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Dear Secretary-General

## EU-Israel Association Agreement

We are writing to the Council on behalf of our clients; Clare Short, a Member of Parliament of the United Kingdom and EU Network, a group of NGOs based in the EU who campaign on Palestinian issues and are deeply concerned by Israeli action in the Gaza strip.

In summary, it is our case that the European Community has under the EU-Israeli Association Agreement (the "Agreement") clear obligations in light of Israel's violation of international human rights and humanitarian law in the Occupied Palestinian Territories. Our clients are concerned that these legal obligations are not at present being met by the European Community.

On 27 December 2008, Israel launched an intensive military offensive in the Gaza strip known as Operation Cast Lead which lasted for 22 days. During Operation Cast Lead, Israel committed serious and persistent breaches of peremptory (*jus cogen*) norms of international law, namely the interference with the Palestinian people's right of self determination, the obligation not to acquire territory by force, and the breach of intransgressible principles of International Humanitarian Law including serious breaches of the Geneva Conventions. We set out below details of the specific violations of international law.

It is our position that prior to the start of Operation Cast Lead, Israel by its actions in the Occupied Palestinian Territories was already acting in breach of peremptory norms of international law. These breaches were worsened and extended by the military offensive. To date the situation in Gaza remains grave. The ongoing blockade imposed by Israel from June 2007 has been tightened. Basic and vital commodities such as food and fuel, educational supplies, construction materials, spare parts and cash, are routinely denied entry into the territory. Reconstruction efforts are blocked. Credible reports of civilians being killed by Israeli armed forces continue to be received.<sup>1</sup>

<sup>1</sup> The Palestinian Centre for Human Rights (PCHR) reported that on 24 and 25 August 2009 three Palestinian civilians were killed including a 16 year old child, following Israeli gunfire in the northern Gaza strip and aerial bombardment south of Rafah, along the Egyptian borders. A fourth civilian is missing and a further seven civilians were injured.



In light of Israel's ongoing breaches we contend that the European Community has obligations under the Agreement to take steps against Israel. Article 2 of the Agreement contains a clause which makes respect for human rights an essential part of the agreement. We submit that, if, in light of Israel's violations which have been worsened under Operation Cast Lead, the Community has failed to take effective and appropriate steps it is in breach of Article 2 because it is not basing its relations with Israel on respect for human rights. Furthermore, the European Community is also in breach of Article 79(1) of the Agreement which establishes positive obligations on the Parties to observe human rights.

In light of the above, we now call upon the EU Council of Ministers to set out what steps it has taken in relation to Israel following Operation Cast Lead. In particular, we seek confirmation of the following:

- (a) what, if any concrete steps the Community has taken against Israel in view of Israel's violation of fundamental rights;
- (b) if the Community has referred Israel's violations to the Association Council and what action, if any, the Association Council has taken;
- (c) to provide details of any specific measures, decisions, or steps that have been taken by the Community since the launching of the Operation Cast Lead in implementation of the Agreement;
- (d) the disclosure of any documents relevant to (a) to (c) above

We are similarly writing to the EU Commission in this regard.

#### **Israel's Violations of International Law**

International law recognises a body of overriding principles. These peremptory norms are fundamental rules of international public order from which no State may derogate even by agreement with another State. Article 53 of the Vienna Convention on the Law of Treaties defines such norms as rules which are "*accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*". Such norms cannot be derogated from by "local or special customs", they are absolute values from which "nobody may deviate" (*Prosecutor v Furundzija* 121 ILR 213 at 153-154). The nature of those obligations is such that they operate *erga omnes*, that is, they are owed too all states.

It is our submission that Israel has breached a series of obligations arising under peremptory norms towards the civilian population of the area of Gaza in the Occupied Palestinian Territories. The systematic nature of Israel's failure to fulfil these obligations is established by even a cursory review of its actions towards Gaza and the responses of various organs of the United Nations, from the time of its unlawful occupation of Gaza in 1967 through to Operation Cast Lead from 27 December 2008 onwards.

Those breaches were furthered during Operation Cast Lead - a military offensive which resulted in the death of more than 1400 Palestinians, a 83% of whom were civilians, including 111 women and some 342 children. Upwards of 5,000 more Palestinians were injured and many were maimed for life. Israeli air strikes and ground incursions led to the destruction of, or damage to 11,154 civilian homes of which 2,632 were totally destroyed. Over 100,000 Palestinian residents including 50,000 children were directly affected by the damage caused. Civilian infrastructure,

including public buildings, hospitals, mosques, police station, United Nations compounds and schools, was wantonly destroyed.<sup>2</sup>

Palestinian, Israeli and international human rights organizations have concluded in numerous reports and studies that Israel's actions in Operation Cast Lead intentionally and systematically disregarded and violated both international humanitarian law and international human rights law. Israel has not conducted any independent investigations into these allegations and to date refuses to give access to the UN Human Rights Council fact-finding commission led by Richard Goldstone.

The specific violations attested include the following:

### ***Acquisition of territory by force***

The prohibition of the use of force is a peremptory norm of international law.<sup>3</sup> As confirmed by the International Court of Justice in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, , an aspect of this peremptory norm is the prohibition on the acquisition of territory by force.<sup>4</sup> The General Assembly's "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970)" codifies the norm as follows:<sup>5</sup>

*The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force.*

The International Court of Justice has affirmed that the unanimous consent of states to this declaration "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves".<sup>6</sup>

Following Israel's occupation of the territories that had constituted Palestine under the British Mandate, including Gaza, in 1967, the UN Security Council called for the:

*(i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;*

*(ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force....<sup>7</sup>*

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<sup>2</sup> These figures are based on data collected by Al Haq and Al Mezan Centre for Human Rights who supported by other field workers documented the effects of Operation Cast Lead. 30,000 questionnaires were distributed and all evidence was independently verified.. "Operation Cast Lead" "A Statistical Analysis" is available at <http://www.alhaq.org/pdfs/gaza-operation-cast-Lead-statistical-analysis%20.pdf> .

<sup>3</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, at pp. 100-101.

<sup>4</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, p. 171, para. 87. See further: R. Jennings, *The Acquisition of Territory in International Law* (1967) p. 54.

<sup>5</sup> GA res 2625 (XXV), principle 1, para. 10.

<sup>6</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, I.C.J. Reports 1986, p. 14, at p. 100, para. 188.

<sup>7</sup> SC res 242 (1967).

The Security Council thereafter reaffirmed in numerous resolutions concerning Israel that "acquisition of territory by military conquest is inadmissible".<sup>8</sup> Likewise, the General Assembly has confirmed in relation to the Occupied Palestinian Territories that "the acquisition of territories by force is inadmissible and that, consequently, territories thus occupied must be restored".<sup>9</sup>

Israel is continuing to breach its obligation arising from a peremptory norm of international law to end its illegal occupation of Gaza. The violent incursion into Gaza during Operation Cast Lead furthered that wrongful act and was irrefutably in breach of the norm. Rather than withdraw from Gaza, a territory it effectively controls through force, Operation Cast Lead has seen Israel solidify that control through further use of military force. The sheer scale and depth of the incursion is clear evidence of the extent of Israel's control of the territory. In bombing tunnels giving means of access to Egypt, and establishing a naval blockade, Israel has strengthened its ability to control the borders of Gaza and rights of entrance and exit through force and signalled its continuing intent to do so. Indeed it is well known that Israel has at times imposed an effective blockade of Gaza so that people, goods and humanitarian aid cannot enter or leave the territory.

### ***Self-determination of the Palestinian People***

The right of peoples to self-determination is a peremptory norm. In the *East Timor* case, the Court described the principle that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character as "irreproachable".<sup>10</sup> The International Court endorsed this observation in *The Wall*.<sup>11</sup> In *Barcelona Traction*, Judge Ammoun described it as an "imperative rule of law"<sup>12</sup> and Professor Brownlie has characterised the right of self-determination as one of the few peremptory norms that is the subject of general agreement, along with rules relating to the use of force and genocide.<sup>13</sup> The UN Human Rights Commission has also confirmed the peremptory nature of the right to self-determination.<sup>14</sup> Evidence of its character as a peremptory norm includes the recognition that any treaties or agreements conflicting with the right of self-determination will be devoid of effect. Thus, the UN General Assembly in its resolution 35/118 "*categorically rejects any agreement, arrangement or unilateral action by colonial or racist Powers which ignores, violates, denies or conflicts with the inalienable rights of peoples under colonial domination to self-determination and independence*".<sup>15</sup>

The principle of self-determination requires that a territory cannot be transferred or acquired without the population expressing its will for otherwise the transfer would be in breach of the peremptory norm and thus void.<sup>16</sup>

The UN General Assembly has affirmed on countless occasions the "inalienable rights of the people of Palestine" to self-determination.<sup>17</sup> In its resolution of 8 November 1970, the General Assembly:

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<sup>8</sup> See for example, SC res 271 (1969)

<sup>9</sup> GA res 2628 (XXV) 4 November 1970, para. 1.

<sup>10</sup> ICJ Reports 1995, p. 102, para. 29.

<sup>11</sup> *The Wall Opinion* p. 199, para. 156.

<sup>12</sup> Separate Opinion, p. 304.

<sup>13</sup> I. Brownlie, *Principles of Public International Law* (6<sup>th</sup> edn, 2003) 490.

<sup>14</sup> UN Human Rights Commission Resolutions 1997/4, 1998/4, 2003/3.

<sup>15</sup> UN Doc A/RES/35/118 at para. 5.

<sup>16</sup> A. Cassese, *Self-Determination of Peoples* (1994) 188-190.

<sup>17</sup> GA res 2535(XXIV), 10 December 1969, para. 1.

1. Recognizes that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations;
2. Declares that full respect for the inalienable rights of the people of Palestine is an indispensable element in the establishment of a just and lasting peace in the Middle East.<sup>18</sup>

The International Court of Justice in its Advisory Opinion on *The Wall (passim)* confirmed that the Palestinian people have the right of self-determination,<sup>19</sup> that such a right has an *erga omnes* character,<sup>20</sup> and that Israel had violated "the obligation to respect the right of the Palestinian people to self-determination".<sup>21</sup>

In *The Wall* opinion, the Court detailed multiple breaches by Israel of its obligations as above to respect the Palestinians' right to self-determination. Ranging from the destruction of the territorial integrity of Palestine in the construction of the Wall to de facto annexation of land, Israel's actions in threatening the future of a viable Palestinian state were declared illegal and unjustifiable<sup>22</sup>.

Clearly, the actions taken by Israel in Gaza since 27 December 2008 in its wanton destruction of civilian, cultural and governmental infrastructure, including factories, legislative buildings, farmland and civic institutions has further thwarted the right of self-determination of the Palestinian people, and further threatened the viability of the future Palestinian state. They are clear breaches of the peremptory norm of self-determination. Indeed the demonstration of absolute control of that territory through such an operation necessarily excludes self-determination

### ***Violations of Intransgressible principles of International Humanitarian Law***

The basic rules of humanitarian law are peremptory in character. They are deemed to be so fundamental to the respect of the human person and elementary considerations of humanity that they must be observed by all states whether or not they have ratified the conventions that contain them.<sup>23</sup> The Trial Chamber II of the International Criminal Tribunal of Yugoslavia in *Prosecutor v Kupreki* confirmed the status of basic rules of humanitarian law as peremptory norms stating:

[M]ost norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character.<sup>24</sup>

The clearest indication that basic rules of humanitarian law as codified in the Geneva Conventions are peremptory norms of international law is the prohibition of any

<sup>18</sup> GA res 2672 C(XXV) 8 December 1970.

<sup>19</sup> *The Wall Opinion* p. 183, para. 118.

<sup>20</sup> *Ibid.* p. 199, para. 155.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Wall Opinion*, paras. 119-121-22.

<sup>23</sup> See *Legality of the Threat or Use of Nuclear Weapons* ICJ Rep. 1996 p226 and 257 at 79

<sup>24</sup> [at 520]

agreements adversely affecting its operation and the protection of the fundamental rights of human beings without possible derogation.<sup>25</sup>

In *The Wall*, the International Court of Justice confirmed that the Fourth Geneva Convention is applicable to the Occupied Palestinian Territories and that Israel is an occupying power for the purposes thereof.<sup>26</sup> The International Court noted that the Security Council, as early as 1967, had required Israel to observe the Geneva Conventions<sup>27</sup> and, on 15 September 1969, called upon "Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation".<sup>28</sup> The International Court in *The Wall* concluded that Israel had violated *erga omnes* obligations including certain of its obligations under international humanitarian law.<sup>29</sup>

United Nations Special Rapporteur Richard Falk reported on Operation Cast Lead to the Human Rights Council on 17 March 2009. He found that there was "no way to reconcile the general purposes and specific prescriptions of international humanitarian law with the scale and nature of the Israeli military attacks commenced on 27 December 2008".<sup>30</sup>

The Report underlined the continuing relevance of the pre-existing blockade of Gaza, which "was in massive violation of the Fourth Geneva Convention, suggesting the presence of war crimes and possibly crimes against humanity". On the basis of the evidence on Operation Cast Lead available to the Special Rapporteur, "the Israelis either refrained from drawing the distinction required by customary and treaty international law or were unable to do so under the prevailing combat conditions, making the attacks impossible to reconcile with international law"<sup>31</sup>. There was reason to come to the conclusion that the launching of the attack was thus "inherently unlawful, and would seem to constitute a war crime of the greatest magnitude under international law"<sup>32</sup>.

In a Combined Report delivered to the United Nations Human Rights Council on 20 March 2009, several Special Rapporteurs charged with investigating the human rights situation in Palestine pursuant to resolution S-9/1 set out in detail the obligations binding Israel under international humanitarian law, and found several breaches of those obligations in Operation Cast lead.

The Special Rapporteur on poverty discussed reports that "during the military intervention Israel deliberately obstructed the work of humanitarian personnel leaving the poor without basic medical, food and other services in violation of both international humanitarian and human rights law"<sup>33</sup>.

The Special Rapporteur on adequate housing observed that "reports indicate that Israeli attacks have not always complied with the principle of distinction between civilians and combatants, and that some of the houses and properties attacked did

<sup>25</sup> See Common Article 7/7/7/8, Common Article 6/6/6/7 and Article 47 of the Fourth Geneva Convention

<sup>26</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, p. 175-7, paras. 91-101.

<sup>27</sup> SC res 237 (1967) 14 June 1967.

<sup>28</sup> SC res 271 (1969).

<sup>29</sup> *Wall Opinion*, p. 199, para. 155.

<sup>30</sup> A/HRC/10/20 at para. 9.

<sup>31</sup> *Ibid* at 8

<sup>32</sup> *Ibid* at 7

<sup>33</sup> *Ibid* at 33

not meet the definition of military objectives"<sup>34</sup>. Further, "in urban areas and several refugee camps in the northern part of Gaza, entire neighbourhoods have been flattened. These acts seem to be contrary to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, in particular Article 53."<sup>35</sup>

In relation to the destruction of commercial enterprise and public infrastructure, the Special Rapporteur on the right to food considered that this constituted "a serious violation of customary international humanitarian law, which prohibits attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population"<sup>36</sup>. Further, "even after the cessation of the hostilities, humanitarian aid convoys still met restrictions in providing for the urgent food and nutritional needs of the population of Gaza, a violation of the obligations of Israel as the occupying Power of the Gaza Strip."<sup>37</sup>

The Special Rapporteur on health rights strongly condemned the targeting of medical workers and facilities. He noted that "under international humanitarian law, all medical personnel and facilities must be protected at all times"<sup>38</sup>. The Special Rapporteur on education deplored "the targeting of schools during wartime, an act that provided the schools are not military objectives- is explicitly prohibited under customary international law, and note[d] that such an attack has been qualified as a war crime by the Rome Statute of the International Criminal Court which, has been ratified by 108 States"<sup>39</sup>.

"Strong and credible reports of war crimes and other violations of international norms" were found by the Special Rapporteur on extrajudicial, summary or arbitrary execution<sup>40</sup>. "Several issues of concern that need thorough investigation were brought to the attention of the Special Rapporteur. These include, inter alia, violations of the principles of conduct of hostilities, the targeting of Palestinian police and members of the Hamas political wing not taking part in hostilities, and the questionable use of certain weapons in densely populated areas, including white phosphorous shells, 155 mm shells and flechette shells"<sup>41</sup>.

Violations of the principles of distinction, proportionality and precaution were indicated in the combined report, with prima facie concerns that the "attacks were carried out without respect for these principles"<sup>42</sup>

The Falk Report is not unusual in its condemnation of Israel's actions. Countless Palestinian and International NGOs and human rights organisations have documented the systematic and persistent breach of international human rights and humanitarian breaches by Israel.

Human Rights Watch <sup>43</sup> in a 75 page report have documented the devastating effects that the use of white phosphorus munitions had on civilians and civilian property in Gaza. After hostilities ended their researchers found spent shells, canister liners, and

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<sup>34</sup> *Ibid* at 40

<sup>35</sup> *Ibid* at 41

<sup>36</sup> *Ibid* at 46

<sup>37</sup> *Ibid* at 50

<sup>38</sup> *Ibid* at 61

<sup>39</sup> *Ibid* at 66

<sup>40</sup> *Ibid* at 91

<sup>41</sup> *Ibid* at 97

<sup>42</sup> *Ibid* at 102(b)

<sup>43</sup> <http://www.hrw.org/sites/default/files/reports/iopt0309web.pdf>

dozens of burnt felt wedges containing white phosphorus on city streets, apartment roofs, residential courtyards, and at a United Nations school. Such indiscriminate weapons necessarily breach the principle of distinction and their use constitutes a grave breach of the Geneva Convention.

Amnesty International in July of this year produced its 118 page report on Operation Cast Lead noting: "Much of the destruction was wanton and resulted from direct attacks on civilian objects as well as indiscriminate attacks that failed to distinguish between legitimate military targets and civilian objects. Such attacks violated fundamental provisions of international humanitarian law, notably the prohibition on direct attacks on civilians and civilian objects (the principle of distinction), the prohibition on indiscriminate or disproportionate attacks, and the prohibition on collective punishment"<sup>44</sup>

A UN Board of Inquiry was set up by the UN Secretary General in February 2009 to look into nine attacks on UN facilities and personnel in Gaza during Operation Cast Lead. In a 27 page summary of the 184 page report the UN condemned the actions of the Israeli army. It found that the Israeli army was responsible in six cases in which UN property was damaged and UN staff and other civilians hurt or killed. It concluded that Israeli military's actions "involved varying degrees of negligence or recklessness"; and Israeli military took "inadequate" precautions to protect UN premises and civilians inside and recommended further investigation into possible war crimes.<sup>45</sup>

Al-Haq (an independent Palestinian non-governmental human rights organisation which has special consultative status with United Nations Economic and Social Council) carried out with Al Mezan Centre for Human Rights a full statistical analysis of Operation Cast Lead which it published in July. The comprehensive report concluded that "an analysis of the choice of targeted areas, methods of attack and the number of civilians killed and injured clearly indicates a reckless disregard for civilian life synonymous with intent. Further, it is clear that "Operation Cast Lead" was not just an assault against the Palestinian population, but also against the Gaza Strip's infrastructure and the livelihoods of its people, with factories, farms and other economic resources systematically targeted. Prima facie evidence exists of the commission of war crimes amounting to grave breaches of the Geneva Conventions, most notably wilful killing of civilians, including women and children; extensive destruction of property, both residential and commercial, public and private; and wilfully causing great suffering and serious injury to body or health."<sup>46</sup>

Israel's response to these serious allegations has been blanket denial. It has failed to establish an independent and impartial investigation into the conduct of its forces during Operation Cast Lead and has vigorously opposed any suggestion it should do so. It has rejected all the findings of the UN Board of Inquiry. It continues to deny access to the UN Human Rights Council's fact finding mission and other international investigation mechanisms headed by Justice Richard Goldstone. This refusal to cooperate with the fact finding mission severely hinders the UN's ability to complete its mission and is suggestive of a wish to suppress the truth.

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<sup>44</sup> "Israel/Gaza Operation 'Cast Lead': 22 Days of Death and Destruction", Amnesty International July 2009, pg 1.

<sup>45</sup> See link below for a copy of the summary:

<http://unispal.un.org/unispal.nsf/eed216406b50bf6485256ce10072f637/3800655e522591fd852575cb004ca773?OpenDocument>

<sup>46</sup> See page 15 "Operation Cast Lead: A Statistical Analysis"



By continuing to maintain a blockade of the people of Gaza, Israel worsens and furthers its breaches of international law. On 2 July 2009 Richard Falk, the UN Special Rapporteur, denounced the unlawful seizure by an Israeli gunboat of a ship on the high seas carrying medicine and reconstruction material to the blockaded people of Gaza. He noted "This Israeli action implements its cruel blockade of the entire Palestinian population of Gaza, in the violation of Article 33 of the Fourth Geneva Convention that prohibits any form of collective punishment directed at an occupied people"<sup>47</sup>. He referred to a report by the International Committee of the Red Cross<sup>48</sup> which underlines Israel's unprecedented actions in prohibiting entry of the reconstruction materials and supplies needed to repair the widespread damage caused by Operation Cast Lead.

### **The Responsibility of the European Community in light of such breaches**

We submit that in light of Israel's clear, ongoing, systematic violations of the peremptory norms of international law the EU as a party under the Agreement is under obligations to take certain steps. We set out below the source and scope of those obligations:

### **The EU-Israeli Association Agreement**

The Agreement is part of a series of trade and cooperation agreements concluded between the EC and third party countries. The Agreement establishes an association between, on the one hand, the Community and the Member States and, on the other hand, the State of Israel. The Agreement has been in force since June 2000. In 2008 the Agreement formed the basis of EU-Israel trading relations, with Israel continuing to be one of the EU's biggest trading partners with total trade amounting to approximately 25.4 billion Euros.

The Agreement is the legal basis for the EU Israel Action Plan, which includes a financial assistance element. Israel is eligible for 14 million Euros in EC financial cooperation over the next 7 years. The current Action Plan includes the aim to work towards a comprehensive settlement of Middle East conflicts and specifically provides:

"While recognising Israel's right of self-defence, the importance of adherence to international law, and the need to preserve the perspective of a viable comprehensive settlement, minimising the impact of security and counter-terrorism measures on the civilian population, facilitate the secure and safe movement of civilians and goods, safeguarding, to the maximum possible, property, institutions and infrastructure" (emphasis added)

The Action plan also includes a general statement concerning shared values and the aim to "Work together to promote the shared values of democracy, rule of law and respect for human rights and international humanitarian law". (emphasis added).

<sup>47</sup><http://unispal.un.org/UNISPAL.NSF/fd807e46661e3689852570d00069e918/4ddcb7d2dbae8553852575eb00654db9?OpenDocument>

<sup>48</sup>[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/palestine-report-260609/\\$File/gaza-report-ICRC-eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/palestine-report-260609/$File/gaza-report-ICRC-eng.pdf)

## ***The Human Rights Clause - Article 2 of the Agreement***

Article 2 of the Agreement contains a human rights clause which states:

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

We contend, and we anticipate that the Council would agree, that Article 2 imposes binding legal obligations on the parties to the Agreement.

Both a literal and a contextual interpretation support the view that Article 2 is intended to create legally binding obligations. Under Article 31(1) of the Vienna Convention on International Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 31(2) states that the context comprises the text, including, among others, its preamble and annexes. The ICJ has stated that “interpretation must be based above all upon the text of the treaty”.<sup>49</sup> The importance of literal interpretation, as the starting point, has also been stressed by the ECJ<sup>50</sup> and also other international tribunals, for example, the WTO Appellate Body.<sup>51</sup>

The text of Article 2 is clear and unambiguous. Article 2 grants to the protection of human rights a cardinal position in the Agreement. It uses peremptory language (“shall”) clearly indicating that the Parties intended to undertake binding commitments and not merely to make empty proclamations. The opposite view would turn Article 2 into such rhetoric.

Furthermore, Article 2 elevates respect for human rights to an “essential element” of the Agreement. It would not make sense if the only provision which is stated to be essential were interpreted not to impose binding obligations on the Parties. Such an interpretation would endanger the character of the Agreement as a binding international treaty and would thus run counter to the clear intention of the Parties. The binding effect of Article 2 is also supported by its position in the Agreement. It is placed in the introductory part, which precedes the individual titles containing the areas of cooperation included in the Agreement. It is thus an umbrella provision which is designed to underpin all provisions of the Agreement as it is expressly stated in Article 2 itself. Finally, the binding character of Article 2 is supported by the case law.<sup>52</sup>

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<sup>49</sup> See *Territorial Dispute (Libya/Chad)* [1994] ICJ Rep 6, para 41.

<sup>50</sup> See e.g. Joined Cases C-310 and C-406/98 *Hauptzollamt Neubrandenburg* [2000] ECR I-1797, para 32, and, more recently, see Case C-127/08, *Metock v Minister for Justice, Equality and Law Reform*, judgment of 25 July 2008.

<sup>51</sup> See WTO Appellate Body Report, *US-Shrimp*, WT/DS58/AB/R, adopted on 6 November 1998, para 114.

<sup>52</sup> See Case C-268/94 *Portugal v Council* [1996] ECR I-6177 where the court were concerned with the interpretation of a human rights clause in the Community-India Cooperation Agreement. The language used was less peremptory than in the Agreement and the Court still concluded that the clause “may be, amongst other things, an important factor for the exercise of the right to have a development cooperation agreement suspended or terminated where the non-member country has violated human rights”. (para 27)

## What are the obligations on the Parties?

Since Article 2 of the Agreement does not incorporate by express reference any specific standards of human rights, we take the view that the Parties are bound to respect, at the very least, the standards imposed by *jus cogens erga omnes obligations*, of customary international law, and the principles of the UN Charter. Given the binding nature of Article 2 and the central place accorded to human rights observance within the Agreement we further submit that Article 2 should be read as incorporating an undertaking by each of the Parties to the other to comply with human rights as protected by international conventions which have come into force and which they have ratified. For all Parties this would include respecting the Geneva Conventions.

Under Article 2:

- 1) The Parties are bound to respect human rights;
- 2) Respect for human rights forms the basis of all the provisions of the Agreement. Therefore, all provisions of the Agreement must be interpreted in the light of respect for human rights and that principle must guide the Parties in the execution of all their obligations under the Agreement.
- 3) The Parties are required to base their relations with each other on respect for human rights. This requirement goes beyond the mere obligation on each Party to ensure that its own actions comply with human rights and requires each Party to base its relations with the other on mutual respect for human rights. It is thus our submission that, if a Party violates human rights and such violation is serious and persistent and another party fails to take appropriate steps, it will be failing in its duties under Article 2 because it will not be basing its relations with the other Party on respect of human rights.
- 4) Not only negative but also positive obligations are placed on each Party to respect human rights, prevent violations, and take steps to terminate them where such violations occur. This interpretation is supported by Article 79(1) of the Agreement which imposes positive obligations on the Parties to fulfil their obligations under Article 2. It states as follows:

“1. The Parties shall take any general or specific measures required to fulfill their obligations under the Agreement. They shall see to it that the objectives set out in the Agreement are attained.”

Accordingly, the Community under Article 2 is obliged to ensure not only that its own actions comply with human rights: it also requires it to base its relations with Israel on mutual respect for human rights and ensure that Israel respects human rights. Thus, where Israel has engaged in a serious and persistent violation of human rights and the Community does not take appropriate steps against Israel it will be in breach of Article 2 because it will not be basing its relations with Israel on respect of human rights. It will also be in breach of Article 79 (1) which establishes positive obligations on the Parties to observe human rights.

For the avoidance of doubt, we do not consider that Israel could invoke Article 76(c) which contains a national security derogation to argue that it is not in breach of Article 2. Article 76 (c) allows a Party to take any measures “which it considers essential to its own security in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the

purpose of maintaining peace and international security without being in breach of the Agreement.” This clause does not give Israel *carte blanche* to act with impunity. It does not entitle a Party to breach the minimum standards of human rights as protected by the UN Charter, rules of customary international law or rules of *jus cogens*. Nor does it entitle Israel to breach international law rules which are applicable in the circumstances which justify its applications (e.g if a party invoked 76(c) to derogate from the Agreement in the case of war it would not be entitled to breach international law governing armed conflict). Under Article 2 respect for human rights forms the basis of “all the provisions of the Agreement” including Article 76 (c). It is further difficult to see how such a violation of human rights could be “essential” for the protection of national security.

### **General Principles of EC Law**

As a matter of EC law the Community itself is under a binding obligation to (a) respect fundamental rights and (b) observe international law. This obligation flows from Articles 6(1) and 6(2) of the Treaty on European Union (“TEU”) and the case law of the European Court of Justice. Article 6(2) TEU states as follows:

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.”

Under settled case law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures.<sup>53</sup> Respect for human rights is thus a condition of the lawfulness of Community acts.<sup>54</sup> In *Schmidberger*, the Court reaffirmed that ‘measures which are incompatible with the observance of human rights ... are not acceptable in the Community’.<sup>55</sup>

The paramount importance which the ECJ attributes to the principle of respect for human rights became evident in its recent judgment in *Kadi*<sup>56</sup> where it held that a Community regulation implementing UN Security Council Resolutions was subject to full review on grounds of compatibility with human rights as they are protected in the Community legal order.

The Court has further held that the Community must respect international law in the exercise of its powers<sup>57</sup> and that rules of customary international law are binding upon the Community institutions and form part of the Community legal order.<sup>58</sup>

Accordingly, the Community's obligations under the Agreement are strengthened in light of the above. The obligations arising out of Article 2 and their scope must be

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<sup>53</sup> Case 5/88 *Wachauf* [1989] ECR 2609, para 17; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, para 17; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 23.

<sup>54</sup> Opinion 2/94 *on the Accession of the EC to the ECHR* [1996] ECR I-1759, para 34.

<sup>55</sup> Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 73.

<sup>56</sup> Joined Cases C-402/05 P & C-415/05 P *Kadi & Al Barakat International Foundation v Council and Commission*, judgment of 3 September 2008.

<sup>57</sup> Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para 9; Case C-162/96 *A. Racke GmbH & Co v Hauptzollamt Mainz*, judgment of 16 June 1998, para 45.

<sup>58</sup> *Racke*, op.cit., para 46.

assessed from within the general framework of international law and respect for human rights that is integral to the European Community.

***What specific steps are the European Community required to take under the Agreement where Israel is in breach Article 2?***

Under Article 79(2) of the Agreement

“If either Party considers that the other Party has failed to fulfill an obligation under the Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.

In the selection of measures, priority shall be given to those which least disturb the functioning of the Agreement.

These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests.”

We submit that a breach of Article 2 which involves, as in this case, a violation of *jus cogens erga omnes* obligations and a serious and persistent violation of human rights must be a case of special urgency under the terms of Article 79(2). In cases of special urgency the European Community may without supplying the Association with all relevant material necessary to examine the case: i) terminate or suspend the Agreement in accordance with Article 60 of the Vienna Convention; or ii) take appropriate measures.

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Article 79 (2) does not grant to the Community institutions unfettered discretion to decide whether to take action or what action to take. Such unfettered discretion would be incompatible:

- (a) with the provisions of Article 2 and 79(1) of the Agreement;
- (b) the obligation of the Community to respect international law;
- (c) the obligation of the Community to respect fundamental rights;
- (d) the general principle of judicial protection.

Accordingly, given the serious, systematic and persistent breaches of international humanitarian law by Israel, we submit that the European Community is under a duty to invoke the non-execution clause of Article 79(2) and at the very least take appropriate measures under the clause.

The Community's failure to take appropriate and effective steps against Israel would also amount to a breach of the Articles on Responsibility of States for Internationally Wrongful Acts which codify customary international law<sup>59</sup>. Taken together with Article

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<sup>59</sup> Articles 40- 41 together with Article 16 are properly to be considered codificatory of customary international law: see *A (No.2)* where Lord Bingham relied upon Articles 40-41 in considering the

6 TEU which requires the Community to respect international law and fundamental rights, these Articles create legally binding obligations on the Community.

Firstly, under Article 16,<sup>60</sup> the Community is under an obligation not to assist another State in the commission of an internationally wrongful act which entails breach of fundamental rights.

Secondly, under Article 41<sup>61</sup>, where a State such as Israel commits a serious breach of an obligation arising under a peremptory norm of general international law, the Community must:

- (a) not render aid or assistance to that State in maintaining that breach;
- (b) not recognise as lawful the situation created as a result of that breach;
- (c) cooperate with other States in order to bring an end to that breach through lawful means.

We submit that the Community is at the very least, under an obligation to take, among others, the following steps:

- (a) raise the violations committed by Israel with the Association Council and require Israel to take immediate steps to stop the violation;
- (b) suspend any financial assistance that it grants to Israel under the Agreement;
- (c) suspend any tariff concessions that it grants to Israel under the Agreement; and
- (d) suspend all cooperation with Israel under the Agreement, including, postponement of any programmes, projects and initiatives in trade, scientific, and cultural matters.

We note that on 15 June 2009, the ninth annual meeting of the Association Council in Luxembourg took place. In the eighth meeting Israel had requested to upgrade its relations with the EU and in December 2008 a series of concrete proposals were presented to achieve this upgrading. In light of Israel's actions since December 2008 and the worsening human rights situation, at the very least, the Community should have publicly declared the upgrading of Israel's relations on hold and taken steps a)

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consequences of the *jus cogens* prohibition on torture for the UK Government [at 34]. Article 41 is an accurate statement of a state's responsibilities under customary international law, and a "fairly cautious version of the subject matter present in [Brownlie, in] the first edition of 1966"; Brownlie, *Principles of Public International Law*, 7th Ed., 2008, 514.

<sup>60</sup> Article 16 of the ILC's Articles reads: "A state which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: a) that State does so with knowledge of the circumstances of the internationally wrongful act; and b) the act would be internationally wrongful if committed by that State."

<sup>61</sup> Article 41 of the ILC's Articles: "1. States shall cooperate to bring an end through lawful means any serious breach with the meaning of article 40. 2. No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation. 3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law."

to d). However, from the statement made by the EU<sup>62</sup> after the meeting it appears that it was very much "business as usual" as it confirmed its readiness to continue strengthening the bilateral partnership. The EU in its statement recognised that there were serious human rights concerns. Amongst other things it:

- called on the government of Israel to commit unequivocally to the two-state solution;
- urged the government of Israel to immediately end settlement activities (which it recognised were illegal under international law), including in East Jerusalem and including natural growth, and to dismantle all outposts erected since March 2001;
- called for an immediate and unconditional opening of crossings for the flow of humanitarian aid, commercial goods and persons to and from Gaza without which the unimpeded delivery of humanitarian aid, reconstruction and economic recovery will not be possible.

However, this recognition of serious human rights violations does not appear to have translated into any concrete actions against Israel under the provisions of the Agreement.

### **Remedies**

In light of the obligations set out above we consider that it is for the Council and the Commission to satisfy our client that the Community has met and continues to meet its obligations with respect to Israel's actions in the Gaza strip. We ask that the Council provide us with a detailed description of compliance with the obligations stated above and in particular:

- (a) state whether the Community has taken or intends to take in the immediate future steps (a) to (d) outlined above;
- (b) state if the Community has taken any other concrete steps against Israel in view of Israel's violation of fundamental rights;
- (c) explain if the Community has referred Israel's violations to the Association Council and what action, if any, the Association Council has taken;
- (d) provide the details of any specific measures, decisions, or steps that they have taken by the Community since the launching of the Operation Cast Lead in implementation of the Agreement;
- (e) provide the disclosure of any documents relevant to (a) to (d) above

We ask for a response to the above questions within **28 days** of receipt of this letter. If we do not receive an adequate response to the questions, we will take the appropriate steps to bring legal action against the Community for its failure to comply with its obligations under the Agreement and under international law.

We look forward to hearing from you.

Yours faithfully



**Public Interest Lawyers**

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<sup>62</sup> 11057/09 Relations with Israel – Adoption of the European Union's position for the Association Council's meeting (Luxembourg, 15 June 2009)