestinians in respect of movement (major roads are reserved exclusively for settlers), building rights and army protection; and the laws governing family reunification unashamedly discriminate against Palestinians [...]”.*⁴⁰

In March 2012, the United Nations Committee on the Elimination of Racial Discrimination deemed that Israeli practices linked to the settlement policy in the occupied territories are in

³⁷ See Orna Ben-Naftali, *supra* note 2, pages. 584-587 ; B'tselem, 'By Hook and by Crook : Israeli Settlement Policy in the West Bank' *supra* note 10, pages 51-52.

³⁸ Human Rights Watch, *Separate and Unequal, Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories*, 19 December 2010, ISBN: 1-56432-729-9, page 1.

³⁹ UN Human Rights Council, *UN Human Rights Council: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, John Dugard A/HRC/4/17, 29 January 2007, para 61, page 23, available at <http://www.refworld.org/docid/461e52b12.html>; UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Richard Falk, A/HRC/16/72, 10 January 2011, para 20, page 12, available at <http://www.refworld.org/docid/4d8b41ce2.html>.

⁴⁰ John Dugard, UN Human Rights Council, *UN Human Rights Council: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, 29 January 2007, A/HRC/4/17, 29 January 2007, pages 19-20, para 50. See also Richard Falk, UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, 10 January 2011, A/HRC/16/72, page 11, para 20.

breach of the prohibition on racial segregation contained in the International Convention on the Elimination of all Forms of Racial Discrimination of 21 December 1965:

“The Committee is extremely concerned at the consequences of policies and practices which amount to de facto segregation, such as the implementation by the State party in the Occupied Palestinian Territory of two entirely separate legal systems and sets of institutions for Jewish communities grouped in illegal settlements on the one hand and Palestinian populations living in Palestinian towns and villages on the other hand. The Committee is particularly appalled at the hermetic character of the separation of two groups, who live on the same territory but do not enjoy either equal use of roads and infrastructure or equal access to basic services and water resources. Such separation is concretized by the implementation of a complex combination of movement restrictions consisting of the Wall, roadblocks, the obligation to use separate roads and a permit regime that only impacts the Palestinian population (art. 3 of the Convention).

The Committee draws the State party’s attention to its general recommendation 19 (1995) concerning the prevention, prohibition and eradication of all policies and practices of racial segregation and apartheid, and urges the State party to take immediate measures to prohibit and eradicate any such policies or practices which severely and disproportionately affect the Palestinian population in the Occupied Palestinian Territory and which violate the provisions of article 3 of the Convention.

The Committee is increasingly concerned at the State party’s discriminatory planning policy, whereby construction permits are rarely if ever granted to Palestinian and Bedouin communities and demolitions principally target property owned by Palestinians and Bedouins. The Committee is concerned at the adverse tendency of preferential treatment for the expansion of Israeli settlements, through the use of “state land” allocated for settlements, the provision of infrastructure such as roads and water systems, high approval rates for planning permits and the establishment of Special Planning Committees consisting of settlers for consultative decision-making processes. The Committee is greatly concerned at the State party’s policy of ‘demographic balance’, which has been a stated aim of official municipal planning documents, particularly in the city of Jerusalem (arts. 2, 3 and 5 of the Convention)”⁴¹

The settlement of occupied territory leads to the adoption of numerous discriminatory practices and norms that are detrimental to the Palestinian population and contravene the prohibition of racial segregation.⁴²

Conclusions

The Israeli settlement policy is at the core of a great many breaches of international law, by Israel, in occupied Palestinian territory. The fact that Israelis settle in the territories is illegal per se, and leads to other unlawful behaviour aimed at allowing settlements to expand and perpetuate by increasingly excluding the Palestinian population from access to land, natural resources and decent living conditions. Consequently, the settlement policy is seen as a

⁴¹ UN Committee on the Elimination of Racial Discrimination (CERD), *Consideration of reports submitted by States parties under article 9 of the Convention: concluding observations of the Committee on the Elimination of Racial Discrimination, Israel*, 9 March 2012, CERD/C/ISR/CO/14-16, paras 24-25.

⁴² See Orna Ben-Naftali, *supra* note 2., pages 586-587.

breach of international law and as the main obstacle to a peaceful solution to the Israeli-Palestinian conflict which that would put an end to occupation. This observation is entirely shared by European Union authorities. In December 2009, the Council of the European Union adopted the following conclusions:

*“The Council reiterates that settlements, the separation barrier where built on occupied land, demolition of homes and evictions are illegal under international law, constitute an obstacle to peace and threaten to make a two-state solution impossible. The Council urges the government of Israel to immediately end all settlement activities, in East Jerusalem and the rest of the West Bank and including natural growth, and to dismantle all outposts erected since March 2001”.*⁴³

This position has been repeated many times, including in the conclusions of the Council of the European Union on the Peace Process in the Middle-East of 10 December 2012:

*“The European Union is deeply dismayed by and strongly opposes Israeli plans to expand settlements in the West Bank, including in East Jerusalem, and in particular plans to develop the E1 area. The E1 plan, if implemented, would seriously undermine the prospects of a negotiated resolution of the conflict by jeopardizing the possibility of a contiguous and viable Palestinian state and of Jerusalem as the future capital of two states. It could also entail forced transfer of civilian population. In the light of its core objective of achieving the two-state solution, the EU will closely monitor the situation and its broader implications, and act accordingly. The European Union reiterates that settlements are illegal under international law and constitute an obstacle to peace”.*⁴⁴

For the European Union, it has been clearly established that settlements and the measures stemming from them constitute flagrant breaches of international law which create specific obligations for third States with respect to their relations with Israel. The scope of and basis for these obligations are dealt with in the section that follows.

⁴³ Council of the European Union, 2985th Council Meeting, Foreign affairs, Council Conclusions, para 6, Brussels, Press Release 17218/09 (Press 371) 8 December 2009.

⁴⁴ Council of the European Union, *Council Conclusions on the Middle East Peace Process (MEPP)* Brussels, 10 December 2012, 17516/12.

II. International obligations of States subsequent to the unlawful situation arising from the settlement policy implemented by the State of Israel

The breaches of international law by Israel described above come with legal consequences for third States: the obligations to “ensure respect” of international law, to not “recognize the illegal situation” created by these breaches, and to not “render aid or assistance” in maintaining the situation.

Obligations relative to breaches of international law are contained in article 41 of the International Law Commission's Articles on State Responsibility which codify customary law in that respect:

“Article 41 - Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

*2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation”.*⁴⁵

Serious breaches as defined in article 40 applies to “an obligation arising under a peremptory norm of general international law” which “involves a gross or systematic failure by the Responsible State to fulfil the obligation”.

We will demonstrate that the breaches of international law imputable to Israel and which stem from its settlement policy, fall under the concept a “serious breach” as defined in article 40 of the International Law Commission's Articles on State Responsibility (A), which creates for third States, including EU Member States, the obligations to ensure respect for relevant international norms, “to not recognize” the illegal situation created by these breaches, and to not “render aid or assistance” in maintaining the situation which entail the duty to ban the sale of products made in Israeli settlements (B).

⁴⁵ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 (12 December 2001), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

A. Israel's settlement policy leads to serious and systematic breaches of peremptory international legal norms

According to the Vienna Convention on the Law of Treaties, a peremptory norm of international law is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted".⁴⁶ Among the norms recognized as peremptory by the International Law Commission are the "basic rules of international humanitarian law", the prohibition "against racial discrimination" and the obligation to respect "the right to self-determination".⁴⁷ Human rights are also a preferred source of peremptory norms.⁴⁸

More specifically, the International Court of Justice recognised the "intransgressible" character of the rules of the Fourth Geneva Convention:

*"It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity", as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I. C. J. Reports 1949, p. 22), that The Hague and Geneva Conventions have enjoyed a broad accession. Further, these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".*⁴⁹

In particular, the transfer of the civilian population, described in article 49, paragraph 6 of the Fourth Geneva Convention, has been characterized as a war crime in the Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflict (article 85, paragraph 4(a), Protocol I of 8 June 1977) and in article 8 (2), b, viii of the Rome Statute of the International Criminal Court of 17 July 1998. The categorisation of this type of act as a crime confirms the imperative need to prohibit the establishment of settlements.

The International Court of Justice has on many occasions emphasized the fundamental and erga omnes nature of the right to self-determination, namely in the case involving the Wall:

"The Court would recall that in 1971 it emphasized that current developments in "international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]". The Court went on to state that "These: developments leave little doubt that the ultimate objective of the

⁴⁶ Article 53 of the Vienna Convention of the Law of Treaties, signed in Vienna on 23 May 1969.

⁴⁷ See International Law Commission *supra* note 45, page 113.

⁴⁸ See UN Human Rights Committee (HRC), *CCPR General Comment No. 29: State of Emergency (Article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11.

⁴⁹ Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, International Court of Justice, Reports 1996, p. 226. See also Eric David, *supra* note 23, pages 107-115; Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law', *International Review of the Red Cross*, 2002, vol. 84, N° 846, page 420 (available at http://www.icrc.org/eng/assets/files/other/401_434_sassoli.pdf).

sacred trust" referred to in Article 22, paragraph 1, of the Covenant of the League of Nations "was the self-determination . . . of the peoples concerned" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 31, paras. 52-53*). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid.*; see also *Western Sahara, Advisory Opinion, I.C.J. report 1975, p. 68, para. 162*). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29*)⁵⁰.

And finally, the United Nations Committee on the Elimination of Racial Discrimination has stated that the prohibition of racial discrimination is "a peremptory norm of international law from which no derogation is permitted".⁵¹

The rules breached by Israel in the context of its settlement policy are unquestionably peremptory norms of international law and obligations *erga omnes*.⁵² These breaches must also be deemed "flagrant or systematic" given their large-scale, intentional, organised, repeated and prolonged nature.⁵³ With respect to the case on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁵⁴ the International Court of Justice decided that the breaches resulting from of the building of the wall, which are very similar in nature to those described below relative to the settlement policy, were of peremptory and *erga omnes* obligations:

*"The Court would observe that the obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the Barcelona Traction Case, such obligations are by their very nature 'the concern of all States' and, 'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection'. (Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33.) The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law".*⁵⁵

With respect to the nature of the norms breached by Israel, the Court concluded that these breaches created legal obligations for third States relative to the illegal situation thus created. In this instance, the illegal situation created by Israel's settlement policy implies legal consequences for third States, including the member states of the European Union. These consequences are examined in the section that follows.

⁵⁰ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ) 9 July 2004 (*supra* note 6) para 88.

⁵¹ UN Committee on the Elimination of Racial Discrimination (CERD), *Report of the UN Committee on the Elimination of Racial Discrimination, Sixtieth Session (4-22 March 2002) and Sixty-first Session (5-23 August 2002)*, 1 November 2002, A/57/18, XI, C, para 4, page 107.

⁵² See Victor Kattan, 'The Wall, Obligations Erga Omnes and Human Rights: The Case for Withdrawing the European Community's Terms of Preferential Trade with Israel' 13 *Palestine Yearbook of International Law*, (2004/2005) vol. XIII, pages 80-83; Al-Haq, 'State Responsibility in Connection with Israel's Illegal Settlement Enterprise in the Occupied Palestinian Territory' July 2012, pages 16-24, available at http://www.alhaq.org/images/stories/PDF/2012/Legal_Memo_State_Responsibility_FINAL_16_07.pdf.

⁵³ See *supra* note 45, commentary on article 40, para 8, page 113.

⁵⁴ See *Advisory Opinion supra* note 23.

⁵⁵ *Id.*, para 155.

B. European Union member states have the obligations to enforce compliance with international law by Israel, to not recognize as legal the illegal situation created by the settlement policy, and to not render aid or assistance in maintaining this situation.

The numerous breaches of peremptory and erga omnes norms by Israel and the resulting continued presence of settlements on Palestinian territory entail various legal obligations for third States. Firstly, the obligation to “ensure respect” of the breached international legal norms, in particular international humanitarian law and the right to self-determination, to cooperate to this end (1), and to not recognise as legal the illegal situation or render aid or assistance to maintaining this illegal situation (2).

1. States have the obligation to enforce compliance with international humanitarian law and with the right of the Palestinian people to self-determination

States have the obligation to cooperate, using legal means, to enforce compliance in cases of serious breaches of international law, as stated in article 41, paragraph 1 of the International Law Commission’s Draft Articles on States international responsibilities (see above). More specifically, States have the obligation to “ensure respect” for international humanitarian law (a) and the right of the Palestinian people to self-determination (b).

a) The obligation to ensure respect for international humanitarian law

The obligation to enforce international humanitarian law is specified in common article 1 of the Geneva Conventions (1949) which stipulates that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”. According to the ICRC commentary, this demands that States “should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally”.⁵⁶ In the Judgement (Merits) in *Nicaragua v. United States of America*, the I.C.J. explains that: “such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression”.⁵⁷

⁵⁶ Jean S. Pictet, ed., *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958), page 16, emphasis added. http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf

⁵⁷ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Rep 1986*, page 114, para 220.

The exact scope of the obligation to “ensure respect” has been the object of debates on legal doctrine. It is generally accepted that Common Article 1 implies that States must take the measures required to enforce compliance with humanitarian law among the persons under their jurisdiction.⁵⁸ What is more debatable, is whether or not this obligation implies the duty for State parties to take action that would induce a State in breach to comply with its obligations under the Convention. According to the minority opinion, the obligation to enforce the compliance of other States does not exist.⁵⁹ The view that widely prevails, however, is that the obligation does exist and can be inferred from numerous instruments.⁶⁰ The obligation is firstly confirmed in the ICRC Commentary on the Geneva Conventions which states: “that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude

⁵⁸ See Laurence Boisson De Chazournes and Luigi Condorelli, ‘Quelques remarques à propos de l’obligation des Etats de “respecter et faire respecter” le droit international humanitaire “en toutes circonstances”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva-The Hague, Martinus Nijhoff Publishers, 1984, pages 17-35 ; Laurence Boisson De Chazournes and Luigi Condorelli, ‘Common Article 1 of the Geneva Conventions revisited : Protecting Collective Interests’, *I.R.R.C.*, 2000, pages 67-89; Nicolas Levrat, “Les conséquences de l’engagement pris par les Hautes Parties contractantes de “faire respecter” les Conventions humanitaires”, in *Mise en œuvre du droit international humanitaire*, Frits Kalshoven and Yves Sandoz (Eds), Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1989, pages 263-296; Eric David, *supra* note 14, pages 643 and ff.

⁵⁹ See Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ *European Journal of International Law*, 2010, pages 125 and following; Frits. Kalshoven, ‘The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit’, *Yearbook of Int’l Humanitarian Law*, 1999, pages 3 and ff ; Separate Opinion of Judge Kooijmans on *Legal Consequences of the Construction of a Wall on Occupied Palestinian Territory*, International Court of Justice, *Rep.* 2004, pages 232-234, available at <http://www.icj-cij.org/docket/files/131/1683.pdf>.

⁶⁰ Boisson De Chazournes and Condorelli, ‘Quelques remarques à propos de l’obligation des Etats de “respecter et faire respecter” le droit international humanitaire “en toutes circonstances”’ *supra* note 58, pages 17-35; Boisson De Chazournes and Condorelli, ‘Common Article 1 of the Geneva Conventions revisited : Protecting Collective Interests’ *supra* note 58, pages 67-89; Levrat *supra* note 57, pages 267-269; U. Palwankar, ‘Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law’, *International Review of the Red Cross*, n° 298, 1993, pages 227 and ff; Eric David, *Principes de droit des conflits armés* (*supra* note 14), pages 643 and ff; Sassoli *supra* note 49, page 421; L. Boisson De Chazournes et L. Condorelli, ‘De la “responsabilité de protéger”, ou d’une nouvelle parure pour une notion déjà bien établie’, *Revue générale de droit international public*, 2006, no. 1, pages 11-18 ; B. Kessler, ‘The Duty to ‘Ensure Respect’ Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts’, *German Yearbook of International Law*. Vol. 44, 2001, pages 504 and ff.; P.-Y. Fux et M. Zambelli, « Mise en œuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: historique d’un processus multilatéral (1997-2001) », *Revue internationale de la Croix-Rouge*, n° 847, 2002, p. 677 ; Georges Abi-Saab, ‘Responsibility of Governments and intergovernmental Organizations in Upholding International Law’, in *Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory — The role of Governments, intergovernmental organizations and civil society*, United Nations International Meeting on the Question of Palestine, Geneva, 8-9 march 2005, p. 43; A. Devillard, ‘L’obligation de faire respecter le droit international humanitaire : l’article 1 commun aux Conventions de Genève et à leur premier Protocole additionnel, fondement d’un droit international humanitaire de coopération ?’, *Revue québécoise de droit international*, 2007, pages 75 and ff; H. Tonkin, ‘Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies’, *Leiden Journal of International Law*, 2009, pages 779 and ff; Isabelle Moulier, ‘L’obligation de faire respecter le droit international humanitaire’ in *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts*, Michael J. Matheson and Djamchid Momtaz (Eds), Brill/Martinus Nijhoff Publishers, 2009, pages 697 and ff; H. Brollowski, ‘The Responsibility to Protect and Common Article 1 of the 1949 Geneva Conventions and Obligations of Third States’, in J. Hoffmann and A. Nollkaemper (Eds.), *Responsibility to Protect. From Principle to Practice*, Pallas Publications, Amsterdam university Press, 2012, pages 93 and ff; O. Corten and V. Koutroulis, ‘The Illegality of Military Support to Rebels in the Libyan War : Aspects of *jus contra bellum* and *jus in bello*’, *Journal of Conflict & Security Law*, 2013, pages 78 and ff.

of respect for the Convention".⁶¹ Moreover, there are abundant examples of state practice that confirm the existence of a veritable obligation to ensure respect for humanitarian law by the other states. This practice is observed in particular with regards to breaches by the Israeli government of the law relative to occupation.⁶² A great number of declarations, adopted by overwhelming majority, have asserted States' obligation to ensure that Israel respects the Fourth Geneva Convention. In resolution ES-10/2 of 5 May 1997, the General Assembly:

*"Recommends to the States that are High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War to take measures, on a national or regional level, in fulfilment of their obligations under article 1 of the Convention, to ensure respect by Israel, the occupying Power, of the Convention".*⁶³

More recently, General Assembly, in his Resolution 68/81, adopted 11 December 2013:

"Calls upon all High Contracting Parties to the Convention, in accordance with article 1 common to the four Geneva Conventions and as mentioned in the advisory opinion of the International Court of Justice of 9 July 2004, to continue to exert all efforts to ensure respect for its provisions by Israel, the occupying Power, in the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967.

*Reiterates the need for speedy implementation of the relevant recommendations contained in the resolutions adopted by the General Assembly, including at its tenth emergency special session and including resolution ES-10/15, with regard to ensuring respect by Israel, the occupying Power, for the provisions of the Convention".*⁶⁴

In Resolution 681 (1990), the Security Council with reference to the States' obligation to enforce compliance with humanitarian law:

*"Calls upon the High Contracting Parties to the said Convention (4th Geneva Convention) to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof".*⁶⁵

The Declaration adopted at the Conference of the High Contracting Parties to the Fourth Geneva Convention of 5 December 2001 with respect to the application of the Convention in occupied Palestinian territories:

The participating High Contracting Parties call upon all parties, directly involved in the conflict or not, to respect and to ensure respect for the Geneva Conventions in all circumstances, to disseminate and take measures necessary for the prevention and suppression of breaches of the Conventions.

[...]

⁶¹ See Pictet, ed., *supra* note 3), Part I, Article One, page 16.

⁶² See Moulier *supra* note 60, pages 711-712.

⁶³ UN General Assembly, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the occupied Palestinian territory*, of 5 May 1997, Resolution ES-10/2, para 8, adopted by 134 votes in favour, 3 against and 11 abstentions. Emphasis added.

⁶⁴ UN General Assembly, *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories*, 11 December 2013, A/RES/68/81.

⁶⁵ UN Security Council, S/RES/681 (1990).

*The participating High Contracting Parties welcome and encourage the initiatives by States Parties, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring the respect of the Convention, and they underline the need for the Parties, to follow up on the implementation of the present Declaration.*⁶⁶

The commentators emphasized that the declaration “constitutes a breakthrough and a new development in the efforts made to render effective the obligation that all State parties have to ‘ensure respect for’ these Conventions”.⁶⁷

In its opinion relative to the wall, the I.C.J. confirmed the “extensive” scope of the obligation to enforce humanitarian law in absolutely clear terms.⁶⁸

*“all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention”.*⁶⁹

This part of the provision was approved by an overwhelming majority of the judges, 13 out of 15. Professors Laurence Boisson de Chazournes and Luigi Condorelli have emphasized that the wording used in the opinion conveys “[...] the Court’s firm desire to clearly identify all of the consequences of the obligation, with respect to international humanitarian law, incumbent on the entire international community and on all States: the objective is not limited to not recognizing illegal situations; everyone must take positive action to put an end to them, by using all available and admissible legal means”.⁷⁰

After the Court released its opinion on the consequences of the wall, the UN General Assembly adopted, by a large majority,⁷¹ Resolution ES 10/15 in which it “acknowledges the advisory opinion of the International Court of Justice” and “calls upon all States parties to the Fourth Geneva Convention to ensure respect by Israel for the Convention”.⁷² Through the resolution, States, yet again, approved the I.C.J.’s interpretation of common article 1.

⁶⁶ Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December 2001, available on line at <http://unispal.un.org/UNISPAL.NSF/0/8FC4F064B9BE5BAD85256C1400722951>.

⁶⁷ See Fux and Zambelli, *supra* note 5.

⁶⁸ See comments made by Boisson De Chazournes and Condorelli, ‘Quelques remarques à propos de l’obligation des Etats de “respecter et faire respecter” le droit international humanitaire “en toutes circonstances”’, *supra* note 58, page 15; Abi-Saab *supra* note 60, page 43.

⁶⁹ See I.C.J. *supra* note 6, paragraph 159.

⁷⁰ See Boisson De Chazournes and Condorelli, ‘De la “responsabilité de protéger”, ou d’une nouvelle parure pour une notion déjà bien établie’, *supra* note 60, page 15.

⁷¹ 150 votes in favour, 6 against (United States of America, Israel, Australia, Palau, Micronesia and the Marshall Islands), and 10 abstentions.

⁷² UN General Assembly, resolution on *Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, 20 July 2004, 2 August 2004, A/RES/ES-10/15.

On the basis of all of these arguments, the unquestionable conclusion is that article 1 of the Geneva Convention implies a positive obligation for State parties to ensure respect of humanitarian law by Israel. After a very thorough study on the obligation to 'ensure respect', Professor Isabelle Moulier concludes that, "while the persons who drafted the Geneva Conventions did not necessarily have in perspective the international scope of the obligation to ensure respect for international humanitarian law, subsequent practice supports a broad interpretation of the obligation".⁷³ She points out that "the most interesting aspect [of the obligation] consists of imposing on third States that they take concrete actions against breaches of international humanitarian law", which is emphasized in the I.C.J.'s advisory opinion on the consequences of the wall.⁷⁴

Consequently, it is difficult to adhere to the opinion expressed by James Crawford who maintains in his report on "Third party obligations with respect to Israeli settlements in the occupied Palestinian territories" that "it is doubtful that the obligation to ensure compliance with the Fourth Geneva Convention extends so far as to require any positive action on the part of individual States".⁷⁵ As we have demonstrated, that position is contradicted by States practice and by the advisory opinion of the I.C.J. on the legal consequences of the wall. However, the measures to be used to ensure that the State concerned complies with its obligations are not pre-established and are contingent on the means available to the States, in the particular circumstances of the case.⁷⁶ Consequently, establishing a minimum level of duties for States in regard to their obligation to "ensure respect" of humanitarian law is not always an easy task. Notwithstanding, as these are veritable obligations, one can consider that States are required to adopt reasonable measures which are in compliance with international law and which would effectively induce the State concerned to comply with international law.⁷⁷ States are required, a fortiori, to abstain from acts that would be contrary to the objective to induce respect of humanitarian law, such as directly financing, favouring or facilitating economic activities that are directly connected to serious breaches of humanitarian law.

⁷³ Isabelle Moulier, 'L'obligation de faire respecter le droit international humanitaire', *supra* note 60, page 713, our translation.

⁷⁴ *Id.*, p. 724.

⁷⁵ See Crawford *supra* note 24, page 18, para 45.

⁷⁶ See Levrat *supra* note 57, pages 275-281; Sassoli *supra* note 49, page 422; B. Kessler, *supra* note 60, pages 505-506.

⁷⁷ For a list of practical measures which could be implemented to ensure compliance with humanitarian law, see Moulier, *supra* note 60, page 732 and ff. See also Al-Haq, 'State Responsibility in Connection with Israel's Illegal Settlement Enterprise in the Occupied Palestinian Territory' 2012, *supra* note 52, pages 27-28; F. Dubuisson, « The Implementation of the Advisory Opinion of the International Court of Justice concerning *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* », *Palestine Yearbook of International Law 2004-2005*, vol. XIII, p. 43 ; Kattan, *supra* note 52, page 87.

b) The obligation to put an end to impediments to the right of the Palestinian people to exercise self-determination

The obligation to ensure the right of the Palestinian people to self-determination derives from the principle contained in UN General Assembly Resolution 2625 (XXV), “Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter”⁷⁸ and in common article 1, paragraph 3 of the ICCPR and the ICESCR (1966)⁷⁹: “The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations”.

James Crawford, in his report on the obligation of third States with respect to Israeli settlements considers that third States do not have “the obligation to ensure Israel’s compliance with the principle [of self-determination]”.⁸⁰ This position is in direct contradiction with the I.C.J.’s advisory opinion on the construction of the wall. Having acknowledged that the right of the Palestinian people to self-determination is a right *erga omnes* and that the building of the wall impedes the exercise of this right, the Court concludes the following:

*“It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end”.*⁸¹

The expression “see to it that [...] is brought to an end” implies positive action on the part of States,⁸² and not simply the passive attitude emphasized by Crawford. Just as there are no pre-established measures for the obligation to “ensure respect”, there are none for the obligation to “put an end to” the violation of the Palestinian people’s right to exercise self-determination, although it does imply that States undertake reasonable measures to induce the State of Israel to comply with international law. The obligation to “put an end to” also implies that States must stop all activities that finance or facilitate economic activities that contribute to impeding the Palestinian people’s right to exercise self-determination.

⁷⁸ Monique Chemillier-Gendreau, ‘Responsibility of Governments and intergovernmental organizations in upholding international law’ in Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory - The role of Governments, intergovernmental organizations and civil society, *supra* note 60, pages 71 and ff.

⁷⁹ The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

⁸⁰ See Crawford *supra* note 24, page 14 para 33.

⁸¹ See I.C.J. *supra* note 6, para 159.

⁸² See e.g. Boisson De Chazournes and Condorelli, ‘De la “responsabilité de protéger”, ou d’une nouvelle parure pour une notion déjà bien établie’, *supra* note 60, p. 15.

2. *The States' obligations to not recognize as legal the illegal situation created by the settlement policy, and to not render aid or assistance in maintaining this situation*

Serious breaches of general international norms by Israel also create the obligation for third States to not recognize the illegal situation arising from these breaches and not to render aid or assistance in the maintaining this situation.⁸³ According to the International Law Commission, the obligation of non-recognition “applies to ‘situations’ created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples”.⁸⁴ This obligation “not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition”.⁸⁵ The obligation to not render aid or assistance “deals with conduct ‘after the fact’ which assists the responsible State in maintaining a situation” in violation of international law.⁸⁶ The aid and assistance referred to in this context does not correspond to the commission of the serious breach itself,⁸⁷ it extends far beyond that and refers to any conduct that contributes to perpetuating the illegal situation.⁸⁸ Practice has demonstrated that the preferred areas for the application of these obligations are cases of illegally acquired territory, the denial of the right to self-determination, racial segregation, and serious breaches of humanitarian law.⁸⁹

In its *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, notwithstanding Security Council resolution 276*, the International Court of Justice concluded that the illegality of South Africa’s presence in Namibia created an obligation: “[...] to refrain from any acts and in particular any dealings with the Government of

⁸³ See Kattan, *supra* note 52, p. 81; Al-Haq, ‘State Responsibility in Connection with Israel’s Illegal Settlement Enterprise in the Occupied Palestinian Territory’, *supra* note 52, pages 26-27; Al-Haq, ‘Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law’, *supra* note 13, pages 27-31.

⁸⁴ See International Law Commission, *supra* note 45, page 114. See also Theodore Christakis, ‘L’obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d’autres actes enfreignant des règles fondamentales’, in Christian Tomuschat and Jean-MarcThouvenin (Eds), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Martinus Nijhof, 2006, pages 127 and ff; Stefan Talmon, ‘The Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?’, in *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, pages 99 and ff; Eric de Brabandere and Larrisa van den Herik, ‘Les obligations des Etats tiers et des acteurs non étatiques relatives au commerce des produits en provenance du territoire palestinien occupé’, *Revue belge de droit international*, 2012/1, pages 150 and ff.

⁸⁵ International Law Commission, *supra* note 45, page 114. See also Christakis *supra* note 83, pages 146-147.

⁸⁶ International Law Commission, *supra* note 45, page 115.

⁸⁷ Situations where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter are deemed as complicity and dealt with in article 16 of the ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.

⁸⁸ International Law Commission, *supra* note 45, pages 115-116. See also Nina Jorgensen, ‘The Obligation of Non-Assistance of the Responsible State’, in J. Crawford, A. Pellet and S. Olleson (Eds.), *The Law of International Responsibility*, Oxford University Press, 2010, page 692.

⁸⁹ See Martin Dawidowicz, ‘The Obligations of Non-Recognition of an Unlawful Situation’, in J. Crawford, A. Pellet and S. Olleson (Eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pages 683-685.

South Africa implying recognition of the legality of, or lending support or assistance to, such presence”⁹⁰ as well as the “obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia”.⁹¹

Both of these categories of obligations were recognised in the I.C.J.’s advisory opinion dated 9 July 2004, which refers to the situation created by the building of the wall on occupied Palestinian territory:

*“Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.”*⁹²

Subsequent to the decision on the construction of the wall, the United Nations General Assembly adopted, by a very wide majority⁹³, Resolution ES-10/15 in which it “Acknowledges the advisory opinion of the International Court of Justice”⁹⁴. In the resolution the General Assembly, “Calls upon all States Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion”.⁹⁵ This part of the resolution is essential because it demonstrates that States voting in favour of the resolution – among them all member states of the EU – have acknowledged to be bound by the categories of obligations set out in the Courts advisory opinion that they themselves have characterised as “legal obligations”.⁹⁶

⁹⁰ International Court of Justice, *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, notwithstanding security council resolution 276*, 21 June 1971, *Reports 1971*, p. 46, para 133.

⁹¹ *Id.*, page 42, para 119.

⁹² See I.C.J. *supra* note 30, para 159.

⁹³ 150 in favour, 6 against (United States of America, Israel, Australia, Palau, Micronesia, and the Marshall Islands) and 10 abstentions.

⁹⁴ See A/RES/ES-10/15 *supra* note 71.

⁹⁵ Emphasis added.

⁹⁶ See Pieter H.F. Bekker, ‘The ICJ’s Advisory Opinion regarding Israel’s West Bank Barrier and the Primacy of International Law’ in *Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory — The role of Governments, intergovernmental organizations and civil society*, *supra* note 60, pages 64-70 ; M. HMOUD, ‘The significance of the Advisory Opinion rendered by the ICJ on the legal consequences of the construction of a Wall in the Occupied Palestinian Territory’, in *Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory — The role of Governments, intergovernmental organizations and civil society*, pages 53-60; François Dubuisson, *supra* note 77, page 30.

III. Third States are under the obligation to cease all economic activities with Israeli entities which contribute to maintaining the illegal situation arising from settlements or to its recognition

The obligations to ensure compliance with international humanitarian law and with the right to self-determination, to not recognise as legal an illegal situation, and to not render aid or assistance to maintaining an illegal situation are expressed in rather general terms, and the opinion of the International Court of Justice has failed to provide a detailed description of the form these obligations should take in relations between Israel and third States. How the obligations are to be fulfilled is determined by each particular situation. When applied to the situation arising from settlements, these obligations require third States to refrain from relations, with Israel and its economic agents, which are contrary in nature to the international obligation to ensure respect for international law (A), lead to some form of recognition of activities connected to settlements (B), or provide some form of aid or assistance to settlements or to settlement related measures (C).

A. The EU and its member states must take the necessary measures to ensure compliance with the prohibition on the establishment of settlements and with the right of the Palestinian people to self-determination

As explained above, this obligation requires States to use the means at their disposal to induce the non-compliant State to put an end to its breaches of international law. EU Member States, individually and collectively within the EU, must consider this obligation in all of the relations established with Israel and adapt their positions and policies so that no benefit is derived from economic activities connected to settlements. The application of the obligation to “ensure respect” must specifically lead to the refusal to import goods from the settlements or from economic entities whose activities are closely linked to the settlements.⁹⁷ The duty to put an end to breaches of international law arising from the settlement policy is incompatible with trading with entities that substantiate these breaches, thereby contributing to the settlements’ economy. The obligation to ensure compliance also requires States to adopt measures with respect to entities under their jurisdictions so that these do not undertake

⁹⁷ See Al-Haq, *supra* note 13, page 31.

activities that contribute to the settlement of the Palestinian territory. Both of these points are discussed in greater detail in the following section.

B. The EU and its member states cannot maintain relations with Israeli entities which imply some form of legal recognition of situations or activities connected to settlements

According to the International Law Commission, the obligation of non-recognition “not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition”.⁹⁸ In its advisory opinion relative to the South African presence in Namibia, the International Court of Justice emphasized that this obligation encompasses economic relations, in particular:⁹⁹

*“The restraints which are implicit in the non-recognition of South Africa's presence in Namibia [...] impose upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.”*¹⁰⁰

The United Nations Security Council was more specific in its Resolution 478 (1980), in which States are called upon to not recognise the annexation, or its consequences, of East Jerusalem by Israel:

“[The Council] decides not to recognize the “basic law” and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem and calls upon:

(a) All Member States to accept this decision;

*(b) Those States that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City.”*¹⁰¹

The intent of this resolution, in its own terms, is the non-recognition of East Jerusalem and the “other actions” which stem from annexation, namely the settlement policy.

The obligation of non-recognition implies that the EU and its member states cannot develop economic relations which would acknowledge Israel’s authority over Palestinian territory, including East Jerusalem, or which would give legal effect to the settlements’ activities.¹⁰²

⁹⁸ See International Law Commission, *supra* note 45, page 114.

⁹⁹ See Christakis, *supra* note 83, pages 154 ff, on the obligation to refuse to maintain economic or trading relations with an illegal authority.

¹⁰⁰ See ICJ *supra* note 90, pages 55-56, para 124, emphasis added.

¹⁰¹ UN Security Council, Resolution 478 (1980), 20 August 1980.

Officially, the position of the EU and its member states is clear: Israeli settlements are illegal and cannot be given any effect, in particular relative to the drawing of borders. The implementation of diverse policies, however, has given legal effect to some of the activities of settlement entities, which were able to apply to certain EU programmes and thus obtain funding or other forms of economic benefits.

An emblematic example is the case of the company Ahava Dead Sea Laboratories (ADSL); the majority of its shares is held by settlements and its only plant is located in the Mitzpe Shalem settlement. ADSL uses natural resources found in the occupied Palestinian territory, in particular those from the Palestinian shores of the Dead Sea.¹⁰³ Under the 5th and 7th EU Framework Programmes, ADSL was awarded funding totalling over a million euros for several research projects some of which were on the effects of minerals from the Dead Sea.¹⁰⁴ Providing funds of this nature to a business whose location and production are part of an illegal settlement policy necessarily “legitimises” its activities; the Israeli research project Who Profits has concluded that:

“By funding research conducted by Ahava – a company whose head office is located in the occupied Palestinian territories and using the natural resources of an occupied territory for the benefit of the occupier – the European Union is funding research conducted by a company which participates in apparent violations of international law. The company itself benefits from the research and its association with the EU. These research projects validate the company’s activities, raise its prestige and create a platform for international commercial and business connections, insuring further profit for the company and the occupation industry.”¹⁰⁵

This “legalization” effect is conveyed clearly in the justification provided by Roksilde University (Denmark), blamed for having a collaboration with Ahava in the framework of an EU research programme:

*“According to regulation of EU research projects by the EU, including the EU’s approval of the projects, it is sufficient guarantee of the project’s legality for Danish participation, and thus a sufficiently non-controversial basis for a Danish university or another Danish public institution involved”.*¹⁰⁶

¹⁰² See de Brabandere and Van Den Herik *supra* note 84, pages 156-157.

¹⁰³ Who Profits, ‘Ahava: Tracking the Trade Trail of Settlements Products’, April 2012, available at http://whoprofits.org/sites/default/files/ahava_report_final.pdf. See also Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 19 September 2012, A/67/379, pages 18-19, paras 55-56; B’tselem *supra* note 20, page 41; Al-Haq, ‘Pillage of the Dead Sea: Israel’s Unlawful Exploitation of Natural Resources in the Occupied Palestinian Territory’, 2012, pages 21-22.

¹⁰⁴ See e.g., the following projects: Novel Approaches for the Development of Customized Skin Treatments and Services (Test Case: Dead Sea Minerals and Conventional Drugs) (SKIN TREAT), European Commission, CORDIS FP7, Jan. 28, 2011; The Reactivity and Toxicity of Engineered Nanoparticles: Risks to the Environment and Human Health (NANORETOX), European Commission, CORDIS, FP7, January 7, 2011; Integration of Novel Nanoparticle Based Technology for Therapeutics and Diagnosis of Different Types of Cancer (NANOTHER), European Commission, CORDIS, FP7, June 14, 2011. A description of these projects is available at http://cordis.europa.eu/home_fr.html. Also see for further information, Who Profits *supra* note 103.

¹⁰⁵ See Who Profits, *supra* note 103, page 18.

¹⁰⁶ Danwatch, ‘Danish Universities Work with Illegal Settlements’, 11 November 2012, available at <http://www.danwatch.dk/en/articles/danish-universities-work-illegal-settlements/225>.

The European Parliament submitted a Parliamentary question to the European Commission which raises the issue of “granting EU research funds to ADSL, whose activities breach the Fourth Geneva Convention as well as the EU’s policy on settlement of the Occupied Palestinian Territories”.¹⁰⁷

The Commissioner for Research Máire Geoghegan-Quinn provided the following response:

*“Israel has been associated to FP5 and FP7 through the agreements on scientific and technical cooperation signed on 10 July 2003 and on 16 July 2007. These international agreements, in conjunction with the relevant Council and European Parliament Regulations on the Rules for Participation in these Framework Programmes, stipulate that legal entities established in countries associated to these Framework Programmes may receive a financial contribution from these programmes for their participation in indirect research actions. Ahava Dead Sea Laboratories is an entity that is formally established within the borders of the internationally recognised State of Israel. The participation condition of being established in a certain territory does not oblige a beneficiary to carry out the funded research in the place of its establishment. Consequently, Ahava Dead Sea Laboratories were and are eligible for participation and funding under the above Framework Programmes. In granting EU research funds to this company, the Commission fulfilled the EU’s legal obligations resulting from the above agreements and it complied with the abovementioned EU regulations”.*¹⁰⁸

This explanation is clearly not satisfactory with regard to the obligation of non-recognition (and of not rendering assistance, see below) because it only makes mention of formal criteria established in EU instruments and fails to take into consideration the general norms of international law and the giving of legal effect to Ahava’s activities which derives from the approval of their participation in EU research projects. The mere fact that ADSL’s main office is on Israeli soil is not enough to make activities on occupied Palestinian territory legal or to justify eligibility for EU funds. The fact that EU rules do “not oblige a beneficiary to carry out the funded research in the place of its establishment” does not infer accepting that that activities be conducted in a place (occupied Palestinian territory) that make them illegal according to peremptory norms of international law.

In December 2012, the Council of the European Union adopted conclusions that allow greater consideration to be given to settlement issues in the adoption and implementation of EU instruments:

*“The European Union expresses its commitment to ensure that – in line with international law – all agreements between the State of Israel and the European Union must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967, namely the Golan Heights, the West Bank including East Jerusalem, and the Gaza Strip. Recalling its Foreign Affairs Council Conclusions adopted in May 2012, the European Union and its Member States reiterate their commitment to ensure continued, full and effective implementation of existing European Union legislation and bilateral arrangements applicable to settlement products”.*¹⁰⁹

¹⁰⁷ Parliamentary Question to the Commission submitted by Keith Taylor, 21 June 2011, JO C 128 E, 3 May 2012.

¹⁰⁸ Response to Parliamentary Question provided by Ms Geoghegan-Quinn on behalf of the Commission, 19 July 2011, Official Journal C 128 E, 3 May 2012.

¹⁰⁹ See Council of the European Union, *supra* note 44, para 4.

This position was followed by the adoption of *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*¹¹⁰ by the EU Commission in July 2013 (hereinafter ‘the Guidelines’), which set out “the conditions under which the Commission will implement key requirements for the awarding of EU support to Israeli entities or to their activities in the territories occupied by Israel since June 1967. Their aim is to ensure the respect of EU positions and commitments *in conformity with international law on the non-recognition* by the EU of Israel’s sovereignty over the territories occupied by Israel since June 1967”.¹¹¹

The Guidelines have been designed explicitly as the application of the international obligation of non-recognition and it is on the basis of what is required by this obligation that they must be interpreted and assessed.

The Guidelines “apply to EU support in the form of grants, prizes or financial instruments [...] which may be awarded to Israeli entities or to their activities in the territories occupied by Israel since June 1967”.¹¹²

EU funding eligibility criteria for Israeli entities are described hereinafter. In the case of grants, prizes or financial instruments, “only Israeli entities having their place of establishment within Israeli borders will be considered eligible, and ‘as final recipient’ in the case of financial instruments”.¹¹³ “The place of establishment is understood to be the legal address where the entity is registered, as confirmed by a precise postal address corresponding to a concrete physical location”, moreover, “the use of a post office box is not allowed”.¹¹⁴ These requirements do not apply to “Israeli public authorities at national level” or to “natural persons”.¹¹⁵

Requirements were also established for activities or operations conducted by Israeli entities, even when the latter are established in Israel. In the case of grants or prizes, entities are eligible when the activities “carried out in the framework of EU-funded grants and prizes” do

¹¹⁰ The Council, ‘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’, *Official Journal*, C 205, 19 July 2013, page 9.

¹¹¹ *Id.*, para 1, emphasis added.

¹¹² *Id.*, para 5.

¹¹³ *Id.*, para 9.

¹¹⁴ *Id.*, para 10.

¹¹⁵ *Id.*, para 11.

not take place, partially or entirely, in occupied territories.¹¹⁶ In the case of financial instruments, entities are ineligible if they conduct activities in occupied territories, be they [the activities] “in the framework of EU-funded financial instruments *or otherwise*”.¹¹⁷ Grants and prizes are distinguished from financial instruments.¹¹⁸ In the case of the grants and prizes, only the specific activity for which the prize or grant has been awarded is taken into consideration. For financial instruments, all activities conducted by the entity are taken into account and can be used to determine eligibility for funding. Notwithstanding, activities that “aim at benefiting protected persons under the terms of international humanitarian law who live in these territories and/or at promoting the Middle East peace process in line with EU policy”¹¹⁹ are eligible. This clause is specifically aimed at allowing funding for Israeli NGOs such as B’tselem and Breaking the Silence that actively defend human rights in occupied Palestinian territory.

The Guidelines also describe how the established requirements are to be implemented. Israeli entities seeking EU funding must enclose, with their application, a declaration on their honour stating that they meet EU requirements.¹²⁰ The EU Commission will:

*“[...] ensure that the work programmes and calls for proposals, rules of contests and calls for the selection of financial intermediaries or dedicated investment vehicles published by the bodies entrusted with budget implementation tasks under indirect management contain the eligibility conditions set out in Sections C and D”.*¹²¹

Lastly, the principles set out in the Guidelines must be applied to all agreements signed between the EU and Israel:

“In order to clearly articulate EU commitments under international law, taking into account relevant EU policies and positions, the Commission will also endeavour to have the content of

¹¹⁶ *Id.*, para 12 a.

¹¹⁷ *Id.*, para 12 b, emphasis added.

¹¹⁸ Regulation (EU, EURATOM) No. 966/2012 of the European Parliament and of The Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 of the Council (*Official Journal* no. L 298 of 26 October 2012, page 1) contains the definition of the types of funding:

- prize: “means a financial contribution given as a reward following a contest”;

- grants: “direct financial contributions, by way of donation, from the budget in order to finance any of the following:

(a) an action intended to help achieve a Union policy objective;

(b) the functioning of a body which pursues an aim of general Union interest or has an objective forming part of, and supporting, a Union policy ('operating grants')”;

- financial instruments: “Union measures of financial support provided on a complementary basis from the budget in order to address one or more specific policy objectives of the Union. Such instruments may take the form of equity or quasi-equity investments, loans or guarantees, or other risk-sharing instruments, and may, where appropriate, be combined with grants”.

¹¹⁹ See *supra* note 110, para 15.

¹²⁰ See *supra* note 110, paras 16-18.

¹²¹ See *supra* note 110, para 20.

*these guidelines reflected in international agreements or protocols thereto or Memoranda of Understanding with Israeli counterparts or with other parties”.*¹²²

The Guidelines are specifically meant to be applied to “Horizon 2020”, the new EU Framework Programme for Research and Innovation for the 2014-2020 period which follows the 7th Framework Programme.¹²³ The new programme will be implemented through financial instruments and grants, and will give rise to agreements with Israel.

Israel sharply protested the adoption of the guidelines.¹²⁴ The Israeli government announced its intention to not sign any agreement that contains the requirements set out in the Guidelines.¹²⁵ The position taken by the government reads:

*“1. Israel is opposed to the demand that Israeli firms or organizations will have to submit a written declaration to EU foundations, in which they promise that they have no direct or indirect connections with groups in the settlements or the West Bank, East Jerusalem and the Golan Heights.
2. Israel is also opposed to the clause that determines that Israeli organizations will not have been eligible for European loans if they have an indirect connection to the settlements. [...]
3. The negative reservation is related to the European demand to introduce a territorial clause in the agreement specifically stating that Israel recognizes the fact that it is not sovereign beyond the 1967 lines and that therefore the agreement does not apply to those territories”.*¹²⁶

The Israeli government explained that its wish was to reach a satisfactory “arrangement” through negotiations with the EU and its member states.¹²⁷

The adoption of the Guidelines was a significant milestone in progress made by the EU to fulfil its international obligations: to ensure respect, to not recognize and to not provide assistance. How the requirements set out in the text are to be enforced will depend, however, on how they are interpreted and on the efficiency of the verification mechanisms established by EU authorities.¹²⁸ With respect to the location where the activity is established, practice has demonstrated that it is rather easy for an Israeli business whose operations are for the most part in occupied Palestinian territory to have its headquarters in

¹²² See *supra* note 110, para 21.

¹²³ See EU Framework Programme for Research and Innovation “Horizon 2020”, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 30 November 2011, COM(2011) 808 final.

¹²⁴ Israel Ministry of Foreign Affairs, ‘Israel’s borders will not be determined by European Commission guidelines but by negotiations between the concerned parties’, 19 July 2013, <http://mfa.gov.il>. See also A. Bell and E. Kontorovich, ‘EU’s Israel Grants Guidelines: A Legal and Policy Analysis’, Kohelet Policy Forum October 2013, who support the Israeli position, available at <http://kohelet.org.il>.

¹²⁵ ‘Israel to tell EU: We won’t sign agreements based on settlement guidelines’, *Haaretz*, 8 August 2013.

¹²⁶ *Id.*

¹²⁷ Israel Ministry of Foreign Affairs, ‘Israel views with gravity the internal guidelines adopted by the European Commission regarding the territorial extension of agreements with Israel, and expressed its hope that positive understandings on the guidelines’ implementation will be found’, 14 August 2013, available at <http://mfa.gov.il>.

¹²⁸ See European Commission, ‘Frequently asked questions on: Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards’, 19 July 2013, available at http://eeas.europa.eu/delegations/israel/documents/press_corner/20130719_faq_guidelines_eu_grants_en.pdf.

Israel; such was the case with Sodastream¹²⁹ and Ahava¹³⁰. The criterion relative to where activities and operations take place is, therefore, essential; although in certain cases it is difficult to verify because entities are asked to declare on their honour that they do not have any activities on Palestinian territory. Equally unclear, is how to determine when financial activities (banking, for example) or services (telephony, transportation, etc.), which extend into the occupied territories, are to be considered as activities “carried out in the territories” referred to in the Guidelines.¹³¹ In all circumstances, the interpretation and application of the Guidelines must take into consideration the concrete requirements of the obligations to not render assistance and of non-recognition. The establishment of guidelines for funds granted as of 1 January 2014 also brings to the fore the extent to which the previous system failed to satisfactorily fulfil international obligations, as demonstrated with the Ahava case discussed previously.

C. The EU and its member states cannot maintain any relations with Israeli entities which involve any form of aid or assistance that perpetuates the illegal situation arising from the settlements

The obligation to not render aid or assistance to maintaining the illegal situation arising from settlements implies that projects and activities cannot receive any contributions that allow settlements to develop, to gain strength or to perpetuate. The obligation to not render assistance to settlement was specifically addressed by the United Nations Security Council in resolution 465 of 1st March 1980 in which it: “Calls upon all States not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories.”¹³²

Economics is the privileged area for the application of the obligation to not render assistance. According to the advisory opinion of the court in the Namibia case, no economic relations could be maintained with Israel which would contribute to the development of the settlements in occupied Palestinian territory.¹³³ All economic exchanges with Israel must be assessed to determine if they constitute a form of aid or assistance, of any nature, to the economy of the settlements. This is the conclusion drawn by Crawford in his report:

¹²⁹ Who Profits, ‘Sodastream: A Case Study for Corporate Activity in Illegal Israeli Settlements’, January 2011, pages 26-30.

¹³⁰ Who Profits, ‘Ahava: Tracking the Trade Trail of Settlements Products’, *supra* note 103 pages 40-44.

¹³¹ See Who Profits, ‘Despite Outcry, EU Guidelines on Settlements Will Have Little Effect’, 17 August 2013, available at <http://www.whoprofits.org/content/despite-outcry-eu-guidelines-settlements-will-have-little-effect>.

¹³² UN Security Council Resolution 465 (1980). See also Security Council Resolution 471 (1980).

¹³³ See De Brabandere and van den Herik *supra* note 84, page 158; Abi-Saab *supra* note 60 pages 42-43; Chemillier-Gendreau, *supra* note 78, page 51.

*“Economic and commercial dealings between Israel and a third State may be considered as either a breach of the obligation of non-recognition [...] or they might be considered to amount to aid or assistance in the commission of an internationally wrongful act, contrary to Articles 16 and 41(2) of the ILC Draft Articles. Some pertinent examples of commercial dealings could be the purchase of agricultural produce from settlements; or the provision of financial or other assistance in the construction of settlement buildings or infrastructure”.*¹³⁴

The obligation to not render assistance can include direct funding. Such was the case with the Ahava corporation discussed earlier, which received EU funds for its participation in various research projects. The obligation can also involve products from the settlements.¹³⁵ The volume of economic exchanges between the EU and Israel is substantial. The EU is the primary importer of Israeli products. As observed by the independent fact-finding mission, a significant share of these exchanges involve products from settlements,¹³⁶ although the exact quantity is difficult to determine because of their labelling as ‘Made in Israel’. Many goods are made wholly or partially in settlements, a conclusion reached by the independent fact-finding mission.¹³⁷ In a report published in 2012, the World Bank highlighted the importance of economic activities in the settlements:

*“There are about 20 Israeli industrial settlements in the West Bank in addition to many others with cultivated agricultural areas (agricultural developments sometimes extend beyond the built up boundaries of the settlements). The Government of Israel estimates that the value of goods produced in West Bank settlements and exported to Europe is USD300 million per year. Other analysis also considers goods that were partially produced in settlements, resulting in an increased estimate of US\$5.4 billion in 2008”.*¹³⁸

The World Bank noted that the agricultural segment of the economy has particularly strong growth:

*“Flourishing Israeli agricultural production in the Jordan Valley settlements is testament to the area’s potential, generating about NIS500 million annually in recent years, yielding 60 percent of production of dates in Israel”.*¹³⁹

The European Union is the main market for Israeli businesses, such as Ahava (cosmetics) or Sodastream (carbonated drinks machines), located in occupied Palestinian territory.¹⁴⁰

¹³⁴ See Crawford *supra* note 24, page 35, paras 84-85.

¹³⁵ See Sassoli *supra* note 49, page 431.

¹³⁶ See Palestinian farming and civil society organisations, ‘Farming Injustice. International trade with Israeli agricultural companies and the destruction of Palestinian farming’, February 2013, page 15.

¹³⁷ See A/HRC/22/63, *supra* note 8, para 99. About the Ahava and Sodastream cases, see Who Profits, ‘Sodastream : A Case Study for Corporate Activity in Illegal Israeli Settlements’, January 2011, pages 26-30 and Who Profits, ‘Ahava: Tracking the Trade Trail of Settlements Products’ *supra* note 103, pages 40-44.

¹³⁸ World Bank, ‘Fiscal Crisis, Economic Prospects. The Imperative for Economic Cohesion in the Palestinian Territories Economic’, Monitoring Report to the Ad Hoc Liaison Committee, September 23, 2012, page 13.

¹³⁹ *Id.*, page 17. See also World Bank, ‘West Bank and Gaza. Area C and the Future of the Palestinian Economy’, Report no. AUS 2922, October 2013, page 10, available at <http://documents.worldbank.org/curated/en/2013/10/18344690/west-bank-gaza-area-c-future-palestinian-economy>; Who Profits, ‘“Made in Israel”: Agricultural Export from Occupied Territories’, May 2012, http://whoprofits.org/sites/default/files/agricultural_export_flash_report_0.pdf; Kerem Navot, ‘Israeli Settler Agriculture as a Means of Land Takeover in the West Bank’, Report, August 2013, pages 82-83, available at <http://rhr.org.il/eng/wp-content/uploads/Kerem-Navot.pdf>.

The World Bank concluded that the taking over by settlements of economic activities in “Area C”, which represents 61% of the West Bank, is the main cause of development difficulties for the Palestinian economy:

*“Undoubtedly Area C is key for the development of a sustainable Palestinian economy. Its significance lies primarily in its setting as the only contiguous land in the West Bank connecting separate geographical areas classified as A and B. Hence, economic cohesion between these areas would continue to be greatly compromised as long as Israeli restrictions on access to Area C continue. Area C is also the most resource abundant space in the West Bank holding the majority of the territory’s water, agricultural lands, natural resources, and land reserves that provide an economic foundation for growth in key sectors of the economy. Ultimately, the entire Palestinian economy is affected by what happens in Area C.”*¹⁴¹

The economic development of Israeli settlements in occupied Palestinian territory is a key part of the Israeli government’s settlement policy. Thirteen industrial zones have been established on the West Bank; they benefit from public investments and preferential fiscal regimes.¹⁴² Furthermore, the Israeli government is actively implementing a policy to extend the settlements’ agricultural zones.¹⁴³ Clearly, economic activities in the settlements play an undeniable role in maintaining the illegal situation arising from settlements – the transfer of civilians to occupied territory, the appropriation of land and natural resources, the exclusion of the Palestinian population – with the trading of goods as a key component.¹⁴⁴ The international fact-finding mission observed:

*“It is with the full knowledge of the current situation and the related liability risks that business enterprises unfold their activities in the settlements and contribute to their maintenance, development and consolidation.”*¹⁴⁵

A report published by the Israeli research project Who Profits on the company Sodastream, located in the town of Ma’aleh Adumim on the West Bank, describes how trade in goods from the settlements contributes to maintaining the illegal situation arising from settlements:

“SodaStream and similar industries in the industrial park of Mishor Edomim directly support the settlement of Ma’aleh Adumim in various aspects. First, the municipal taxes that the company pays (property tax for production facilities, or “Arnona”, in Hebrew) go to the Ma’aleh Adumim Municipality’ where they are solely used to support the growth and development of the settlement. The funds the municipality of the Ma’aleh Adumim settlement collects from SodaStream and the other factories in its industrial zone are used for the construction of

¹⁴⁰ FIDH and coalition of NGOs, ‘Trading Away Peace: How Europe Helps Sustain Illegal Israeli Settlements’, Crisisaction, October 2012, page 22, available at <http://www.fidh.org/IMG/pdf/trading.pdf>, p. 22.

¹⁴¹ World Bank, *supra* note 138, page 13. See also World Bank, ‘West Bank and Gaza. Area C and the Future of the Palestinian Economy’ *supra* note 138; B’tselem, ‘Acting the Landlord: Israel’s Policy in Area C, the West Bank’ *supra* note 20; Kerem Navot *supra* note 22.

¹⁴² B’tselem, ‘By Hook and by Crook: Israeli Settlement Policy in the West Bank’, *supra* note 10, pages 42-44; ‘Trading Away Peace: How Europe Helps Sustain Illegal Israeli Settlements’, *supra* note 140, page 17; Who Profits, ‘Forbidden Fruit: The Israeli Wine Industry and the Occupation’, Report, April 2011, <http://whoprofits.s483.sureserver.com/sites/default/files/WhoProfits-IsraeliWines.pdf>, pages 17-18.

¹⁴³ Kerem Navot, *supra* note 22, page 17.

¹⁴⁴ See Al-Haq, ‘Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law’, *supra* note 13, pages 12-13.

¹⁴⁵ See UN HRC A/HRC/22/63 *supra* note 8, para 97, emphasis added.

*roads, education services, sewage treatment, gardening, for the payment of salaries of municipal employees and the like. Thus, when one buys a SodaStream device – one contributes to sustaining the Ma'aleh Adumim settlement”.*¹⁴⁶

All Israeli businesses based in occupied Palestinian territory, for most of their activities, necessarily rely on the wrongful acts perpetrated by the Occupying Power: the building of infrastructure on expropriated land, the use of Palestinian natural resources (water, agriculture, etc.), “security” measures such as the wall or checkpoints, the conveyance of goods via restricted roads, etc. Unquestionably, trade and economic activities conducted by Israeli settlements strengthen and perpetuate the settlement of the occupied Palestinian territory, which constitutes the main obstacle to the economic development of Palestinians. By allowing the trading and importation of goods from Israeli settlements, the member states of the European Union incontrovertibly contribute to their economic prosperity thereby undeniably providing “aid” and “assistance” in maintaining the illegal situation created by Israel’s settlement policy.¹⁴⁷ The problem created by goods from Israeli settlements has been raised for many years and the fact that EU Member States allow these goods to enter EU markets is no doubt a matter of choice and the result of an informed decision. Accepting the trade of goods from settlements is clearly a consciously made policy that leads to a form of assistance in the maintaining of the situation arising from the settlements.

There are, however, several European states who, in order to comply with international law, have adopted measures specifically to avoid providing any form of assistance to Israeli entities actively involved in the settlement process. Norway has excluded three Israeli companies involved in the building of the wall in the West Bank and in East Jerusalem: Shikun & Binui Ltd¹⁴⁸, Danya Cebus Ltd. and Africa Israel Investments Ltd.¹⁴⁹ The decision was based on recommendations made by the pension fund’s Council on Ethics:

¹⁴⁶ Who Profits, ‘Sodastream: A Case Study for Corporate Activity in Illegal Israeli Settlements’, January 2011, pages 6-7.

¹⁴⁷ See Tom Moerenhout, ‘The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories’, *Journal of International Humanitarian Legal Studies*, 2012, Volume 3, Issue 2, page 352.

¹⁴⁸ The Government Pension Fund Global, Council on Ethics, ‘Recommendation to the Ministry of Finance for exclusion of Shikun & Binui Ltd from the Government Pension Fund Global (GPF Global)’, 21 December 2011, http://www.regjeringen.no/pages/37921777/Tilr_Shikun_Binui_publ_eng.pdf. See also ‘Exclusion of a company from the Government Pension Fund’, 15 June 2012, <http://www.regjeringen.no/en/dep/fin/news/news/2012/exclusion-of-a-company-from-the-governme.html?id=685898>.

¹⁴⁹ Council on Ethics, Recommendation to the Ministry of Finance concerning the companies Africa Israel Investments Ltd. and Danya Cebus Ltd., 16 November 2009, http://www.regjeringen.no/pages/13898012/Recommendation_Africa_Israel.pdf. The exclusion of Africa Israel Investments from the fund was revoked in April 2013, but only on the basis of the promise made by the company to not engage in construction work in occupied Palestinian territory: Council on Ethics, ‘Recommendation to revoke the exclusion of the companies Africa Israel Investments Ltd. and Danya Cebus Ltd. from the investment universe of the Government Pension Fund Global’, 25 April 2013, http://www.regjeringen.no/pages/13898012/AFI_opphevelse_april_2013_ENG.pdf ; “Three companies excluded

“The Council bases its opinion on statements made by the International Court of Justice (ICJ) in The Hague, the UN Security Council and the International Committee of the Red Cross (ICRC), all of which state that the building of Israeli settlements on the West Bank and in East Jerusalem is contrary to the IV Geneva Convention. The purpose of the IV Geneva Convention is to protect civilians in situations of war and occupation.

*The Council considers that the investment made by the Government Pension Fund Global (GPF) in the company is contrary to the Fund’s Ethical Guidelines because the company’s activities entail an unacceptable risk that it will contribute to serious violations of the rights of individuals in situations of war or conflict”.*¹⁵⁰

The Council on Ethics made a similar recommendation concerning Elbit Systems Limited, a company that provides the surveillance system used for the portion of the wall built by Israel on the West Bank:

“Elbit supplies a surveillance system that is part of the separation barrier being built by the Israeli government in the West Bank. The construction of parts of the barrier may be considered to constitute violations of international law and Elbit, through its supply contract, is thus helping to sustain these violations.

*The Council on Ethics considers the Fund’s investment in Elbit to constitute an unacceptable risk of complicity in serious violations of fundamental ethical norms.”*¹⁵¹

In December 2012, the New Zealand Superannuation Fund, a government fund, decided to exclude the same three Israeli companies.¹⁵²

“Findings by the United Nations that the Separation Barrier and settlement activities were illegal under international law were central to the Fund’s decision to exclude the companies, said Manager responsible for Investment Anne-Maree O’Connor.

The Fund also factored in votes by New Zealand for UN Security Council resolutions demanding the cessation and dismantling of the Separation Barrier, and the cessation of Israeli settlement activities in the Occupied Palestinian Territories”.

The Swedish public pension fund, AP4, also excluded Elbit because of their contribution to the building of the wall and to settlement expansion:

“[Elbit System] can be associated with violation of international humanitarian law, contrary to the Fourth Geneva Convention. Both the European Union and the Swedish Government are clear on their stance that those sections of the separation barrier, and the settlements erected by Israel on the occupied territories, are contrary to international public law, and, more specifically, to Article 49 of the Fourth Geneva Convention, which states that the occupying

from the Government Pension Fund Global’, Press release no. 48/201023, August 2010, <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2010/three-companies-excluded-from-the-govern.html?id=612790>.

¹⁵⁰ See GPF *supra* note 148.

¹⁵¹ The Government Pension Fund Global, Council on Ethics, ‘Recommendation to the Ministry of Finance, 15 May 2009’, http://www.regjeringen.no/pages/2236685/Elbit_engelsk.pdf. See also ‘Supplier of surveillance equipment for the separation barrier in the West Bank excluded from the Government Pension Fund – Global’, Press Release no. 66/209, 3 September 2009, <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2009/supplier-of-surveillance-equipment-for-t.html?id=575444>.

¹⁵² New Zealand Superannuation Fund, ‘New Zealand Superannuation Fund excludes three companies on responsible investment ground’ Press release, 12 December 2012, <http://www.nzsuperfund.co.nz/news.asp?pageID=2145831983&RefID=2141742545>.

*power may not deport or transfer sections of its civilian population into the territory it occupies”.*¹⁵³

At last, the Dutch pension fund PGGM decided to sever all ties with five Israeli banks with branches in the West Bank and providing funding for the construction of settlements. This decision was taken due to the fact that settlements are illegal under international law:

“ PGGM recently decided to no longer invest in five Israeli banks, namely Bank Hapoalim, Bank Leumi, First International Bank of Israel, Israel Discount Bank and Mizrahi Tefahot Bank. For several years PGGM has been in dialogue with these banks. The reason for this engagement was their involvement in financing Israeli settlements in the occupied Palestinian territories. This was a concern, as the settlements in the Palestinian territories are considered illegal under international humanitarian law. Moreover, international observers have indicated that the settlements constitute an important obstacle to a peaceful (two-state) solution of the Israeli-Palestinian conflict.

In 2004 the International Court of Justice concluded in an Advisory Opinion that the settlements in the Palestinian territories are in breach of Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Population in Time of War. This article prohibits an occupying power to transfer its own citizens to occupied territory. International bodies, including the UN General Assembly and the UN Human Rights Council have adopted various broadly supported resolutions, which state that the settlements are considered illegal. Israel disputes this interpretation of the applicability of international law.

*In line with the Responsible Investment policy, a dialogue has taken place with the before mentioned banks. Engagement is an important tool to allow PGGM to act as a responsible owner on behalf of its clients. The dialogue showed however that, given the day-to-day reality and domestic legal framework they operate in, the banks have limited to no possibilities to end their involvement in the financing of settlements in the occupied Palestinian territories. Therefore, it was concluded that engagement as a tool to bring about change will not be effective in this case. As concerns remain and changes are not expected in the foreseeable future, PGGM no longer invests in the companies concerned as of January 1st 2014 ”.*¹⁵⁴

The practice of excluding such entities from government investment funds¹⁵⁵ demonstrates that investing in an Israeli company connected to the settlement policy must be seen as contributing to the continued breach of international law and, consequently, must be stopped immediately.

Yet another example is the Spanish government’s decision to disqualify Ariel University from participating in an international architecture competition for universities.¹⁵⁶ Ariel University is located in a settlement in the West Bank. The communiqué explaining the decision states that it was based on requirements related to compliance with international law:

¹⁵³ AP4, Ethical Council, Annual Report 2010, p. 19, http://www.ap4.se/upload/Etikr%C3%A5det/Etikr%C3%A5det%20ENG/Ethical_Council_Annual_Report2010_3.pdf.

¹⁵⁴ PGGM, « Statement regarding exclusion of Israeli banks », 8 January 2014, [https://www.pggm.nl/english/what-we-do/Documents/Statement exclusion Israeli banks.pdf](https://www.pggm.nl/english/what-we-do/Documents/Statement%20exclusion%20Israeli%20banks.pdf)

¹⁵⁵ For decisions made by the Norwegian public investment fund KLP, see ‘Responsible Investments’, Report December 2011, page 21, https://www.klp.no/polopoly_fs/1.11860.1322724271!/menu/standard/file/SRI_Report_2_2011_english.pdf.

¹⁵⁶ Haaretz, ‘Spain boots Ariel College from Contest’, 25 September 2009.

*“The decision was made by the Spanish government based on the fact that the university is located in occupied territory in the West Bank. The Spanish government is committed to uphold the international agreement under the framework of the European Union and the United Nations regarding this geographical area”.*¹⁵⁷

For its part, the German government announced that it will condition continued grants to Israeli high-tech companies, as well as the renewal of an agreement on scientific cooperation, on the inclusion of a clause stating that the Israeli entities located in the West Bank and East Jerusalem will not be eligible for funding¹⁵⁸.

The Non-Aligned Movement, comprised of 120 members and 17 observer countries, has voted several declarations calling for the adoption of regional and national measures aimed at goods from settlements and at companies connected to illegal activities in occupied Palestinian territory:

*“The Heads of State and Government also reiterated their call for specific actions to be taken including by legislative measures, collectively, regionally and individually, to prevent any products of the illegal Israeli settlements from entering their markets, consistent with obligations under international treaties, to decline entry to Israeli settlers and to impose sanctions on companies and entities involved in construction of the Wall and other illegal colonization activities in the Occupied Palestinian Territory, including East Jerusalem”.*¹⁵⁹

All of the precedents and declarations mentioned above are evidence that States have taken specific measures to fulfil their obligations to “ensure respect”, to not recognise, and to not render aid or assistance, and that subsequent to the I.C.J. opinion on the wall, States have not remained passive, contrary to the impression proffered by certain authors.¹⁶⁰

Conclusions

Serious breaches of international law connected to Israel’s settlement policy incontrovertibly entail obligations for the EU and its member states: to ensure respect for humanitarian law and for the Palestinians’ right to exercise self-determination, to not give any legal effect to settlement activities, and to refrain from providing any form of aid or assistance to maintaining the illegal situation arising from the settlements. These obligations imply placing a prohibition in EU markets on goods originating from the settlements because they are intrinsically connected to a set of serious breaches of peremptory and erga omnes norms of

¹⁵⁷ Quoted from Ynet.News, ‘Spain boycotts Ariel college for being on ‘occupied territory’, <http://www.ynetnews.com/articles/0,7340,L-3779907,00.html>.

¹⁵⁸ Haaretz, « Germany conditions high-tech, science grants on settlement funding ban », 23 January 2014.

¹⁵⁹ Non-Aligned Movement, Declaration on Palestine, 15th Summit Conference of Heads of State and Government of the Non-Aligned Movement, Sharm El Sheikh, Egypt, 11-16 July 2009, NAM2009/DPAL/Doc.7.

¹⁶⁰ See Talmon *supra* note 84, page 106.

international law, and not allowing any investments in business entities involved in the expansion of the settlements. The fulfilment of this obligation corresponds entirely to EU policy which has set compliance with international humanitarian law by third States as one of its primordial objectives.¹⁶¹ In that respect, the European Union Guidelines on promoting compliance with international humanitarian law indicate that the use of “restrictive measures” as “an effective means of promoting compliance with IHL” is a “means of action” in “relations with third countries”.¹⁶² In this instance, the banning of goods from settlements in the EU corresponds to the fulfilment of international obligations incumbent on the EU and its member states. The State practice described above, which ultimately led to the adoption of the EU Guidelines, indicate that obligations for third States are not devoid of content or ineffective, but are interpreted as veritable obligations which call for relevant measures.

¹⁶¹ The EU Council, Notices from European Union Institutions and Bodies, ‘Updated European Union Guidelines on promoting compliance with international humanitarian law’(IHL), (2009/C 303/06), *OJ C 303*, 15 December 2009, pages 12–17, para 3.

¹⁶² *Id.*, para 16 (d).

IV. Implementation of the obligation to prohibit the commercialisation of goods produced in the settlements within the territory of the European Union

The current legal status in European law of settlement goods must be examined before the instruments available for implementing measures prohibiting commercialisation can be analysed, (A) to ascertain that the European project for labelling products from the settlements fulfils the non-assistance obligation (B) and to study the legal modalities of such a measure in European law and at the WTO (C).

A. EU law on the legal status of settlement products

At the European level, trade between the EU countries and Israel is governed by an Association Agreement¹⁶³, signed on 20 November 1995, which entered into force in June 2000. Title II of this Agreement pertains to the “Free Movement of Goods” and aims to reinforce the free trade area between the Community and Israel. More specifically, article 8 prohibits “Customs duties on imports and exports, and any charges having equivalent effect” A special regime that is applied to agricultural products authorises the application of customs duties and other taxes, according to the conditions set out in the Agreement.¹⁶⁴ Article 83 stipulates that “this Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European Coal and Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand, to the territory of the State of Israel”.

Goods imported from Israel benefit from preferential tariffs and customs conditions. But these conditions, according to article 7, only apply to “products originating in Israel”.¹⁶⁵ Protocol 4 to the Agreement gives the following definition:

“(a) products wholly obtained in Israel within the meaning of article 4 of this Protocol;

*(b) products obtained in Israel which contain materials not wholly obtained there, provided that the said materials have undergone sufficient working or processing in Israel within the meaning of article 5 of this Protocol”.*¹⁶⁶

¹⁶³ Euro-Mediterranean Agreement establishing an association between the European Communities and their Members States, of the one part, and the State of Israel, of the other part, *JO L 147/3*, 21 June 2000.

¹⁶⁴ *Id.*, Articles 9 to 15 of the Agreement and the corresponding annexes.

¹⁶⁵ See also articles 10, 12, 18 and 19.

¹⁶⁶ Article 2, 2) of Protocol no. 4 concerning the definition of the concept of “originating products” and methods of administrative cooperation.

Article 4 gives example of cases in which a product is be considered as “wholly obtained” in Israel. The common characteristic of these cases is that the main territorial criterion defining the place where the products are obtained, such as where the vegetables are harvested, live animals raised, and mineral resources extracted. The criteria for recognising the origin of products that have been sufficiently worked or processed are stipulated for each product in annexes I and II to Protocol no. 4. Without considering the highly technical details of these criteria, we see that they mainly focus on the “made in Israeli territory” criterion, and apply a percentage (between 0 and 100%) to the whole product. Lastly, according to article 6, certain operations and transformations shall be considered as “insufficient working or processing” to confer the status of products originating, e.g. storage, sorting, classifying, packaging, affixing labels, slaughter of animals, mixing of products, etc.

For the purpose of importing into the European Union, the origin of the Israeli products is established either by a EUR.1 movement certificate which is issued by the Israeli customs authorities at the request (in writing) of the exporter¹⁶⁷ or by an invoice declaration¹⁶⁸ in the case of an approved exporter.¹⁶⁹ In both cases, the origin is determined a priori on the basis of the exporter’s declarations; an a posteriori verification can only be carried out by the customs authorities of the exporter’s country or the customs authorities of the importing country.¹⁷⁰

It is clearly stated that: “the exporter applying for a movement certificate [or establishing an invoice declaration] must be able, at any time, to submit upon the request of the customs authorities of the exporting country [...] all appropriate documents proving the originating status of the products concerned”.¹⁷¹

Upon entry into the importing country, subsequent verification of EUR.1 movement certificates and of invoice declarations shall be carried out at random or whenever the customs authorities of the importing State have a reasonable doubt as to the authenticity of such documents, the origin of the products concerned or the fulfilment of the other requirements of this Protocol.¹⁷²

¹⁶⁷ Article 18 of Protocol no. 4.

¹⁶⁸ Article 22 of Protocol no. 4.

¹⁶⁹ Article 23 of Protocol no. 4.

¹⁷⁰ Article 18 para 6 of Protocol no. 4.

¹⁷¹ Article 18 para 3 and article 22 para 3 of Protocol no. 4.

¹⁷² Article 32 para 1 of Protocol no. 4.

In case of doubt about the origin of the product, the certificate or the declaration are sent back to the customs authorities of the exporting country for verification.¹⁷³

In cases where the product is determined not to be from its declared country of origin, or where insufficient information is provided, or no response is provided or if there is no reply within 10 months, entitlement to preferential treatment is refused.¹⁷⁴

The implementation of this regulation has created numerous problems between the European Union and Israel. As stated below in the opinion of the Advocate General in the Brita/Sodaclub case:

*“The question of the rule governing origin and the extent of the territorial scope of the EC-Israel Agreement has been the subject of a dispute between the Community and the State of Israel for many years. The Community takes the view that products originating in the occupied territories of the West Bank and the Gaza Strip are not entitled to the preferential regime established by the EC-Israel Agreement, while the State of Israel takes the view that this is not the case.”*¹⁷⁵

In practice, the policy of the Israeli customs authorities in applying the criteria of origin is to include the settlements in East Jerusalem and in the West Bank within the territorial scope of Israel.¹⁷⁶ The result is that products obtained from Palestinian territory and/or produced partly or wholly in the settlements benefit from the preferential customs regime unless customs authorities in the importing country question the origin of the goods, which only happens rarely and randomly¹⁷⁷. In 2001, the European Union responded to this problem by publishing a “Notice to Importers” in its Official Journal alerting importers of goods from Israel as follows:

*“As to the substantial errors in the application of the Agreements, operators are informed that arising from the results of the verification procedures carried out, it is now confirmed that Israel issues proofs of origin for products coming from places brought under Israeli administration since 1967, which, according to the Community, are not entitled to benefit from preferential treatment under the Agreements. Community operators presenting documentary evidence of origin with a view to securing preferential treatment for products originating from Israeli settlements in the West Bank, Gaza Strip, East Jerusalem and the Golan Heights, are informed that they must take all the necessary precautions and that putting the goods in free circulation may give rise to a customs debt.”*¹⁷⁸

This issue finally brought the Brita/Sodaclub case before the Court of Justice of the European Communities (hereinafter the Court of Justice of the European Union). In this

¹⁷³ Article 32 para 2 of Protocol no. 4.

¹⁷⁴ Article 32 para 6 of Protocol no. 4.

¹⁷⁵ Conclusions of Advocate General Yves Bot, case no. C-386/08, *Firma Brita GmbH / Hauptzollamt Hamburg-Hafen*, opinion of 29 October 2009, para 26.

¹⁷⁶ *Id.*, paras 26 and ff.

¹⁷⁷ See Al-Haq, ‘Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law’, *supra* note 13, pages 16-18.

¹⁷⁸ Notice to Importers - Imports from Israel into the Community (2001/C 328/04) OJ C 328/6, 23 November 2001.

case, German customs authorities refused to apply the preferential regime set out in the EC-Israel Association Agreement because of doubts about whether the imported goods came from Israel, as indicated on the invoice declaration, or whether they were produced in a settlement in the occupied Palestinian territory. The issue was about goods made by the Sodaclub company located in Mishor Adumin in the West Bank to the east of Jerusalem. In reply to a question from German authorities, Israeli customs authorities said: “our verification has proven that the goods in question originate in an area that is under Israeli Customs responsibility. As such, they are products originating in Israel pursuant to the EC-Israel Association Agreement and are entitled to preferential treatment under that agreement”.¹⁷⁹ German customs authorities felt that the reply was not satisfactory and withdrew the benefits of the preferential treatment. Brita, the company that imports Sodaclub products, referred the issue to the German courts, which submitted a preliminary question to the European Court of Justice. The Court concluded that “products which prove to originate in the West Bank, do not fall within the territorial scope of the EC-Israel Agreement and are not entitled to the preferential treatment under this Agreement”.¹⁸⁰

As regards the capacity of the authorities in the importing State to question the certificate of origin issued by the authorities of the exporting State, the Court felt that in principle, “the customs authorities of the importing State may not unilaterally declare invalid an invoice declaration made out by an exporter who has been properly approved by the customs authorities of the exporting State”¹⁸¹. But in this case “the aim of the subsequent verification was to establish the precise place of manufacture of the imported products, for the purposes of determining whether those products fell within the territorial scope of the EC-Israel Association Agreement”¹⁸². The Court deemed that: “the Israeli customs authorities gave no reply to the letters which the German customs authorities had sent in order to check whether the products at issue had been manufactured in Israeli-occupied settlements in the West Bank, the Gaza Strip, East Jerusalem or the Golan Heights”¹⁸³. Consequently, the Court decided that:

“[...] it must be held that a reply such as that given by the customs authorities of the exporting State does not contain sufficient information, for the purposes of Article 32(6) of the EC-Israel Protocol, to enable the real origin of the products to be determined, which means that, in a context such as this, the assertion made by those authorities that the products at issue qualify

¹⁷⁹ *Id. para 56.*

¹⁸⁰ ECJ, C-386/08, *Firma Brita GmbH / Hauptzollamt Hamburg-Hafen*, judgement of the Court of 25 February 2010 para 58.

¹⁸¹ *Id. para 63.*

¹⁸² *Id. para 64.*

¹⁸³ *Id. para 66.*

*for preferential treatment under the EC-Israel Association Agreement is not binding upon the customs authorities of the importing Member State”.*¹⁸⁴

As a result, German customs authorities were entitled to refuse the preferential treatment provided by the Association Agreement for the products in question, on the grounds that they originated in the West Bank.

The events concerned by the Court decision date back to 2002. In the meantime, the European Union and Israel have made a “technical arrangement” that was supposed to settle the dispute on the certification of origin of products from the settlements. A “Notice to Importers” published in 2005 stipulates that henceforth the certificate or declaration of origin must specify the name of the city, village or industrial zone where the goods were produced:

“According to the Community, products coming from places brought under Israeli Administration since 1967 are not entitled to benefit from preferential tariff treatment under the EU-Israel Association Agreement.

Operators are informed that the EU and Israel have arrived to an arrangement for the implementation of Protocol 4 to the Agreement. As a result, all EUR.1 movement certificates and invoice declarations made out in Israel will bear, as from 1 February 2005 the name of the city, village or industrial zone where production conferring originating status has taken place.

*Operators presenting preferential proofs of origin under the EU-Israel Association Agreement are informed that the preferential treatment will be refused to the goods for which the proof of origin indicates that the production conferring originating status has taken place in a city, village or industrial zone which is brought under Israeli Administration since 1967”.*¹⁸⁵

The requirement about the precise place of production was supposed to make it easier for the customs authorities to verify whether Israeli products were eligible for preferential treatment. In practice, however, products are always marked as originating in Israel, even when the place of manufacture is located in Palestinian territory¹⁸⁶. This situation was described by the NGO Human Rights Watch:

*“Rather than clearly stating the actual origins of all its exports, Israel merely provides the originating postal codes. The job of spotting settlement goods is left to importers, yet some settlement goods bear the misleading codes of corporate headquarters inside Israel”.*¹⁸⁷

¹⁸⁴ *Id. para 67.*

¹⁸⁵ Notice to Importers – Imports from Israel into the Community OJ C20/02 25, January 2005.

¹⁸⁶ See Aprodev and Euro-Mediterranean Human Rights Network, *EU-Israel Relations: Promoting and Ensuring Respect For International Law*, February 2012, available at aprodev.eu/files/Palestine_Israel/ra_eu_isreal_en_web72dpi_00_5498995891.pdf, p. 44.

¹⁸⁷ Bill Van Esveld, Human Rights Watch, ‘An Unsettling Situation. What the EU should tell Israel, and itself, about settlements, trade and the destruction of EU aid’, 11 May 2012, available at <http://www.hrw.org/news/2012/05/11/unsettling-situation>.

This information was confirmed very recently by the independent international fact-finding mission:

*“The mission also noted that Israel labels all its export products as originating from ‘Israel’, including those wholly or partially produced in settlements. Some companies operating in settlements have been accused of hiding the original place of production of their products. This situation poses an issue of traceability of products for other States wishing to align themselves with their international and regional obligations”.*¹⁸⁸

As verifications by the authorities of the importing States are not systematic, a large part of the products from the settlements still benefit from preferential treatment. This was emphasised in a resolution adopted by the European Parliament in February 2012:

*“[...] whereas it is the customs authorities of the individual EU Member States which are responsible for checking the validity of claims regarding the preferential origin of products imported into the EU; whereas the customs authorities, despite their best endeavours, cannot possibly check and control each and every proof-of-origin document and every consignment preferentially imported from Israel into the EU [...]”.*¹⁸⁹

Because this situation has not changed, the European Parliament “is seriously concerned about the practices employed by certain companies which persist in exploiting the terms of the EU-Israel Association Agreement by exporting goods produced in the Occupied Territories”. The Parliament noted that: “[...] the EU and EFTA member states each have a Technical Arrangement with Israel which deals with the issue of territoriality and which, to a limited extent, offers some solutions”, but “takes the view that the solutions offered by these Technical Arrangements are not satisfactory” and further “considers that a simple, efficient and reliable mechanism to replace the existing technical arrangement should be agreed with Israel”. Lastly, the European Parliament:

“[...] urges the Member States to ensure that their customs authorities effectively apply the Technical Arrangement and the spirit of the judgment of the European Court of Justice to Israeli cumulated products entering the EU under the diagonal cumulation provided for in the regional Convention; believes that the Commission should take the lead in coordinating such EU-wide efforts and should also take steps to create awareness among the customs authorities of the individual EU Member States as to how the Technical Arrangement should be applied to Israeli cumulated products; believes that the EU customs authorities should scrutinize the application of the Technical Arrangement more effectively in order to prevent abuse of the system of preferences”.

In August 2012, another “Notice to Importers” was published to add the following information to the 2005 Notice:

¹⁸⁸ UN Human Rights Council, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem* 7 February 2013, A/HRC/22/63, para 99.

¹⁸⁹ European Parliament resolution on the proposal for a Council decision on the conclusion of the regional Convention on pan-Euro-Mediterranean preferential rules of origin, 16 February 2012.

*“While the procedures in place allow for an adequate application of the arrangement, the way it is implemented in the EU should be streamlined in the light of experience. For that purpose, importers are informed that the up-to-date list of non-eligible locations and their postal codes is from now on available on the Commission’s thematic website on the customs union. It may also be obtained from the customs authorities of the EU Member States or accessed through the latter’s websites”.*¹⁹⁰

This revised notice is useful in providing a list of Israeli areas that are not eligible for preferential treatment,¹⁹¹ and should provide more information for the importers and encourage them not to apply for a preferential tariff for products originating in the settlements. However, since no changes will be made to the customs verifications mechanisms, it is very doubtful that this addition will meet the wishes of the European Parliament and change the attitude of Israel, which criticised the list saying that it was not up to the EU to determine which locations and which products are to be considered as originating, or not, in Israeli territory.¹⁹²

More information can be obtained by analysing the position of European law on the status of products from the Israeli settlements.

First, whether products from the settlements are to benefit from preferential treatment is not a question considered in European law except in the formal rules of association agreements; no consideration is given to the illegality of settlements under international law. The European Court of Justice, nor the advocate general, nor the European authorities mention the illegality of the situation in which products are produced in the settlements in order to justify the exclusion of these products from the benefits of preferential treatment. The Court only bases its decision on the territorial scope criterion since Israeli customs do not have the authority to issue certificates of origin for products produced in the West Bank, a territory that falls under the Association Agreement signed with the PLO. This line of reasoning does not satisfy the requirements of the obligation of non-recognition and non-assistance, or the obligation to ensure respect for international humanitarian law and the right to self-determination with regard to Israel.¹⁹³ The Court’s decision and the position of the European authorities are tantamount, theoretically, to a denial of the benefits of preferential treatment to products made in the settlements, but does not prohibit their sale within the European Union, although they are clearly identified as products made in the settlements.

¹⁹⁰ Notice to Importers - Imports from Israel into the EU (2012/C 232/03), OJ C 232, 3 August 2012, page 5. See also Aprove and Euro-Mediterranean Human Rights Network, “EU-Israel Relations: Promoting and Ensuring Respect for International Law”, *supra* note 186, pages 44-45.

¹⁹¹ Available at [Http://ec.europa.eu/taxation_customs/customs/technical-arrangement_postal-codes.pdf](http://ec.europa.eu/taxation_customs/customs/technical-arrangement_postal-codes.pdf).

¹⁹² Israel Ministry of Foreign Affairs, ‘Israel’s reaction to EU customs list of non-eligible locations’, 14 August 2012, available at <http://mfa.gov.il>.

¹⁹³ See Eric de Brabandere and Larissa van den Herik, *supra* note 84, page 157.

Clearly, European authorities and its member states are showing a flagrant lack of diligence by only applying the provisions of the Association Agreement. The European Parliament noted that the provisions on the rule of origin still do not enable customs authorities in European countries to reliably distinguish between products made in Israel and products made in the settlements.

Last, we see that EU Member States and European authorities knowingly allow products from the settlements to be sold in the EU. They conclude that the effect of the origin criterion is to refuse preferential treatment and not to prevent the importation of these products into the EU under normal tariff conditions. This is what can be inferred, especially from the “Notice to Importers” stating that “putting the goods [that originate in the Jewish settlements of the West Bank, Gaza Strip, East Jerusalem and the Golan Heights] in free circulation may give rise to a customs debt” that has to be paid by the EU community importing operators.¹⁹⁴ This is also clearly brought out in an explanation given by the Commission in a ‘Frequently Asked Questions’ on the application of the Guidelines:

“Question: I produce wine in a West Bank settlement. Will these guidelines affect my exports to the European market?”

*Answer: No. The guidelines refer only to EU-funded grants, prizes and financial instruments such as loans. They do not refer to exports to the European Union. There is no limitation of exports to the European Union of products produced in the settlements. According to the Association Agreement, these products however do not benefit from exemptions from customs duties”.*¹⁹⁵

Since the Israeli settlement policy has been pursued actively during the last few years, the EU States are considering the introduction of a ‘labelling’ policy for products from the settlements. But the following section explains that this would not be sufficient to meet States’ obligations under international law because of the serious breaches of international law connected to the occupation of Palestinian territory.

¹⁹⁴ Notice to Importers — Imports from Israel into the EU (2001/C 328/04 OJ C 328, 23 November 2001, page 6.

¹⁹⁵ European Commission, *Frequently asked questions on: Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards*, 19 July 2013, emphasis added.

B. The European labelling project for products from the settlements: not sufficient to meet the international obligation of non-assistance

According to several concurring sources, the European Commission intends to prepare guidelines that may include the 'labelling' of Israeli products from the settlements¹⁹⁶, drawing on initiatives taken by some states in this field, including the UK¹⁹⁷. In reply to a question from Parliament on this issue, Catherine Ashton said:

*"The Commission considers that existing EU legislation on these matters is sufficiently clear and precise. However, while implementation of EU legislation on origin labelling is the responsibility of member states' competent authorities, the Commission has urged all member states to pay close attention to the significance of the full and effective enforcement of EU labelling legislation in the case of Israel and the need for enhanced efforts on the part of competent authorities to that end. Recent initiatives by the UK and Denmark are fully in line with EU legislation. The Commission is committed to work on preparing EU-wide guidelines that would strengthen the coherent implementation of relevant EU legislation and its consistency with EU foreign policy".*¹⁹⁸

At present, the European does not have a general regulation that makes it compulsory to indicate the country of origin for products imported into the EU. Earlier plans along these lines seem to be at a standstill¹⁹⁹, although there are rules that arise from regulations on specific products and relate to consumer protection.

The EU Regulation of 25 October 2011 on food information for consumers²⁰⁰ makes information on the country of origin or place of provenance obligatory for certain categories of meat or "where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance".²⁰¹

¹⁹⁶ See Haaretz, 'Catherine Ashton: Israeli settlement products to be labeled in EU by end of 2013', 23 July 2013, available at <http://www.haaretz.com/news/diplomacy-defense/.premium-1.537315>.

¹⁹⁷ See Department for Environment, Food and Rural Affairs, "Technical advice: labelling of produce grown in the Occupied Palestinian Territories", 10 December 2009, <http://archive.defra.gov.uk/foodfarm/food/pdf/labelling-palestine.pdf>.

¹⁹⁸ Answer given by High Representative/Vice-President Ashton on behalf of the Commission, 19 June 2013, E-003668-13.

¹⁹⁹ See European Parliament Resolution of 17 January 2013 on the indication of country of origin for certain products entering the EU from third countries, 2012/2923(RSP).

²⁰⁰ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and the Council and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, OJ L 304 of 22 November 2011 page 18.

²⁰¹ Article 26 2a of the Regulation.

The Regulation also gives the Commission, in 2014, the possibility to extend the obligation to indicate national origin to other foodstuffs. Other products such as honey²⁰², fruit and vegetables²⁰³, fish²⁰⁴, beef products²⁰⁵ and olive oil²⁰⁶ are covered by special regulations which require the national origin or the place of production to be indicated, in one form or another. More generally, the 11 May 2005 Directive on unfair business-to-consumer commercial practices²⁰⁷ prohibits misleading commercial practices such as false information, in particular on the “geographical origin” of a product, if this information “is likely to cause him [the consumer] to take a transactional decision that he would not have taken otherwise”.

The European Commission’s plan to require adequate labelling of products originating from the settlements seems to stem exclusively from the implementation of these regulations in the areas of consumer protection and information. In this vein, the indication of “Israel” as country of provenance or manufacture for products originating in the settlements may thus be considered as a violation of the requirements set out in this legislation.²⁰⁸ From the standpoint of the European authorities, the only requirement is to ensure the proper application of the European standards and not to take into consideration international obligations related to serious breaches of international law arising from the settlements, discussed herein.

As mentioned above, the obligations to ‘ensure respect’ and ‘non-assistance’ require a ban on the importation of products from the settlements into the EU and not merely to indicate their precise place of origin on a label, which would be totally insufficient for this purpose. The obligation to correctly label products from Israeli settlements reflects the position taken by the EU and its member States, with full knowledge of the facts, to authorise the importation and commercialisation of these products on their markets. The product origin

²⁰² Council Directive 2001/110/EC of 20 December 2001 relating to honey, *OJ* L 10 of 12 January 2002, page 47, article 2.

²⁰³ Commission Regulation (EC) No. 1580/2007 of 21 December 2007 on the application of regulations (EC) no. 2200/96, (EC) no 2201/96 and (EC) no 1182/2007 on fruit and vegetables *OJ* no. L 350 of 31 December 2007, p. 1, article 6 para 3.

²⁰⁴ Council Regulation (EC) no. 104/2000 of 17 December 1999 on the common organisation of the markets in fishery and aquaculture products *OJ* no. L 17 of 21 January 2000 p. 22, article 4 para 1.

²⁰⁵ Regulation (EC) no. 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products *OJ* no. L 204 of 11 August 2000 page 1, article 4 para 1, articles 13 to 15.

²⁰⁶ Commission Regulation (EC) no. 1019/2002 of 13 June 2002 on marketing standards for olive oil *OJ*. L 17 of 14 June 2002 p. 27,

²⁰⁷ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 on unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC and Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and the Regulation (EC) no. 2006/2004 of the European Parliament and of the Council *OJ* no. L 149 of 11 June 2005 page 22.

²⁰⁸ See FIDH and coalition of NGOs, ‘Trading Away Peace: How Europe helps sustain illegal Israeli settlements’, *supra* note 140, pages 27-28.

issue thus becomes a mere question of providing information to the consumer, who is then free to choose, whether to buy or not to buy.

An EU decision to authorise the importation and commercialisation of products intrinsically connected to serious breaches of international law would be substantiated by adequate labelling, and would constitute a breach of the obligation not to provide assistance for maintaining an illegal situation. Consequently, the introduction of guidelines for labelling which indicate the precise origin of products from the settlements cannot be considered as a measure that ensures full compliance with the non-assistance obligation.

C. Implementation of the measure prohibiting the importation and commercialisation of products originating in the settlements with regard to European and World Trade Organisation (WTO) law

A ban on importing and commercialising products originating from the settlements is a means to fulfil the obligations of non-recognition and non-assistance, as explained above. Since these obligations are connected to respect for peremptory and erga omnes international norms breached by Israel, third States must take appropriate measure to comply with them.

First, the adoption of measures banning products from the settlements does not create any problem with regard to international trade regulations. At present, there is no specific rule which covers trade in products from the settlements between the EU and Israel. As previously established, this type of trade does not fall within the scope of the EU-Israel Association Agreement and is not affected by the free trade obligations in the Agreement. Furthermore, WTO regulations, especially the ones in the General Agreement on Tariffs and Trade (GATT) do not apply.²⁰⁹

Article XI of the Agreement, which provides for the elimination of quantitative restrictions, only applies “to the importation of any product of the territory of any other contracting party”. For the import restrictions ban to apply, the products must come from the territory of a state party to GATT. The EU does not consider the products from the settlements to originate in Israel²¹⁰, which means that the GATT does not apply to these products, and no prohibition

²⁰⁹ See Monique Chemillier-Gendreau, *supra* note 78, page 52; Al-Haq, ‘Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law’, *supra* note 13, pages 36-37.

²¹⁰ See also WTO Agreement on Rules of Origin, 1994.

measures can be applied.²¹¹ Article XXVI of the Agreement extends the notion of the territory of a State to include “other territories for which it has international responsibility”, but this does not cover the occupied Palestinian territory because Israel is an occupying power, and is not entitled by law to represent the territories internationally, according to this clause.²¹²

The European regulation on the common rules for imports²¹³ establishes the principle that products from third States may be “freely imported into the Community and [...] shall not be subject to any quantitative restrictions”. However, it is very doubtful that this clause can be applied to products from the settlements since they are not considered as originating in a “third State”, i.e. Israel. Hypothetically, this general rule on unimpeded importation needs to be interpreted and applied in compliance with the international obligations of the EU and its member states, especially the obligations of non-assistance and non-recognition. The Treaty on the European Union states that:

*“The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”.*²¹⁴

Consequently, the principle of free importation can only be applied under the condition that it is not otherwise prohibited by international law, which is the case here. Furthermore, the European Regulation maintains the possibility for member States to prohibit imports for various reasons, including “public morality” and “public security”.²¹⁵

On the question of what legal implications of EU law could be derived from a member State's policy to refuse access to its markets for goods produced in illegal Israeli settlements²¹⁶, the Commission replied:

“In the light of Article 207 of the Treaty on the Functioning of the European Union, and of Regulation 260/2009, measures in the field of trade policy are normally adopted at EU level. A Member State cannot adopt import measures unless specifically authorised in an act of the Union or, unless, on the basis of Regulation 260/2009 it can justify its action on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or

²¹¹ See Tom Moerenhout, *supra* note 147, pages 362 and ff.

²¹² *Id.* pages 365 and ff.

²¹³ Council Regulation (EC) no. 260/2009 of 26 February 2009 on the common rules for imports, *OJ*, no. L 84 of 31 March 2009, page 1, article 1 paras 1 and 2.

²¹⁴ Article 21 of the Treaty on the European Union. See also article 3.5.

²¹⁵ Article 24 para 2 a) of the Regulation.

²¹⁶ Question from Joe Higgins with request for written answer from the Commission, 13 January 2011, E-000047/11, *OJ C* 279 E of 23 September 2011.

*archaeological value, or the protection of industrial and commercial property, and in doing so it does not infringe on EC law”.*²¹⁷

Once again, the reply given by the Commission only considers European law and does not give any attention to general international law. Although the reply is not very specific, it suggests that States are authorised to adopt a national prohibition measure on the grounds of protecting public morality or public security. These concepts might be used to target the illegality of producing goods in the Israeli settlements.²¹⁸

With regard to the more general prohibition measure that may be adopted by the EU, which in principle has the sole responsibility for the external trade policy,²¹⁹ the Treaty on the Functioning of the European Union allows for the adoption of “restrictive measures” that provide “for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries”, by the Council, acting by a qualified majority.²²⁰ Remember that, in this regard, the “European Union Guidelines on promoting compliance with International Humanitarian Law” include the adoption of “restrictive measures” against a third State as “an effective means of promoting compliance with IHL”.²²¹ Consequently, in its economic relations with Israel and considering the illegal situation stemming from the creation of the settlements, there is no institutional barrier to a European decision to ban the commercialisation of products originating in the settlements. A decision of this sort, as established above, would merely be the fulfilment of the international obligations of the EU and its member states.

In fact, European law has already created a precedent by prohibiting the commerce of products in European territory on the grounds of their illegal production conditions. The Regulation of 20 October 2010, laying down the obligations of operators who place timber and timber products on the market,²²² states that “the placing on the market of illegally harvested timber or timber products derived from such timber shall be prohibited.”²²³ The forbidden timber is timber “illegally harvested [...] in contravention of the applicable

²¹⁷ Joint answer given by Mr Karel De Gucht on behalf of the Commission, 7 February 2011, *OJ C 279 E* of 23 September 2011.

²¹⁸ See James Crawford *supra* note 24, pp. 53-54 ; Al-Haq, ‘Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law’, *supra* note 13, pp. 33-35.

²¹⁹ Article 207 of the Treaty on the Functioning of the European Union.

²²⁰ Article 215, para 1 of the Treaty on the Functioning of the European Union.

²²¹ Updated European Union Guidelines on promoting compliance with International Humanitarian Law, mentioned above, para 16 d).

²²² EU Regulation no. 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, *OJ, L 295* of 12 November 2010, page 23.

²²³ *Id.*, Article 4 para 1 of the Regulation.

legislation in the country of harvest”.²²⁴ The Regulation establishes the obligation of traceability, “due diligence systems”²²⁵ composed of measures and procedures to minimise the risk of having illegal products placed on the internal market,²²⁶ authorities and control mechanisms to ensure proper application of the Regulation,²²⁷ and a system of penalties.²²⁸ This system can easily be transposed for application to products from the settlements where the conditions of harvesting and production can be said to breach applicable legal norms, in other words, international humanitarian law, human rights, permanent sovereignty over natural resources and the right to self-determination. The Regulation on the timber trade is also an example of the feasibility within European law, to adopt measures to restrict the importation and commercialisation of products when they are of illegal origin, despite the free trade principle normally applied.

²²⁴ *Id.*, Article 2 g) of the Regulation.

²²⁵ *Id.*, Article 6 of the Regulation.

²²⁶ *Id.* Whereas 16 of the Regulation.

²²⁷ *Id.* Articles 7 to 11 of the Regulation.

²²⁸ *Id.* Article 19 of the Regulation.

V. The obligation of States to adopt measures designed to keep companies from carrying out economic activities that could contribute to maintaining settlements

Various international reports indicate that transnational, especially European companies are expanding their economic activities in the occupied Palestinian territory as part of, or for the benefit of settlements, or maintain commercial relations with Israeli companies working in the settlements. In a report submitted in 2012, the UN Special Rapporteur noted that there was “[...] a wide range of companies that have linked their business operations to Israel’s settlements in the occupied Palestinian territory”.²²⁹ The report makes mention of “a small portion” of these that includes several European companies, i.e., Volvo, Dexia, Veolia, G4S, Riwal Holding, Mul-T-Lock/Assa Abloy.²³⁰

Several aspects of the settlement policy constitute war crimes²³¹ – especially the prohibited transfer of parts of its own civilian population²³² and the illegal destruction and appropriation of property²³³ – and the strong involvement of companies in activities connected to the settlements could, in certain cases, be analysed as complicity with war crimes²³⁴. In such an event, rules of procedure for legal proceedings before the national courts vary according to the national legislation.²³⁵

In addition, in 2011 the United Nations adopted Guiding Principles on Business and Human Rights which emphasize the responsibility of businesses to respect these rights²³⁶. These guiding principles specify that “the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context,

²²⁹ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/67/379, *supra* note 103, para 37, page 12.

²³⁰ *Supra* note 103, pages 13-25. See also FIDH and coalition of NGOs, ‘Trading Away Peace: How Europe helps sustain illegal Israeli settlements’, *supra* note 140, page 25.

²³¹ See Michael Lynk, ‘The Wall and the Settlements’, *in* Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory — The role of Governments, intergovernmental organizations and civil society, *supra* note 60, page 56.

²³² Article 8 para 2 b viii of the Statute of the International Criminal Court.

²³³ Article 8 para 2 a iv of the Statute of the International Criminal Court.

²³⁴ Eric David, ‘La responsabilité des entreprises privées qui aident Israël à violer le droit international’, *Revue belge de droit international*, 2012/1, pages 131-133; Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *supra* note 103, paras 33-34, page 12.

²³⁵ See Crawford, *supra* note 23, pages 41-42; Michael Lynk, ‘The Wall and the Settlements’, *supra* note 231, pages 57-59; Eric de Brabandere and Larissa van den Herik, *supra* note 84, pages 173 and ff.

²³⁶ United Nations, *Guiding Principles on Business and Human Rights*, 2011, available at <http://www.business-humanrights.org>. See Rachel Davis, ‘The UN Guiding Principles on Business and Human Rights and Conflict-affected Areas: State Obligations and Business Responsibilities’, *ICRC Review*, 2012, vol. 94, n° 887, pages 961 and ff.

ownership and structure”.²³⁷ This responsibility obliges the enterprises to “avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur”.²³⁸

On the other hand, States must protect against human rights abuses by third parties within their territory and/or jurisdiction.²³⁹ The obligation to protect “requires taking appropriate steps to prevent, investigate, punish and redress such abuses through effective policies, legislation, regulations and adjudication”.²⁴⁰ The State’s responsibility is even greater for business activities in zones of armed conflict. The Guiding Principles specifies that States should help ensure that business enterprises operating in those contexts are not involved with such abuses by taking measures that include the following:

“(a) engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

(b) providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

(c) denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

*(d) ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses”.*²⁴¹

The same type of principles are found in the “OECD Guidelines for Multinational Enterprises”²⁴² that were adopted by all member states. The OECD Guidelines provide that “States have the duty to protect human rights and that enterprises, regardless of their size, sector, operational context, ownership and structure, should respect human rights wherever they operate”.²⁴³ The European Commission has also published practical human rights guidance for enterprises in several business sectors.²⁴⁴

These obligations and recommendations should be compared with the States’ obligation “to ensure respect” of international humanitarian law, which implies that “they should do everything in their power to ensure that the humanitarian principles underpinning the

²³⁷ Principle no. 14.

²³⁸ Principle no. 13 a.

²³⁹ Principle no. 1. See Rachel Davis, *supra* note 236, pages 964-969.

²⁴⁰ Principle no. 1.

²⁴¹ Principle no. 7.

²⁴² 2011 Update of the OECD Guidelines for Multinational Enterprises 2011, available at <http://www.oecd.org/fr/daf/inv/mne/principesdirecteursdelocdealintentiondesentreprisesmultinationales.htm>.

²⁴³ *Id.* page 38, para 37.

²⁴⁴ European Commission, ‘Business and Human Rights’, http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm.

Conventions are respected universally”.²⁴⁵ Professor Sassoli stressed that “the obligation to ‘ensure respect’ laid down in article 1 common to the Conventions could also be seen as establishing a standard of due diligence with regard to private players if the latter find themselves under the jurisdiction of a State, or even with regard to breaches of international humanitarian law by States and non-State actors abroad which could be influenced by a State”.²⁴⁶ In their 2012 report on the situation in Jerusalem, the heads of mission of the EU Member States recommended to “prevent, discourage and raise awareness about problematic implications of financial transactions, including foreign direct investments, from within the EU in support of settlement activities, infrastructures and services”.²⁴⁷ In connection with the obligation to ensure respect for humanitarian law and to seek to eliminate obstacles to the right of self-determination, the State has the duty to act to dissuade business companies from carrying out activities that violate these principles.²⁴⁸

The obligation to “ensure respect” is connected to Norway’s adoption of guidelines on the exclusion of business companies from the government pension fund. These guidelines were adopted in 2010 in application of the law on the Pension Funds and provide for the exclusion of all companies that are “responsible for serious violations of the rights of individuals in situations of war or conflict” and consequently could involve the Fund in contributing to such violations²⁴⁹. As mentioned above, these guidelines have led to the exclusion of three Israeli companies that participate in the construction of the settlements and the wall in occupied Palestinian territory. Other foreign companies have been excluded because of their participation in human rights abuses or in the manufacture of weapons that violate international humanitarian law.²⁵⁰

In 2000, the United Nations adopted the ‘UN Global Compact’ which business companies are free to join in order to align their operations and strategies with the ten universally-accepted

²⁴⁵ Jean S. Pictet (ed.), ‘Commentary to article 1 of the Fourth Geneva Convention’, (1956), available at <http://www.icrc.org>.

²⁴⁶ Marco Sassoli, *supra* note 49, page 411.

²⁴⁷ *EU Heads of Mission Jerusalem Report 2012*, January 2013, page 12, available at http://www.eccpalestine.org/wp-content/uploads/2013/02/EU_Homs_Jerusalem_Report_2012-1.pdf.

²⁴⁸ According to J. Crawford, “a State does not aid or assist unlawful conduct by merely permitting corporations within its jurisdiction to trade commercially with Israel” (Abovementioned report, page 37, para 91). For the purposes of article 16 of the articles on the International Responsibility of States (complicity) to which he refers, this statement is accurate but it does not consider the responsibility of the State towards its obligation to ensure respect for humanitarian law, and does not consider the practices examined below.

²⁴⁹ Ministry of Finance, ‘Guidelines for the observation and exclusion of companies from the Government Pension Fund Global’s investment universe’, 1 March 2010, available at http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277.

²⁵⁰ This applies particularly to Wal-Mart, Textron, General Dynamics Corporation, Dong Feng Motorgroup, ... : http://www.regjeringen.no/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/selskaper-som-er-utelukket-fra-fondets-i.html?id=447122.

principles, especially in the area of human rights²⁵¹. It was noteworthy that the New Zealand Superannuation Fund used the Global Compact as the basis for its decision to exclude three companies that were participating in building the settlements and the wall:

*“The Fund also viewed the companies’ activities to be inconsistent with the UN Global Compact, the key benchmark against which the Fund measures corporate behaviour”.*²⁵²

In view of these principles, the EU Member States will need to adopt legislation and executive measures to guarantee that European companies do not maintain economic relationships with Israeli companies or settlements that could contribute to maintaining the illegal situation stemming from the settlement policy.²⁵³ European states tend to dissuade national companies to becoming involved in activities carried out in the occupied Palestinian territory to the benefit of the settlements. The Netherlands, for instance, warned Royal HaskoningDHV that its participation in a wastewater treatment project in East Jerusalem, that would benefit the settlements, would contribute to “violating international law” and could cause legal problems.²⁵⁴ The result was that Royal HaskoningDHV terminated its participation in the project, stating that its decision was based on its concern for abiding by international law:

“Royal HaskoningDHV has today advised the client it has decided to terminate the contract for the Kidron wastewater treatment plant project. The project is in the early stages of the preliminary design phase.

*Royal HaskoningDHV carries out its work with the highest regard for integrity and in compliance with international laws and regulations. In the course of the project, and after due consultation with various stakeholders, the company came to understand that future involvement in the project could be in violation of international law. This has led to the decision of Royal HaskoningDHV to terminate its involvement in the project”.*²⁵⁵

Similarly, after a new intervention of the Dutch government, the company Vitens chose to cancel its collaboration with Mekorot, the Israeli water company, because of the activities of

²⁵¹ The Global Compact, United Nations, 2000, available at <http://www.unglobalcompact.org>

²⁵² “New Zealand Superannuation Fund excludes three companies on responsible investment grounds”, 12 December 2012, available at <http://www.nzsuperfund.co.nz/news.asp?pageID=2145831983&RefID=2141742545>.

²⁵³ See Eric David, *La responsabilité des entreprises privées qui aident Israël à violer le droit international supra* note 234, pages 123 and ff., more specifically pages 131-133 concerning assistance in maintaining the settlements and page 135 and ff on types of responsibility; FIDH and coalition of NGOs, ‘Trading Away Peace: How Europe helps sustain illegal Israeli settlements’, *supra* note 140, page 28.

²⁵⁴ Haaretz.com, ‘Dutch government urges local firm to cancel East Jerusalem project’, 26 August 2013; Royal Haskoning DHV, “Wastewater treatment in East Jerusalem”, 27 August 2013, available at <http://www.royalhaskoningdhv.com/en-gb/news/wastewater-treatment-in-east-jerusalem/665>.

²⁵⁵ Royal HaskoningDHV, *Royal HaskoningDHV terminates its involvement in the wastewater treatment plant in East Jerusalem*, 6 September 2013, available at <http://www.royalhaskoningdhv.com/en-gb/news/royal-haskoningdhv-terminates-its-involvement-in-the-wastewater-treatment-plant-in-east-jerusalem/727>.

this company in the settlements²⁵⁶ : “Vitens attaches great importance to integrity and abides by national and international law and regulations”²⁵⁷ .

German Transport Minister intervened with the state railway company Deutsche Bahn to discourage continued participation in Israeli project railway Jerusalem-Tel Aviv, because the line will pass in part through the occupied Palestinian territories, causing possible violations of international law²⁵⁸ . As a result, Deutsche Bahn decided to withdraw from the project.²⁵⁹

Another example is the Roskilde University (DTU) of Denmark which was carrying out a research project with the Ariel University, located in an Israeli settlement.²⁶⁰ After hearing about the implications of the project, the president of the university decided to end the relationship:

*“We have ended the cooperation immediately after we were made aware of it. The money that was devoted to analyses in the laboratories of Ariel University has been suspended and will be paid back to the fund that supplied the finances. [...] If you fund analyses in laboratories at Ariel University, it can be seen as supporting a settlement, something we will not”.*²⁶¹

This decision was approved fully by the Danish Minister of Foreign Affairs:

*“We do not want Danish scientific institutions participating in activities that may help to maintain the illegal settlements. If there has been any doubt about our position on this matter, the case of DTU is a good opportunity to reiterate”.*²⁶²

Important lessons can be learned from the Riwal/Lima Holding case in the Netherlands²⁶³ . In 2010, Al-Haq, a Palestinian association, filed a criminal complaint against the company Riwal and its branch, Lima Holding B.V. for their participation in the construction of the separation wall and the settlements in the West Bank, in particular by supplying equipment. After three years of investigation, the Public Prosecutor finally decided to dismiss the case. The justification for this decision was expressed in a letter to the plaintiff’s association in May

²⁵⁶ Haaretz, « Dutch water giant severs ties with Israeli water company due to settlements », 10 december 2013.

²⁵⁷ Vitens, « Vitens beëindigt samenwerking Mekorot », 10 décembre 2013, <http://www.vitens.nl/overvitens/organisatie/nieuws/Paginas/Vitens-be%C3%ABindigt-samenwerking-Mekorot.aspx>.

²⁵⁸ “Letter from the German Minister of Transportation, Dr. Peter Ramsauer, to the CEO of the Deutsche Bahn AG, Dr. Rüdiger Grube concerning the engagement of DB International GmbH in Israel”, 16 February 2010, http://www.bds-kampagne.de/assets/337/110216_FM%20Ramsauer%20to%20DB_Grube_DE_EN.pdf

²⁵⁹ Haaretz, “Deutsche Bahn pulls out of TA-Jerusalem railroad”, 12 may 2011.

²⁶⁰ Danwatch, “Danish universities work with illegal settlements”, 11 November 2012, available at <http://www.danwatch.dk/en/articles/danish-universities-work-illegal-settlements/225>

²⁶¹ Cited in *id.*

²⁶² Cited in *id.*

²⁶³ For background information, see Eric de Brabandere and Larissa van den Herik, *supra* note 84, pages 174-175.

2013²⁶⁴ and is of great interest. The Public Prosecutor explained that the case had been dismissed not for reasons of principle but because, in this case, participation was rather limited, the company in the meantime had ended all activities connected to the construction of the wall and furthermore, the compilation of additional evidence would be difficult since the State of Israel was not cooperating and resources were scarce. Speaking on the basis of the case, the Public Prosecutor explained that substantial participation in the settlements' activities would be considered complicity with a war crime:

"The construction a the barrier and/or a settlement may be considered to be a violation of International Humanitarian Law, among which the Geneva Convention of 1949, if, as in the aforementioned case, this construction took place in occupied territory. This finding is supported by, inter alia, the Advisory Opinion of the International Court of Justice of 9 July 2004, as adopted by the General Assembly of the United Nations. Participation in a violation of International Humanitarian Law by Dutch persons and legal entities, is a crime proscribed in article 5 of the International Crimes Act. When making considerations with regard to a settlement according to criminal law, the Public Prosecution Service considered in the first place that a violation of article 5 of the International Crimes Act is a serious criminal offence. Persons and legal entities within the Dutch jurisdiction are required not in any way to be involved in, or contribute to, possible violations of the Geneva Conventions or other rules of International Humanitarian Law. They are also required to take decisions of authoritative international bodies and judicial institutions such as the International Court of Justice about the status, legitimacy and consequences of the barrier extremely serious".²⁶⁵

The Public Prosecutor also reported that the Dutch Ministry of Foreign Affairs had talked to Lima Holding about ending its participation in the construction of the wall:

"The Minister of Foreign Affairs reacted by pointing out to the managing directors of Lima Holding B.V., that the barrier in occupied territory is unlawful. Furthermore, he insisted that the company would cease any involvement in the construction of the barrier in occupied territory and that it would avoid any such involvement in the future".²⁶⁶

A rather similar question was brought up in a case filed with the Quebec courts, but citing civil liability (article 1457 of the Civil Code of Quebec²⁶⁷). The City Council of Bil'in, a village in the West Bank, and one of its residents filed a civil liability suit against Greenpark, a Canadian company, for its participation in building and selling homes in the settlements located on village lands. The Quebec Supreme Court finally declared itself incompetent for procedural reasons (application of the forum non conveniens principle²⁶⁸) but nonetheless

²⁶⁴ Letter of the Bureau of Chief Prosecutor, 13 May 2013, available at http://www.alhaq.org/images/stories/Brief_Landelijk_Parket_13-05-2013_ENG__a_Sj_crona_Van_Stigt_Advocaten.pdf.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Article 1457 of the Civil Code of Quebec: "Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another."

²⁶⁸ For a critical analysis of the decision that led to rejection of competence, see James Yap, *Bil'in and Yassin v. Green Park International Ltd.: Quebec Court Acknowledges War Crimes as Potential Basis for Civil Liability, Claim Ultimately Fails on Forum Non Conveniens*, 14 October 2009, available at

reiterated the principle of corporate responsibility for contributions to activities involving settlements in occupied Palestinian territory:

“In theory, a person would therefore commit a civil fault pursuant to art. 1457 C.C.Q. by knowingly participating in a foreign country in the unlawful transfer by an occupying power of a portion of its own civilian population into the territory it occupies, in violation of an international instrument which the occupying power has ratified. Such a person would thus be knowingly assisting the occupying power in the violation of the latter’s obligations and would also become a party to a war crime, thereby violating an elementary norm of prudence.

[...]

On this basis, as already noted, the Defendants would be under the general obligation not to prejudice the Plaintiffs by favouring even indirectly a breach by Israel of its undertakings as a High Contracting Party pursuant to the Fourth Geneva Convention. Knowingly participating in such breach would constitute a civil fault, as would an intentional participation to a war crime.

[...]

*The Defendants’ contention that the rights created by the Fourth Geneva Convention inure to the exclusive benefit of signatory states and that only states and their agents are subject to its obligations are therefore not decisive: if the Plaintiffs’ allegations are true, a trial judge could find that the Corporations are at fault for knowingly participating in Israel’s alleged illegal policy”.*²⁶⁹

After exhausting all national avenues for recourse and appealing to the Canadian Supreme Court, the plaintiffs submitted a complaint against Canada to the UN Human Rights Committee, which has jurisdiction over breaches of the Covenant on Civil and Political Rights. The complaint reproaches Canada for not having fulfilled its “extra-territorial” obligation to “ensure respect” for the Covenant’s human rights provisions by companies having the same nationality and falling under its jurisdiction²⁷⁰. These rights include the prohibition on cruel, inhuman or degrading treatment (article 7), the right to liberty of movement (article 12), the right to private and family life (article 17) and the rights of minorities (article 27). The motion states that Canada has not obtained an effective remedy to violations of these rights (article 2 paragraph 3 of the Covenant). The complaint reads:

“Canada has violated and is in violation of its extra-territorial obligation to ensure articles 2, 12, 17, and 27 of the International Covenant on Civil and Political Rights for failing to regulate the activities of Green Park International, Inc. and Green Mount International, Inc., Canadian

<http://www.thecourt.ca/2009/10/14/bil%E2%80%99in-and-yassin-v-green-park-international-ltd-quebec-court-acknowledges-war-crimes-as-potential-basis-for-civil-liability-claim-ultimately-fails-on-forum-non-conveniens/>.

²⁶⁹ Superior Court of Québec, *Bil’in (Village Council) v. Green Park International Ltd.*, 18 September 2009, 2009 QCCS 4151, available at <http://www.jugements.qc.ca>, paragraphs 176, 188 and 190. The principles put forward by the Quebec court directly contradict the reasons given by the Versailles Court of Appeal for rejecting legal proceedings against two French companies, Véolia and Alstom, for their participation in the construction of a tramway connecting East Jerusalem to certain settlements (*AFPS and PLO v/ Véolia and Alstom*, order of 22 March 2013, decision available at <http://www.france-palestine.org/Tramway-colonial-un-jugement>.) In this case, the Versailles Court of Appeal referred mainly to the fact that, in his opinion, the Fourth Geneva Convention does not grant rights to individuals and does not create obligations for private persons, especially in private companies. For a critical analysis of this decision, see Eric David, ‘L’affaire du tramway de Jérusalem (Alstom/Veolia)’, *Juriste International*, 2013/3, pages 24-27, available at <http://www.uianet.org/fr/documentation/juriste>.

²⁷⁰ Individual complaint to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, *Bil’in & Yassin v. Canada*, 28 February 2013, available at <http://globalinitiative-escr.org/wp-content/uploads/2013/03/130228-NRC-Individual-Complaint-ICCPR-Canada-ETOs-FINAL.pdf>.

transnational corporations, so as to prevent human rights violations in the occupied Palestinian territory".²⁷¹

The complaint is based mainly on a recommendation published by the Human Rights Committee in 2012 that orders Germany to ensure that German companies do not violate human rights:

"While welcoming measures taken by the State party to provide remedies against German companies acting abroad allegedly in contravention of relevant human rights standards, the Committee is concerned that such remedies may not be sufficient in all cases (article 2, para 2).

*The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.*²⁷²

The Committee's decision in *Bill'in v/ Canada* will be very important in determining the extent of the State's obligations with regard to activities of companies of their nationality.

It is also important to mention that the British Government recently adopted an "Action Plan"²⁷³ designed to implement the UN's Guiding Principles on Business and Human Rights. This document seeks to "incentivise businesses to meet their responsibility to respect human rights throughout their operations both at home and abroad", especially to ensure "access to effective remedy for victims of human rights abuse involving business enterprises within UK jurisdiction".

After the Plan was adopted, the government has revised its directives to businesses on the issue of investments in Israel and in the occupied Palestinian territories. These directives now states:

"The UK has a clear position on Israeli settlements: The West Bank, including East Jerusalem, Gaza and the Golan Heights are territories which have been occupied by Israel since 1967. Settlements are illegal under international law, constitute an obstacle to peace and threaten to make a two-state solution to the Israeli-Palestinian conflict impossible. We will not recognise any changes to the pre-1967 borders, including with regard to Jerusalem, other than those agreed by the parties.

²⁷¹ *Id.*, para 80.

²⁷² Human Rights Committee, "Concluding Remarks on the Sixth Periodic Report of Germany, adopted by the Committee at its 106th Session, (15 October-2 November 2012)" CCPR/C/DEU/CO/6, 13 November 2012, para 16.

²⁷³ "Good Business implementing the UN Guiding Principles on Business and Human Rights", presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, September 2013, available at <https://www.gov.uk/government/publications/bhr-action-plan>.

There are therefore clear risks related to economic and financial activities in the settlements, and we do not encourage or offer support to such activity. Financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements, entail legal and economic risks stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognised as a legitimate part of Israel's territory. This may result in disputed titles to the land, water, mineral or other natural resources which might be the subject of purchase or investment.

EU citizens and businesses should also be aware of the potential reputational implications of getting involved in economic and financial activities in settlements, as well as possible abuses of the rights of individuals. Those contemplating any economic or financial involvement in settlements should seek appropriate legal advice²⁷⁴.

The examples mentioned above illustrate how the States ensure that entities under their jurisdiction carry out their obligation to “ensure respect” for international humanitarian law and comply with ethical standards on abstaining from activities that contribute to the maintenance of an illegal situation. The decision that will be made by the Human Rights Committee on the Bil’in v/ Canada case will make it possible to determine whether the “ensure respect” obligation can also be applied to human rights and whether it can imply that the State has the duty to anticipate and prevent violations committed abroad by companies of their nationality and provide domestic recourse in such cases.

²⁷⁴ UK Trade & Investment, « Overseas Business Risk – Israel », 3 December 2013, http://www.ukti.gov.uk/fr_fr/export/countries/asiapacific/neareast/israel/overseasbusinessrisk.html?null.

OVERALL CONCLUSIONS

The settlement policy is responsible for numerous breaches of international law committed by Israel in occupied Palestinian territory. Installing settlers is illegal and causes many other illegal acts that contribute to the development and permanence of the settlements whilst increasingly denying Palestinians access to land, natural resources and decent living conditions.

From an international standpoint, the settlement policy is considered illegal. With Israel being charged with “serious” breaches of international law, third States, including the EU Member States will have to fulfil their obligation to “ensure respect” for the prescriptions of international law, “not to recognise” the illegal situation created de facto by these breaches and not to “render aid or assistance” in maintaining this situation.

These obligations imply that the products made in settlements should be prohibited for sale on the European Union markets because of their intrinsic links to a series of serious breaches of peremptory and *erga omnes* norms of international law and that the EU and its Member States should not grant any form of funding or aid to the Israeli entities installed or operating in occupied Palestinian territory.

In this respect, the labelling project for products from the settlements would not be sufficient to meet the requirements of the obligations of non-assistance and non-recognition. The only satisfactory measure would be a comprehensive prohibition on the importation of these products. With regard to European and WTO law, a measure of this nature could be adopted either by the States individually or by the EU.

The EU and its Member States should also adopt the measures to guarantee that European companies do not maintain economic relations with Israeli companies or settlements that could contribute to maintaining the illegal situation created by the settlement policy.

This report expounds that European States have already adopted measures to fulfil obligations stemming from the Israeli’s illegal settlement policy, although the road to the full application of these measures remains long. Civil society has an essential role to play in reminding governments of their international obligations.

This primordial role has been clearly highlighted in Professor Georges Abi-Saab's comments on the follow-up to the I.C.J. opinion on the construction of the wall on Palestinian territory:

"When there is a strong international feeling in international public opinion, States do react. Very important States, which started by giving cents, ended up by giving hundreds of millions under the pressure of their own public opinion, as well as international public opinion. So that is also a dimension which has to be factored in, in trying to create a movement, not only to dismantle the wall – which, as the Court itself has said, is only part of a larger picture – but also to reach a lawful and just solution to the conflict that constitutes this larger picture".²⁷⁵

FRANÇOIS DUBUISSON

FEBRUARY 2014

²⁷⁵ Georges Abi-Saab, *supra* note 60, page 43.



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