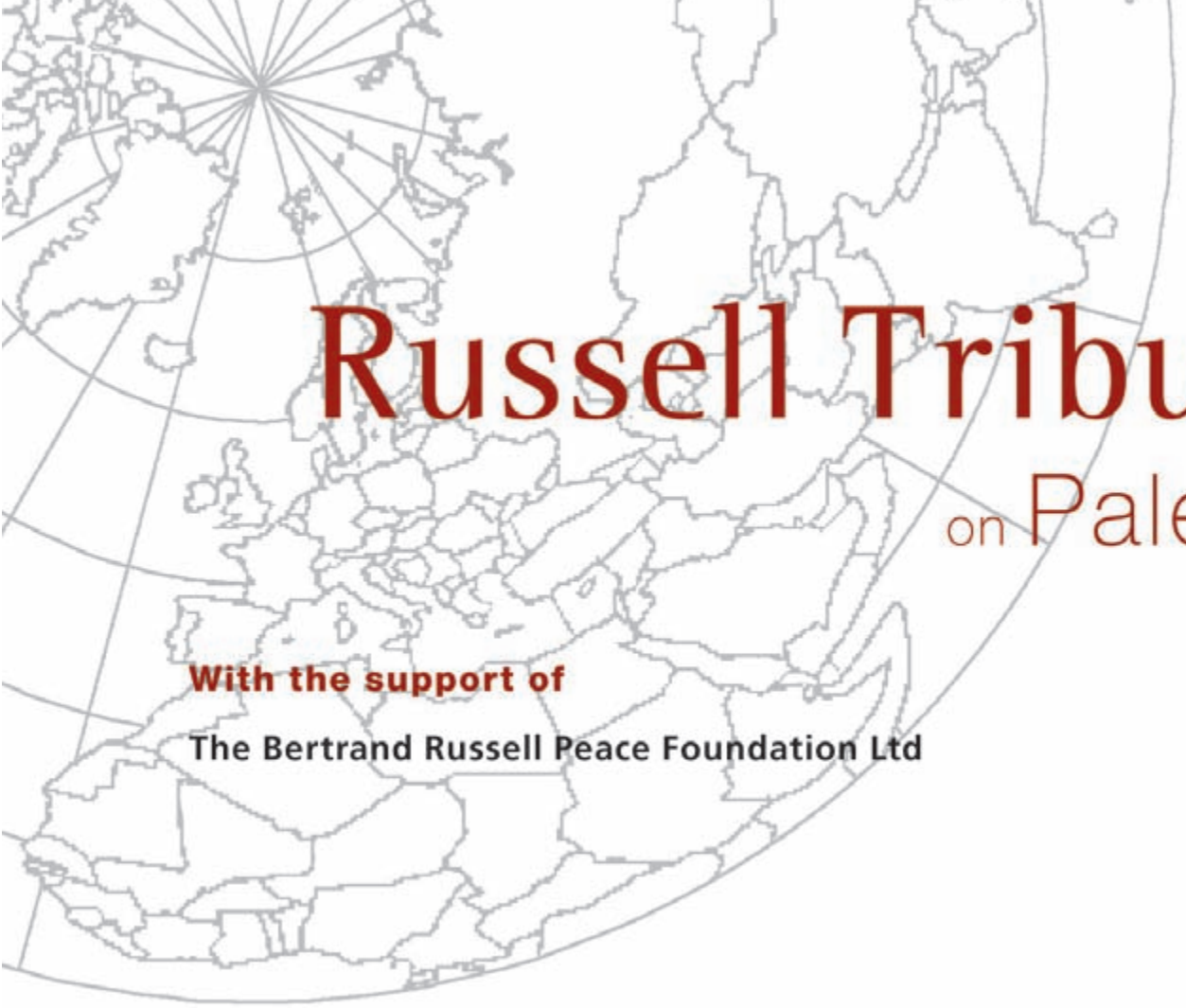


Russell Tribunal on Palestine

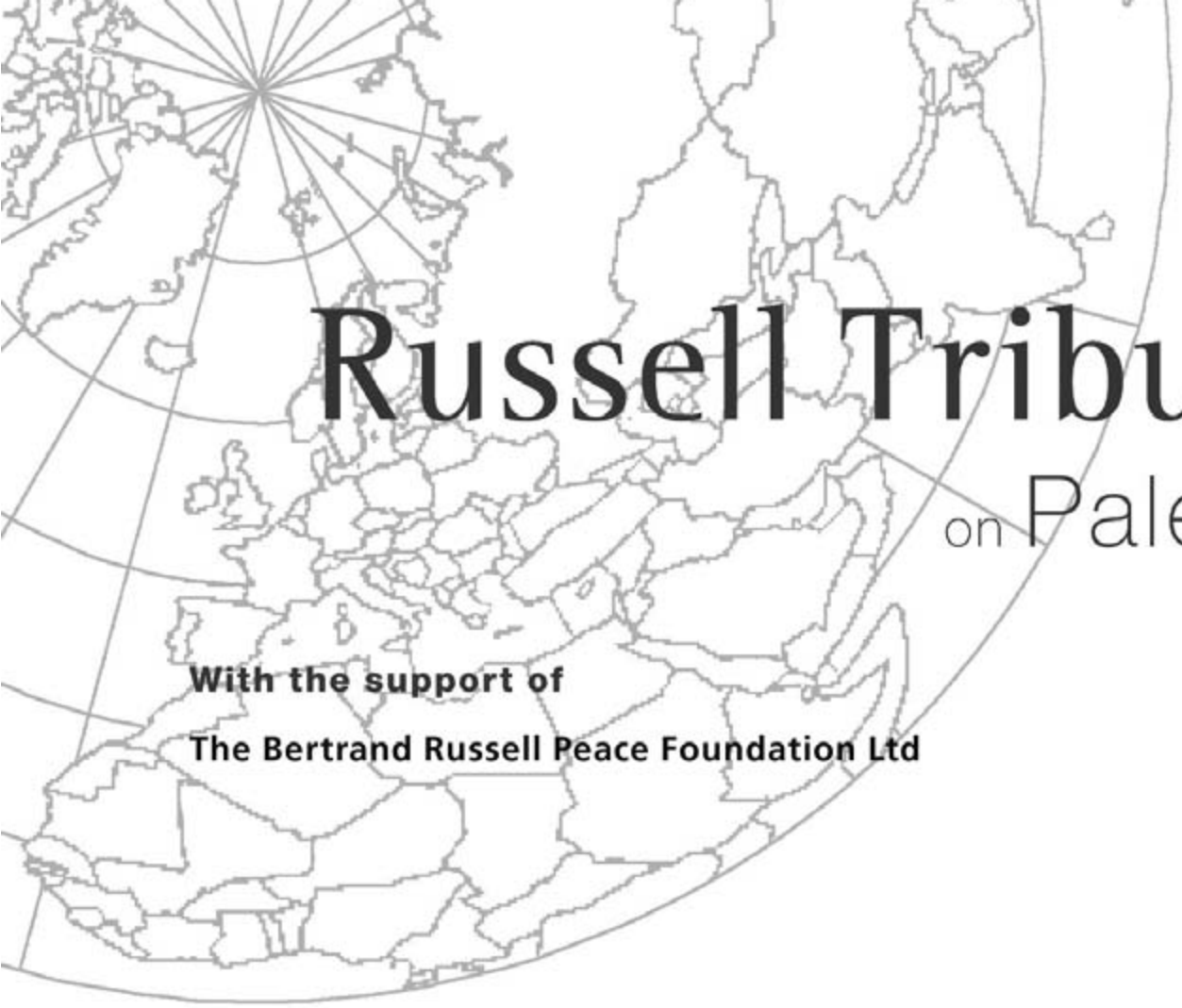
With the support of

The Bertrand Russell Peace Foundation Ltd

Document prepared by the Committee of Experts of the Russell Tribunal of Spain and Catalonia and Proceedings of the First International Session of the Russell Tribunal on Palestine

Barcelona
1, 2, 3 March 2010

INSTITUT CATALÀ INTERNACIONAL PER LA PAU



Russell Tribunal on Palestine

With the support of

The Bertrand Russell Peace Foundation Ltd

Document prepared by the Committee of Experts of the Russell Tribunal of Spain and Catalonia and Proceedings of the First International Session of the Russell Tribunal on Palestine

Barcelona
1, 2, 3 March 2010

INSTITUT CATALÀ INTERNACIONAL PER LA PAU

Gran Via, 658, baix. 08010 Barcelona (Spain)

T. +34 93 554 42 70 | F. +34 93 554 42 80

icip@gencat.cat | www.icip.cat

Amb Palestina al Cor

With Palestine by the Heart (Amb Palestina al Cor. www.alcor.palestina.cat) composed by the following organizations.

- ACSUR-LAS SEGOVIAS
- Alliance for Freedom and Dignity
- Catalan Association for Peace
- CIEMEN
- Youth Council for Barcelona
- The Palestinian Community of Catalonia
- The Institute for Human Rights of Catalonia
- Movements for Peace
- NEXES
- NOVA – Centre for Social Innovation
- Civil Service International
- Sodepau
- Palestine Red Liaison

These proceedings, correspond to the First International Session of the Russell Tribunal on Palestine, held in Barcelona 1st, 2nd and 3rd of March, 2010 were completed by Luciana Coconi from the Institut de Drets Humans de Catalunya (IDHC) Catherine Charrett and Pablo Aguiar from the Institut Català Internacional per la Pau (ICIP). Luciana Coconi and Catherine Charrett attended as note-takers to both Tribunal sessions and the reading of the Tribunal conclusions on the third day. The proceedings have been compiled from their notes, the written documents presented by some of the Tribunal experts and witnesses and from the voice recordings of the event.

Graphic Design and Typesetting

Ātona, S.L.

Printed by

gama, sl

DL

B. 39.128-2010

INDEX

Part II:
First International Session of the Russell Tribunal on Palestine

Part III:
Conclusions of the First International Session of the Russell Tribunal on Palestine

Annexes

PRELIMINARY NOTE

This volume is divided into four parts.

The first part collects the different studies that, with various perspectives, have been elaborated upon by the experts who form the Committee of Experts of the Russell Tribunal for Spain and Catalonia. In these studies they expose the serious violations of International Law by the State of Israel and by the people who are in charge of executing its policies against the rights and the dignity of the Palestinian people. It also lays bare the complicity of the European Union and its member states. This document has been made available to the organizers, both national and international, of the various sessions of the Russell Tribunal so that it can be used by the members of this Tribunal, not only in the Barcelona session but also in the ones following it.

The second part includes the expert's testimonies of the First International Session of the Russell Tribunal on Palestine, held in Barcelona 1st, 2nd and 3rd of March, 2010.

The third part are the Conclusions of the First International Session of the Russell Tribunal on Palestine.

Lastly there is a compilation of Annexes including the executive summary of the testimonies of the First International Session of the Russell Tribunal on Palestine, the list of abreviations, and other relevant information.

The Document of the Experts Committee for the Barcelona Session of the Russell Tribunal has been promoted by the Coordinating Entities of "With Palestine by the Heart" (*www.alcor.palestina.cat*) and composed by the following organizations.

- ACSUR-LAS SEGOVIAS
- Alliance for Freedom and Dignity
- Catalan Association for Peace
- CIEMEN
- Youth Council for Barcelona
- The Palestinian Community of Catalonia
- The Institute for Human Rights of Catalonia
- Movements for Peace
- NEXES
- NOVA – Centre for Social Innovation
- Civil Service International
- Sodepau
- Palestine Red Liaison

The realization and Publication of **The Document of the Experts Committee for the Barcelona Session of the Russell Tribunal** was made possible by:

• International Catalan Institute for Peace (ICIP)
• Office for the Promotion of Peace and Human Rights
• City council of Girona
• City council of Sant Feliu de Llobregat

The Barcelona Session of the Russell Tribunal on Palestine was organized by:

The International Organising Committee (IOC): Ken Coates, Pierre Galand, Stéphane Hessel, Marcel-Francis Kahn, Robert Kissous, François Maspero, Paulette Pierson-Mathy, Bernard Ravenel, Brahim Senouci, Gianni Tognoni and its International Secretariat: Frank Barat and Virginie Vanhaeverbeke.

The Spanish and Catalan Support Committee.

The Irish, French, Italian, Belgian, Luxembourg, German, British, Portuguese and Swiss support committees.

The International Organising Committee wishes to thank the municipality of Barcelona and the Generalitat of Catalunya for their support, as well as all the people and organisations who made possible this first session of the Russell Tribunal on Palestine.

It was made possible thanks to:
The City council of Barcelona – Barcelona Solidarity

INTRODUCTION

The Russell Tribunal on Palestine: first session celebrated in Barcelona

Frequently the lack of respect of International Law of Israel towards the Palestinian people has been denounced, it has been done from several national and international institutions. These denounces include severe violations of the human rights international Law and of the humanitarian international Law ordered and committed by members of the government and of the Israeli army. Now, already in the 21st century, if we make a historical balance of this situation, we can be sure that many of these breaches would not have been produced without having determinate complicity of States and of other actors of the international community. We can ascertain that this silence - or, better said, crime of silence- is a clear omission of the guarantor's role of those to whom it corresponds to watch over the respect of the international legality.

Although we counted and count with an international juridical system that facilitates us the task of observing the pathologies committed by the Israeli authorities towards the Palestinian population, a Court to be able to denounce these illegalities was lacking us. Too often the political declarations of condemned have not been accompanied by the demand of juridical responsibilities. The lack of a Court to make these responsibilities effective is due to several reasons:

Firstly, the International Court of Justice, maximum jurisdictional organ of the United Nations, does not have competence for judging these violations since Israel has not accepted its jurisdiction; and, even though Palestine has not yet been officially recognized as State and, therefore, can not either litigate against Israel, some of the committed violations affect rules of *ius cogenes* that entail *erga omnes* effects and, therefore, they would enable any other State to demand in front of the International Court of Justice against Israel, only in the case that Israel had accepted its jurisdiction.

Secondly, it is not possible to judge the responsible persons, directly or indirectly, of the several war crimes and crimes against humanity committed against the Palestinian population in front of the International Criminal Court, since Israel has not ratified its Statute –and it seems that, after the review conference of Kampala, Palestine will hardly be able to become part of the Rome Statute.

Thirdly, it is publicly known that the Israeli internal courts refuse to clarify these individual responsibilities while alleging that are consequences of actions carried out to defend the security of the State and to face the fight against terrorism, conceding a total impunity to the persons responsible for these violations.

Fourthly, another possibility that was still alive, at list in Spanish State, was that of the universal jurisdiction; but through an agreement between the two majority political parties, on behalf of the socialist government and under pressures of foreign authorities, this possibility was cut and denaturalized, through the reform, of November of 2009, of article 23.4 of the Organic Law of the Judicial Power. Unfortunately, this decision has entailed an attempt to leave to many victims of violations of human rights

without hope, without justice and without the right to knowledge; that is, it has intended continous invisibility for them, not only where they have suffered the violations, but also in our own territory.

The former arguments drive us to a clear thought: we had and we have the Law but the Court was lacking to us. To face this invisibility of the victims and in front of this jurisdictional emptiness it has been necessary to retrieve the spirit of the first Russell Tribunal, which was celebrated in 1967, for investigating the crimes of war committed in Vietnam. Afterwards there were other Russell Tribunals for judging the atrocities of the dictatorships in Latin America, the invasion of Iraq and, at last, a Russell Tribunal on Palestine has been constituted, in order to defend the legitimacy of the victims using international law arguments that, fundamentally, should apply them and, especially, would have to protect them. In this sense, the constitution of this Court supposes an international initiative of a high moral, intellectual and scientific quality that has as a goal returning the rights and the dignity of people.

As coincidence to the Spanish presidency of the EU, it was decided that the first session of this Tribunal would be celebrated in Barcelona, (1st-3rd March 2010), on behalf of the initiative of the Bertrand Russell Foundation and the promotion of the entities platform named "*Amb Palestina al Cor*" with the support, mainly, of the Town Council of Barcelona and of the International Catalan Institute for Peace (ICIP). Such a session was established with the mandate of studying, including a change of strategy, the degree of complicity of the European Union and of its member States in the prolongation of the occupation of the Palestinian Territory and in the reiterated violations of the rights of the Palestinian people on behalf of Israel. Mainly, this session considered analyzing and judging the complicity of the EU and of its member States in relation to several subjects as the right to self-determination of the Palestinian people, the Gaza Strip blockade and the Operation Cast Lead, the settlements and the pillage of the natural resources, the agreement of association UE-Israel and the annexation of Jerusalem East.

During the celebration of this session in Barcelona several experts and witnesses exposed their knowledge so that the jury could sentence. It is worth reminding who were the persons responsible for manifesting about this complicity, at the session of Barcelona (Michael Mansfield, Gisèle Halimi, Alberto Sanjuan, José Antonio Martín Pallín, Ronald Kasrils, Mairead Corrigan-Maguire, Cynthia McKinney i Aminata Traoré) persons characterized by being of recognized intellectual prestige that, beyond pro-Palestinian or pro-Israeli positions, they stand out for its positioning in favor of the defense of the human rights and of the validity and application of the International Law.

After the appearance of the experts and of the witness and of the interrogations on the part of the jury, there were formulated and made public some conclusions. Among the final conclusions of the Barcelona session we can highlight that, in first place, the violations of the International Law committed by the State of Israel were evident; in second place, the noncompliances of the EU and of its member States of specific rules of the International Law that require the European Union and its member States to react in front of the violations taken part on behalf of the State of Israel; in third place, the noncompliances of the EU and of its member States of general rules of the International Law that require the European Union and its member States to react in front of the violations taken part on behalf of the State of Israel; and finally failure of the European Union and its member States to refrain from contributing to the violations of International law committed by Israel.

This will not have been the only opportunity to discuss international juridical arguments that affect to the Palestinian cause in front of this innovative institution. More sessions of this Russell Tribunal on Palestine during year 2010 and 2011 have been foreseen. However, it is necessary to highlight that, making a global look, we are not in front of isolated sessions and appearances. We are living a truly *process* that started two years ago with the constitution of the Organizing Committee and with other sessions planned; second one will be celebrating in November 2010 in London – focused on the complicities and omissions of the transnational companies that support the policies of the Israeli Government contraries to human rights; later, other sessions will be organized in different continents to approach other types of complicity and omissions, especially related with the United States and of the United Nations -foreseen in New York in year 2011; and finally the process will close up with a great final session to celebrate in South Africa, in 2011, where the situation of the apartheid against the Palestinian people will be analyzed and a harmonization of the conclusions of all the former sessions will allow an overall view of the whole process.

It is in this overall view where the big bet of the International Catalan Institute for Peace (ICIP) and of the platform *Amb Palestina al cor* lies since in the moment of entrusting the previous documentation elaborated by the Spanish and Catalan Committee of experts they understood right away the reach of the challenge: we were in front of a process and not in front of isolated sessions. That is why they elaborated a document, facilitated to the members of the jury with anticipation to the session of Barcelona, it was thought and was carried out as a working document to be useful also during the rest of the sessions – implying as well the presence of the ICIP and of the platform *Amb Palestina al Cor* in all the sessions of the Russell Tribunal on Palestine-. In this report it was analyzed: the security fallacy and the threats to human security; the passive complicity of the European Union in relation to the violations of the International Law that derive from the Israeli occupation of the Palestinian Territory; the Spanish foreign policy; the arms trade and the military and security cooperation between Spain and Israel; the consultative opinion of the International Court of Justice about the juridical consequences of the construction of a wall in the occupied Palestinian territory, especially reference to the question of the settlements and Jerusalem; the Israeli policies with respect to the hydric resources of the occupied territories and its consequences for the Palestinian population; Gaza Strip, the Cast Lead Operation and the Goldstone report; the limitations of access to the international justice of the Palestinian victims of severe violations of human rights; and, the apartheid against the Palestinian people.

Having into consideration the above arguments, we can affirm that the Russell Tribunal for Palestine opens the opportunity to a new initiative that reminds us civil society capacity to take action against the injustice. It can be said that the conclusions of the Russell Tribunal on Palestine will not have compulsory juridical value –but that does not mean it has not any juridical value-. As a former member of the jury, Julio Cortazar, once said "*the true efficiency, the most authentic value of the Russell Tribunal does not reside in the immediate and circumstantial effect of its meetings, but in the whole lot of universal information that can be carried out on the basis of what it has been said during its sessions. There should be no confusion between the ordinary juridical procedure typical of the Court with the moral and political repercussions that its sentence can have. Although the sessions are public, the capacity of a room is insignificant in relation with the millions of persons who consider important the action and the conclusions of the Russell Tribunal*".

Although the capacity of the rooms where the different sessions of the Russell Tribunal on Palestine can be insignificant -fact completely denied by the massive assistance of the civil society, national and international in the Hall of Acts of the Distinguished Bar Association of Barcelona, the last 1 to 3 March- the effect and the repercussion of its conclusions and of the previous works brings to light that the international public opinion already starts to get angry in front of the silence of the countries.

To do one's bit to achieve to break this silence progressively, in this publication we offer you the several studies that configure the shapeless one elaborated by the Spanish and Catalan Committee of experts of the Russell Tribunal, an accurate proceedings of the development of the two conferences of the session of Barcelona and the provisional conclusions where they are denounced, among other things, the complicity of the European Union and of its member States.

We expect that this publication is of your interest in order to know with more detail how the session of Barcelona took place and to understand better the functioning of the Russell Tribunal on Palestine. A way of appraising this initiative is against those that name it the Court of the poor we can call it the Court of the People, the Court of the Civil Society, including the critical voices of the Israeli civil society, that has left behind the fear to name things by its name: the existence of severe violations of the International Law and severe complicity of other countries and other international actors that harm the principle of respect for human dignity of the Palestinian people.

We are speaking about an international civil society that believes in the creation of a Palestinian State, but not at any price; an international civil society that says no to impunity, that demands that the crimes against the Humanity shall be judged and also asks that the severe violations of human rights and international humanitarian law should be repaired. In short, an international civil society that demands to go from the declarations to the facts and that requires to its governments to understand that the fight against the impunity requires the right to knowledge, justice and reparation. Here and in Palestine.

Rafael Grasa, President of the International Catalan Institute for Peace.
Antoni Pigrau, member of the Board of Governors of
the International Catalan Institute for Peace.
David Bondia, Director of the Catalan Institute for Human Rights.
Luciana Coconi, member of the Catalan Institute for Human Rights.

PART I

Document prepared for the
First International Session of the
Russell Tribunal on Palestine.
Committee of Experts of the Russell
Tribunal of Spain and Catalonia

EXECUTIVE SUMMARY

This document collects the different studies that, with various perspectives, have been elaborated upon by the experts who form the Committee of Experts of the Russell Tribunal for Spain and Catalonia. In these studies they expose the serious violations of International Law by the State of Israel and by the people who are in charge of executing its policies against the rights and the dignity of the Palestinian people. It also lays bare the complicity of the European Union and its member states.

This document has been made available to the organizers, both national and international, of the various sessions of the Russell Tribunal so that it can be used by the members of this Tribunal, not only in the Barcelona session but also in the ones following it.

The subjects dealt with by the experts are as follows:

A) The fallacy of "security" and the threats to human security

RAFAEL ESCUDERO

Professor of Philosophy of Law at University Carlos III, Madrid

Its starting point is the concept of human security as the "liberty of people in relation to basic insecurities caused by serious human rights violations." It goes on to demonstrate how Israeli policies violate this concept of human security and how they also generate numerous threats against it. Successive Israeli governments have used security as an argument to justify policies that have little do to with the protection of security; making a fallacious use of the argument of security, as a way of concealing policies of a very different nature. It also exposes how the "real" policies of the European Union are deeply inconsistent with the compromises it has assumed in the defence and protection of human security.

B) A case of passive complicity of the European Union in relation to the violations of International Law stemming from the Israeli occupation of the Palestinian Territories

AGNÈS BERTRAND

Researcher for SOAS and the Middle East Policy Officer for APRODEV

The EU's repeated silence and lack of action in view of the violations of International Law contribute to transmitting tolerance of an illegal situation that perpetuates itself.

Its decision (December, 2008) to strengthen its relations with Israel continues along this same line. The European Union adopted this decision while the people in Gaza were suffering a situation of isolation, causing a a serious decline in their living

conditions. And also while the perspective of creating a Palestinian State, an aim the EU has consistently supported, seems very distant.

Finally, it must be outlined that while the problem of the violation of the association agreement between the EU and Israel has attracted a certain amount of political interest, the problem of Israel extending its international agreements to include its colonies in Occupied Palestinian Territories and the tacit silence in view of the destruction of infrastructures financed by the EU and its member states have not been analysed with the interest they deserve.

C) Spanish Foreign Policy

IGNACIO ÁLVAREZ-OSSORIO

Professor in Arabic and Islamic Area Studies at the University of Alicante

This document shows how the relations between Spain and Israel have been strengthened despite the systematic violation of the human rights of the Palestinian population under Israeli occupation. This occupation and the annexation measures undertaken do not seem to have any cost for Israel. Its actions have had no direct consequences in the strengthening of economic, political and cultural bonds between Spain and Israel, with a remarkable increase in technological and trade links. In 2006, the Spanish government expressed its will to "set an example in bilateral relations with Israel". This decision was preceded by the strengthening of links between the European Union and Israel after the new European Neighbourhood Policy –which includes the Euro-Israeli Action Plan-became effective.

D) Arms Trade and Military and Security Cooperation between Spain and Israel

ALEJANDRO POZO

Researcher on peace, armed conflicts and disarmament at the Centre of Studies for Peace– Josep Maria Delàs

This work signals that military relations between Spain and Israel are fluid and stable, with a significant volume of trade both in the field of security and in the military field.

Spain exports arms to Israel and it also imports arms from this country. The volume is especially significant in the latter case. It is important to remember that imports make the productions costs lower for the Israeli industry and that the weapons involved are very advanced technologically, as a consequence of using the occupied territories as a permanent test field. Within the European Union, policies in this field are uneven, but Spain cannot be considered, in any case, among the countries with of best practices, especially during moments of serious conflict in the Occupied Palestinian Territories.

E) Analysis of the Advisory Opinion of the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territories, with a special reference to the question of settlements and Jerusalem

JAUME SAURA

Professor of International Law at the University of Barcelona

On the 9th of July, 2004, the International Criminal court issued an Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory. Having established Israel's international responsibility for breaching its international obligations, the International Criminal Court established that Israel must respect the right of the Palestinian people to free determination under its obligations in accord with International Humanitarian Law and International Human Rights Law. On the other hand, the other States of the international community, due to the *erga omnes* nature of the obligation to respect the right of self-determination and of some of the obligations of International Humanitarian Law, also have a number of responsibilities.

In particular, any State would be violating International Law if, in any way, it recognized *de jure* any *de facto* situation created as a consequence of the construction of the Wall. Furthermore, any State, or the European Union as an entity, are obliged to adopt reasonable pressure measures, of an economic nature, for instance, to try and force Israel into complying with its international obligations.

F) Israeli Policies on the Water Resources of the Occupied Territories, and their consequences for the Palestinian population

FERRÁN IZQUIERDO

Professor of International Relations at the Autonomous University of Barcelona

Water resources, like land, are the object of colonial appropriation by Israel, in violation with the regulations of International Law. Water is an instrument of collective punishments, of repression against the population and a booty for the Israeli occupation forces. Even if war and the conquests of 1967 were not motivated by water, it is also true that from the very first moment –and up until today– water has had an important role in the occupation policies of the West Bank and the Golan Heights. The Israeli control over water resources froze Palestinian consumption and prevented the development of agriculture. Restrictions to Palestinian consumption have an effect on all the sectors related to the water cycle, they cause serious underdevelopment of Palestinian agriculture and they maintain urban consumption levels that are very inferior to the demand. The socio-economic differences between Palestinian and Israelis are due, among many other factors, to the unequal distribution of the water resources.

G) Gaza, Operation "Cast Lead" and the Goldstone Report

MARGALIDA CAPELLA

Professor of International Public Law at the University of the Baleares Islands

The harassing of the Palestinian population (civilians and –real or alleged– combatants) by civil and military leaders, covers various punitive forms that are due to various reasons or aims (security, occupation, colonialism, annexation, ethnic cleansing, apartheid, etc.). They are all crimes against humanity committed against the Palestinian population.

The bombing of the Gaza strip from December 2008 to January 2009 cannot be analysed as an isolated event. The analysis must cover what has been happening during the last four years in Gaza. Not only has the population of the strip become isolated from the Palestinians in the West Bank, it is also isolated from the International community, due to the majority support to the Israeli and American policies, even by the European Union, its member States and the United Nations.

Not only must we evaluate the consequences of the Israeli bombings, under "Operation Molten Lead", already considered a humanitarian catastrophe. To these we have to add not only human and material losses, but also the consequences of a blockade that has not ceased and that prevents the population in Gaza from reconstructing their houses, buildings or facilities destroyed during these bombings.

If Judge Goldstone's categorical report comes to nothing, a common outcome when dealing with Israel and the Palestinian Occupied Territories, another failure will be added to the efforts of the International community towards reaching peace in this conflict. But as long as peace is not linked with justice, and impunity continues to be the norm and historic guideline of the conflict, it will be very difficult to reach lasting peace. Meanwhile, a humanitarian catastrophe is still going on, planned and executed under the compliance of an International community that has also participated in its build-up.

H) Limitations on Access to International Justice for Palestinian Victims of Human Rights Volations

ANTONI PIGRAU

Professor of International Law at the University Rovira i Virgili

The serious human rights violations affecting the Palestinian population, as a consequence of the Israeli occupation, in the vast majority of cases, and apart from a few exceptions by the courts of justice of the occupying country, remain under the mantle of impunity. This is due to present limitations in the access to the International Criminal Court and to other national jurisdictions.

It is evident that there is an obvious political discomfort in the countries who have had to deal with charges about violations of international humanitarian law committed by Israeli nationals, which always end in a lack of criminal action, consolidating the impunity for crimes that will obviously not be persecuted in Israel either.

The application of this double standard, if compared, for instance, with the numerous cases against Rwandan nationals that have been brought to trial thanks to universal jurisdiction has completely broken the credibility of the most developed countries, including the members of the European Union, in the fight against impunity of the

most serious crimes in international law and it has consolidated the situation of defencelessness of the weakest segments of the civil population of the world, among them, of course, the Palestinian population.

I) Apartheid Against the Palestinian People

LUCIANA COCONI/DAVID BONDIA

Luciana Coconi is a Researcher for the Institute for Human Rights of Catalonia

David Bondia is a Professor of International Public Law and International Relations at the University of Barcelona and Director of the Institute for Human Rights of Catalonia

This analysis covers, on the one hand, international legal regulations in the field of human rights and, on the other, the national legislation and its application, both in Israel and in the Palestinian Occupied Territories, to determine if there is –or not– a **crime of Apartheid**. Even if the International community decided to categorize the crime of apartheid in relation to what was happening in South Africa, once the original cause of this category has been overcome –the racist and segregationist South African regime–, the persecution of this crime against humanity is still in force. This can be done through the guidelines established in the Convention against Apartheid, in the Rome Statute of the International Criminal Court or in International Customary Law.

As established in Article 7 of the Statute of the International Criminal Court, it deals with "inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime". Taking as a reference the most recent definition we have, compiling all the jurisprudence and international customary law dealing with it, it is a question of determining, also following the guidelines established in the Convention against Apartheid, if the Palestinian people are suffering similar policies and situations.

After having analysed all the violations that the Palestinian people suffer continuously, it can be determined that it is indeed a victim of a crime of apartheid. It must also be mentioned that this crime of apartheid is not of recent execution. More than sixty years have passed since the start of discriminatory measures against the Palestinian people and they have become, gradually, a systematic practice that implies a domination of one ethnic group over another, through laws, policies and practices. It is obvious that if such a situation has been going on for more than sixty years, it is because Israel has benefited from the (active or passive) complicity of the International community. In this aspect, the institutional silence of the European Union and its member states is particularly remarkable. Silence, not only in view of the serious violations of international humanitarian law and of international human rights law that were committed during the bombing of the Gaza Strip, in December 2008 and January 2009 (made evident in the votes on the Goldstone Report before the Human Rights Council and the General Assembly of the United Nations), but also in the silence and hypocrisy that impedes the European Union and its member states from denouncing this crime of apartheid and that leads them to consent the perpetuation of a policy that denies the respect of the principle of human dignity to the Palestinian people.

LUCIANA COCONI and DAVID BONDIA
Coordinators of the Expert Committee

A) THE FALLACY OF "SECURITY" AND THE THREATS TO HUMAN SECURITY

1. Concept of human security vs. fallacious use of security

We should start from the concept of human security included in the report made by the Study Group on Europe's capabilities in matters of security: *A Human Security Doctrine for Europe*, also known as "Barcelona report". This Report was presented on the 15th of December, 2004 to Javier Solana (Former CFSP Mr).

This Report defines human security as "freedom for individuals from basic insecurities caused by gross human rights violations". In order for the EU security policy to be coherent with this definition, the Report establishes the following strategic lines that this organization should follow:

- Primacy of human rights.
- Clear political authority.
- Multilateralism.
- A bottom-up approach, from the local to the global.
- Regional focus of security and conflicts.
- The use of legal international instruments
- Appropriate use of force.

The following pages are intended to provide the arguments to support these two statements:

- On the one hand, Israeli policy not only violates this concept of human security, but also threatens it constantly. The successive Israeli governments appeal for security, as an argument to wield policies that have few to do with protection of security. It is a "fallacious" use this of an argument –in this case, on security– that is called upon to hide different policies.
- On the other hand, real EU political practice is seriously incongruent with its promises assumed under defence and protection of human security.

2. Violations of procedural security and due process: Enemy criminal law

Security is the leading argument given by the Israeli authorities for the treatment of Palestinian prisoners. It is an argument that enables them to adopt incompatible measures with their domestic Law and international Law. In fact, Israeli criminal and procedural Law stands out –regarding the Palestinian prisoners– as being similar to the "Guantanamo model" adopted by the US authorities and responds to what is called "enemy criminal law".

The most contrasting aspects with international regulations are the following:

- *Sine die* imprisonment of people
- Privation of liberty takes place on the basis of administrative orders, instead of judicial, and which often are out of judicial control itself.
- Solitary confinement.
- Impossibility of exercising the right of defence, as there is no possibility to turn to a lawyer, so these detentions are under a "juridical limbo", without any control by the courts.
- Physical and psychic treatment often similar to what could be classified as torture, which –must be remembered– was even admitted by the Israeli courts themselves until 1999.

At this point the action of the Israeli courts and, concretely, of its Supreme Court is especially grave. An action that is characterized by "following" the successive Israeli governments' positions. This fact seriously questions the principles of the separation powers and judicial independence; principles which are characteristics of democratic systems.

In the case HCJ 11026/05 *Anonymous v. Commander of IDF Forces in Judea and Samaria* there is a good example of this lack of independence by the judicial authorities to assess the practices of their government. In this occasion the Israeli Supreme Court issued a four-year administrative detention order against this individual based on his threat of committing an alleged terrorist action had not changed since the arresting time and, so, "the danger he poses is clear"[1]

On the other hand, the policy of "targeted assassinations" implies the ignorance of fundamental rights and procedural guarantees such as presumption of innocence or effective judicial protection, among others. The Israeli Supreme Court ratified the extrajudicial executions policy the sentence passed in the case 769/02 *The Public Committee Against Torture in Israel and The Palestinian Society for the Protection of Human Rights and the Environment v The Government of Israel*[2]. In this sentence the Court legalized "targeted assassinations" against people suspected of having committed or willing to commit armed actions against Israel. For this, it used the following argument:

Firstly, the Court excludes this kind of actions committed by the Israeli army from the crime and procedural law framework, which establishes a series of guarantees

1. See the matter, at http://www.mfa.gov.il/NR/rdonlyres/514D9726-B235-415E-9A8D-5031E1DD5459/0/SupremeCourtFightingTerror2.pdf (reference date: December 10, 2009).
2. See the issue at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (reference date: 10th December 2009).

such as presumption of innocence, right to due process and to a fair trial or right to a lawyer, among others; that is to say, the characteristics guaranteed by the Rule of Law. Secondly, the Court qualifies as civil the members of Palestinian organizations taking part in armed actions against Israel, and not as military combatants, given that –in its opinion– they do not fulfil the Law of War regulation. It does not grant them the deserved protection for being civil, given that protection granted to civil people by the Geneva Accords will not be valid when they take part in the military hostilities. This implies, for example, that they can be legitimate objective of a military attack. This means that they can suffer the risks of being a military combatant, but without having the protection that military combatants have, according to the Law of War regulation. In short, what the Court does sets under the category of "illegal combatants" civil people taking part in military hostilities. These people lack the protection they deserve by the Humanitarian International Law or by the International Human Rights Law, as they are not considered combatants or civil people with right to protection.

Moreover, in this same sentence the Court consolidates the argument of proportionality for the purposes of justifying the damage these attacks could cause to innocent civil people. As far as it is concerned, collateral damage of the "targeted assassinations" are justified as long as they are proportional to the military advantage gained with the attack. If proportionality is respected between means and effects, then the attack is justified "although an innocent passer-by can be injured". By means of this argument, the Court takes this kind of actions out of the logic of crime and Procedural Law to introduce them into the frame of war, where it is unavoidable that armed actions cause collateral damage. This way, the Court manages to discuss that the concept and features of proportionality as to when an action is carried out and when it is not, to avoid the debate on the major premise of the argument: the legalization of extrajudicial executions and the correlative death of innocent civil people.

Violation of the basic principles of International Law is clear. The duties of investigating and, if needed, sanctioning these conducts are not carried out. These conducts are in principle considered admissible and so, no responsibility is demanded of their executors. In this sense, the Report dated on the 8th of March 2006 (E/CN.4/2006/53) by the UN Special Rapporteur summary on extrajudicial or arbitrary executions expressly refers to "transparency in armed conflicts" and to the absolute character of "the obligation to investigate, as this would deprive the character of non-derogable right to life." This Report adds that "States must create institutions able to fulfil the obligations of the human rights Law: military justice must be subjected to the norms"[3].

The EU knows perfectly well the situation of Palestinian prisoners in Israeli prisons. The European Parliament issued on the 4th of November, 2008 a Resolution where it denounced the situation of complete defencelessness that more than a thousand of the estimated nearly eleven thousand Palestinian prisoners suffer, of whom some three hundred are minors[4].

Despite resolutions like this one, where both violation of human rights and continuous non-fulfilment of applicable International Law by the Israeli authorities are reported, EU policy towards Israel is not affected.

3. See the report text at http://www.acnur.org/biblioteca/pdf/5018.pdf (reference date: December 10, 2009).
4. See this Resolution at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0404+0+DOC+XML+V0//ES&language=ES (reference date: December 10, 2009).

3. Security of the Occupation Instruments

Security is the argument claimed by the Israeli authorities to justify annexation and segregationist actions and policies. This fallacious use of security is clearly highlighted in the actions addressed to:

3.1. ILLEGAL ANNEXATION OF PALESTINIAN TERRITORY

- Settlements:

Under the euphemism of "natural growth", the Israeli Government has made it clear that it will continue to expand the already existing settlements to enable the normal life of its communities. That is to say, they are not new settlements, but a mere expansion of the ancient ones. Consequently, it must be made clear that all the settlements are illegal, whether they are new or an expansion of the ancient ones and whether they have building permits issued by the Israeli Government or not. They are illegal because they violate the Forth Geneva Convention 1949, which forbids moving civil population from the occupying power to the occupied territory. Settlements are one of the main obstacles for the resolution of the conflict. On the one hand, because they imply consolidating the violation of International Law: there are lots of resolutions issued by the United Nations and by other international organizations stating that this Israeli occupation and exploitation of the Palestinian best and most fertile lands is illegal. And, on the other hand, because their presence along and across the West Bank avoids the continuity of the territory and, therefore, the viability for this future Palestinian State. It is estimated that today there are more than half a million Jewish colonists living in East Jerusalem and the West Bank; a growing population since 1967. Their presence is accompanied by a military control net (the infamous check-points), roads blockade, security areas, etc. that make impossible the normal development of communication and people's and goods transport in the West Bank[5].

- Wall:

The Wall Israel is building around the West Bank territory that began in April 2002 has been officially labelled a security instrument. Despite this –another example of the fallacious use of the aforementioned concept– the Wall performs territory annexation functions on the one hand, and segregation and reclusion of the Palestinian population functions on the other. Notice that the Wall is being built on Palestinian territory, occupied since 1967, and penetrates the territory up to twenty kilometres beyond the armistice line. What the Wall effectively does is ensures that the great settlements in the West Bank remain safe in the Israeli side, violating the Geneva conventions, which forbid the transfer of occupying population to the occupied territory. This a policy of *faits accomplis*, based on consolidating territories so that if a Palestinian "final statute" is negotiated someday, it will be done from the strongest position possible for the occupying party.

Moreover, rather than talking about the Wall, we should talk about the walls, because, paying detailed attention to its route, one can see the construction of more than

5. See the location of these blockages and road cuts in the web site of the Office for the Coordination of Humanitarian Affairs (OCHA) of UN in the Palestinian occupied territory: http://www.ochaopt.org/?module=displaysection&section_id=96&static=0&format=html. Last updated on June 2009.

one wall. In areas like Tulkarm, Kalkilia or Belem real "closed areas" are being built – under absolute Israeli military control– aimed to confine the Palestinians to ghettos, to segregate and separate each other. One also notices this in the East Jerusalem, where walls separating Palestinian neighbourhoods from Israeli neighbourhoods are being built. These walls segregate and confine them in closed ghettos[6]. In short, the Wall is nothing but a chained link made to appropriate as much Palestinian territory as possible with the lowest number of Palestinian population in it.

Once again, Israel ignores the claims coming from several forums, including the EU, demanding it to fulfil international regulation. And, again, silence is usually the response of Israeli authorities. Regarding the Wall, moreover, there is an Advisory Opinion of the International Court of Justice dated on the 9th of July 2004 stating that the construction of the Wall is illegal according to International Law[7]. This Opinion demanded the State of Israel immediately stop the construction of the Wall, return to the starting situation and the *restitutio in integrum,* that is to say, give the compensation owed for damages caused since the beginning of construction. It also demands the international community not to recognize the illegal situation and to carry out the necessary actions needed to end this situation. It is true that it is a non-binding declaration, but it is also true that it is an instrument that could be used by the states supporting it to put pressure on the State of Israel. In relation to this, up until now the Wall is still being built in a relentless way on Palestinian territory, destroying houses and farming lands, separating owners from their properties, confining and insulating complete population centres and segregating Palestinian people from each other.

- Demolition of houses:

Demolitions and occupation of houses are a quotidian element of tension in the Palestinian-Israeli framework. However, this reality is scarcely reflected in the media. Through these practices, the Palestinian population are forced to leave their houses. This means that they are deprived of their roots and their means of life and development. This is a practice that could be likened to inhumane treatment, to the extent that the sight of the destruction of one's home is certainly an unbearable feeling. The analysis of the demolitions practices carried out by the Israeli Government enables to systematize this action and to propose the following classification:

A Punitive Demolitions. The justification "legal" action for such demolitions is, quite simply, the law of retaliation. The former invokes the biblical curse that justifies not leaving one stone of the enemies upon the land of Israel. It is a measure taken against the families of suicide bombers spreading, thus the responsibility to the family group.

B Demolitions as strategic military reasons. This kind of demolition affects, generally, any kinds of houses and buildings placed closer than 200 metres from the Wall. It is equally applied in defence of the settlements' security.

C Demolitions for a lack of occupation. Just like demolitions named as punitive, these are a manner that constitutes a real juridical outrage. As a consequence

6. See, again, OCHA web site, where one can clearly see the sinuous route of this occupation instrument http://www.ochaopt.org/?module=displaysection&section_id=108&static=0&edition_id=&format=html.

7. Check this whole text in the web page of the Court: http://www.icj-cij.org/homepage/sp/advisory/advisory_2004-07-09.pdf.

of the Wall route, many areas are insulated in Palestinian territory. There is no chance for their inhabitants to communicate with their former neighbours or go to cultivate their lands. For this reason, houses are empty or sold at a very low price. Even, a law dated back to 1950 has been applied again, by which it is allowed to occupy uninhabited houses to settle Jewish colonization pioneers. In many cases these houses are demolished.

D Administrative demolitions. There is no debating that in these cases refinement and twisting of the Law reaches great sophistication levels. Administrative authorities start a demolition expedient against those houses they consider illegal. Illegality may come from the lack of land ownership evidence or by the lack of building permit. The person receiving the administrative order about its irregular situation can go to Courts. This is an expensive task for most people, and unaffordable for many. Even in the cases that reach the Supreme Court, in most situations they will not be able to prove ownership of their lands because the very few that appear in the records, which date back to the Ottoman era are not valid before the Israeli Courts. Anyways, they lack the permit and it will never be granted.

E Demolitions for urban pressure. These cases mainly take place in the cities of Jerusalem or Hebron. In the case of East Jerusalem the expansion of the Jewish properties is unstoppable. Then, by de facto, occupations of areas where Jewish people settle leave the Arabian population in helplessness conditions due to the many administrative obstacles they face. In view of pressure, that can be qualified as authentic "landlord harassment" the owners finally accept the offers from the Jewish people usually at a very low cost. So the Jewish people gradually obtain the houses property, which, theoretically, are under Arab-Israeli administration.

3.2. EXPULSION OF PALESTINIAN POPULATION

The special case to be treated here is the refugees matter. It can be considered as an example of a real threat to human security and of flagrant non-fulfilment of the International Law since the creation of the State of Israel.

The Israeli Government proposal for Palestinian refugees is illegal according to the international legislation. For refugees, Netanyahu claims a solution out of the borders of Israel, without explaining which one and ignoring with impunity the Resolution 194/48, dated on the 11th of December, of the United Nations. According to this resolution, these people have the right to return, that is to say, right to go back to the places they were expelled from, most of them now set inside the borders of the State of Israel, the right to compensation for those who do not want to return. Recent data coming from the "new" Israeli historiography estimates that more than 750,000 Arab people were expelled during the 1948 war; this number has to be added the refugees after the 1967 war. All of them and their descendants add up to an amount of four and a half million people nowadays. Their return, –they have the right to according to numerous UN resolutions– would completely reverse the relation between Jewish and Arab citizens in the State of Israel. This is why the Israeli leaders reject chance of return, that is to say, they reject to fulfil the International Law regarding this point. For reminder

purposes, as it has no other function nowadays, we must notice that the United Nations set as a requirement, for Israel to join the UN, the fulfilment of both this Resolution 194/48 and the Partition Plan.

There is no doubt Israel has interpreted the lack of political will that clearly enables the situation stated as a reason, not only to ignore the continuous claims for fulfilling international obligations, but to expand and consolidate an Occupation which, apart from complicating the future solution of the conflict, has created a growing problem of domestic transferring of Palestinian population.

3.3. SEGREGATION OF PALESTINIAN POPULATION

Israeli annexation policies also cause segregation of the Palestinian population into ghettos, that is to say, more and more limited, insulated and unconnected nuclei. This implies impossibility of passing people and goods between Gaza and the West Bank, existence of several separating "walls" in the own Palestinian neighbourhoods in Jerusalem, borders control, arbitrary closures of roads in and out of town to urban centres and forced population transferring. These actions hide the development of annexation, racist and segregationist policies that respond to what can be qualified as *apartheid*.

A special case to be observed is the one of the Law Citizenship and Entry into Israel 2003, reported by organizations such as Amnesty International[8]. This Law forbids –"for security reasons", as for what is inferred from the document– starting Arab families inside of Israel, by blocking the Arab-Israeli marriages between Palestinian people from the Occupied Territories from living with their spouses in Israel. Something which is allowed for any Jewish person living in any part of the world. The result is that any Jewish person can gain Israeli citizenship thanks to its condition of Jewish, while Arab people wishing to gain it cannot[9]. It is, in short, race discrimination without justification –not even for hypothetical "security reasons"– and that seriously questions the adjective of democratic so many people defend in Israeli legal-social system. To say it differently, this prohibition is incompatible with the article 17.1 of the international Covenant on Civil and Political Rights, which guarantees the right for individuals not to suffer arbitrary and illegal interferences in its private life and family.

As for the EU, it "validates" this discriminatory Israeli practices as it does not denounce them or even introduce them in its agenda as issues to discuss with the Israeli authorities.

8. See its report "Israel/Occupied Palestinian Territories: Right to family life denied: Foreign spouses of Palestinians barred". Available at https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI?CMD=VERDOC&BASE=SIAI&SORT=-FPUB&DOCR=10&RNG=10&SEPARADOR=&&TPRI=ISRAEL.

9. Art. 2 of the law states the following: "During the period in which this law shall remain in force[…] the Minister of the Interior shall not grant the inhabitant of an area [West Bank and Gaza]citizenship and shall not give him a license to reside in Israel on the basis of the Entry into Israel Law". See the law's text at http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm.

4. Security and destruction of Palestinian political institutions

It is frequently discussed the need to establish a Palestine a legal and political system based on democracy and respect for the Rule of Law. It is true that democracy and the Rule of Law are the only institutions through which security and protection of human rights can be properly guaranteed.

However, the Palestinian society will never be able to develop these institutions while the Israeli Occupation and the consequent violation of international legality of this regime continue. It is sarcastic to demand the fulfilment of the Rule of Law to a society under an Occupation that not only occupies a territory, but also suffocates its population and does not fulfil its international obligations as an occupying power. Moreover, it prevents the Palestinian society from creating political and civil institutions. This is what has happened every time the Palestinians have tried to start an appropriate criminal and procedural system to fight against crime and corruption, so much discussed when analysing the Palestinian political situation. In successive military actions, the Israeli army has bombed and destroyed systematically the Palestinian prisons. This has caused –apart from a real judicial collapse in Gaza– the impossibility of establishing an effective criminal control, with the threat this implies for the citizens' security.

To this we must add the current paralyzed situation of the Palestinian Legislative Council, body for the development of laws and government control. Nowadays this body cannot develop either function entrusted to it according to Palestinian Basic Law, due to a fact which, unfortunately, is not given the importance it deserves: since June 2006, there are seventy Hamas local representatives and members of parliament imprisoned by Israel. These people were elected in the legislative election on the 25th of January that same year. This Israeli action is one of the most serious, which has occurred in the last years in its attempt to suffocate any Palestinian political initiative, on one hand, because it makes obvious its absolute contempt for the voice of the Palestinian people, who freely voted in that election. And it does so with total impunity in front of the silence of the International Community. On the other hand, because this prevents the Palestinian authorities from fulfilling the legislative power assigned to them and it presents to the world an image of chaos or anarchy in the Palestinian political institutions.

In closing, just adding some words on what is another fallacy among all the other fallacies surrounding this matter of security in Palestine. It is about not recognizing the result the legislative election that gave the victory to Hamas. It is unacceptable insisting on the need of giving the word to the Palestinian society to choose for itself – under an Occupation regime that violates its rights and the international legality, remember– finally not recognizing the result of its freely and democratically voted choice. And up to the point of suspending any economical and political aid for the Palestinian people.

The fact that Israel and the US did not recognize the victory of Hamas was not a surprise. However, the European Union joining this policy, non-fulfilling its international promises or even more, its own principles about the virtues of democracy and its link to security, is something much less expectable. When doing it, the EU itself is became a threat to security, which so many pompously claim to defend.

Notice the EU's incongruent policy:

- On one hand, it demands the fulfilment of the Rule of Law to those who live under a regime that not only occupies their territory and expels their population, but also violates its international obligations and prevents Palestinian society from any attempt to create political and civil institutions.
- On the other hand, it remains silent against the flagrant violation of the International Law and "political" clauses of economical agreements signed between them and the successive Israeli Governments. The EU does not know its own principles, the ones to govern its relations with third States, and it does not fulfil its own political "ideology" about the virtues of democracy and its link with security.

5. Security and democracy: as a summary

This last point is aimed to highlight the points that make clear the limited quality of Israel's democracy. What serves, once again, to stress the EU's incongruence, as it cannot admit or consider "as one of them" a state with a significant democratic deficit. There are three democratic deficits affecting the State of Israel.

5.1 DEMOCRACY AND RESPECT FOR INTERNATIONAL LAW

The contempt the Israeli Government shows towards international legality is proven by its agents and authorities' practices regarding the Palestinian people. The mere list of rules of the Humanitarian International Law (the *jus in bello* or Laws of War) and the International Law of Human Rights violated by the Israeli authorities would make these pages endless. The same way the list of international institutions that have denounced those violations is long: United Nations, Council of Europe, European Parliament, state governments, etc. All these institutions periodically claim their deepest rejection against the practices of Israel and demand it to refocus its policy within the frame of international legality. It is well known how unsuccessful these declarations have been, more grandiloquent than effective.

Just to finish with this point, stressing the conceptual impossibility between being an occupying State and being a democratic State. This is a contradiction the State of Israel is immersed in.

5.2. DEMOCRACY, FORMAL EQUALITY AND NON-DISCRIMINATION

Democracy also demands respect for conditions that guarantee formal equality or non-discrimination between people: all citizens of the State have to start from a position of equal opportunity. This implies the conceptual link between democracy and the non-discrimination principle on the basis of national origin. However, in the case of Israel there is some notable discrimination towards the Arab-Israeli people, that is to say, the descendants –the ones still alive. Discrimination reflected not only in some

of the valid laws in the State of Israel, but also –and mainly– in its institutional practice and its social reality. Today, these "Palestinians of 1948" are in the bottom rungs of the Israeli productive system and, consequently, of the social hierarchy.

Apart from the already analysed case of the Law of Citizenship and Entry into Israel, other discrimination suppositions towards the Arab-Israeli people are, for example, that they are not allowed to work in strategic companies like in electricity, gas or airlines companies. Or, in the other sense, advantages in fiscal matters for ultraorthodox Jewish people included forbidding civil marriages in the Israeli legislation.

Furthermore, the current Israeli Government has introduced a new condition: recognizing Israel as the "Jewish national home". This claim hides a clear segregation and marginalization policy towards the million and a half Arab-Israeli people living in Israel; a minority legally, socially and institutionally discriminated against in its own State. It is important to notice that currently there are two bills in the *Knesset* awaiting to be passed, which is more than probable: first, the one prescribing one-year jail for those who do not recognize the Jewish and democratic character of the State of Israel, the other one, which establishes three-year jail for those who commemorate *Nakba* (term with which the Palestinian people refer to the "Disaster", that is to say, the expelling in 1948 from their lands and homes). This added to the legislative attempts of demanding a loyalty declaration to a "Jewish, Zionist and democratic" State of Israel for those who request the Israeli citizenship or the parliamentarians (*no loyalty, no citizenship*), the result will be the inexistence of future Arab-Israeli citizens and parliamentarians. All these things happen in a State that claims to be democratic, when discrimination and democracy are two opposite terms.

It is then convenient to have a look at the current Israeli Government, whose Foreign Affairs Minister is Avigdor Lieberman, leader of the Yisrael Beiteinu party, which was the third most-voted political power in the last election. This individual, apart from violating international peace agreements, is famous for his xenophobia, racism and his hate towards the Arab people, as his proposals of dropping an atomic bomb in Gaza or throwing the Palestinian people to the Dead Sea prove. His presence in the Government should be taken into account by the European Union, mainly compared to the action the Union itself followed in the case of the Palestinian election that gave the victory to Hamas or with the measures adopted in 2000 when Jörg Haider's extreme right party became part of the Austrian Government.

5.3. DEMOCRACY AND JUDICIAL CONTROL OVER POLITICAL POWER: THE ACTION OF THE ISRAELI SUPREME COURT

On the other hand, the concept of democracy keeps an inseparable relation with the development of the government's action. Unlimited political power concentrated in a few hands and with no means of control over its decisions cannot be qualified as democratic either. Hence, the link of democracy with the separation and judicial control over the powers of the executive.

Israeli courts do very few to reverse its political and legislative authorities' policies. These courts do not act as control mechanisms of the political power regarding anything surrounding the action of the Israeli public powers in the Occupied Palestinian territories and towards the Palestinian population. They reject, then, to fulfil the control function over executive power reserved to the courts acting in so-called democra-

cies. Indeed, there are many issues that the Court assumes the position of the Israeli authorities, regardless of the way it violates international law and, therefore, without exercising their independence and control function of the executive.

A Now we will bring up two relevant cases in this sense[10]. The first one refers to the Wall which, based on security reasons, the Israeli Government has been building since April 2002 in areas of the occupied territory in the West Bank and East Jerusalem. The Supreme Court has had the occasion to rule on the matter, although it is important to pay attention to the way it has been done. The Court uses an argumentative strategy that avoids it from having to declare itself on the ICJ Resolution and on the legality of the Wall itself, which, incidentally, refered to it as a *security fence* to the image of how Israeli Government does. On the first occasion the Court faced the matter, in the issue 2056/04; it decided over a petition for the modification of the Wall's route made by the inhabitants of Beit Sourik, village at the North-east of the West Bank[11]. And it accepted a modification of the initial route of the Wall in the affected area that had been planned this way, according to the Israeli Government, because of being the one that better guaranteed security.

However, at no time did the Court discuss the legality of the Wall itself, arguing that the decision of building it is given by military reasons, not political ones. And, from the Court's point of view, IHL enables the armed conflict parts to adopt those military measures addressed to protect their citizens' security; in this case, the construction of a barrier that guaranteed Palestinian and Israeli people's security. Therefore, the Court accepted the justification of the construction of the Wall by the Israeli Government: "it was built for military reasons; there is no room for an additional system of considerations, whether they be political considerations or the annexation of territory". To this major premise the Court applied the proportionality principle, placing on one side "legitimate" objective of security claimed by the Army and, on the other side, the concrete damage caused by the separation fence route to the rights of the inhabitants of the area. It made a balancing exercise and concluded by partially modifying the route where the security argument resulted disproportioned.

Notice that the Court focused the matter around proportionality and not around the concrete route of the fence, avoiding this way discussing on the military or political fundament of the Government's decision to build the Wall. This would have obliged it to question –at least hypothetically– the aforementioned decision, something that at no time did it carry out, rejecting this way the legal function of controlling the executive power. The strategy ends with the following Court's decision, included on the issue 7957/04 (known as the "case of Alfei Menashe"): here it avoids confronting the ICJ[12] Resolution directly and it does it, once again, by avoiding the discussion about the matter's basis and insisting on the fact that the reasons of the exist-

10. To be added the issue HCT 9132/07 Jaber Al-Basssiouni Ahmed and others v. The Prime Minister, where the Supreme Court "validates" the adopted punitive actions against the whole population in the Gaza Strip. See the sentence at http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf (reference date: 10 December 2009).

11. See the IHL 2056/04 Beit Sourik Village Council v. The Government of Israel at http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf (reference date: 10 December 2009).

12. It is the IHL 7957/04 Zaharan Yunis Muhammad Mara'abe and others v. The Prime Minister of Israel. Available at http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.pdf (reference date: 10 December 2009).

ence of the Wall are military and not political, so its construction is within the framework of international legality. The arguments of the Court are simple, but effective: given that the ICJ Resolution responds to a different background, the Wall being built for political reasons and not military security ones, then this Resolution has no case. In his own words, "ICJ's conclusion based on factual basis laid before the Court, it is not *res judicata*, and it does not bind Israel Supreme Court to establish that each segment of the fence violate International Law".

B A second relevant case is the one for the justification by the Supreme Court of punitive demolitions. That is to say, demolitions of the relatives' houses of people committing armed attacks against Israeli objectives or citizens. According to the Government, these demolitions are justified in the fight against terrorism and have legal basis in the legislation of the British Mandate incorporated into Israeli Law. Towards this, it is claimed the way in which the relatives of those qualified as terrorists are affected by these actions. Is it impossible to discern the relation of imputation which the law requires between some illegal conduct and the pertinent punishment in cases of this type: criminal liability is strictly individual and cannot be extended to the relatives of those responsible for illegal actions, in modern law at least.

The Court considered the legality of this kind of military actions in the issue 2007/97[13]. Its argumentative guideline is similar to that already explained in the previous case. For this, the Court does not qualify this kind of measures as "punitive", but as "preventive". Its aim is not punishing, but preventing further attacks. The Court expressly claims that "family pressure discourages terrorists". Then it will be the proportionality principle between damaged caused –destruction of home– and the good to protect –security in the State of Israel– what must determine the legality of each demolition. If it is legal, then the attack against the family's house is justified; if it is illegal, it will not be justified. Once again, the Court avoids declaring itself on the legitimacy of the initial decision: demolishing the houses of the families of those responsible for activities qualified as terrorist. Again, it does stay the line set by the military and governmental authorities.

C But, the case that questions, to a greater extent the Israeli Judicial Power's independency and its defence of democracy and the principles defined by the Rule of Law is, without doubt is, the case relating the Law of Citizenship and Entry into Israel Law, 2003. As mentioned in previous pages, this law forbids family reunification of Arab-Israeli citizens married with Palestinians who live in occupied Palestinian territories. The Israeli Supreme Court had the occasion of correcting this flagrant discrimination. However, once again, it has aligned itself with the official thesis, in this case, both the Knesset's and the Israeli Government's. In May 2006, in issue 7052/03, the Supreme Court confirmed this law was constitutional[14]. Regarding the right to equality and family reunification, the Court claims the security argument. The opinion of most of

13. See IHL 2006/97 Janimat v. IDF Military Commander. The sentence text is available at http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Resolutions/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm (reference date: 10 December 2009).

14. See the sentence text IHL 7052/03 Adalah v. The Minister of Interior at http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf (reference date: 10 December 2009).

the court is that Israeli citizens do not enjoy a constitutional right according to which their spouses can emigrate to Israel after the marriage. To this it must be added that "the resident Palestinians in the region [in the Occupied Territories] are national enemies and as such, they constitute a special risk group for the citizens and residents of Israel". Therefore, these residents are not allowed to enter Israel, given that "they are a risk to national security".

Notice how in this case the Court does not even need to make any balancing exercises it usually makes when rights of the residents of the Occupied Territories come into play. And it does not make it because, in this case, there are not two rights to balance, as there is no constitutional law for family reunification for Arab-Israeli citizens. There are then two discriminations assumed by the Court with this decision: first, against Palestinian civil people who do not take part or have not taken part in armed actions. They are classified as "enemies", ignoring this distinction and the rights Humanitarian International Law grants to those who do not take part in armed actions during the conflict. For the Supreme Court all of them are "foreign enemies".

If this first discrimination is serious, much worse is the second one: that one affecting Arab-Israeli citizens, compared to Jewish Israeli citizens. According to Aharon Barak's minority particular vote, who in that moment was the President of the Supreme Court, Israeli legislation recognizes family reunification of the Israeli citizens as an integrating part of the constitutional right to life with the family. Then, this is a right constitutionally granted to all Israeli citizens. Therefore, its denial to the Arab citizens whose spouses live in the Occupied Territories is clearly discriminatory. This limitation does not affect the Jewish people, who independently of their place of birth and residence, enjoy –according to the Law of Return 1950– the right to live in Israel and to have Israeli citizenship. This citizenship includes the right to live with the family and, therefore, the possibility of reunifying this family in Israeli territory.

Following this formulation there is the distinction between citizenship and nationality; this distinction is mainly highlighted by the rights derived from both conditions. Israeli citizenship is possessed by everyone born in Israel, both Jewish and Arab people, while nationality varies according to ethnic or religious roots of each person. A Jewish person has Jewish nationality, the same way an Arab person has Arab nationality. As one can see in examples like the one explained in the previous paragraph, although all of them have the same citizenship, they do not have the same rights. No national group has as many individual and collective rights compared to those reserved to the "Jewish national people"[15].

D

It is also remarkable the sentence –aforementioned in these pages– that declared "targeted assassinations" policy constitutional (in fact, summary and illegal executions, forbidden by the International Law) –supported on military resolutions at the administrative level– against leaders of the Palestinian resistance, who are qualified as terrorists with no criminal or military trial. Notice that, the adjective "alleged" does not exist in the Israeli legal frame, being

15. See, in this sense, the report by the Human Sciences Reserch Council of South Africa, titled "Occupation, Colonialism, Apartheid: A Re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law" (May 2009) and coordinated by Virginia Tylley. Available at http://www.hsrc.ac.za/Document-3202.phtml (reference date: 10 December 2009).

this one of the most flagrant contradictions between the criminal and procedural Israeli system and the so-called democratic systems.

E Moreover, some of the Israeli Supreme Court silences are highly significant. For example, its denial to face this "juridical limbo" where Palestinian prisoners are; its rejection to face the matter of the West Bank Wall's legality; or its way of avoiding the matter relating to the settlements. In this last case, the Court avoids ruling itself claiming that the Geneva Conventions that could be applied –conventions which, remember, establish the illegality of transferring the population of the occupying to occupied territory– are not part of International Common Law and, therefore, they are not applicable by the Court. This follows the Israeli Government official thesis point-to-point.

In short, many sentences by the Israeli Supreme Court are not characterized by respecting fundamental rights included not only in modern constitutions, but even in international treats on human rights ratified by Israel and even included in its own domestic legislation.

B) A CASE OF PASSIVE COMPLICITY OF THE EUROPEAN UNION IN RELATION TO THE VIOLATIONS OF INTERNATIONAL LAW STEMMING FROM THE ISRAELI OCCUPATION OF PALESTINIAN TERRITORIES

1. The position of the European Union on the Israeli-Palestinian conflict

The position of the European Union in relation to the Israeli-Palestinian conflict revolves around two axes:

- Creating an independent and democratic Palestinian state that is the outcome of negotiations between the parties.
- The parties to the conflict must respect international law.

The bases of this position were laid down at the Venice Declaration in 1981 as member states of the European Community (EC) of that time established that the Israeli settlements in the occupied Palestinian territories violated the Fourth Geneva Convention.[1] The EC became then the first third party in the Israeli-Palestinian conflict to establish that the right to self-determination of the Palestinian people should be respected.

Even so, it would be wrong to proclaim the EU the champion or the guardian of international law in its declaratory policy. It is important to note that the requirement that parties must respect international law did decrease during the peace process in the 90s. The member states of the EU seemed more concerned by keeping the negotiations going between the parties and did not dare making a reference to international law, fearing to "offend" one or the other party. Some argue that the desire to see the parties engaged in a process of negotiation results in losing sight of the outcome of these negotiations. Furthermore, some form of equidistance has always marked the EU statements. The denunciations of Israel for its settlement policy or its practice of extrajudicial killings have always been followed by a symmetrical requirement directed at the Palestinian Authority to fight terrorism or to implement reforms.

The fact remains that compared to other third parties, and to the United States in particular, EU statements about the Middle East contain sparse references to international law.

1. Declaration by the European Council in Venice on the Situation in the Middle East, 12-13 June 1980.

Proof of this is this meaningful extract of the Commission's Communication of 2003, "Reinvigorating Human Rights in the Mediterranean Area", where the European Commission stated:

> "There is an urgent need to place compliance with universal human rights standards and humanitarian law by all parties involved in the Israeli-Palestinian conflict as a central factor in the efforts to put the Middle-East peace process back on track."[2]

That same year, the EU, in its "European Security Strategy", declared that the resolution of the Arab-Israeli conflict was a priority for the EU, that the EU and its member states were committed to promoting international law on the international stage and that the framework for the conduct of international relations was the United Nations Charter.[3]

The December 2009 declaration on the Middle East is illustrative of the desire of some member states, and of the Swedish Presidency in particular, to give international law and human rights a more visible place in the declaratory policy of the EU. The declaration reiterates the illegality of the settlements and of the building of the wall, the non-recognition of the annexation of East Jerusalem and the implementation of international humanitarian law in Gaza.

2. The European foreign policy on human rights directed toward Israel and the Palestinians

In the early 90s, the Maastricht Treaty gives birth to the European Common Security Policy. The member states of the European Union had to define the pillars and goals of the new Foreign Affairs decision framework of the EU. With the fall of the communist bloc, Western liberal democracies emerged as the dominant model. A foreign policy on human rights is then established, the contours of which are still relatively undefined. It is certain that its goal is not so much to promote respect for human rights in the world as to engage its partners in a dialogue on the issue of human rights and democratic principles and the respect for them.

In the same vein, the EU implemented in 1995 the Euro-Mediterranean Partnership, also known as the Barcelona Process. The idea was to promote trade between the countries of the southern shores of the Mediterranean and with European countries in order to create the conditions conducive to durable peace and lasting stability. The political pillar of the Euro-Mediterranean partnership is the promotion of human rights and democratic standards. In order to achieve this objective, the EC, in each association agreement signed with its partners, included a clause stating that the respect for human rights and democratic principles constitutes an essential element of the partnership established by the agreement. The association agreements between the EC and Israel and the EC and the PLO did not escape this rule.

2. Commission Communication, 21 May 2003, COM (2003) 294 final, p. 5.
3. A Secure Europe in a Better World, European Security Strategy Document, 12 December 2003, Brussels.

- **What is the commitment of the EU when it inserts such human rights clauses in its association agreements?**

A basis for the suspension of the agreement?

Theoretically, these clauses can serve as a legal basis for suspending the agreement. The decision of the European Court of Justice in Portugal v. Council has confirmed it. This ruling established that one of the central purposes of this clause was to provide a legal basis to suspend or terminate an agreement if the other party had not respected human rights.[4]

The origin of the human rights provision can be traced to the Yugoslav crisis of the early 90s. In 1991, the EC found it necessary to suspend its agreement with Yugoslavia in response to the serious violations of human rights carried out despite the fact that the Vienna Convention on the Law of Treaties does not make any reference to the possibility to suspend or terminate a treaty on the sole basis of human rights violations.[5]

Nevertheless, the possibility of suspension on account of these reasons remains theoretical. The EU resorts to the suspension based on the human rights provision only in exceptional cases. Until now, most of the times, the cases of suspension have been directed to ACP (Africa-Caribbean-Pacific) states, and only in cases of gross violations of the principles of democracy and of the rule of law, such as coup d'état, overthrowing of governments and election irregularities.[6]

The Commission and member states are absolutely clear on the fact that the human rights clauses do not entitle to an automatic suspension of the association agreements in cases of human rights violation by its partner.[7] The political and legal arguments are mixed. The agreements themselves state that in case of failure to comply with one of the provisions of the agreement, the parties must adopt the measures which least disturb its functioning (Article 25.2 in the case of the Association Agreement between the EU and Israel). In addition, representatives of the EU and its member states are intent on stressing that imposing sanctions against one of its partners could be counterproductive. A practice concerning the Mediterranean states has developed amongst them. If the EU should suspend an association agreement with one of its Mediterranean partners on the basis of the human rights clause, then it should do so with all of them since not one of them has a satisfactory "record of achievements" on human rights.

4. Case C-298/94 Portugal v. Council [1996] ECR I-6177, para. 27.

5. At the time, the EC, nevertheless, found its basis on the Article 62 of the Vienna Convention "fundamental change of circumstances" and had invoked Security Council resolution 713. B. Brandter and A. Rosas, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" (1998) 9 EJIL 468-490, p. 474, and J. Rideau, "Le concept d'association dans les accords passés par la Communauté : essai de clarification", Proceedings of the symposium organized by the Centre de Droit Européen et Comparé, (Université René Descartes – Paris V 1999), pp. 139-195, p. 157.

6. E. Paasivirta, "Human Rights, Diplomacy and Sanctions: Aspects to 'Human Rights Clauses' in the External Agreements of the European Union", In J. Klabbers and J. Petman (eds.), Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi, (Leiden 2003), pp. 155-180, p. 169 and E. Fierro, The EU's Approach to Human Rights Conditionality in Practice (The Hague 2003), pp. 309-310.

7. "The principal rationale for the clause is to form a positive basis for advancing human rights in third countries through dialogue and persuasion. In other words, the preference is to use positive action rather than penalties" in Furthering Democracy and Human Rights Across the Globe. European Communities, 2007, p. 9.

"The most effective way of achieving change is therefore a positive and constructive partnership with governments, based on dialogue, support and encouragement. This should aim to improve mutual understanding and respect, and promote sustainable reform [...]. All avenues for progress are explored before the EU resorts to sanctions. [...] In many cases, the basis for a dialogue on human rights and democracy is the 'essential elements' clause included in all third country Community agreements since 1992". "The European Union's Role in Promoting Human Rights and Democratization in Third Countries", Commission Communication, 8 May 2001, COM (2001) 252 final.. "The principal rationale for the clause is to form a positive basis for advancing human rights in third countries through dialogue and persuasion. In other words, the preference is to use positive action rather than penalties" in Furthering Democracy and Human Rights Across the Globe. European Communities, 2007, p. 9.

A basis for consolidating relations?

Firstly, if the human rights provision is the basis for pursuing a dialogue on human rights with its partners, we can say, *a minima*, that this clause serves to raise the issue of respect for human rights without making it an unacceptable interference in the domestic affairs of its partner. Moreover, by making the human rights provision an essential element of the agreement, the EU allows itself to address the issue of respect for human rights in the same manner as the other aspects of the Association Agreement.

If the barriers separating these issues disappear, the respect for human rights and democratic principles becomes the condition for rapprochement. This assertion is supported by the role assigned to the "human rights" component of the European Neighbourhood Policy (ENP). The ENP launched in 2004 is the new framework for EU relations with countries located on its periphery. The ENP is based on the assumption that the EU and its neighbours share the values codified in the Universal Declaration of Human Rights, the Organization for Security and Cooperation in Europe and the standards issued by the European Council.[8] Therefore, the consolidation of their relations and the prospect of closer economic integration depend on the expression of a commitment to respect democratic principles and human rights.[9] The human rights dimension of the ENP is thus subject to a system of positive requirements in which the reforms and progress on human rights and democracy identified in each Action Plan are expected to be evaluated annually and be the condition for closer relations and an extension of the privileges with the EU. Thus, the deepening of relations without regard for the systematic violations of human rights by its partner is for the EU a violation of the commitments initially made, not only at the time of the proposal of the Action Plan but also, and above all, at the time of the signing of the Association Agreement. (The action plan does not have the value of treaty).

3. How to evaluate the complicity of the EU?

In its ruling on the wall, the International Court of Justice stated legal obligations falling to the international community in connection with the construction of the wall.[10]

Besides the obligation included in Article 1 of the Fourth Geneva Convention,[11] these duties had already been set out by the United Nations International Commission (UNIC) in article 41 of its draft on the responsibility of the states.[12]

This paper will not give rise to an extensive analysis of the contents of these obligations nor to a criticism of the methodology of the UNIC to establish the obligations of

8. "Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", Commission Communication, 11 March 2003, COM (2003) 104 final, p. 16.

9. Ibid., p. 9.

10. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Rep. (2004), p. 200 (para. 159).

11. Common Article 1 of the Geneva Convention reiterated in the 1977 Protocols: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

12. "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.

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".

third countries to an aggravated violation of the international law. We will only say, firstly, that of the three requirements set by the Commission, only the obligations not to aid and assist and to not recognize are customary obligations.[13] Moreover, to make use only of these bonds to assess the "complicity of the EU" in relation to the violations of international law emanating from the Israeli occupation of occupied territories is not necessarily adapted, for several reasons.

First, it is clear that the "Israeli-Palestinian conflict" does not consist of a series of violations of human rights and international law but rather of a process intended to destroy the opportunities for the Palestinian people to exercise its right to self-determination. Others have even established that it was an apartheid system.[14] Reducing the obligations of third parties to two negative obligations is limited because it does not take into account the variety of positive and / or negative acts by third parties that may lead to the consolidation or perpetuation of this system or process.

Moreover, to make use only of the obligations imposed by the Commission is limited because it does not take into account the degree of relationship between the third parties and the parties to the conflict and therefore the degree of "exposure" of each third party to the violations of international law.

The relations between the EU, Israel and the Palestinians –taken separately– are highly developed. The European Community and its member states have always been the top backers of the Palestinian Authority and the first donor of humanitarian and development aid. Besides signing an association agreement with the EC, Israel participates in the Seventh Framework Programme for Research and Development and in other community programmes such as Galileo, "Competitiveness and Innovation Programme" etc ... Israel and the European Community are about to sign an agreement on civil aviation and Europol is poised to sign a cooperation agreement with Israel. The European Community is Israel's largest trading partner.

The "complicity" of the EU can then be assessed and established by looking at several aspects.

The persistent silence of the EU or the lack of response to some violations of human rights, when it would be in its own interest to take action, given that its political or financial interests are at stake, may send the signal that the illegal practice in question is tolerated. This is especially accentuated when taking into account its previous commitments and more particularly the insertion of the human rights clause in its agreements.

In addition, with Israel, the EU is facing a partner whose interpretation of international law and human rights differs from the EU's. These differences of interpretation will necessarily come into play when implementing agreements between the EU and Israel. The way member states of the EU react, allowing or not Israel to enforce these agreements according to Israel's own interpretation, is crucial not only because this can jeopardize the integrity of their own legal system but because it is an indicator of tolerance to this interpretation and therefore also to the violations of the law stemming from it.

The following sections will provide examples in which we find these cases.

13. J. Crawford, The International Law Commission' Articles on State Responsibility, Introduction, Text and Commentaries, (Cambridge, New York 2002).

14. Occupation, colonialism, apartheid?: A re-assessment of Israel's practices in the occupied Palestinian Territories under international law, (Middle-East Project for the Human Sciences, Research Council of South Africa), (May 2009). Coconi L., Apartheid against the Palestinian people, (Catalan Coordination Committee for a just and sustainable peace in the Middle East, "Amb Catalunya al Cor"), (August 2009).

4. EU-Israel bilateral relations

The violation of the association agreement, or how a violation of international law ended up at the centre of the implementation of a trade agreement

In 1995, the EC and Israel signed an association agreement. This agreement stipulates that preferential treatment is given only to products "produced or substantially modified" in the territory of member states and the territory of the State of Israel (Protocol 4 of the Association Agreement between the EC and Israel). Israel regards the settlements in occupied territories as its own territory. Therefore, shortly after signing the agreement, several Palestinian and European NGOs pointed out to the European Commission and member states that Israel exported products from the settlements, and that these products, upon their arrival in the common market, benefited from a preferential customs tariff because they arrived with an Israeli certificate of origin EUR1.

Although the exports of the colonies represent a fairly insignificant amount, this problem became a real controversial issue between Israel and the EU.[15] Each year, the same issue was raised before the Council of the Association with Israel and each year, both parties agreed that they must find a "technical solution".

In 2005, they agreed on a technical arrangement according to which the certificates of origin for Israeli products exported to the European market would henceforth include the postcode of the place from which they originated. This arrangement was a compromise. On one hand, Israel could still extend the application of the Agreement to the occupied territories, and on the other, the European customs officers could tax the products from the colonies.

This arrangement raises several issues.

Firstly, as soon as it came into force, Israel created a fund to compensate the loss of earnings of the exporters from the colonies. In 2006, the Israeli government had allocated this fund 30 million shekels.[16] This initiative constitutes an illegal subsidy and therefore a violation of the Association Agreement (Article 6.1). No protest has been raised by the EU or by its member states.

Secondly, the arrangement, as it has been conceived, does not allow all the products coming from the colonies to be taxed. In November 2008, the British government announced it had taken steps to oppose the exports of the colonies arriving in Europe labelled "Made in West Bank". In fact, the British had discovered a discrepancy between the amounts of the above mentioned compensation fund and the total fees collected by the European customs. They suspected that some products from the settlements were exported carrying labels from a city located in Israel. They then conducted an investigation and found virtually no cases of fraud. It would appear indeed that a number of settlement products are not taxed. However, it is not due to a fraud related to the requirements of the technical arrangement but rather to the inability of European customs to verify all certificates of origin from Israel. The European customs of-

15. The volume of settlement products coming directly from the colonies and exported to the European market is estimated at 100 million Euros per year, and the total customs duty payable on these products is estimated at 7 million per year. G. Harpaz, "The Effectiveness of Europe's Economic and 'Soft' Power Instruments in its Relations with the State of Israel" (2005) 7 Cambridge Yearbook on European Legal Studies 159-185, p. 183.

16. S. Peretz, "Lying on the Fence", Globes, (27-28 February 2006).

ficers employ private agents to verify the licenses of products arriving to the European ports and airports. Customs have a pre-established list of products known to come from the colonies, and each time an agent reports the arrival of such a product, the certificate of origin is checked and taxed accordingly. The problem would appear to be then that some settlement products not yet detected —and not added to this list— manage to pass through the cracks.

Moreover, and from a more theoretical perspective, with this arrangement, even if the EU manages to maintain its stance — that settlements are not part of Israel and that settlement products cannot be regarded as Israeli — Israel does not need to recognize in any official document that the products from the colonies are not Israeli products, and can thus maintain the connection between its own territory and its colonies.[17]

Finally, many believe that these products, in fact, are themselves illegal and therefore should not even be allowed to make their way into the European market. The problem has never before been posed in these terms among the European policymakers. It is nevertheless true that a thorough research on the issue would be most appropriate. It is quite possible that some European laws could qualify these products as illegal, allowing consequently an effective and legal boycott of these products.

A general problem

It is important to point out that even though the problem of the violation of the Association Agreement has attracted a great amount of political attention, the problem of Israeli extension to its settlements on its international agreements is not restricted to the Association Agreement.

The same issue was raised in 2005 in connection with the Fifth and Sixth Framework Programme for Research and Development. Pressed by parliamentary questions, the Commission admitted the participation of entities based in the settlements. The Commission then took precautionary measures to prevent the same thing happening with the Seventh Framework Programme and established a "filter system" to prevent the participation of colony-based entities. However, according to a report from the Euro-Mediterranean Human Rights Network, the system put in place does not constitute an efficient filter fully preventing the participation of colony-based entities. For example, a company registered in Israel but whose premises are located in the colonies could participate without any problem; furthermore, the arrangement does not extend to companies affiliated with the Ministry of Industry and Research in Israel.[18]

Finally, no precaution was taken to avoid such a problem arising when Israel entered the "Competitiveness and Innovation Programme", nor on the occasion of the loans granted by the European Investment Bank.

As aforementioned, Israel and the EU are about to sign a civil aviation agreement. If no prior precautions are taken, such as the inclusion of a clause restricting the territory of the State of Israel to the borders of 67, the same kind of problems may arise again.

17. R. Frid and G. Harpaz, "Israel: Exported Products to the EU – An Agreement reached Over the Treatment of Products Exported to the EU From the Golan Eights, East Jerusalem, the West Bank and the Gaza Strip (the Territories)" (2004) 10 International Trade Law and Regulation 32-33, p. 32.

18. S. Rockwell and C. Shamas, "A Human Rights review on the EU and Israel – Mainstreaming or Selective Extinguishing of Human Rights?", (Euro-Mediterranean Human Rights Network), (2005). p. 38.

The cooperation agreement Europol-Israel

This agreement requires a particular section, as the problems arising from its implementation are not only territorial.

In April 2008, the Council gave the green light for Europol to negotiate a cooperation agreement with Israel.

The legality of obtaining personal data is one of the principles governing the collection and storage of data by Europol.[19] If Israel would exchange personal data with Europol —and consequently with the police and security agencies of member states— such a principle would be undermined. If it is known, for instance, that Israel places conditions on granting permits to patients needing to undergo medical treatment outside Gaza for the issuance of specific information; or that Israel takes prisoners arrested in the occupied territories into its own territory for questioning (sometimes under torture), in violation of Article 49 of the Fourth Geneva Convention.

5. The destruction of infrastructures financed by the EU and its member states

A recent report published by EUNIDA, the association of cooperation and development agencies, has estimated that the infrastructure financed by the European Community and its member states destroyed by Israel since the year 2000 amounted to 56,35 million Euros. The damage suffered during Operation Cast Lead has been estimated at around 12,35 million.[20]

The EU Commission and its member states have no intention to claim damages for the destruction of infrastructure. They usually hide behind the same argument, that these facilities were given to the Palestinian Authority (PA) and therefore, only the PA has an interest in taking action. Even so, no legal support has been offered to the Palestinian Authority to demand reparations.

The fact remains that this infrastructure has been financed by European funds and that its construction was part of the broader objective of the EU and its member states — to help build a Palestinian state. The failure of the EU to act and tackle the destruction of its projects, and thus the shattering of the objectives of its policy, are tantamount to a tacit silence of the violations of international law that have brought Israel to destroy these buildings.

6. The release of oil and the siege of Gaza

The supply of industrial fuel to the power station in Gaza is an example illustrating very well how illegal Israeli practices may dictate how the European humanitarian policy is run.

19. Article 5 (a) of the Council of Europe 108 Convention: "Personal data undergoing automatic processing shall be obtained and processed fairly and lawfully".

20. Final report. Damage assessment and needs identification in the Gaza Strip, submitted by EUNIDA, EUROPEAID, March 2009.

In 2007, Israel began to impose a siege on the Gaza population. The EC pays for the industrial fuel that powers the Gaza power plant through PEGASE, the funding mechanism for Palestinian aid.

Restrictions were imposed on the fuel release. In October 2007, Israel only allowed the arrival of half the quantity needed to operate the plant at full capacity. In January 2008, it had exhausted its reserves and could only operate at 30% of its capacity.[21] At present, the total amount of industrial fuel allowed to enter Gaza is 2,2 million litres per week, that is, 75% of what it needs to operate at 100% (2,9 million litres).[22]

We often hear that the EU, when providing its aid to Palestine, takes the place of Israel and fulfils its obligations as an occupying power.[23] In this specific case, and adding to this, there is the fact that the aid to the Palestinians is blocked by the enforcement of a collective punishment imposed on the civilian population.

However, this is not the only instance in which Israel prevents European aid from reaching Palestinians in Gaza. According to the latest report by CIDSE, the European association of Catholic NGOs of development and humanitarian operations and agencies, since Operation Cast Lead, ECHO (European Community Humanitarian Office) and other donors have been unable to continue, or to give support to, some emergency projects due to the lack of rebuilding materials. Moreover, the shortage of cash caused by the siege prevents the more impoverished Palestinians, the Palestinian Authority employees and the pensioners to obtain in due time the EU assistance disbursed through PEGASE.[24]

7. The place of human rights in the dialogue between the EU and Israel

As previously stated, with the inclusion of the human rights clause, the European Community and its member states wanted to make human rights an essential element of their dealings with Israel. As the above examples have shown, even when the EU is directly confronted with violations of international law committed by Israel because its interests are at stake, the EU fails to respond, and its silence leads to a tacit agreement on its part that contradicts the principles contained in its statements.

In fact, the same phenomenon is noticeable in relation to the conduct of the dialogue on human rights with Israel. When the EU and Israel developed their Action Plan within the framework of the ENP, they failed to agree on the creation of a sub-committee of human rights, despite of the fact that such a sub-committee had been established with other EU partners such as Morocco and Jordan. In order to adopt a "balanced" attitude, the EU then decided not to establish such a sub-committee with the Palestinian Authority, thereby reducing the EU's previous ambitions of promoting human rights with the parties to the conflict.

21. "Israel's Fuel Cuts Cause 30% Reduction in Gaza Power Plant Production", Briefing Note, Gisha, January 2008. Available at http://www.gisha.org/index.php?intLanguage=2&intItemId=744&intSiteSN=113 (last visited 11 December 2009).

22. "Israel's Fuel Cuts Cause 30% Reduction in Gaza Power Plant Production", Briefing Note, Gisha, January 2008. Available at http://www.gisha.org/index.php?intLanguage=2&intItemId=744&intSiteSN=113 (last visited 11 December 2009).

23. A. Meyer and D. Shearer, The Dilemma of Aid under Occupation, In M. Keating, A. L. More and R. Lowe (eds.), Aid, Diplomacy and Facts on the Ground: The Case of Palestine, (Bristol 2005), pp. 165-176, p. 170.

24. "The EU's aid to the Palestinian Occupied Territories (II), the deepening crisis in Gaza", CIDSE, June 2009.

Since February 2007, the issue of human rights has been addressed with Israel in an "informal working group". No written record is produced after these meetings.[25] In the EU, the establishment of this working group is considered a small victory, since the issue of human rights is very difficult to address when dealing with Israel.

Finally, in the Action Plan, the status of Israel as the occupying power and its responsibilities towards the Palestinian population stemming from international humanitarian law and human rights are mentioned nowhere. Instead, the Plan of Action calls on Israel to minimize the impact on the civilian population of its counter-terrorist and security measures and to preserve as much as possible the properties, institutions and infrastructure.[26]

Conclusion

The EU's recurring silence and inaction in front of the violations of international law to which it is directly confronted contribute to send a message of tolerance to an illegal situation that perpetuates itself.

The EU's decision to deepen its relations with Israel in December 2008 draws on the same message. It takes such a decision while the Gaza population is besieged and while, generally, the prospect of the creation of a Palestinian state, to which the EU itself has devoted substantial efforts, is very restricted.

Without a true strategy that puts human rights and international law at its centre, the EU will perpetuate an attitude in which it constantly adjusts its policies to the crisis stemming from the Israeli-Palestinian conflict and, as a result, helps the perpetuation of an occupation, not to say of an apartheid system.

25. The EU-Israel Action Plan within the European Neighbourhood Policy: What is the impact of the EU-Israel Action Plan on Human Rigts in Israel and the Occupied Palestinian Territories?, Training and Seminar, Euro-Mediterranean Human Rights Network, (Tel Aviv and Ramallah 2007), p. 4.

26. "Proposed EU-Israel Action Plan", European Commission, Brussels, 9 December 2004, p. 6.

C) SPANISH FOREIGN POLICY

1. Spanish foreign policy towards the Palestine matter

Since 1977, Spanish governments, independent of their actions, have given their support for a solution to the Arab-Israeli conflict, conforming to the UN resolutions and have supported the creation of a sovereign independent Palestinian State. Some of the milestones of this approach to the Palestine matter were the official visit of Yasir Arafat to Spain in 1991 or the appointment of Miguel Ángel Moratinos as special correspondent to the EU for the Peace Process in 1996.

After the electoral victory of the PSOE in the 2004 election, the President José Luis Rodríguez Zapatero gave numerous signs of support to the peace process and the Ministry of Foreign Affairs and Cooperation (henceforth MAEC) has considered the Middle East as "a priority region for our foreign policy". In fact, the Palestinian territory is the only programme "country" in the Middle East and the only one that has a Technical Office of Cooperation, being the main beneficiary of the Spanish Cooperation in the Asia-Middle East area.

In 2006, coinciding with the 20th anniversary of the establishment of diplomatic relations with Israel, the Spanish government expressed its will of "promoting bilateral diplomatic relations with Israel", despite the systematic violation of human rights of the Palestinian population under Israeli occupation. This decision was preceded by the intensification of links between the EU and Israel after the starting of the new European Neighbour Policy which gave a framework to the EU-Israeli Action Plan, aiming to "reinforce political and economical interdependence" and considering "the possibility for Israel to participate progressively in key aspects of EU policies and programmes, as well as upgrade the scope and intensity of political co-operation"[1].

These two decades of Hispanic-Israeli relations prove that the occupation of the Palestinian Territories and the annexation measures taken do not seem to have any cost for Israel, as it has had no direct consequence in the intensification of economical, political and cultural ties, particularly notable in the trade and technological field (security, defence, investigation, agriculture, energy and environment) between Spain and Israel. These relations have been reinforced despite the Israeli continuous attempts to modify the nature of the Occupied Territories by means of intensive colonization of the West Bank, the judaization of East Jerusalem, the construction of the Wall or the strangling of the Gaza Strip. Both the president of the Spanish government and the MAEC abstain deliberately from condemning these Israeli practices, which involve a flagrant violation of International Law, in order not to be exposed to the possible criticism by Israel and the growing pro-Israeli lobby operating in the Spanish State.

1. http://europa.eu.int/comm/world/enp/pdf/action_plans/Proposed_Action_Plan_EU-Israel.pdf

Instead of punishing Israel for its constant violation of the elemental rights of the Palestinian population, Spain, like other EU countries, has chosen compliance, claiming that harder criticisms would obstruct their capacity of influence in the peace process and would question their dialogue capability between the parties. We must not forget that the mentioned Action Plan, 2004 clearly advised that the intensification of the relation "will depend on the degree of commitment" Israel is determined to assume in fields like democracy, human rights and fundamental freedoms.

As the Euro-Mediterranean Human Rights Network report published in *Israel´s Human Rights Behaviour, July 2004-July 2005* stated: "Israel committed itself to the principles of the Barcelona process. When signing the Agreement of Association between Israel and the EU, both parts assumed the responsibility of promoting human rights in their bilateral relations. Both parts have the duty of dissuading the violation of human rights committed by its associate. Although the EU regularly criticises Israeli violation of humanitarian law and human rights, this is not reflected in its practical relations with Israel"[2]

Spain and the rest of EU country members keep close trade ties with Israel. It has, however, the necessary mechanisms to put pressure on Israel so that they see that their annexation practices involve consequences and, therefore, they must stop their policy of "fait accompli" if they do not want the current preferential treatment to be revised. Spain, holding the EU presidency during the first semester of 2010, should clearly inform Israel that maintenance of this treatment will depend on the scrupulous respect of the elemental rights of the Palestinian people and the completion of negotiations to establish a viable State in the territories, occupied since 1967.

If it does not adopt this attitude, not only will the EU's credibility as a negotiator be questioned; it would also be an accomplice to the Israeli policy based on turning the Palestinian national problem into a humanitarian one (a mere rice problem instead of a rights one), which would lead them to assume the increasingly high cost of the humanitarian catastrophe that looms over the Occupied Territories. It is suffice to say that, nowadays, 80% of Gaza's population depends exclusively on international aid to guarantee their living, as a direct consequence of the intentioned closure policy applied by the Israeli authorities, but also as a result of their deliberate strategy to destroy the Palestinian economy[3].

2. Zapatero's government and the victory of Hamas

The electoral victory of Hamas in the elections of the 25th of January, 2006 was met with a revision of the Spanish foreign policy towards the conflict. From the very first moment, the MAEC established a number of conditions on the recognition of the new Islamic Executive. In its first report on this matter, the MAEC expressed its hope that "the new government assumes the historical responsibility the Palestinian people has put in its hands and commits itself clearly and resolutely to the peaceful option of ne-

2. http://www.euromedrights.net

3. Sara Roy (1987): "The Gaza Strip: A Case of Economic De-Development", Journal of Palestine Studies, vol. 17, n. 1, p. 56-88 and (1999): "De-development Revisited: Palestinian Economy and Society since Oslo" Journal of Palestine Studies, vol. 28, n. 3, p. 64-82.

gotiation, declining violence and recognizing the State of Israel". An identical stance would later be assumed by the so-called Quartet of the Middle East (formed by the USA, the EU, the UN and Russia). Spain, like the rest of the EU members, gave support to the boycott of the new Palestinian government claiming that Hamas has been part of the European list of terrorist organizations since September 2004, and this formally prevented it from developing contacts with its leaders.

This was not all. Spain also positioned itself at the forefront of those demanding that Ismael Haniye's government recognize the state of Israel, renounce violence and fulfil the Oslo Accords as a condition for their reinstatement. The surprising fact is that at no time did Spain demand from Ehud Olmert a similar commitment to the peace process by recognizing a Palestine State, stopping its annexation policies or by fulfilling the agreements signed with the PLO. When doing so, the Spanish government seemed to align itself with the Israeli thesis, which considers Hamas –and not the occupation– as the first obstacle towards peace.

The Spanish government's attitude was short-sighted, as it only followed the guidelines set by the Quartet (in which, *de facto*, the Bush Administration had the capacity to veto any decision). This meant a loss of specific weight in the region, by aligning itself exclusively with the Fatah position and overlooking the electoral results that showed a generalized and profound disenchantment towards an endless peace process that had notably damaged the living conditions of the population. We must remember that Russia, as opposed to Spain, decided to distance itself from the positions marked by the Quartet by developing contacts with Hamas' representatives and inviting the first minister Ismail Haniye to a state visit in Moscow.

Instead of simply "following the leader", Spain should have adapted to the new power distribution in the territory by starting contacts with the Islamic leadership, in order to encourage the steps taken by Hamas in the last years: keeping an unilateral truce, integration in the political systems through its participation in elections and the tacit acceptance of the two-States solution. Gaining a distance, therefore, from previous maximalist positions and getting closer to the Fatah positions based on the defence of a State on the West Bank and Gaza with East Jerusalem as the capital city. Spain should have also refrained from focusing all its energies on putting pressure to the weakest actor –Palestine-, as the imperfect Road Map also demanded Israel –the strongest actor– to stop colonization. However, an eloquent silent was kept over this demand.

Instead of positively receiving the growing pragmatism of Hamas, Spain chose the strategy of sanctions, linked more with the idea of forcing a change in the government rather than to encourage the possibilism of Hamas. So their statement about using "all means" –including political ones– to solve the conflict, included in its electoral programme, was sanctioned instead of applauded. It was made clear that the Quartet's triple conditioning kept a greater relation with the need of creating a "cordon sanitaire" around Hamas, reinforced after its electoral victory, rather than the will of approaching it through the political arena and away from violence.

As Álvaro de Soto, special coordinator for the UN in the Middle East Peace Process and its representative in the Quartet, expressed in June 2007: the EU did not give him support in his attempt to "transmit to Hamas the message that the international community recognized and welcomed the change made when taking part in the elections and respecting the rules of the electoral game and, over all, respecting the "truce"; that, moreover, we sincerely hoped this trend would go further so that the international community could keep the support that had always been given to the

Palestinians"[4]. The opinion of the Peruvian diplomatic is that "this declaration transformed the Quartet. From being a group which, guided by the Road Map, aimed to promote negotiation, it became a different one that imposed sanctions to a freely voted government of a country under occupation and, moreover, established some unreachable conditions in order to take the dialogue up again".

In another UN report, made by John Dugard, the UN special rapporteur on the situation of Human Rights in the Occupied Territories, he states his critical approach towards the Quartet's contribution, accusing it of "having overlooked a peaceful agreement when imposing punitive measures enacted to force Hamas to change their ideological approach, or to cause a change in the regime. It should be questioned whether the UN is juridically authorized to take part in the economical coercion carried out through the Quartet without following their own procedures stipulated in the Statement. In any case, diplomacy has given way to coercion"[5].

3. Spanish position over Summer Rain

The kidnapping, on the 25th June 2006, of Corporal Gilad Shalit, was used as a pretext to launch a vast offensive against Gaza under the name of Summer Rain. During this attack, the Israeli Defence Forces (IDF) bombed the Gaza Strip for several weeks with the underlying aim of overthrowing the Islamic Government and releasing the kidnapped soldier. The conflict spread to Lebanon, where the IDF destroyed a great part of Lebanese civil facilities (airports, bridges, motorways, electric power stations, as well as several Beirut suburbs).

The international community reacted in different ways. Some countries shared the US approach and declared that it was an act of self-defence. However, the European presidency, held by Finland during that semester, expressed that it was "very concerned, due to the disproportioned use of force carried out by Israel in Lebanon" and stated: "Blockading Lebanon by land and air is not justified. Contrary actions to international humanitarian laws can only aggravate the vicious cycle of violence and punishment and do not benefit anyone's legitimate interests of security.". As well as this, it demanded the immediate and unconditional liberation of the two Israeli soldiers kidnapped by Hezbollah, but it refrained from demanding the release of the 40 Palestinian parliamentarians placed under arrest during the previous weeks in Gaza and the West Bank.

The government of Rodríguez Zapatero distinguished itself by expressing its "firm condemn" to the "disproportioned" use of force and warning that "the silence about what is happening today in the Middle East may bring repentance tomorrow". In his appearance before the Committee on Foreign Affairs of the Congress on the 19th July, Miguel Ángel Moratinos expressed his concern regarding the situation in Gaza: "The destruction of civil facilities, like the electric power station of Gaza, and the insulation of the Strip, make the fear that a grave crisis of humanitarian character can be caused among the already harmed Palestinian people. The aim of the Spanish Government is to prevent and resolve the humanitarian crisis in Gaza. It is in this field where the

4. DE SOTO, Álvaro, End of Mission Report: http://image.guardian.co.uk/sys-files/Guardian/documents/2007/06/12/DeSotoReport.pdf

5. DUGARD, John, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967: http://www.ohchr.org/english/bodies/hrcouncil/docs/4session/A.HRC.4.17.pdf

MAEC has been working on, aiming not only to keep the same level of aid for the Palestinian people as there was before the victory of Hamas in the general election, but increasing it, given that the humanitarian needs of the population have also increased". Although the MAEC explicitly acknowledged that the suffocation policy carried out by Israel would force Spain to assign a progressively higher amount of funds to alleviate the humanitarian catastrophe caused by the iron-tight closure of Gaza's borders, the government of Rodríguez Zapatero refrained from explicitly condemning the closure policy and the collective punishments which, according to international legislation, can be considered a crime against humanity.

In its resolution B6-0477/06, dated on the 4th of September, 2006, the European Parliament was more categorical than the Spanish government, denouncing "that the occupation has created a catastrophic situation at a humanitarian level which is extremely dangerous in political terms" and that "40 democratically elected Palestinian ministers—among them Dr. Aziz Dweik, spokesman of the Palestinian Council — have been kidnapped and imprisoned". Moreover, the Chamber demanded "an exhaustive, impartial and independent investigation on the violations of Humanitarian International Laws and of Human Rights" and it demanded that "the people responsible for crimes according to the International Law appear in court and the victims receive full redress" highlighting "the responsibility of Israel because of damages to civil facilities and insisting on the fact that the rebuilding costs must be at the expense of this country". These recommendations were not assumed by the Presidency or the Commission which, moreover, negotiated in the following months an improvement of the association treatment.

Spain did not focus all its energies on putting pressure on Israel, as the European Parliament demanded, but on proposing that a new peace conference be held, in an attempt to recover past formulas that were condemned to failure by the new regional *status quo*. In his intervention in the UN General Assembly of the 21st of September, minister Moratinos declared: "From this platform, I make a call for a true coalition for peace. It is not about rediscovering the Mediterranean, but about going from commitment to political and diplomatic action. We say yes to the creation of a viable and peaceful Palestinian State. Yes to a clear support for the President Mahmud Abbas. Yes to the end of the violence and the terror against Israel. Yes to the recovery of the Madrid process that started 20 years ago. Yes to restoring conversations between Syria and Israel. We must say yes to the end of the tragedy. The only possible way for a solution is political and diplomatic action, not military action". Once again he forgot to condemn the violations committed by Israel and to highlight the incompatibility between its annexation policies and the peace process.

The initiative of holding a new peace conference only got partial support from France and Italy, and Spain had to be satisfied with the approval, during the European Council held in Brussels between the 14th and 15th December, of a Declaration on the Middle East which, as well as claiming for the umpteenth time the fulfilment of the Road Map, named the colonization of the Occupied Territories as a mere "obstacle" in the peace process: "The parties must adopt concrete and immediate steps to end all violent acts and all the activities contrary to International Law, including the colonization activities and the construction of the barrier in the Palestinian territory, that constitute an obstacle for the consecution of this objective. The EU will not recognize any change in the borders previous to 1967 that is not recognized by both parties"[6]. Just as expected, that declaration showed their unwavering support for the PA president,

6. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/es/ec/92217.pdf

but at the same time, the recognition of a Palestinian unity government to comply with the Quartet's imposed conditions.

The creation of the coalition government on the 17th of March, after signing the Mecca Agreement, did not modify the situation, as the EU did not lift the sanctions set a year before, stating that Ismael Haniyye continued being the president of the government, despite the incorporation of a considerable number of independent people who assumed the Finance portfolio (Salam Fayyad), Home Office (Hani al-Qawasme) and Foreign Affairs (Ziad Abu Amr). The coalition government hardly lasted for four months, essentially due to its incapability to stop the blockade of the international community. The end of this cohabitation experience could not have been more devastating, as the Hamas and Fatah militias were involved in a shootout over Gaza's control.

Just as expected, the Spanish government condemned Hamas and gave support to Fatah. In his appearance on the 19th of June before the Committee on Foreign Affairs of the Parliament, the minister of Foreign Affairs and Cooperation stated: "We must resolutely support President Abbas in his efforts to defend the institutions. Their preservation is necessary for the complete realization of the Palestinian national project. Peace also requires the end of the violence and of any action that intends to prejudge unilaterally the matters related to the final statute". After the creation of a new government led by Salam Fayad, Spain decided to support the decision of the Quartet of lifting the sanctions on the new executive and supported the "West Bank First" strategy, which sought to consign Gaza –dominated by Hamas– to ostracism. This was another step in the pressure process started immediately after the victory of Hamas, aiming to undermine the Islamic government and bring the return of Fatah, more favourable to negotiations with Israel.

4. The backing of the peace forums

On the 14th of December, 2007, a few weeks after the holding of the Annapolis Conference in the United States, the MAEC promoted the holding of a Forum for a Just Peace in the Middle East that intended to gather members of the Palestinian and Israeli civil societies. The meeting was suspended due to the last minute attempt to incorporate several organizations that did not accept the reference frame of the statement based on "an alternative view of peace based on multilateralism, International Law and the people's right to their full sovereignty and territorial integrity".

In a press release dated on the 13th of that month, the Palestinian delegation informed of its withdrawal from the Forum and denounced "an unprecedented pressure from the Israeli establishment, [pressure thanks to which] a substantial Israeli delegation (different from the progressive civil society Israeli delegation led by the Alternative Information Center, AIC, scheduled to participate in the Forum) was undemocratically and underhandedly "invited" to participate in the Forum without endorsing the Forum's Reference Document based on the International Law and the Universal Human Rights", meaning an "unacceptable attempt by some to impose governmental will on distinct civil society initiatives", as "their political agenda essentially contradicts the basic principle that only peace built on justice, International Law and human rights can be viable, equitable and sustainable."[7]

7. http://www.foroporlapaz.org/upload/documentos/D0005-07_Reference_doc_FINAL_EN.pdf

According to a declaration by the Coordination Committee of the Palestinian Delegation at the Forum "the delegation of the Israeli 'establishment' included organizations, representatives and local politicians known for their clear rejection to the application of the strictest justice, International Law and universal rights with the aim of reaching a sustainable and true peace in the Middle East [...]. All of them, fraudulently, claim to belong to the "peace field" when indeed they defend a peace empty of any content [...]. This last-moment delegation included representatives of the Israeli political parties that historically –and in the present– have been and are considered responsible for the ethnic cleansing, the occupation, the colonization and the war crimes committed by the Israeli army against the Palestinians"[8].

As for Michael Warchawski, he justified the withdrawal of the Alternative Information Centre the following way: "The composition of the delegations, however, especially the Israeli one, didn't satisfy the Spanish Minister of Foreign Affairs... or the Peres Peace Center. Obviously, the Spanish government has the right to sympathize more with Zionist organizations, and it can organize its own conference. Nevertheless, it cannot interfere in the Social Forum [...]. In an unacceptable procedure, the Spanish Foreign Ministry established a parallel Israeli delegation, bigger than the official one, aimed to change the agenda of the Madrid Social Forum from an Anti-Annapolis conference to an "all inclusive" gathering, discussing the pro and against of the war plans shaped in Annapolis by George W. Bush and Ehud Olmert.[9].

Two years later, in October 2009, a new meeting was held. Unlike the 2007 meeting, the presence of Zionist organization was confirmed in advance, but this did not prevent several Palestinian groups from interpreting that it was a direct attack against the Boycott, Divestment and Sanctions movement (BDS)[10]. On the 22nd of October in Seville, the Madrid Coalition was formed as an initiative of the Cooperation Assembly for Peace and funded by the MAEC; it intended to be, according to an official communiqué, "a joint effort of civil society for peace" with a hundred organizations taking part with the aim of "increasing the support to Palestinian and Israeli civil society for a dialogued solution of the Middle East conflict based on the Arab League Initiative for Peace"[11].

The official declaration added: "In the frame of the new international effort to reach a peace accord in the Middle East and facing the incoming Spanish presidency of the European Union, the Madrid Coalition starts the process of supporting the dialogue from the Palestinian, Israeli and European social and labour union movement. It is the first time such a wide range of social organizations of the parts in conflict met in the Middle East, and they did it to fight for a common objective: promoting the support to peaceful negotiations in Israeli, Palestinian and European civil society"[12]. The creation of this platform, which marked a pro-government profile, was strongly criticized. It was interpreted that it was a remote-controlled manoeuvre to ostracize the sectors who were critical of the peace process and who demanded negotiations based on international legality and not only on the distribution of powers in the territory. Anyway, the aforementioned Madrid Coalition did not denounce at any time the Israeli occupation or its annexation practices or its constant violations of the elemental rights of the Palestinian people.

8. Response of the Coordinator Committee of the Palestinian Delegation to the Madrid Social Forum because of its distortion of the facts, December 20, 2007, Rebelión, http://www.rebelion.org/noticia.php?id=60521

9. Michael Warchawski, "Reasons why I am not taking part in the Madrid Social Forum for a Just Peace in the Middle East", AlternativeNews.org: http://www.rebelion.org/noticia.php?id=60481

10. http://www.bdsmovement.net/

11. www.acpp.com/madrid_coalition_sevilla.htm

12. http://www.acpp.com/madrid_coalition_sevilla.htm#PICSA

5. Reactions to the Cast Lead operation

After the beginning of the Cast Lead Operation against Gaza on the 27th of December 2008, some European countries showed their solidarity with Israel stating that it had the right to defend itself from the launching of rockets from the Strip on its territory. The government of Rodríguez Zapatero adopted a lukewarm position, much less critical towards Israel than that made in 2006, merely denouncing the disproportion of Israeli action. Only when the number of civil victims increased significantly, did the government decide to raise the tone of its criticisms. The general attitude gave the impression of self-censoring in order to avoid colliding with Israel again.

In the midst of the attack, on the 8th of January, 2009, Rodríguez Zapatero received Mahmud Abbas, who was deeply questioned on a domestic level because of his management on the crisis. In that meeting, the Spanish president supported the Franco-Egyptian plan to reach a truce and condemned "the excessive reaction" by Israel, but then tried to avoid the criticism from damaging bilateral relations, expressing that "we must talk to friends sincerely" because "if one thinks that the military solution is not the solution, it must be expressed". As in past occasions, there was the intention of counterbalancing the diplomatic immobility with concession of economic aids to alleviate the catastrophic humanitarian situation (in this occasion, five million Euros for the UNRWA). A further demonstration of its trust on already failed and obsolete schemes was a calling for a new "road map".

Shortly thereafter, the same minister, Moratinos went on a tour of the Middle East that took him to Syria, Israel, Egypt and the Palestinian Territories. In Israel he asked for a truce and demanded to "urgently" allow the evacuation of the Spanish people settled there, but without condemning the Israeli military operations despite the high number of Palestinian civil victims or without criticizing the brutal closure of the Strip. This Spanish lukewarmness contrasted with the forcefulness of the other international actors' message, among which there was the Secretary General of the United Nations Ban Ki Moon who that same day stated: "Too many people have died. The civil population has suffered very much. Many people live daily with the fear to die. And in Gaza, society is being destroyed: people's houses, facilities, hospitals and schools".

After the approval of the cease-fire, President Rodríguez Zapatero went to Egypt where he took part, along with other international leaders –among them, Ban Ki Moon, Nicolas Sarkozy, Angela Merkel, Gordon Brown, Abdullah Gül– in a mini-summit held on the 18th January at the Sharm el-Sheij aimed to demand the end of the Gaza blockage and to give support to the rebuilding of the Strip. After this meeting, also attended by the Palestinian president Mahmud Abbas, the European leaders went to Israel where they met with the first minister Ehud Olmert, thus aborting any chances for the Israeli Executive to experience anything similar to an international condemnation because of his unilateral behaviour. In response to the passivity of the European troika, the Israeli leader even expressed his willingness to work with the Europeans to "create better conditions of prosperity for the Palestinians in the Strip. The silence of the European leaders was eloquent and, in a certain way, it was equivalent to consent of the harassing policy towards the Strip, as the EU continued to consider Hamas as "non grata".

Instead of taking advantage of the occasion to condemn Israel's behaviour, the European leaders merely repeated, once again, their concern about setting up "a long lasting peace" and showed their will to become gendarmes for Israel, sending patrol cars to avoid Hamas from rearming. The Spanish president stated: "We are convinced

that peace is not impossible and we have the moral duty of achieving it". Unfortunately, Rodríguez Zapatero did not lead any initiative at an European level, but merely recommended that the new US president Barack Obama take "a new, more committed and dynamic approach" as he understood that with his arrival to the White House "a new horizon of hope opened", in what seemed to be an expressed recognition of the limitations of the EU itself. Likewise, the Spanish president stated that the "priority is saving lives", focusing on humanitarian action. Once again he gave support to "work for Palestinian reconciliation", although the usual conditions of the Quartet were not revised. At no moment did the Spanish leader condemn the violation of human rights committed by Israel nor did he mention his support to the opening of a new investigation to define responsibilities for the war crimes and crimes against humanity committed during the attack.

Two months later, on the 2nd of March, in Sharm al-Sheij, an international conference in support of the Palestinian Economy and Gaza Reconstruction was held. The commissioner for Foreign Relations and European Neighbour Policy Benita Ferrero-Waldner demanded the opening of all the border crossings of Gaza, the end of the "destruction-reconstruction" cycle, a long lasting cease-fire that will enable the reconstruction of the Strip, a rekindling of the peace process and a Palestinian unitary government. Lastly, she promised 42 million Euros for immediate humanitarian aid through the PEGASE programme: "Our initial efforts of reconstruction will aim at removing rubble and unexploded ammunitions and make the return to normal life easier by means of the reconstruction of the damaged houses. As we have been doing for the last two years, we will continue to provide funds to the PA to pay for half the salaries of their civil employees in Gaza, we will pay for the oil to generate 30% of the electricity in Gaza and we will directly assist about 25,000 of the poorest families in Gaza." The commissioner stressed that, during 2009, the European Commission would give 440 million Euros to the PA and that half of this amount would be going to Gaza. What she did not explain is how the Strip would be reconstructed while Israeli authorities did not end their blockade.

During the conference, Minister Moratinos expressed his hope that 2009 would be a "peaceful year" and announced a new Spanish contribution for the population of the Gaza Strip of 180 million Euros for the 2009-2010 period (half of it would be directed to the reconstruction of Gaza and the rest to pay for the salaries of the PA staff members in order to avoid their collapse). During the Cast Lead Operation, Spain was already forced to give 6.5 million Euros in humanitarian aid for the besieged people. Once again it was obvious that Spain and the EU had to shoulder the heavy burden of humanitarian aid which was more and more expensive due to the Israeli attempt of turning the national Palestinian problem into a rice one. At no time was it considered that those contributions would only help perpetuate the *status quo*; it favoured a standstill between both the PA (forced by the international community to continue year after year with negotiations that lead nowhere) and Israel (relieved to find that its responsibilities are assumed by others while it is free to intensify its annexation policies).

6. The limitation of universal jurisdiction

In October 2009, president Rodríguez Zapatero went on his first official tour of the Middle East. A month before that, an Israeli newspaper published a clarifying article

titled "Israel need not worry, it's got a friend in Spain" which stated that the visit implied "a change in Zapatero's priorities and also an upgrade in relations between Israel and Spain"[13]. This article also stated that "Moratinos, who was formerly regarded in Israel with suspicion and even scorn, has become one of the most important elements in rapprochement between Jerusalem and Madrid". The argumentation was as follows: "Moratinos' status in Israel's eyes has been upgraded mainly because of his determined activity on the issue of Spain's decision to prosecute six senior Israelis who were involved in the 2002 assassination of the chief of the military arm of Hamas in Gaza, Salah Shehadeh. It was Moratinos who pushed through legislation in the Spanish parliament that severely limited the possibility of pursuing such prosecutions in the future and led to the cancelation of the indictment that was already under way". As it happens, the Foreign Affairs and Cooperation minister had previously promised his Israeli homologue Tzipi Livni a change in the legislation to avoid Spain from investigating war and torture crimes in other countries when there were no Spanish people implied in those acts[14].

On October 16, Rodríguez Zapatero met in Jerusalem with his Israeli homologue Simon Peres, who was grateful to him in a press conference "for not taking to courts the civil and military Israeli leaders, who did nothing but defend the lives of their people", in a clear allusion to the legal reform that limited the universal jurisdiction and avoided the National Spanish Court from judging the alleged crimes committed by Israelis. Peres took advantage of the press conference to attack the Goldstone Report, made by request of the UN Human rights council, and Rodríguez Zapatero did not defend at any time the need of investigating the war crimes and crimes against humanity, as the report stated. Neither did the Spanish president raise an official protest regarding the destruction of the projects funded by the Spanish Cooperation[15].

In his visit to Ramallah, where he met with President Mahmud Abbas, the Spanish president expressed his support to the "reduction of the historical time" and "accelerate the steps" so that an independent Palestinian State could be recognized, ignoring the fact that the possibility would have very few chances of being undertaken while Israel kept-up its occupation. At the same time he exhorted Israel to "freeze the settlements in the Palestinian territories, to start the dialogue and progress towards peace", but without denouncing categorically that this colonizing policy made practically unviable the creation of a Palestinian State with territorial continuity.

After this trip, the Spanish government softened even more its tone towards Israel. In the government's weekly panel session held on the 20th of October, the minister Moratinos was in favour of "not submitting Israel to a criminal process" for the Cast Lead Operation because "he wanted to look ahead" and the conclusions of that report could have "negative consequences" when taking up negotiations again between Israelis and Palestinians. According to the minister, the damage caused by "the wars"

13. Haaretz, 12/9/2009, http://www.haaretz.com/hasen/spages/1113098html
14. Haaretz, 1/2/2009
15. An EU report estimated at least at 12,349,641 € the damages suffered by European projects. A good deal of those projects had been funded with Spanish capital, among which Gaza International Airport (300.000 €); Elementary & Secondary School for Boys – Al Awda (35.300 €); Hispanic/Palestinian Institute (67.400 €); Al Karameh Orphanage (620.000 €); Emergency support and employment generation for female-headed households through backyard farming and cottage industry in the West Bank and the Gaza Strip– FAO Spain (no estimated); Improving the livelihoods of farming households through diversification of vegetable and medicinal plant production in the West Bank and the Gaza Strip – FAO (no estimated); Quick and High Impact Poverty Alleviation Programme,– Job Creation Programme – Office of the President (1.170.000 €); Middle East Regional Programme for the Sustainable Management of Natural Resources (250.000 €); Wadi Gaza Municipality, Compactor Truck (102.000 €). See Final Report Damage Assessment and Needs Identification in the Gaza Strip: http://ec.europa.eu/europeaid/where/neighbourhood/country-cooperation/occupied_palestinian_territory/tim/documents/final_report_version6_t1.pdf

and “violence” and the “bloodshed” would not be repaired “by dwelling on the past”. Once again, this amnesic policy did not at all imply Spain’s increasing capacity of dialogue, or any consideration by the Benjamin Netanyahu government, that continued regarding any EU movement in favour of peace as hostile.

These accommodating declarations toward Israel were accompanied by a new Spanish economical effort to alleviate the Palestinian humanitarian crisis and to avoid the PA from collapsing due to the lack of funds. On the 4th of November, Spain felt compelled to respond once again, in this case, along with Sweden, then holding the EU’s presidency, and assist the PA to face the November and December salaries of 80,000 staff members. Spain gave 25 million Euros, compared to the 5 million promised by Sweden. The Spanish consul in Jerusalem, Ramón Ansoaín, considered that “the 25 million Euros contributed reflected the support of the Spanish government to institutional and social stability in a context marked by the necessary preparations for the establishment of a Palestinian State”.

Once again the short-term sight of the Spanish foreign policy was evident as well as its incapacity of self-criticism, implying, to a certain extent, that Spain seems to have assumed the role Israel seems to consider fir for the EU: financing indefinitely a PA controlled by Fatah in the West Bank and its immense bureaucratic and political machine and giving basic aid to the population of the Gaza Strip while Hamas holds the power. All of this without Spain having succeeded in any of the political dialogues with Israel, who continues to reject the creation of a viable Palestinian State with territorial continuity as the international resolutions demand.

This framework makes one think that Spain has resigned itself to occupying a secondary role and to follow a copycat policy, and to merely pressure the weakest actor – the Palestinians, and particularly the Islamist sectors– not to collide again with Israel again, the strong part in the equation. This strategy is not only very expensive but also mistaken, as Spain will feel obliged to assume more and more costs to keep up the facade of the peace process: a PA whose authority is more and more eroded, endless negotiations that are blank checks for the strengthening of the Israeli colonization and an increasingly expensive bill facing the Gaza’s humanitarian catastrophe.

D) ARMS TRADE, MILITARY AND SECURITY COOPERATION BETWEEN SPAIN AND ISRAEL[1]

1. Introduction

Israel is the key actor in an armed conflict lasting more than sixty years, which is at the heart of global geopolitics and has important implications for regional and global stability. Because of this reality, Israel has become one of the most militarized states in the world and a producer of the most cutting edge systems in military and security sectors. Violence experienced in the region has become a source of profit in which specific armed conflicts are nourishing this kind of business. The purpose of this report is to establish the various relations between Spain and Israel, which include exports and imports, business relationships, agreements and practices in the area of military and security. In making these connections the report attempts to answer the question of how much Spain contributes to violence in one of the most troubled regions of the world.

2. Military and security cooperation between Spain and Israel

Military relations between Spain and Israel have developed alongside diplomatic relations, which have not been uncontroversial. The European Union accounts for one third of Israeli exports, but because Israel makes almost all of its acquisitions with the help of the program of Foreign Military Sales FMS from the U.S., the majority of imports come from the U.S. and the ones from Europe are marginal. While relations between Israel and Spain in the military field were anything but prosperous during the Franco era, in a democracy the views and attitudes of the two major political parties (PP and PSOE) showed no significant differences and both have favored the strengthening of multilateral and bilateral military relations[2]. According to Yitzhak Soroka, counselor of the Delegation of Israeli Defence Ministry in Spain in 2006, "Relations between the two countries in the field of defence can be characterized as more than

1. This text is a summary of an extensive report titled "España-Israel: Relaciones en materia militar, armamentística y de seguridad. Balance y tendencias", Nova – Centre d'Estudis per a la Pau J.M.Delàs, Barcelona, December of 2009.

2. José María Navarro (2006a): "Entrevistamos a Yitzhak Soroka, consejero en Jefe de la delegación del Ministerio de Defensa de Israel en España", Defensa: Revista Internacional de Ejércitos, Armamento y Tecnología, number. 337, May, p. 21.

good" with "great stability and solidity."[3] From the Israeli perspective, Spain is a good gateway to Europe for its arms industry, and this interest increases with the creation of a single body for the procurement of products of defence handled by Europe. Thus, although Spain is not one of Israel's major customers in the military material, it is considered one of the most important goals for cooperation between military companies. The vast majority of defence projects between Israel and Spain include technology transfer and involves cooperation between both countries in the manufacture of components for Eurofighter aircraft systems, weapon systems testing in military camps and bases of the Israeli Defence Forces.[4]

Military and security agreements between Spain and Israel[5]

- 1997 (23rd of January). Memorandum of Understanding on Industrial Cooperation of Defence.
- 1998 (15th of June). Memorandum of Understanding on the Assurance of Quality of the Products of Defence.
- 2004 (8th of February). Agreement of Implementation (Cooperation NBQ) Complement num. 1 of the MOU on Cooperation in Research and Development (R+D) Military and of Defence.
- 2004 (8th of February). Memorandum of Understanding on Cooperation in Research and Development (R+D) Military and of Defence.
- 2004 (11th of November). Framework Convention on Research and Development (R+D) in the field of aerospace.
- 2007 (18th of April, entry into force on the 29th of January 2008). Security cooperation agreement between Spain and Israel.

Moreover, the traditional boundaries between internal security (Ministries of Internal Affairs) and the military world (Defence) are increasingly blurred. The most used argument to justify this trend is the emergence of new threats that would not fit into those areas. Among these "new" threats include "terrorism", organized crime, proliferation of certain types of weapons, immigration and so-called "fragile states". As a result, some countries have created a new department or ministry, called Homeland Security, or "Integrated Security". In parallel, there has been an impressive private industry to develop products and market this "new" field of security. This market is largely financed by public funds. With respect to Israel, it can be said that, with the U.S, it is the most crucial country in this sector, and its dependence on associated technologies is significant. It should be noted that in many cases large companies involved in this market are those that operate in the defence market, producing derived technological innovations. The working areas of the Integrated Security are according to the government of Israel, aviation security, maritime and transportation, crisis management and emergency counterterrorism, CBRN (chemical, biological, radioactive, nuclear), EMS (emergency medical services), public awareness, law enforcement, security of information technology and fraud and protection of critical infra-

3. José María Navarro (2006a): Op. Cit., p. 16.
4. Daniela Berdugo (2009): "Estudio de mercado: La industria aerospacial en Israel", Oficina Económica y Comercial de la Embajada de España en Tel Aviv – ICEX, September, p. 42.
5. The first five, web of Ministry of Defence of Spain, www.mde.es/descarga/acuerdo.pdf [Consultation: 2 November 2009].

structure. Relations between Israel and Spain in this sector of intelligence and Integrated Security are also important. It should be noted that if in the past, the main (sometimes only) customer of the arms industry were ministries of defence, now so are the ministers of the internal affairs (the previously mentioned chief adviser, Yitzhak Soroka, said the turnover of the two ministries was "almost identical").[6] Soroka's successor, Itamar Graff, said in January 2009, referring to the area of Integrated Security that "Spanish companies have great potential to succeed in this market. The best way for them to gain market share in Israel is to search for an Israeli company as a local partner, like Israeli companies do in Spain".[7]

3. Transfers of arms between Spain and Israel

EXPORT OF SPANISH ARMS TO ISRAEL

Tel Aviv is not a priority for Spanish arms. In fact, in 1998, which registered the highest export share in total Spanish transfers, Israel accounted for just 2.74%.[8] Today that percentage is even lower. In 2008 Spanish exports to Israel in defence equipment accounted for 0.25% of the total while dual-use materials accounted for 0.52%.[9] However, it is noteworthy that the economic volume of material for military and dual use goods exported to Israel does not correspond to the relevance and impact these products may have on the internal and regional stability of the recipient. In fact, the exports of military equipment to Israel are very questionable, to the point of representing a more than possible violation of Spanish law. The following table highlights the highest exports in 2000, the year of the commencement of the second Intifada. The trends are upward and in only the first half of 2008 Spain had more military transfers to Israel than any full year since 2000.[10]

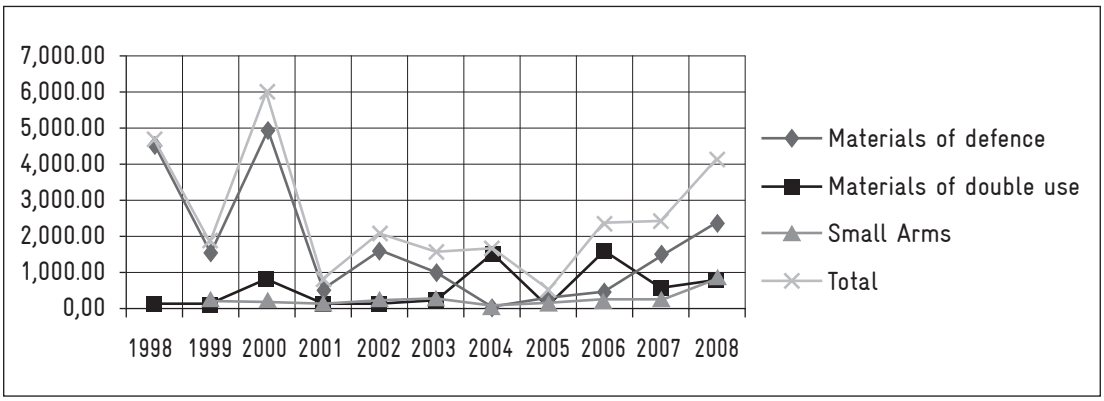
Spanish authorizations and exports of material of defence and double use to Israel (in thousands of Euros)

Year	Authorizations (materials of defence)	Materials of defence	Materials of double use	Small arms	TOTAL (exports)
1995	No data	273,32	No data	No data	273,32
1996	No data	2.724,12	No data	No data	2.724,12
1997	No data	544,06	2.579,79	No data	3.123,85
1998	No data	4.497,30	131,39	No data	4.628,69
1999	No data	1.533,71	128,03	223,15	1.884,89

6. José María Navarro (2006a): Op. Cit., p.20.
7. Joaquín Mirkin (2009): "Itamar Graff, consejero-jefe de la Delegación de Defensa israelí en España: 'Las industrias israelíes mantienen excelentes relaciones de colaboración con las industrias españolas' ", at Infodefensa.com: Industria de Defensa israelí, un paso por delante, edició especial, 20 of January.
8. From data from the Centro de Estudios por la Paz J.M. Delàs, www.centredelas.org.
9. According to the data of the Secretary of State of Commerce (2009): "Spanish Statistics of Export of Defense, other materials and products and dual-use technologies, 2008", Ministry of Industry, Tourism, and Trade.
10. The totals only include the data available considering that some results could be higher than shown in the table. The sources used are: Tica Font (2008): "Informe 2008. Exportaciones españolas de armamento 1998-2007", Justícia i Pau, Barcelona; statistics of the web of Centre d'Estudis per a la Pau J.M. Delàs: Op. Cit.; and Secretary of the State of Commerce (various years): Op. Cit.

Year	Authorizations (materials of defence)	Materials of defence	Materials of double use	Small arms	TOTAL (exports)
2000	No data	4.909,68	822,73	226,57	5.958,98
2001	1.314,19	487,97	99,20	165,99	753,16
2002	2.530,86	1.597,10	152,56	298,16	2.047,82
2003	734,48	1.005,80	244,29	289,30	1.539,39
2004	175,54	35,26	1.515,64	106,40	1.657,30
2005	953,12	273,73	41,32	173,64	488,69
2006	1.109,57	441,34	1.587,32	247,27	2.275,93
2007	4.365,31	1.515,93	576,81	274,08	2.366,82
2008	157,20	2.358,99	801,57	903,20	4.063,76
TOTAL	**11.340,27 (2001-2008)**	**22.198,31 (1995-2008)**	**8.680,65 (1997-2008)**	**2.907,76 (1999-2008)**	**33.786,72 (exports)**

Evolution of Spanish exports to Israel



Spanish exports to Israel in materials of defence by categories of products (in thousands of current euros)[11]

Cat.	Description	2004	2005	2006	2007	2008	TOTAL
15	Imaging equipment or countermeasure		132,49	160,42	1.239,28	2.194,42	3.726,61
1	Smoothbore weapons with a caliber less than 20 mm	35,26	83,74	74,91	163,60	128,17	485,68
8	Energy materials and related substances		50,76	50,76	87,59		189,11
4	Bombs, rockets, torpedoes, missiles		6,74	155,26	25,47		187,47
3	Ammunition, devices and components					36,4	36,4
	TOTAL	**35,26**	**273,73**	**441,35**	**1.515,93**	**2.358,99**	**4.625,27**

11. Department of Gen. of Foreign Trade of Material of Defence and Double Use. Secretary of State of Commerce (various years): Op. Cit.

Spanish exports to Israel in material of double use by category of product (in thousands of current euros)[12]

Cat.	Description	2004	2005	2006	2007	2008	TOTAL
2	Treatment of materials			1.500,00			1.500,00
5	Telecommunications and " information security"	340,50		68,90			409,40
4	Computers				283,05	796,60	1.079,65
3	Electronics				252,00		252,00
1	Materials, chemical substances, "microorganisms" and toxins	3,56	41,32	18,42	41,76	4,97	110,03
	TOTAL	344,06	41,32	1.587,32	576,81	801,57	3.351,08

Exports carried out of materials of defence indicating the nature of final use (in percentage)[13]

	2006	2007	2008
Private business	35,58%	70,19%	1,54%
Public business	25,80%	7,46%	0,00%
Armed Forces (public)	36,35%	22,25%	93,03%
Armory (private)	2,27%	0,10%	5,43%

The table above highlights the high percentage in 2007 for private business (70.19%). It is worrying that Spain has exported military equipment of category 4 (bombs rockets, torpedoes, missiles) to private recipients (which is the case), particularly given that there is a significant number of private military companies in Israel [14] who also carry out combat roles.

Financing of the export of arms

One of the essential phases of the arms cycle is to finance exports. Companies that manufacture and export weapons do not receive money from the sale immediately, but rather over a long periode of time. Therefore, arms companies require financial institutions that will provide the necessary funds to remain functional. Spain does not make their arms export financing public. Almost no country publishes this data including the European Union. However, the Italian government is an exception. In 1990 Italy adopted the Law 185/90, which regulates the import and export of weapons systems and the publication of information relating to these commercial operations, although it is noteworthy that there are gaps and deficiencies in the information provided. Despite these limitations, it is possible to know that in 2006, Banco Bilbao Vizcaya Argentaria (BBVA) funded Italian military exports to Israel for a value of 329,066 euros.[15] Therefore, it is possi-

12. Ibídem.
13. Tica Font (2008): Op. *Cit* Department of Gen. of Foreign Trade of Material of Defence and Double Use; Secretary of State of Commerce (some years): *Op. Cit.*
14. Some businesses of this type are Security and Intelligence Advising, Levdan, GIR S.A. (Israel Military Industries Ltd.), Spearhead Ltd.
15. Government of Italy (2007): "Relazione Sulle Operazioni Autorizzate E Svolte Per Il Controllo Dell'esportazione, Importazione E Transito Dei Materiali Di Armamento, Nonché Dell'esportazione E Del Transito Dei Prodotti Ad Alta Tecnología (Anno 2006)", Doc. LXVII, number. 2.

ble to know what Spanish financial institutions do with Italian military equipment, but not what they do with Spanish military equipment. It is known, however, the active role played by financial institutions in the military industry.

Excerpt reproduced in its entirety on exports declared by the Government of Spain:[16]

Year 2005

- Components of sporting pistols that an Israeli company assembles to subsequently re-export to the U.S.,
- Gunpowder and ammunition of 120 mm. of the Leopard tank, which are tested by a public company in Israel in firing ranges not available in Spain as a result of an agreement between the Spanish and Israeli company regarding the supply of the first of its ammunition to the Spanish Ministry of Defence,
- and infrared cameras to be integrated into EF-2000 aircraft systems (Eurofighter program), subsequently re-exported to the UK.

Year 2006

- Components of sporting pistols, which an Israeli company assembles for re-export to the U.S.,
- 105 mm. ammunition of the Spanish M60 tank that runs tests for a laboratory in Israel,
- 120 mm. gunpowder and ammunition of the Spanish Leopard tank,
- missiles and parts whose warhead has an inert filler, for shot tests in the Tiger helicopter that is made in Spain (program Eurocopter),
- and infrared cameras to be integrated into EF-2000 aircraft systems (Eurofighter program), subsequently re-exported to the UK and Netherlands.

Year 2007

- Components of sporting pistols that an Israeli company assembles to subsequently re-export to the U.S.,
- 120 mm. gunpowder and ammunition of the Spanish Leopard tank,
- receivers and transmitters with zero value being returned to source, material mistakenly sent from Israel to the Spanish Army Headquarters,
- parts for infrared cameras to be integrated into systems of various aircrafts belonging to the Air Forces of Brazil, Hungary, South Africa and Italy,
- and infrared cameras to be integrated into systems of EF-2000 aircraft (Eurofighter program) and the Tornado subsequently re-exported to the UK.

Year 2008

- Components of sporting pistols that an Israeli company assembles to subsequently re-export to the U.S.,
- 120 mm. gunpowder and ammunition of the Spanish Leopard tank,
- infrared cameras of the EF-2000 aircraft as part of the program of cooperation between four European Union countries (Britain, Germany, Italy and Spain), integrated in Israel and re-exported to the UK ,
- Electronic cards of image processing, with zero value, to be integrated into computers that are then re-exported to Italy, Colombia and Brazil for specific Air Force aircraft in these countries.

16. Government of Spain (2009): Answer of the 8th of July to the written question to Congress 184/54281 of Gaspar Llamazares Trigo, 24 Fembrary 2009, pp. 2-3.

European legislation and procedure for the export of arms in Spain

In Spain there is specific legislation that deals with arms exports. By contrast, there is no specific legislation on imports or on relations with the military industry, although these practices may have a significant negative effect on populations of the countries involved.

Adopted on 8 June 1998, the Code of Conduct of the European Union is the most advanced and comprehensive of its kind, besides being one of the most used, because of the sheer volume of weapons exported by the EU (more than a third of the world total). It consists of eight criteria for determining the appropriateness of authorizing exports and twelve operational arrangements to assist Member States in implementing the Code and promoting cooperation. The Code of Conduct has several supporting documents, such as a User's Guide (to assist in the implementation), a Common List of Military Equipment (to unify criteria) and a common understanding between arms brokers, and others. Until 2008 the Code was not mandatory for EU Member States, since their duties were subject to public international law, not Community law, and it was only a political agreement, not a legal one.[17] That changed on 8 December 2008 with the adoption, after nine rounds of the presidency receiving pressure from civil society and some politicians, of a Common Position by the Council of the European Union. Member States are obliged to ensure the consistency of national legislation with a Common Position. The text states that "under this Common Position, each EU Member State must assess, on a case by case basis, the demands for export authorizations that are directed to the equipment contained in the common list of military equipment of the EU, according to the following criteria:". It goes on to mention the same eight criteria that were contained in the Code of Conduct 1998, incorporating an explicit reference in criterion 2 to the violations of International Humanitarian Law, among other minor additions.[18] In any case, the common position of the European Union on Export Control of Weapons makes clear that its implementation does not prevent each EU Member State to adopt a more restrictive internal policy regarding the control of exports.

In the Spanish case, the criteria of the Code of Conduct was already binding before the adoption of a common position, as it was detailed in the first state law on arms trade (Law 53/2007 of 28 December 2007) . However, Professor Eduardo Melero argues that the Code was previously legally binding in the Spanish State, as a result of the specific reference to the content of articles 8.1.b) and 14.3.a) of the Regulation on the Foreign Trade Control Defence Material, Other Material and Dual-Use Technology (2004). [19] Even since 1988, the criteria for authorizing exports of Spanish arms include references to restricting sales to countries in situations of armed conflict or where human rights are violated.[20] The User's Guide in principle is not normative, but it would also be legally binding by the specific reference to Articles 8.1.a) and 8.1.c) Act 2007. According to Melero, this Guide "could be used by the courts as a parameter for judging the administrative action".[21]

17. Eduardo Melero Alonso (2008): Régimen jurídico del control de las exportaciones de material de defensa y de doble uso. El secreto negocio de la industria de guerra, Madrid, Dykinson, p. 2.

18. Council of the European Union (2008): "Common Position 2008/944/Pesc of the Council of 8 December 2008 that defines the common rules that restricts the control of export of military technology and equipment", Official Journal of the European Union, 13 December 2008, pp. L 335/99–335/103.

19. Eduardo Melero (2008): Op. Cit., pp. 2-3.

20. Mark Bromley (2008): The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports: The Czech Republic, the Netherlands and Spain, SIPRI Policy Paper num. 21, SIPRI, Stockolm, p. 40.

21. Eduardo Melero (2008): Op. Cit., p. 3.

The current Spanish legislation is as follows:[22]

- **Law 53/2007 of 28 December 2007 on Control of Foreign Trade of Material of Defence and Dual-use**. Converts the Royal Decree 1782/2004 of 30 July 2004 (which approved the Regulation on the Control of Foreign Trade of Material of Defence, Other Material and Dual-Use Technology) in law, in addition to extending the powers and insists on mandatory compliance with the Code of Conduct of the EU and refers to the Document on Small and Light Arms of the OSCE.
- **Royal Decree 2061/08 of 12 December 2008.**
- **A new Royal Decree shall enter into force in 2010 incorporating the Common Position 2008/944/CFSP.**

Companies seeking to export military equipment should apply for a license, including documents of control (their function is to ensure that the recipient and, where appropriate, that the final use of materials, products and technologies meet the boundaries of administrative approval and include information on the countries of transit and methods of transportation and financing).[23] It is the responsibility formally, of the General Secretariat of Foreign Trade, of the Ministry of Industry, Tourism and Trade to reject or approve export authorizations of materials for defence and dual use, through a mandatory and binding report of the Joint Regulatory Board of Foreign Trade of Materials of Defence and Dual-Use (JIMDDU) (it is, therefore, this agency that will decide on permits). JIMDDU has eleven representatives from five ministries, each with veto power: Industry, Tourism and Trade (with 4 members, one of them president) Foreign Affairs and Cooperation (2 representatives), Interior (2) Defence (2) and Economy and Finance (1).[24] An agreement of the Council of Ministers on 12 March 1987 classified the proceedings of the JIMDDU as secret, implying that these records cannot be communicated, disseminated or published. This means that information about the arms trade cannot be known by the public or be subject to parliamentary scrutiny. Only the arms industry and the administration know the details of arms transfers and the arms industries of the Administration making it impossible, in practice to carry out a judicial review of administrative authorizations granting exports. Legally, this classification of secrecy violates the law on official secrets, which permits declaring as a secret only the information whose disclosure "might damage or endanger state security and defence" (Article 2).[25] The Act requires the Government to send to the Congress of Deputies statistical information on arms exports (Article 16), but this information is very partial and does not include the type of weapons that are exported (only the category to which they belong) or sellers and buyers. Statistical confidentiality is not set out explicitly in the text of the Act, but applies under Article 13 of Law 12/1989 of 9 May, from the Public Statistics Function. Furthermore, the JIMDDU may decide not to comment on a particular operation and to exempt exporters from the requirement to submit the documents (Article 14, paragraph 3) (the Act

22. "Eleventh annual report according to article 8(2) of council common position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment", Official Journal of the European Union, p. C265/414.

23. Eduardo Melero (2009): "La Administración y el comercio exterior del material de defensa y los productos y tecnologías de doble uso", forthcoming publication.

24. Eduardo Melero (2009): Op. Cit.

25. The argumentation on the classification of the secret acts of the JIMDDU violating the Law of Official Secrets is widely developed at Eduardo Melero (2008): Op. Cit., pp. 182-209.

does not prevent the JIMDDU from deciding not to control specific exports).[26] Finally, it is clear that the Ministry of Industry, Tourism and Trade carries much weight in the authorization process, a fact that has spearheaded criticism of the preference of commercial considerations. Indeed, the operative provision 10 of the Code of Conduct opens the door to prioritizing Spanish economic, social, commercial or industrial criteria over the protection of human rights, peace and international security and disarmament.[27]

Analyzing the framework normatively, the interesting question here is: does Israel violate the contents specified in the legislation? The criteria of the Code of Conduct are, in general, susceptible to being interpreted differently depending on the eye of the observer and the position held. The JIMDDU, for example, did not consider it a violation of the eight criteria included in the law when it authorized them that Spanish exports involve. However, as shown in the table below, exports to Israel do not comply, in general, with the criteria stipulated in the Code of Conduct. As a result, several member states of the European Union have refused export permits for military material. These denials are systematic and, for select criteria, the number of appeals is very high. 260 licenses for exports to Israel were rejected between 2001 and 2008, and it has appealed to criterion 1 (on 7 occasions), to criterion 2 (159), criterion 3 (176), criterion 4 (74), criterion 5 (4), criterion 6 (21), criterion 7 (26) and criterion 8 (on 2 occasions). In total, these criteria have been appealed on 432 occasions.[28] Unfortunately, no one can know, beyond a few isolated cases, what countries have denied licences to Israel. Practices differ in a very conspicuous way. For example, the Israel Armed Forces said they have used more weapons and more ammunition against the Palestinians in April 2002 than in the previous 10 years.[29] In response to this escalation, the European Union reacted and several countries, including Britain, Belgium, France and Germany wholly or partially suspended their exports of military equipment to Israel. The Spanish Government, however, increased its transfers by 2.7.[30] Several European countries do not export arms to Israel (such as Sweden, Norway, Malta and Luxembourg), others only occasionally do it (eg Denmark), others have significantly decreased their exports (including Germany), while others opt for exorbitant export volumes (like France and Romania). Spain is among those that have barely changed their exports (see annexes).

26. Tica Font and Eduardo Melero (2007): "La ley de ocultación de armas", 23 November, available at the Centro de Estudios por la Paz J. M. Delàs, Materiales de Trabajo, number. 33, February 2008, pp. 8-9.

27. Centro de Estudios por la Paz J.M. Delàs (2007): "Primera ley que regula el comercio de armas en España", Editorial, Materiales de Trabajo, number. 33, February 2008, editorial.

28. Reports of the Council of the European Union (varoius years): "Annual report according to operative provision 8 of the european union code of conduct on arms exports", Official Journal of the European Union, reports of the years 2002, 2003, 2004, 2005, 2006, 2007, 2008 and 2009.

29. Declarations of the British parliament member, Ann Clwyd, in 2002, available at: www.parliament.the-stationery-office.co.uk/pa/cm200102/cmhansrd/vo020723/debtext/20723-03.htm [Consultation: 29 November 2008].

30. Difference between the total of exported military material in 2002 (2,047,820 euros) with respect to the year before (753,160 euros).

Summary of implementation of the criteria of the Code of Conduct in the case of Israel [31]

No violation of the criteria

Possible violation of the criteria

Violation of the criteria

Flagrant violation of the criteria

Criteria	Non-compliance
Criteria 1. *With respect to international commitments of EU members*	Israel has not ratified any of the eight agreements mentioned in the wording of paragraphs b), c) and d) of this criteria: Biological and Toxin Weapons Convention, Chemical Weapons Convention, the Nuclear Non-Proliferation Treaty, Convention against landmines. It does not form part of the Wassenaar Arrangement, the Australia Group, the Plan of Missile Technology Control or the Nuclear Suppliers Group. Spanish cooperation in chemical programs for military purposes.
Criteria 2. *With respect to the human rights of the country of final destination*	Systematic annual conviction by the Human Rights Commission of the UN. Systematic annual conviction by the European Union. Systematic annual conviction by Amnesty International or Human Rights Watch. Political Terror Scale (Amnesty International and U.S. State Department) between levels 4 and 5 on a scale from 1 to 5 (maximum).
Criteria 3. *Internal situation of the country of final destination (existence of tensions or armed conflicts)*	Existence of armed conflict between 2003 y 2008 according to the principle centers on conclicts (SIPRI, University of Heidelberg, University of Maryland and the School for a Culture of Peace-UAB); external armed conflicts (Lebanon: 2006).
Criteria 4. *Maintenance of peace, security, and regional stability*	Recent regional armed conflicts (Lebanon: 2006). Permanent tension and mutual threat to Iran. Possibility of regional armed conflict. Israeli military incursions into Syria. Military occupation in Syria and Lebanon. Latent tensions with Syria, Saudi Arabia, Lebanon (Hezbollah), Iran ... particularly after the Israeli military incursions. Regional arms race, including weapons of mass destruction.
Criteria 5. *National security of the member states and of the territories under their responsibility and of the friendly countries and allies*	Some allies of the member states of the European Union do not have diplomatic relations with Israel and are in constant tension with Tel Aviv. The Israeli-Palestinian conflict is at the center of a massive polarization of relations between the Islamic world with and the West. It is manipulated by extremist organizations. Israel has a regional destabilization potential and ultimately, global.

31. The data, arguments, details, and source of each point included in the table are developed in the report "Spain-Israel: Relations in military material, the arms industry, and security. Balance and tendencies", Op. Cit.

Criteria	Non-compliance
Criteria 6. *Behavior of the buying country, especially with respect to terrorism and International Law*	Israel has violated numerous UN mandatory resolutions, among them resolution 242 (1967) and resolution 338 (1973). U.S. has vetoed a minimum of 42 resolutions that sought to condemn or severely castigate Israel. Israel has not ratified any of the three instruments mentioned specifically: Toxin and Biological Weapons Convention; Chemical Weapons Convention and the Nuclear Nonproliferation Treaty. Severe and massive violations of International Humanitarian lLaw (especially in Lebanon in 2006 and Gaza in 2008-2009). The establishment of permanent settlements in occupied territories violates several articles of the Fourth Geneva Convention. The separation wall between Israel and the West Bank violates International Law.
Criterio 7. *Risk of diversion or re-exporting under undesirable conditions*	Israel has carried out re-exports to countries at war or that systematically violates human rights, and is well known for its exports to very questionable regimes. Spain maintained relations over military equipment that can be re-exported to Israel (especially from the USA). Much of Spanish exports to Israel are re-exported to third countries.
Criterio 8. *Compatibility of the arms exports with economic and technical capacity of the receiving country*	Israel is an enriched country, and has economic and military technical capacity. In spite of Israeli military spending being bigger than health and education, the social spending is frequently superior to that of Spain. Even though the social budget should perhaps increase, it is possible that the export of weapons to Israel do not violate the spirit of the text of this criterion.

Author's elaboration

After the events of January 2009 in Gaza and the controversy aroused by the exports of Spanish weapons to Israel, the Secretary of State of Commerce, Silvia Iranzo, assured that since 2001 Spain had not authorized any export to Tel Aviv of "any armament or equipment that would be lethal".[32] One could insist that every material of Defence exported is, directly or as an integrated component, susceptible to killing. The number of denied authorizations is published in Spain from 1999 and from 2001 specifies (in a very vague way) the type of export denied and the criterion applied (a total of 89 licenses to all countries has been denied since then). However, the country of destination and other key details are not specified. Thus, no denial of authorization of export of Spanish weapons to Israel is known (and it is highly probable that they have taken place). According to sources of the Ministry of Industry, Tourism and Trade, Spain consults the database of denials of exports of European weapons and it states it has never approved a request for export that was "essentially identical" to another one previously denied by another member state, [33] as prohibited in the Code of Conduct, which specifies that the denying state must be consulted before approving the authorization. These consultations are not public. However, according to the Spanish authorities Spain has not carried out any consultation since 1999 on authorizations "essentially identical" to those of the other countries, therefore one may suppose that these situations have not occurred. Considering that the members of the EU have denied Israel 260 export licences of materials of defence, of various unauthorized products, and that Spain has authorized, between 2001 and 2008, at least 109 licenses for Israel of materials of defence, in at least of five different categories. One

32. EFE (2009): "Desde 2001 no se autoriza la exportación de armas letales a Israel, según Comercio", El Día, 24 February.

33. Mark Bromley (2008): Op. Cit., p. 47.

may conclude that Spain has not denied any authorization of export of material of defence to Israel or, if it has done it, the reason of this denial was so evident that it did not require to carry out a consultation.

Different groups have asked that Spanish export of arms to Israel be interrupted. Among the non governmental organizations there is the School for the Culture of Peace from the Autonomous University of Barcelona, Greenpeace, Intermon-Oxfam, International Amnesty or the Foundation for Peace, among many others. In the United Kingdom, lawyers who represent 30 Palestinian families have taken the exports of weapons to Israel to the British Secretary of Exteriors Courts, David Miliband, and other authorities have accused them of having acted illegally for not suspending the export of arms to Israel.[34] In the official framework, on the 20th of April 2002 the European Parliament elaborated a resolution to ask the Council of the European Union that it declare an embargo of weapons on Israel; in July 2006, the Democratic Liberal Party of the United Kingdom asked for the suspension of all the exports of weapons to Israel, as had one of the three parties that govern in Norway and the Confederation of Trade Unions of Norway; and on the 10th of November 2006 the special rapporteur of the UN, John Duggard, requested an embargo of weapons on Israel. [35] In Spain, the political groups Esquerra Republicana de Catalunya (ERC) and Iniciativa per Catalunya (ICV) requested in 2009 that the Government suspend the sale of military material to Israel, accusing it of violating Spanish legislation.[36]

Spanish import of Israeli arms

To understand the relevance of the imports of Israeli military material, one may include the way in which this business works. First, one of the main reasons a country decides to export military equipment is to reduce the price of internal production. The main customer of the weapons indudtry is usually the Armed Forces, which carry out the orders. The cost for a unit of product will be different if only the quantity that demanded is by the state is produced with an extra number of equipment being made and the surplus being exported. For this reason, the Government itself usually advocates the export of weapons that it authorizes, because it means a cost reduction for the government. Following this explanation, one may insist that the export of Israeli weapons has an impact on the internal militarization in Israel. Contrary to what happens in other countries, Israel exports 75% of their production of arms, and its military industry depends on these exports.[37]

Second, it must be considered that Israel exports of highly developed military technology is a consequence of the experience accumulated through long conflicts with the Palestinians. Itamar Graff, head adviser of the Delegation of Israeli Defence in Spain, recognizes that Israel (referring also to the Occupied Territories) is "a 'laboratory' of the means of combat and of new technologies of defence, for a very simple reason: the constant threats each time more sophisticated than it has suppressed since its creation as a state and during its permanent struggle for survival".[38] One of the main characteristics of the Israeli industry is the speed in the development of the programs of

34. Afua Hirsch and David Pallister (2009): "Miliband accused over arms exports to Israel", The Guardian, 25 February.

35. Palestinian Grassroots Anti Apartheid Wall Campaign (2008): "Exporting occupation: the israeli arms trade", p. 4, available at: www.stopthewall.org [Consultation: 9 March 2009].

36. Europa Press (2009): "ERC e ICV exigen que se corte la exportación de armas a Israel y piden explicaciones a Sebastián", 12 January.

37. Sudha Ramachandran (2004): "US up in arms over Sino-Israel ties", Asian Times Online, 21 December.

38. Joaquín Mirkin (2009): Op. Cit.

R+D and in which the projects pass to the operational state, to be later exported, as a consequence of the frequent activities of the military forces of Israel in armed conflicts.[39] In the words of Itamar Graff: "Unlike other countries, in Israel the engineer who develops a technology is acting at the same time in the Army as combatant or as head of some unit during his service as reservist and, therefore, he or she experiences closely and knows the needs of the Defence Forces of Israel. This existing daily interaction between the industry and the Army allows flexibility, improvisation, creativity and a considerable reduction in the stages of the projects".[40] Then observe that the total economic activities of the imports are much higher than those of the Spanish exports of military material to Israel.

Some recent examples of significant Spanish imports of Israeli arms:

2000
- Contract with IAI of 20 million dollars to improve the air force of SF-5Bs,[41] specifically 22 CASA-Northrop airplanes, with option of modernization of another 18 devices.[42]
- Contract with Rafael of 14 million dollars to equip the Boeing EF-18 Hornets planes of the Spanish Air Forces with systems of tactical oblique photography of long distance (LOROP), which allows a dual system of recognition and selection of objectives.[43]
- Purchase of two Litening-2 (system of airtransport and innovator of navigation and aiming) for the AV-8B airplanes of combat. Acquired via US, of the line of American production. Delivered in 2000 as part of an agreement of 25 million dollars. [44]

2001
- Spain was the first customer of the systems of tactical recognition RecceLite, of the company Rafael, used for the Spanish fleet of Boeing fighters.[45]
- Acquisition of 25 Litening-2, delivered in 2003-2004, for the F/A-18 airplanes of combat, probably of the line of American production. These systems (similar versions) have also been installed in the AV-8B Harriers.[46]
- Modernization of the F-5 and T-38 airplanes; imports of systems of communication and of radars of terrestrial surveillance.[47]

2003
- The first 2E Leopard tanks arrive for the Spanish army, a hybrid between the Swedish and German models. The ammunition for these tanks will be supplied by Israel Military Industries (IMI). [48]

2006
- Purchase of 2600 Spike-MR/LR antitank missiles to the company Rafael (with General Dynamics Santa Bárbara Systems), in terrestrial version to equip the Tigre combat helicopters. Operation valued at 324 million euros, including 260 shuttles (manufacture in Spain, probably for Tecnobit). Production of components in Spain, also for export to South America (between 50% and 60% of the cost of the program was foreseen to stay in Spanish territory).[49] The final users will be the land forces and the Marine infantry.

39. José María Navarro (2006b): "La industria de Defensa de Israel", Defensa: Revista Internacional de Ejércitos, Armamento y Tecnología, number. 337, May, p. 4.
40. Joaquín Mirkin (2009): Op. Cit.
41. Mandy Turner (2002): "Arming the Occupation. Israel and the arms trade", *CAAT (Campaign Against Arms Trade)*, London, p. 10.
42. Steve Rodan (2000): "IAI to upgrade F-5s for Spanish Air Force", *Jane's Defence Weekly*, 19 July.
43. "Spain buys Rafael LOROP", *Flight International*, num. 4742, vol. 157, 15-21 August 2000, p. 15; Mandy Turner (2002): *Op. Cit.*
44. Database FIRST (SIPRI).
45. Mandy Turner (2002): *Op. Cit.*
46. Alon Ben-David (2005): "Israeli Defence Industry – Partner power", *Jane's Defence Weekly*, 23 November; Database FIRST (SIPRI).
47. The year of import could be different. Shlomo Brom and Yiftah Shapir (eds.) (2002): *The Middle East Military Balance 2001-2002*, Tel Aviv University – The Mit Press, Cambridge (Mass.) – London, p. 181.
48. David Ing (2003): "Spain finally set to receive tanks", *Jane's Defence Weekly*, 21 May.
49. "Santa Bárbara invertirá 15 millones en el misil Spike", *La Voz de Asturias*, 8 March 2006, *Op. Cit.*; Database FIRST (SIPRI).

2008

- Purchase of 4 UAV Searcher Mk II unmanned planes of the company Israel Aerospace Industries (IAI). The winner of the competition was the Temporary Union of Enterprises (UTE), formed by Indra, IAI and EADS-CASA. The total cost was 17 million euros (14.37 million for the airplanes), including a land station, the system of launch and landing, one data-link for the exchange of information from land with the device and a terminal of remote video. The soldiers responsible for operating the system attended a course of IAI of training in Israel. Those airplanes were deployed in 2008 in Afghanistan with 36 Spanish soldiers as workers. The maintenance is in charge of Indra.[50]
- The Spanish Ministry of Defence purchased in July 100 RG-31 MK5E armored vehicles of the MRAP type (which withstands attacks with mines) from the South African firm BAE Land Systems, for a value of 75 million euros. The RG-31 is equipped with a Mini-Samson tower of the company Rafael, with a system of nocturnal vision and remote control that prevents the exposure of the shooter. BAE Land Systems disputed the contract against the the Gold Model from Rafael. The plan of renovation foresees the purchasing of 575 armored vehicles for 321 million euros.[51]

4. Business relations between Spain and Israel in military material and security

Spain and Israel have solid business relations and a volume of trade supior to Spanish official exports. According to Itamar Graff: "The annual average of volume of business among Israeli companies and the Spanish is between 50 and 70 million dollars".[52] It is important to point out that in increasing the commercial options of the Israeli military industry it means cooperating in the development of military products that present two characteristics: specific arms to be used in the Occupied Territories of Palestine and enormous technological capacity developed by Israel as consequence of its numerous disputes in the Occupied Territories and with several Arab countries.

The policies applied by the countries manufacturing arms, which promote the local industry have increased the difficulties to access to foreign markets. That's why the agreements among local and foreign military companies are increasingly more common. Israel is one of the countries that utilize this commercial logic more, a vital condition to guarantee contracts, and it has established links of joint production with companies in numerous countries, including Spain. In the words of Shimon Eckhaus, vice-president of marketing and development of business of the Israeli company, Israel Aerospace Industries (IAI), "the only mechanism that allows a successful penetration [in other countries] is to activate the local factors of every country and to sign co-operation agreements with them".[53] Besides, this permits concealing responsibilities, and that's why the establishment of alliances with European firms is essential.

50. José María Navarro (2008a): "Aviones sin piloto en España", in *Fuerzas de Defensa y Seguridad*,number. 361, May, pp. 22-36; J. M. Navarro (2007): "El Searcher Mk II", en *Fuerzas de Defensa y Seguridad*, num. 350, June, pp. 6-12.

51. Miguel González (2008): "Chacón adelanta seis meses la compra de 100 blindados surafricanos", *El País*, 31 July.

52. José María Navarro (2008b): "Entrevista: Itamar Graff. Consejero-jefe de la delegación del Ministerio de Defensa de Israel en España", Fuerzas de Defensa y Seguridad, num. 368, December, p. 18.

53. Harald Molgaard (2005): "Arms exports and collaborations: the UK and Israel", CAAT, London, June, available at: www.caat.org.uk.

For instance, regarding the consortium Eurospike (between Rafael and the Germans Diehl Munitionssysteme and Rheinmetall Defence Electronics) that markets the anti-tank missiles, the spokesman of Rafael, Amit Zimmer, recognized that "it is simply more comfortable for European customers to buy from Eurospike than to buy from the Israeli Rafael". [54]

The Ministry of Defence of Israel has cooperated with a great number of Spanish companies. On the other hand, there are a lot of Israeli military companies that collaborate with the Spanish industry and government, mainly in systems of electronic war, missiles, protection of vehicles, unmanned planes or protection of borders, among another.[55] It must be kept in mind that the Israeli military industry is mostly public (and the private part involves a strong state intervention), whereas the Spanish companies involved in these military consortiums, they are usually private companies, although they receive public funds and other facilities of the governmental structures.[56]

Some current collaboration in 2008 between the Spanish Government and Israeli companies:

- Rafael is responsible for developing different projects for the Land Forces, like the systems of Spike missiles and the turrets of arms of the new Spanish armor.
- Israel Aerospace Industries (IAI) is working in the project of PASI unmanned planes and collaborates with the Guardia Civil.[13] It also continues to be in charge of modernizing the two-seater F-5 Northrop airplanes to adapt the systems of aviation and precision in the navigation, as well as their presentation in the cabin so that they are similar to the ones used by the modern C.15 (F-18) and C.16 (EF-2000) combat airplanes, so that they can be used as advanced trainer of the crews. Also to modernize the structure of 20 airships and to prolong their useful life up to 2015.[14]
- Elbit Systems cooperates "very closely" with the Spanish Land Forces on systems of telecommunications, particularly the radiotelephone for Infantry.[15]
- Tadiran. Through this Israeli company the Spanish company RIMSA has acquired means of aerial communication to endow important units with an automatic and digital system of transmissions with measures of protection in the face of actions of war. Red Básica de Área is the name of the program of the Spanish Ministry of Defence and the modern concept of tactical communications. [16]
- Some Israeli companies maintain agreements with the Spanish State. This way the export of its material to Spain is tied up with the purchase of different materials of Spanish manufacture.[17]
- Aeronautics gives services to the Board of Castile and Lion on civil and environment defence.[18]

54. Alon Ben-David (2005): Op. Cit.
55. José María. Navarro (2006a): Op. Cit., p. 20.
56. To know more about the public-private relations in the Spanish military industry see Pere Ortega (2007): "La ineficiencia de la industria de guerra", in Arcadi Oliveres and Pere Ortega: El Militarismo en España, Icaria, Barcelona, pp. 159-89.
57. José María Navarro (2008b): *Op. Cit*, pp. 19-20.
58. General Department of Arms and Material of the Ministry of Defence available at: www.mde.es/dgam/principalesprogramasaym.htm [Consultation: 22 December 2008].
59. José María Navarro (2008b): *Op. Cit*, pp. 19-20.
60. General Department of Arms and Material of the Ministry of Defence: *Op. Cit.*
61. Daniela Berdugo (2009): *Op. Cit.*, p. 14.
62. Daniela Berdugo (2009): *Op. Cit.*, p. 17.

Some collaboration between Spanish and Israeli companies:[63]

Spanish group	Israeli group	Collaboration
General Dynamics Santa Bárbara	IMI	Supply of ammunition of 120 mm. for the Leopard vehicles of combat of the Army.
EADS-CASA	IAI	Modernization of the F-5 of the Air Force.
Tecnobit y EXPAL	Rafael	Maintenance "since some time ago"agreements of cooperation.[64]
Amper	Tadiran Com.	In 1997, systems of military communication for the value of 35 millon dollars. Part of a major transference to be carried out in the next 5 years.[65]
Amper	Tadiran Com.	License for distribution of the No Protected Tactical Light Radiotelephones to the Spanish troops in Afghanistan. 270 delivered in 2008, 3,500 will be delivered between 2009 and 2010 and another 2,730 from 2010.[66]
Indra y Amper	Elbit Systems	Electronics of war.
EADS-CASA	Elbit Systems	Contract with the subsidiary of Elbit, ELOP. Also contract with Spanish distributing company of helicopters to which it sells special helmets.[67]
Telefónica Soluciones	Tadiran Com.	Use of technology of Snapshield Ltd. (100% from Tadiran) for applications of mobile technology. Announced in 2005.[68] Civil and military applications.
General Dynamics Santa Bárbara	Rafael	Spike Missiles of average scope.
Iberia	IAI	They competed to modernize 12 C-130 Hercules Spanish transport airplanes in 1994.[69]
Indra y EADS-CASA	IAI	Searcher Mk II unmanned planes.

The presence of Israeli military companies in Spain is important. Aeronautics is currently opening a factory in Valladolid,[70] but already in 1988 Israel Aircraft Industries (IAI), the leading Israeli military company, established a permanent office to facilitate military cooperation between Spain and Israel.[71] Apart from those mentioned in the table above, other Spanish military companies who report to Israel as a client are the Compañía Española de Sistemas Aeronáuticos (CESA) (approximately 70% of military production); European Security Fencing (40% of military production); UAV Navigation (55% of military sales) HAS Israel Aerospace Industries (IAI) as a direct client; Tecnobit (produces equipment and flight simulators, 90% military sales), and

63. If another source is not specified, J. M. Navarro (2006a): Op. Cit., p.16.
64. Daniela Berdugo (2009): *Op. Cit.*, p. 37.
65. According to Hezi Hermoni, president of Tadiran Com. "Contracts awarded, Communications Tadiran Com, Holon, Israel", *Jane's Defence Weekly*, 1 March 1997, p. 9; Shai Feldman and Yiftah Shapir (eds.) (2001): *The Middle East Military Balance 2000-2001*, Tel Aviv University and The Mit Press, Cambridge (Mass.)-London, p. 168.
66. Infodefensa.com, "Amper entrega al Ejército de Tierra los primeros 270 Radioteléfonos Ligeros Tácticos", 6 November 2008.
67. Daniela Berdugo (2009): *Op. Cit.*, p. 16.
68. "Expanded Deployment of Snapshield's Secure Communication Solutions by Telefonica Soluciones SARL in Spain", press note of Tadiran Communications, 28 November 2005, available in: www.army-technology.com/contractors/navigation/tadiran/press13.html [Consultation: 22 December 2008].
69. "CASA wins C-130 contract", *Jane's Defence Weekly*, 4 November 1995, p. 15.
70. José María Navarro (2008b): Op. Cit, pp. 19-20.
71. "Ingenieros de España e Israel establecen contractos técnicos para el desarrollo de un futuro misil español", El País, 2 February 1989.

Fabricaciones Extremeñas S.A. (in Explosivos Alaveses S.A. (Expal, 100% military) today within Maxam Corp.), which between 1991 and 1997 would export pistols worth 5.1 million euros, between 1997 and 2000 sold to Israel radar equipment worth 12.8 million euros; in 2001 projectiles for .49 million and military technology in 2002 for 1.6 million euros.[72]

For illustrative examples, the competition for unmanned aircraft, as indicated in the table above, has had as the winner the Joint Venture Company (UTE), formed by Indra, IAI and EADS-CASA. The strong business relations between the two countries before was shown when the Spanish companies that chose to compete chose in three of the five nominations shareholders in Israel (Amper teamed with Elbit and came in second, and General Dynamics Santa Bárbara with Aeronautics). In 2008 the Spanish company, Indra, is allied with the French Dassault Aviation and Thales to build a unmanned aircraft for the French and Spanish forces from the Heron TP model of Israel Aerospace Industries (IAI) to compete with the model of EADS, which exceeded the Heron model in cost and time of product development. Each device will be built by IAI, equipped by Thales and Indra, integrated and certified by Dassault, to be available in 2012.[73] As an example of access to contracts outside Spain and Israel, in 2004 Santa Barbara Sistemas, a former Spanish public company acquired by American General Dynamics, was part of an international consortium to enter a contract in the U.S. on small arms ammunition. The consortium also included another division of General Dynamics, Winchester (part of Olin, U.S.), Canada's SNC Technologies and Israel Military Industries (IMI).[74] Santa Bárbara continues to be the supplier of ammunition and tanks for the Spanish Army.

It is important to note that Spanish arms companies have financial institutions as shareholders, which often have decision-making power in corporate policies. In Delàs Center website it is possible to find an updated schema making these connections.

Relations in the field of Integrated Security

The Program ESRP (European Union's Security Research Programme) has a duration of seven years (2007-2013) and a cost of 1,400 million euros. It is part of the Seventh Framework Program of R+D (FP7) and s one of its objectives is to promote business growth in the industry of the Integrated Security in Europe. Public and private entities participate in the field of defence and technology. [75] In late 2009, in more than fifty FP7 projects that were underway, in 13 there was the collaboration between Israeli and Spanish public or private entities (at the same time), and at least 5 of these projects were led by an Israeli entity.[76] Below are listed some of these joint projects with Euro-

72. Directory of military busineses of the Centro de Estudios por la Paz J.M. Delàs, available at: http://www.centredelas.org/index.php?option=com_wrapper&view=wrapper&Itemid=101&lang=es [Consultation: 13 October 2009]; José María Navarro (2009): "Directorio de empresas de Defensa en España 2009", in Fuerzas de Defensa y Seguridad, num. special 84, July, pp. 37-66. Data of exports of Fabricaciones Extremeñas from the School for a Culture of Peace (2002), available at: http://unicornio.freens.org/profpcm-aux/Palestina/InformeArmas.pdf [Consultation: 24 December 2008].

73. J.A.C. Lewis (2008): "Dassault, Thales, Indra unveil MALE UAV project", Jane's Defence Weekly, 11 June.

74. David Ing (2004): "Santa Barbara bids to supply munitions to US", Jane's Defence Weekly, 21 July.

75. Ben Hayes (2009): "Israel's participation in EU R&D Framework Programmes Importing Homeland security, exporting R&D subsidies?", Amsterdam, Transnational Institute, February.

76. The details of all the projects mentioned can be found in the database CORDIS of the European Union: http://cordis.europa.eu/search/index.cfm?fuseaction=search.simple.

pean Union funding, besides others beyond the FP7 programs related to the internal or integrated security sector. In each case, it shows the group coordinator whether Israeli or Spanish and also the number of other participating groups.

Research projects funded by the European Union in the field of Integrated Security with the participation of Spanish and Israeli entities:[77]

FP7-Security Projects		Other non-FP7 projects in the field of integrated security	
Name (description)	Businesses participating from Israel and Spain	Name (description)	Businesses participating from Israel and Spain
INFRA (crisis management)	Athena GS3-Security Implementations Ltd (Holon, Israel) (coord.); Ingeniera de Sistemas para la Defensa de España SA-ISDEFE (Madrid); Everis Spain Sl (Madrid); Halevi Dweck & Co. Arttic Israel Company Ltd (Jerusalem); Opgal Optronics Indutries Ltd (Karmiel, Israel); another 5.	CAPECON (commercial applications of unmanned aircraft)	Israel Aircraft Industries Ltd (coord.); Tadiran Spectralink Ltd (Holon, Israel); Technion – Israel Institute Of Technology (Haifa); Tadiran Electronic Systems Ltd (Holon, Israel); Instituto Nacional de Técnica Aeroespacial Esteban Terradas (Torrejón de Ardoz); another 14 including EADS and Eurocopter.
ESS (crisis managemen)	Verint Systems Ltd (Herzelia, Israel) (coord.); Maden David Adom In Israel (Tel Aviv); Ernst & Young (Israel) Ltd (Tel Aviv); Aeronautics Defense Systems Ltd (Yavne, Israel); Grupo Mecanica Del Vuelo Sistemas S.A. (Tres Cantos, Madrid); another 14.	BIOSEC (Biometric technology intelligence)	Telefónica Investigacion y Desarrollo S.A. Unipersonal (Madrid) (coord.); Carlos III University of Madrid; Technical University of Madrid; Ibermatica S.A. (Guipúzcoa); ETRA Investigacion y Desarrollo S.A. (Valencia); VCON Telecommunications Ltd (Herzliya, Israel); Polytechnic University of Catalonia; another 16
SAFE-COMMS (management terrorist crisis)	Bar Ilan University (Ramat Gan, Israel) (coord.); University of Burgos; otras 4.	BEMOSA (airport security)	Technion – Israel Institute of Technology (Haifa) (coord.); Cartif Technology Centre (Boecillo, España); another 8.
EUSECON (network of research and security)	University of the Basque Country (Vizcaya); Ingeniera de Sistemas para la Defensa de España SA-ISDEFE (Madrid); The Hebrew University of Jerusalem; another 11.	SECURE-FORCE (business participation in security)	Andalusian Institute of Technology (Sevilla); Consen EEIG Euro-Group A.E.I.E. (Barcelona); Alma Consulting Group Ltd. (Rehovot, Israel); Econet, S.L. (Madrid); another 18.
IDETECT 4ALL (surveillance and detection)	Halevi Dweck & Co. Arttic Israel Company Ltd (Jerusalem); C.A.L. Cargo Airlines Limited (Hayarden, Israel); Azimuth Technologies Limited (Raanana, Israel); Motorola Israel Ltd (Tel Aviv); Everis Spain SL (Madrid); another 5.	VULCAN (antiterrorist security of aircraft)	Inasmet Tecnalia (Donostia); Israel Aircraft Industries Ltd.; Sener Ingeniería y Sistemas (Getxo); another 12.

77. Database CORDIS of the European Union.

FP7-Security Projects		Other non-FP7 projects in the field of integrated security	
Name (description)	Businesses participating from Israel and Spain	Name (description)	Businesses participating from Israel and Spain
TALOS (control of borders)	TTI Norte SL (Santander); Israel Aerospace Industries Ltd. (IAI); another 12.	MEDSI (crisis management)	Telefónica I+D S.A. Unipersonal (Madrid) (coord.); Grupo Apex SA (Pozuelo de Alarcón); Holon municipality (Israel); another 8.
SEREN (research coordination of security)	Centre for the Development of Industrial Technology (Madrid); zMatimop, Israeli Industry Center for Research & Development (Tel Aviv); another 26.	SAFEE (antiterrorist security of aircraft)	GS-3 Global Security Services Solutions (Tel Aviv); Ingeniería de Sistemas para la Defensa de España, S.A.-ISDEFE (Madrid); another 26.

Bilateral cooperation

TRAINING IN ISRAEL.[78] There are favorable conditions of Israeli law regarding the use of weapons. On the one hand, you can freely shoot live ammunition, while in Spain it is limited to 19 shots per trimester (it is estimated that in Israel there are between 1200 and 1500 shots a week). On the other hand, in Israel shooting practice is carried out in motion from vehicles and combined scenarios or with a partner alongside the shooter, while in Spain live ammunition is only fired in shooting galleries with straight lines and always with the presence of the Guardia Civil. Agents of the Guardia Civil and bodyguards of businessmen, politicians and judges in the Basque Country have been students in courses in Israel on an individual basis. Security and Intelligence Advising provided a course in Israel, attended by representatives of BBVA, Telefónica, and Renfe.[79]

TRAINING IN SPAIN. Despite that the conditions are less flexible, in Spanish territory training programs were also carried out. For example, in April 2008, two Israeli experts instructed agents of the National Intelligence Center (CNI) and of the Guardia Civil mainly in the management of high-speed kidnappings and detection of "Islamist terrorist groups".[80]

COOPERATION WITH CATALONIA. According to *Israel Business Today*, in 1992 the company Israel Military Industries (IMI) won a contract of $40 million to revise the security system of three Catalan prisons (expandable to 13 prisons). IMI would be subcontracted by TENBA. [81] Moreover, Israeli companies provided security and consultancy services in the Barcelona Olympics.[82]

The Israeli Embassy in Madrid has said that there are 41 Israeli security companies

78. "Israel, escuela de seguridad para escoltas españoles", EFE, 11 April 2008.

79. According to SIA (Security and Intelligence Advising). See: "Curso de Security Management en Español en Israel culmina con participación de altísimo nivel española, estadounidense y latinoamericana", note of SIA on 19 July 2004, available at: www.siacorp.com/190704press.htm [Consultation: 4 October 2008].

80. "Escoltas del País Vasco y guardias civiles entrenan en Israel", El País, 12 April 2008.

81. "IMI locks up Spain", Israel Business Today, 29 May 1992.

82. Government of Israel: Invest in Israel, available at: www.investinisrael.gov.il/NR/exeres/7C2F6937-A259-4A4A-9C29-DE351032B87A.htm [Consultation: 25 November 2009]; "La empresa israelí ICTS se presentó en público hace cuatro meses", El País, 13 October 1989.

seeking representation and market in Spain. [83] The Israeli Government does not accept responsibility for external action of security companies run by their country's nationals. [84] Many of the workers of these companies are former soldiers of the Tzahal and the Shin Beit, and business partnerships have been frequent. For examples, International Security Academy (ISA) conducted training for a month to a Spanish group on the border of the Gaza Strip with a team of Israeli Special Forces and the manager of SGSI (Servicio Global de Seguridad e Inteligencia) says that he cooperates with the Spanish National Intelligence Center (CNI).[85]

5. Conclusions and suggestions for witnesses

Military relations between Spain and Israel are recent. However, they are now very fluid, stable and growing, and they have cooperation agreements in different sectors of defence and security. Among the members of the European Union, Spain is not among those who use best practices and there is not a significant difference between the Partido Popular (PP) and the Socialist Party (PSOE) when it comes to military relations with Israel. Although these military relationships are often reduced to the Spanish arms exports, we can conclude that there are two areas to be dealt with in different ways. First, there is the legislative level. Indeed, arms exports are governed by Spanish law and therefore it is possible to speak of the legality or illegality of exporting arms to Israel. The second field is that of ethics and human rights. Although not regulated by law, there are controversial military relations that can promote militarization of conflicts in the region and the use of violence, even against the content of International Humanitarian Law and the Universal Declaration of Human Rights. These two fields of legislation and human rights will be addressed separately.

With respect to legislation one could argue that, in general, Israel flagrantly violates four of the eight criteria of the Code of Conduct (criteria 2, 3, 4 and 6) which are binding in Spanish legislation. In addition, it less clearly violates another criterion (7), possibly violates other two (1 and 5) and only one is not violated (8). Therefore, arms exports to Israel do not comply with Spanish law itself. Obviously it cannot be proved conclusively that the weapons exported are used to violate the content of these criteria, but it is important to know that there is no guarantee on the end use of the material imported by Israel, that is, there is no way to prevent the use of Spanish arms in events such as those recently in the Gaza Strip.

Furthermore, on the one hand, these exports are covered by a lack of transparency, protected in terms of "national security"; and on the other hand, there is an obvious collusion between the Spanish Government and the authorities and companies of Israel and the preference of the first for questions of commerce when authorizing exports. It is not known if any of the licenses refused by the Spanish State had Israel as a recipient. In the past fourteen years, Spain has exported "material of defence" and small arms to Israel worth over 25 million, plus other exports of dual-use material in excess of 8.6 million euros. Needless to say, Spain has never exported weapons to Palestinian groups or authorities, a practice that also would have been a violation of Spanish law.

83. Lucas Marco (2007): "Empresas israelíes de ex altos mandos militares desembarcan en el mercado español de la seguridad", 23 September, available at: www.profesionalespcm.org/_php/MuestraArticulo2.php?id=9397 [Consultation: 20 September 2008].

84. "La empresa israelí ICTS se presentó en público hace cuatro meses", Op. Cit.

85. Both examples from Lucas Marco (2007): Op. Cit.

Exports of arms to Israel from all countries (2000-2007)

		2000	2001	2002	2003	2004	2005	2006	2007	Total 2000-07
1	United States	150.581.360	250.837.652	206.287.699	207.230.688	288.010.479	194.474.578	383.744.410	446.680.089	2.127.846.955
2	Serbia and Montenegro			6.074		8.626.560	2.230.693	3.894.987	205.458	14.963.772
3	Poland	3.693.000				298.565	1.011.508	1.350.736	4.794.870	11.148.679
4	Czech Republic	189.850	511.629	2.886.296	939.634	742.792	2.252.488	910.507	585.966	9.019.162
5	Austria	6.357	55.232	1.163.498	3.651.078	3.104.130	218.714	192.696	500.447	8.892.152
6	Republic of Korea	843.581	525.237	396.385	240.685	1.051.257	649.770	3.583.663	579.796	7.870.374
7	Italy	2.219.979	1.710.110	29.794	670.874	15.097	182.349	1.488.356	1.502.094	7.818.653
8	Romanía							3.136.165	3.621.076	6.757.241
9	Slovakia	125.950	126.246	100.093	227.963	1.847.926	2.461.123	1.105.956		5.995.257
10	Finland	416.211	274.961	267.775	8.993	5.465	636.589	1.977.459	1.519.218	5.106.671
11	Turkey	261.782	348.844	487.143	1.374.998	189.027	480.571	539.774	754.182	4.436.321
12	Germany	244.000	124.000	249.000	118.000	315.000	476.000	265.000	475.000	2.266.000
13	Brazil		6.000	180.094	71.849	124.895	10.413	988.090	859.768	2.241.109
14	Spain	208.615	148.574	281.633	327.567	132.337	215.974	310.555	293.859	1.919.114
15	Bosnia					53.975	42.667	302.599	1.481.258	1.880.499
16	Colombia	2.159		59.399	4.225	19.019	105.960	1.155.818	215.395	1.561.975
17	Chile			1.399.999						1.399.999
18	Albania			4		387.169		868.246		1.255.419
19	Canada	124.826	216.309	14.987	146.887	53.788	132.811	166.269	354.516	1.210.393
20	United Kingdom	202.671	67.074	58.525	6.188	82.141	277.883	341.692	52.651	1.088.825
21	India					7.705	85.601	363.551	595.823	1.052.680
22	Croatia	175.083	446.660	185.898	144.800		47.342	14.990		1.014.773
23	Norway			833.777						833.777
24	The Netherlands						420.360	364.354		784.714
25	Switzerland	13.808	5.314	101.022	82.657	146.017	53.130	15.175	25.429	442.552
26	France		51.934	169.935	19.242			2.511	104.287	347.909
27	Sweden	19.424	149.462	43.741	23.313					235.940
28	Kazakhstan								217.714	217.714

		2000	2001	2002	2003	2004	2005	2006	2007	Total 2000-07
29	Thailand		61.942	11.755	17.398		22.775		85.650	199.520
30	China	700	44.550	9.609	9.980	42.115	38.798	20.479	22.836	189.067
31	Estonia								185.772	185.772
32	Denmark					50.093	35.904		74.752	160.749
33	Mexico	895				118.988				119.883
34	Australia	28.815	13.699	19.349	35.665		3.800		12.159	113.487
35	South Africa	20.555		50.742		11.127				82.424
36	Cyprus	36.030		9.601		5.428		5.743	7.483	64.285
37	Luxembourg						49.746			49.746
38	Portugal	8.747	9.208	11.768	3.131	5.251		2.112	2.708	42.925
39	Greece	5.219	24.236							29.455
40	Georgia				20.247					20.247
41	Japan	17.869								17.869
42	Vietnam							12.200		12.200
43	Hungry	6.000								6.000
44	Kenya					5.103				5.103
45	Botswana						4.055			4.055
46	Trinidad and Tobago			2.900						2.900
47	Belgium	1.510		1.112						2.622
48	Russia						1.948		135	2.083
49	Uganda								2.000	2.000
50	Zimbabwe							1.023		1.023
51	New Zealand						565			565
52	Guatemala		503							503
53	Palestine							45		45
		2000	2001	2002	2003	2004	2005	2006	2007	Total 2000-07
TOTAL $		159.454.996	255.759.376	215.319.607	215.376.062	305.451.449	206.624.115	407.125.161	465.812.391	2.230.923.157
U.S. % of total		94,44%	98,08%	95,81%	96,22%	94,29%	94,12%	94,26%	95,89%	95,38%

Source: Database of United Nations of Commerce of Products (COMTRADE) (The countries not represented have not declared any arms sales to Israel)

The second field relevant for considering military relations between Spain and Israel is not a question of law, but of ethics and human rights. These factors are involved in the imports of Israeli military equipment by Spain, the collaboration between enterprises of both countries and the connections in the fields of internal security and Integrated Security (Homeland Security). As for imports, it is unknown the total volume of transfers from Israel to Spain, although some sales are well known in the form of missiles and unmanned aerial vehicles (used by Spain in Afghanistan). Only those items had a cost exceeding 340 million euros, and therefore can be said that the turnover of Israeli arms imports of Spain is much higher than exports in the opposite direction. First, these imports cheapen domestic production of arms in Israel, which exports more than three quarters of its military production and thus has an industry highly dependent on exports. Also, it is interesting to note here that if Spain imports military equipment from Israel it is because this country boasts one of the most "advanced" military industries in the world, because of its military effort (about eight times higher than the Spanish in terms of percentage of expenditure on GDP), which receives its domestic legitimacy by the constant threat (real or figurative) that the Israeli public perceives both abroad (Iran, some Arab countries ...) and from the "inside"; (the Occupied Territories of Palestine, stressing the particularity of the Gaza Strip). Thus, it is important to note that there also exists a clear link, albeit indirect, between the Spanish imports of Israeli weapons and the occupation of Palestine.

Relations in industrial cooperation are even more significant. In a situation where each country prioritizes its own local defence industry, the consortia that materialize between Israeli and Spanish companies to access each of the respective markets are important and, following the same logic, they are important in other markets after companies from those countries join the consortium. Turnover of these collaborations can exceed fifty million annually, much higher than that recorded by Spanish exports of military equipment. In this connection it is recalled that the Israeli military industry is mostly public (and the private industry has a strong state intervention), while Spanish companies involved in these military consortia (Indra, Amper, EADS-CASA , Santa Bárbara, Tecnobit and Telefónica, among others), while generally private, are publicly funded and receive other facilities by the Spanish government structures.

Finally, the internal and integrated security sector represents a very prosperous business, having identified a "new" threat related to "terrorism", organized crime, trafficking in illegal products or immigration, among others. Although it was not possible to determine the volume of business between Spain and Israel in this sector it is estimated to be moving closer to the Defence side, and those large companies involved are generally the same in both sectors. In the field of Research and Development (R+D), Israel participates often with Spanish companies in programs financed by the European Union. Business relationships between the two countries on security issues are strong, growing and stable, as is the establishment of the Israeli industry in Spain.

E) ANALYSIS OF THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE ON THE LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORIES, WITH SPECIAL REFERENCE TO THE QUESTION OF SETTLEMENTS AND EAST JERUSALEM

1. Introduction

On 9 July 2004 the International Court of Justice issued an Advisory Opinion on the Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory. The ruling constitutes the Court's answer to the question raised by the General Assembly of the United Nations, through resolution ES-10/14 of 8 December:

"What are the legal consequences arising from the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory, including East Jerusalem and its surroundings, as described in the report of the Secretary General, taking into account the rules and principles of international law, including the Fourth Geneva Convention of 1949 and the relevant resolutions of the Security Council and General Assembly?"

The wall referred to in the question from the General Assembly is a barrier that reaches 650 kilometres long and that seeks to separate Israel from the Occupied Palestinian Territories. Its construction began in summer 2002, after a wave of suicide bombings, but was originally an idea from the labour party, which in the past used "to propose as one of its election slogans the phrase 'us here and them there'".[1] The effects of the construction of the wall and its associated regime are described by the Secretary General of the United Nations, at the request of the Assembly, in the report to which the question refers.[2]

After some considerations concerning the jurisdiction of the Court and the opportunity to express an opinion on the question, the Court concludes that the construction of the wall and its associated regime are contrary to international law. Consequently, the Court adds that Israel is obliged to stop work, dismantle the construction

1. Vid. Álvarez-Ossorio, I.: "El Muro de Separación y el futuro de Palestina", *Análisis del Real Instituto*, Real Instituto Elcano, 19 July 2004, at http://www.realinstitutoelcano.org

2. Vid. Resolution of the General Assembly ES-10/13, of 27 October 2003 and report of the Secretary General in document A/ES-10/248, of 24 November 2003.

and compensate for the damages caused. In addition, all states have a duty not to recognize the illegal situation resulting from the construction of the wall and the countries should refrain from assisting Israel in maintaining the situation created. Finally, the Court states that the General Assembly and the Security Council should consider what further action is necessary to end the illegal situation resulting from the construction of the wall and the associated regime.

To reach this decision, the Court made a detailed analysis of its role as the principal judicial organ of the United Nations and an equally detailed study of the law applicable to the Israeli-Palestinian conflict, in particular the element in question, the wall of separation, with respect to International Humanitarian Law and International Human Rights law. This valuable contribution to jurisprudence, moreover, was reinforced by the majority from within the Court: 14 votes to one, belonging to Judge Buergenthal; except for the consequences of building the wall for third states, in which a second magistrate, Kooijmans, also voted against the majority. It is noteworthy that the negative vote of the American judge does not question the existence of Israeli violations of international law in connection with the separation wall, but because, in his opinion there was insufficient evidence for issuing the opinion.

The virtual unanimity on the merits should not delude us about the practical consequences of the court decision as the government of Israel has repeatedly refused to accept the verdict, which derives from the position that it is a non-contentious matter and that it is not legally binding. However, it is important to remember that the advisory opinion is the opinion of the highest court of law available to the international community, which unquestionably has enormous authority from alegal point of view.

2. Historical review and applicable law

The Court addressed the issue raised by the General Assembly with a brief overview of the history of the territory from the Ottoman Age (paragraphs 70 to 78) and describing the wall that "Israel has constructed or plans to build" (paragraphs 79 to 85). From the historical review it is worth noting the reached conclusion that the territories of historic Palestine, which are located beyond the "green line" (the armistice line of the war of 1949) are "occupied territories". This includes the Gaza Strip, West Bank and East Jerusalem. As for the description of the works completed and in progress, it highlights the fact that the majority are running into these occupied territories (West Bank and East Jerusalem), on land expropriated from Palestinians, so that 975 square kilometres, equivalent to over 16% of the West Bank, lie between the Green Line and the wall. The wall, therefore not only separates Israel from the territories, but divides these territories into two halves, so that some 320,000 Jewish settlers and 400,000 Palestinians are in that area. One of the areas, according to the new administrative regime who accompanies the construction of the wall, is a "closed zone", which Palestinians can only enter and remain in with a license or identification card issued by the Israeli authorities.

From these facts the court determined the principles and international standards applied, followed the legal classification of the events described and pointed out the legal consequences arising from it all.

The considerations made by the International Court of Justice on the law applicable to the conflict between Israel and Palestine have great relevance because they con-

firm, under jurisdiction, what the specialized doctrine and what the majority of states in the international community have been saying for many years. The legal rules relevant to the case are, in the opinion of the Court:

- The prohibition of the threat and use of armed force, as a corollary, the illegality of territorial acquisition resulting from the threat or use of force.
- The right to self-determination of peoples, which the Palestinian people hold.
- International Humanitarian Law, in particular the Fourth Hague Convention on laws and customs of war on land (1907) and the Fourth Geneva Convention on the civilian population (1949).
- The international human rights law, including international conventions to which Israel is party, namely the International Covenant on Civil and Political Rights (1966), the Covenant of Economic, Social and Cultural Rights (1966) and the Convention on the Rights of Children (1989).

The first two statements are so unchallenged, even by the Israeli government, that they hardly deserve a couple of paragraphs of the Advisory Opinion. With regard to International Humanitarian Law, however, the Court must confront the fact that Israel is not party to the Fourth Hague Convention of 1907 and, though it is party to the Geneva Conventions, it has repeatedly refused to consider applicable *de jure* the Fourth Convention to the Occupied Palestinian Territories. In connection with the first of these treaties, the Court observes that under the established case law during the Nuremberg trials, settled in the Advisory Opinion of the Court authority on the Legality of the Threat or Use of Nuclear Weapons (1996), the "Hague Rules" have become part of customary international law. As the applicability of the Fourth Geneva Convention is concerned, Israel's refusal is based on that article 2.2 of the Convention providing that it applies "in all cases of partial or total occupation of the territory of a High Contracting Party, even if such occupation do not meet armed resistance". Since, as is generally recognized, the West Bank was never *de jure* a sovereign Jordanian territory, but only a territory administered by that country, the Fourth Convention would not apply. However, the Court correctly interpreted that that paragraph does not restrict, but clarifies the scope determined by the first paragraph of the provision. And under that provision, for the Convention to apply it only needs to be an armed conflict and that conflict has to have arisen between two participating parties (paragraph 95). As Israel and Jordan were parties to the Fourth Convention when the war started in 1967, the Convention is fully applicable. This has been recognized in venues as significant as the General Assembly and Security Council of the United Nations, the conference of participating states in the Fourth Geneva Convention (1999), the International Committee of the Red Cross and by the Israel Supreme Court itself (ruling of 30 May 2004).

Israel is also a cause for concern regarding the applicability of the conventional instruments of human rights protection for the Palestinian question in general, and the construction of the wall in particular. For two reasons: first, by the apparent inconsistency between this body of law and International Humanitarian Law. According to this thesis, the "human rights" would be applicable only in peacetime, while in time of war humanitarian law should apply. Second, because the people who should benefit from these national rules and are not physically in the territory of the state which requires their respect. This is a surprising argument when it has been argued previously that the humanitarian law is also not applicable, *de jure*, to this population.

The relationship between International Humanitarian Law and human rights law was clarified in the ICJ Advisory Opinion of 8 July 1996. On that occasion, the Court affirmed that the protection afforded by the Covenant on Civil and Political Rights "does not cease in times of war". In fact, the Covenant itself envisages the possibility that some of its provisions can be suspended when there is a situation of national emergency. In contrast, other rights are fixed, even in wartime. The Court therefore concluded that the protection offered by human rights conventions "does not cease in the case of armed conflict, except in the case of applying provisions of suspension" (paragraph 106), which Israel has done in relation to an article of this agreement.

Regarding the territorial and personal application of the treaties of human rights protection, Article 2.1 of the Covenant on Civil and Political Rights specifies that the commitment of participating states extends "to all individuals who are in its territory and are *subject to its jurisdiction*". The Court, taking as its basis the practice of the Human Rights Committee of the United Nations, concludes that the Covenant "is applicable with respect to acts of a State in the exercise of its jurisdiction outside its own territory" (paragraph 111). The same applies to the applicability of the Convention on the Rights of the Child ("the participating states... shall ensure its implementation to each child *subject to its jurisdiction*"). However, as far as the Covenant on Economic, Social and Cultural Rights is concerned, the absence of any provision for the area of application does not exclude, in the opinion of the Court, its applicability to territories under the "jurisdiction", instead of under the sovereignty, of a participating State. We fully agree with the interpretation by the Court of the area of application of these conventions, that in reality could actually be extended to the entire law of human rights, conventional or customary, meaning that where a state exercises its functions, with these functions having a personal or territorial basis, a sovereign foundation or not, it has the duty to respect the established obligations under this branch of public international law. Therefore, while Israel *de facto* controls the occupied territories (which it does: whether or not under the Palestinian Authority, whether or not withdrawn unilaterally from Gaza), it will be responsible for what happens in them.

3. Legal qualification of the facts. The case of the settlements and Jerusalem

Based on the collection of facts described and of applicable law the court ruled that, with the construction of the wall, Israel is in violation of international law (Section 3.A of the operative part of the opinion). The ruling, however, does not specify which specific provisions have been violated, which has been criticized by some judges. To find out, one must see paragraphs 114 and the following of the text of the Opinion.

1 There we find, first, that the wall "severely impedes the Palestinian people's exercise of their right to self-determination" (paragraph 122). In reaching this conclusion, the Court notes that the "devious" route of the wall includes, within what is called the "closed zone," 80% of the settlers living in Palestinian territory.

This fact allows the Court to say that Israeli settlements in occupied territory, including East Jerusalem, are illegal. One issue that neither the General As-

sembly has asked, or is inherent in the construction of the wall, since the policy of settlements is much older, but is something all the judges agree on, even Judge Buergenthal.[3] Indeed, since the 1967 war, in all the occupied territories, with varying intensity according to its strategic or emotional value, Israel has carried out a policy of settlements with the installation of successive waves of Jewish immigrants in colonies with the purpose of changing the demographics of the territory. This has been done in flagrant violation of Article 49 of the Geneva Convention relative to the protection of civilian persons in time of war. Today, more than 400,000 settlers live in dozens of settlements in the West Bank and East Jerusalem.[4] The concentration of settlers is particularly notable in the city of Jerusalem, whose municipal boundaries have been expanded considerably after the 1967 annexation to allow the installation of up to twelve settlements of about 200,000 settlers. The construction of some of these settlements was started, and almost all of them have been extended, or expanded, when the Oslo peace process was already underway.
In this context, the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that this is a temporary measure, but:

"...it cannot remain indifferent to all the fears that have been expressed that the route of the wall will shape the future border between Israel and Palestine, and to the fear that Israel might decide to integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated regime create a *fait accompli* on the ground that could well become permanent, in which case and notwithstanding the formal characterization of the wall by Israel, would amount to a de facto annexation" (paragraph 121).

In short, the wall adds to the settlement policy, illegal under Article 49 of the Fourth Geneva Convention, and this addition results more than probably in annexation of a significant portion of Palestinian territory, also illegal because it is a consequence of the use of armed force.

2 Next, the Court found a substantial number of violations of International Humanitarian Law and human rights law as a direct result of the construction of the wall and its associated regime. They are breaches of specific treaty provisions, from which the following stand out being most significant:

- Article 46 of the Hague Rules, which prohibits the confiscation of private property, in accordance with Article 52 of the same text.
- Article 49 of the Fourth Geneva Convention, which prohibits deportation.
- Article 52 of Fourth Convention, which prohibits any action aiming at creating unemployment or at restricting the employment opportunities of workers in an occupied country.
- Article 53 of the same text, which prohibits destruction of real or personal property belonging to individuals or public communities.
- Article 59 of the same text, which requires sufficient supply to the population of occupied territories.

3. Vid. Declaration of Judge Buergenthal, paragraph 9.
4. In 2005 the few colonies existing in the Gaza Strip were dismantled, where reside (at least on paper) approximately 7,000 Israeli colonies.

– Article 12.1 of the Covenant on Civil and Political Rights, which guarantees freedom of movement and residence.
– And Article 17.1 of the same Convenant, which prohibits arbitrary or unlawful interference with private and family life.[5]

The facts described in the report of the Secretary General, as well as reports of various special rapporteurs of the United Nations, let the Court forcefully assert that Israel is in violation of the rules just outlined. However, the Court is aware that some International Humanitarian Law obligations in the agreements are formulated in order to take into consideration "military exigencies". It is therefore necessary to consider whether those requirements, arising from the situation of occupation, can somehow justify the consequences that the construction of the wall is having on the Palestinian population.

A In this sense, the Court refers only to Article 53 of the Fourth Geneva Convention, Article 12 of the Covenant on Civil and Political Rights and other relevant provisions of the Covenant on Economic, Social and Cultural Rights, since the other provisions under consideration establish absolute and unconditional obligations. In the first case, the prohibition of destruction of property is an exception when "rendered absolutely necessary due to military operations"; the freedom of movement and residence of the Covenant on Civil and Political Rights may have restrictions provided "under the law", necessary, among other things "to protect public security or public order." Economic, social and cultural rights can be restricted by law "for the sole purpose of promoting general welfare in a democratic society". In each of these cases, the Court used a similar formula and perhaps over-cautious, and "on the basis of available information" deemed that the above conditions of exception were not met. The wording of these paragraphs is somewhat timid and its tone contradicts the factual claims made outright a few pages before. In my opinion, it would have been enough to compare the destruction and dislocation that the construction of the wall causes with the military advantage it brings, and to remember that, as stated by Judge Elaraby,[6] the exceptions to the rule must be strictly interpreted so they could have given greater authority to these arguments.

B Instead, the Court is very clear in rejecting the argument of self-defence raised by Israel. The attacks come from occupied territory and are not attributable to a third state; there is no "armed attack", within the meaning of the Charter, therefore the claim to the principle of self-defence is not applicable. Although some judges seem surprised by what they see as a classical interpretation of the right to self-defence as a link only between sovereign states, especially in light of the attacks of 11 September 2001 and subsequent resolutions 1368 and

5. It is excluded the enforceability of Article 9 of the Covenant on Civil and Political Rights (on the right to liberty and security of people) because, under Article 4 of the Covenant itself, Israel notified at the time the suspension of this right to the Secretary General of the United Nations. Instead, the Court considers payable in addition to the requirements set out above, but does not dwell on it, almost all the substantive articles of the International Covenant on Economic, Social and Cultural Rights (regarding the right to work, to protection and assistance to the family, the right to an adequate standard of living, the right to health and the right to education) and the corresponding provisions of the Convention on the Rights of the Child (Articles 16, 24, 27 and 28).

6. Vid. paragraph 3.2 of the separate opinion of Judge Nabil Elaraby.

1373 (2001) of the Security Council.[7] I essentially agree with the Court: self-defence is predicated on a relationship between states, even when the "aggressor" is only the aggressor in an indirect way, for having allowed or encouraged the activities of a terrorist group from its territory. However, it is not the situation that occurs in our case; as Israel itself states the violence comes from the occupied territories; territories that under the occupation regime, are under its responsibility. The existence of a Palestinian Authority is, for the purposes of The Hague and Geneva Conventions, irrelevant, since its *de facto* control of the Palestinian territories, besides being very partial, depends on what the Israeli army decides at any time. To this must be added the argument of Judge Higgins that: a) the construction of the wall is not a "use of force" that may come justified by a prior armed attack, b) even if it were, it would not meet the requirements of "necessity" and "proportionality" that customarily are required for the exercise of self-defence.

C

The Court also examines the possibility of invoking a possible "state of necessity" in the terms outlined by the Draft Articles of the International Law Commission on International Responsibility of the State, 2001, and the ruling of the ICJ in 1997, in the case concerning the Project Gabcikovo-Nagymaros. Again, "in light of the material before it," the Court is not convinced that building the wall is the only way to safeguard the interests of Israel against the peril which it has invoked as justification for that construction. While I agree with the conclusion of the Court, further work is also missing at this point on: a) the exceptional circumstance of precluding wrongfulness, b) the impossibility of relying on the state of necessity when the wrongful act "seriously affects an essential interest of the state or states towards which the obligation exists, or of the whole international community" (art. 25.1.a of the Draft Articles), and: c) when "The state has contributed to the occurrence of the state of necessity" (Article 25.2.b).

The Court therefore concludes that there are no grounds for excluding the wrongfulness of the construction of the wall. And states in a dictum that would be perfectly applicable to all states who say they are "at war against terrorism" that:

"while Israel has the right, and indeed the duty, to respond to those acts [of terrorism] in order to protect the lives of its citizens … the measures taken must be consistent with applicable international law" (paragraph 141).

3

The case of the occupation of East Jerusalem deserves a separate comment, which does not appear in the advisory opinion because it is not directly affected by the construction of the wall.
As is known, the General Assembly of the United Nations prepared a Partition Plan in 1947 [resolution 181 (II)] which proposed the establishment of two states, one Jewish and one Arab, with an international status for Jerusalem and Bethlehem for ten years. The first Arab-Israeli war altered the territorial limits controlled by the new state of Israel and by the Arab states (Egypt and Jordan) which administered the Gaza Strip and West Bank territory, including

7. Vid. the declaration of the Judge Buergenthal, paragraph 6, and the separate opinions of Judges Higgins (paragraph 33 and 34) and Kooijmans (paragraph 35).

East Jerusalem. Israel joined the United Nations Organization on 11 May 1949, with the vast majority of states at the time, although not the Arab countries, recognizing it as a sovereign state with the borders resulting from the conflict of 1948-49. This is why it is questionable from a legal standpoint to now claim a Palestinian state with something like the proposed boundaries in the Partition Plan. But with one important exception: the General Assembly resolution 303 (IV) of December 1949, reaffirmed the intention to place Jerusalem under international regime, with appropriate safeguards for the protection of sacred sites, and therefore does not recognize the annexation of the western sector of the city proclaimed by the Ben Gurion government in February of that year, neither the declaration of Jerusalem as Israel's capital by the same government a few days before the adoption of the resolution. To date, the international community has never explicitly recognized Israeli sovereignty over any sector of Jerusalem.

Thus the solution for Jerusalem under international law would be to give two capital statuses in the city. This would be citywide, including the western sector. Since this option seems ruled out by the Palestinians themselves, we must recognize the need to divide the city and claim East Jerusalem as capital of a Palestinian state. In this context, all the areas inhabited by the settlers in the last thirty-eight years correspond to Palestine. It is important to remember that the territories occupied by Israel in 1967 only represent 22% of historic Palestine (British Mandate). Palestine has recognized Israel as a state since 1988 and has therefore resigned to claim a good part of that 78% of territory which, in law and justice, could correspond to Palestine. Building their state only on the occupied territories cannot be considered the starting point for negotiations, but an inalienable right. The right of self determination that the International Court of Justice and numerous United Nations resolutions recognise for the Palestinian people cannot be done on *any* territorial basis but on the integrity of the territories occupied in 1967, including East Jerusalem. It must be added that any concession on this point, as it would mean a territorial cession derived from the use of armed force and a violation of the principle of self-determination of peoples, would be illegal and void under international law.

4. Legal consequences

Having reviewed Israel's international responsibility for violating its international obligations, the Court may proceed to answer the question posed by the General Assembly, namely, what are the legal consequences of that violation. These consequences involve the state committing the wrongdoing, Israel, and the entire international community.

The obligations of Israel pointed out by the Court are a mere application to the case of the general theory of international responsibility and the Draft Articles on International Responsibility of the State mentioned above. Israel must "respect the right of the Palestinian people to self-determination and its obligations under International Humanitarian Law and the international human rights law" (paragraph 149). In particular, it should:

– Put an end to violations that are being committed, i.e., stop construction and dismantle the parts of the structure already built within the Occupied Palestinian Territory. In legal terms, the duty of "cessation" involves the repeal of all legislative and regulatory acts adopted in view of building the wall.
– Repairing the damage caused to all natural or legal persons concerned, that is, return the land, orchards, olive groves and other property to its former owners. And when *restitutio in integrum* is not possible, it should compensate the persons in question for damages.

For its part, the remaining states in the international community, under the natural *erga omnes* of the obligation to respect the right to self determination and of the obligations under humanitarian law, have the duty to:

– Not to recognize the illegal situation resulting from the construction of the wall.
– Not to render aid or assistance in maintaining the situation created by such construction.
– Ensure an end to any impediment, resulting from the construction of the wall, to the exercise of the Palestinian people for their right to self determination.
– Make Israel respect International Humanitarian Law embodied in the Fourth Geneva Convention.

These obligations, except the second, may seem somewhat vague, but they have the potential to highlight, in legal terms, that the underlying conflict is not simply a bilateral issue. It is a problem that reaches the entire international community and it generates rights and obligations, particularly to states or international organizations that are poised to have a greater ability to influence the offender, such as the United States of America or the European Union.

In particular, any state would be in violation of international law if somehow *de jure* would recognise any actual situation created as a consequence of the construction of the wall. But furthermore, any state or the European Union as a whole, are required to take lawful measures, for example, to economically pressure Israel to comply with its international obligations. Unfortunately, however European rhetoric has supported the reasoning of the Court and, in general, the Palestinian cause, although at the moment of truth it has not acted on all the legal consequences, for example, by suspending the trade agreements that connect the EU to Israel until Israel complies with its obligations under international law.

F) ISRAELI POLICIES ON THE WATER RESOURCES OF THE OCCUPIED TERRITORIES, AND THEIR CONSEQUENCES FOR THE PALESTINIAN POPULATION

Water resources, as well as land, continue to be today the object of colonial appropriation by Israel. International Law explicitly prohibits what Israeli governments are doing in Jerusalem, the West Bank, Gaza and the Golan Heights. It is also banned by the agreement between the Palestinian National Authority and the Israel government precisely to protect water infrastructures[1]. However, water continues to be a tool of collective punishment, of repression against the population and a booty for Israeli occupation forces. Once again, a culture of protection of civilian population and a basic principle of Law: the unlawfulness of collective punishments, needs to be imposed. A first step towards it must be to respect that water is a vital resource and, hence, it must be safeguarded and cannot be used nor as a weapon neither as a tool of power. The United Nations Economic and Social Council made an important step towards that in 2002 when declaring water as a Human Right[2]

1. Occupation and discrimination also in the access to water

War and the conquests of Arab lands in June 1967 were not because of water. However, since the beginning until now, it has been of the most weighted in the policies of the West Bank and Golan Heights occupation. That same year, 1967, Israel took

1. Israel-Palestinian Joint Water Committe, "Joint Decalration for Keeping the Water Infrastructure out of the Cycle of Violence" (31st January 2003).

2. Economic and Social Council / ECONOMIC, SOCIAL AND CULTURAL RIGHST COMMITTEE (E/C.12/2002/11 20th January 2003) General Comment n. 15 (2002) The right to water (articles 11 and 12 of International Covenant on Economic, Social and Cultural Rights)

"I. INTRODUCTION

1. Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. The Committee has been confronted continually with the widespread denial of the rights to water in developing as well as developed countries. Over one billion persons lack access to a basic water supply, while several billion do not have access to adequate sanitation, which is the primary cause of water contamination and diseases linked to water. The continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty. States parties have to adopt effective measures to realize, without discrimination, the right to water, as set out in this general comment."

control of water in the occupied territories, under the military order, 92 that prohibited to drill new wells without the permit of the occupation military authorities, it established quotas for water extraction and expropriated wells belonging to absent owners and those that were in the expropriated areas. In October that year, the military authority published the military order 158 that, in article 4, stated: "Nobody can set up, mount, possess or make work any water installation without a permit issued by the area's commander". Between 1967 and 1993 only 34 permits were issued for new wells, for domestic use and a maximum of 140 meters deep. These orders were followed by many others that continued to limit Palestinians access to water resources.

Israeli control on water resources froze Palestinian consumption and prevented agricultural development just when Israel and the rest of the world were carrying out "green revolutions", based mainly on an intensive use of irrigation.

At present, the Israeli population consumes about 300 cubic meters (cm) per person, yearly and the Palestinian less than 70 (cm). Differences of consumption between Palestinians and Jewish settlers in the West Bank and Jerusalem are even more severe, since settlers are consuming between 5 and 10 times more water *per capita* than the Palestinian population (when there were still settlements in the Gaza Strip, differences were even bigger).

The Oslo Agreements did not modify the situation, because any change in the use of water needs permission from Israel. "Management of the western and coastal aquifers demonstrates the problem. Part of the Jordan Basis, the western aquifer is the single most important source of renewable water for the Occupied Palestinian Territories. Nearly three-quarters of the aquifer is refilled in the West Bank and flows from the West Bank towards the coast of Israel. Much of this water is unused by the Palestinians. One reason: Israeli representatives on the Joint Water Committee stringently regulate the quantity and depth of wells operated by Palestinians. Less stringent rules are applied to Israeli settlers, enabling them to sink deeper wells. With only 13% of all wells in the West Bank settlers account for about 53% of groundwater extraction. Water not used in the Occupied Palestinian Territories eventually flows under Israeli territory and is extracted by wells on the Israeli side. There are similar problems with the waters of the Coastal Basin. These barely reach the Gaza Strip because of high rates of extraction on the Israeli side. The result: extraction rates from shallow aquifers within the Gaza Strip far exceed the refill rates, leading to increasing salinization of water resources. Limitations on access to water are holding back development of Palestinian agriculture. Although the sector represents a shrinking share of the Palestinian economy –estimated at roughly 15% for income and employment in 2002– it is nonetheless crucial to the livelihoods of some of the poorest people. Irrigation is currently underdeveloped with less than a third of potential area covered because of the lack of water. The underdevelopment of water resources means that many Palestinians depend on water deliveries from Israeli companies. This is a source of vulnerability and uncertainty because supplies are frequently interrupted during periods of tension. The construction of the controversial Separation Wall threatens to exacerbate water insecurity. Construction of the wall has resulted in the loss of some Palestinian wells and the separation of farmers from their fields, especially in highly productive rainfed areas around the Bethlehem, Jenin, Nablus, Qalqiya, Ramallah and Tuldarem governorates" (UNDP, 2006).

2. Water and apartheid

Israeli policies that limit Palestinian water consumption aim at preventing restrictions to Israeli and Jewish settlers consumption, in a way that the needs of the Palestinian population (even in terms of surviving) are subject to the Israeli population's welfare. The problem of the lack of water is provoking to the population of the Occupied Palestinian Territories in a way that affects all sectors: health, domestic needs, agriculture, economic development and possibility to give shelter to Palestinian refugees. The impoverishment of aquifers because of overexploitation and pollution is causing severe health problems such as ulcers, cancer, fluorosis, neurological problems, anaemia, heart problems, hypertension, etc. Lack of infrastructures for sewage treatment is also provoking many problems of infectious illness and parasitism. Shortage of water for homes also brings grave hygienic issues and consequent health problems to people. Thus, the Palestinian population suffers a double sanitary problem. On the one hand, we find diseases that affect usually developed countries such as hypertension, heart diseases, cancer, diabetes, psychiatric problems, etc. On the other hand, there are also those diseases typical of developing societies, as infectious illness, malnutrition, and infant mortality. These are, in good part, a consequence of the terrible living conditions imposed by the Israeli military occupation, and have worsened a lot in the last years due to restrictions and punishments imposed by the government of Israel.[3]

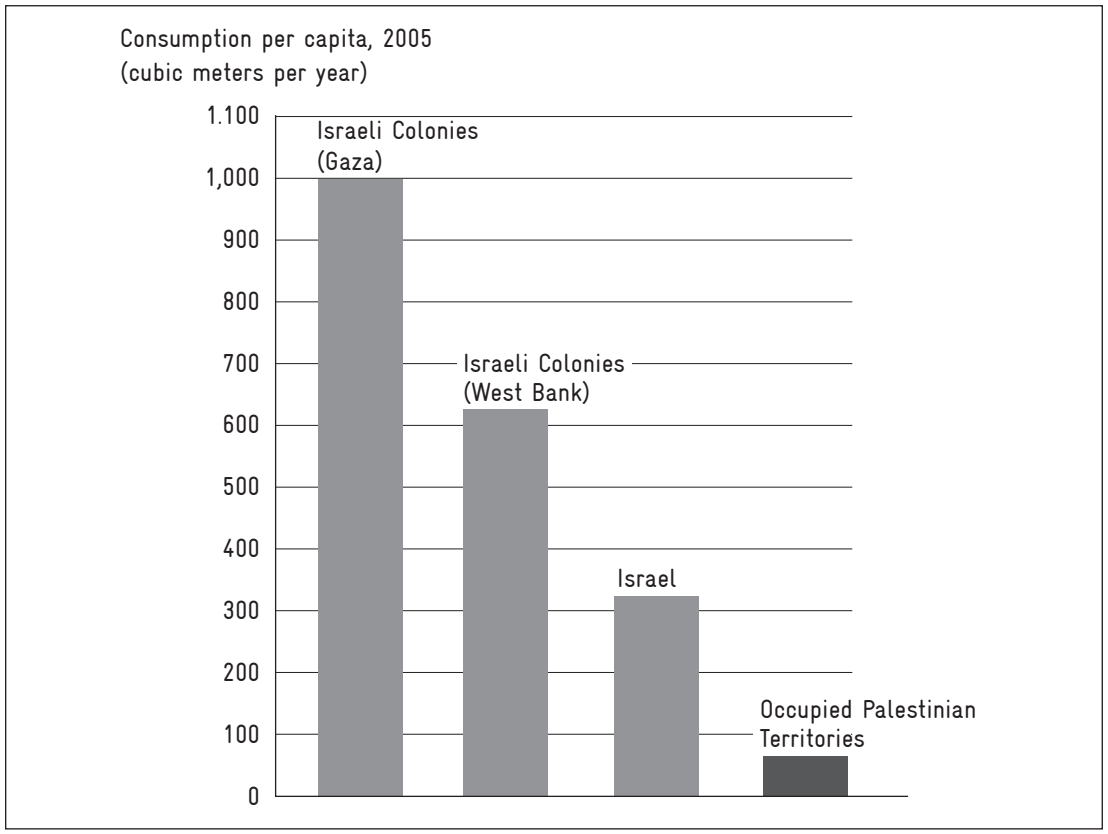
Restrictions on Palestinian consumption affect all sectors related to the cycle of water and have provoked a severe underdevelopment of the Palestinian agriculture and keep urban consumption at levels much lower than the demand. Socio-economic differences between Palestinians and Israelis are due, among many other reasons, to inequality of water resources distribution, particularly with regards to agriculture. At present, Israel is practically watering 100% of ground suitable for irrigation, therefore some authors consider that we cannot talk about water shortage in the Israeli society still. Especially, considering that irrigating water is subsidized and the weight of agriculture in Israel's economy is very low: 2% of the GDP and 2,2% of the workforce in 2000.

The situation for Palestinians is very different. As seen, since 1967, the year of the Israeli military occupation, farmed land in the occupied territories has not only not grown but it has diminished as a result of the Israeli and colonial appropriation of more than 50% of the land, the best for farming. The lack of water to irrigate has been the other big obstacle imposed by Israeli authorities that, from 1967 to 1993 did not allow to drill new wells destined for agriculture, they also did not allow the reparation of those wells near the Jewish settlers' wells, and many times the settlers' overexploitation dried Palestinian wells. Today land and water expropriations continue with the building of the Apartheid Wall, that closed part of the farming lands and left in the hands of Israel or settlers wells that are now being exploited by Palestinians and give more than 4 million cubic meters yearly.

The policy of discrimination is expressed in all areas, from the most general already described, to the daily aggression that most of the people suffer. For example, Israeli soldiers and settlers often destroy water tanks (in a visit to the surroundings of Nablus we saw, for instance, the little village of Yanun's water tanks and the electric generator destroyed by the [tamar] settlers and the result is that in some places, the use of Pales-

3. About the health problems in the Occupied Territories related to water, see, inter alia, BELLISARI, 1994 and the WHO reports <http://www.emro.who.int/palestine/> and the Office for the Coordination of Humanitarian Affairs (OCHA) <http://www.ochaopt.org/>

tinian water has been reduced to catastrophic 20 litres per day –levels of a humanitarian emergency. Crops and animals are dying and farmers are forced to leave the land that is not productive any more. To make matters worse, these Palestinian people often can see the lush grass and even swimming pools in the Israeli colonies, that deviate water for their own use.



3. Restriction of access to water as collective punishment

Cuts on the water supply and destruction of infrastructures related to water resources are regular practices of the occupying power. Despite having signed the joint declaration to ban such practices[4], water shortages continue to be used to punish population collectively.

Humanitarian and human rights defence organizations have repeatedly reported collective punishments against the Palestinian population by Israel, also related to water. For example, Amnesty International's report denounces explicitly such practices: "Destruction of Palestinians' goods during Israeli military operations is better known and documented in connection to houses and orchards, but water installations have also suffered the same treatment. Tens of wells, cisterns to collect rainwater and tankers have been destroyed or damaged by Israeli forces during their military operations, as well as many kilometres of pipelines and other installations and irrigation networks. Water and sewage pipes have been systematically crashed by armour vehi-

4. Israel-Palestinian Joint Water Committee, "Joint Declaration for Keeping the Water Infrastructur out of the Cycle of Violence" (31st January 2001).

cles and tanks, during Israeli military incursions into Palestinian towns and refugee camps in the West Bank and Gaza, and water tanks have often been shot and damaged by the soldiers. Although some of the damages were incidental, much of the destruction caused by the Israeli army is due to deliberate, direct or indiscriminate attacks in breach of international humanitarian law. The already overburdened water infrastructures and installations in the occupied Palestinian territories suffered important damages in recent years. At the same time, Israeli restrictions to movement or persons and goods in the Occupied Territories have hindered or prevented the reparation of damaged water networks and installations, exposing some Palestinian residents to long waterless periods. The widest destruction of water and sanitation supply is the result of Israeli strikes and ground forces incursions in Palestinian towns and villages, often with armed confrontations with Palestinian armed groups." (AI, 2009).

Likewise, the COHRE report denounces the same situation: "The Centre on Housing Rights and Evictions (COHRE) is deeply concerned about the denial of the human right to water and sanitation derived from the present Israeli occupation, the blockade and the international sanctions on the Gaza Strip; the collapse in the supply of water and basic sewage services; the Israeli denial to the entry permits for essential materials necessary to operate and keep water and sewer systems services. Israeli restrictions on the entry of fuel in the Gaza Strip, that had a negative impact on the functioning of basic services; deterioration of Gaza's inhabitants health because of the decreasing quality of water and the prohibition of entry of chemical products to purify water such as chlorine; Israeli military incursions aimed at water and sewer systems infrastructures; disproportioned raising of water and sewer systems prices; the state of collapse of the remaining of water treatment plants that can become a humanitarian and environmental generalised catastrophe; the shortage of water available to personal and domestic needs; the sudden and severe cutting of the financing of public works in the Gaza Strip as a political position of the western states, and the Quartet, including the United Nations, the United States, the European Union and Russia. Due to financial and economic sanctions, the blockade that prevents the entry of spare parts into Gaza and the fuel's restrictions, the water supply has been on and off in certain zones, with some people suffering cuts of up to eighteen hours per day. The increase of poverty levels has also led many families to face difficulties to pay for drinking water and they cannot pay the cost of emptying the septic tanks, which means the overflowing of sewage, which threatens public health." (COHRE, 2008).

Many of these infrastructures and installations have been paid for through European cooperation, some of them more than once since they have been repeatedly destroyed by Israeli attacks. The European governments have never adopted any measure to pressure Israel for these facts that affect them directly and could be considered as war crimes.

As seen in the COHRE report and in the information given by the newspaper *El País*, presently we can add to these practices, that amount to crimes against humanity, the punishment on the population of the Gaza Strip also by the EU and US governments: "The economic blockade imposed by Israel and the international community after Hamas' electoral victory in January 2006, is attaining its maximum harshness these days. No spare parts can enter. Electric energy is scarce. The sewage treatment is about to collapse. And to take out some drinking liquid from the 137 wells is such a feat. Non-governmental organizations and those of the United Nations have been for months warning about the brutal humanitarian cost of the embargo." (MUÑOZ, 2007).

4. Infringement of International Law

As reported by the Israeli organization B'Tselem[5], as in many other issues, Israel does not respect International Law with regards to water resources:

- Article 43 of the 1907 Hague Regulations prohibits an occupying state from changing the legislation in effect prior to occupation. However, the military orders that Israel issued regarding the water resources and the supply of water in the Occupied Territories significantly changed the legal and institutional structure of the water sector. The water resources in the Occupied Territories were integrated into the legal and bureaucratic system of Israel, severely limiting the ability of Palestinians to develop those resources.
- Article 56 of the Hague Regulations limits the right of occupying states to utilize the water sources of an occupied territory. The use is limited to military needs and may not exceed past use. Use of groundwater of the Occupied Territories in the settlements does not meet these criteria and therefore breaches article 56.
- Article 27 of the Fourth Geneva Convention of 1949 prohibits an occupying state from discriminating between residents of an occupied territory. The quantity of water supplied to the settlements is vastly larger than that which is supplied to the Palestinians. Similarly, the regularity of supply is much greater in the settlements. This discrimination is especially blatant during the summer months when the supply to Palestinians in some areas of the West Bank is reduced in order to meet the increased demand for water in the settlements receiving their water from the same pipelines.

On the other hand, at present these discriminatory policies have already acquired the character of an apartheid regime, qualified as a crime against humanity in the Statute of Rome of the International Criminal Court. Beside many other war crimes or crimes against humanity set forth in the Statute and breached by Israeli military and politicians, we can also find some of them affecting the use of water and natural resources. Article 8 of the Statute defines as war crimes: Art 8.2.a.iii) Willfully causing great suffering, or serious injury to body or health; Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; Art. 8.2.b.ii) Intentionally directing attacks against civilian objects, objects that are not military objectives; iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities or war.

5. The liability of European governments

Despite that water resources are one of the highlighted sectors of the policy of European cooperation and aid towards Palestinian territories, the European Union and

5. http://www.btselem.org/english/Water/International_Law.asp

member states governments have very few times exercised pressures on the Israeli governments to protect infrastructures and assures that the population receives the necessary water for their survival and development in terms of food, health and economic development.

The EU and its member states have renounced putting pressure to protect even infrastructures paid for by them, thus becoming not only accomplices, but also victims of the Israeli attacks. As seen, these attacks are part of a policy of occupation, aggression and apartheid on the Palestinian population that can amount to crimes against humanity or war crimes. For this reason, European governments and UE agencies implicated in these attacks should denounce these crimes against humanity and war crimes, as affected parties by these crimes.

However, the EU and member state governments do not only not denounce these crimes, but they do not do anything to make sure that the commission of crimes will not benefit criminals in their relations with the EU. For example, in the last year, the EU signed a new pact with Israel on agriculture trade, improving both sides' access to markets which, according to the EU, is an important step to integrating Israeli and EU markets. In 2008, the EU imported Israeli agriculture goods to the value of 1.000 million Euro. So, European States have been importing disputed water that the Palestinian population should be consuming. This means that Israeli agriculture companies and also European companies are making important profits thanks to Israeli policies of apartheid, discrimination and destruction in the occupied territories, both Palestinian and Syrian in the Golan Heights.

Moreover, although products coming from Israeli colonies in the occupied territories (the West Bank, East Jerusalem and the Golan Heights) cannot benefit from the conditions of the EU-Israel agreements, the European party does not exercise any control to check it, and so commercial and association agreements turn into mechanisms of complicity with the occupation and colonization of Palestinian, Syrian and Lebanese territories by Israel. Agriculture is a very important economic sector in Israeli settlements, particularly in the colonies of the Jordan Valley that represent a 28,5% of the West Bank's total surface. Apart from the colonial problem in the occupied territory, it must be taken into account that such exploitations consume an equivalent to 75% of the yearly water consumption of the West Bank Palestinian population[6]. Many of the products are intended for export, mainly to the European Union. Various sources indicate that crops produced in the Israeli settlements in the occupied territories are routinely mixed with other crops from Israel in the packaging facilities of the major exporting companies[7]. In this way, the EU and European importing states add complicity to the exploitation of water resources in the occupied territories and to the above mentioned crimes, through the complicity with the occupation and colonization of these territories and populations.

We should add to these elements the European rejecting to apply article 2 of the Association Agreement that states that relations between Israel and the EU will be based on the respect of human rights and democratic principles that must govern domestic and international policy.

6. See Note by Secretary General, Economic and social repercussions of the Israeli occuparion on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan, UN Doc. A/61/67 and E/2006/13 (3rd May 2006), 12-13, para. 47

7. See: Jan Willem van Gelder y Hassel Kroes (10 February 2009) "UK economic links with Israeli settlements in occupied Palestinian territory. A research paper prepared for the Sir Joseph Hotung Programme for Law, Human Rights and Peace Building in the Middle East, School of Oriental and African Studies, University of London", Profundo < http://www.soas.ac.uk/lawpeacemideast/file49531.pdf>

6. Recommendations to the EU and member states governments[8]

The EU and member states governments should suspend the Association Agreement with Israel by virtue of article two, which requires respect for human rights.

The EU and member states governments should denounce and prosecute war crimes and criminals as well as crimes against humanity. This is so established under treaties signed by European states. Not doing so means that obligations under those treaties are not being complied with, and also that governments place themselves into the status of accomplices. As seen, reports can be filed even as parties directly or indirectly affected by the crimes committed by some Israeli military and politicians.

The EU and member states governments should prohibit the entrance into the EU of any product coming from Israeli colonies in the occupied territories.

The EU and member states governments should suspend import of any irrigation agriculture production, since the water used comes in good part from occupied territories, be it the West Bank of the Golan Heights.

The EU and member state governments should prohibit, in their territories, any economic activity of companies that benefit from the occupation and colonization of the Palestinian, Syrian and Lebanese occupied territories.

The EU and member states governments should suspend all actions that make economic development and social rights of the population of the Gaza Strip difficult. Presently, their actions have become a direct complicity with the policies of collective punishment practices by Israel.

The EU and member state governments should sanction Israel if it does not lift its blockade on the Gaza Strip.

The EU and member states governments should sanction Israel if it does not cease its policy of restriction of fuel supply to Gaza.

The EU and member states governments should resume immediately aid to water and sewage sectors in Gaza.

In the case of the EU leaders and member states governments continuing their complicity policies with war crimes and criminals as well as crimes against humanity, a possible denunciation also against those European politicians before the adequate tribunals to judge such crimes should be considered.

8. Some of these recommendations follow criteria proposed by the COHRE and other international organizations.

G) GAZA, OPERATION "CAST LEAD" AND THE GOLDSTONE REPORT

1. Introduction

By reporting the devastating humanitarian consequences of attacks against the Gaza Strip by the Israeli army in December 2008, some voices were raised at the international scene to remind of the situation of humanitarian disaster born by the population of Gaza even before those attacks. An extraordinarily weakened population after a two-year blockade or siege not only by Israel but by the international community as well, including the EU.

Precisely in December 2008, some days before the attack, the UN Council on Human Rights urged Israel to withdraw from the Occupied Palestinian Territories which have been occupied since 1967, respect the right of the Palestinian people to self-determination, accept and implement the advisory opinion of the International Court of Justice on the illegality of the wall, dismantle the settlements, cease its military operations in the West Bank and Gaza and cease the destruction of houses in East Jerusalem, inter alia, to comply with its obligations on human rights issues[1] Moreover, Israel was also urged to lift blockades initiated in 2007 in the Gaza Strip after Hamas' electoral victory, an issue that, as all the others referred to the Occupied Palestinian Territories, was not included in any paragraph in the national report submitted by Israel to the Council[2]. Israel, as part of its official doctrine, does not admit discussion about it because it considers that since its disengagement from Gaza in 2005 its has no further obligations as occupying Power as it has no military o civilian presence in that territory, declared as "hostile entity" in 2007.

However, it is amazing to see how in that session of the Council numerous non-governmental organizations submitted information and gave their opinion and, in many cases, their experience on terrain, about the real situation of the Palestinians, as parallel reports to counteract Israel's Government refusal to permit the visit of the Special Rapporteur Mr. Richard Falk to the OPTs,[3]

Thus, Amnesty International said that Israel failed to recognize the applicability of humanitarian international law and human rights law in the OPTs[4]. The BADIL Resource Centre for Palestinian Residency and Refugee Rights, the Anti-Apartheid Wall

1. Human Rights Council – Universal Periodic Review, Third Session Meeting Highlights, 4th December 2008. Available at http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights4December2008pm.aspx. See the report by the Working Group, with its recommendations and the transcription of the session in UN doc. A/HRC/10/76, of 8th January 2009.

2. UN doc.A/HRC/WG.6/3/ISR/1, of 25th September 2008. Available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session3/IL/A_HRC_WG6_3_ISR_1_Israel_E.pdf.

3. See reports by 29 non-governmental organizations one of which composed of a coalition of a civil coalition to defend Palestinian rights in Jerusalem: http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRILStakeholdersInfoS3.aspx.

4. Ídem, Amnesty International, p. 1.

Campaign, the Arab Human Rights Association, the Association for the Defense of the Rights of the Internally Displaced, the Housing and Land Rights Network-Habitat International Coalition and Zochrot in cooperation with Ittijah –Union of Arab Community-based Associations– pointed out, in a joint submission, that in the OPTs Israel applies domestic civil and criminal law to Jewish settlers (nationals), while a repressive military regime is applied to the Palestinian civilian population[5].

The International Commission of Jurists indicated that the Israeli Government has argued that after the withdrawal from Gaza in September 2005, the military government was dissolved by the disengagement decision of the Israeli Government, and therefore, under those circumstances, the State of Israel could no longer be considered an occupying Power and bearing no general obligation to ensure the protection and appropriate living conditions of the civilians living in the Gaza Strip. However, as highlighted by many organizations, the Israeli Government continues to exercise an effective control over the Gaza Strip.[6] The Palestinian Independent Commission for Citizen's Rights of Ramallah, meanwhile, pointed out that the occupying Israeli authorities had closed the Gaza Strip entirely, which lead to a grave humanitarian crisis and, that living conditions were catastrophic during the precise month of December 2008[7] Human Rights Watch, on its part, referred to the consequences of the blockade imposed by Israel on the Gaza Strip, and qualified such blockade as "a collective punishment of the civilian population in violation of international humanitarian law"[8]. The International Committee of the Red Cross, on its part, invoked since the beginning of the blockade, the requirements of dignity for human life, which they argued could absolutely not be attained sealing off more than a million people in a reduced territory and in the middle of a conflict not only between Israel and Hamas, but also among the different Palestinian clans[9]

The idea that the blockade is collective punishment and systematically unlawful and a large scale violation of article 33 of the Geneva Convention is not exclusive to non-governmental organizations. The United Nations Office for Humanitarian Affairs (OCHA), in its most recent report on the situation in Gaza concludes that the present situation is a "protracted human dignity crisis" and a form of collective punishment on the entire Gazan population[10]. The United Nations High Commissioner for Human Rights for UNRWA (United Nations Relief and Works Agency) has repeatedly highlighted before the 2008 December attacks, that the humanitarian crisis in Gaza (already then) deliberately imposed by political actors, was the result of policies that were imposed against the Palestinian population[11].

But the Special Rapporteur on the situation of human rights on PTOs since 1967, Mr. Richard Falk, has gone further in his view of the Gazan blockade. Before the Human Rights Council held in December 2008, set out by the UNRWA representative in that session appealed to the desperate urgency to adopt protective, effective measures

5. Ídem, BADIL Resource Center for Palestinian Residency and Refugee Rights, the Anti-Apartheid Wall Campaign, the Arab Human Rights Association (HRA), the Association for the Defense of the Rights of the Internally Displaced (ADRID), the HIC –Housing and Land Rights Network-Habitat International Coalition– and Zochrot in cooperation with Ittijah –Union of Arab Community-based Associations, p. 3.

6. Ídem, International Commission of Jurists, p. 2. See also reports by Amnesty International, Human Rights Watch and the Palestinian one Independent Commission for Human Rights, on this matter.

7. Ídem, Independent Commission for Human Rights, p. 1.

8. Ídem, Human Rights Watch, p. 1.

9. International Committee of the Red Cross: "Dignity Denied", November 2007. Available at: http://www.icrc.org/web/eng/siteengo.nsf/htmlall/palestine-report-131207/$FILE/0941_002_Dignity_Denied_OT_Palestine.pdf

10. OCHA: "Locked in: The Humanitarian Impact of Two years of Blockade On The Gaza Strip". Available at: http://www.ochaopt.org/documents/Ocha_opt_Gaza_impact_of_two_years_of_blockade_August_2009_english.pdf

11. See The Guardian of 5th December 2008

to face the unacceptable living conditions of the Gazan civilian population. This echoed a surge of information reported by NGOs, not seen at the United Nations since the time of the South-African regime of *Apartheid*. Such measures, said Falk, should protect civilian population from being collectively punished by policies that amount to a crime against humanity[12].

In a later analysis on the Gaza situation during the first days of the Israeli attacks of Operation "Cast Lead", the Special Rapporteur denounced the collective punishment to which an entire civilian population was submitted, the civilian targets and the disproportionate military response of the attacks as grave and massive violations of international humanitarian law. Falk stated: "Certainly the rocket attacks against civilian targets in Israel are unlawful. But that illegality does not give rise to any Israeli right, neither as the Occupying Power nor as a sovereign state, to violate international humanitarian law and commit war crimes or crimes against humanity"[13]

2. The Blockade In The Gaza Strip As A Collective Punishment: Key Facts, Blockade Methods And Legal Consequences

Harassment, by civil and military authorities against the Palestinian population (civilians and combatants or alleged combatants) have numerous punitive forms that can respond to various reasons or aims (security, occupation, colonialism, annexation, ethnic cleansing, apartheid, etc.); these are not the core elements of this article. We will only refer to the facts that, in our understanding, could constitute crimes against humanity committed against the Gazan population. We will not tackle the practices and policies implemented in the West Bank either, because we understand that Gaza's disengagement in 2005 and its particular border and passages closure after its declaration as "hostile entity" in 2007 turns this territory, unlike the West Bank[14], into an immense detention camp or illegal confinement of 1,5 million people submitted to arbitrary decisions that gravely and collectively affect not only their health, their freedom or their life, but generally, the most elementary human dignity conditions.

12. "Protective action must be taken immediately to offset the persisting and wide-ranging violations of the fundamental human right to life, and in view of the emergency situation that is producing a humanitarian catastrophe that is unfolding day by day. However difficult politically, it is time to act. At the very least, an urgent effort should be made at the United Nations to implement the agreed norm of a 'responsibility to protect' a civilian population being collectively punished by policies that amount to a Crime Against Humanity" See: "Gaza: Silence is not an option", Statement, 9th December 2008. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/183ED1610B2BCB80C125751A002B06B2?opendocument

13. See his statement of 27th December 2008. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/F1EC67EF7A498A30C125752D005D17F7?opendocument

14. The problematic construction of the West Bank Barrier deserves a specific research from the human rights and criminal internacional law situation. Moreover, the ICJ advisory opinion of 2004 declaring its unlawfulness, as well as periodic reports by OCHA and UNRWA analyse the consequences of the route on the enjoyment of the Palestinian population human rights, to the detriment of life that non-Arab Israelians enjoy. See report of July 2008 by UNRWA at: http://www.un.org/unrwa/access/BarrierReport_July2008.pdf

2.1. THE GAZA STRIP BLOCKADE: DATES AND KEY FACTS

Briefly, it is necessary to settle what has happened in the last four years in Gaza with respect to its entire isolation from the rest of the Palestinian population and the international community, receiving a majority of support from the Israel and US policy, even by the UN[15].

In the history of the Near East, 2005 will be remembered for Israel's unilateral withdrawal from the Gaza Strip, but according to International Law, this withdrawal (literally, disengagement) in fact put an entire territory into a legal limbo as it is nor under the sovereignty of any state, neither considered as an occupied territory by a state bearing obligations towards its population.

This unilateral Israeli withdrawal, in August 2005, responded to the purpose of leading "to a better security, political, economic and demographic situation", without specifying if for the Palestinian or the Israeli population[16]. The two main elements of the plan were dismantling Israeli settlements in Gaza and relocating settlers to Israeli territory, and withdrawing all Israeli military and security forces operating in the area according to the Oslo Agreements. The Plan was submitted on the 18th April, 2004 to the Israeli Parliament supported by the US Government, without entering into negotiations with any Palestinian authority.[17] Nonetheless, some instruments regulating relationships between Israel and the PNA were adopted. The most important and clear in this respect is the Declaration of Principles on Interim Self-Government Arrangements (Oslo Agreements I, 1993), clearly establishing that the West Bank and Gaza are "a single territorial unit."[18]

Despite this, the Israeli withdrawal, carried out obviously after a 38-year occupation, led in practice to the division of the Palestinian territory in two, as well as to the territory's submission to legally different regimes. According to Israel's intention, as expressly stated in the Disengagement Plan as well as in official public statements, its withdrawal means, that from the very moment to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip.[19], Because, since the disengagement, there will be no permanent presence of Israeli security forces[20], that is, Israel will not exercise any effective control as occupying Power according to the Fourth Geneva Convention.

However, Israel will keep and control Gaza Strip's external perimeter, will continue to have exclusive authority over Gaza's air space and to control security in the Strip's coast, pleading that such territory be demilitarized and remain free of weapons running contrary to Israeli-Palestinian Agreements. Furthermore, Israel keeps the right to self-defence both preventive and reactive, including the use of force when necessary, with regard to menaces coming from the Gaza Strip.

According to the Plan of disengagement, infrastructures regarding water, electricity, sewage and telecommunications will be kept and Israel grants to continue to pro-

15. See, in extenso, chronology on the armed conflict since the withdrawal from Gaza, published by CIDOB at: http://www.cidob.org/es/programas/mediterraneo_y_oriente_medio/dossiers/cronologia_israel_palestina.

16. See revised vesion at: http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm

17. Expecting, according to point four of the Plan, that "a new Palestinian leadership will emerge and prove itself capable of fulfilling its commitments under the Roadmap". See point four of the Plan.

18. According to article IV: "Jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations. The two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved dirung the interim period". See the Agreement annexed in CASSESE, A.: "The Israel-PLO Agreement and Self-Determination", European Journal of International Law, n. 4, 1993, pp. 564-571.

19. See point six of the Plan.

20. Point 2.A.3.1.2 of the Plan

vide electricity, water, gas and oil to Palestinians according to the agreements in force. Also with regards to economic matters: agreements related to food exchange between Gaza, the West Bank and Israel and abroad, currency system, tax and customs, post and communications and workers entry in Israel.

While the Plan of disengagement was announced and its implementation began, in January 2005 the election of Mahboud Abbas as Palestinian President allowed the PNA to break its isolation and, following his meeting with the Israeli Prime Minister in Sharm-el-Sheik, to declare the end of hostilities and restart peace negotiations between Israel and the PNA. This boost in negotiations led to the release of about 900 Palestinian prisoners in February and June and to the transfer of security of some villages in the West Bank to the PNA. However, in 2006 elections took place in the PTOs, Hamas achieved the absolute majority in the Palestinian Legislative Council elections and it formed a government in March. When refusing to renounce violence, to recognize the state of Israel and to respect the agreements already signed by the PNA and Israel –three prerequisites imposed by the Quartet to recognize the Government of Hamas[21]-, the new PNA faced diplomatic isolation, cessation of international aid and a freeze of transfer of taxes and customs duties by Israel. This led to a severe financial and humanitarian crisis in the Palestinian territories, though in May the Quartet created a "temporary international mechanism". In the beginning of April 2006, as a response to the launching of rockets against Israeli villages, the biggest military operation was undertaken against the Gaza Strip since the Jewish settlers withdrawal in 2005. At the end of May, Israeli troops penetrated into the Gaza Strip.

On the 25th of June, Israel intensified its military offensive after the capture and retention of an Israeli soldier by Palestinian groups (that it is still lasting). As a response, in June Israel launched the "Summer Rains Operation" and dozens of Hamas' Palestinian representatives, among which 9 were ministers, and the President of the Palestinian Legislative Council. However, on the 26th November a ceasefire between Israel and Palestinian militants entered into force, and the Israeli Armed Forces withdrew from the Gaza Strip.

During 2007, in the occupied territories interpalestinian violences between Fatah and Hamas followers continued, and thus the Government of the National Union created in March never really worked. European and US Governments declared that they would meet members of the new cabinet non-affiliate to Hamas whereas Israel refused, straight away, to have any dialogue with the new Government of the Union. At mid June, wars between the two rival groups led to Hamas taking control of the Gaza Strip that, politically, separating the PTOs into two blocks, and left the West Band under Fatah's control.

As a response, President Mahmoud Abbas removed the National Union Government from office, set up an emergency cabinet and outlawed Hamas' executive forces and its militias. The EU and US recognized the emergency Government immediately and announced the end of the economic and political embargo against the PNA in June. In July, a new Palestinian Government was established in the West Bank, supported by the Western world and, at the same time, the isolation of Hamas was formalized in Gaza and, at once, that of the entire population residing in that territory.

In 2007 the launching of rockets between both parts was intensified and in September, Israel declared the Gaza Stip as "hostile territory", adopting officially a policy

21. See the Roadmap approved by the UN Security Council in Resolution S/2003/529, of 7th May, containing conditions imposed to both Israelians and Palestinians.

aimed to limit the traffic of goods towards that territory, as well as fuel and electricity supply, with the aim to strangle the Government of Hamas. Reports mentioned above, issued by NGOs and UN agencies prove that Israeli measures aggravated the humanitarian crisis, which affected inhabitants in the Gaza Strip since Hamas' legislative elections victory in January 2006.

It is well known that in 2008 neither suicidal attacks in Israel, rocket launching from the Strip, neither Israeli incursions into Gaza ceased. Tensions between Israel and the Palestinian territories reached a crucial point at the end of the year; on the 27th of December, Israeli fighters bombed the cities of Gaza, Khan Younis and Rafah, in the Gaza Strip. On the 18th of January, the Israeli Government declared a unilateral ceasefire to which Hamas responded positively. Israel withdrew its troops from Gaza, but the blockade continues. Up to now, OCHA has identified 1.383 Palestinians deaths.[22]

That situation, which already qualified as humanitarian catastrophe, has worsened by the consequences not only of human and material losses but also of those derived from an ongoing blockade that prevents the Gaza population from rebuilding their houses, buildings and civil facilities destroyed after the recent strikes.

According to the proposal made by the Special Rapporteur to qualify Israeli actions as a crime against humanity, there are three kinds of sanctions imposed on the Gaza population that, according to us, could be considered as elements of a crime against humanity perpetrated systematically, massively and with a clear knowledge of its consequences. We use the term "sanctions" consciously because it reflects on the intrinsic punitive character of such measures, as they were so qualified by Israeli authorities when they were adopted in 2007[23] .

2.2. ECONOMIC SANCTIONS

Economic sanctions linked to the blockade are, basically:

1. The closing of the Karni crossing (north-east of the Strip), that is the biggest and best equipped border between Israel and the Strip.
2. Radical restrictions on the import of industrial, agricultural and construction materials.
3. Suspension of most of exports.
4. Reduction on the amount of oil, industrial fuel and domestic gas permitted to enter.
5. A general prohibition to movement of Palestinians through Eretz, the only crossing for people to the West Bank, except for a limited number of "humanitarian cases".

22. See OCHA: "Locked in: The Humanitarian Impact of Two years of Blockade On The Gaza Strip", op. cit. p. 12

23. Statement by the Israeli Prime Minister's Cabinet on the 19th September 2007: "In today's unanimous decision, it was determined: Hamas is a terrorist organization that has taken control of the Gaza Strip and turned it into hostile territory. This organization engages in hostile activity against the State of Israel and its citizens and bears responsibiliy for this activity. In light of the foregoing, it has been decided to adopt the recommendations that have been presented by the security establishment, including the continuation of military and counter-terrorist operations against the terrorist organizations. Additional sanctions will be placed on the Hamas regime in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity. Restrictions will also be placed on the movement of people to and from the Gaza Strip. The sanctions will be enacted following a legal examination, while taking into account both the humanitarian aspects relevant to the Gaza Strip and the intention to avoid a humanitarian crisis." See the statement in http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm

6 The closing of the Rafah crossing, controlled directly by Egypt, except for sporadic and punctual openings-

7 A significant reduction of fishing and crop areas available to Palestinians.

We only note some data taken from OCHA's most recent report on the consequences of a three-year blockade: over 40% of workforce is unemployed, more than 75% of the population (more than 1.1 million people) is food insecure due to the increase in poverty, the destruction of agricultural assets and the inflation in prices of key food items; the ban on the import of building materials does make impossible the reconstruction of the more than 6.000 homes destroyed before and during the 2008 attack, more than 20.000 displaced people that cannot go back to their houses and live in rented apartments, houses of relatives or tents next to their houses; the reduction in the amount of fuel supplied by Israeli authorities has forced the sole power plant that existed to reduce its level of production in a 20%, which has led to electricity supply cuts in homes and public institutions, including sanitary ones, that have needed to resort to their own backup generators. This critical situation derives not only from the increasingly restrictive energy supply by Israel, but also especially from the destruction of the most important Gaza power plant on the 28th June 2006, a plant that could until then produce half the energy that the Gazan population needs.

More than 10.000 people in Northern Gaza have no access to drinking water. There are no means to treat the sewage and every day 80 million litters of untreated waste water are being discharged into the sea, with the resulting contamination of aquifers in the territory of Gaza.

With regards to health matters, continuous restrictions of movement are imposed, including to ill and wounded people. The strikes affected dramatically working conditions for medical personnel. According to OCHA, since January 2008, 40% of the applications for permits to leave Gaza for medical reasons were rejected, compared to 10% in 2006.

It is necessary to link progressive cuts and restrictions of energy, fuel, permits to leave Gaza and all aspects of daily life in the Strip, to the worsening of the armed conflict and the reprisals taken by Israel and from the Palestinian side. In general reprisals/sanctions launched against civilians on both sides of the borders of the Strip. Thus, it was not by chance that the blowing up of the power plant took place two days after soldier Shalit's capture[24], on the 26th of June, 2006. Since the end of June the Rafah crossing was closed too. Launchings of rockets from the Strip are often followed by more restrictions on the Israeli side against a territory that is closed by land, sea and air, and military controlled "from the distance" since the Israeli military withdrawal.

Israel is not free from its international obligations towards Gaza's civilian population precisely due to this control, despite its claim that the unilateral withdrawal is equivalent to extinction of its liability. This is clearly pointed out by the Special Rapporteur Mr. John Dugard in his last report of January 2008[25]:

24. See report by B'Tselem of September 2006: "Act of Vengeance: Israel's Bombing of the Gaza Power Plant and its Effects", that considers that a measure affecting thousands of civilians keeps no proportionality to a soldier's kidnapping. See document at http://www.btselem.org/english/Publications/Summaries/200609_Act_of_Vengeance.asp

25. UN doc. A/HRC/7/17. "Human Rights situation in Palestine and other occupied Arab territories. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard", of 21st January 2008, p. 8.

"10. On 19 September 2007 Israel seemed to give a new status to Gaza when its Security Cabinet declared Gaza to be "hostile territory" – a characterization that was shortly afterwards approved by the United States Secretary of State. Although the legal implications that Israel intends to attach to this "status" remain unclear, the political purpose of this declaration was immediately made known – namely the reduction of the supply of fuel and electricity to Gaza.

"11. The test for determining whether a territory is occupied under international law is effective control[26], and not the permanent physical presence of the occupying Power's military forces in the territory in question. Judged by this test it is clear that Israel remains the occupying Power as technological developments have made it possible for Israel to assert control over the people of Gaza without a permanent military presence".

The following factors named in this report imply an effective control by Israel and fit with the position of international organizations (UN High Commissioner for Human Rights, Secretary General, General Assembly and Security Council)[27] and NGOs on the continuous effective control of Israel despite its unilateral withdrawal:

1. Substantial control of Gaza's six land crossings: the Erez crossing is closed to Palestinians wishing to cross to Israel or the West Bank. The Rafah crossing between Egypt and Gaza, which is regulated by the Agreement on Movement and Access entered into between Israel and the PNA on 15th November 2005 (brokered by the United States, the EU and the international community's envoy for the Israeli disengagement from Gaza), has been closed by Israel for lengthy periods since June 2006. The main crossing for goods at Karni is strictly controlled by Israel and since June 2006 this crossing too has been largely closed, with disastrous consequences for the Palestinian economy.
2. Control through military incursions, rocket attacks and sonic bombs: sections of Gaza have been declared "no-go" zones in which residents will be shot if they enter.
3. Complete control of Gaza's airspace and territorial waters.
4. Control of the Palestinian Population Registry, the definition of who is "Palestinian" and who is a resident of Gaza and the West Bank is controlled by the Israeli military. Even when the Rafah crossing is open, only holders of Palestinian identity cards can enter Gaza through the crossing; therefore control over the Palestinian Population Registry is also control over who may enter and leava Gaza. Since 2000, with few exceptions, Israel has not permitted additions to the Palestinian Population Registry.

The fact that Gaza continues to be an occupied territory means that Israel's actions towards it must be evaluated in the light of Humanitarian International Law[28]

26. See also Democratic Republic of Congo v. Uganda, International Court of Justice, 2005, paras. 173 and 174.

27. See arguments given by the UN High Commissioner doc. A/HRC/8/17, of 6th June 2008; General Assembly Resolutions 63/96 and 63/98 and Security Council Resolution 1860 (2009), "Recalling all of its relevant resolutions, including resolutions 242 (1967), 338 (1973), 1397 (2002), 1515 (2003) AND 1850 (2008); Stressing that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state."

28. We cannot expand further on rights and duties of Occupation. Specifically, in the present debate regarding Israel's occupation, see doctrine perspectives in Académie de Droit International, http://www.adh-geneva.ch/RULAC/applicable_international_law.php?id_state=113.

This is not, however, Israel's Government position, often repeated, that belligerent occupation of the Gaza Strip by Israeli Defence Forces ended as of 12th September 2005, including all political, legal and security ramifications. Israel explicitly draws the main conclusion that, since that date, full governing powers were transferred to the PNA. Nevertheless, the factual siege that imposes great difficulty to Gaza's inhabitants with, additionally, the international participation, has prevented Palestinian administrative authorities from giving a minimum standard of welfare to Gaza's 1,5 million residents[29].

The Government of Israel bases its position upon Israeli Supreme Court in *Al-Bassiouni v. the Prime Minister*[30], according to which the Government does not have a general duty to take care of the welfare of the Strip's residents.

This case is fundamental in Gaza's humanitarian crisis, since it tackles the lawfulness of electricity and fuel cuts to Gaza, in a complaint made by individuals and NGOs both from Israel and Palestine[31] in October 2007. These NGOs claimed that the decision to adopt sanctions against Gaza caused harmful humanitarian consequences and they urged to declare such Israeli governmental policy unlawful. Petitioners argued that it was physically impossible to reduce Gaza's electricity and fuel without causing continuous power cuts in hospitals and water-treatment plants reducing the to supply civilian population and causing severe interruptions in basic services. Implementation of sanctions was to cause, according to the petitioners, certain, grave and irreversible harms to vital humanitarian systems in the Gaza Strip, to hospitals, to water supply and treatment systems and to Gaza's entire population.

On the governmental side, they defended, obviously, their decision's lawfulness based not only upon their duty to protect Israeli civilian population from indiscriminate attacks launched from the Gaza Strip, but also upon controlled proportionality of the measures they were applying and, on the other hand, upon their lack of liability towards the Palestinian population since Israeli civil and military authorities withdrawal in 2005 and Gaza's disengagement.

With regards to the proportionality argument (also invoked during Israel strikes in December 2008 and the selective assassinations), the state recognized the bound duty to not eliminate the supply of basic vital resources in the Gaza Strip and explained that when applying the sanctions, they would control and ensure that restrictions imposed did not reach such a degree that inflicted damage to basic human resources.

The Supreme Court did not examine thoroughly whether it was possible or not to reduce vital supplies without severely affecting the population's basic needs; it went on to determine Israel's liabilities over Gaza and its population: depending on this, duties derived from International Law and the Law of War should be complied with the armed conflict between the State of Israel and Hamas, preventing harms to civilians that are not in a combat zone during hostilities or rather duties derived from the position of Occupying Power that, for the purpose of the Court's decision, mean to take care of the welfare.

Thus, for instance, in this case, article 55 of the IV Geneva Convention would be applicable:

29. UN doc. A/63/326 of 25th August 2008, par. 5.

30. Israeli Supreme Court: HCJ 9132/07 Gaber Al-Bassiouni v. Prime Minister. See the decision at http://www.mfa.gov.il/NR/rdonlyres/938CCD2E-89C7-4E77-B071-56772DFF79CC/0/HCJGazaelectricity.pdf.

31. Ten human rights and health NGOs, inter alia: HaMoked, Physicians for Human Rights, the Palestinian Center for Human Rights, B'Tselem (The Israeli Informations Center for Human Rights in the Occupied Territories), The Public Committee Against Torture in Israel, and the Gaza Center for Mental Health.

"To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."

The Court agrees partially with the Government when it comes to the conclusion that[32] under the international law of occupation, the State of Israel is no longer an Occupying Power and has no general obligation to care for the welfare of the residents of the Strip or to maintain public order within the Gaza Strip. Nevertheless, Israel has some primary obligations regarding residents of the Gaza Strip, derived from:

1 The warfare situation between Israel and Hamas.
2 The degree of control that the State of Israel has at the border crossings between it and the Gaza Strip; and
3 The situation created between the State of Israel and the territory of the Gaza Strip after years of Israeli military control in the area, following which the Gaza Strip is now almost totally dependent on Israel for its electricity supply.

The core of the discussion between the claimant NGOs and the Government of Israel before the Supreme Court was focussed on whether Israel has or not the obligation to *allow the passage* of basic essential items, as admitted by the Government, or rather the obligation to supply goods that are not basic or essential or those necessary to meet humanitarian needs.

Israeli military authorities explained to the Court their calculations about how to reduce fuel and electricity supply without doing any harm to the civilian population's basic needs from a humanitarian perspective. This explanation convinced the Court about the fact that the reduction imposed to that moment (January 2008) did not breach the State of Israel's humanitarian duties in the context of warfare between itself and Hamas, that controls the Gaza Strip territory.

The Court's judgement follows this course and is favourable to the Government of Israel in these terms, which are, according to us, debatable[33]

"Indeed, during a period of warfare, as is the case before us, the civilian population finds itself, to its disadvantage, in territory in which the warfare is being waged, and it is the first and principal victim of the fighting, even when efforts are made to minimize the injury to civilian population. In the territory of the State of Israel as well, in an era of terrorist attacks that have continued for years, the immediate and principal victim of the warfare is the civilian population. However, in the case of the actions against Israel, the damage is not of an accidental or incidental nature, but rather is the result of deliberate and frequent attacks against the civilian population that are aimed at harming innocent civilians. This is the difference between the State of Israel, a democracy fighting for its life within the confines of the law, and the terrorist organizations that rise up against the State of Israel. "The State is fighting for the sake of the law and for the sake of safeguarding the law. The terrorists are fighting against the law while breaching it. The war against terrorism is also a war of the law against those who rise up against it" (...) In our case, the facts presented to us, delineated above, indicate that the State of Israel accepts and re-

32. See HCJ 9132/07 Gaber Al-Bassiouni v. Prime Minister, op. cit., par. 12
33. Ídem, par. 21.

spects the rules set forth in the laws of warfare, and undertakes to continue to transfer to the Gaza Strip the amount of fuel and electricity needed to meet the vital humanitarian needs of the civilian population in the Strip."

The Court does not take into account, in our opinion, that Palestinians in Gaza not only find themselves, "to their disadvantage", in a war zone all the time due to the reduced territory of 360 km2 in which they are confined by a unilateral decision of Israel; also they cannot go out from it to seek shelter in a safe place. The key of the Israeli reasoning that links blockade to crimes against humanity is found, however, in the expression "innocent civilians" that uses the Court, an expression of little innocent, in our opinion: why does the Court not qualify Palestinian civilians as "innocent civilians" and it does so referring to Israeli civilians?

Israeli authorities state that restrictions imposed to items that get in Gaza are a response to Palestinian attacks, particularly to indiscriminate launching of rudimentary rockets fired from Gaza against the nearby Israeli city of Sderot and surrounding villages. Nevertheless, the Israeli blockade is not directed against Palestinian armed groups responsible for those attacks, but it collectively punishes the entire Gaza's population: the entire population is considered guilty of the existence and support of Hamas in Gaza, it does not treat them as innocent civilians, even though they do not take part now or in the past in the hostilities, nor do they launch rockets against Israeli civilians. There is a collective liability for each Israeli civilian or soldier's death, and the punishment can only be collective: that's why there are indiscriminate economic sanctions against the civilian population as well as the other sanctions that, collectively applied, are inhuman acts against Gaza's population.

In short, the existence of a series of practices and policies against the Gaza Strip has already led to an unprecedent humanitarian crisis that could be summarized through three key issues: firstly, the deterioration of the population's living conditions, caused by the lack of life means and the gradual deterioration of infrastructures as well as of basic services' quality in health, water and education areas, as a result of economic sanctions imposed. Despite Israel's opinion that its application is controlled and respectful of humanitarian limits, in our understanding, they are discretionary, arbitrary and submitted to the development of an armed conflict derived from its illegal occupation of Palestinian territories.

Secondly, the blockade is carried out in the middle of constant cycles of violence derived from the Israel/Palestine conflict and the government of Hamas in Gaza, which aggravate the population's situation of dependence and uncertainty.

A third element of this crisis is the denial of Palestinians their right to leave Gaza or to free movement to the West Bank, particularly when this affects their lives, their physical integrity or their basic freedoms. Such a denial of rights had a devastating impact during the military operation: three weeks of Israeli offensive caused massive destruction of houses, infrastructures and productive goods. Continuous restrictions to movement of people and goods from and to Gaza through border crossings has limited the capacity of all actors to try to recover emerging needs as a result of the recent military offensive.

Between May and August 2009, Israel allowed entry into Gaza of a small number of trucks with goods that were not allowed to pass before, including construction materials, water, educational and health materials. However, according to OCHA, the impact of these first steps since the December-January offensive, compared to the present degree of needs in Gaza, is imperceptible.

2.3. ADMINISTRATIVE SANCTIONS: RESTRICTIONS TO FREEDOM OF MOVEMENT, DENIAL OF THE STATUS OF "PALESTINIAN" AND SEPARATION *DE FACTO* OF THE GAZA AND THE WEST BANK POPULATIONS

In spite of Israel's withdrawal of the Strip in 2005 and its claim that it bears no duties towards Gaza's civilian population as Occupying Power, one of the key elements of its effective control over the Strip and, in particular, over the Palestinian population in this territory is the power it keeps regarding the civil registry that allows it to control who gets in and out of the Strip. Although formally, the power to administrate the population's registry was transferred to the PNA under the II Oslo Agreements, in practice, Israel continues to exercise those powers because any change in the registry needs permission from Israel, it does not accept not allowed changes made by the PNA. In fact, since the beginning of the second Intifada this power kept by Israel has meant that it is Israel who determines who is a "Palestinian resident" both in Gaza and in the West Bank and this causes serious problems after the new system imposed from November 2007 after the Gaza's disengagement and its qualification as "hostile territory".

The first problem, already pointed out, is the division of a territorial entity that, under the 1993 Declaration of Principles should be sole, which will undoubtedly affect the conditions to create a sole Palestinian state, which would have nothing to do with the 1967 borders.

The second problem, related to the first one, is seemingly more subtle but has overwhelming effects. Since November 2007, Israeli authorities have requested to the Strip residents present in the West Bank a specific permit issued by the military authority, valid only for three months and conditioned to the applicant's previous and continuous presence in the West Bank during eight years[34]. This impacts two situations: that of mixed marriages where one of the spouses is resident in Gaza and the other in the West Bank, and that of Gazans living or residing in the West Bank.

Let us be briefly reminded that, after the 1967 occupation, Israel declared the West Bank and Gaza as "closed areas" where any movement to get in and out required a permit issued by the military authority. In October 1967 Israel made a census of the PTOs' population, recognizing the status of "permanent resident" to those over 16. Those who were not in the PTOs when the census was made did not get that status and had to leave the territories. Those who were residents could lose their status if they stayed outside the territories for more than six consecutive years. The revocation of the right to reside in the PTOs to hundreds of Palestinians divided families and created very complex situations in mixed marriages composed by West Bank and Gaza's residents, often members of the same family, separated after the Occupation. However, despite the border crossings, military permits and distance, the Palestinian marriages and family traditions went on.

Few days after the start of the Second Intifada, in September 2000, Israel established a new policy on family reunification in the PTOs[35] Under a new regulation,

34. See about this new norms the disturbing and complete report made by B'Tselem and HaMoked: "Separated Entities, Israel Divides Palestinian Population of West Bank and Gaza Strip. Position paper". Available at: http://www.hamoked.org.il/items/unlegal_pp_eng.pdf

35. Apart from it but directly related to the restrictions imposed to Palestinian marriages, it bears special atention the Israeli Citizenship and Entry into Israel Law (the Family Reunification Act), of 27th July 2003 (revised in 2005) that prohibits family reunification in cases of Israelian males married to Palestinian women under 25 years of

processes to apply for family reunification were frozen, and permits were granted in very few cases. The state's official position is that family reunification is not an individual acquired right to be exercised whenever, but that approval of a family reunification application is an Israeli authorities' discretionary act.

Apart from this policy, contrary to the right to family life, that split indefinitely and arbitrarily Palestinian families, the new regime's grant to permits to stay in the West Bank creates even more implausible situations, as a consequence of such regime in the Palestinians status as a people or nation. As pointed out above, Resident Palestinians in Gaza need a special and temporary permit to stay in the West Bank. Those do not have such permit are detained, expelled to Gaza and defined as "illegal aliens".

This situation happens easily due to the paralysis in the Palestinian census' updating on the Israeli authorities' part; even if Palestinian authorities process a copy with the modifications in the civil registry, Israel does not update residency changes from Gaza to the West Bank. The application for a new permit to stay in the West Bank for Gaza's residents based on the address that appears in the civil registry, and is not updated in the Israeli database, thus it is practically impossible that a Gazan resident gets the necessary permit to reside "legally" (under the Israeli legislation) in the West Bank, and he/she is exposed to be detained in any checkpoint and be expelled to Gaza with no possibility of returning, despite the fact of having a job and family in the West Bank.

Israeli NGOs that give legal assistance to affected, declare that this new reality makes life unbearable for Gaza's Palestinians, that are treated as foreigners or "illegal" in their own territory, splitted by Israel in order to isolate Hamas in Gaza. It is, besides a continuous harassment, a blatant violation of article 49 of the IV Geneva Convention that prohibits, regardless of the reason, mass or individual forcible transfers.

Implausible consequences of the new Israeli policy regarding stay and family reunification for Gaza's Palestinians exceed any known practice of harassment to civilian population. Apart from the fact that the stay permit in the West Bank is required to Gaza's Palestinians but not to Israeli settlers that reside in the PTOs' illegal occupation, the siege is tightened even more to Gazans when they seek to leave Gaza for reasonable motives, and the Israeli Supreme Court legalizes this policy since 2007 in

age and those of Israelian women married to Palestinian males under 35 years of age. Such law, denounced by Amnesty International and the UN Committee Against Racial Discrimination, explicitly discriminates against Palestinians and, implicitly also Israeli Palestinian citizens, that amount to 20% of the country's population and Palestinians Jerosolimitans that are almost exclusively those who marry PTOs' Palestinians. According to Amnesty International's report on this reform, "the Law has some exceptions based on age and gender, and only favour a little percentage of Palestinian-Israeli couples that apply for family reunification, since most of them get married at ages earlier than the established by the law. Moreover, even in these cases, although the spouse meet age criteria, the application can be rejected should Israeli authorities determine that this person or a relative constitute "a risk for security". Until now, a big number of applications have been rejected for this reason, though no explanation or the possibility of appealing the rejection has been given to the applicants. The new law will continue to affect thousands of couples, who will be denied their right to enjoy a normal family life, obliging many Israeli citizens to live separated from their Palestinian spouses or to leave the country in order to reunite them. Israeli authorities have tried to justify the new law's discriminatory norms on security reasons, particularly the need to prevent Palestinians considered a menace to security from settling in Israel. However, in practice they could already deny the entry into the country to Palestinians by virtue of the existing legislation. Recent statements made by Prime Minister, Ariel Sharon, and other ministers and authorities, suggest that, in fact, the new law could respond basically to demographic reasons. In a meeting hold the 4th April 2005 to talk about this law, Prime Minister Sharon said: "There is no need to hide behind security arguments. It is necessary fot the existence of a Jewish State", and the Minister of Economy, Netanyahy pointed out: "Instead of making things easy to Palestinians that want to get the citizenship, we must make the process much more difficult and, thus, guarantee Israel's security and a Jewish majority in Israel (according to information published in the Israeli newspaper Ha'aretz that the Government has not denied). See also a statement on this law made by the Prime Minister Office on the 15th May 2005, which said that Prime Minister Sharon had stated that the Jewish nature had to be preserved in Jerusalem and that it was all about Israel's existence: http://www.pmo.gov.il/PMOEng/Government/Government+Secretary/Press/govmes150505.htm". See AI Report: MDE 15/042/2005, "Israel and the Occupied Territories: Amnesty International condemns the discriminatory legislation passed by the Israeli Parliament", 2005 Available at http://www.amnesty.org/es/library/info/MDE15/063/2004.

most of its judgements. As an example, the Court approved in 2007 the state action to a bride resident in Gaza to deposit 20.000 Dirham as a guarantee that she would go back to the Strip after getting married in the West Bank[36].

In 2008, the Supreme Court also accepted a condition imposed on a Palestinian woman to let her go to the West Bank to receive medical treatment without her four children, who had to stay alone in Gaza as a measure to put pressure on the mother to go back after the treatment[37]. In another occasion, a Gazan Palestinian woman was denied her application to visit her three adult sons living in the West Bank after years without seeing them and the Supreme Court literally stated that "Palestinians do not have a vested right to enter Israel for any purpose whatsover, including transit to the Judea and Samaria Area"[38].

Finally, apart from these policies that affect Gazans' permanence in the West Bank, marriages, family life with no interferences, family reunification, restrictions to freedom of movement in the Gaza Strip checkpoints must be highlighted. Severe restrictions imposed by Israel to the freedom of movement of Palestinians in the PTOs have had devastating effects in the life of most of Palestinians. Closures, roadblocks, military checkpoints, curfews and a surge of more restrictions often prevent the Palestinian population in the West Bank and Gaza from going out of their homes or immediately adjacent areas and have led, or contributed, to the practically total collapse of the Palestinian economy. Effects on their right to work, to an adequate standard of living, to education and to health are devastating, and much more extensive, though less documented, than other human rights violations, such as homicides, detentions and destruction of houses and goods.

In this context, the *Bertini Report*, made in 2007 by the personal humanitarian envoy of the UN Secretary General, described how Palestinians are subject to a variety of closures, curfews, roadblocks and restrictions that have caused a near-collapse of the Palestinian economy, rising unemployment, increased poverty, reduced commercial activities, limited access to essential services (such as water, medical care, education, emergency services) and rising dependency on humanitarian assistance. The restrictions affect almost all activities, rendering most Palestinians unable to carry out any semblance of a normal life and subject them to daily hardships, deprivations and affronts to human dignity[39].

2.4. CRIMINAL "SANCTIONS". SELECTIVE ASSASSINATIONS AND BOMBINGS AS A COLLECTIVE PUNISHMENT

Finally, we reach the common tackled issue in this study on the *Shehadeh* case before the National Audience of Spain: ordered selective assassinations, planned and executed by Israeli authorities since 2000 up to now. Such assassinations have been treated as extrajudicial executions in the language used in the International Human Rights Law, but what makes the Israeli case unique is that there is an established policy of

36. See HCJ 3592/08 Hmeidat et al. v. Military Commander in the West Bank et al., 11 June 2008. See judgements mentioned in this chapter at www.hamoked.org

37. See HCJ 726/08 Al-'Adhuni et al. v. Military Commander in the West Bank et al., 21 February 2008. See abstracts at www.hamoked.org/news_main_en.asp?id=491.

38. See HCJ 9657/07 Jarbu'a et al. v. Commander of the Military Forces in the West Bank, 24th July 2008 (this sentence is put in bold in the judgement)

39. See BERTINI, C._ Mission Report, 2002, point 4. The text of the report is available at: http://www.reliefweb.int/library/documents/2002/un-opt-19aug.pdf

selective assassinations or "lethal attacks", (expression used among the Israeli political and judicial establishment.)

Thus, the state deprives certain persons of their lives without a judicial decision or a legal known reasoning, and the targets' selection are not public nor is the reason known or the selection's process.

The examation of these assassinations can be understood from a Humanitarian International Law perspective, as a war crime; from the International Human Rights Law perspective, as a violation to the right to life and to a fair trial; and from that of the Criminal International Law, as a war crime.

However, the proposal in this chapter goes further, in the process of considering that Israeli policy and practice to select individuals as objects of lethal attacks because of their alleged link or participation in Hamas, are part of a systematic and massive attack in the shape of collective punishments, inflicted particularly against the Gaza population.

As is known, the Israeli Supreme Court have (also) adopted the state's main arguments about the practice of selective assassinations in its judgement of 13th December 2006 (*Public Committee Against Torture v. Government of Israel*). In that judgement, the Court concluded, basically, that

1. It cannot be settled that an operation of preventive execution is always legal, the same way that it cannot be settled that it is never legal.
2. It must meet criteria of necessity and proportionality: An attack on civilians that take direct part in terrorist attacks is always allowed when a) there exist no other means to reduce harm on them; and b) the preventive execution («the "preventive impact" that cause the terrorists' death») is proportional on them.
3. In case of "collateral harms" to civilians, the relationship between the harm caused and the military gain previewed in the operation must be examined case by case.
4. Finally it is settled that after an operation of this nature, there must be *a posteri* detailed and independent revision on the accuracy in the identification and circumstances of the facts.

It is necessary to look at it from outside the Israeli justice system(the same that prohibited torture in 1998 despite it was also, until then, apart from permitted, a systematic and generalized practice) to be able to visualize more clearly and, above all more humanely, selective assassinations. However banal it may seem, invoking the principle that everybody is innocent until proven guilty and the right to all persons to a fair trial should rule out, from the start, any legal reasoning on the legitimacy or not to extrajudicial executions of persons defined as terrorists objects.

But, Israeli civilian, military and judicial authorities' reasoning work on a quantitative premise (how many deaths of civilians are tolerable to attain the elimination of a terrorist menace?) that forgets basic qualitative prerequisites of human dignity. Before the 1998 Supreme Court judgements that prohibit torture totally, it was permitted under certain suffering and control limits. The same criteria is applied when determining if sanctions are lawful with selective assassinations as well as the blockade, attaining, at the end a degree of "humanitarian tolerance" based, according to Israeli Government and Justice, on international standards, and, according to us, in the Israeli society's state of opinion in a given moment.

For Israeli authorities, what determines if a sanction is lawful is "proportionality", seen always in reference to the defence of Israel's interests. That is, selective assassinations are allowed whenever they are proportional to their interests (military advantage over the enemy, consolidation of a Jewish State, etc.), but the fact that the right to life is vested and there is no possible proportionality to measure it mathematically with regard to human losses, be them Israeli or Palestinian, cannot be taken into account. The same thing happens with economic sanctions; is it possible to calculate from which exact point a blockade is intolerable for minimum humanitarian requirements to which Israel accepts to submit? All in all, how to measure humanity exactly through measures that are, by nature, inhuman?

3. Consideration Of Israeli Practices And Policies As Crimes Against Humanity

The most consolidated definition of crimes against humanity is in article 7 of the ICC Statute[40]

1 For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack:

- A Murder;
- B Extermination;
- C Enslavement;
- D Deportation or forcible transfer of population;
- E Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- F Torture;
- G Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- H Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- I Enforced disappearance of persons;
- J The crime of apartheid;
- K Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2 For the purpose of paragraph 1:

- A "Attacks directed against any civilian population" means a course of conduct involving a multiple commission of acts referred to in para-

40. UN doc. A/CONF.183/9, of 17th July 1998. For a specific study on the creation and consolidation of the offence "crimes against humanity", see CAPELLÀ, M.: La tipificación internacional de los crímenes contra la humanidad. Tirant lo Blanch, Valencia 2005.

graph 1 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack;

B "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine calculated to bring about the destruction of part of a population;

C "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

D "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

E "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

F "Forced pregnancy" means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

G "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

H "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a state or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3 For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Multiple aspects of Israeli practices and policies in connection with Gaza's population since disengagement in 2005 and, in particular, since the 2007 blockade, bear evidence of the commission of crimes against humanity. Such crimes are, according to case law of the International Criminal Court for the former Yugoslavia, more severe than war crimes, for its massive and systematic character and for what it means in itself to attack civilian population[41]. We understand, following this reasoning, that the category of crimes against humanity is the most accurate to include the whole of inhu-

41. See statement made by the Court for the former Yugoslavia (ICTY-TPIY) in the case Tadic: "A prohibited act committed as part of a crime against humanity, that is with an awareness that the act formed part of a widespread or systematic attack on a civilian population, is, all else being equal, a more serious offence than an ordinary war crime. This follows from the requirement that crimes against humanity be committed on a widespread or systematic scale, the quantity of the crimes having a qualitative impact on the nature of the offence which is seen as a crime against

mane acts and persecutions as well as war crimes against the Palestinian civilian population.

The idea around which, crimes against humanity in turn is, precisely that; humanity as a whole is their victim[42]:

> "Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity".

The sanctions explained in this article against Gaza's civilian population are planned and organized by the Israeli authorities, that is, it is not about isolated attacks committed by Israeli soldiers of civilian authorities. The population has been the object of a detailed discrimination for belonging to a national group subject to military occupation.

To the purposes of the international criminal case law, in our view is that, the case of Gaza fulfils the elements of crimes against humanity:

3.1. MASSIVE AND SYSTEMATIC ATTACK

Facts, numbers and circumstances under which administrative, criminal and economic sanctions have been applied against Gaza, prove clearly that Israeli practices and policies against the Gaza population have a massive and systematic character. The mass character affects the magnitude of the actions committed and the number of victims[43]. The systematic character refers to four elements, that are met in the case of Gaza[44]:

1. Existence of a political objective, a plan or an ideology to destroy, persecute or weaken a community.
2. The perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another.
3. The preparation and use of significant public or private resources, whether military or other.
4. The implication of high-level political and/or military authorities (not necessarily state) in the definition and establishment of the methodical plan[45].

more than just the victims themselves but against humanity as a whole." See ICTY-IT-94-1; Tadic, Judgement, 14th July 1997.

42. See ICTY-IT-96-22: Erdemovic, Sentencing Judgement, 29th November 1996, paras. 27-28
43. See IT-95-1: Blaskic, Judgement, 3rd March 2000, para. 208.
44. Ídem, para. 203-205.
45. It is not necessary to declare expressly such plan. It can derive from acts as for example: general political historical circumstances in which criminal acts fall within, the creation of autonomous powers and structures in its territory, the contents of a political program, media propaganda, armed forces mobilization, military offensive repeated and coordinated in time and territory, modification on the ethnic composition of populations, discriminatory measures, etc.

The attack is not a synonym of the existence of an armed conflict in itself, it can precede or continue during a general armed conflict and besides, it is not necessarily characterised by the use of armed force, it encompasses any mistreatment of the civilian population[46].

3.2. AGAINST A CIVILIAN POPULATION

Firstly, it is understood that the term "population" shows the collective character of these crimes, concreted in three sub-conditions:

1. Individual or isolated cases are excluded but are credited as war crimes or common crimes[47]
2. The authors of crimes against humanity distinguish between the population and select their victims according to their belonging to a specific civilian population gathered round features that characterise them before other social groups[48]
3. There must be a policy through the discrimination of civilian population, although it is not necessary that such policy be explicitly formulated or be a state's work; this is the reason why it needs the requisite of systematicy in the commission of crimes against humanity, for having been planned or organised against a certain civilian population[49].

The collective character of crimes against humanity indicates for itself its massive or at a large scale commission because they are directed against population, not against individually considered persons but for their belonging to a certain social, cultural, religious or other group. In any case, international criminal case law requires alternatively the massive commission in connection to the systematic commission, and it can be understood that the attack must not necessarily be directed against *the entire population*, that is; the attack must not be characterised as "generalised", it is enough if it is massive or at a large scale[50]. This element makes it possible to differentiate, in the case of the Gaza population, the different attacks against the entire Palestinian population, dividec into two blocks after the 2005 disengagement.

Is must be pointed out, moreover, that in order to delimit the concept of "civilian" population, it encompasses a wide notion that include also resilience movements; all civilian in the strict sense, all people outside the combat.[51]

46. See ICTY-IT-97-24-T: Stakic (Prijedor), Judgement, 31st July 2003, para. 623; and ICTY-96-23: Kumarac et consorts (Foca), Appeal Judgement, para. 86

47. "The requirement of "population" is rather directed to imply crimes of a collective nature and excludes individual or isolated acts that, although may amount to war crimes or crimes against national criminal legislation, do not reach the degree of importance of crimes against humanity". Ídem, para. 646.

48. See case Tadic, Judgement I, para. 649

49. Ídem, para. 646

50. Íbidem.

51. "Thus the presence of those actively involved in the conflict should not prevent the cgaracterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity". (Ibidem, para. 643). Concretely, the ICTY Chamber considers that "the"civilian population" comprises, as suggested by the Commentary to the two Additional Protocols of 1977 to the Geneva Conventions of 1949, all persons who are civilians as opposed to members of the armed forces and other legitimate combatants. The targeted population must be of a predominantly civilian nature. However, the presence of certain non-civilians in its midst does not chage the character of the population." See ICTY-IT-96-23, Kumarac, Kovac and Vakovic, Judgement, 22 February 2001, para. 425.

3.3. WITH THE KNOWLEDGE OF THE ATTACKS

Crimes against humanity require a subjective element (mes rea): the author's knowledge of the context in which the crime is committed, that is a generalised or systematic attack against a civilian population whose acts are part of it because they take place in that temporary and geographical context.
In turn, the subjective element is composed of two parts:

1. A positive part: the intention to commit the conduct and the knowledge of the context in which it is committed.
2. A negative part: to not have committed the act for purely personal reasons, dissociated to the context of armed conflict under which article 5 of the International Criminal Court Statute for the former Yugoslavia and, in general, the Court's Statute, is applicable[52].

This subjective element is essential to the characterisation of crimes against humanity as a group of crimes extendible to common offences and aggravated by the circumstance of being committed in the context of an attack against civilian population: they are not isolated acts, but conducts reproached not only as ordinary crimes but also for the fact of *taking profit of unequal and discriminatory situations in which civilian population remains unprotected*. The consciousness of such circumstances is necessary to determine the conduct's specificity and unlawfulness.

This non-protection is clear in the case of the Gaza population that is subject to economic, administrative and criminal sanctions that obey to a criminal continuous policy of collective punishment; who are also confined in a closed space during months up to the moment they are attacked with no possibilities to flee to save their lives.

3.4. A CRIME AGAINST HUMANITY OF PERSECUTION

Finally, we should ask what type of crime against humanity being committed against the Gaza population, would fulfill the premises and elements described above. The answer is not easy, since various conducts make up the whole collective punishment against the civilian population, in the shape of the mentioned administrative, criminal and economic sanctions, applied since 2005 after the Strip's disengagement.

The most recent United Nations report on the Israeli attacks against the Gaza Strip in December-January 2009, that analyses international and criminal liability of the different actors in the conflict pursuant to the UNO official investigation that took place during six months of interviews and reports' studying, give an answer to this qualification.

52. See Tadic, Judgement I, para. 656-659. On the Blaskic case, Chamber I stated "It follows that the mens rea specific to a crime agains humanity does not require that the agent be identified with the ideology, policy or plan in whose nema mass crimes were prepetrated nor even that he suppported it. It suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan. This specifically menas that it must, for example, be proved that: the accused willingly agreed to carry out the functions he was performing; that these functions resulted in his collaboration with the political, military or civilian authorities defining the ideology, policy or plan at the root of the crimes; that he received orders relating to the ideology, policy or plan; and that he contributed to its commission through intentional acts or by simply refusing of his own accord to take measures necessary to prevent their perpetration". See Blaskic, Judgement, para. 257.

This investigation started in April 2009 when the President of the Human Rights Council established the United Nations Fact Finding Mission on the Gaza Conflict with the mandate "to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after". Justice Richard Goldstone was appointed the head of the Mission. Despite reiterated diplomatic efforts, Israel did not cooperate and the Mission's public hearings and research in Gaza were only possible thanks to the cooperation of Egypt, that allowed the passing through its border with the Strip.

The report[53], submitted on the 15th September 2009, it is outstanding in the fact that its findings are not limited to the particular operation carried out from December 2008 to January 2009, but also include human rights and humanitarian law breaches committed in that period are related and analysed together with other possible previous or later violations in the context of the Israeli operation "Cast Lead"-

This temporary perspective places the United Nations in the research of a course of conducts, policies and practice carried out by Israel against the Gaza population before the mentioned military operation. As pointed out in the report,

> "the military operations of 28 December to 19 January 2009 and their impact cannot be fully evaluated without taking into account the context and the prevailing living conditions at the time they began. In material respect, the military hostilities were a culmination of the long process of economic and political isolation imposed on the Gaza Strip by Israel, which is generally described as a blockade[54]."

In the report, the Mission describes what has this blockade consisted of, a detailed analysis of the blockade and the military operations' cumulative impact on the Gaza population and their human rights. Finally, it qualifies the conduct both of Israeli armed forces and the Palestinian armed groups[55] before, during and after the December 2008 military operation.

The general conclusion reached by the Mission is striking and unpredictable in its impacts since never before had Israel's conduct towards the Palestinian population been investigated and analysed as a deliberate, planned and systematic attack against a civilian population. The report is extensive, detailed and thorough, but we highlight three of the arguments that interest this study:

53. UN doc. A/HRC/12/48, "Report of the United Nations Fact Finding Mission on the Gaza Conflict", 15th September 2009, available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf.

54. Ibidem, para. 311

55. It also considers that the deliberated launching of rockets and mortars by Palestinian armed groups constitute indiscriminate attacks upon the civilian population. These acts could constitute war crimes and may amount to crimes against humanity. Given the seeming inability of the Palestinian armed groups to direct the rockets and mortars towards specific targets, there is significant evidence to suggest that one of the primary purposes of the rocket and mortar attacks is to spread terror amongst the Israeli civilian population, a violation of international law (Ibidem, para. 108-109). At this point, it is relevant to outline how the Mission notes that the relatively few casualties sustained by civilians inside Israel is due in large part to the precautions put into place by Israel with the provision of public shelters and fortifications of schools and other public buildings at great financial cost to the Government of Israel. Palestinian citizens of Israel have no access to these installations, though they are also within the area where the rockets are directed to (Ibidem, para. 110)

A) The joint impact of blockade and military operations was lethal to the Gaza civilian population

The cumulative effect of the blockade policies, and the resulting hardship and deterioration among the whole population, as well as of military operations together with Israel's statements that led the entire Gaza Strip to be considered a "hostile territory" (without distinction between civilian population and members of Palestinian armed groups) suggests, according to the Mission, that "there was an intent to subject the Gaza population to conditions such that they would be induced into withdrawing their support from Hamas" [56]. Israel, as noted by the Mission in its report, "rather than fighting the Palestinian armed groups operating in Gaza in a targeted way, has chosen to punish the whole Gaza Strip and its population with economic, political and military sanctions. This has been seen and felt by many people with whom the Mission spoke, as a form of collective punishment inflicted on the Palestinians because of their political choices"[57].

B) Before and during the Israeli military operation, the disproportioned destruction and the violence against civilians were part of a deliberate policy

The conclusions drawn by the Mission in this sense are clear and forceful:

> "The Gaza military operations were, according to the Israeli Government, thoroughly and extensively planned. While the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole.[58]
>
> "In this respect, the operations were in furtherance of an overall policy aimed at punishing the Gaza population for its resilience and for its apparent support for Hamas, and possibly with the intent of forcing a change in such support.[59]
>
> "The [military] operations were carefully planned in all their phases. Legal opinions and advice were given throughout the planning stages and at certain operational levels during the campaign. There were almost no mistakes made according to the Government of Israel. It is in these circumstances that the Mission concludes that what occurred in just over three weeks at the end of 2008 and the beginning of 2009 was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability"[60].

56. Ibidem, para. 1324.
57. Ibidem, para. 1325.
58. Ibidem, para. 1680.
59. Ibidem, para. 1681.
60. Ibidem, para. 1690.

C) Israel committed war crimes and the crime against humanity of persecution, apart from various human rights violations before, during and after the operation "Cast Lead"

War crimes committed during the Israeli operation are, inter alia: attacks against civilian items in Gaza (industrial infrastructure, food production, water installations, sewage treatment and housing) without military justification, in breach of the IV Geneva Convention; hostage takings and their use as human shields by Israeli forces putting their lives at risk and constituting also an inhuman and cruel treatment; or arbitrary detention of civilian Palestinian as the application of a collective punishment considered also as an intimidatory and terror measure, inter alia[61].

All these practices constitute, according to the Mission, violations of international human rights and humanitarian law, including the prohibition of arbitrary detention, the right to equal protection under the law and not to be discriminated based on political beliefs and the special protection to which children are entitled. It also finds that the detention of PLC members may amount to collective punishment contrary to international humanitarian law[62].

Moreover, the Mission qualifies sanctions applied both before and during operations from 27th December 2008 to 18 January 2009 as a collective punishment against the Gaza population, planned and executed in breach of article 33 of the IV Geneva Convention.

It goes further, in the course of this article: a crime against humanity of persecution against the Gaza civilian population. To make such an statement, the Mission takes into account that the crime of persecution comprises a variety of acts, including, inter alia, those of physical, economic or judicial nature that breach the right of persons to an equal enjoyment of their basic rights.

Following the ICTY judgement in the Kupreskic case[63], it understands that the notion of persecution is commonly used to describe a variety of acts, rather than a single act, that are part of a policy or a practice and must be regarded in their own context. It reminds that in that case, the ICTY raised that restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theatres or libraries) constitute discrimination, that may be or not considered as persecutions, depending on their context and weighed for their cumulative effect (para. 1326).

In the detailed analysis of the context related to the December-January 2009 operation, the Mission describes in its report a whole series of policies undertaken by Israeli military and civilian authorities that deprived Palestinians in Gaza from their means of subsistence, employment, housing and water. Palestinians are further denied freedom of movement and their right to leave and enter their own country and their access to a court of law and an effective remedy are limited or denied by Israeli laws[64]. Such practices could amount to persecution, a crime against humanity[65] and, moreover, in the view of the Mission, "some of the actions of the Government of Israel

61. See para. 50, 55 and 60.
62. Ibidem, para. 91
63. Prosecutor v. Tadic, International Criminal Tribunal for the former Yogoslavia. Trial Chamber No. IT-94-1-T. Judgement of 7 May 1997, 710.
64. UN doc. A/HRC/12/48, cit. Para. 1328.
65. Ibidem, para. 75.

might justify a competent court finding that crimes against humanity have been committed"[66].

Out of all recommendations made by the Fact Finding Mission about the Gaza facts, we would outline two or them, relevant to the object of this article: the convenience to count with mechanisms of universal jurisdiction to investigate and pursue crimes committed in connection with the military operation of December-January 2009, in the context of persecution and collective punishment inflicted to the Gaza civilian population[67]; and, also, the need that the Prosecutor of the International Criminal Court make a decision, as expeditiously as possible, regarding the legal determination of acceptance of the Court jurisdiction by the Government of Palestine, "in the interests of peace and justice in the region"[68].

If this conclusive report remains a worthless bit of paper, as all the others regarding Israel and the PTOs, another failure will be added to the international community's efforts to attain peace in that conflict. But while peace remains not linked to justice and impunity continues to be the main and historical pattern that distinguish the Israeli/Palestinian conflict, a lasting peace will be unlikely. In the meantime, a humanitarian catastrophe goes on, announced, planned and executed within sight of an international community that, consequently, has taken part in it.

66. Ibidem, para. 1329.
67. Ibidem, paras. 1646-1654.
68. Ibidem, para. 1767.

H) LIMITATIONS ON ACCESS TO INTERNATIONAL JUSTICE FOR PALESTINIAN VICTIMS OF HUMAN RIGHTS VIOLATIONS

The serious human rights violations affecting the Palestinian population as a consequence of the Israeli occupation remain, in the vast majority of cases, and apart from some exceptions by the courts of justice of the occupying country, under the mantle of impunity. This is due to present limitations on the access to the International Criminal Court and other national jurisdictions.

1. The International Criminal Court option

1.1. THE COMPETENCE LIMITS OF THE INTERNATIONAL CRIMINAL COURT

The basic elements that have to be taken into consideration are the following:

- La Prosecutor of the International Criminal Court can start an investigation when required to do so by a Member State, by the Security Council –through a resolution adopted in the framework of Chapter VII of the United Nations Charter– or ex-officio; by its own decision in view of the information it might have obtained or that has been furnished to it by individuals, victim groups, non-governmental organizations or other sources. (arts. 13 and 15 of the Rome Statute).
- According to the 2nd paragraph of article 15, the Prosecutor, if he should reach the conclusion that there is a reasonable basis to start an investigation, will present an authorization request at the start of said investigation…"
- The Prosecutor may conclude that there is not enough basis for prosecution, for three motives(art. 53.2):

  A There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
  B The case is inadmissible under article 17; or
  C A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of vic-

tims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;"

- The Pre-Trial Chamber can, ex-officio, revise the Prosecutor's decision of not opening an investigation if said decision is based on paragraph 2 c).
- As for motive b, the Prosecutor will have to bear in mind the existence of an investigation, trial or judicial decision within national jurisdiction for these same events.
- And in relation to motive a), it is basically referred to the material competence of the Court, which includes the categories of genocide, war crimes and crimes against humanity. There are different reports confirming that there is enough evidence that crimes against humanity and crimes of war were committed, for example, in the armed attack against Gaza of December 2008, like indiscriminate attacks against civil population, the use of white phosphorus bombs against civilians, the collective punishment, the deliberate attack against United Nations' buildings or against ambulances and health facilities[1].
- Following the 2nd paragraph of Article 12 of the Rome Statute, if an investigation is opened upon requirement of a Member State or ex-officio, by requirement of the Prosecution,

> "The Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3 :
>
> A The State on the territory of which the conduct in question occurred [...];
> B The State of which the person accused of the crime is a national."

In the case we are dealing with, Israel, the state we should consider national to the alleged authors of the crimes competence of the Court, it is not a Party of the Rome Statute.

- There are other ways of making the Court competent, although they are highly unlikely, such as getting Israel to accept the competence of the International Criminal Court. Or that the case be submitted to the Court by the Security Council, like it did with Darfur through Resolution 1593 (2005). This would make Israel's acceptance unnecessary and would probably be the most natural way of making the Court competent to obtain information on the acts committed by Israeli nationals in Palestine, while following the logic of the system established by the Rome Statute.

1.2. THE VALUE OF THE PALESTINIAN DECLARATION OF ACCEPTANCE OF THE COURT'S JURISDICTION

The Palestinian National Authority has accepted the competence of the International Criminal Court, through a formal Declaration on January, 21st, 2009, with retroactive effect on the crimes committed in Palestinian territory since July the 1st, 2002, found-

1. Among others: Amnesty International, Israël et territoires palestiniens occupés. Le conflit de Gaza : le droit, les enquêtes et l'obligation de rendre des comptes, Janvier 2009 ; Human Rights Situation in Palestine and other Occupied Arab Territories, NU, Doc. A/HRC/10/22, 20 March 2009 ; Joint report by various relators to the Human Rights Council ; Report of the Independent Fact Finding Committee On Gaza: No Safe Place; Presented to the League of Arab States, 30 April 2009. And, of course, the Goldstone Report; "Human Rights in Palestine and other Occupied Arab Territories", Report of the United Nations Fact-Finding Mission on the Gaza Conflict A/HRC/12/48, 25th September, 2009.

ing its acceptance on the possibility of acceptance expressed in article 12, paragraph 3, of the Rome Statute.

The question that arises is related to the evaluation of the declaration under the light of item A of article 12.2: Can the Palestinian National Authority be considered as the state in which the events have taken place?

International Legislations after the Second World War show us a great typology of entities that, without completely meeting the usual requirements in international law, have been, with political motives, recognized as States (for example, the situation of Ukraine and Belarus in 1945 within the United Nations). The reverse is also not unknown in the practice of non-recognition of entities that seem to meet all the necessary requirements (for example, with Taiwan). So we can see that there is a considerable pragmatism that leads to a case by case treatment of the cases that have their roots in more or less internationalized conflicts. So in this particular case an explicit and absolute positioning about the statehood condition of Palestine is not necessary. A more pragmatic solution is possible, oriented towards a sufficient international representation to the effect concerning the International Criminal Court and its Statute.

In this context, the Palestinian Liberation Organization (PLO) maintained a considerable recognition scope in relation to its capacity of having an autonomous presence in international relations, in the maintenance of *nearly diplomatic* relations with numerous states and its participation in some international treaties.

The PLO presented, in June 21st 1989, a declaration in the Swiss Ministry of Foreign Affairs, in which it stated that the Palestinian National Council had decided to subscribe to the four Geneva Conventions of 1949 and its Additional Protocols of 1977. And already in that moment (13th of September, 1989), the Swiss government informed the States that were Party to these agreements that it was not in conditions to decide if said instrument constituted a bona fide instrument of subscription, due to the uncertainty in the international community regarding the existence or not of a Palestinian State.

The field of international law has always been more open than others to the participation of entities of debatable statehood. This is due to the interest of the international community in obtaining the widest support possible for its regulations, especially regarding those entities that could be really or potentially involved in armed conflicts. And also due to the compromise of these Member States of respecting these regulations and *making them be respected*.

In that moment, 1989, the PLO was considered as a representative of an Uncertain State and, without any notable opposition, as apt to assume international obligations through the acceptance of said agreements. Now, twenty years later, in 2009, it would be difficult to comprehend that the Palestinian National Authority, created and governed by people elected in supervised processes, with international recognition, with more than ninety accredited representations among States and intergovernmental organizations and representing a higher threshold of effective government, with a degree of territorial control that the PLO never had, be considered as lacking representativity[2].

But this argument gains more relevance if it is connected with the previsions of the

2. It is also pertinent to remember the example of the United Nations Council with Namibia that, on the 18th of October, 1983, presented an instrument of support of the Geneva Conventions of 1949 and its Additional Protocols of 1977, in representation for Namibia, a territory which was then legally under UN supervision and illegally occupied by South Africa. The United Nations Council for Namibia did not have any –other than symbolic– control over the territory in the final steps towards independence of this country.

Rome Statute of the International Criminal Court. In its Preamble, the Member States proclaim "that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity", stating that "the most serious crimes of concern to the international community as a whole must not go unpunished" and that they are determined "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."

If the main goal of the Statute is to put an end to impunity and not leave the victims without justice, with a universal vocation, we will have to convene that the intention of the Parties was not to leave people or spaces out of the potential effects of the treaty.

As indicated, article 12 requires, in order for the Prosecution to open an investigation ex-officio or by requirement of a Member State, that they are Parties or have accepted the competence of the Court of the State in whose territory the conduct has taken place or the State that is national to the accused of the crime.

Regarding the State in terms of nationality, inasmuch as Israel is not a Party in the Statute, all the actions incurred by citizens who only have Israeli nationality would have not consented this. A different question that requires a case by case analysis would be that of possible authors that could have a different nationality and who would have participated in the commission of crimes that are a competence of the Court. And the identification of the specific culprits cannot be undertaken without the corresponding previous investigation.

And also regarding the State of the nationality: Which is the State that should accept the competence in a possible crime of the Court's competence committed by a Palestinian combatant? It probably will not be Israel, except, again, if we are dealing with alleged Israeli nationals, with or without another nationality, fighting on the Palestinian side. If these people only have Palestinian citizenship, their participation in eventual crimes that are a competence of the Court would be safeguarded by the fact that there is no State for that nationality... except, of course, if we give this condition to the Palestinian National Authority.

But let's move on to the State in terms of territory. Israel cannot be the State representing the territories of Gaza and the West Bank, because it holds in both the condition of occupying power since 1967, as stated, for example, in Resolution 1860 (2009), approved by the Security Council on the 8th of January, 2009, in the midst of the Israeli attack. If, on the other hand, the Palestinian National Authority is not accepted as internationally responsible for the territory and since there is no other State or entity with a wider recognition in this sense, we would have to convene that Gaza and the West Bank are territories without international representation. Or, in other words, that the people who live in Palestine have no authority to protect themselves against serious human right violations like the ones that constitute the material field of the International Criminal Court. And if it were Palestinian citizens who committed said crimes in Palestine itself, against, for instance, Israeli citizens, this reasoning would lead us to affirm their absolute impunity within the system created by the Rome Statute, as there would be no State of the nationality or State of the territory.

However, all this seems far from the aims of the Rome Statute and from the intentions of the States who promoted it. In this state of affairs, an interpretation of the Statute according to its aims should prevail, in the sense of accepting the Palestinian National Authority as the only internationally recognized authority (without necessarily affirming its condition as a full state) with the capacity of representing the territory and the people of Palestine.

1.3. THE RESPONSIBILITY OF THE STATES WHO SIGNED THE ROME STATUTE AND ESPECIALLY THE EUROPEAN UNION STATES

The EU maintains formal relations with the PNA, as demonstrated, among many other facts, by the signing of the Interim Association Agreement on Trade and Co-operation between the EC and the PLO (in benefit of the Palestinian Authority), in May 2005. In fact, the EU is the main fund donor to the PNA in –among others– the field of humanitarian assistance, refugee support, development cooperation and institutional support for the PNA.

It is not convenient to put all the responsibility on the shoulders of the ICC's prosecutors in such a delicate political matter, with so many legal consequences beyond penal responsibility. It is necessary that these considerations are formally assumed by the Assembly of Member States in the Charter of the International Criminal Court, with a revision conference due for the 31st of May 2010 in Kampala (Uganda). For the interpretation of the treaty, the Article 31 of the 1969 Vienna Convention allows, as a part of the context, to bear in mind "a) any ulterior agreement between the parties related to the interpretation of the treaty or the application of any of its dispositions" or b) "any ulterior practice followed in the application of the treaty in which the agreement of the parties is stated in relation to the interpretation of the treaty"". So an amendment of the Statute would probably not be necessary: it would be sufficient with an interpretative declaration by the Conference, in the sense that the term *State*, to the effects of paragraph 2 of article 12 is comparable to any other entity that is internationally recognized as a legitimate representative of territories awaiting decolonization or submitted to a situation of foreign occupation or, more directly, to specifically include the Palestinian National Authority.

Furthermore, there is no obstacle, in legal terms, impeding that the 27 states that are European Union members –and who represent a quarter of the Member States[3]– formulate a declaration in this sense without waiting for the aforementioned Conference.

This is the only coherent position with the repeated declarations of the Council and the European Union's Commission stating their compromise with the Court and with the fight against impunity[4]. Positions that have been strongly held in other cases, like the Kenyan conflict[5] or the detention order against the President of Sudan[6].

Rather, the EU's position has been to maintain a strikingly low profile in relation to the "Operation Molten Lead" against Gaza, from the end of 2008 to the beginning of 2009. It has limited itself to condemning equally the Israeli bombing and the launch-

3. Without mentioning the States linked in various degrees with the EU, like Croatia, the Former Yugoslavian Republic of Macedonia, Albania, Bosnia-Herzegovina, Serbia, Iceland, Liechtenstein, Norway or Georgia.

4. For instance, in the preamble of the Common Position 2003/444/PESC of the Council, on the 16th of June, 2003, concerning the International Criminal Court, it states that: The serious crimes within the jurisdiction of the Court are of concern to all Member States, which are determined to cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof."; DOUE L 150/67, 18.6.2003. In similar terms, in the Agreement between the International Criminal Court and the European Union on cooperation and assistance, DOUE L 115/50, 28.4.2006. And more recently, on the 16th of June, 2008, through the Declaration of the Presidency in representation of the EU on occasion of the 10th anniversary of the Rome Statute, in which, among other things, it affirmed that: " "The EU and its Member States remain committed to promoting the universality of the Rome Statute and protecting its integrity." And that: "The EU will continue to use all means available to it to promote the ICC in its policies and the principles of international criminal justice. It will accordingly bring the ICC into its policies, particularly in development, conflict prevention, justice, freedom and security."

5. Declaration of the Presidency in representation of the EU about Kenya, on the 1st of October, 2009.

6. Declaration of the Presidency in representation of the EU in relation with the ICC's decision relative to the detention order against President Al-Bashir, of the 6th of May, 2009..

ing of rockets from Gaza, as well as reaffirming the validity of international humanitarian law in every circumstance, asking for "the immediate reopening of all the frontier passes, that the delivery of humanitarian products and fuel be restarted without delay, as well as free access for international and humanitarian organizations, diplomats and journalists", but without saying a single word in relation to the criminal responsibility for the crimes committed there[7]. The tone was generally much smoother in the statements than that which took place during the Czech presidency[8]. The EU's influence in the ceasefire of the 17th of January was practically non-existent, despite the numerous on-the-spot missions. Despite the significant –and later– compromise of sending funds for humanitarian aid and for the reconstruction of Gaza, the EU has not been capable of confronting Israel's blockade, which has effectively impeded the arrival and the fluidity of these funds into Gaza. In the same way, it has not been able to demand an Israeli compromise regarding reconstruction of the area. In fact, the European Union has not even reclaimed a refund from Israel for the destruction of the EU financed infrastructures, with an estimated value of nearly 25 million Euros. And during the entire process disparity of the positions of the member States has been notorious. Some, like Germany, Italy, the Czech Republic or the Netherlands have completely complied with Israeli positions. Only Belgium, Ireland and Sweden have suggested the necessity of investigating the crimes committed. This division has become evident once again during the debate that preceded the passing of resolution A/64/10, of the 5th of November 2009, related to the Goldstone Report, demanding both parts to undertake, within three months, independent investigations on the serious violations of international humanitarian law and of human rights committed during the Gaza conflict[9].

Finally, it is also worth mentioning the scant interest that the European Union shows in relation to the fate of the Palestinian population, rendering useless the solemn compromises assumed in the official discourse about the concept of "the responsibility to protect" assumed by the General Assembly of the United Nations in its 2005 summit:

> "The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[10]

7. Statement of the Presidency of the Council of the European Union on the violence in Gaza, of the 27th of December, 2008. And EU Statement on the Middle Eastern situation of the 30th of December, 2008.

8. On the 3rd, 7th 9th and 15th of January, 2009; even though they also deplored the civil victims and they recalled the obligation of respecting international humanitarian law.

9. In the European Union, the votes in favour were from Cyprus, Ireland, Malta, Portugal and Slovenia; the votes against were from the Czech Republic, Hungary, Italy, the Netherlands, Poland and Slovakia; with the following countries abstaining: Austria, Belgium, Bulgaria, Denmark, Spain, Estonia, Finland, France, Greece, Latvia, Lithuania, Luxembourg, Romania, Sweden and the United Kingdom.

10. Resolution 60/1 of the General Assembly of the United Nations, on the 24th of October, 2005, "Final Document of the World Summit 2005".

2. The universal jurisdiction option

2.1. THE EXTENSION OF UNIVERSAL JURISDICTION IN THE EUROPEAN UNION

The Rome Statute of the ICC has promoted a spectacular legislative process on a national level. Due to its universal vocation and to the number of States who have ratified the Rome Statute (110 at present), this same ratification process has led many States to revise their legislations in order to adapt them to the Statute of the ICC, both in the sense of harmonizing the national penal types and the jurisdiction spheres of its national tribunals, in order to articulate the criminal cooperation between the national jurisdictions and the ICC. In this context, there is a growing tendency of national laws to consider the crimes that are the ICC's competence as crimes that must be included in the field of action of the principle of universal jurisdiction.

From the practical point of view, in the countries that have not adopted special laws to deal with the crimes that are the Court's competence and are still ruled by rules set before the Rome Statute, we can see that not all the crimes are treated equally, so that universal jurisdiction is established for some crimes and not for others. It is commonly established in those cases in which it is derived from a convention, specially the repression of serious violations of the Geneva Conventions of 1949 and of torture, following the United Nation's Convention of 1984 (Austria, Denmark, Greece or Italy). Genocide (in the case of Greece), on the other hand, or crimes against humanity (Bulgaria, Denmark, Finland or Sweden) are not always defined as such and are prosecutable in certain specific assumptions, for instance, as incurring in assassinations or torture, or crimes of slavery or forced disappearances, if there has not been, like in the framework of specific cooperation with the ad hoc tribunals for the former Yugoslavia or Rwanda, the establishment of specific regulations for these assumptions (France).

In the countries that have adopted specific criminal laws for complementarity with the Court (Malta, Netherlands, Portugal or the United Kingdom and in the ones that have reformed their criminal codes or its procedural regulations to these effects (Germany, Belgium or Spain), we can ascertain, in general, an homologation of treatment regarding the cases of genocide, war crimes, crimes against humanity and even torture, in the sense that they have established universal jurisdiction, in varying terms, for all of them.

The specific exercise of universal jurisdiction, however, is subject to different conditions in the different States, such as personal immunities, prescription periods, the monopoly of the prosecution or the requirement of connection points with the State it aims to prosecute.

Despite this new legislative development, contemplating –in many countries– universal jurisdiction that for the most serious crimes, until now, only in some of them have there been cases in which universal jurisdiction has been applicable and in only a few of them has a trial been held (in Germany, Austria, Belgium, Canada, Denmark, Spain, Finland, France, Norway, the Netherlands, the United Kingdom and Switzerland). But it must be mentioned that this practice has increased in the past few years, especially within the European Union.

2.2. POLITICAL PRESSURES ON THE MOST ACTIVE STATES AND LEGAL SETBACKS: THE CASES OF BELGIUM AND SPAIN

In this context, with the field of universal jurisdiction widening, there have been important setbacks in two of the countries with a most favourable legislation for a far-reaching exercise of universal jurisdiction: Belgium and Spain. In both cases it has been due to pressure of foreign States and, in particular, of the United States, and in both cases Israel has participated in these pressures, due to the implication of some of its citizens in penal procedures started in both countries.

One of the motives of the crisis of the Belgian law of universal jurisdiction, in its versions of the 16th of June, 1993 (related to the repression of serious violations of the Geneva Conventions of the 12th of August, 1949 and the 1st and 2nd Protocols of the 8th of June, 1977, additions of the aforementioned Conventions) and the 10th of February, 1999 (related to the repression of serious violations of international humanitarian law), which led to its derogation in June, 2003, was that it did not recognize the immunity of heads of state and other foreign representatives, with the resulting political pressures of the countries involved.

As far as the United States is concerned, the motive is to be found in the lawsuits presented in March 2003 against president George H.W. Bush and others, for alleged violations of international humanitarian law in Iraq. Due to these lawsuits, the United States threatened Belgium with moving NATO's headquarters. In the case of Israel, the matter at hand was the slaughtering of civilians in the refugee camps of Shabra and Chatila, in Lebanon, between the 16th and the 18th of September, 1982. There were lawsuits against various Israeli leaders, among them the Defence Minister, Ariel Sharon and the then brigadier general of the army, Amos Yaron.

In the Spanish case, the problems with the United States arose from the prosecution of the three soldiers involved in the case of José Manuel Couso Permuy, a Tele 5 cameraman, killed in Baghdad on the 8th of April, 2003, as a consequence of a shell shot by an Abrams M-1 tank of the US Army, while he was in a room in the 14th floor of the Hotel Meridien Palestine. And also due to the procedures related to the CIA's secret flights and the Guantanamo detention centre. For Israel, it was in relation to the lawsuit against various Israeli leaders, held as a consequence of the prosecution promoted, among others, by the Human Rights Centre of Palestine along with some of the victims, for crimes against humanity. The event in question was the air attack perpetrated on the 22nd of July, 2002, with a very powerful bomb, against Salah Shehade, the Hamas leader. In the attack, in a densely populated area of Gaza (al Daraj), the leader was killed along with his bodyguard and fourteen civilians. 150 civilians were also wounded in this attack, and many houses were destroyed. Israel did not give any answer to the request sent in August 2008 by the Spanish High Court Judge Fernando Andreu, asking for information on the investigations carried out in their country, so the Judge decided, in January 2009, to proceed with the lawsuit and prosecute the accused, among them the former Israeli Defence Minister, Benjamin Ben-Eliezer. The rest of the accused are the former military secretary of the Minister, Michael Herzog, the former Chief of Staff, the then commander of the Israeli Air Force, Dan Halutz, the general in charge of the Southern Command of the Israeli Defence Forces, Doron Almog, the head of the National Security Council and National Security Advisor, Giora Eiland, and the director of the General Security Service, Avraham Dichter. When the documentation sent by Israel was received and studied, the Attorney-General pre-

sented an appeal against the writ of admissibility on the grounds that the lawsuit was considered matter that had already been investigated in the country of origin. But Judge Andreu considered that there never had been a real judiciary investigation in Israel and he rejected the appeal in May 2009. However, the appeal presented by the Attorney-General was admitted by the Criminal Hall of the National Court, who thereby decided, on the 30th of June, to file the lawsuit.

Encouraged by the protests of the United States and Israel (and other States like China, who also do no accept the Rome Statute of the ICC), Spain has undergone a process of progressive restriction of universal jurisdiction. It started with the last Aznar government in 2003[11] and it has culminated with the approval of the Organic Law 1/2009 of the 3rd of November[12], changing the article 23.4 of the Organic Law 6/1985, of the 1st of July, of the Judiciary, approved thanks to an agreement between the Partido Socialista and the Partido Popular, with the support of other parliamentary groups. This decision has been openly and publicly appreciated by Israeli leaders.

Following the 1st article of this law, in order to learn about the acts that can be considered of criminal nature committed by Spanish or foreign people in foreign land, according to the Spanish law, as genocide, war crimes or crimes against humanity "it will have to be proven that their alleged authors are in Spain or there are victims of Spanish nationality, or a relevant link with Spain and, in any case, that no other implicated country or International Court has already started a lawsuit that implies an investigation and an effective persecution, if necessary, of these criminal acts." With this measure Spain contributes to guaranteeing the impunity of the crimes committed by nationals of States who also do not accept the jurisdiction of the International Criminal Court. This is hardly compatible with its official stance of supporting the ICC.

2.3. OTHER EXAMPLES PROVING A REMARKABLE TOLERANCE TO ISRAEL'S ABUSES

Apart from the aforementioned cases of Belgium and Spain, in other countries, –and within the framework of universal jurisdiction– reports have been presented in relation with alleged crimes committed by the Israeli armed forces against the Palestinian population, but they have not prospered in any of them. The following examples are quite representative:

In Sweden, in 2002, charges of war crimes were presented against Ariel Sharon, in relation with the massacre of the Sabra and Chatila camps, in Lebanon. Even though the Attorney-General considered that Sweden had jurisdiction, it declined to do so because it considered that there would be no final results, due to the foreseeable lack of cooperation on Israel's behalf.

In Denmark, in 2003, charges of generalized torture were not brought up against the former head of the Israeli secret services (SHABAK), Carmi Gillon, then the Israeli ambassador to Denmark, due to the criminal impunity he had thanks to the Vienna Convention on Diplomatic Relations of 1961. Denmark, however, did not even reject him as an ambassador.

11. Through the Organic Law 18/2003, of the 10th of December, of Cooperation with the International Criminal Court; BOE of the 11th of December, 2003, num. 296.

12. BOE, nr. 266, of the 4th of November, 2009.

Following the charges presented by a non-governmental organization, on the 10th of September, 2005, a London judge sent out a detention order for the Israeli general Doron Almog. He was accused of serious violations of the fourth Geneva Convention of 1949 in the adoption of consistent reprisals in the demolition of 59 Palestine housings in the Rafah camp, in the Gaza Strip. On the following day, the general arrived at Heathrow airport, where the police were waiting to arrest him. Having been forewarned, he refused to leave the aeroplane, the agents did not try to board the plane to arrest him, so the accused was able to return to Israel in the same plane.

In New Zealand charges were presented against *Moshe Ya'alon*, Chief of Staff of the Israeli army in 2002, when the air attack in Al Daraj, against the Hamas leader, Salah Shehadeh, took place, an event that has already been mentioned in relation with Spain. In November, 2006, a judge of the District Court of Auckland gave a detention order against him, based on his serious violation of the fourth Geneva Convention of 1949. However, the Attorney-General decided, on the 28th of November 2006, to close the case, without giving any further explanations.

Ami Ayalon, the former head of the Israeli General Security Service (Shin Bet) was involved in a torture case, during a visit to the Netherlands in May 2008, but the Attorney-General was incapable of starting an investigation due to the internal debates about his eventual immunity, a thesis that was eventually rejected, but only after Ayalon had already left the country. On the 26th of October, 2009, an Appeal Court of the Netherlands rejected the charges presented against Ami Ayalon, although it accepted that the presence of the accused was sufficient to establish jurisdiction, it also determined that, in order to really establish jurisdiction in a specific case, the prosecutor had to determine if the person in question could be identified as a suspect in view of the Convention against Torture and the application of the Dutch law, something which it did not manage to do.

In April 2009, a group of lawyers presented charges to the Norwegian Attorney-General against ten Israeli leaders for war crimes committed during the attack against the Gaza Strip in December 2008 and January 2009, which left more than 1.400 Palestinians dead, most of them civilians. Among those implied, were the former Prime Minister Ehud Olmert, the Defence Minister Ehud Barak and the leader of the opposition, Tzipi Livni. The Attorney-General refused to proceed with the case.

In short, it is evident that there is an obvious political discomfort in the countries who have had to deal with charges about violations of international humanitarian law committed by Israeli nationals, which always end in a lack of criminal action, consolidating the impunity for crimes that will obviously not be persecuted in Israel either.

The application of this double standard, if compared with, for instance, the numerous cases against Rwandan nationals that have been brought to trial thanks to universal jurisdiction (in Belgium, Canada, Denmark, the Netherlands or Switzerland, as well as procedures opened in France, Spain, Finland or the United Kingdom), has completely broken the credibility of the most developed countries, including the members of the European Union, in the fight against impunity of the most serious crimes in international law and it consolidates the situation of defencelessness of the weakest segments of the civil population of the world, among them, of course, the Palestinian population.

I) APARTHEID AGAINST THE PALESTINIAN PEOPLE

1. Introduction

This document, titled "*Apartheid against the Palestinian people*" aims to, from a distance –without any preconceived position– and through analysis, on one hand, of the international legal regulations and, on the other, of the national legislation and its application, both in Israel and in the Occupied Palestinian Territories, to determine the existence –or not– of a **crime of apartheid against the Palestinian people.**

Throughout this study, we will be able to distinguish what is understood as a crime of apartheid. We know what happened in South Africa, we suspect what might be happening in Israel and in the Occupied Palestinian Territories, but not much time has been dedicated to analysing why it arose and how was it categorized as a **crime against humanity** and what its legal content is.

While it is a fact that the international Community decided to typify the category of crime of apartheid because of what was happening in South Africa, it is also true that once the original cause of its creation –the segregationist and racist South African regime-, the persecution of this crime against humanity is still applicable. This can be done through the Convention against Apartheid, the Rome Statute or international customary law.

As defined in article 7 of the Statute of the International Criminal Court, apartheid is "inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime". Taking as a reference the most recent definition we have, which includes all jurisprudence and international customary law on this subject, it is a question of determining, following the guidelines established in the Convention against Apartheid, if the Palestinian people are suffering similar policies and situations.

The study is not only focused on the violations of international humanitarian law that Israel is committing in the Occupied Palestinian Territories; it is centred on the analysis of **international human rights law**. On one hand, the reports elaborated by the experts who are part of the various conventional mechanisms established in the international human rights treaties are fundamental. Their importance lies in that they are international treaties ratified by Israel, applicable in all the territories under its jurisdiction –Israel and the Occupied Palestinian Territories– and in that they analyse the information supplied by the Israeli government itself. So the repeated condemnations by these experts cannot be qualified as one-sided or biased because even the government of Israel has recognized that they have this authority.

And if this was not enough, this report we will be able to appreciate how, in the field of the various non-treaty based mechanisms, various Special Rapporteurs have been

categorically regarding the racist and segregationist policies undertaken, as a preconceived plan, by several Israeli organs and authorities. All of this is completed with other United Nations documentation, including the Advisory Opinion of the International Criminal Court on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory.

After analysing the international regulations, the report focuses on the legislation applicable to Israel and the Occupied Palestinian Territories and it outlines not only the discrimination suffered by the Palestinian people, but also the plan aimed to deny the respect of their dignity as human beings. This denial has a specific legal categorization: **crime of apartheid**.

2. What is apartheid?

Apartheid is an Afrikaner term meaning **"separateness".** It is a system establishing, through laws, policies and practices the supremacy of one human group over another, based on racial criteria. This system was developed in South Africa between 1948 and 1990, creating a legal framework institutionalizing racial segregation.

A) Constitutive elements of the crime of apartheid

As determined by the Special Group of Experts[1] of the United Nations Commission on Human Rights, these elements are:

1. The "Bantustan policy", creating reserved areas for specific racial groups.
2. The regulations concerning the circulation of black Africans and Asians in the urban areas.
3. Demographic policy with the aim of reducing the number of black population, while favouring white immigration.
4. The imprisonment and ill-treatment of non-white political leaders and of non-white prisoners in general.

All these violations are committed on a large scale, and they constitute a systematic discriminatory practice regarding the most essential human rights.

B) Where is the crime of apartheid categorized?

- International Convention on the Elimination of All Forms of Racial Discrimination. (1965).
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968).
- International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).
- Rome Statute of the International Criminal Court (1998).

1. Human Rights Commission, Study Concerning the Question of Apartheid from the Point of View of International Penal Law, E/CN.4/1075, 15th of February, 1972, pp. 51 – 52.

Even if it does not exist in South Africa any more, apartheid, as a **crime against humanity**, is still condemned by international legislation, because it is one of the *worst forms of racial discrimination*.

C) The International Convention on the Suppression and Punishment of the Crime of Apartheid

The Convention was adopted by 91 votes in favour, 4 against (the United States of America, Portugal, the United Kingdom and South Africa) and 26 abstentions. It entered into force on the 18th of July, 1976 in accordance with article XV and is currently ratified by 107 countries. Israel has not signed or ratified this Convention.

Article II defines apartheid as those

> *"... inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them"*

These acts are:

A *Denial to a member or members of a racial group or groups the right to life and liberty of person:*

1. *Murder of members of a racial group or groups;*
2. *By the infliction upon the members of a racial group or groups serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;*
3. *Arbitrary arrest and illegal imprisonment of the members of a racial group or groups;*

B *Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;*

C *Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular denying members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognised trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;*

D *Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;*

E *Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;*

F *Persecution of organisations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.*

D) Can the people responsible for this crime be punished?

Can the people responsible for committing this crime in Israel and the Occupied Palestinian Territory be punished, even though Israel has not ratified the Convention against Apartheid? **Yes.** Even if Israel is under no obligation due to its non-ratification of this International Treaty on the crime of apartheid, it must still respect the regulations it contains, because the suppression and the punishment of these crimes against humanity constitutes an **imperative rule generated from international customary law and therefore binds States irrespective if they have ratified the international treaties or not.**

As far as the responsibility of the individual is concerned, the Nuremberg Principles state that: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law (Principle II)[2].

Apartheid, as a **crime against humanity**, is subject to two principles that distinguish it from ordinary crimes:

- **Principle of universal or extraterritorial jurisdictions.** It implies the possibility of taking those responsible of crimes against humanity to trial, based exclusively on the nature of said crimes, without taking into consideration the nationality of the accused or of the victim or the place where the crime was committed. This principle features in various international treaties, among them the International Convention on the Suppression and Punishment of the Crime of Apartheid (articles IV and V) and in the internal legislation of several States, among them, Spain (article 23.4 of the Organic Law on Judiciary Power).
- **The principle of Non-Applicability of Statutory Limitations.** Crimes against humanity must be persecuted and their authors punished, irrespective of the moment when they were committed. In other words, their trial has no time limit, unlike other crimes.

2. Principles of International Law recognized by the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal. Draft Code of Crimes Against the Peace and Security of Mankind– Yearbook of the International Law Commission, UN, A/CN.4/368,13th of April, 1983.

3. International Legislation applicable in Israel and in the Occupied Palestinian Territories

A) International legal regulations that Israel should apply

What international human rights and humanitarian legislation should Israel apply in its territory and in the Occupied Palestinian Territories? Israel declares that the international human rights treaties it signed are only applicable in Israel, because these treaties protect the citizens against the State itself in peacetime, and it does not apply to the Occupied Palestinian Territories, where the regulations of humanitarian law are still applicable. Israel also maintains that the occupation of the Gaza Strip ended on the 12th of September, 2005, when it transferred full powers to the Palestinian Authority. This means that Israel is not responsible for the well-being of the citizens of the Strip[3]. We can ascertain why this is not truthful:

- The International Criminal Court determined that in the Occupied Palestinian Territories the legislation on human rights should also be applicable, and not only the regulations of international humanitarian law[4].
- As the occupying force, Israel has the duty of fulfilling the obligations established by international humanitarian law and by international human rights law. And this obligation is extensive not only to the West Bank, but also to the Gaza Strip, because "a territory is occupied if it is under the "effective control" of a State other than that of the territorial sovereign"[5]. Therefore, "the test for determining whether a territory is occupied under international law is effective control and not the permanent physical presence of the occupying Power's military forces in the territory in question"[6].

The ***effective control*** **of Israel over the Gaza Strip** is demonstrated through the following factors:

A Substantial control of Gaza's six land crossings.

B Control through military incursions, rocket attacks and sonic booms.

C Complete control of Gaza's airspace and territorial waters.

D Control of the Palestinian Population Registry: the definition of who is "Palestinian" and who is a resident of Gaza and the West Bank[7].

3. Decision of the Supreme Court of Israel in Al Bassiouni vs the Prime Minister.
4. Advisory Opinion of the International Criminal Court on the Legal Consequences of the Construction of a Wall in Ocuppied Palestinian Territory, A/ES-10/273, of the 9th of July, 2004, paragraph 114.
5. Special Rapporteur's report on the Human Rights situation in the Occupied Palestinian Territories since 1967, Mr. Richard Falk, A/63/326, August 2008.
6. Special Rapporteur's report on the Human Rights situation in the Occupied Palestinian Territories since 1967, Mr. John Dugard, A/HRC/7/17, of the 21st of January, 2008.
7. Source: Ibid.

B) Human Rights treaties ratified by Israel[8]

The rules of international human rights law which should be applied in the Occupied Palestinian Territories and in Israel, recorded in various human rights treaties ratified by Israel, are as follows:

- **International Convention on the Elimination of All Forms of Racial Discrimination** (ratified by Israel on the 03/01/1979).
- **International Covenant on Civil and Political Rights** (ratified by Israel on the 03/10/1991).
- **International Covenant on Economic, Social and Cultural Rights** (ratified by Israel on the 03/10/1991).
- **Convention on the rights of the Child** (ratified by Israel on the 03/10/1991).
- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (ratified by Israel on the 03/10/1991).
- **Convention on the Elimination of All Forms of Discrimination against Women** (ratified by Israel on the 03/10/1991).

C) International humanitarian law applicable to the Occupied Palestinian Territories

The rules of international humanitarian which should be applied in the Occupied Palestinian Territories are the following:

- Those included in the **IV The Hague Convention, related to the laws and customs of war on land, in whose appendix there are the Rules of the Hague, of the 18th of October, 1907.** Israel is not to party of this Convention, but the International Criminal Court ruled that the dispositions it contained were part of **customary law,** which, as such, was binding for all the States, with Israel obviously included[9].
- Those included in the **IV Geneva Convention of the 12th of August, 1949, relative to the due Protection of Civilians in time of war**(ratified by Israel on 06/07/1951).
- The **customary regulations of international humanitarian law applicable to occupation,** which, as such, are of mandatory application for Israel.

8. Source: Office of the UN High Commissioner for Human Rights : http://www.unhchr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=84#84

9. Advisory Opinion of the International Criminal Court on the legal consequences of the construction of a Wall in Occupied Palestinian Territory, A/ES-10/273, of the 9th of July, 2004, paragraph 89.

4. Human Rights violations in Israel and the Occupied Palestinian Territories

A) Violations identified by the Treaty Committees

Israel has ratified the vast majority of international treaties related to the protection and promotion of human rights. Each of these treaties has a monitoring body called a "Committee", supervising its application and to whom States, *having freely accepted the treaty*, must send periodical reports in which they must detail how these rights have been incorporated into their legislations and made effective. The Committee "answers" these reports with its Concluding Observations, expressing its recommendations and worries to the State. In the specific case of Israel, the Committees, in their Concluding Observations, have condemned the constant human rights violations suffered by the Palestinian people, which, if analyzed as a whole, divulge the existence of an apartheid regime. We will now enumerate these violations, as mentioned in the most recent reports by the Committees of the aforementioned treaties.

1. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION[10]

- **In Israel:**

– Establishment of a legislation of privileges in favour of Jewish nationals in relation to the **access to land and certain benefits** (§ 23).
– **Denial of the right of refugees and displaced Palestinians to return and repossess their land in Israel** (§ 23).
– **Exclusion of Arab Israeli citizens from certain lands** controlled by the State through what is established as a criterion of social adequacy to apply for access to land through the Israel Land Administration (the condition for the applicants is that they have to be "ideal for living in a regime of small communities") (§ 23).
– Existence of **separate "sectors" for Jews and Arabs**, in particular in **housing** and in **education,** causing unequal treatments and funding that may **represent** racial segregation (§ 22).
– **Low level of education provision for Arab Israeli citizens,** a barrier in the access to employment, something that is reflected in that their average income is considerably lower than that of the Jewish citizens (§ 24).
– Differences in the **rates of child mortality and life expectancy of the Jewish and non-Jewish population.** Women and girls of minorities tend to be the most disadvantaged (§ 24).
– Indirect **Discrimination** against Arabs through the psychometric examina-

10. Final Observations for the Committee on the Elimination of Racial Discrimination, Israel, CERD/C/ISR/CO/13, 14th of June, 2007.

tions that are used to check aptitudes, ability and personality in **access to higher education** (§27).

- **Racial discrimination through access to public services associated to military service**, like housing and education, bearing in mind that most of the Arab-Israeli citizens do not perform military service. (§ 21).
- **Lack of preservation of the cultural and religious Arab heritage**, bearing in mind that there are Jewish cultural institutions dedicated to protect the Jewish heritage. There is a different level of protection for Jewish and Non-Jewish holy sites. (§ 28).
- **Lack of protection and effective legal instruments** against **discriminatory acts**. There is no clear and resolute policy of the Attorney-General in the trial of politicians, civil servants and other public figures if they incite hatred against the Arab minority (§ 29).
- Actions that alter the demographic composition of the Occupied Palestinian Territories(§ 14).

• **In the Occupied Palestinian Territories:**

- Existence of the **Wall of separation in the West Bank** (§ 33).
- **Restrictions on freedom of movement** imposed by the Wall and other barriers (§ 34).
- Application of **different laws for Jewish settlers and for Palestinians** (§ 36).
- Application of different criminal laws inflicting **more prolonged detentions and more severe punishments to Palestinians** than to Israelis for the same crimes (§ 36).
- **Unequal distribution of water resources** in prejudice of Palestinians(§ 36).
- **Demolition of Palestinian houses** (§ 26).
- **Persistence of violence by Jewish settlers** against the Palestinian population (§ 37).

2. HUMAN RIGHTS COMMITTEE[11]

• **In Israel:**

- Public pronouncements by prominent Israeli figures in relation to Arabs, which may represent a *call to racial hatred and an invitation to discrimination, hostility and violence* (§ 20).
- **Israeli legislation violating the rights of the Palestinian people** (Law of Nationality and Entry into Israel Law (Temporary Order) of the 31st of July, 2003, and the Law on Citizenship Law of 1952) (§ 22).
- **Percentage law for the Israeli Arabs in the public sector and in the Civil Service.** There are no progresses in the improvement of participation, especially in relation with women (§ 23).

11. Concluding Observations of the Human Rights Committee: Israel. 21/08/2003, CCPR/CO/78/ISR. The third and last Periodical Report on Israel (CCPR/C/ISR/3 y HRI/CORE/ISR/2008, de 21/11/2008) will be considered in the 97th of the Human Rights Committee, in Geneva, October 2009.

- **In the Occupied Palestinian Territories:**

– A frequent use of various forms of **administrative detention**, restrictions in the access to a lawyer and lack of information about the motives of detention (§ 12).
– **Ambiguous wording** of the r**egulations related to terrorism**, vagueness in the definition of laws that threaten the principle of legality, like the use of probationary presumptions against the accused (§ 14).
– Practice of **"selective executions"** of people that Israel *suspects* are terrorists, a practice used, at least in part, as an element of deterrence or punishment. (§ 15).
– **Demolition of property and family homes**, some of whose members were or are considered as suspicious of participating in terrorist activities or in suicide bombings, *with punitive character, at least in part* (§ 16).
– The use of local residents as ***"voluntary human shields"*** by the Israeli Defence Forces (IDF) during military operations, particularly in order to search houses and to facilitate the surrender of people that Israel has considered as terrorist suspects(§ 17).
– The use by Israel of *interrogation methods* that constitute **torture** (§ 18).
– *Serious and unjustifiable restriction on the right to free movement of Palestinians* through the establishment of a **"Seperation Zone"** by means of a fence and, in part, of a wall, beyond the Green Line (§ 19).

3. ECONOMIC, SOCIAL AND CULTURAL RIGHTS COMMITTEE[12]

- **In Israel:**

– ***Different treatment of Jews and Non-Jews*, particularly the Arab and Bedouin communities, in the exercise of economic, social and cultural rights.** *"The excessive emphasis upon the State as a 'Jewish State' encourages discrimination and accords a second-class status to its non-Jewish citizens. This discriminatory attitude is apparent in the continuing lower standard of living of Israeli Arabs as a result, inter alia, of higher unemployment rates, restricted access to and participation in trade unions, lack of access to housing, water, electricity and health care and a lower level of education, despite the State party's efforts to close the gap..."* (§ 16).
– The Israeli Law of Return which "*results in practice in discriminatory treatment against non-Jews, in particular Palestinian refugees*". A restrictive practice regarding the reunification of Palestinian families, adopted for national security reasons(§ 18).
– **Increase in the unemployment rate**, specially significant in the non-Jewish sectors of the population, and over 50% in the occupied territories "*as a result of the closures which have prevented Palestinians from working in Israel*" (§ 20). The persisting inequality in wages of Jews and Arabs in Israel, as well as the severe underrepresentation of the Arab sector in the civil service and universities is also alarming (§ 21).

12. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel. 26/06/2003, E/C.12/1/Add.90.

- **In the Occupied Palestinian Territories:**

– *Deplorable living conditions of the Palestinians in the occupied territories*, who – as a result of the continuing occupation and subsequent measures of closures, extended curfews, roadblocks and security checkpoints – suffer from an infringement on their enjoyment of economic, social and cultural rights enshrined in the Covenant, in particular **access to work, land, water, health care, education and food** (§ 19).
– **Limited access to and distribution and availability of water** for Palestinians in the occupied territories, as a result of inequitable management, extraction and distribution of shared water resources, which are predominantly under Israeli control (§ 25).
– *Home demolitions,* land confiscations and restrictions on residency rights by Israel. Adoption of policies resulting in **substandard housing and living conditions**, including *extreme overcrowding* and lack of services, of Palestinians in East Jerusalem, in particular in the old city. *The continuing practice of expropriation of Palestinian properties and resources for the expansion of Israeli settlements in the occupied territories* (§ 26).

4. COMMITTEE ON THE RIGHTS OF THE CHILD[13]

- **In Israel and in the Occupied Palestinian Territories:**

– *Inequalities in the enjoyment of the economic, social and cultural rights* (i.e. access to education, health care and social services) of Israeli Arabs and other minorities and Palestinian children in the Occupied Palestinian Territories (§ 26).
– Large gap between services provided to Jewish and Israeli *Arab children with disabilities* (§ 42).
– In Israel the investment in and the quality of education in the Israeli Arab sector is significantly lower than in the Jewish sector (§ 54).

- **In the Occupied Palestinian Territories:**

– Difference in the **legal definition of childhood**. In Israel, children are persons under 18 and in the Occupied Palestinian Territories, children are *persons under 16* (§ 24).
– *Detention and interrogation of children* (§ 62)
– Allegations and complaints of **inhuman or degrading practices and of torture and ill-treatment of Palestinian children** by police officers during arrest and interrogation and in places of detention (§ 36).
– Military orders which may allow *prolonged rights, access to legal assistance* and family visits (§ 62).
– Serious deterioration of **the health of children** and of the health **services for children**, especially as a result of the measures imposed by the IDF, including, among others, road closures, curfews and mobility restrictions, and the destruction of Palestinian economic and health infrastructure. Delays and interference in the activities of the medical personnel, the shortages of basic medical supplies and

13. 14 Concluding Observations of the Committee on the Rights of the Child: Israel. 09/10/2002, CRC/C/15/Add.195.

malnutrition in children owing to the disruption of markets and the prohibitively high prices of basic foodstuffs (§ 44).
– *Large-scale demolition of houses and infrastructure in the occupied Palestinian territories, which constitutes a serious violation of the right to an adequate standard of living for children in those territories* (§ 50).
– Impact of *terrorism* on the rights of children in Israel, as well as the impact of *military action* on the rights of children in the Occupied Palestinian Territories and the lack of redress available to child victims of IDF in that territory (§ 58).
– **Serious deterioration of access to the education** of children in the occupied Palestinian territories as a result of the measures imposed by the IDF, including curfews, circulation restrictions and the destruction of school infrastructure (§ 52).

5. COMMITTEE AGAINST TORTURE[14]

- **In Israel and the Occupied Palestinian Territories:**

– *Reports of torture and ill-treatment of Palestinian minors (§ 52).*
– Administrative detention and the continued use of **isolated detention, even in the case of children (§ 52).**
– Few prosecutions started against the law enforcement officials accused of *torture and ill-treatment* (§ 52).
– **Israeli policies of closures and demolition of houses which may amount to cruel, inhuman or degrading treatment or punishment** (§ 52).
– Few prosecutions started against the law enforcement officials accused of *torture and ill-treatment* (§ 52).
– Cases of "**extrajudicial killings**" (§ 52).

6. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN[15]

- **In Israel:**

– Low number and level of representation of women in important posts in the civil service (§ 31).
– Arab Israeli women are in a situation of vulnerability*, discrimination and inequality*, especially obvious regarding *education and health* (§ 35). This inequality is even worse amongst the Bedouin women living in the Negev (§ 39).

- **In the Occupied Palestinian Territories:**

– *Restrictions on the freedom of movement*, especially at Israeli checkpoints, undermining the rights of Palestinian women, including the right of access to healthcare services for **pregnant women** (§ 37).

14. Concluding Observations of the Committee against Torture: Israel, 25/09/2002, A/57/44.
15. Concluding Observation of the CEDAW Committee: Israel CEDAW/C/ISR/CO/3, of 22nd July 2005. The fourth and fifth reports now presented by Israel (CEDAW/C/ISR/4) shall be analysed in the upcoming session of the Committee.

B) Violations identified by the united nations special rapporteurs

"Special procedures" are the extra-conventional mechanisms for the protection of human rights established by the Commission on Human Rights (substituted in 2006 by the Human Rights Council). They are named, amongst other dominations, "Special Rapporteurs". Various special procedures have expressed concern about the human rights situation in Israel and the Occupied Palestinian Territories. Here we shall review the latest special procedure reports concerning the matter in question, namely the discrimination suffered by the Palestinian people.

1. REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS IN ISRAEL AND THE PALESTINIAN TERRITORIES OCCUPIED SINCE 1967, MR. RICHARD FALK[16]

- *"The Special Rapporteur takes particular note of the fact that the military occupation of the Palestinian territory has gone on for more than 40 years and that it possesses characteristics of colonialism and apartheid, as has been observed by the previous Special Rapporteur" (§ 3).*
- "*Dangerous and non-sustainable levels of* ***mental and physical suffering and trauma for the Palestinian people*** *living under occupation are being reached"* (§ 6).
- **Checkpoints** have a negative effect on the access to hospitals and medical facilities in the cities from villages and refugee camps. These adverse conditions cause various ailments, especially in children suffering from malnutrition and various traumas (§ 38).
- All movement is *extremely difficult* due to the combination of checkpoints, roadblocks and permit requirements. These restrictions also make access to Israel nearly impossible, for most Palestinians in the West Bank(§ 38). *""Such restrictions seem excessive, and have been frequently noted, combined with a variety of intimidating and humiliating practices which discourage Palestinian movement in the West Bank..."* (§ 44).
- "*The regime of confinement amounts to* ***collective punishment*** *..."* (§ 44)
- *"The expansion of* ***settlements*** *has been particularly notable in East Jerusalem... The expansion also furthers the Israeli policy of making East Jerusalem into a place of majority Jewish residence, and is accompanied by expulsions of Palestinians. In addition, the presence of 250,000 Jews living "illegally" in East Jerusalem is being overlooked"* (§ 33).
- *"Palestinian land taken by Israel for settlements, for closed military zones (including almost the entire Jordan Valley), and for Israeli-declared nature preserves now renders 40 per cent of the West Bank inaccessible and unusable for residential, agricultural, commercial or municipal development" (§ 32).*
- **Closures and the "cantonisation" process** of the territory make it *practically impossible* to carry out any gainful economic activity(§ 38).

16. Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories occupied since 1967, Mr. Richard Falk, A/63/326, 25th August 2008.

– *Extremely high unemployment and poverty rates*. The poverty rate for the West Bank and Gaza combined is currently 59 % and food insecurity affects at least 38 per cent of the overall population of the Occupied Palestinian Territory. The **unemployment level in Gaza is the highest in the world: 45 % of the population**. 95 % of the factories in Gaza are now closed due to the siege. The World Bank has suggested that that set of conditions could produce an *"irreversible" economic collapse* (§ 35).

2. REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS IN ISRAEL AND THE PALESTINIAN TERRITORIES OCCUPIED SINCE 1967, MR. JOHN DUGARD[17]

– "*More than 38 per cent of the West Bank consists of* ***settlements, outposts, military areas and Israeli nature reserves that are off limits to Palestinians***. *Settler roads link settlements to each other and to Israel. These roads are largely closed to Palestinian vehicles. (Israel has therefore introduced a system of "****road apartheid****", which was unknown in apartheid South Africa.)" (§ 30).*
– *"...Settlements constitute a form of colonialism... which is contrary to international law..."* (§ 32).
– **Confiscation of Palestinian land to construct roads***: "the road is part of Israel's broader plan to replace territorial contiguity with "transportational contiguity" by artificially connecting Palestinian population centres through an elaborate network of alternate roads and tunnels and creating segregated road networks, one for Palestinians and another for Israeli settlers, in the West Bank" (§ 33).*
– **Physical barriers** preventing Palestinians' movements within the West Bank, with *disastrous consequences for both personal life and the economy*. These hundreds of barriers, consist of manned checkpoints and unmanned locked gates, earth mounds, concrete blocks and ditches. In addition, thousands of temporary checkpoints, known as flying checkpoints, are set up every year by Israeli army patrols on roads throughout the West Bank for periods ranging from half an hour to several hours (§ 34).
– **Limitations and prohibitions on travelling** for Palestinians who need permits to travel to the West Bank and East Jerusalem. *"Checkpoints serve to humiliate Palestinians and create feelings of deep hostility towards Israel. In this respect they resemble the "pass laws" of apartheid South Africa, which required black South Africans to demonstrate permission to travel or reside anywhere in South Africa" (§ 35).*
– **Separation wall constructed on Palestinian territory which has grave consequences on the lives of the Palestinians**. There is a Palestinian zone trapped between the Green Line and the wall. People living there are cut off from places of employment, schools, universities and specialised medical care. Bureau-

17. Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories occupied since 1967, Mr. John Dugard, A/HRC/17, 21st January 2008.

cratic procedures for obtaining these permits are "*humiliating and obstructive*"... Only about 18 % of those who used to work theses land in the closed zone receive permits. The regulation on the **opening and closing of the gates** leading to the closed zone is extremely restrictive: in 2007 only 19 of the 67 gates in the wall were open to Palestinians for use all year round on a daily basis. The IDF humilliate and ill-treat the Palestinians who use these doors. All these hardships experienced by Palestinians living within the closed zone and in the precincts of the wall have already resulted in the *displacement* of some 15,000 persons (§ 36 to 38).

- Demolition of houses: *"Both law and fact show, however, that houses are not demolished in the course of "normal" town planning operations, but are instead demolished in a discriminatory manner to demonstrate the power of the occupier over the occupied"* (§ 41).
- In both East Jerusalem and that part of the West Bank categorised as Area C, **houses and structures may not be built without –extremely hard to get– permits**. Due to this, Palestinians are frequently forced to build homes without permits. *"In East Jerusalem house demolitions are implemented in a discriminatory manner: Arab homes are destroyed but not Jewish houses. In Area C the IDF has demolished or designated for demolition homes, schools, clinics and mosques on the ground that permits have not been obtained"*. The Rapporteur concludes by stating that *"this brings back memories of the practice in apartheid South Africa of destroying black villages (termed "black spots") that were too close to white residents...*(§ 42).
- In short, *"The construction of the wall, the expansion of settlements, the restrictions on freedom of movement, house demolitions and military incursions have had a disastrous impact on the economy, health, education, family life and standard of living of Palestinians in the West Bank... Poverty and unemployment are at their highest levels ever; health and education are undermined by military incursions, the wall and checkpoints; and the social fabric of society is threatened "* (§ 43). Both in Gaza and the West Bank, "***Israel's actions constitute an unlawful collective punishment of the Palestinian people***" (§ 44).
- Detainees, including minors and "*administrative*" detainees (people not convicted for any offence, held for renewable periods of up to six months) are **systematically treated in a degrading and humiliating way.** (§ 45).

3. REPORT OF THE SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, AS A COMPONENT OF THE RIGHT TO AN ADEQUATE STANDARD OF LIVING, MR. MILOON KOTHARIN, MISSION IN THE OCCUPIED PALESTINIAN TERRITORIES[18]

- *The serial destruction of households, property and patrimony is a continuous process in the Occupied Palestinian Territories*. This causes untold suffering to people who have no connection with the actual violence... *Israel favours illegal settlers with generous land allotments, subsidies, impunity for violent criminal*

18. Report of the Special Rapporteur on Adequate Housing, as a component of the right to an adequate standard of living, Mr. Miloon Kothari, Addendum, Visit to the Occupied Palestinian Territories, E/CN.4/2003/5/Add.1, 17th June 2002.

activity, State-sponsored and private financing, and all manner of services at the expense of the indigenous Palestinian host population and international peace and security. Essentially, the institutions, laws and practices that Israel had developed to dispossess the Palestinians (now Israeli citizens) inside its 1948 border (the Green Line) have been applied with comparable effect in the areas occupied since 1967" (§ 7).

- A dominant feature of Israeli occupation is the **confiscation of land and properties belonging privately and collectively to the Palestinians**. As a consequence of these Israeli policies, most of the Palestinian population lives in refugee camps, the old quarters of the city, densely populated villages and slums. (§ 48).
- *Territorial planning regulations established by Israel are discriminatory by nature*. Due to these regulation, the Palestinian population suffers from **acute land shortage**, with the consequence of higher prices, depletion of water resources and a higher population density(§ 17).
- The occupation forces carry out **punitive and violent demolitions of Palestinian** houses for lack of licence and, many times, the punishment is *retroactive* to the establishment or public disclosure of a master plan (§ 18). *The demolitions ordered either for lack of permit or another pretext have a military dimension and a gratuitously cruel nature* (§ 22).
- Violation of the right to housing by the Israeli army through military **bombing**. Often, this bombing has no military objective, but is part of the *implementation of the planned contiguity of the settler colonies by eliminating the indigenous population* (§ 26).
- **The settlements are an obstacle to peace (§ 35). "*The active and sustained implantation* *of Jewish settler colonies serves the geostrategic purpose of acquiring territory and natural resources and limiting the living space of the Palestinian host population*"(§ 39).

4. REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, MR. JEAN ZIEGLER. MISSION TO THE OCCUPIED PALESTINIAN TERRITORIES[19]

- *Already by 2003, more than half of Palestinian households would eat only once per day*. Around 60 per cent of Palestinians were living in acute poverty (75 per cent in Gaza and 50 per cent in the West Bank). **Over 50 per cent of Palestinians were completely dependent on food aid** (p. 3).
- The measures taken by Israel, for alleged *security reasons*, are totally *disproportionate and counterproductive*, as they cause **hunger and malnutrition** amongst the Palestinian population, women and children included, and therefore amount to the collective punishment of the Palestinian population (p. 3).
- The confiscation of land reveals the presence of a covert strategy of "**Bantustanisation**".*"The construction of the security fence/apartheid wall is, in the opinion of many, a specific display of this Bantustanisation, as it divides the Occupied Palestinian Territories into five non-joining territorial areas with-*

19. Report of the Special Rapporteur on the Right to Food, Mr. Jean Ziegler, Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31st October 2003.

out international borders and poses a threat to the future establishment of a viable Palestinian State with a normal economy that could ensure the right to food for its own population" (p. 3).

5. REPORT OF THE SPECIAL RAPPORTEUR ON THE FREEDOM OF RELIGION OR BELIEFS, MS. ASMA JAHANGIR. MISSION TO ISRAEL AND THE OCCUPIED PALESTINIAN TERRITORIES[20]

- The **freedom of movement**, including access to places of worship, is restricted, particularly for Muslims and Palestinian Christians, by means of the present system of permits, checkpoints, curfews, visas and the wall (§ 27). *These restrictions appear to be disproportionate to their aim (security reasons) as well as discriminatory and arbitrary in their application* (§ 33).
- **There is a serious discrimination in the preservation of non-Jewish places of worship**: Israel has many legal provisions to protect holy sites and places of worship, but *this protection only applies to Jewish sites* (§ 37).
- The **indication of religious affiliation** on official identity cards carries a serious risk of abuse or discrimination based on religion or belief. Moreover, the degree of mobility in Jerusalem and in the Occupied Palestinian Territory depends on one's type of identity card (§ 40 to 43).
- In relation to persons deprived of their liberty, their religious rights are not respected. While there are places for prayer and rabbis for Jewish detainees, there are no or few religious representatives for Muslim and Christian detainees (§ 52).
- *Increase in both Israel and the Occupied Palestinian Territories of religious hatred that constitutes incitement to discrimination, hostility or violence (§ 55).*

6. COMBINED REPORT OF THE SPECIAL RAPPORTEURS ON THE SITUATION IN GAZA[21]

- **Independent expert on the question of human rights and extreme poverty: the blockade** is the primary cause of poverty in Gaza (§ 27). Poverty in Gaza is a direct consequence of systematic violations of a wide range of *civil, political, economic, social and cultural rights* against Gazan residents. In particular, their rights to education, food, housing and healthcare have been violated (§ 29).
- **Special Rapporteur on Adequate Housing as a component on the right to an adequate standard of living, and the right to non-discrimination**

20. Report of the Special Rapporteur on the Freedom of Religion or Beliefs, Ms. Asma Jahangir, Addendum, Mission to Israel and the Occupied Palestinian Territory, A/HRC/10/8/Add.2, 12th January 2009.

21. Human Rights Situation in Palestine and other Occupied Arab Territories, Combined report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Representative of the Secretary-General for Children and Armed Conflict, the Special Rapporteur on violence against women, its causes and consequences, the Representative of the Secretary-General on the human rights of internally displaced persons, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, the Special Rapporteur on the right to food, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the right to education and the Independent Expert on the question of human rights and extreme poverty (A/HRC/10/22), 20th March 2009.

in this context: Overcrowding, lack of sanitation and other difficult living conditions have not only been the result of demolitions and destruction of homes in the recent military offensives, but a *permanent urban condition that prevents the people of Gaza from having access to acceptable minimal standards of adequate housing* (§ 37).

- **Special Rapporteur on the right to food**: the violation of the right to food of the Gaza population is *on a large scale* and on a routine basis, not only due to the latest attacks; it is a long-standing tendency (§ 45).
- **Special Rapporteur on the right of everyone to enjoy the highest attainable standard of physical and mental health**: The material damages caused by the recent hostilities, the border closures resulting, the restricted entry of medical supplies and equipment and the denial of access to health care outside the borders of Gaza constitute *grave violations of the right to the health* (§ 63).
- **Special Rapporteur on the right to education**: The destruction of schools and restrictions on the entry of supplies necessary to guarantee access to education, as well as the prolonged deterioration of Gaza educational infrastructure, constitute *violations of the right to education*. (§ 72).
- **Special Rapporteur on violence against women, its causes and consequences**: *the denial of safe access to pregnant women to appropriate health care and hospitals owing to the constant shelling constitutes a grave violation of human rights* (§ 76). Disproportionate effects of house demolitions on women, children and the elderly (§ 78).
- **Representative of the Secretary-General on the human rights of internally displaced persons**: *the occupation policies and practices that Israel has pursued since the 1967 war have infringed on the human rights of Palestinians and resulted in large-scale forced displacement of Palestinians within the Occupied Palestinian Territory*, even before the Israeli military incursion into Gaza that began in December 2008. These displacements are caused by **incursions and military operations**, **evictions and land appropriations**, the expansion of illegal **settlements** and related infrastructure, the illegal construction of the **Wall** in the Occupied Palestinian Territory, the **violence and harassment by the settlers**, **the revocation of residency rights in East Jerusalem**, d**iscriminatory denial of building permits** and **house demolitions**. Forced displacement is also caused by a system of closures and restrictions on the right to freedom of movement through an elaborate regime of permits and checkpoints that *make life unsustainable for many residents of Palestinian enclaves, forcing them to leave* (§ 80).

5. Legislation applicable in Israel and in the Occupied Palestinian Territories

In a **system of apartheid, legislation plays a crucial role**, as it lays down **criteria of segregation and division of the population along racial lines**, or it **limits the practice of certain human rights**.

A) Different groups affected by this legislation

Israeli legislation has different effects on the Palestinian population, depending on which of these three great groups they would be ascribed to:

- Palestinian refugees
- inhabitants of the Occupied Palestinian Territories
- Israeli Palestinians (i.e.: Palestinians with Israeli citizenships).

Legislation applied by the State of Israel to each of the groups is different, depending on the place of residence, and does not reach the entire Palestinian population.

- Within the territory of the **State of Israel** and therefore Palestinians with Israeli citizenship are subject to it. Part of this legislation also affects Palestinian refugees. This is the legislation that prevents them from returning to their places of origin.
- As for the Occupied Palestinian Territories, Gaza and the situation of the West Bank and East Jerusalem, their situations must be distinguished one from one another.
- In **Gaza** no form of Israeli legislation is applied, neither civil nor military.
- In the **West Bank**, different "zones" must be recognised. In the so-called "**zone C**", representing approximately 61% of the territory of the West Bank, Israel has military and civil control as far as construction and territorial planning are concerned. Israeli legislation is applied to a lesser extent in "**zone B**", where Israel has military control and the Palestinian Authority has civil control, and is not applied in "**zone A**", which is under Palestinian Authority control[22]. The lives of Palestinians living in zones B and C of the West Bank are ruled by a series of Military Orders and Regulations, which are issued and usually published by the IDF Military Commander in the West Bank and which, as such, are not subject to review by any civil legal authority. As there are no established rules of procedure in relation to those orders, their content may vary from day to day and from Commander to Commander, because the manner of their implementation is left largely to the criteria of the soldiers. The IDF also apply certain "emergency" regulations inherited from the British Mandate and reviewed by the Israeli authorities as Defence (Emergency) regulations of 1945[23].
- With regard to **East Jerusalem**, this was the commercial and administrative centre of the West Bank until 1967, when it was annexed by Israel. In 1980, a law adopted by the Knesset ("Basic Law: Jerusalem – capital of Israel"), declared that "Jerusalem, complete and united, is the capital of Israel" and "the seat of the President of the State, the Knesset, the Government and the Supreme Court"[24]. At present, East Jerusalem is occupied and controlled by Israel. It must be pointed out that Palestinians in the city of Jerusalem have a status inferior to the Jews.

22. These zones were established in the Oslo Accords (1993), a series of agreements negotiated between the Israeli government and the Palestinian Liberation Organisation, which acted on behalf of the Palestinian population.

23. See: KIRSHBAUM, David, Israeli emergency regulations & the Defense (Emergency) Regulations of 1945, http://www.geocities.com/savepalestinenow/emergencyregs/essays/emergencyregsessay.htm

24. Ministry of Foreign Affairs of Israel, http://www.mfa.gov.il/MFAES/Facts%20About%20Israel/Jerusalem%20-%20la%20Capital%20de%20Israel

Palestinians are not citizens of the eastern part of the city, as Jews are, but they are simply residents[25]. Israeli legislation is applied there.

B) Israeli legislation

The following Israeli legislation is clearly discriminatory, and as a whole, as we shall see, constitutive of a crime of apartheid towards the Palestinian people::

- **Law of Return (1950)**. Grants every Jew, wherever he may be, the right to come ("to return") to Israel as an *oleh* (a Jew immigrating to Israel) and become an Israeli citizen. By this law, Non-Jews are not eligible, regardless of birth, ancestry or other factors. The fact that Jews can "return", unlike the Palestinians who left the zone during the 1948 war, is clearly discriminatory.
- **Nationality Law (1952)**. While specifically not stating so, it discriminates against native Palestinians and states that Palestinian refugees are excluded from the right to citizenship in the State of Israel. So, Jews hold Israeli nationality and citizenship, whereas Palestinian citizens who remain in Israel only have citizenship, implying the deprivation of a series of rights.
- **Citizenship and Entry into Israel Law (2003) Temporary Order 5763 of 31st May 2003, extended to 31st July 2008**. This law introduces restrictions in the granting of residence permits and Israeli citizenship to the spouses of Israeli citizens residing in the Gaza Strip or the West Bank, through family reunification.
- **Absentee Property Law (1950)**. This law established that the properties of Palestinians who had fled from Israel during the 1948 war, or who had been displaced provisionally for reasons of security, remained under the custody of the Custodian of Absentee Property. As a result of this law, many Palestinians lost their properties in Israel.
- **Status Law of Israel (1952)**. This law determines that most of the land of Israel be used exclusively to benefit Jews, through the World Zionist Organisation/Jewish Agency and the Jewish National Fund.
- **Basic Law: Israel Lands (1960)**. This law prohibits the transfer of the ownership of land. Thus, land is administrated for the development of Jews, but cannot be transferred nor can it belong to others.
- **Land Acquisition Law (1953)**. This law retroactively validated Israel's acquisition of lands that had been confiscated from the Palestinians.
- **Planning and Construction Law (1965)**. This law envisaged the future expansion of Jewish communities whilst also limiting and assigning very small spaces to Palestinians, many of which were declared "illegal".
- **Law on Agricultural Settlement** (1967). This law prohibited the Jewish National Fund from subletting land to non-Jews.

C) Military orders

The following legislation is applied only in the Occupied Palestinian Territories and is an example of the many Military Orders which discriminate and violate the rights of the Palestinians, and as a whole, constitute a crime of apartheid:

25. See: MARGALIT, Meir, Discrimination in the heart of the Holy City, The International Peace and Cooperation Center, Jerusalem, 2006.

1. MILITARY ORDERS AFFECTING LEGAL PROCEDURES AND THE DETENTION OF PERSONS

- **Military Order Nº 29 (1967)** concerning the operation of prisons. States that prisoners can be denied access to lawyers at any time and at the discretion of the Israeli Military Commander.
- **Military Order Nº 378 (1970)**. Authorises Military Commanders to establish military courts with prosecutors, magistrates and presidents appointed by the Commander himself. These courts are authorised to diverge from legal rules (with regard to laws of evidence, etc.)

2. MILITARY ORDERS CONCERNING THE OWNERSHIP OF LAND

- **Military Order Nº 58 (1967)**. Grants Israeli military authorities the control of the land of "absentees" (according to the definition of absentee in the Absentee Property Law of 1950).
- **Military Order Nº 59 (1967)**. Assigns military authorities with the "Custody of Government Property", being able to appropriate private lands from individuals or groups by declaring them "Public Lands" or "Lands belonging to the State".
- **Military Order Nº 291 (1968)**. Grants Israeli military authorities the control of all disputes concerning land or water.
- **Military Order Nº 1060 (1983)**. Transfers all pending disputes concerning land from the local Jordanian Courts to the Israeli Military Committee for their judgement.
- **Military Order Nº 321 (1969).** Gives military authorities the right to confiscate Palestinian land in the name of "Public Service" (not defined) and without giving compensation.

3. MILITARY ORDERS CONCERNING FREEDOM OF EXPRESSION

- **Military Order Nº 107.** It concerns the use of textbooks. It sets out a list of 55 books which are not allowed to be taught in schools. This list includes books in Arabic, and history, geography, sociology and philosophy books.
- **Military Order Nº 50 (1967).** Anything published in the West Bank, or imported into the West Bank, must be approved by the Israeli military authorities.
- **Military Order Nº 101 (1967).** Prohibits publications with political content in all of the media.
- **Military Order Nº 1079.** Prohibits the use of material of a political nature in videos and audio.

4. MILITARY ORDERS WHICH CREATE A DIFFERENT LEGAL SYSTEM FOR SETTLERS OF THE OCCUPIED PALESTINIAN TERRITORIES

Military Order Nº 561 (1974). Sets out "Religious Councils" to administer the Jewish settlements in the West Bank.

Military Order Nº 783 (1979). Sets out 5 additional "Religious Council" and Municipal Courts for specific settlements in the West Bank, and states that they are all constituted and operating in accordance with the regulation set out by the Military Area Commander.

Military Order Nº 981 (1982). Establishes Rabbinical Courts in the settlements to resolve matters concerning the personal status of the settlers (divorce, adoption, inheritances etc.)

5. OTHER MILITARY ORDERS OF INTEREST

Military Order Nº 224 (1967). Brings back into force the Emergency Regulations established by the British Mandate Authorities in 1945. These regulations "authorise" military forces to violate a whole series of civil rights under the pretence of an "emergency situation" in the West Bank.

Military Order Nº 92 (1967). Concerns jurisdiction regulating water supplies. This order confers all powers established in Jordanian legislation concerning water and its use to an Israeli official nominated by the Area Commander, who will have total control of all water resources. Any person or entity wishing to install any mechanism used for water extraction (such as pumps, irrigation systems etc.) must request a permit from this Israeli authority, who, once it has been conceded, may cancel it at any moment and for any reason.

Military Order Nº 5. Relates to the closure of the West Bank. It declares the West Bank a closed military area, with its entrances and exits controlled according to the conditions stipulated by the military forces.

Military Order Nº 537 (1974). Relates to Municipal Legislation. It gives ample powers to the Area Commander over municipal boundaries and services, their planning and those who execute and supervise them. It gives the Area Commander the power to dismiss mayors who have been democratically elected.

Military Order Nº 297. It establishes a system of identity cards, which are required for undertaking any commercial transaction. It gives the military authorities the right to confiscate them for any reason.

6. Conclusion: Is there really apartheid in Israel and in the Occupied Palestinian Territories?

Having reached this point and as a result of our analysis, we can affirm that the discrimination to which Israel is submitting the people of Palestine constitutes a *crime of apartheid*.

The situation of the Palestinian people is similar to that of the South African, with some added characteristics which also adjust to those established in the Convention on Apartheid. For this reason, we will make a comparison between the contents of Article II of the Convention and the laws and practices of Israel which we have analysed.

Article II of the Convention on Apartheid establishes the following:

> *""For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:*

A ***Denial to a member or members of a racial group or groups the right to life and liberty of person:***

I ***By murder of members of a racial group or groups;***

Through "**selective killings**" – which actually constitute extrajudicial executions – the IDF eliminates Palestinian activists, with the aim of suffocating any any possible uprising. These killings, which are usually carried out in response to attacks against Israel carried out by Palestinian groups, affect not only the "targets", but also many other people, such as family members or persons who at the time were nearby. Hundreds of Palestinians have met their death in these precise strikes by Israeli elite commandos and helicopters.

II ***By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;***

The restrictions on the **freedom of movement**, through roadblocks, closure of roads or physical barriers such as the Wall, inflict physical and mental harm on the people living in the Occupied Palestinian Territories in many different ways. They prejudice those people who must leave the Occupied Territories to receive medical treatment or pregnant women who need to get to a hospital to give birth. Many times they do not make it and are forced to give birth without the necessary medical attention. They lead to malnutrition and illnesses arising from insufficient food intake by preventing the entrance of food aid to the Occupied Palestinian Territories through the blockades. They prevent farmers from getting to their own lands, when they happen to be located between the Green Line and the Wall, thus affecting their right to health and food. The controls to which the Palestinians are subjected when they must cross these physical barriers are humiliating and degrading.

The demolition of **houses and infrastructures** also inflicts physical and mental

harm on the people living in the Occupied Palestinian Territories, as it sentences entire families to live in poverty and overcrowded situations, or without the minimum services necessary to lead a normal life (schools, medical centres, electricity, etc.). All these actions constitute collective punishment and psychological **torture**.

The **ill-treatment and interrogation methods constituting torture** to which Palestinians – adults and children – are subjected to when they are detained and imprisoned.

III ***By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;***

The practice of "***administrative detentions***", without charges or trials, which can be prolonged for extended periods of time and which affects not only adults but also under-18s.

B ***Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;***

The **closure of the Gaza border crossing**s, with the consequent restrictions on the movement of persons and food, and the damage caused to the food production infrastructure, effectively sentences the population to **hunger and malnutrition**.

C ***Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognised trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;***

The **entire Israeli legal system** establishes an e**normous gap between Jews and Palestinian Arabs**, since all legislation is designed to favour Jews and keep Palestinian Arabs in a situation of inferiority. This can be clearly seen through certain examples.

Several Israeli laws prevent Palestinian refugees from returning and recovering their land and enjoying a nationality, thus violating their right to enter and leave the country, the freedom of movement and residency and the right to a nationality. In Israel, the unequal distribution of resources for education and cultural activities for Palestinians, the restrictions on leaving and returning to Israel and the Occupied Palestinian Territories, the restrictions on family reunification for those living in the Occupied Palestinian Territories or the lack of representation in the civil service are violations of all the rights stipulated in this subsection c.

The Palestinians who reside in the Occupied Palestinian Territories and work in Israel have enormous difficulties in joining Israeli trade unions or forming their own trade unions in Israel. This violates their right to work and to form recognised trade unions. A further violation of rights is the demolition of houses and the prohibition to

build new ones in the Occupied Palestinian Territories, and so are all the restrictions on the freedom of opinion and expression, prohibiting the organisation of meetings or the publication and dissemination of ideas.

D ***Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;***

The Jewish and Palestinian populations are clearly separated and are allocated different physical spaces, with varying levels and quality of infrastructure, services and access to resources. In Israel, Palestinians live in crowded spaces, unable and unauthorised to refurbish or construct houses, living in villages which often are not even officially recognised. Jews occupy larger expanses of land, guaranteed by Jewish public or government-managed agencies (Jewish National Fund, Israel Land Administration), which ensure that the best land goes to this segment of the population. Another issue is that the Occupied Palestinian Territories are dominated by Jewish settlements, "islands" interrupting the continuity of the territory, where settlers enjoy the protection of Israeli authorities, with their own laws and where they enjoy scarce resources such as water, to the detriment of the Palestinian population. To all this we must add the prohibition for Palestinians to travel to outposts, military zones and natural reserves. These settlements are linked by roads for the exclusive by Jews. Palestinians have their movement restricted by the need for Israeli permits to undertake any type of journey. The expropriation of Palestinian property has been happening since the creation of the State of Israel, and is backed up by a series of laws and Military Orders which have stripped Palestinians of almost all their land.

E ***Exploitation of labour of the members of a racial group or groups, in particular by submitting them to forced labour;***

Although Israel has no exploitation system of labour of the Palestinian population, its policies have restructured the Palestinian workforce by suppressing Palestinian industry, establishing restrictions on exports and other measures that have increased the Occupied Palestinian Territories' dependence on Israel and –now more than ever before– on international aid. Until the mid-1980s, Israel intensively used Palestinian labour for work connected to agriculture and construction, with appalling employment conditions and without any of the benefits enjoyed by Jewish workers. But since 1993, the number of Palestinian workers in Israel has plummeted from over 100,000 to just a few hundred. And since the construction of the wall, there are hardly any Palestinian workers employed in Israel. Since Hamas won the January 2006 elections in the Gaza Strip, no workers from this area whatsoever have access to Israel.[26].

F ***Persecution of organisations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.***

26. See: Human Sciences Research Council, Occupation, Colonialism, Apartheid?, May 2009, Cape Town, South Africa, p. 268.

Israel persecutes and imposes restrictions on the people who oppose this regime of segregation, who condemn the violations of human rights by the government or who criticise the actions of the IDF. It also suppresses all demonstrations in the Occupied Palestinian Territories, both by organisations and individuals, against the Wall or the discriminatory administration of land, water and infrastructures.

Having seen all these violations suffered by the Palestinian people on a day-to-day basis, we can clearly state that they are victims of a crime of apartheid.

It must also be mentioned that this crime of apartheid is not of recent execution. More than sixty years have passed since the start of discriminatory measures against the Palestinian people and they have become, gradually, a systematic practice that implies a domination of one ethnic group over another, through laws, policies and practices. It is obvious that if such a situation has been going on for more than sixty years, it is because Israel has benefited from the (active or passive) complicity of the International community. In this aspect, the institutional silence of the European Union and its member States is particularly remarkable. Silence not only in view of the serious violations of international humanitarian law and of international human rights law that were committed during the bombing of the Gaza Strip, in December 2008 and January 2009 (made evident in the sense of the votes on the Goldstone Report before the Human Rights Council and the General Assembly of the United Nations), but also in the silence and hypocrisy that impedes the European Union and its member states from denouncing this crime of apartheid and that leads them to consent the perpetuation of a policy that denies the respect of the principle of human dignity to the Palestinian people.

PART II

First International Session of the Russell Tribunal on Palestine

EXECUTIVE SUMMARY OF EXPERT TESTIMONIES

A) Breaches and Violations of International Law by Israel in the Occupied Palestinian Territory

HOCINE OUAZRAF

Researcher, Belgium, Expert for the RToP

The expert pointed out that since 1948 Israel has persistently violated all peremptory norms of international law and has continually demonstrated an attitude of flagrant contempt for its international obligations. He then highlighted each of the areas in which he considered these violations had taken place. First of all, the respect for the principle of the Palestinian people's right to self-determination. Given that this principle is mentioned in the text of Article 1 of the UN Charter, it is considered a cornerstone of international law.

Secondly, the expert stated that a direct corollary of the right of the Palestinian people to self-determination is the prohibition of the acquisition of territory by force. Thus, the denial of the Palestinian people's right to self-determination by the State of Israel also breaches the principle of the inadmissibility of the acquisition of territory by force. Since June 1967, after the Six-Day War, the Israeli armed forces occupied all the territories constituting historic Palestine. On 22 November 1967, the United Nations Security Council adopted resolution 242, which restates the principle of the inadmissibility of the acquisition of territory by force, sets forth the principles that must be fulfilled to bring about a just peace in the Middle East, and calls for "*the withdrawal of Israel armed forces from territories occupied in the recent conflict*". Israel has to date violated and continues to violate more than 30 Security Council resolutions.

Furthermore, the development and expansion of settlements constitute an ongoing and illegal impediment to the effective exercise by the Palestinians of their right to self-determination. The colonisation of the Palestinian territories occupied since 1967 has been a mainstay of the policy of all Israeli Governments irrespective of their political orientation and persuasion. This policy of establishing settlements in Palestinian territory violates the right of the Palestinian people to sovereignty over their natural resources.

The expert focused then on the question of Jerusalem, for him it seems to be one of the thorniest issues in the struggle of the Palestinian people to recover their right to self-determination. The city of Jerusalem originally enjoyed a separate international status defined as follows by UNGA resolution 181 of 29 November 1947:

The international status of Jerusalem established by UNGA resolution was undermined by the policy of territorial expansion pursued by the State of Israel that decided to extend its sovereignty by decree (Decree 2064 of 28 June 1967) to the entire territory of Jerusalem after the Six-Day War in June 1967.

As part of their policy of aggression against the Palestinian people, the Israeli authorities have treated the Gaza Strip as "a hostile entity" for more than three years and subjected it to an economic and humanitarian blockade. Gaza Strip is still an occupied

territory in terms of the provisions of international humanitarian law and international human rights law. Israel remains an occupying power and the inhabitants of the Gaza Strip continue to enjoy the protection of the Fourth Convention. All acts undertaken by the State of Israel in the Gaza Strip must therefore be assessed in the light of the provisions of these two branches of international law. It follows that the blockade and siege of the Gaza Strip in force for more than three years breach the international obligations of the State of Israel. This policy has diverse (economic, health, nutrition) negative consequences for the civil population. Moreover, during operation "Cast Lead" the State of Israel deliberately targeted the civilian population of the Gaza Strip. This fact has been confirmed by the conclusions of the Goldstone Report and the testimonies collected by the Israeli organisation "Breaking the Silence".

Regarding the **construction of the Wall in the occupied West Bank the expert emphasised that** the International Court of Justice issued an unequivocal opinion:

- The construction of the wall by Israel, the occupying power in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime are in violation of the international obligations incumbent upon it;
- Israel must put an end to the violation of its international obligations stemming from the construction of the Wall. It must cease construction of the Wall and dismantle those parts of the Wall situated within the Occupied Palestinian Territory;
- It must provide reparations for the damage caused by the construction of the Wall;
- States are under an obligation not to recognize the illegal situation resulting from the construction of the Wall and not to render aid or assistance in maintaining the situation created by such construction.

To conclude the expert focused on the European Union-Israel Association Agreement, in his opinion some clauses of the Agreement seem to have been overlooked by the State of Israel, primarily the principles set forth in Article 2 related to human rights and democratic principles and Article 83 dealing with the territorial scope of the agreement limiting Israel to the borders as established in 1967.

B) The right of the Palestinian People to Self-determination

Madjid Benchikh

Emeritus professor, Cergy-Pontoise University (Paris Val d'Oise) former dean of the Algiers Law Faculty

The expert witness reiterated that the right of the Palestinian people to self-determination has been explicitly recognised by the international community under various resolutions from the United Nations General Assembly and the Security Council, and even by Israel itself on the basis of the Oslo Accords (1993-1995). By the same token, the EU has also recognised the right of the Palestinian people to self-determination and to establish itself as an independent State with the borders as configured in 1967 having its capital in East Jerusalem. The EU has issued several resolutions and declarations condemning Israeli acts of aggression committed against the Palestinian people. Nevertheless, both the EU and its Member States are in violation of EU and United Nations obligations regarding the right to self-determination.

Under the **framework of the United Nations**, to what degree can responsibility be placed with the EU? Two European States are permanent members of the Secu-

rity Council: The United Kingdom of Great Britain and Northern Ireland and France, both of whom have the powers to request, under the framework of Chapter VII of The United Nations Charter, which permits the debate and adoption of measures against Israel, the inclusion of items on the Security Council agenda; Israel's violations, the endangering of peace in the region and the breaches of the Palestinian people's right to self-determination. This has never happened: all Security Council resolutions concerning the situation in Palestine have been adopted outside the framework of Chapter VII and are, as such not mandatory, as is the case with resolutions adopted by the General Assembly.

The expert explained that in the case of international relations based on the principle of good faith, there must be consequences when discrepancies exist between awareness of violation and the resulting action. This principle of good faith is enshrined in The United Nations Charter: it is not possible to condemn violations on the one hand and then fail to include them on the agenda of the Security Council. Consistency between deed and word in order to further the development of international relations is a Principle of Law.

Under the **framework of the EU itself**, we can observe that the European Parliament and the Council of Ministers, as well as the Council of the European Union have adopted resolutions condemning Israeli policies against the Palestinian people. Since 1980, the EU has requested that the exercise of the right to self-determination become reality by the creation of a Palestinian State. However, the EU has failed to adopt any specific policy in favour of the creation of this Palestinian State, nor has it imposed sanctions on Israel. Moreover, the EU has acted in violation of the principle of self-determination by refusing the formation of a national unity government between Hamas and the PLO following the legislative elections of the Palestinian Council and has in fact acted in a discriminatory manner by demanding, among other matters, that Hamas renounce violence without demanding any similar counterpart measure from Israel. Neither the European Union itself nor as a member of the Quartet, nor by way of France or Great Britain as permanent members of the Security Council, have sanctions been adopted against acts of aggression committed by Israel against the Palestinian people.

The expert concluded by stating that, for practically the entire EU and the principal powers within The United Nations, including the United States, the safety of Israel, as defined by Israel itself, takes precedence over the foundations of The United Nations Charter and is placed above the rules of international Law. This is a way of making the Palestinian people pay for crimes they have not committed.

In response to the question from the Panel as to whether it is possible to establish a dissenting opinion in order to strengthen The General Assembly of The United Nations resolutions, the expert responded that this was possible. UNGA Resolution 377 (V) of November 3, 1950, titled Uniting for Peace makes provision for by-passing a deadlock of the Security Council when peace is threatened and it becomes inactive as a result of a veto by one of its permanent members. This resolution has not been used for a long time because the permanent members of the Security Council do not wish to waive their prerogative to veto. The ideal situation would be that the powers which defend the right to self-determination include the exercise of the Palestinian people's right to self-determination on international organisations' agendas.

C) Jerusalem and the European Union

Ghada Karmi

Expert, author and physician, Palestine, expert for the RToP

This expert discussed the ongoing, strong and healthy relationship tha exists between Israel and the European Union in the areas of trade and research and development despite the EU's continued affirmation that its partner's actions in East Jerusalem are illegal and unacceptable. Israel annexed East Jerusalem in 1967 and since then it has engaged in policies of political and physical colonisation through firstly, the eviction of the Palestinians from the city, by house demolition, restriction on residency rights and discriminatory municipal services. Simultaneously Israel has increased the number of Jewish settlements there and declared the city to be Israel's capital. Israel has pursued aims of demographic change and discriminatory archaeological exploration in order to erase the Arab identity of Jerusalem and replace it with an increasingly Jewish one. Lastly, Israel has physically separated the Palestinians from Jerusalem, a former central part of the local society through the expropriation of lands adjoining the West Bank with holy city, the erection of the separation wall and through the restriction on Palestinian movement in and out of Jerusalem.

The EU's formal voice on these actions is unambiguously clear; the capture and continued colonisation of Jerusalem by the Israelis should be condemned, house demolitions are illegal under international law, the settlements are obstructing peacemaking opportunities and the creation of a two state solution with Jerusalem as the capital of the two states should be the objective. However, EU actions are contradictory to this stance; European reports representing a reproachful view go unpublished or fail to result in punitive action or sanctions. Even the damage inflicted upon European funded infrastructures in Palestine at the hand of Israel goes unaccounted for.

The expert here further characterized EU policy on Jerusalem as hypocritical based not only on its lack of proper castigation but on its maintained favourable relations with Israel through the EU-Israel Association Agreement (AA), which eases tariffs and cooperation. Israel and EU also maintain close ties in scientific cooperation and Israel enjoys generous access to European research funds and facilities to the point that Israel has been included in the European Research Area and benefits from close collaboration with universities and research institutes within the EU, despite acknowledgement that many ties exist with Israeli firms located in the illegal settlements.

D) Settlements and the plundering of natural resources

James Phillips

Lawyer, expert for the RToP

The expert began by stating that Israel acts as a democracy only where the Jews are concerned and that the settlements are one of the main obstacles to achieving lasting peace. In the immediate aftermath of the war of 1967, when the building of settlements began, was the first time that Israel could have engaged in a peaceful exchange of territories but failed to do so. Riding the wave of victorious sentiment having won the war, the Israelis began establishing settlements in The Gaza Strip and in The West Bank, in violation of the rule of international humanitarian law, which prohibits the

transfer of civilians from the occupying forces to the occupied territories. At this point, Israel carried out a policy of outright ethnic cleansing. After the forced deportations, all evidence of the presence of Palestinians was immediately wiped away and any remains of razed towns were hidden. Hundreds of thousands of pine trees were planted to eliminate any evidence of what had taken place.

The belligerent occupation by the colonists is awarded preferential tax treatment, good schools, etc. The occupation is a lucrative source of income for Israel: for every dollar generated by the occupation and export of raw materials from the OPT, 75% goes to Israel.

The expert discussed how the settlements are distributed in such a way as to prevent the Palestinians from ever establishing a continuous State. Moreover, the colonists' control of water sources would mean that a future Palestinian State would not be viable due to the lack of access to water.

In conclusion, the expert emphasised that what the Israeli authorities are pursuing is actually worse than apartheid and goes much further than apartheid. Their aim is to remove the Palestinians, fracture the Palestinian people and destroy them: "This is a form of slow genocide and not just apartheid".

E) The European Union and the military cooperation with Israel

Patrice Bouveret

President of the Armaments Observatory, expert for the RToP

The expert discussed the arms trade between the EU and Israel and explained that even though the sale of arms to Israel by the EU represents just 5% of overall arms sales, in comparison with the United States of America, where the figure is 90%, the trend is on the increase.

Currently, there is no regulation to control the sale and production of arms. The only data available concerning this issue is financial data and it does not specify the kind of weapons the information refers to. In order to do this, we must first establish a precise list of materials exported by the EU, in this case, to Israel.

The expert referred to the criteria established under the EU's Common Position on Arms Exports and the need to make public a detailed list of materials exported to Israel, in order to ascertain whether it meets the criteria or not. This list would enable for a more precise inventory of the EU Member States military contribution to the Israeli army and the consequent degree of responsibility in human rights violations committed by the Israeli army.

F) The Gaza blockade and Operation 'Cast Lead' in Gaza. Some health-related material relevant to Fourth Geneva Convention violations

Dr. Derek Summerfield

Honorary senior lecturer at London's Institute of Psychiatry, expert for the RToP

This expert focussed on the consequences of Operation "Cast Lead" on the health of the Gaza population and the violations of the Fourth Geneva Convention (August 12, 1949) relative to the Protection of Civilian Persons in Time of War.

Article 55 of the Convention recognises the duty of the occupying power of ensuring the food and medical supplies of the population and to import them when the resourc-

es of the occupied territory are insufficient. Summerfield pointed out that it was not necessary to enact new laws but to comply with those that already exist.

Even as early as 2003, The United Nations Special Rapporteur on The Right to Food, Jean Ziegler stated that Gaza was a "catastrophe" and that over half the households ate only one meal per day. In 2006 John Dugard, Special Rapporteur on human rights conditions in the Occupied Palestinian Territories since 1967 stated that Gaza was a prison and Israel appears to have thrown away the key. As a result of the blockade by Israel only a small part of the food aid destined for Gaza reaches the population.

The expert described how attacks against the civilian population are referred to as collateral damage by the Israeli authorities. He stated in no uncertain terms that hunger was employed by Israel as a weapon of war.

He quoted the words of Dov Weisglass, advisor to Israeli Prime Minister Ehud Olmert: "The idea is to put the Palestinians on a diet, but not to make them die of hunger", and also quoted Ehud Olmert as saying "we will not let the residents of Gaza live a comfortable and pleasant life"

At present, 20% of children under the age of five suffer from malnutrition and the number of children who suffer from hunger has doubled in recent years. 9.3% suffer extreme malnutrition.

Summerfield denounced the systematic use of torture in Israel during interrogations of men and children and the complicity of doctors with this practice which has never been investigated nor punished. Israeli doctors must examine prisoners before, during and after interrogations and document cases of torture. However they fail to comply with this obligation. The Israeli Medical Association is an accomplice in this system in violation of the Declaration of Tokyo of the World Medical Association which forbids doctors to participate directly or indirectly in torture and reiterates their duty to question such practices. It was stated that after Operation Cast Lead unusual wounds were detected among the Palestinian population. This was due to the fact that Israel used Gaza as a testing ground to try out new weapons. The EU has an obligation to speak out about these matters but it has not done so.

G) The Compliance by the European Union of its International Obligations in connection with the Construction by Israel of the Wall in Occupied Palestinian Territories

François Dubuisson

Law professor at the Universite Libre de Bruxelles, Belgium, RTP expert

The expert in this case explained the obligation placed upon the EU Member States due to the ruling of illegality of the wall built by Israel in the OTs by the Opinion of the ICJ of 9 July 2004 and of the reflections in the United Nations General Assembly resolution ES 10/15. The obligation of the EU Member States can be understood through three facets of responsibility, firstly, Member States are obliged not to recognize the unlawful situation resulting from the construction of the wall, such as the transfer of territory due to its construction and not to aid or assist in maintaining the situation, such as when the EU may be involved in the financing of the wall. Secondly, Member States are obliged to ensure compliance by Israel with international humanitarian law and end restrictions which exist on allowing the Palestinians people to exercise their

right to self-determination. Lastly, there is an obligation to consider what action is necessary to put an end to the unlawful situation resulting from the construction of the wall. Such obligations can therefore, be understood as passive, such as non-recognition or active, seeking to end the unlawful situation. The expert then reviewed to what extent EU members have fulfilled these obligations.

EU Member States have repeatedly condemned the construction of the wall and therefore, have fulfilled their passive obligation of non-recognition. The expert also concluded that there are no grounds to consider that the EU and its Member States have failed the obligation not to render assistance in maintaining the situation. Regarding active responsibility under the ICJ rulings the EU has failed to take measures to encourage Israel's compliance with international law and the AA and to ensure respect for International Humanitarian Law and to promote the self-determination of the Palestinian people. What is exactly demanded upon states is not specified in the ICJ conclusions; however, it can be reasonably inferred that the fulfilment of such obligations has not occurred. The EU as member of the Quartet promoted a peace process which does not require Israel to immediately halt the construction of the wall. Furthermore, the expert explained that there exists the opportunity to suspend the AA under Article 2 of the protection of human rights; not only was this not done but there have been additional advantages awarded to Israel under an upgrade agreement. The argument for not breaking the AA is to maintain the capacity to negotiate with Israel, however no signs of this or any evidence of what this may entail has been seen.

A) BREACHES AND VIOLATIONS OF INTERNATIONAL LAW BY ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORY

Since 1948 Israel has persistently violated all peremptory norms of international law and has continually demonstrated an attitude of flagrant contempt for its international obligations.

1. Respect for the principle of the Palestinian people's right to self-determination

This right, won by colonised peoples through a hard-fought struggle, is the cornerstone of international law. For 60 years Israel has prevented the Palestinian people from exercising the right of self-determination, although the right of peoples to self-determination is a principle enshrined in Article 1, paragraph 2, of the UN Charter, which states that one of the purposes of the United Nations is: "**To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...".**

United Nations General Assembly (hereinafter UNGA) resolution 1514 (XV) of 14 December 1960 on the granting of independence to colonial countries and peoples draws attention to this obligation and declares that the **subjection of peoples to alien subjugation, domination and exploitation** is prohibited**.**

The right of peoples to self-determination is also reaffirmed as an inalienable principle in the *Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States* of 24 October 1970 (UNGA resolution 2625 (XXV).

In its resolution 2649 of 30 November 1970, the UNGA recognises the applicability of resolution 1514 (XV) to the Palestinian case by noting that the Palestinians are a people under "**colonial and alien domination**" and are thus entitled to benefit from the principles set forth in resolution 1514 (XV). It "condemns those Governments that deny the right to self-determination of peoples recognized as being entitled to it, especially of the peoples of southern Africa **and Palestine**".

More recently, the International Court of Justice, in the Advisory Opinion concerning the **Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory***,* stated that Israel has breached the right of the Palestinian people to self-determination**.** Furthermore, it affirms that the right of peoples to self-determination has acquired an *erga omnes* character.

It also notes that, pursuant to Article 1, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the States parties to the two Covenants are required to promote the realisation of the right to self-determination.

It thus reaffirms the obligations incumbent on the State of Israel, which is bound by a number of human rights treaties notwithstanding the fact that the State of Israel appears to dispute their applicability to the Palestinian territories on the ground that the international instruments in question afford protection only in peacetime and not in time of war. This argument was rebutted by the Court, which firmly concludes that human rights treaties are applicable, in addition, to international humanitarian law. The State of Israel is therefore bound to fulfil its human rights obligations in the Occupied Palestinian Territory under the instruments that it has ratified. This position was endorsed by the United Nations Human Rights Committee, which stated that the provisions of both Covenants were applicable to the inhabitants of the Occupied PalestinianTerritory.

A direct corollary of the right of the Palestinian people to self-determination is the prohibition of the acquisition of territory by force. Thus, the denial of the Palestinian people's right to self-determination by the State of Israel also breaches the principle of the inadmissibility of the acquisition of territory by force, as stated unequivocally in Article 2, paragraph 4, of the UN Charter: **"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."**

In June 1967, after the Six-Day War, the Israeli armed forces occupied all the territories constituting historic Palestine. Today, the State of Israel still occupies the West Bank, the Gaza Strip and East Jerusalem. On 22 November 1967, the United Nations Security Council (hereinafter UNSC) adopted resolution 242, which restates the principle of the inadmissibility of the acquisition of territory by force, sets forth the principles that must be fulfilled to bring about a just peace in the Middle East, and calls for "**the withdrawal of Israel armed forces from territories occupied in the recent conflict**". Israel is bound to implement Security Council resolutions by Article 25 of the United Nations Charter, which requires Member States "to accept and carry out the decisions of the Security Council". Israel has to date violated and continues to violate more than 30 Security Council resolutions.

The relationship between the two principles (self-determination and the inadmissibility of the acquisition of territory by force) is clearly discernible in UNGA resolution 31/20 of 24 November 1976, which considers that the evacuation of the territory occupied by Israel in 1967 is a prerequisite for the exercise of the right of the Palestinian people to self-determination.

Furthermore, the GA recognises the "right of resistance" of peoples under colonial rule with a view to recovering their legitimate rights. This explicit recognition of the "right to resistance" may be clearly inferred from resolution 2649 of 30 November 1970, in which the General Assembly:

> "1. Affirms the legitimacy of the struggle of peoples under colonial and alien domination recognized as being entitled to the right of self-determination to restore to themselves that right by any means at their disposal;
> 2. Recognizes the right of peoples under colonial and alien domination in the legitimate exercise of their right to self-determination to seek and receive all kinds of moral and material assistance, in accordance with the resolutions of the United Nations and the spirit of the Charter of the United Nations."

Moreover, as noted earlier, the aforementioned resolution contains a direct reference to the Palestinian case.

The legitimacy of the right to resistance is confirmed in Article 1, paragraph 4, of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (hereinafter Protocol I), which stipulates that:

> "The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

2. Settlements and the plundering of natural resources

The development and expansion of settlements constitute an ongoing and illegal impediment to the effective exercise by the Palestinians of their right to self-determination. Since 1967 Israel has been pursuing an unrelenting policy of colonisation of Palestinian territory, with almost 150 settlements in the West Bank and East Jerusalem. More than 38% of the West Bank now consists of settlements, and their number continued to increase even during the periods when the so-called "peace process" was under way. Thus, the number of settlements has increased by 63% since 1993 notwithstanding the launching of the Oslo peace process.

The colonisation of the Palestinian territories occupied since 1967 has been a mainstay of the policy of all Israeli Governments irrespective of their political orientation and persuasion. The pursuit by the Israeli authorities of an intensive colonisation policy in the West Bank and East Jerusalem violates numerous provisions of international law and, in particular, a number of principles of international humanitarian law.

Although Israel disputes the applicability of principles of international humanitarian law to the Palestinian territories, there is no longer any doubt whatsoever that the Fourth Geneva Convention "relative to the Protection of Civilian Persons in Time of War", adopted on 12 August 1949, is applicable to the Occupied Palestinian Territory (hereinafter Fourth Convention). On the one hand, the State of Israel is bound by the Convention, which it ratified on 6 July 1951; on the other hand, Palestine made a unilateral declaration in 1982 in which it undertook to apply the Convention. Israel disputes the applicability of the Fourth Convention on the ground that Palestine is not the territory of a High Contracting Party within the meaning of the Convention. But this position does not stand up to an analysis of the articles concerning the scope of the principles enshrined in the Fourth Convention. Thus, the Palestinians benefit under Article 4 of the Fourth Convention from the protection afforded by the humanitarian instrument, according to which:

> "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

The UNGA and the UNSC have reaffirmed this view on a number of occasions and have consistently and repeatedly called ion Israel to apply the Fourth Convention. For instance, on 5 November 2009 the General Assembly, in resolution 64/10 endorsing the conclusions of the GOLDSTONE report, clearly reiterates this view:

> "the relevant rules and principles of international law, including international humanitarian and human rights law, in particular the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, which is applicable to the Occupied Palestinian Territory, including East Jerusalem."

The same is true of the International Committee of the Red Cross, which has supported and endorsed the positions of the UNSC and the UNGA on several occasions.

It should further be noted that while the State of Israel has ratified the four Geneva Conventions of 1949, it has not ratified Protocol I. It is nonetheless required to comply with its provisions inasmuch as the principles enshrined in the two Protocols form part of customary international law. They must thus be respected by all parties to an armed conflict.

Pursuant to Article 49 (para. 6) of the Fourth Convention, settlements are illegal. They breach the principles set forth in this article, which stipulates that:

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

These practices, which are designed to bring about a drastic change in the demographic status of the Palestinian population, have been repeatedly condemned by the UNSC and the UNGA. For instance, on 8 December 1972 the UNGA issued a reminder of the prohibition of any action that changes the physical character or demographic composition of the occupied Arab territories.

A similar view has been expressed on many occasions by the UNSC. Thus, in resolution 446 (22 March 1979) the Security Council reiterates that the establishment of settlements in the occupied Arab territories has "no legal validity" and calls on Israel, the occupying power, to withdraw from the occupied territories.

Furthermore, the policy of establishing settlements in Palestinian territory violates the right of the Palestinian people to sovereignty over their natural resources. The issue of control over natural resources must be viewed in conjunction with respect for the right to self-determination of the Palestinian people. It constitutes a collective right that is a key component of the right of the Palestinian people to self-determination. Issues relating to sovereignty over natural resources as a direct corollary of the right of peoples to self-determination have given rise to heated debate in the United Nations. In its resolution 3281 (XXIX) of 12 December 1974 (Charter of Economic Rights and Duties of States), the General Assembly reiterates that all forms of occupation and associated appropriation of natural resources are prohibited. It calls for the restitution of such resources and, where appropriate, compensation.

The two components of this resolution (condemnation and compensation) have been endorsed in a number of UNGA resolutions concerning the case of Palestine. For example, paragraph 2 of resolution 3175 of 17 December 1973, referring to the prohibition of the exploitation of resources by an occupying power, reaffirms that "all measures undertaken by Israel to exploit the human and natural resources of the occupied Arab territories are illegal and calls upon Israel to halt such measures forth-

with." The Palestinian people's right to compensation has also been addressed in a number of General Assembly resolutions which call for "full compensation for the exploitation, depletion, loss of and damages to the natural resources of the Palestinian territories".

3. The annexation of East Jerusalem

Jerusalem seems to be one of the thorniest issues in the struggle of the Palestinian people to recover their right to self-determination. The city of Jerusalem originally enjoyed a separate international status defined as follows by UNGA resolution 181 of 29 November 1947:

> "The City of Jerusalem shall be established as a *corpus separatum* under a special international regime and shall be administered by the United Nations. The Trusteeship
> Council shall be designated to discharge the responsibilities of the Administering Authority on behalf of the United Nations."

The international status of Jerusalem established by UNGA resolution 181 was undermined by the policy of territorial expansion pursued by the State of Israel. As early as 1948, Israel seized the eastern part of the city after the first Israeli-Arab war (1948-1949), an act that led to a division of the city, with the new Jewish State occupying the western part of the Holy City. This action was condemned by the UNGA, which reiterates the need for an international regime for the Holy City and states that the Jerusalem area "should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control".

The Israel decision to extend its sovereignty by decree (Decree 2064 of 28 June 1967) to the entire territory of Jerusalem after the Six-Day War in June 1967 was vigorously condemned by the UNSC.

In its resolution 298 (25 September 1971), the UNSC "confirms in the clearest possible terms that all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid".

Notwithstanding the UNSC warnings to the State of Israel to refrain from taking any legislative or administrative action to change the political or physical status of the City of Jerusalem, the Israeli authorities went one step further on 30 July 1980 when they adopted the basic law, turning Jerusalem into the "undivided and reunified capital of the State of Israel". Faced with this situation, the UNSC adopted resolution 478 of 20 August 1978 in which it:

> "2. Affirms that the enactment of the 'basic law' by Israel constitutes a violation of international law (...)
> 5. 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."

Today the State of Israel is pursuing the illegal annexation of East Jerusalem actively and with impunity through its policy of Judaisation, reflected in the process of increased and sustained colonisation, the transfer of the population of Israel to East Jerusalem, the expulsion of Palestinian residents on various pretexts and the destruction of their homes. Day by day, these practices are reducing the prospects of making Jerusalem the capital of two states. The European Union has never recognised the annexation of East Jerusalem by Israel, and its member states have therefore established their accredited diplomatic missions in Tel Aviv.

Since 1967 the UNSC resolutions dealing with the status of Jerusalem have consistently reiterated their condemnation of the annexation by the Israel authorities of the Holy City.

4. The Gaza blockade and operation "Cast Lead"

As part of their policy of aggression against the Palestinian people, the Israeli authorities have treated the Gaza Strip as "a hostile entity" for more than three years and subjected it to an economic and humanitarian blockade. Some clarifications regarding the legal status of the Gaza Strip in terms of the principles of international law should first be provided. The evacuation of the settlers and Israeli military from the Gaza Strip in 2005 was presented by the Israeli political and military leadership as a step that would terminate the occupation of the territory. Thus, former Israeli Prime Minister Ariel SHARON stated before the UNGA on 15 September 2005 that the Gaza Strip was now a free and sovereign territory, so that Israel's obligations vis-à-vis the territory as an occupying power had ceased. However, the key criterion that enables one to determine under international law whether a territory is occupied is the exercise of effective control over the territory, which does not necessarily involve a military presence. It may be asserted without the shadow of a doubt, in the light of a whole series of considerations, that Israel is still an occupying power that exercises effective control over the Gaza Strip. The following list of points may be invoked in support of our conclusion:

a) Israel still controls the six access routes to the Gaza Strip;
b) Israel still controls the Gaza Strip by means of military incursions;
c) Israel has banned the inhabitants from accessing some parts of the Gaza Strip. In these areas, the army has been ordered to fire on anyone failing to respect the ban;
d) Israel still has total control over the Gaza Strip's airspace;
e) Israel still controls the Gaza Strip's territorial waters;
f) Israel controls the Palestinians' civil status records: the status of the inhabitants of the Gaza Strip is determined by the Israeli army.

All these points confirm that the Gaza Strip is still an occupied territory in terms of the provisions of international humanitarian law and international human rights law. Israel remains an occupying power and the inhabitants of the Gaza Strip continue to

enjoy the protection of the Fourth Convention. All acts undertaken by the State of Israel in the Gaza Strip must therefore be assessed in the light of the provisions of these two branches of international law. It follows that the blockade and siege of the Gaza Strip in force for more than three years breach the international obligations of the State of Israel. This practice is comparable in many ways to collective punishment, which is prohibited by Article 33 of the Fourth Convention. Moreover, as an occupying power, Israel is required to do its utmost to prevent the humanitarian crises that the Gaza Strip has been suffering as a result of the blockade. At least, this is what may be inferred from Article 55 of the Fourth Convention.

The blockade of the Gaza Strip has led to all kinds of shortages that are attributable to the actions of the Israeli military leadership. The measures taken by Israel (closure of crossing points, reduction of supplies of fuel and electricity, suspension of banking activity, the food crisis, endemic unemployment, etc.) constitute manifest violations of international human rights law, especially the provisions of the International Covenant on Economic Social and Cultural Rights, such as the right to life (art. 6), the right to adequate food (art. 11), the right to the highest attainable standard of physical and mental health (art. 12), the right to education (art. 13), etc.

Moreover, the blockade of the Gaza Strip has increased the risks of child malnutrition. The rights of children to decent living conditions and to health are among the principles set forth in Article 24 of the Convention on the Rights of the Child, which the State of Israel has ratified.

During the "Cast Lead" military offensive launched against the Gaza Strip from 27 December 2008 to 18 January 2009, which the ICRC bluntly described as the "epicentre of a massive earthquake" on witnessing the vast scale of the human and material devastation wrought by the 22-day operation, Israel deliberately committed violations of the law of armed conflict, starting with the most elementary principle of distinguishing between civilians and combatants. It is a peremptory requirement of international humanitarian law that the parties to a conflict must distinguish between civilians and combatants during military operations. Indiscriminate attacks are prohibited. The GOLDSTONE report notes that the Israeli armed forces targeted the civilian population of the Gaza Strip in flagrant breach of the most elementary rules of international humanitarian law. Attacks against civilians violate the principles set forth in Articles 48 and 51 of Protocol I. The members of the GOLDSTONE Mission had no hesitation in stating that:

> "the Mission finds that the conduct of the Israeli armed forces constitute grave breaches of the Fourth Geneva Convention in respect of wilful killings and wilfully causing great suffering to protected persons and as such give rise to individual criminal responsibility. It also finds that the direct targeting and arbitrary killing of Palestinian civilians is a violation of the right to life."

The Israeli organisation "Breaking the Silence" collected testimony from soldiers who took part in the military operation and who confirm the conclusions of the GOLDSTONE report. They testify to the fact that deliberate attacks were undertaken against Palestinian civilians during Operation "Cast Lead". Moreover, the soldiers involved were submitted to pressure by the Military Rabbinate, which took the form of dehumanisation of the Arabs and depiction of the conflict as a holy war against a demonic enemy.

Another distinction to be respected in any international conflict is that between a military object and a civilian object.

According to the GOLDSTONE report, the Israeli army deliberately targeted civilian objects during the military operations. Such conduct constitutes a violation of the rule of customary international law according to which attacks must be strictly limited to military objects. The aerial bombardments, the navy attacks and the ground incursions resulted in the destruction of civilian homes (no fewer than 21,000 dwellings were destroyed), civilian hospitals and official institutions in breach of the provisions of Article 53 of the Fourth Convention and Article 51 of Protocol I. Judge Richard GOLDSTONE has no hesitation in stating that "acts of illegal and blind destruction that are not justified by necessity constitute war crimes".

– *Refusal to evacuate or to provide assistance to the wounded*

The GOLDSTONE report also notes that the Israeli armed forces systematically refused to evacuate wounded Palestinians and denied them access to ambulances. Yet Article 56 of the Fourth Convention strictly prohibits any form of interference with the work of humanitarian and medical personnel in conflict areas.

– *The use of Palestinian civilians as human shields and the detention of persons in Israel*

The use of Palestinian civilians by Israel as human shields during Operation Cast Lead was condemned by the members of the GOLDSTONE Mission. The Mission's report describes situations in which:

> "Israeli forces coerced Palestinian civilian men at gun point to take part in house searches during the military operations (...).The Mission concludes that this practice amounts to the use of Palestinian civilians as human shields and is therefore prohibited by international humanitarian law. It puts the right to life of the civilians at risk in an arbitrary and unlawful manner and constitutes cruel and inhuman treatment. The use of human shields also is a war crime."

A number of international instruments prohibit the use of non-combatants as human shields. The Fourth Convention, for instance, explicitly prohibits such practices. Article 28 stipulates that: "The presence of a protected person may not be used to render certain points or areas immune from military operations." Protocol I (Article 51, para. 7) uses even more explicit terms to prohibit the use of civilians as human shields.

Furthermore, the Mission notes that during some military operations large numbers of Palestinian civilians were detained, some in the Gaza Strip and others in detention centres in Israel:

> "From the facts gathered, the Mission finds that there were numerous violations of international humanitarian law and human rights law committed in the context of these detentions. Civilians, including women and children, were detained in degrading conditions, deprived of food, water and access to sanitary facilities, and exposed to the elements in January without any shelter. The men were handcuffed, blindfolded and repeatedly made to strip, sometimes naked, at different stages of their detention."

This finding leads it to conclude that:

"the treatment of these civilians constitutes the infliction of a collective penalty on those persons and amounts to measures of intimidation and terror. Such acts are grave breaches of the Geneva Conventions and constitute a war crime."

Most of the Palestinian detainees were incarcerated in Israel, a practice that breaches Article 76 of the Fourth Convention. It should be noted that the same article prohibits the ill-treatment of detainees.

In May 2009 the United Nations Committee against Torture expressed concern about the conditions of detention of Palestinian prisoners in Israeli jails. The Committee noted that some Israel practices violate the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

– *The delivery of humanitarian assistance*

The Mission's report also mentions the difficulties encountered by humanitarian agencies in supplying the civilian Palestinian population with basic necessities and means of subsistence. It notes in this connection that Israel's deliberate restrictions on the passage of humanitarian assistance breached its obligations under the Fourth Convention and, in particular, Article 23 thereof.

– *Closure of border crossings*

Furthermore, all the Gaza Strip's border crossings remained closed during the conflict, so that the inhabitants were unable to flee from the conflict zone. The inhabitants of the Gaza Strip, confined to a territory encompassing only 360 square kilometres, were compelled by the Israeli army to remain in the area and were denied the opportunity to seek safety and shelter from the military operations. According to the Universal Declaration of Human Rights, everyone has the right to leave any country, including his or her own, and to return to his or her country (art. 13, para. 2) and everyone has the right to seek asylum (art. 14, para. 1). The freedom to leave any country, including one's own, is also enshrined in the International Covenant on Civil and Political Rights (art. 12, para. 2). This did not prevent the State of Israel from keeping the Gaza Strip's border crossings closed throughout the conflict.

In the light of all the foregoing points regarding Israeli army practices during Operation "Cast Lead", we may cite, in conclusion, Professor John DUGARD, former United Nations Special Rapporteur on the situation of human rights in the Occupied Palestinian Territory, including East Jerusalem, who notes that:

"It is highly arguable that Israel has violated the most fundamental rules of international humanitarian law, which constitute war crimes in terms of article 147 of the Fourth Geneva Convention and article 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I). These crimes include direct attacks against civilians and civilian objects, and attacks which fail to distinguish between military targets and civilians and civilian objects (articles 48, 51 (4) and 52 (1) of Protocol I); the excessive use of force arising from disproportionate attacks on civilians and civilian objects (articles 51 (4) and 51 (5) of Protocol I); and the spreading of terror among the civilian population (article 33 of the Fourth Geneva Convention and article 51 (2) of Protocol I)."

– *The actions of the State of Israel: crimes against humanity?*

Looking at all the actions undertaken by the Israeli military forces in the Gaza Strip during Operation "Cast Lead", the Fact-Finding Mission led by Judge GOLDSTONE raises the question of whether such acts might constitute crimes against humanity. It presents its comment in the following terms:

> "Finally, the Mission considered whether the series of acts that deprive Palestinians in the Gaza Strip of their means of sustenance, employment, housing and water, that deny their freedom of movement and their right to leave and enter their own country, that limit their access a court of law and an effective remedy, could amount to persecution, a crime against humanity. From the facts available to it, the Mission is of the view that some of the actions of the Government of Israel might justify a competent court finding that crimes against humanity have been committed."

5. The construction of the Wall in the occupied West Bank

At the request of the UNGA, the International Court of Justice issued an opinion on the legality of the Wall under construction in the Occupied Palestinian Territory. In its Advisory Opinion issued on 9 July 2004, the ICJ undertakes a detailed examination of the violations of international law to which I have just referred. Its opinion regarding the illegality of the Wall in the Occupied Palestinian Territory is unequivocal:

- By constructing the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated regime, Israel, the occupying power, has violated the international obligations incumbent upon it;
- Israel must put an end to the violation of its international obligations flowing from the construction of the Wall. It must cease construction of the Wall and dismantle those parts of the Wall situated within the Occupied Palestinian Territory;
- It must provide reparations for the damage caused by the construction of the Wall;
- States are under an obligation not to recognize the illegal situation resulting from the construction of the Wall and not to render aid or assistance in maintaining the situation created by such construction.

In its Opinion, the ICJ states that the construction of the Wall in the Occupied Palestinian Territory "severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force". In addition, it fears that the route of the Wall will prejudge the future frontier between Israel and Palestine. It considers that the "construction of the wall and its associated régime create a '*fait accompli*' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tan-

tamount to *de facto* annexation". It expresses concern about the route of the Wall, which lies beyond the 1967 green line.

Moreover, the construction of the Wall violates international obligations incurred in treaties ratified by Israel. Mention may be made of the following:

- According to the ICJ, "the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention". Such destruction cannot be justified by military necessity or national security;
- The construction of the Wall has imposed major restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory, in violation of Article 12 of the International Covenant on Civil and Political Rights, according to which: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." The restrictions on freedom of movement lead to violations of other rights enjoyed by the Palestinians under Protocol I, such as: the right to health, to employment, to education, to an adequate standard of living, etc. It should be stressed that the restrictions on freedom of movement are applicable not only to the area adjoining the route of the Wall. In the West Bank permanent barriers impede Palestinian's everyday movements. In 2009, there were no fewer than 634 barriers impeding the freedom of movement of Palestinians. Israel argues that the checkpoints are necessary to guarantee its security. But it should be noted that most of the checkpoints are located beyond the green line in the West Bank.

The ICJ also analyses the legal obligations incumbent on third-party states. It emphasises that the construction flagrantly violates obligations flowing from the Fourth Convention and notes that, pursuant to Article 1 of the Convention: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Every state party is required to ensure respect for the Convention, whether or not it is a party to a conflict. It classifies the international obligations violated by Israel through its construction of the Wall as obligations *erga omnes*. 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".

The ICJ further considers that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character".

On 20 July 2004 the General Assembly adopted resolution ES-10/15 in which it demanded compliance by Israel with the Advisory Opinion of the International Court of Justice.

6. The European Union-Israel Association Agreement

It was in the context of the Barcelona process (November 1995), aimed at fostering relations between the European Union and partners countries in the Mediterranean

area, that the European Union-Israel Association Agreement was signed in 1995. On ratification by the Knesset, the national parliaments of member states and the European Parliament, it entered into force in June 2000. The Agreement provides for the gradual liberalisation of trade between Israel and the European Union, especially in agricultural produce and services, and the free movement of capital. Such agreements also seek to encourage cooperation between each partner country and the European Union in the social and cultural fields. However, some clauses of the Agreement seem to have been overlooked by the State of Israel, primarily the principles set forth in Articles 2 and 83 of the Association Agreement.

– *Article 2: the human rights and democratic principles clause*

Article 2 of the Association Agreement states that relations resulting from the partnership shall be based on respect for human rights and democratic principles. Yet one cannot help noting that, while the European Union generally condemns the violations of international law perpetrated by Israel in the Palestinian territories, it draws no legal consequences in terms of the principles set forth in Article 2. The persistent violation of human rights in the Occupied Palestinian Territory constitutes a manifest breach of Article 2 of the Association Agreement. This being the case, the European Union is under an obligation to suspend the EU-Israel Agreement for as long as Israel continues to violate human rights. The possibility of suspending association agreement was raised in 2002 in a resolution before the European Parliament calling for the freezing of the Agreement in response to the manifest violation of Article 2. Moreover, provision has been made for association agreement monitoring procedures. Pursuant to Article 79, the Council of Ministers of the European Union may take appropriate measures in the event of non-respect of association agreements. Far from complying with the European Parliament resolution referred to above or with the monitoring procedures envisaged by the Association Agreement, the European Union is currently considering the possibility of enhancing its partnership with Israel.

– *Article 83: the territorial scope of the Association Agreement*

The territorial scope of the Association Agreement is limited, pursuant to the principles set forth in Article 83, to the State of Israel within its 1967 borders. Yet Israel violates the legal provisions of Article 83 by exporting settlement products bearing Israeli labels to the European Union with a view to benefiting from the trade advantages offered by the Association Agreement, in particular the reduced customs duties imposed on Israeli products entering the territory of the European Union.

B) THE RIGHT OF THE PALESTINIAN PEOPLE TO SELF-DETERMINATION

The right of people to govern themselves, or the right of people to self-determination, has for a long time been recognised as a fundamental principle of international law. Indeed, Article 1 §2 and Article 55 of the United Nations Charter codify this rule while fixing as an aim of the United Nations to develop "peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."

It is therefore pursuant to the Charter that the United Nations General Assembly adopted, on 14 December 1960, resolution 1514 (XV) which stresses that " all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory". This resolution declares that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.... [...] Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"

Resolution 2625 (XXV), adopted by the United Nations General Assembly on 24 October 1970, confirms the "codification" of the "principle of equal rights and self-determination of peoples."

Numerous treaties or resolutions, concluded between states or under the aegis of international organisations, recall and strengthen this rule which thus appears as an essential and even imperative rule, as the International Law Commission underlines. Furthermore, the two 1966 International Covenants relating to civil and political laws and to economic, social and cultural rights recall: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

In the context of this fundamental precept of contemporary international law, the Palestinian people have been struggling to exercise their right to self-determination for a long time, in particular since the partition decided by Resolution 181 of the United Nations General Assembly of 29 November 1947.

It is therefore first of all by its struggles that the Palestinian people insisted on formal recognition by the international Community of its right, and even by Israel from the Oslo Accords in 1993 -1995. But we will see that this recognition is limited or thwarted by numerous obstacles and by violations of international law initiated by Israel to prevent its concretisation in a sovereign state (part 1). But it must be seen that the failure of the Palestinian people to realise their right to self-determination without doubt would not have been assured if several major powers had not chosen to support Israel and to safeguard its impunity. It is advisable on this subject to examine the European Union's share of responsibility (part 2), even if this research does not aim to diminish the decisive role of the

United States of America in violations of international law by Israel, and especially in the impunity of this state.

1. The multiple violations by Israel of the Palestinian people's right to self-determination

Before examining the violations of the Palestinian people's right to self-determination, it is advisable to recall that this right was recognised explicitly for Palestinian people by the United Nations, by numerous states and other international law subjects, and even by Israel under the Oslo Accords, particularly by the Israeli-Palestinian Interim Agreements of 28 September 1995.

1.1. THE RECOGNITION OF THE RIGHT OF THE PALESTINIAN PEOPLE TO SELF-DETERMINATION

The Palestinian people's determined struggle enabled them to extract recognition of their right to self-determination. *This struggle and this result are in line with the line of the contributions which allowed the transformation of international law and the conquests of rights carried out thanks to national freedom movements.*

Several resolutions of the United Nations General Assembly and of other international organisations recognise very clearly the right of the Palestinian people to self-determination. It is not necessary to quote them all; it is sufficient to refer to the proceedings of the Committee on the Exercise of the Inalienable Rights of Palestinian people since 1975 and to recall the most recent resolutions of the General Assembly and of the Security Council.

As on numerous other occasions, the United Nations General Assembly reaffirmed, on 18 December 2009 (A/64/438), "the right of the Palestinian people to self-determination". But the General Assembly also clarified the right to self-determination by underlining the right of this people in an independent state, and the need to respect its territorial unity and the contiguity and integrity of its territory, including East Jerusalem.

The Security Council itself, although slower and more reticent to decide the recognition of the right to the Palestinian people to self-determination, in view of the policies of support for Israel stated by the USA and by certain European permanent members, has nevertheless adopted several resolutions in which it recognises the right of the Palestinian people to a state. Resolution 1850 (2008) adopted on 16 December 2008 is very explicit. The Security Council reiterates "its vision of a region where two democratic States, Israel and Palestine, live side by side in peace within secure and recognized borders". It welcomes "the 9 November 2008 statement from the Quartet "and calls for the obligations arising under the Roadmap and from the Annapolis *agreement* to be respected. It "calls on all States and international organizations to support [...] the Palestinian government that is committed to the Quartet principles and the Arab Peace Initiative and respects the commitments of the Palestinian Liberation Organization". The Security Council affirms that "lasting peace can only be based on an enduring commitment to mutual recognition, freedom from violence, incitement, and terror, and the two-State solution, building upon previous agreements and obligations".

The General Assembly and the United Nations Security Council have therefore on several occasions not only affirmed the right of the Palestinian people to self-determi-

nation, but have also given precise content to this right by asking for the creation and the recognition of an independent Palestinian state with East Jerusalem as its capital, integrity and the *contiguity* of the Palestinian territory on the basis of Resolution 242 of the Security Council and the opening of negotiations with the purpose of realising these rights.

Resolution 242 of 22 November 1967 is based particularly on the Charter of the United Nations, and in particular on Article 2 which prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". This resolution states that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

i) withdrawal of Israeli armed forces from territories occupied during 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 recognised borders free from threats or acts of force."

This resolution is of capital importance for at least two reasons. On the one hand, it prohibits recourse to force and draws the consequences by calling upon Israel to withdraw from the territories occupied during the June 1967 war; on the other hand, it will serve as a basis to determine the territorial base of the Palestinian state, with the exception of arrangements agreed upon by the parties. The right to self-determination has consequently to be exerted on the Palestinian territories in the West Bank including East Jerusalem and the Gaza Strip, as they were configured before the June 1967 war.

It is also noteworthy that the General Assembly and the Security Council have on several occasions affirmed that the town of East Jerusalem is not recognised as a part of the Israeli capital (Resolution A/64/L.24). According to United Nations Resolutions, supported and reiterated by several states and international organisations, East Jerusalem is part of the Palestinian territories on which the Palestinian people have the right to exercise their self-determination. As an example, Resolution 55/50 of 1 December 2000 of the General Assembly and Resolution 478 of the Security Council of 20 August 1980 reject the so-called "Basic Law" on Jerusalem and the proclamation of Jerusalem as the capital of Israel. The Security Council even "called upon those States which had established diplomatic missions in Jerusalem to withdraw such missions..." Twenty years later the above mentioned Resolution 55/50 recalled the obligation of states to comply with Security Council Resolution 478 (1980).

This recognition of the right of the Palestinian people to self-determination and to form a sovereign state within the borders of the territories occupied in 1967, with Jerusalem as capital, is also affirmed by the European Union. We shall see that whatever the positive aspect of this recognition, this organisation does not draw all the political and legal consequences which would make it possible to oblige Israel to respect the Resolutions of the Security Council, of the United Nations General Assembly and the European Union.

1.2. VIOLATIONS BY ISRAEL OF THE RIGHT OF THE PALESTINIAN PEOPLE TO SELF-DETERMINATION

For a long time the state of Israel refused any contact with the Palestinians and denied any representation to the Palestine Liberation Organisation. Despite covert contacts, the success of the secret negotiations in Oslo had to be awaited, and precisely the Israeli Prime Minister's letter dated 9 September 1993, which stated that: "the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people and commence negotiations with the PLO within the Middle East peace process." "But this recognition of the PLO did not clearly express the Palestinian people's right to self-determination.

The Oslo Accords, including obviously the Interim Agreement of 28 September 1995, are as we wrote (French Directory of International Law 1995), very miserly in direct references to the Palestinian people and Palestinian rights. It was only at the insistence of Arafat, and his threat not to sign the Interim Agreement in Washington, that the expression "the Palestine Liberation Organization (hereinafter "the PLO"), the representative of the Palestinian people" was introduced into the Agreement. Certainly, the Interim Agreement is considered as an international agreement. The commitments which are entered into by the parties are those usually undertaken by the subjects of international law. *The Agreement begins with an opening sentence in the purest style of negotiations with a view to realising national liberation*: " The Government of the State of Israel and the Palestine Liberation Organization (hereinafter "the PLO")". Everything occurs as if the Interim Agreement and all that is called the Oslo process were a step in the liberation process, and therefore a step in the implementation of the right of the Palestinian people to self-determination.

Certainly, the setting up of a "Palestinian Authority" prefigures a kind of state and "the Palestinian Executive" with a "President" gives the appearance of a government just as the creation of an elected Palestinian "Council" resembles Parliament. These agreements make it possible to pass through a stage in the exercise of the right to self-determination not only because representative Palestinian institutions are set up but also because these institutions have jurisdiction both on the Palestinian people and on the West Bank and Gaza territories, as they were configured before the occupation of June 1967, Some of the solutions adopted by the Interim Agreement of 1995 (see article 11§2) regarding the territorial jurisdiction of the Authority, integrity and the unity of the territory express a vision in conformity with the usual exercise of the right to self-determination. The provisions of this Agreement on the "legislative" elections of the Council and on the election of the President of the Authority can be interpreted in the same sense, as favouring the exercise of the right to self-determination.

But these agreements do not only express reticence in a terminological sense with regard to the exercise of the Palestinian people's right to self-determination. The violations by Israel, of general international law and of conventional international law, in this case the violations of the Oslo Accords, were already rooted in the clauses of the Interim Agreement of 1995. The continuation of the military occupation, all recourse to force, colonisation and the construction of the wall on the Palestinian Occupied Territories are clearly in breach of general international law rules and of the United Nations Charter.

The difficulties and the obstacles encountered by the Palestinian people to exercise their right to self-determination, connected obviously to the power balance in-

volved on the ground and at an international level, and also inscribed in the provisions of the Interim Agreement. Several clauses express the Israeli refusal to implement the Palestinian people's right to self-determination. Israel never recognised unequivocally and explicitly the right of the Palestinian people to self-determination.

Certain provisions of the Interim Agreement, expressing the Israeli positions, are clearly violations of international law. The recognition of the Palestinian competence in "the Occupied Territories", despite recognised territorial integrity, is undermined in several clauses. The Palestinian Authority can only exert jurisdiction by attribution. Israel continues to exert competence which has not been expressly transferred, thus in breach of the international law of decolonisation accepted by the United Nations. Moreover, the Israeli citizens residing in Palestine do not fall within Palestinian jurisdiction. This recalls the distressing "capitulations" that certain European states imposed on defeated states in the 19th century. This provision is all the more contrary to contemporary international law because it contains the germ of conflict and domination since all the Israeli colonies are not dismantled. From this point of view, by not putting any clear end to colonisation and by not accepting Palestinian jurisdiction over the Israeli residents, Israel violates an essential element of the Palestinian people's right to self-determination by preventing it from availing of all its land and by placing its citizens above Palestinian law. What was embedded in the Interim agreement was unfortunately implemented by Israel by multiplying the authorisations to build and extend settlements on Palestinian territory or by endorsing the settlers' individual initiatives.

The Interim agreement implies, in several articles, that the territorial questions will be settled only in the final definitive status. The Agreement stipulates therefore that there can be "exceptions" to the principle of territorial integrity: which constitutes a refusal to simply agree to restore to the Palestinian people the territories occupied in 1967, in accordance with Security Council Resolutions 242 and 338. This involves not only a violation of the Security Council Resolutions but especially a violation of the fundamental rules of international law prohibiting recourse to force and the acquisition of territories by war (Article 2 of the United Nations Charter.)

Very quickly Israel embarked upon a series of violations of the Interim Agreement thus precluding the implementation of the right to self-determination. This includes for examples unexpected and brutal military incursions into the Palestinian territories, the arrest of Palestinians and in particular of elected personalities. Several Palestinian ministers or delegates have been imprisoned. This also involves various abuses by Israeli forces regarding movement of people, withholding of customs duties, refusing permits to build houses and farms and refusing to allow exports of goods. In short, instead of implementing the Interim Agreement in good faith, in accordance with the United Nations Charter and in the Vienna Convention of 1969 on the Law of Treaties, Israel has been acting to undermine it and violate it, thus ending the self-determination process that it should have set in motion. Israel on the contrary used the limits and the serious deficiencies contained in the Agreement to put an end to it by its actions.

The result is that by its refusal to accept expressly the Palestinian people's right to self-determination, by its rejection of a sovereign Palestinian state as an essential consequence of the exercise of the right to self-determination and by its use of force against the Palestinian people and institutions, in particular against Gaza in December 2008 and January 2009, Israel is deliberately violating international law - which serves as

the basis for the exercise of the right to self-determination - and is in breach of the Oslo Accords, including the Interim Agreement, which constitute the conventional international law governing, for an interim period, relations between the two parties.

Numerous resolutions made by international organisations and opinions of States which have called for recognition and implementation of the Palestinian people's right to self-determination, and in particular for the creation of a sovereign state with East Jerusalem as its capital, have thus failed. The international community appears to be impotent to enforce the most fundamental international laws. Israel, a new state, with a territory, a population and limited natural and financial resources of its own, has an army and sophisticated military equipment that the industrial powers have placed at its disposal in violation of the rules and code of good conduct that they themselves have established. Without any protest on the part of the major powers, Israel can build a nuclear bomb and provide its army and intelligence services with highly sophisticated equipment, including weapons of mass destruction. Israel can violate the most undeniable rules of international law without any fear of sanctions. Despite several acts of aggression and taking of territory by force, against the neighbouring states and against the Palestinian people, despite the non-compliance with the opinion of the International Court of Justice on the construction of the wall on Palestinian territories, despite denouncements by international human rights organisations of torture, arbitrary arrests, bombardment of civilian populations, of extra-judicial killings and of destruction of Palestinian homes, despite the overwhelming findings of the Goldstone report including with regard to war crimes, Israel can bypass the core rules of international law, without any sanction. Israel clearly enjoys impunity which "enables" it to violate international law, without any detrimental consequences for its interests.

The exceptional situation of Israel in the international order is explained by the conditions under which the Jewish people were oppressed in Europe, in particular between the two world wars and during the Nazi period, and by the birth of Zionism, which led to the creation of the Israeli state at the urging of the European powers, the USA and with the agreement of the USSR. As from the moment when, for these reasons, the major powers decided to create the Israeli state, it had to be assured, according to them, that the Jews would not be at risk of a recurrence of any attack or oppression. The security of "the Jewish state", conceived to achieve this objective, is therefore above all international law.

Although globally there are various conceptions of the security and respect of Jewish rights and of the safety of the Israelis and of their state, despite some disputes in particular by the European Union or some of its Member States, it is as if the policies and the measures laid down by the Israeli government have to take precedence over all other legal considerations. Israel thus acquires a special status that enables it to be apart in the international order. In this perspective, the support of the USA, as the prime global superpower, is the more critical, but also significant is the support of the European Union and its Member States. Although we have to keep in mind the essential and decisive role of the USA regarding the respect of the Palestinian people's right to self-determination and the establishment of peace in the Middle East compared to the roles of any other power, it is useful to clarify the policies of the European Union by showing its involvement in the violation of the Palestinian people's right to exercise self-determination.

2. The European Union's responsibilities with regard to the violation of the Palestinian people's right to self-determination

It can appear paradoxical to want to underline the responsibilities of the European Union (EU), and of some of its Member States, in the violation of the Palestinian peoples right to self-determination insofar as several resolutions and statements of the bodies of this organisation distance themselves from the Israel positions, or sometimes even condemn some of its policies and measures of recourse to force, of repression and of violation of international law.

However, a more precise analysis of the resolutions of the EU and of the policies and measures actually carried out by this organisation and by some of its Member States shows serious failures in relation to the obligations of this organisation and/or of some of its Member States, both with regard to the United Nations and to the obligations of the Association Agreement concluded with Israel. It is not the intention to raise here all the failures of the organisation and of each Member State relating to the conflict between Israel and Palestine or other countries of the Middle East. We retain primarily the policies having an impact on the violation of the Palestinian people's right to self-determination. If the EU has to be encouraged to support the Palestinian people in their struggle to exercise their right to self-determination and to condemn all the violations of international law by Israel, it is however necessary, in a constructive spirit, to note the responsibilities and the failures of this organisation and of some of its Member States when it come to implementing both the resolutions of its own bodies and those of the Security Council.

This manner of seeing is all the more necessary as the EU is a major economic and political power, with sufficient weight to be able to have an influence on the solution to the conflict and capable of obstructing, or even preventing or sanctioning, violations of international law. It is an important actor on the international stage and in addition is a member of the Quartet. We will in turn examine the policies of the EU or of some of its most important Member States, regarding the Palestinian people's right to self-determination, first in the context of the United Nations and then in the context of the EU's institutions and in particular in the implementation of the Association Agreement with Israel.

2.1. THE FAILURES THE EU AND OF CERTAIN OF ITS MEMBER STATES WITH REGARD TO THE UN

Everyone knows the place and the role of the Security Council in the maintenance of international peace and security. We recalled that several Council Resolutions require Israel's withdrawal from the Occupied Territories (Resolutions 242 and 338), the creation of an independent and viable Palestinian state alongside the state of Israel, an end to use of force in Gaza, respect of humanitarian law, an end to Israel's illegal actions concerning East Jerusalem (Resolutions 1397 (2002), 1515 (2003), 1850,2008), 1860 (2009)). But these resolutions have essentially remained without any effect. One

of the reasons for this situation lies in the fact that these resolutions are not taken under Chapter VII of the United Nations Charter, which would make it impose political, diplomatic or military sanctions against those responsible for contraventions which undermine peace or international security.

Two Member States of the EU are permanent members of the Security Council and therefore have the capacity to propose and put on the agenda recourse to Chapter VII to discuss and adopt sanction measures against Israeli policies which undermining peace and international security.

The occupation of territories, the attacks on the status of East Jerusalem, the bombardments of Palestine populations in Syria and in Lebanon, the massive violations of human rights, in contravention of the Geneva Conventions of 1949 and of the two 1966 United Nations Charters on human rights, are issues on which the Security Council has the authority to meet under Chapter VII. The EU itself has never sought, either at the diplomatic level, or within its institutions, or in the context of the United Nations, to engage its members or the international Community in a process of sanctions or threats of sanction to bring to an end the abovementioned Israeli contraventions.

Within the framework of the work of the United Nations relating to all issues regarding the right to self-determination, the EU and several of its Member States, while distancing themselves, at times, from the USA's unconditional support for Israel, attempt to avoid binding sanctions or measures which they consider could vex Israel. The resolutions of the Security Council are often addressed to all the parties, including the Palestinian victims, as if the latter, in opposing the denial of their rights and in particular the contravention of their right to self-determination, were responsible for similar contraventions comparable with those of the Israeli occupant. But whatever the attraction of compromise, this EU diplomacy amounts to extending the status quo based on the use of force and on the contravention of the Palestinian people's right to self-determination.

Placing on an equal footing the Israeli aggressor and the Palestinian victims, the European Union and certain of its Member States contribute, by a manipulation of the facts, to a breach of the principle of good faith which should govern implementation of international law, in accordance with the United Nations Charter (art. 2 §2) and with the 1969 Vienna Convention on the Law of Treaties of (Article 26).

The European Union has, however, on several occasions, acted in an active and determined way in issues relating to Serbian aggressions in Bosnia and Kosovo and during the conflict between Georgia and the Russian Federation. During the conflict in Georgia, the EU dispatched a fact-finding mission (Decision of the Council on 2 December 2008) to "investigate the origins and the course of the conflict in Georgia, including with regard to international law, humanitarian law and human rights, and the accusations made in this context, including allegations of war crimes". (See on these issues the report drawn up by several NGOs including Amnesty International, Oxfam International, Pax Christi International, EMHRN and others: *The position of the EU on the peace process in the Middle East: principal contradiction,* September 2009.). The EU has never made an equivalent effort to oblige Israel to respect the resolutions of the Security Council or of the institutions of the EU itself.

2.2. THE RESPONSIBILITIES OF THE EU WITHIN THE FRAMEWORK OF ITS RESOLUTIONS AND THE ASSOCIATION AGREEMENT WITH ISRAEL

Several resolutions of the of the EU and its institutions, in particular the European Parliament, the Council of Ministers and the Council of the European Union, have condemned Israeli policies. Thus, resolutions Council of the EU condemned the occupation of the territories by force, the colonisation of the Palestinian territories, the construction of the partition wall, the Gaza blockade and the bombardments of this territory. (Also see EU Council Resolution of 15 June 2009 and Council Resolutions of 12/07/2004 relating to the Wall, Council conclusions of 17-18 June 2004 relating to ending the establishment of colonies etc.)

Since the 1980 European Council in Venice, the EU has been asking that the right of the Palestinian people to self-determination take practical form in the creation of a Palestinian state.

In 1999, the European Council asked that the Palestinian state be created on the basis of the territories occupied in 1967. The European Council of Seville of 21 and 22 June 2002 took a similar position. In accepting to be member of the Quartet, the European Union has the responsibility to take action to give concrete expression to the creation of a sovereign Palestinian state. The principle of good faith compels the EU and the Member States to show consistency between, on the one hand, the decisions and public statements which they make, the responsibilities accepted as members of the Quartet and of the Security Council and, on the other hand, the political, diplomatic and legal actions in which they engage. The EU has never undertaken actions making it possible to give concrete expression to its declared policies on the establishment of a Palestinian state.

On the contrary, the EU has gone in a direction, with, some of its policies, which is contrary to the principle of the right of the Palestinian people to self-determination. Indeed, after the results of the general election to the Palestinian Council, which gave the majority to the Hamas movement, the EU made demands which deliberately undermined the Palestinian people's will, as if the latter could only express the interests of foreign points of view. By denying the Palestinian voters' will and by refusing the formation of a national unity government between the PLO and Hamas, the EU yielded to Israeli demands and contravened the principle and the substance of the Palestinian people's right to self-determination.

Furthermore, the EU acts in a discriminatory manner in several areas which are sensitive for the exercise of the right to self-determination. In the context of the Quartet and also outside this context, the EU insists that Hamas recognise Israel and gives up all use of force against the occupant without making any demands of Israel in return, in particular regarding clear and complete recognition of the right of the Palestinian people to self-determination, even though this recognition is an essential precondition which has to be required of Israel.

The EU insists that the Palestinian Authority respect the law with regard to the occupier and its nationals, without requiring in return any effective action against the violence of the settlers. The EU takes no action with regard to the discrimination constituted by the application of military law to the Palestinians. The settlers' violence remains generally unpunished. The statement of the Quartet on 26 September 2008, which "condemned the recent rise in settler violence against Palestinian civilians, urg-

ing the enforcement of the rule of law without discrimination or exception" remained without follow-up on the ground, as if the Israeli government and the settlers were ensured impunity, as a consequence of inertia or often as a consequence of the support of the USA and the European Union.

This discriminatory behaviour, incompatible with the EU's participation and its responsibilities in the Quartet, is confirmed in several areas. One can quote, for examples, the renewed calls by the European Council for the release of a corporal of the Israeli army detained by militants of the Hamas and the absence of any mention of the thousands of Palestinian prisoners or any calls for the release of Palestinian ministers and delegates imprisoned by Israel. As the NGOs point out (Amnesty International, Oxfam, international Pax Christi, REMDH and others...) in their report referred to above on these questions, "only in December 2008 did the Council address the broader issue by stating that....."Palestinian prisoners should be released in greater numbers, with priority being given to minors ". The NGOs which quote the statistics drawn up by Israeli organisations, point out in their report referred to above that more than 7,800 Palestinian prisoners are detained by Israel, of which more than 387 are in military administrative detention without charge or trial. According to NGOs and to Amnesty International's 1989 annual report, these "fall far short of due process and fair trial standards".

According to the facts reported by these NGOs, it can be affirmed that "the Israeli military courts do not comply with the rules of international law ". (See in particular the proceedings of the United Nations Committee against torture, fourth periodic report of the Israeli government, particularly the Israeli and international NGOs' contributions.)

This discriminatory behaviour, already in itself contrary to international law, is incompatible with the responsibilities that the EU accepted as a member of the Quartet. These discriminations are reflected finally in a cover-up of the violations of international law perpetrated by Israel and even by encouragement to persevere in the denial of the Palestinian people's right to self-determination.

This interpretation is clearly corroborated by the proposals of the Ministers of Foreign Affairs of the EU to "upgrade" the EU-Israeli relations and status. This proposal is added to the "advanced status" from which Israel already benefits in the EU and which demonstrates that, despite the Council Resolutions favouring respect of international law and despite all the violations of international law signalled by the United Nations, by numerous states and human rights NGOs, the European Union is satisfied and is pleased with the behaviour of this state. Much more, the proposal to "upgrade" the Israel relations with the EU constitutes an encouragement to continue to act in the same way and to resort to force. Thus a few months after this proposal to "upgrade" the relations with Europe, Israel felt secure in its position as a state able to act above international law and decided to start, on 30 December 2008, a war against the people of Gaza. The reaction of the EU was in the usual direction of the policies of this organisation, that is, refusing to take the measures likely to stop and sanction the violence of the Israeli army, despite the horror of the massacres of civilians and destruction of the public services most essential for the population. The Goldstone report, carried out under the aegis of the United Nations, found evidence on the part of the protagonists of the conflict and particularly on the part of the Israeli army, of serious crimes that amount to war crimes and crimes against humanity. Europe supported the adoption of the report by the United Nations General Assembly without drawing any consequences with regard to reparations or other sanctions which should consequently be

decided against Israel. General international law requires various integral reparations or equivalent to rectify the violations of international law on foreign territories. However in the case of Israeli crimes and destruction, neither the EU nor its Member States have ever tried to put on the agenda the issue of Israeli reparations in conformity with international law. In such cases as this, as in other circumstances, no initiative has been seriously put forward by the EU, nor by France nor the United Kingdom, as permanent members of the Security Council and as influential member of the Quartet, to rule on sanctions against the aggressions perpetrated against the Palestinian people.

C) JERUSALEM AND THE EUROPEAN UNION

Jerusalem's significance for the three major monotheistic religions places it in a position of exceptional importance. The EU, as a collective of Christian states, even if nominally, with large Muslim minorities, is especially responsible for trying to maintain the harmony and peace of this unique city. Moreover, the EU's membership of the Quartet, places an additional onus on it to work towards ending the Israeli-Palestinian conflict, which is played out so vividly in the struggle for Jerusalem

1. Background: Israel's colonisation of East Jerusalem

Ever since Israel acquired the eastern half of Jerusalem in the 1967 Arab-Israeli war, it has pursued a policy of aggressive colonisation. This has aimed to transform the previously Arab city into a Jewish one, and to consolidate Israel's hold there. This colonisation has progressed on several fronts:

1. Political colonisation – establishing Jerusalem as the capital of Israel. This process started in 1950 when the Israeli government declared West Jerusalem to be its capital. It moved its offices and other administration there and built the Knesset on the site of what had been the Palestinian village of Lifta. In 1967, Israel annexed the eastern half of the city, and has been mounting a ceaseless effort to persuade the international community of Jerusalem's status as Israel's capital and persuading foreign states to move their embassies there. So far, this pressure has been resisted, although efforts by US Congressmen on behalf of Israel aiming to move the US embassy to Jerusalem are ongoing.
2. Physical colonisation – accomplished through the building of three rings of Jewish settlements around the eastern half of Jerusalem, in addition to settlements within the Old City and the Arab neighbourhoods of Jerusalem. This has also taken the form of evicting Arabs from their homes and replacing them with Jewish settlers. As a result, there are today 190,000 Jewish settlers in Jerusalem. A policy of Arab house demolition, (400 houses were bulldozed in 2004, and 1,000 are currently under demolition orders), has also released more space for Jewish settlers. In the last year the spotlight has been on Sheikh Jarrah, a traditionally Arab neighbourhood, where Jewish settlers, protected by Israeli police, have been taking over Arab houses.
3. Demographic change – in order to transform Jerusalem into a Jewish city, several judaising policies have been introduced, all acting to denude Jerusalem of its Arab population. Thus, a Jewish settler population now amounting to 190,000 settlers, has been imported into the city. At the same time; many Arabs have lost their residency rights, either by withdrawal of their permits or other devices in a complex weave of bureaucratic and Byzantine Israeli rules.

In addition, discriminatory policies against Arabs with regard to house building permits have meant that they either have to move out or build "illegally". The demolition of such Arab homes has decreased the Arab population further. Today, and as a result of these policies, the Jewish-Arab population ratio of Jerusalem is 70-30 percent, where in 1967, it was nearly 100 percent Arab.

4. Archaeological exploration – since 1967, Israeli archaeologists have carried out extensive excavations in the Old City and in the adjoining village of Silwan with the aim of finding evidence of a historical Jewish presence. This task has now been assigned to fundamentalist Jewish religious organisations with an avowed policy of making Jerusalem exclusively Jewish. Many reports have indicated that these digs endanger the ancient foundations of the Islamic historical buildings in the old city. Latterly, a system of underground tunnels is being opened up to connect Silwan with the Old City, and also between different parts of the Old City. This activity has resulted in the destruction of historical material from various Islamic and pre-Islamic periods. Currently, the ancient Islamic Mamilla cemetery is the site chosen for a "Museum of Tolerance" to be erected. This will result in the destruction of historic tombs
5. Expansion – settlement building has expropriated a large area of the adjoining West Bank. The largest Jerusalem settlement, Maale Adumim, has been expanded virtually to the Jordan Valley, and threatens to cut the West Bank in half. The barrier wall, which encircles eastern Jerusalem, has also annexed considerable areas of Palestinian land to Israel.
6. Societal effects – Israel restricts the movement of Palestinians in and out of Jerusalem. In addition, the discrimination against Arabs in Jerusalem has created a feeling of siege and isolation from the West Bank and Gaza. The inability of Palestinians outside Jerusalem to enter the city, except in a minority of cases, has severed these Palestinians from what had been the major centre of Palestinian life. They cannot worship at their holy shrines in Jerusalem. All this has had damaging societal effects, threatening to fragment Palestinian society and identity. These unquantifiable effects of Israel's rule over the Palestinians are none the less serious and long-lasting.

2. EU Policy on Jerusalem

EU policy on Jerusalem has been characterised by a basic contradiction. On the one hand, the formal EU position on the Israeli practices listed above is that they are all illegal. Thus, the EU does not accept:

1. Israel's annexation of the city
2. The settlements established there
3. The separation wall
4. The demographic changes Israel has created.
5. Discrimination against the Arab population in housing permits, municipal services, residency rights and other social and political discrimination.

Several EU reports have raised these issues and openly criticised Israel's policy on Jerusalem. On the other hand, the EU has failed to put any meaningful pressure on Is-

rael to halt any of its activities, and has maintained a close and favoured relationship with Israel.

3. Contradictions in EU policy towards Israel

The EU has at various times issued opinions, reports and declarations critical of Israel's activities in East Jerusalem on the grounds that they conflict with EU official policy. However, these criticisms have rarely if ever resulted in sanction or meaningful pressure against Israel to enforce its compliance with international norms. The EU has also made good the damage wreaked by Israel on Palestinian buildings and infrastructure, often paid for by the EU, without at any time requesting compensation from Israel.

On the contrary, and despite Israeli violations, the EU has maintained a strong relationship with Israel and affords Israel exceptional advantages. On those occasions when Israel has been censured by one or more member state, efforts have soon been exerted to dilute or neutralise the censure. The EU has at various times issued opinions, reports and declarations critical of Israel's activities in East Jerusalem on the grounds that they conflict with EU official policy. However, these criticisms have rarely if ever resulted in sanction or meaningful pressure against Israel to enforce its compliance with international norms. The failure to take punitive action against Israel to enforce either UN resolutions or the EU's own charter of human rights promotes a state of Israeli exceptionalism, supported in practice by many western governments, many of them European states.

SOME CASE STUDIES

1. The EU Council meeting on foreign affairs on 8 December 2009:
    - Reiterated that the EU does not recognise any changes made by Israel in the occupied territories, including Jerusalem, and that settlement building, the separation wall, house demolitions are all illegal under international law, obstruct peacemaking and the two-state solution. It urged Israel to stop all settlement activity, and to open the Gaza crossings.
    - Called for Jerusalem to be the capital of two states. Originally the Swedish presidency had asked that East Jerusalem should be the capital of the Palestinian state and implied that the EU would recognise this state: negotiations should lead to the establishment of a Palestinian state in the West Bank and Gaza, with East Jerusalem as capital. However, lobbying by Germany, France and Italy led to the proposal being watered down
2. EU Heads of Mission in Jerusalem produce regular reports, many of them critical of Israel's conduct in Jerusalem. But these are kept confidential and are unpublished because of Israeli pressure. Such a report, drawn up on 15 December 2008, was leaked to The Guardian on 9 March 2009. It accused Israel of trying to annex East Jerusalem through a combination of Arab house demolitions, settlement building and discriminatory housing policies. Israel was undermining the Palestinian Authority and obstructing peacemaking, and aiming to cut Jerusalem off from the West Bank. The report expressed concern over the growth of settlements

in the Old City with 35 new units in the Muslim Quarter and 3,500 units for Maale Adumim.

3. Another report, on 23 November 2009, spoke strongly against Israel's policy of changing Jerusalem's demography and its attempts to sever Jerusalem from the West Bank. Israel, the report said, was helping right-wing religious organisations such as El Ad and Ateret Cohanim to plant Jewish settlers in the Muslim Quarter. Israel was promoting archaeology for ideological motives, which distorted the character and identity of Jerusalem. The report recommended countermeasures against this by urging EU officials to strengthen the PA presence in the city, to host PA officials and for EU officials to refrain from visiting Israeli offices in East Jerusalem.
4. A 2005 British report on Jerusalem had levelled much the same criticisms that Israel was trying to annex East Jerusalem through settlement building, and the separation wall. It was presented to the EU Council of Ministers on 25 November 2005, but was suppressed and remains unpublished.

EXAMPLES OF EU COOPERATION AND FAVOURABLE DEALINGS WITH ISRAEL

As if none of the above had happened, the EU has cultivated a close relationship with Israel, which is highly advantageous to the Jewish state.

POLITICAL AND TRADE TIES

1. The EU-Israel Association Agreement 1995 and ratified in 2000. This allows for integration of Israel into the European economy. It ensures a free flow of trade in manufactured and agricultural goods, with easing of tariffs and cooperation. The Agreement has provided Israel with far reaching political and economic advantages: institutional political dialogue at the most senior levels in the EU and agricultural exports from Israel to the EU exempt from tariffs. The EU Framework Agreement allows the European Investment Bank to provide Israel with loans and institutionalises its relationship with Israel.
2. The EU is Israel's largest export market and the second largest source of imports (after the US). Israel is already part of the Euro-Med Partnership.
3. Relations with Israel were due to be upgraded on 27 January 2010, but the upgrade was delayed because of Israel's war on Gaza, December 2008-February 2009. However, the consensus is that the EU will be unlikely to impose any sanction on Israel.
4. On 12 December 2009, the EU announced its strong commitment to a partnership with Israel in the areas of mutual trade, investment, and economic, social, financial, civil, scientific, cultural and social cooperation. The objective is to integrate Israel into European policies and programmes "tailor-made" to reflect Israel's interests and priorities and level of development. Israel will receive €14 million over the next seven years in financial cooperation.
5. Italy's prime minister proposed on 1 February 2010 that Israel should become a member state of the EU.

SCIENTIFIC COOPERATION

There is extensive and far-reaching collaboration between Israel and the EU in the field of science and technology which has existed for many years. Israel has access to generous EU research funds and facilities. Numerous joint programmes integrate Israeli scientists into European universities and technological institutes. Scholarships are open to Israeli scholars in many areas.

It is not difficult to see why. Israel's scientific and technological wealth makes it a valued economic, scientific and technological partner. Israel's expertise in, the natural sciences, research and development, is formidable. In its eight universities, together with the Weitzman and Technion research institutes, and in fields ranging from mathematics and computing through sub-particle physics to molecular biology and neuroscience, Israel ranks amongst world leaders. It spends a higher proportion of GDP (4.7%) on R&D than any other country including the US (2.6%). Israel's universities, institutes and companies are rich in lucrative patents; Israel is an inventor and exporter of high technology products and know-how – including military technology. In an increasingly globalised economy, scientific research, whether publicly or privately financed, has become international. Israel's science and technology are central drivers of this powerful knowledge economy. This pre-eminence is a matter of huge national pride and international prestige. It is here that Israel's participation in the ERA becomes so important, not just to Israel but also to an EU increasingly committed to neoliberalism.

THE EUROPEAN RESEARCH AREA (ERA)[1]

The European research system was originally limited to the EU nation-state members. This was later expanded to become the ERA, primarily to include other European countries such as Norway and Iceland.

The ERA is funded though the transfer of a proportion of the national research and development (R&D) budgets of EU member states to the European Commission's Research Directorate. Research is funded from this budget through five-year Framework Programmes. These aim to build a 'European identity' in research, to aid in wealth creation and quality of life, and to strengthen research in less well-developed EU nations. The Framework programme funds multinational R&D programmes involving universities, research institutes and small and medium enterprises. The current programme (FP7) began in 2007 and is scheduled to spend €50.5 billion over its five-year life.

During the 4th Framework Programme, Israel was added to the ERA. Over the past decade Israel has been included in some 1700 R&D collaborations, and between now and 2013, the Israeli government is to contribute €440 million per year, so that it can participate in the Framework Programmes.

All Israel's eight universities, from Bar-Ilan to Tel-Aviv, as well as technical institutes, and many companies are active collaborators with European partners. To take the case of Britain, there are currently 27 active projects at Imperial College and 21 at University College in London; Oxford and Cambridge have participated in 101 projects each with Israeli partner institutes over the past decade, mostly in nanotechnology,

1. I am indebted for much of the information in this section to Steven and Hilary Rose's paper in *Race and Class*

molecular neuroscience, and information technology. Others have focused on water management and fishery stocks. This has gone on while gross water allocation inequality and severe restriction on fishing rights is meted out to Palestinians on a daily basis.

Currently, the Commission is considering new steps to deepen its cooperation on scientific research with Israel, despite admitting that previous funds earmarked for that purpose have gone to firms based in illegal settlements in the Palestinian territories. While this is in breach of the European directive which forbids trade with the illegal settlements, there are no signs that Europe is going to pursue the matter. An unpublished document prepared by EU diplomats reveals that because much of the joint research will relate to security issues, Israel has requested a formal assurance that any information it gives to Brussels will be treated confidentially. An IPS report says that the EU Commission's spokesman for enterprise and industry acknowledged that the joint research with Israel will have a so-called anti-terrorist dimension, but it was not aimed at the military, he said, as the Commission was mindful of the ethical dimension, with human rights at the forefront.

In 2006 the Greens tried to block participation for any state in breach of the European Convention on Human Rights in the European Parliament debate on the research budget for the seventh Framework programme. They did not name Israel as such, but instead sought the reaffirmation of the Convention, mindful however of Israel's continual breaches of international humanitarian law. Clearly, such breaches call into question the appropriateness of Europe-Israel trade agreements and its presence in the European Research Area.

The Greens did not succeed. The Research Commissioner and many EU parliamentarians wanted to include Israel because of its A-rated natural science and engineering researchers, which they thought would lead to innovation and wealth creation. The calibre of Israeli research was so important that it took precedence over human rights. Since then scientific cooperation with Israel has only deepened. Last year the EU offered the Hebrew University access to the EU EURAXESS programme, which permits Israeli researchers access to a European-wide network of researchers' mobility and research facilities. This opens up the EU database of job opportunities for Israeli researchers.

4. Conclusion

An anomaly exists at the heart of EU dealings with Israel. How is it that a country geographically located squarely in the Middle East has managed to persuade Europeans that it is actually part of Europe? Israel's footballers play in the UEFA cup, its singers compete in Eurovision song contests and its research scientists participate in the European Research Area.

This ambivalence towards Israel has resulted in effective outright complicity with its human rights abuses against the Palestinians and its breaches of international law. So long as that situation continues, it is unlikely that Israel's conduct will change. In that sense, the EU has become an accessory to Israeli misbehaviour and a fellow perpetrator of illegal acts against international law and the Palestinian people.

D) SETTLEMENT AND THE PLUNDERING OF NATURAL RESOURCES

1. Israeli Sponsored Illegal Settlements in the West Bank of Palestine

1.1. The issue of settlements, and continued settlement expansion and their effect on the indigenous Palestinian population is one of the principal obstacles to the attainment of lasting peace in the Middle East. The settlements have long since been declared illegal by; inter alia, the International Court of Justice, the High Contracting Parties of the Fourth Geneva Convention, the United Nations and the European Union. Israeli settlement policy ranges from active promotion to removal by force and violence.

1.2. In order to understand the ideology underpinning the settlement enterprise in the context of Israel's belligerent occupation of the Palestinian Territories, it is necessary to briefly examine the historical and political make-up of the land collectively known as Israel and the Occupied Palestinian Territories. Following the collapse of the Ottoman Empire after World War One, these lands were subject to the British Mandate for Palestine, formally approved by the League of Nations in 1922 and endorsing the earlier Balfour Declaration of 1917, in which the British Government "**viewed with favour**" the establishment in Palestine of a national home for the Jewish people. Following this, and against the backdrop of increased Jewish immigration and rising violence, the United Nations assumed control over the area. On 29th November 1947, the U.N. adopted General Assembly Resolution 181 which proposed to divide the British Mandate for Palestine into two states: one Arab and one Jewish, with the city of Jerusalem placed under a Corpus Seperatum to be administered by the U.N. in order to preserve the inimitable religious and spiritual status of the city among the world's principal monotheistic religions. The Jewish State was to traverse some 56% of the land with the remainder to the proposed Arab State. Following the partition plan, Israel declared its independence and the Arab-Israeli war ensured which culminated in the 1949 Arms Agreement which established the Green Line, a *de jure* international border between Israel and the then Jordanian controlled West Bank. Referring to the Green Line, Article III, Paragraph 2 of the Agreement provides, "**No element ..... of the military or paramilitary forces of either party ..... shall advance beyond or pass over for any purpose whatsoever, the armistice demarcation lines** ....."

1.3. Notwithstanding this injunction in relation to the Green Line, following the 1967 armed conflict, Israeli forces proceeded beyond the Green Line and occupied all the territories which had constituted Palestine under the British Mandate, including

the West Bank. As part of its push into the Palestinian Territories, Israel has stolen thousands of dunams of land from the Palestinians and has established thereon dozens of settlements in which hundreds of thousands of Israeli civilians now live. Palestinians, having been expelled from their land, are refused re-entry. The settlements constitute a continuing violation of their human rights.

2. Commencement and Progress of the Illegal Settlements

2.1. During the 1967 war, Israel occupied East Jerusalem and the West Bank, the Gaza Strip, the Golan Heights and the Sinai Peninsula. It immediately began establishing settlements in these areas, particularly East Jerusalem. More than four decades later the settlements have grown dramatically. Settlements dominate and permeate many areas of the Palestinian West Bank. According to the B'Tselem's 2008 Annual Report, there were some 121 settlements in the West Bank, excluding East Jerusalem. In addition to this, there were also 12 large settlements and other small settlement points in East Jerusalem and a further 100 outposts in the West Bank. The Israeli Central Bureau of Statistics estimated that the 2008 population of the settlements, including those in East Jerusalem, approached half a million people. The settlement enterprise is supported and sustained through an intricate and sophisticated bypass road network system in the occupied territories that is not designed to serve the infrastructural needs of the local Palestinian population. Taken together, the settlement enterprise and their accompanying road network system amount to unconcealed policies of land appropriation and confiscation. In other words, a land grab. In this activity, as in many others, Israel is in breach of many facets of International Law.

2.2. Article 49 of the Geneva Convention expressly provides:

> "…. the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies".

Further, Article 147 of the Convention provides that the extensive appropriation of property constitutes a grave breach of the Convention. Moreover, such practices constitute a breach of Article 8 of the Rome Statute of the International Criminal Court which criminalizes grave breaches of the Geneva Conventions of 1949 and categorises such breaches as "**war crimes**". Although Israel is not a signatory to the Rome State, *arguendo*, such a Statute is reflective of customary International Law. The Hague Regulations also prohibit an occupying power from undertaking permanent changes in the occupied area unless these are due to military needs in the narrow sense of the term, or unless they are undertaken for the benefit of the local population.

2.3. Israel occupied the West Bank as a belligerent occupant and is therefore obliged to leave in place the existing laws and judicial institutions. This it did not do. Rather, it superimposed a system of military orders and military courts. Israel's military administration has issued over 2,000 orders of a legislative effect that substantially displaced the significance and practical effect of previous law. Israel's occupation has im-

paired judicial autonomy, including the seizure of the power to appoint and remove Judges. Israeli military authorities have trampled upon the jurisdiction of Palestinian courts on many issues, including the right to move any trial or hearing to a military court. Within the military courts, its orders always take precedence over Israeli and International Law. Israeli military courts have repeatedly refused to apply International Laws and conventions.

2.4. The issue of settlements has been adjudicated upon by the International Court of Justice in its ruling on the legal consequences of the construction of a wall in the occupied Palestinian Territory. The Court concluded that the settlements established by Israel in the occupied Palestinian Territory are in breach of International Law. It further ruled that the construction of the Wall and its associated regime create a "***fait accompli***" on the ground that could well become permanent. The Court also considered the applicable provisions of International Humanitarian Law and Human Rights Instruments relevant to the destruction and requisition of property, restrictions on freedom of movement of inhabitants of the Occupied Palestinian Territory, impediments to the exercise by those concerned of the right to work, to health, to education and to an adequate standard of living. The construction of the Wall and the settlements regime cannot be justified by military exigencies or by the requirements of national security or public order. The Court therefore found that there was a breach by Israel of several of its obligations under the applicable provisions of International Humanitarian Law and Human Rights Instruments. It also made reference to the risk of the situation being considered tantamount to *de facto* annexation. Israel continues to defy the Court's ruling and the aforementioned Conventions.

2.5. The presence of the settlers is actively encouraged and funded and protected by successive Israeli governments. Jews from both inside Israel and worldwide are encouraged onto the land by various incentives; subsidies, preferential low interest rate loans, grants, low property prices, lower taxes, quality utilities, high quality schools, park lands and leisure facilities. A by-product of the settlements is the phenomenon of settler violence. Settler violence against the Palestinian population is aided and abetted by the Israeli military. Many settlers are armed and permitted to mistreat, perpetrate violence upon and even kill, Palestinians without sanction.

2.6. Israel has now all but dropped the pretence that the settlements are necessitated for reasons of security. In the immediate aftermath of Israel's agreement to return Sinai to Egypt, (after pressure from the United States), the World Zionist Organisation, fearful of similar pressure being exerted over the Occupied Palestinian Territories, produced a report which, inter alia, openly stated that Israel was in a "**race against time and must concentrate on establishing facts on the ground ….. There mustn't even be a shadow of a doubt about our intention to keep the territories of Judea and Samaria for good**". The report also spells out strategies for how to settle the land, referring to techniques used in 1948 and since applied to the Palestinian community within Israel itself; geographically dissecting and fragmenting yet more of their land, paralysing them politically and socially, thus ensuring their dependence on the Jewish economy. The Israeli government has applied most aspects of Israeli law to the settlers and the settlements, thus effectively purporting to annex them. Local government in the settlements has been established in a manner similar to that which pertains inside Israel itself. The areas of jurisdiction of the Jewish local authori-

ties are defined as "closed military zones" in the military Orders passed to give purported validity to the settlements. Israeli citizens, Jews from throughout the world and tourists all have access to these areas without the need for a permit, whereas Palestinians are forbidden to enter these areas with authorisation from the Israeli military.

3. Effect of the Settlements on the Palestinian Population

3.1. The consequences of the settlements and the Wall upon the Palestinian population are incalculable. Through a sophisticated road network system, the settlements separate Palestinian land and communities and are consequently segregationist in nature. The settlements fracture Palestinian territorial integrity and secure for the first time through the assistance of a well developed road network system, Israeli territorial contiguity with the settlements. In eroding the Green Line, the settlement project has resulted in an incontiguous Palestine. This is a deliberate and calculated attempted destruction of the Palestinians' right to self-determination and a workable, contiguous Palestinian State. The settlements also ensure the existence of two separate legal systems in the West Bank which are divided along ethnic lines. The Jewish settlers are extra-territorially subject to Israeli Civilian Law while the Palestinians are subject to Israeli Military Law. In its 2008 Annual Report, B'Tselem states that "**The existence of the settlements has caused grave and prolonged infringement of the human rights of Palestinians. Among the rights infringed are the right to self-determination, the right to equality, the right to property, the right to freedom of movement and the right to an adequate standard of living**". Additionally, in the 6th Sir David Williams Lecture, given on the 16th November 2006, Lord Bingham of Cornhill, former Lord Chief Justice of England, in his lecture entitled "**The Rule of Law**" stated as follows at page17/18 stated "The preamble to the United Declaration of Human Rights 1948 recites that "it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law"

3.2. For Israel, the belligerent occupier of the Palestinian Territory, the benefits of expanding and deepening the settlements are considerable. Israel has acquired, illegally, large tracts of extra territory, including farmland and quarries, and, more importantly, the water underneath it. The decision to locate settlement blocks along the ridge of the West Bank was a strategic one: they embrace the territories aquifers and enable Israel to prevent the Palestinians from drilling wells on their own land. Similarly, settlements along the Jordan Valley bring the aquifer there within Israel's grasp. Israel now controls 80% of the West Bank's water sources and diverts most of that supply to its own citizens, inside Israel and the settlements with only a fifth of the West Bank's water available to its Palestinian population. In controlling the aquifers, Israel ensures that each settler is supplied with nearly 1,500 cubic metres of water per year, whereas each Palestinian receives just 83 cubic metres. More than 200,000 rural Palestinians, the majority living in Area C under Israeli control, having no running water at all, are forced to buy water from Israeli tanker trucks. In a further effort to undermine the Palestinian population in the West Bank, Israel has also systematically

destroyed wells in the villages and routinely forbids Palestinians from collecting rainwater.

3.3. Israel continues to forcibly expel Palestinians from their land in complete disregard for their right and title to same and their entitlement to fair procedures and natural justice. In many instances, Palestinian residents are unaware that their land has been registered in the name of the Israeli State. For many, by the time they learn of this fact, it is too late to invoke the inadequate appeal process available to them. The Israeli Supreme Court has sanctioned the mechanism used to unilaterally take control of Palestinian land and in so doing attempts to mask the illegality of what is being done.

3.4. Israel, in its capacity as the Occupying Power in the Occupied Territories, has defined obligations and responsibilities under International Law pertaining to the provision of the right to water. Specifically, reference is made to Article 56 of the Fourth Geneva Convention, which imposes on the occupying state a duty of "**ensuring and maintaining, with the cooperation of national and local authorities ..... public health and hygiene in the Occupied Territory**". Similarly, Article 43 of the Regulations attached to the Hague Convention Respecting the Laws and Customs of War 1907 recognise the occupying State's duty to ensure "public order and safety". It is clear from these provisions that not only are water rights included within their compass but are central to their realisation. Israel exercises its control over water in the West Bank pursuant to Military Order 92 issued on the 15th of August 1967 which purports to grant complete authority over all water related issues in the Occupied Territories to the Israeli army. This was followed by Military Order 158 of the 19th of November 1967 which purported to stipulate that Palestinians cannot construct water installations without obtaining a permit. Military Order 291 of the 19th of December 1968 purportedly annulled all water related arrangements which existed prior to Israel entering into occupation.

3.5. The right to water can neither be understated nor overstated. According to the World Health Organisation in its 2003 publication, The Right To Water "**water is the essence of life. Without water, human beings cannot live for more than a few days. It plays a vital role in nearly every function of the body, protecting the immune system – the body's natural defence system – and helping remove waste matter**". In addition to this, water is of course necessary for many aspects of personal, domestic and economic life. As a direct consequence of the belligerent occupation of the Palestinian Territory by Israel and its policies employer there, the provision of water and the realisation of basic rights have been seriously undermined to a very significant extent. According to Amnesty International in their 2009 report Thirsting for Justice: Palestinian Access to Water Restricted "**Palestinian water consumption barely reaches 70 litres a day per person – well below the World Health Organisation's recommended daily minimum of 100 litres per capita. In contrast, Israeli daily per capita consumption is four times as much**". Israel continues its policies in wilful disregard of its obligations under International Law and in particular its responsibilities under the Fourth Geneva Convention, specifically Articles 85 and 89 which explicitly guarantee the right to water. The continued repudiation of the right to water in the West Bank has had inestimable ramifications for its citizens and their well-being. The World Bank in

its 2009 report on the **Assessment of Restrictions on Palestinian Water Sector Development** has outlined the catastrophic effects upon which the continued illegal occupation has had on the water and sanitation conditions in both the West Bank and the Gaza Strip.

3.6. The Oslo 2 Agreement, concluded in 1995, contained provisions on both water and sewage that recognised undefined Palestinian water rights, and returned some West Bank water resources and services to the Palestinian authorities. The Agreement also provided that water and sewage was to be managed and maintained in the following way:

(i) Existing levels of resource utilisation was to be maintained;
(ii) The deterioration of water quality and water resources was to be prevented;
(iii) Water was to be managed sustainably;
(iv) Water resources were to be adjusted according to climatological and hydrological conditions;
(v) Necessary measures were to be taken to prevent any harm to water resources;
(vi) Domestic, agriculture, urban and industrial was to be treated appropriately;
(vii) An extra 28.6 mcm/year was to be made available to the Palestinians;
(viii) A joint water committee was to be established to deal with all water and sewage related issues in the West Bank.

Notwithstanding the aforesaid provisions, Israel has failed to honour or comply with same and continues to exercise unilateral control over the West Bank's water sources to the manifest detriment of the Palestinian population. Through a sophisticated system of permit authorisation, movement and access restrictions, over-extraction of water and *de facto* control of borders and peoples, Israel perpetuates the ongoing water and sanitation crisis for the Palestinian residents. Settler-owned swimming pools, well watered lawns and large irrigated farms stand in stark contrast next to Palestinian villages whose residents live adjacent to open sewers and struggle to meet even their basic and essential domestic water needs. In parts of the West Bank, Israeli settlers use up to twenty times more water per capita than neighbouring Palestinian communities.

3.7. Israel continues to be in illegal occupation of the West Bank and East Jerusalem, in wilful defiance of International Law and numerous U.N. resolutions. In an effort to justify its abuses of International Law, Israel has constructed and maintained a legal fiction (alleged security needs) which it has employed to carry out theft of Palestinian land and the exploitation of its natural resources on a grand scale. In so doing, Israel has ghettoised and dehumanised the Palestinian population in the West Bank and, in the words of Harvard scholar, Sara Roy, has stolen from the native population;

> "its most critical resources, namely land, water and labour and the capacity and potential for developing those resources. Not only are Palestinians exploited economically, they are deprived of their livelihood and developmental potential, national identity and sovereignty. The result is the deliberate, systematic and progressive dismemberment of the indigenous economy by the dominant one".

3.8. The plight of the Palestinian population imprisoned in the West Bank is aggravated by the checkpoint and permit regime operated by the Israeli military. The checkpoints and restriction of movement imposed upon the population deprive them of their dignity, space, mobility, connection, relaxation and leisure. Deliberate and endless waiting at checkpoints amounts to cruelty and a breach of human rights. Time is a precious fundamental human resource. Every day Israel's closure policy robs 3.5 million human beings of that precious resource and in so doing, steals from them the right and ability to plan their lives.

4. General Principles of EU Law

4.1. The European Union is a principal actor on the global economic, political and legal front. As an intergovernmental organization, the composition of which is made up of some twenty-seven sovereign independent states, International Law is of central significance to the Union's aims and objectives. Indeed, the core tenets of International Law and the upholding and adherence to same are not only a cardinal feature of the EU's identity but are also central to the EU's conduct in the area of external relations. This is explicitly stated in the Treaty of the European Union (TEU), which clearly defines and delineates the powers, competencies and values of the Union.

4.2. Respect for International Law, democratic principles and human rights are constitutional priorities, which underpin the conduct of the EU. Accordingly, reference is made to Article 2 of the TEU, which states:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"

Additionally, such underpinning functional and constitutional duties are reiterated in Article 3(5) of the TEU, which states:

> "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter"

Accordingly, the central position of International Law within the EU is unequivocally enunciated in the aforesaid articles and thus, human rights, democratic principles and the adherence to same are intrinsically linked to the EU's external relations. Moreover, the numerous agreements and treaties the Union has concluded with numerous countries, including Israel, which expressly stipulate such values, evidence the importance of such international norms. Furthermore, the EU's obligation to respect International

Law in the exercise of its power has been expressly stated by the European Court of Justice. In the case of *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* (Case C-286/90 (1992) ECR 1-6048) the ECJ unequivocally stated, "As a preliminary point, it must be observed, first, that the European Community must respect international law in the exercise of its powers". While this case related to a fisheries issue, the dicta as espoused by the ECJ is nonetheless of immense significance.

4.3. Moreover, the foundation of the EU's external actions and external competencies are clearly demarcated by Article 21 of the TEU. It asserts:

> "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"

Accordingly, the pivotal position in which human rights, democratic principles, human dignity and the importance of International Law occupy within the EU's composition can neither be understated nor overstated and the significance of same is self-evident.

4.4. In light of the explicit treaty based duties incumbent on the European Union, which demarcate the Union's obligations in respect of human rights and democratic principles, it is clear that all actions of the EU, internal and external, must be in accordance with and within the boundaries of the spirit and wording of the above-mentioned Articles.

4.5. The EU's role in relation to the ongoing situation in the Occupied Palestinian Territories is one of dysfunctional failure. Through a myriad of Agreements including the European Neighbourhood Policy and the legally binding EU-Israel Association Agreement and the tangible benefits which Israel derive from same, the EU has not only ignored its own treaty-based duties and international law obligations which pertain to its external relations policies but has also facilitated the ongoing human rights violations in the Occupied Palestinian Territories, including the unlawful settlement enterprise which continues to grossly hamper peace and infringe numerous human rights. Through its association with Israel, including through the EU- Israel Association Agreement and the duties it assumes from same, the EU has done next to nothing to ensure Israel desist from its ongoing human rights abuses subsuming the settlement enterprise. Accordingly, the EU in overtly circumventing its obligations and is thus culpable of passive and institutional collusion.

5.1. The EU – Israel Association Agreement

5.1. The primary legal nexus between the European Union and Israel is the EU-Israel Association Agreement, which came into force in June 2000. The principal tenets of the Agreement are the liberalization of services, the free movement of capital and

competition rules, regular political dialogue, the strengthening of economic acquaintances and an overall preferential treatment of goods and services between both entities. Of cardinal importance is Article 2 of the said Agreement, which defines the basis upon which the Agreement is configured upon and also the crucial importance which is attached to respect for human rights and democratic principles. Article 2 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"

Implicit within the meaning of respect for human rights and democratic principles and thereby forming an essential element of the Agreement is the faithful observance and adherence to Customary International Law, International Humanitarian Law and International Human rights law. The mandatory nature and wording of Article 2 is such that the basis of the Agreement itself shall be based on the positive and ongoing promotion, protection and vindication of all aspects of human rights and democratic principles.

5.2. It is manifest and incontestable that the actions of the Israeli State constitute a gross, calculated and continuing breach of the rights of the resident Palestinian populations in the West Bank, Gaza and East Jerusalem. Such violations have been referred to above.

5.3. By reason of Israel's ongoing abuses of humanitarian and human rights law in the Occupied Palestinian Territories, Article 2 of the said Agreement has been indisputably breached. The depth, level and intensity of such breaches are such, that they constitute a case of **"special urgency"** pursuant to Article 79 (2) of the Association Agreement. This Article stipulates:

> "If either Party considers that the other Party has failed to fulfil 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"

5.4. The present situation in the Occupied Palestinian Territories not only amounts to a "special urgency" within the meaning of the above-listed provision, but that of an emergency, which warrants immediate and authoritative intervention.

5.5. As a party to the Agreement, the European Union and its member states have assumed the responsibility of ensuring the execution of the Agreement. Further, in its role as guardian of the Treaties pursuant to Article 17 (1) of the TEU the European Commission is mandated to ensure the application of the Treaties and the general interests of the Union including the observance of International Law, Humanitarian Law and Human Rights Law. It is evident that through the Agreement's ongoing subsistence, despite the above-mentioned irrefutable breaches, the Commission, rather than ensuring its application has permitted through its inaction the ongoing human rights abuses in the Occupied Palestinian Territories by Israel.

6. Options for Further Action

6.1. The European Union which includes the Council, the Parliament and the Commission, at an absolute minimum, should immediately take the following action:

1. Suspend the EU- Israel Association Agreement.
2. Suspend all assistance, including technical, financial, trade, social and cultural assistance either under the Association Agreement or otherwise.
3. Educate the public in all Member States to a real appreciation of the situation persisting for the Palestinian people in the West Bank and Gaza and of the obligations of the Union and of the Member States of the Union to take positive action to enforce the provisions of the current European Treaties in regard to the enforcement of human rights and the establishment of democratic principles.

6.2. All Member States in their individual capacity have corresponding obligations to take all necessary and appropriate steps to ensure that human rights and democratic principles are established and positively promoted by the Union of which they are Members.

E) THE EUROPEAN UNION AND THE MILITARY COOPERATION WITH ISRAEL

The aim of this paper is to start thinking about the legality of the European Union weapons transfers towards Israel with regard to international law.

Submitted to the first working session of the Russell Tribunal –focused on the shortcomings of the European Union–, this report does not draw up an overall picture of the problems raised by the military cooperation of various states with Israel, nor by Israel's defence industrial and technological base. Instead, we will endeavour to emphasize how the Member States of the European Union have failed to respect their own regulations on arms sales and military cooperation, more particularly over the last ten years.

1. The lack of international regulation on arms trade: an anomaly of the international legal system

The flagrant violations of international humanitarian law should have led – for many years– the international community to impose an embargo on arms transfers against the players of the Israeli-Palestinian conflict. This has not been the case. The Security Council has not adopted any resolution to that effect.[1]

However, this does not mean that the states transferring weapons in this region are exempt from accountability . For, as pointed out by the ICRC[2]: " *When a State transfers military weapons or equipment, it is providing the recipient with the means to engage in armed conflict – the conduct of which is regulated by international humanitarian law (IHL). Under Article 1 common to the Geneva Conventions of 1949, States have an obligation to "respect and ensure respect" for international humanitarian law. To ensure that violations of humanitarian law are not facilitated by unregulated access to arms and ammunition, arms transfer decisions should include a consideration of whether the recipient is likely to respect this law.*"

Indeed, the first article common to the Geneva Conventions is generally interpreted as conferring third States not involved in a current armed conflict a double "negative obligation", namely, not to encourage a party to an armed conflict to violate international humanitarian law or to take actions which could help the commission of such violations; and a "positive obligation" of taking the appropriate measures to put an end to violations. As military weapons are transferred with the objective of allowing the recipient to engage in armed conflict, such transfers should be considered in the

1. Except in 1948, when the Security Council imposed an embargo on arms transfers to Israel and the neighbouring Arab countries in conflict. Short-lived, it was lifted in 1949 after the signing of an armistice agreement between Israel, Egypt, Jordan, Lebanon and Syria.

2. Cf. *Décision en matière de transferts d'armes. Application des critères fondés sur le droit international. Guide pratique,* CICR, June 2007, p. 3.

light of the obligation falling on the states to guarantee the compliance with humanitarian law.

Third states have therefore a special responsibility to intervene with states or armed groups over which they could exert some influence. This is why states transferring weapons should be considered particularly influential and capable to "enforce" international humanitarian law because of their ability to provide, or refuse to provide, the means that could be used to commit serious violations. Consequently, such third states should take special care to ensure that transferred weapons are not used to carry out serious violations of international humanitarian law.

Moreover, the states parties to the Geneva Conventions asserted this responsibility at the 28th International Conference of the Red Cross and Red Crescent in December 2003. In the Agenda for Humanitarian Action adopted by the Conference,[3] the states parties to the Geneva Conventions committed themselves to "*make respect for international humanitarian law one of the fundamental criteria on which arms transfer decisions are assessed*", and they were encouraged to include these criteria in their legislation or national policy, as well as in regional and global regulation on arms transfers.

The fact remains that, talking about legally binding instruments is one thing, but implementing them is another one, and the way long from one to the other. For, if in recent decades the states have adopted significant prohibitions and restrictions –on the transfer of chemical, biological and nuclear weapons, missile systems and components of these technologies, mines and more recently cluster munitions– the transfer of classic or conventional weapons has received –to say the least– scant attention at the international community level. Yet, these are the weapons–including assault rifles, grenades, mines, bombs, rockets and missiles, etc..– causing the highest number of dead and wounded in present day conflicts.

We can notice, however, in recent years –chiefly since the end of the Cold War and especially since the first Gulf War of 1991– some developments in this field. On the one hand, a number of regional instruments –such as, for example, since 1998, the Code of Conduct of the European Union, which became legally binding in December 2008– now include a list of criteria to consider before authorizing any arms transfer. On the other hand, after the establishment of an international register of transfers of conventional weapons, a worldwide legally binding treaty –setting common standards for the responsible transfer of conventional weapons and their ammunition based on the responsibilities imposed on the States by international law, including international humanitarian law (IHL) – is being developed within the UN. The fact remains that it will still take some years before this treaty on arms trade is effectively implemented...

The exporting states shelter behind Article 51 of the UN Charter[4] acknowledging the right of any State to self defence:

"**Article 51**

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this

3. Available in ICRC website: http://www.icrc.org/Web/eng/siteengo.nsf/htmlall/p1103/$File/ICRC_002_1103.pdf

4. Cf. http://www.un.org/fr/documents/charter/index.shtml/.

right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

States do tend to make an extensive reading of this article, which, that being said, does not explicitly allow a state to arm itself preventively and intensively .

Not to mention Article 26 of the above-mentioned UN Charter, which states:

"**Article 26**
In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments."

2. Inventory of EU exports or the limits of transparency

The issue of information sources

The first obstacle found is the availability of reliable and accurate information. The sources of available data on arms exports are almost exclusively in terms of financial data, the total amount of the contracts. The main difficulty is to establish a reliable and accurate list of the type of goods being exported in order to verify –since there is no treaty on arms trade in force– if their use complies with current international law –or with regional law, as far as the European Union is concerned. The only "official" international instrument resting on a descriptive list of equipment is the UN Register on Conventional Weapons, with all the limitations contained therein, as discussed below.

To complete this list, the only information we could possibly have available comes mainly from press releases published on the occasion of the signing of this or that contract, or from "advertising" documents released by weapons manufacturers in which they state their commercial successes targeting the various national armies. However, between the announcement effect of this or that particular intention of signing a contract and the completion of the export through a delivery of arms and their ammunition, there may be, not only significant delays, but also, a great difference.

There is also a third indicator : the international surveys conducted after a period of conflict by the commissions under the mandate of the UN bodies, or by NGOs such as Amnesty International or Human Rights Watch.

In this inventory of military cooperation between the EU and Israel, we must also signal the arms purchases by Member States to the Israeli military industry. Certainly, if one takes a legal perspective *stricto sensu*, Israel's arms exports towards the European Union should be excluded from our study since these weapons are not used in the

Israeli-Palestinian conflict... But the fact that European states buy military equipment from Israel allows the latter to strengthen its industrial capabilities and obtain better returns on its military investments. Imports of arms from the Israeli state can therefore be analyzed as a support for the war effort in that state, or even as complicity.

At the UN level

At the international level, we have the UN Register on the arms trade business established since 1992. It is based on voluntary reports from each of the UN Member States which every year present a declaration of their imports and exports of weapons to the Secretary-General classified in seven broad categories of materials (ie: I- tanks; II- armoured fighting vehicles; III- high calibre artillery systems; IV- combat aircraft; V- attack helicopters; VI- warships; VII- missiles and missile launchers). The Registry is accessible on the Internet.[5]

Israel participates in the Register since its inception in 1992. Often delayed, for it was only the 22nd of December 2009 that Israel's declaration for the year 2008 was registered by the UN Secretariat, when the deadline for sending the document was the 31st May following the reference year. No too bad, considering that the 2007 declaration... was sent in March 2009, eight months late!

Of the 17 declarations published (1992-2008) by the State of Israel, besides the U.S., only Germany is mentioned three times in 1999, 2000 and 2006 in reference to the delivery to Israel of 5 units of the *Dolphin* submarine.

It is surprising, however, to see that Germany, in its 2006 declaration, did not report the delivery to Israel of the *Dolphin*, unlike the 1999 and 2000 deliveries. It must be noted that further negotiations were initiated in late 2009 for the sale by Germany to Israel of naval equipment worth around 1 billion Euros, including an additional submarine *Dolphin U-212* with nuclear capacity, torpedoes and two vessels.[6]

The Israeli register does not mention any of the other major European exporters as having sold their weapons to Israel. On the contrary, Israel reports having exported weapons, among the European countries, to Spain (two 120 mm guns, in 2003) – which, in turn, does not signal having purchased those weapons from Israel...– and to Romania (390 160 mm Barrels mortars in 2008).

This could likely confirm that the European states –besides the German submarines– do not export "operational" finished military products included in the list of seven categories. It would export, instead, either parts or components for the manufacture of weapons, either equipment not listed in the UN catalogue ... Let us not neglect a third hypothesis induced by the voluntary nature of the UN Register: some countries may not want to publicly display their military relations with Israel because it is a sensitive issue at their own public opinion level, or, simply, so they don't "offend" other states in the Middle East region who are among their customers or under "commercial" exploration ...

The Register of Conventional weapons is subject to regular examination by the UN every three years. Following the work conducted by the ad hoc Government Experts Panel in 2003 and 2006 and adopted by the UN General Assembly, the states were also invited to provide information on their light weapons and small calibre arms imports and exports. Israel has never provided such information.

NB. At international level, there is also a UN database on international trade: Com-

5. Cf. http://disarmament.un.org/UN_REGISTER.nsf/.
6. According to a dispatch dated 19 January 2010 published on www.israelvalley.com/.

trade, compiled from declarations provided by the customs authorities of each state. But again, the category distribution of the total amount of the exports does not allow to make a reliable difference between military and civilian equipment, included in the same category, as is the case, for example, for explosives.

At the SIPRI level

The source most frequently used –especially by many media, NGOs and even governments– the SIPRI (*Stockholm International Peace Research Institute*, independent strategic studies body founded in 1966 in Sweden) publishes annually the *SIPRI Yearbook* containing an assessment of the weapons trade, not related to the extent of actual exports financial flows, but built on their own price index. This is a very useful tool for comparison and for measuring trends ...

The SIPRI has also made available a public database in the Internet listing all the arms deals has verified by this body, and this, from the 1950s to date.[7] However, the SIPRI only takes into account conventional weapons and does not include light weapons and small calibre arms in its estimates. Within the framework of this study, the evidence obtained allows to have an unofficial list –albeit no doubt very incomplete– of military equipment (*see tables, Appendix 1*).

Keeping within the limits of the past ten years (that is, from 1999 to 2008, the latest available year), only one European state is listed for exporting to Israel: Germany, consistent with the registry of the United Nations.

The number of Member States having purchased military equipment from Israel during the same period is much higher. 13 out of 27, namely: Germany, Belgium, Spain, Finland, France, Greece, Hungary, Italy, Netherlands, Poland, Portugal, Slovenia and the United Kingdom. Cyprus and Romania could also be added to this list, but their purchases of Israeli military equipment were made during the period prior to their accession to the European Union.

At the small arms and light weapons level

There is no doubt that these materials, on the one hand, are more sensitive, from the standpoint of their use in terms of violations of the rules of international humanitarian law; and, on the other, they are materials for which data is the hardest to find!

The UN, in the late 1990s, driven in particular by the NGOs, were concerned about this "scourge" and organized a conference to address the illicit trade in light weapons and small calibre arms. However, because of the obstructionism of the United States in particular, but also of China and Russia, this conference has produced only a plan of action limited in scope since it contains no binding measure.

Since 2001, a Swiss organization, Small Arms Survey, tracks specifically this type of weapons and publishes a directory[8] containing relevant analysis, but this academic research institute has no databases available online as those of SIPRI.

However, according to the information we have been able to collect –besides the purchase from the US of specific equipment within the framework of the preferential agreements which benefit Israel– Israel has acquired a significant autonomy in the manufacture of small arms and light weapons, and has even become a major exporter of such equipment.

7. Cf. http://www.sipri.org/databases/armstransfers/.
8. Cf. http://www.smallarmssurvey.org/.

At the European Union level

Since the introduction of the Code of Conduct on arms exports in 1998, the European Union publishes an annual report prepared on the basis of the declarations made by each Member State. The report is drafted by COARM (Council working arms group), a body created in September 1991 by the Council of the European Union to harmonize policies on arms exports and in charge since then of managing the plan of action of the Code of Conduct, which became common position in December 2008. The EU report is published in the Official Journal of the European Union and the successive editions are available on the Internet.[9] However, the EU has not yet developed a database compiling all the data on exports and available to the public.

Even if the report of the European Union has expanded since its first edition, it has many limitations, in terms of transparency, as a tool to exercise democratic control. It is only since the 4th report – on the results of 2001– that the data per member state divided into importing countries is beginning to emerge. Nevertheless, the information provided by the Member States is still far from complete and harmonized.

From the 6th Report onwards – covering the year 2003– the breakdown by destination has been expanded with the introduction of a division into the 22 categories of the common military equipment list of the European Union.

Currently, the report provides information on the total amount of the export license approvals, divided into countries and according to the list of 22 categories of equipment. But this total amount of approvals for negotiations does not correspond to the amount of actual deliveries, nor to the orders recorded in the final year of reference... If we take the example of France, the overall number of authorisations for the year 2008 shown in the UE's report is 10,738.2 million Euros, while the global amount of new orders is only of 6, 583.5 million Euros and the global amount of the deliveries made during that same year 2008, 3,172.8 million Euros.[10]

The report covering year 2008 was published in the *Official Journal of the European Union*, November 6th 2009. This eleventh report includes some novelties, in particular the number of licenses –total amount and type of categories– granted by Member State for brokerage transactions including the country of origin and destination country of the military equipment. Thus, brokering licenses involving Israel were granted during the year 2008 in Germany and the United Kingdom. And the only brokerage license denied described in the report concerns material with destination Israel. But the UE Member State at the root of this refusal is not indicated. However, only 11 out of 27 States have provided information. France hasn't. While the *Rapport au Parlement sur les exportations d'armement de la France en 2008* [2008 Report to Parliament on France's arms exports] indicates (p. 43): "*Whereas 161 applications for brokerage authorizations were filed in 2008, 160 were granted. One was refused.*" But of course, without giving any indication on the countries concerned and the final destinations of these brokerage licenses. Would the French government be somehow reluctant to disclose the details of such permissions at European level?

The EU report also indicates the number of contracts having been refused permission, classified according to each of the eight criteria of the Common Position. So we know that in 2008 the EU has generally declined 22 contracts towards Israel over a total of 833 granted (28 refusals over 1,018 licenses granted in 2007) ... Even so, we

9. Cf. http://www.consilium.europa.eu/showPage.aspx?id=1484&lang=fr/.

10. The number of orders and deliveries is based on the Report to Parliament on arms exports to France in 2008, published by the Department of Defence, September 2009, available at: http://www.defense.gouv.fr/.

can not know the number of refusals towards Israel for each of the Member States! However, we do have a distribution of the refusals according to the criteria of the Code of Conduct. Thus in 2008, knowing that several criteria can be referred to the same refusal, vis-à-vis Israel, criterion 1 has been reported once; criterion 2, 9 times; criterion 3, 12 times; criterion 4, 7 times; criterion 6, once; Criterion 7, 7 times (*the criteria are explained in Part III*).

Within the European Union –since 2001, when the distribution of exports by recipients was made public– 20 states have exported to various degrees military equipment to Israel, namely: Germany, Austria, Belgium, Bulgaria, Cyprus, Denmark, Spain, Finland, France, Greece, Hungary, Italy, Luxembourg, Netherlands, Poland, Czech Republic, Romania, United Kingdom, Slovakia and Slovenia.

But of course, nothing really comparable between Cyprus and Luxembourg, which gave a single export license for 8 years, and, for example France, whose exports towards the Jewish state amount to more than 50% of those of the European Union. Indeed, a small number of States heavily dominates arms exports. The top five exporters have secured, between2003 and 2007, over 92% of the arms sales from the European Union to Israel: France, 52.7%, Germany 25.3% United Kingdom 9.5%, Belgium 2.7%, Poland 2.4%.

All military equipment (or its components) is included, except the equipment belonging to categories 12 (high-speed kinetic energy weapons systems and related equipment) and 19 (directed-energy weapons systems, related or counter-measure material and test models).

In view of the declarations published in successive editions of the European report, only seven states have not exported military equipment to Israel: Estonia, Ireland, Latvia, Lithuania, Malta, Portugal and Sweden. Of these, only Sweden – which is among the top 10 exporters worldwide– would have refused on the grounds of political choice.[11]

Similarly, simply reading the European reports, it is difficult to correlate the Israeli-Lebanese war of summer 2006, or Operation "Cast Lead" against Gaza, with a significant variation on both the amount of exports from EU to Israel and an increase in the number of refusals of licenses.

At the France level

The first *Rapport au Parlement sur les exportations d'armement de la France* was published in 2000 and included the 1998 data. The tenth edition was published in September 2009. Please note that after having experienced an improvement, the report has undergone in the past two years a slimming cure, turning into a tool more for promoting arms sales than a tool for their monitoring by parliamentarians and civil society.

Again, the report sheds light on the amount of French exports of military equipment, according to both recipients and categories and in accordance to the list established by the European Union, but does not describe the type of goods being exported.

The Defence Ministry makes a distinction between the total amount of the new orders made in the base year and the total amount of the deliveries (*see tables in Appendix 2*).

As its name suggests, the report refers only to exports from France. It does not include the amount of imports, so it does not allow measuring the reality of the military

11. Cf. Caroline Pailhe contribution , " L'Union européenne et son code de conduite ", in Qui arme Israël et le Hamas ?, collective work published by Grip, Amnesty International and the Observatoire des armements, May 2009.

cooperation between France and Israel, which focuses mainly on sensitive technologies (UAVs, reconnaissance aircraft, electro-optics, optical detection, lasers). Moreover, it is also a two-way technological cooperation giving "*the French and Israeli manufacturers, both affected by defence budgets cuts, the opportunity to form joint ventures so they can enter new markets*"[12] . Above all, this cooperation allows both countries to improve their products while benefiting from the mutual progress gained both by the industry and by the testing of materials on the field in real combat situations.

Subsidiary but important elements...

To complete this inventory, two aspects of the support to Israel's military policy deserve to be mentioned, although they are not directly related to a direct contribution to violations of international humanitarian law.

First, the scientific research programs funded by the European Union which have benefited Israeli weapon manufacturers, *cf. Article by David Cronin, Annex 3*.

And second, the hosting of Israeli weapon companies in the professional arms trade shows, especially those organized in France by the Ministry of Defence. This is a support for the Israeli armaments industry, coming to the French territory to exhibit equipment used by the Israeli army in military operations conducted in the Palestinian Territories. The proven effectiveness in combat is even one of the major arguments touted by their salespeople to "hook" the customer...

Moreover, the Israeli presence in the weapons trade shows is constantly growing. For example, during the 2008 edition of the "international land defence Exhibition", Eurosatory, no fewer than 47 companies were listed, against only 17 in the 1998 edition ... Same increase for the "worldwide exhibition of internal state security", Milipol (military and police equipment): 16 exhibitors in 1997, 42 in 2007 and 47 exhibitors at the 2009 edition ...

3. The EU arms transfers: a significant ethical and legal problem!

The Code of Conduct of the European Union was born out of the war against Iraq in 1991 with the adoption of eight criteria in 1991 and 1992 and the introduction from 1998 onwards of a harmonization tool for weapons exports managed within COARM ... In December 2008, the Code became "Common Position" and acquired therefore a legally binding character...

As emphasized in the *Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*" adopted December 8, 2008 by the Council of the European Union and published in the Official Journal of the European Union of 13 December 2008:

> "*Member States recognize the special responsibility of military technology and equipment exporting States*."
> "*Member States are determined to prevent the export of military technology and*

12. Armement: Charles Millon veut doper les échanges avec Israël ", Claudine Meyer, *Les Échos* February 17th 1997.

equipment which might be used for internal repression or international aggression or contribute to regional instability."

Through this Common Position, Member States are required to evaluate, on a **case by case** basis, according to a list of eight criteria, all applications for export authorizations for materials included in the common list of military equipment of the European Union. This list includes 22 categories of equipment, as we have already reported in the second part.

Virtually each one of the eight criteria may be applied and lead Member States to refuse any export of military equipment and technology to Israel... In fact, in account of the information provided in the various annual reports of the European Union, we can see that –to varying degrees– all the criteria have been used to justify refusal of a license to Israel.

Here is the description of the eight criteria set forth in Article 2 of the Common Position:

CRITERIA

1. Criterion One: Respect for the international obligations and commitments of Member States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.

An export license shall be denied if approval would be inconsistent with, *inter alia*:

a) the international obligations of Member States and their commitments to enforce United Nations, European Union and Organisation for Security and Cooperation in Europe arms embargoes;

b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;

c) the commitment of Member States not to export any form of anti-personnel landmine;

d) the commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and The Hague Code of Conduct against Ballistic Missile Proliferation.

2. Criterion Two: Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.

– Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall:

a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;

b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe.

For these purposes, technology or equipment which might be used for internal repression will include, *inter alia*, technology or equipment where there is evidence of the use of this or similar technology or equipment for internal repression by the proposed end-user, or where there is reason to believe that the technology or equipment will be diverted from its stated end-use or end-user and used for internal repression. In line with Article 1 of this Common Position, the nature of the technology or equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, *inter alia*, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

– Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:

c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.

3. Criterion Three: Internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts. Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

4. Criterion Four: Preservation of regional peace, security and stability.
Member States shall deny an export licence if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim. When considering these risks, Member States shall take into account *inter alia*:

a) the existence or likelihood of armed conflict between the recipient and another country; (b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;
b) the likelihood of the military technology or equipment being used other than for the legitimate national security and defence of the recipient;
c) the need not to affect adversely regional stability in any significant way.

5. Criterion Five: National security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries.

Member States shall take into account:
a) the potential effect of the military technology or equipment to be exported on their defence and security interests as well as those of Member State and those of friendly and allied countries, while recognising that this factor cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability;

b) the risk of use of the military technology or equipment concerned against their forces or those of Member States and those of friendly and allied countries.

6. Criterion Six: Behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law.

Member States shall take into account, *inter alia*, the record of the buyer country with regard to:

a) its support for or encouragement of terrorism and international organised crime;
b) its compliance with its international commitments, in particular on the non-use of force, and with international humanitarian law;
c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in point (b) of Criterion One.

7. Criterion Seven: Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions.

In assessing the impact of the military technology or equipment to be exported on the recipient country and the risk that such technology or equipment might be diverted to an undesirable end-user or for an undesirable end use, the following shall be considered:

a) the legitimate defence and domestic security interests of the recipient country, including any participation in United Nations or other peace-keeping activity;
b) the technical capability of the recipient country to use such technology or equipment;
c) the capability of the recipient country to apply effective export controls;
d) the risk of such technology or equipment being re-exported to undesirable destinations, and the record of the recipient country in respecting any re-export provision or consent prior to re-export which the exporting Member State considers appropriate to impose;
e) the risk of such technology or equipment being diverted to terrorist organisations or to individual terrorists;
f) the risk of reverse engineering or unintended technology transfer.

8. Criterion Eight: Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments.

Member States shall take into account, in the light of information from relevant sources such as United Nations Development Programme, World Bank, International Monetary Fund and Organisation for Economic Cooperation and Develop-

ment reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They shall consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid.

The difficulty arises from the fact that for Member States it is a case by case assessment and that the link between the exported product and its use against the criteria as defined must be direct. In addition, the Common Position makes it clear (*Article 4, paragraph 2*) that "*The decision to transfer or deny the transfer of any military technology or equipment shall remain at the national discretion of each Member State*."

A procedure for "confidential" information and consultation between Member States has been established to harmonize policies and prevent some states seeking to "*use them for commercial advantage*".

However, the Common Position rests on a trust procedure between States and no verification system for the authorisations according to the criteria, nor sanctions in case of non-compliance, has been established.

In terms of transparency, at the civil society level, the only information we have from the Member States of the European Union is the distribution of the number of contracts and their economic amounts under the 22 categories defined in the European Union list. When, to verify the implementation of the Common Position criteria by Member States exporting to Israel, a specific list of the materials exported would need to be published...

Taking the example of France –which represents about half of the European Union exports, *cf. the second part*– we know that Israel has placed orders for equipment classified in the following categories:

- *Ammunition and rocket adjustment devices;*
- *Bombs, torpedoes, rockets, missiles, other explosive devices and charges, and related equipment and accessories;*
- *Equipment for fire control and related alert and warning equipment, and related alignment, test, and counter-measure equipment and systems, specially designed for military use, and their components and accessories;*
- *Chemical or biological toxic agents, "riot control agents", radioactive substances , related components and substances;*
- *"Energetic materials", and related substances;*
- *Warships (ships or submarines), specialized naval equipment, accessories, components and other surface ships;*
- *"Aircraft", "lighter-than air vehicles", unmanned air vehicles, engines and "aircraft" equipment, related equipment and components, specially designed or modified for military use;*
- *Electronic equipment, not included, on the other hand, in the European Union common list of military equipment;*
- *Imaging or counter-measures equipment, specially designed for military use, and its components and accessories;*
- *Cryogenic and "superconductive" material and its components and accessories.*

Reading this list, we can not help noticing that it describes equipment –depending on how it is used– whose export is at odds with the standards of the Code of Con-

duct. However, sheltered by trade secret and other arguments equally fallacious, there is a lack of transparency – and for good reason– on the type of equipment sold. At the EU level, only the number of licenses granted and the distribution of the amount of orders according to the 22 categories defined in the "Common Military List of the European Union" are made public.[13]

However, only the publication of a specific list of the exported products would allow to measure more precisely the military contribution –and responsibility– of the various exporting European states in the massacres perpetrated by Israeli armed forces against Palestinian population. Several reports issued by international bodies such as the Goldstone Commission, Amnesty International, Human Rights Watch, etc. largely support this. At the same time, it would also allow to verify how the criteria of the European Union Code of Conduct are being implemented. For the devil is in the details and the issue of arms exports cannot be measured solely against its financial volume.

Indeed, when, for example, the question is raised to the French government –either by journalists, MPs or even by a community representative– the spokesman of the Foreign Ministry incessantly asserts that, "*concerning Israel, a country for which the total of French weapon exports is relatively low, the CIEEMG [Inter-ministerial Commission for the Study of the exports of war material] is particularly vigilant on all exports of war materials*".[14] A principle declaration impossible to verify due to the lack of more precise evidence.

Similarly, when questioned by a member of Parliament who was concerned precisely by "*the intensification of trade in the weapons field*", Mr. Hervé Morin, Minister of Defence, replied that "*the level of direct sales of French hardware to the Israeli State remains relatively low and remains focused on components*".[15] So be it.

However, Amnesty International investigators found from fragments of a missile used by the Israelis in Gaza against a Palestinian ambulance that some of the components were labelled "Made in France".[16]

13. Available at : http://www.consilium.europa.eu/showPage.aspx?id=1484&lang=fr/.
14. Quai d'Orsay spokesman press point, January 16th 2009 (www.diplomatie.gouv.fr).
15. Question n° 17773 from M. Jean-Jacques Candelier, parliament representative, published in the *Journal officiel,* February 26th 2008, p. 1526; answer by the Defence Minister published in the *Journal officiel,* May 13th 2008, p. 4001. Available at: http://questions;assemblee-nationale.fr/q13/13-17773QU.htm/.
16. See the report *Fuelling conflict: Foreign arms supplies to Israel/Gaza* published last 23rd February by Amnesty International, pp. 12-13 (AI Index : MDE 15/012/2009).

Appendix 1

Table of arms transfers from France to Israel

Year	Orders taken	Deliveries	Total amount of the AEMG	Number of AEMGs
2004	26.0	18.8	101.3	122
2005 (1)	19.6	14.0	72.2	133
2006	18.4	22.3	89.1	144
2007	20.4	8.2	126.3	112
2008	8.4	16.2	75.0	104

The data shown is in constant million Euros 2008 and is extracted from the *Rapport au Parlement sur les exportations d'armement de la France en 2008* published by the Ministry of Defence in August 2009 (available at: www.defense.gouv.fr).

According to the French terminology, the number of orders taken relates to the total amount of the contracts signed and come into force by means of paying an initial instalment during the same year; the number of deliveries, to the total deliveries of that year. Only the French share of the production is accounted for. The difference between the two amounts is explained as follows: by the chronological difference between orders and deliveries; by the phasing of the deliveries over several years; as well as by the fluctuations in the exchange rates.

The amount of AEMGs (Authorization to export war material) relates to the total of files registered with the CIEEMG (Interministerial Commission for the study of war material exports) by exporters in order to obtain the necessary permits to answer calls for bids and negotiate the contracts.

1) In the 2005 COARM report, the total amount of the shipments indicated is only 12.8 million Euros (see the *Official Journal of the European Union*, 16/10/2006), that is, 0.4 million Euros lower than the amount indicated in the *Rapport au Parlement*. Is it a transcription error?

AMOUNT OF SALES OF MATERIALS AND EQUIPMENT BY THE MINISTRY OF DEFENCE

Year	Deliveries in return for payment
2004	214 875.50
2005	5 447,10
2006	650,80
2007	2 236,40
2008	3 537,20

The Ministry of Defence conducts regular deliveries of equipment, in return for payment or free, with destination to various states. Transfers to Israel include military equipment, except light weapons and small calibre arms. The figures shown are in current Euros and have been taken from the successive editions of the *Rapport au Parlement sur les exportations d'Armement de la France* published by the Ministry of Defence (available at: www.defense.gouv.fr).

DISTRIBUTION OF ARMS EXPORTS BY CATEGORIES

Categories	2004 deliveries	2005 deliveries	2006 deliveries	2007 orders	2007 orders
ML1 – Light weapons <12.7 mm					
ML2 – Guns > 12.7 mm, mortars, antitank weapons					
ML3 – All calibre ammunition	1.2	1.5	1.5	0.0	0.0
ML 4 – Missiles (except anti-tank)	0.0		0.1	1.1	0.21
ML5 - Fire control, radars	0.0	0.6	0.3	5.7	2.0
ML6 - Wheeled or tracked vehicles	0.1		0.6		
ML7 - NBC (detection, protection)	0.2	0.2	0.2	0.1	0.2
ML8 - Explosives or propulsion materials		0.0	0.0	0.1	0.3
ML9 -Vessels of war (surface or underwater)	1.9	0.1	0.5	1.3	0.3
ML10 - Aircraft (airplanes, helicopters, UAV)	5.3	5.1	5.1	5.9	3.0
ML11 - Communications, counter-measures	1.8	0.8	4.7	2.5	1.3
ML 12 - Kinetic energy weapon systems					
ML 13 – Armoured materials, helmets, vests	6.1	3.4		0.0	
ML14 - Training, simulators			0.0		
ML15 - Imaging, optronics	0.7	1.0	0.3		0.0
ML16 – Forgings and castings	0.0				
ML17 – Diving and engineering equipment, robots					
ML18 – Weapon production equipment and components			0.1		
ML19 - Directed energy weapons (DEW)					
ML20 - Cryogenic and superconducting equipment		0.0	8.1	3.2	1.2
ML21 - Software					
ML22 - Technologies					
Total	**17.4**	**12.8**	**21.4**	**19.8**	**8.4**

The data shown here is in millions of Euros and has been taken from successive editions of the *Rapport au Parlement sur les exportations d'Armement de la France* published by the Ministry of Defence (available at: www.defense.gouv.fr).

Arms transfers are distributed according to the "*Common Military List of the European Union*" adopted by the European Union (available at: http://www.consilium.europa.eu/showPage.aspx?id=1484&
lang=fr).

0.0 means an amount less than 50.000 Euros.

Since publishing the *Rapport sur les exportations d'armement de la France* in 2007, only the distribution of the total amount of the orders is indicated and not the total amount of the deliveries as in previous years ... It does not help comparisons!

According to the data published in successive editions of the *Rapport au Parlement sur les exportations d'Armement de la France* , there has been no export of SALW (small arms and light weapons) towards Israel during the past five years (2004-2008).

Appendix 2

FACTSHEET: HOW ISRAELI ARMS COMPANIES BENEFIT FROM EU SCIENCE FUNDS

Israel is the main foreign partner for the EU's "framework programme" for scientific research, which has been allocated €53 billion between 2007 and 2013. The EU is the second only to the Israel Science Foundation in Jerusalem as a source of research funding for Israel.

Israel expects that its investment in the EU's current research programme will be worth at least €500 million by the time it has concluded in 2013.

Using the pretext of fighting terrorism, the EU has decided in recent years that arms companies are eligible to receive funding for "security research". Ten of the 45 initial projects described by the EU as "security research" have involved Israeli companies, academic or state institutions.

Motorola Israel, for example, is taking part in iDetect 4All, an EU-funded surveillance project designed to provide alerts of suspicious activities near buildings or resources of economic value. Motorola is the top maker of fuses for aircraft bombs used by the Israeli air force. Weapons components bearing a Motorola label have been found by investigators from Human Rights Watch who searched the sites bombed by Israel in Gaza in late 2008 and the beginning of 2009. Motorola-made fuses were also a central part of the bomb with which Israel killed at least 28 civilians, most of them children, living in an apartment block in Qana, Lebanon, in 2006.

The iDetect 4All project is likely to draw on experience gained from the use of surveillance technology in the occupied West Bank. Over the past five years, a Motorola radar system worth $158 million has been installed in 47 Israeli settlements there. The Jerusalem Post has described the system as a "virtual fence" that uses thermal cameras to pinpoint "intruders".

Not all of the EU-financed projects involving Israel fall under the security research category. Israel is participating, too, in road safety and environmental research. It is instructive, however, that Israeli arms companies are active in apparently civilian projects, suggesting that the technology being developed by them can have military applications.

Israel Aerospace Industries (IAI), the manufacturer of warplanes used by Israel in the occupied Palestinian territories, is also benefiting from several EU-financed projects. These include the "Clean Sky" project, aimed at developing more environmentally-friendly aircraft engines. The European Commission has confirmed that IAI

will be able to apply for patents on innovations realised as part of this project, allowing it to use the fruits of research financed by the European taxpayer for military purposes.

Elbit, the largest private arms company in Israel, is taking part in a project called CAPECON (Civil Applications and Economical Effectivity of Potential UAV Configurations). Its objective is to deliver a blueprint for flying unmanned aerial vehicles (UAVs) in civilian airspace by 2015. More commonly known as drones, Elbit's UAVs have been used frequently in attacks on Palestinian civilians, as well as in Afghanistan and Iraq. Thomas Bingham, a British law lord, has compared these weapons to landmines and cluster bombs and suggested they are so cruel "as to be beyond the pale of human tolerance".

Israel is intimately involved in the EU's research activities on nanotechnology. Following Israel's war against Lebanon in 2006, Shimon Peres (now Israel's president) expressed a desire to see nanotechnology yielding the weapons of the future. Although Israel has more recently conveyed the impression that most of its nanotechnology activities are medical in nature, Israel's interest in this area of science cannot be separated from the occupation of Palestine. Israel's national strategy on nanotechnology is being implemented with advice from representatives of the Israeli ministry of defence and a former president of Rafael, the Israeli weapons development authority.

In a 2004 report, the Euro-Mediterranean Human Rights Network documented how firms in Israeli settlements in the Golan Heights and Jordan Valley were benefitting from EU research grants. The firms' participation in EU activities contradicted statements that only bodies within Israel's internationally recognised borders were entitled to cooperate with the Union.

* David Cronin is an Irish journalist and lives in Brussels.
His book *Europe's Unholy Alliance With Israel* will be published by Pluto Press in 2010.

Posted by IPSC (Ireland Palestine Solidarity Campaign) http://www.ipsc.ie
Published Saturday, January 16th 2010 in French by Info Palestine.
http://www.info-palestine.net/artic...

F) THE GAZA BLOCKADE AND OPERATION 'CAST LEAD' IN GAZA. SOME HEALTH-RELATED MATERIAL RELEVANT TO FOURTH GENEVA CONVENTION VIOLATIONS

1. Besieging a population into destitution

As far back as 2003 a UN Rapporteur concluded that Gaza and the West Bank were **"on the brink of a humanitarian catastrophe"**. The World Bank estimated then that 60% of the population were subsisting at poverty level, a tripling in only three years. Half a million people were completely dependent on food aid and Amnesty International expressed concern that the Israeli Defence Force was hampering distribution in Gaza. Over half of all households were only eating one meal a day. A study by Johns Hopkins and Al Quds' universities in Gaza found that 20% of children under 5 years old were anaemic, 9.3% acutely malnourished and a further 13.2% chronically malnourished. The doctors I met on a professional visit in 2004 pointed to a rising prevalence of anaemia in pregnant women and low birth rate babies.

In 2006 John Dugard, UN Special Rapporteur in the Occupied Palestinian Territory, told a session of the UN Human Rights Council that **"Gaza is a prison and Israel seems to have thrown away the key".** He repeated earlier accusations that Israel was breaking international humanitarian law with security measures which amounted to "collective punishment" of the entire Gaza population. **"What Israel chooses to describe as collateral damage to the civilian population is in fact indiscriminate killing prohibited by international law"**, he said. He cited Israel's destruction in June 2006 of the only domestic power plant in Gaza, causing power cuts, and Israeli tanks and bulldozers had destroyed houses, schools and farmland. (Between 2000 and 2004, Israel had destroyed 2,370 housing units in the Gaza strip, leaving 22,800 people homeless by UNRWA calculations).

Mr Dugard noted that besides Israel, the US, Canada and the EU should also be blamed as they **have "contributed substantially to the humanitarian crisis by withdrawing funding not only from the Palestinian authority but also the Palestinian people"**. He noted that if the international community could not recognise what was happening in Occupied Palestinian Territories, **"they must not be surprised if the people of the planet disbelieve that they are seriously committed to the promotion of human rights".**

Israel began restricting fuel imports in October 2007. This caused periodic disruptions to Gaza's main electricity supply. Power cuts and shortages of fuel for back up generators meant that Gaza's three sewage plants had been unable to secure the 14 days uninterrupted power supplies required to treat sewage. Gaza's sewage treatment body had less than 40% of the fuel it needed for much of that year, and estimated that it had been releasing 50/70 million litres of raw or poorly treated sewage into the sea

every day during 2008. Aid agencies say that water pumping stations had struggled with power and fuel shortages, and in 2008 15% of the population had access to water four to six hours per week, 25% had water every four days and 60% every second day. 70% of agricultural water wells require diesel for their pumps and many farmers lost crops due to lack of irrigation. One poultry farmer had to slaughter 165,000 chicks because he did not have the fuel for the incubators to keep them alive.

There were regular restrictions on construction materials, particularly cement, and spare parts for machinery. Israel said many of these items were considered "dual use" and could be used for weapons manufacture – for example water pipes, fertiliser, cement. UNRWA said that a lack of construction material had prevented the provision of accommodation for 38,000 people living in inadequate conditions. Factories making construction materials were obliged to shut down so that the construction and maintenance of roads, water and sanitation infrastructure, medical facilities, schools and housing projects had largely been halted. Lack of paper and printing material meant school books were distributed four months late for the 2007/8 school year, according to UNRWA.

The closures devastated the private sector of Gaza's economy. Nothing, apart from a small number of trucks of strawberries and flowers were exported after June 2007. Combined with a lack of raw materials and agricultural imports like fertilizer, approximately 95% of Gaza's industrial facilities were closed or operating at minimal levels.. 25,000 tonnes of potatoes and 10,000 tonnes of other crops perished or were sold off at a fraction of their value as a result. Before the closure, Gaza's exports were worth US$ 500,000 per day

By late 2007 the WFP was warning that less than half of Gaza's food import needs were being met. Basics including wheat grain, vegetable oil, dairy products and baby milk were in short supply. Few families could afford meat. Anaemia rates were rising sharply and UNRWA noted that **"we are seeing evidence of stunting of children; their growth is slowing, because our ration is only 61% of what people should have**". Giacaman et al from the Institute of Community and Public Health, Bir Zeit University, noted in the 2009 Lancet Series on Palestine that the rate of stunting in children under 5 years of age had risen from 7.2% in 1996 to 10.2% in 2006, using WHO Child Health Standards. Stunting during childhood is an indicator of chronic malnutrition, and is associated with increased disease burden and death, included compromised intellectual development and educational performance, and chronic diseases in adulthood.

By early 2008, the United Nations Relief and Works Agency (UNRWA) had almost depleted the stock of emergency food it had previously built up. Only 32 truckloads of goods had been allowed to enter Gaza since Israel imposed total closure on 18 January, whereas up to 250 trucks were entering daily before June 2007 and even that was insufficient. On 30 January UNRWA warned that unless something changed, the daily ration that it would distribute to 860,000 refugees in Gaza would lack a protein component: the canned meat that was the only source of protein in food parcels was being held up by Israel, and stocks inside Gaza were exhausted. The World Food Programme (WFP), then feeding another 340,000 Gazans, had been allowed by Israel to bring through 9 trucks of food aid in the previous 2 weeks; in the 7 months before that, the WFP had been bringing in 15 trucks per day.

In 2007/8 the Gazan population had been receiving, on average, on less than a fifth of the volume of imported supplies they had received in 2005. Only basic humanitarian items were allowed in, and virtually no export permitted, paralysing the economy.

At times even basic supplies like flour and cooking oil were blocked from entry to Gaza. A joint survey by three UN agencies in May 2008 found that all Gazan retailers had run out of flour, rice, sugar, dairy products, milk power and vegetable oil on three occasions in 2007.

In 2008 between half and three quarters of the Gazan population were relying on food aid from UNRWA for their staple foods. The ration provided about two thirds of daily nutritional needs and needed supplement by dairy produce, meat, fish and fresh fruit and vegetables bought on the open market, if available. Increasingly impoverished Gazans had great difficulty and pain for these extra items. The UN survey found that more than half Gazan households had sold their disposable assets and were relying on credit to buy food, with three quarters of Gazans buying less food than in the past.

In February 2008, under pressure from the US and Israel, Egypt dispatched additional border guards armed with water cannons and electric cattle prods to regain control of their border with Gaza. This followed desperate shopping by Gazans in Egyptian border towns as a result of the blocking by Israel of food that UN and other relief agencies were seeking to deliver.

Since the middle of 2007, movement in and out of the Gaza strip has been effectively prohibited. In totality these measures have comprised a state of siege, and throughout history besiegers have used hunger as a weapon.

As a result of all these measures, according to the UN, the economy has suffered **"irreversible damage"** and that 37% of breadwinners were now unemployed, with an average of 8.6 dependents per employed person. . Poverty rates in 2007 were 52% in Gaza (and 19% in West Bank) and are still increasing. When food aid and remittances were excluded, the rates rose to 79% in Gaza and 46% in West Bank.

According to the Commissioner General of UNRWA in 2008, **"Gaza is on the threshold of becoming the first territory to be intentionally reduced to a state of abject destitution, with the knowledge, acquiescence and - some would say – encouragement of the international community".**

When Israel limited commercial shipments of food into Gaza in 2006, a senior government adviser Dov Weisglass, explained that **"the idea is to put the Palestinians on a diet but not to make them die of hunger".**

In September 2007 the Israeli government declared Gaza **"a hostile entity**", and then Prime Minister Olmert said that **"we will not allow them to lead a pleasant life".**

In January 2008 Israel's Supreme Court dismissed the challenge by human rights organisations to the policy of restricting fuel supply.

In his Comment for the 2009 Lancet Series on Health in the Occupied Palestinian Territory, ex-US President Jimmy Carter wrote that Israel had **"consistently violated**" its commitment in the 1978 Camp David Accords **"to withdraw its political and military forces from Palestinian territory and grant the Palestinians full autonomy over their own affairs…There has been no withdrawal from the West Bank and Palestinians here and in the Gaza Strip have been increasingly strangled. Therefore the conflict within the occupied Palestinian territory has not abated and, by any objective measure, has worsened since I left office".**

Measures by Israel to control and impede economic activity, and freedom of movement in and out of Gaza, has represented consistent and visible policy maintained over several years, yet evoking no criticism from the EU. Taken in conjunction with the staggering damage inflicted in Operation 'Cast Lead', Israeli policy appears to have

centred on the de-development of Gaza. The World Bank has described Gaza as **"starkly transforming from a potential trade route to a walled hub of humanitarian donations".** More than US$9 billion in international aid has not provided development because Palestinians lack basic security and rights

We should note that Article 55 of the 4th Geneva Convention (1949) specifically demands that **"to the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should in particular bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate".**

2. Access to medical care

The apartheid Wall, on which construction began in 2002, continues in violation of the ruling of the International Court of Justice. It has been destroying the coherence of the Palestinian health system. By 2004 it was evident that the Wall would isolate around 97 primary health clinics and 11 hospitals from the populations they served. Qalqilya hospital, which primarily served refugees, saw a 40% fall in follow up appointments because patients could not enter the city. By 2004 there had been at least 87 documented cases (including 30 children) in which denial of access to medical treatment had led directly to deaths, including those of babies born while women were held up in checkpoints. Outside some villages Israeli Defence Force checkpoints closed at 7pm and not even an ambulance could pass after this time. As a consequence, for example, a man in a now fenced-in village near Qalqilya approached the gate with his seriously ill daughter in his arms, begging the soldiers on duty to let him pass so he could take her to hospital. The soldiers refused, and a Palestinian doctor summoned from the other side was also refused access to the child. The doctor was obliged to attempt a physical examination, and to the give the girl an injection, through the wire.

Since the blockade Gazan hospitals have lacked heating because of power cuts, and spare parts for diagnostic machines, ventilators, incubators. Patients have been dying unnecessarily: cancer patients cut off from chemotherapy regiments, kidney patients from dialysis treatments etc. By early 2008, supplies of 107 classes of basic medicine were depleted and 97 medications on the verge of depletion.

According to the Palestinian International Campaign to End the Siege on Gaza, 90 patients had died between June 2007 and February 2008 as a direct result of Israel's siege, which denied them access to medical treatment.

The data collated by Physicians for Human Rights-Israel (PHRI) is noteworthy. In a report in April 2008, PHRI noted that prior to June 2007 about 400 patients left Gaza for Egypt via Rafah each month, and an additional monthly average of 650 requested permits for exit via Erez to medical centres in Israel, the West Bank, East Jerusalem and Jordan. In June 2007 Egypt closed the Rafah crossing and as a consequence the number of applications to exit Gaza via Israeli-controlled Erez doubled. Yet PHRI witnessed a drastic decline in the number of permits that were granted by the Israeli authorities. Most requests were being denied on the grounds of "security provisions" issued by the Israeli General Security Service GSS, who had assumed an increasingly prominent role. Many patients were thus trapped in Gaza.

From June 2007 Israel maintained a life/limb distinction regarding applications,

refusing to recognise the right of patients not in a life threatening condition to exit Gaza. The result was the amputation of limbs and loss of eyesight that could have been prevented. From September 2007 even life threatening cases were denied and the number of access-related deaths rose.The success rate of applications supported by PHRI fell from 67% to 7%. PHRI also noted drastic deterioration in the policy being applied by the Israeli High Court of Justice (HCJ) in response to appeals. In November 2007 the HCJ ruled that **"even evil people should not be denied life saving care"**. By April 2008 WHO had registered 32 deaths directly related to denial of access to care.

On 30 January 2008 the HCJ declared that the occupation of the Gaza Strip had ended and that Israel had very little responsibility to its residents, in effect granting legitimacy to Israeli government policy to impose collective measures against the civilian population of Gaza. In March, during a petition for a cancer patient Mustafa Hilu, not only was the petition rejected, but the judge, Justice Melzer, wondered why the patient had not submitted a letter of thanks to Israel following care given to him previously.

PHRI collected data to indicate that in at least 30 cases since July 2007, the Israeli Secret Service had called patients – many of them with exit permits, obtained after many obstacles and delays – to interrogation at Erez crossing. In the course of the interrogation they were asked to provide information about relatives and acquaintances, or asked to collaborate and provide information on a regular basis as a condition for being allowed to exit Gaza to obtain life-saving medical treatment. If they refused or could not provide the information, they were turned back to Gaza. A petition submitted by PHRI to the HCJ on this issue was rejected after the judges refused to discuss the topic.

PHRI said that 200 patients had died while waiting for permits in 2007/8.

In April 2008, PHRI were demanding that the government of Israel ensured access to all patients needing medical care unavailable in Gaza to medical centres outside Gaza as a matter of policy; that the GSS desisted immediately from conditioning the exit of patients from Gaza on agreement to inform on others; that as occupying power Israel recognised its responsibility in international law for the welfare of the Gazan population; that international players used political means as well as leverage connected to their own provision of aid to Gaza to pressure Israel to recognise its responsibilities for the Occupied Territories as a whole and to end its siege on Gaza.

PHRI described the Gazan health system as "collapsing" under the pressure of shortage of equipment and spare parts, fuel and trained staff. According to the WHO, Gazan health authorities said in April 2008 that 85 urgently needed drugs and 52 items of medical supplies (e.g. swabs) were out of stock. Medical institutions had largely been unable to afford spare parts for equipment and the UN said that by December 2007, the majority of diagnostic equipment, such as X-ray machines and MRI scanners, in municipal facilities were no longer functioning. Medical staff were unable to exit Gaza for training and PHR gave an example of a new radiotherapy facility that could not be used as there were no trained staff to use it. Fuel shortages affected hospitals, with ambulances running out of fuel at points in early 2008, and backup generators – needed during power cuts- running low on fuel and spare parts.

The 2009 Amnesty International report on the Gaza attack entitled "Operation Cast Lead: 22 Days of Death and Destruction" concludes that **"after Israeli ground forces took positions inside Gaza on 3 January 2009 they routinely prevented ambulances and other vehicles from reaching the wounded or**

from collecting bodies anywhere near their positions. Requests by the Palestinian ambulance services to be allowed passage to rescue the wounded and the dead in any area in Gaza which had been taken over by Israeli forces were consistently denied by the Israeli army. The ICRC estimated that the average time required to evacuate injured people was between two and ten hours and in some cases several days". On 6 January the UN Office for the Coordination of Humanitarian Affairs (OCHA) reported "over the last twenty-four hours the Palestinian Red Cross Society has not received Israeli approval for any of its coordination requests to reach those killed or injured". As a result many of the wounded, who were never more than fifteen minutes away from a hospital, died needlessly.

On 7 January, three PRCS ambulances escorted by an ICRC vehicle were finally allowed to evacuate fourteen wounded civilians, mostly children, from a house in the Al-Zaytoun area, in Southeast Gaza. All were members of the Al-Sammouni family who had been trapped in the house for three days. After the house was shelled on 5 January, tens of family members were killed or injured. All the surviving children and elderly people were wounded and had no food or water. Israeli forces did not allow the ambulance to approach the house so the paramedics had to walk 1.5 kilometres and transport the wounded, along with three other bodies, on a donkey cart from the house to the ambulance. The four small children next to their dead mothers were said by ICRC to be too weak to stand up on their own. In all there were at least twelve corpses lying on mattresses. The ICRC had been seeking access to the areas since the 4 January.

Amnesty gives several other examples of injured civilians who called out to Israeli soldiers in nearby buildings but were not answered. Ambulances were not allowed to come to their rescue and as a result one young man Ibrahim Shurrab, 18, died from loss of blood. His initial injury had not been serious but he bled to death. The father who watched Ibrahim and his other son bleed to death was unable to receive any help until eventually on the following day an ambulance was allowed to get through – some twenty two hours after they had been shot.

The Fourth Geneva Convention relative to the Protection of Civilian persons in Time of War of 12 August 1949 obliges states to respect and protect the wounded, to allow the removal from besieged areas of the wounded or sick, and the passage of medical personnel to such areas. The deliberate obstruction of medical personnel to prevent the wounded receiving medical attention may constitute "wilfully causing great suffering or serious injury to body or health", a grave breach of the Fourth Geneva Convention, and a war crime.

3. Torture and medical complicity

Torture continues to be state policy in Israel, institutionalised over many years in the interrogation of Palestinian men, but also children. This practice violates Article 2 of the Convention against Torture (CAT). Imprisonment of children violates the UN Convention on the Rights of the Child. The 2008 UAT report to the UN Committee against Torture concludes that torture and ill-treatment is widespread and systematic, involving complicity by agents of the State at all levels, and that the State was unwilling or unable to fulfil its treaty obligations under CAT.

Since 2000 more than 500 complaints of torture have been registered, but none have been investigated by the Israeli State Attorney.

The number of Palestinians held in Israeli prisons and detention facilities has steadily increased from 737 in 2001 to over 8,000 by the end of 2008. Children too are detained and held for indefinite periods, frequently without access to lawyers or parents.

Furthermore, it has been evident for many years that Israeli doctors serving in security units "form part of a system in which detainees are tortured, ill treated and humiliated in ways that place prison medical practice in conflict with medical ethics" (Amnesty International 1996). More recently, the 2007 report "Ticking Bombs" by the Public Committee Against Torture in Israel (PCATI) provided a graphic demonstration of the extent to which Israeli doctors continued to form an integral and everyday part of the running of interrogation suites whose output was torture. Israeli doctors might see detainees before, during and after interrogations accompanied by torture, did not take a proper history of their injuries (they knew how they had arisen), made no protest on behalf of these men, and returned them to their interrogators. The Israeli Medical Association appears to have been in collusion with the status quo in Israel regarding torture for many years, and thus in violation of the World Medical Association's Declaration of Tokyo (to which they are a signatory) which forbids any involvement, however indirect, of physicians with torture and mandates them to challenge and speak out whenever they encounter it.

4. Harm to medical personnel

A PHRI report in 2002, following the invasion of the West Bank, noted that **"we believed that the Israeli Medical Association might be able to curb the appalling deterioration in the attitude of Israeli military forces towards Palestinian health and rescue services. Yet despite severe injury to medical personnel and to the ability of physicians to act in safety to advance their patients' interests; despite Israeli shells that had fallen on Palestinian hospitals; despite the killing of medical personnel on duty – the IMA has chosen to remain silent"**. A 2003 report by PHRI and B'Tselem, the Israeli Information Centre for Human Rights in the Occupied Territories, referenced below, gave a comprehensive account of the abuse of Palestinian medical personnel by the Israeli Security Forces in breach of international law. It described the unwarranted delaying of medical teams at checkpoints, the humiliation and attacks they were subjected to by the Israeli defence force, and the illegal use of Palestinian ambulances by IDF soldiers.

The 2009 Amnesty International report on the Gaza attack entitled "Operation Cast Lead: 22 Days of Death and Destruction" devoted seven pages to descriptions of attacks and obstruction of medical workers, the firing on ambulances, and the prevention of access to medical care for the wounded. Amnesty noted that clearly marked ambulances flashing emergency lights, and paramedics wearing recognisable fluorescent vests, were repeatedly fired upon as they attempted to rescue the wounded and collect the dead. Such attacks intensified after Israeli ground forces took positions inside Gaza on 3 January 2009. Amnesty noted that ambulance crews risked their lives every day to carry out their mission.

Amongst the instances given by Amnesty are the killing by missiles of three paramedics as they walked towards two wounded men on 4 January (as well as a 12 year

old boy who was showing them the way), and the missile attack on another ambulance crew in North Gaza on 4 January, in which the driver told Amnesty International: "we came about fifteen minutes after the missile strike. None of those lying in the road had any weapons; they were just civilians, all young men; their bodies were scattered, not together. The paramedics picked up the first injured man and put him in the ambulance; then they picked up a second man, transferring him from the stretcher to the ambulance when the shell hit the ambulance. Arafa Abd al-Dayem fell, badly injured, and the patient had his head and legs blown off". The head of the tank shell went straight through the ambulance and lodged in the engine. The shell was a flechette shell, which on explosion fired several thousand small but deadly metal darts over a large area. The two paramedics were both seriously wounded and one of them died later that day. The driver also sustained a head wound. On 12th January, a 32 year old doctor was killed while attempting to rescue three residents in an apartment building in Jabalia, Northern Gaza. Dr Issa Abd Al-Rahim Saleh and a paramedic went up the stairs, both wearing red fluorescent medical jackets. They found two dead women and a wounded man, whom they placed on the stretcher and began to take downstairs. The stairs of the buildings were well lit by a window running down the length of the building. A shell or missile struck Dr Saleh, cutting off his head and killing the wounded man on the stretcher. The paramedic was seriously injured.

5. Palestinian Red Crescent Society (PRCS) report for 2009

PRCS has recorded a total of 455 violations by Israeli Occupation Forces against PRCS medical teams in 2009. These included direct shooting incidents, verbal and physical abuse, as well as impeding PRCS access to the sick and wounded in breach of international humanitarian law.

15 shooting incidents and attacks against PRCS ambulances and their teams were recorded in the West Bank and the Gaza Strip. Furthermore, a PRCS volunteer in the Gaza Strip died in the course of duty, while 10 others were injured and 22 ambulances sustained damage.

Moreover, PRCS recorded 440 incidents where its ambulances were delayed or denied access, including 289 such incidents on checkpoints leading to Jerusalem and 132 incidents in the Gaza Strip during Operation 'Cast Lead'. Another five similar incidents were reported at Al Alami gate (Allenby bridge/Jericho), while 2 incidents were reported in Ramallah and 2 others in Nablus and Qalqilya.

The biggest single violation committed by Israeli Occupation Forces against PRCS in 2009 was the targeting of PRCS Al Noor City in Tal Al Hawa/Gaza. White phosphorous bombs rained on the City, severely damaging medical facilities in the compound which includes Al Quds Hospital, the EMS station, the Administrative building and warehouses.

PRCS affirms that these practices constitute a crying violation of international humanitarian law, mainly the 4th Geneva Convention of 1949 on the protection of civilians in times of war and the 1st Additional Protocol which legally apply to the Occupied Territories, and which guarantee the respect and protection of the personnel engaged in the search for, remov-

al and transporting of and caring for wounded and sick civilians and for providing them with first aid, as well as the respect of the life and dignity of civilians under military occupation.

Such practices also violate article 20 of the 4th Geneva Convention which guarantees the respect and protection of the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, and article 63 which affirms that National Red Cross and Red Crescent Societies shall be able to pursue their activities subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power.

Furthermore, Articles 12 and 15 of the 1st Protocol Additional to the Geneva Conventions stipulate that "Medical units shall be respected and protected at all times and shall not be the object of attack" and that they "shall have access to any place where their services are essential".

6. Some references

Special rapporteur. The right to food. Commission on Human Rights. UN Economic and Social Council. E/CN.4/2004/10/Add2. 31 October 2003.

Palestinian Environmental NGOs Network. The Wall in Palestine. PENGON: Jerusalem 2003.

Amnesty International. The fence/wall violates international law. Index MDE 15/018/2004. 19 Feb 2004.

Amnesty International. Oral statement to 60th session UN Commission on Human Rights. Index IOR/012/2004. 6 April 2004.

Jewish American Medical Project@yahoogroups.com. 22 June 2004.

Palestinian doctors despair at rising toll of children shot dead by army snipers. The Guardian 2004 May 20:15.

Amnesty International. Israel/Occupied Territories: killing of children must be investigated. Index MDE 15/055/2004. 25 May 2004.

www.palestinemonitor.org

Barghouti M.(ed) Health and Segregation. The impact of the Israeli Separation Wall on access to health services. Ramallah: Health, Development, Information and Policy Institute, 2004.

Amnesty International. Israel must facilitate, not hinder, relief for the occupied population. Index MDE 15/036/2004. 2 April 2004.

B'Tselem/PHR Israel. Harm to Medical Personnel. The Delay, Abuse and Humiliation of Medical Personnel by the Israeli Security Forces. B'Tselem- The Israeli Information Center for Human Rights in the Occupied Territories/ Physicians for Human Rights- Israel. December 2003.

Dyer O. Israeli Army accused of obstructing medical access to civilians. BMJ 2004; 328: 1278.

Physicians for Human Rights. A legacy of injustice: a critique of Israeli approaches to the right to health of Palestinians in the Occupied Territories. Israel: Physicians for Human rights, 2002. http://www.phr.org.il/phr/downloads/dl 145.pdf.

Summerfield D. Medical Ethics, the Israeli Medical Association, and the state of the World medical Association. Open letter to the BMA.. BMJ 2003; 327: 56.v.

Summerfield D. Palestine: the assault on health and other war crimes. BMJ 2004;329:924.
Lancet Series. Health in the Occupied Palestinian Territory. 5 papers published in 2009, with Comment by Jimmy Carter. Papers entitled “Health status and health services in the occupied Palestinian territory”; “Maternal and child health in the occupied Palestinian territory”; “Cardiovascular diseases, diabetes mellitus, and cancer in the occupied Palestinian territory”; “Health as human security in the occupied Palestinian territory”; “The health-care system: an assessment and reform agenda:.
Amnesty International. Israel/Gaza. Operation ‘Cast Lead’: 22 days of death and destruction. MDE 15/015/2009. London 2009.
World Medical Association. Doctors urged to document cases of torture. Press Release 8 Oct 2007.
Miles S, Freedman A. Medical ethics and torture: revising the Declaration of Tokyo. Lancet 2009: 373:344-48.
Amnesty International. “Under constant medical supervision”, torture, ill-treatment and the health professions in Israel and the Occupied Territories. London. Amnesty International. MDE 15/37/96. 1996.
Amnesty International. Israel/OPT. Briefing to the Committee Against Torture. MDE 15/040/2008. 2008.
Public Committee Against Torture in Israel. Ticking Bombs testimonies of torture victims in Israel. PCATI 2007. stoptorture.org.il.
Defence for Children International. Palestine Section. UAT Report: Torture and ill-treatment in Israel and the OPT. 2008.
Defence for Children International. Palestine Section. Ill-treatment and torture of Palestinian children- a report. (dci-pal.org). June 2009.

2008/11/25

7. UAT report: Torture and ill-treatment in Israel and the OPT

In its 2008 Annual Report, the United Against Torture Coalition (UAT Coalition), a coalition of 14 Palestinian and Israeli human rights organisations, has undertaken an in-depth and critical analysis of Israel’s compliance with the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

The report examines the continued and systemic use of torture by the State of Israel, in both Israel and in the occupied Palestinian territory (OPT).

In accordance with the mandate of the UAT Coalition, the Annual Report focuses on violations against Palestinians, in both theOPT and Israel. The Annual Report is based on material submitted by the UAT Coalition to the United Nations Committee against

Torture (the Committee) in September 2008, pending the Committee's periodical review of Israel's compliance with CAT, scheduled for May 2009.

The Annual Report draws upon the considerable experience of the UAT Coalition membership including more than 80 pages of affidavit material, extracts of which are interspersed throughout.

In preparing the Annual Report, the UAT Coalition examined the use of torture and ill-treatment by the Israeli authorities against Palestinians from the point of arrest, through interrogation and detention as well as the use of coerced confessions in the military courts. The Annual Report also considers:

- The use of torture and ill-treatment in non-conventional circumstances, including house demolitions, the Gaza siege and the coercion by the Israeli Security Agency (ISA) of medical patients attempting to exit Gaza in order to access necessary medical treatment.
- The continued use of incommunicado detention and lack of prompt access to lawyers for Palestinians detainees.
- The discriminatory nature in which laws and practices are applied to Palestinian detainees compared to Israeli citizens.
- The impunity with which ISA interrogators, police officers and members of the Israeli army torture and abuse Palestinian detainees, including children as young as 12.
- A legislative exemption that allows the ISA to interrogate Palestinian detainees without audio visual recordings as is required in other investigations.
- The failure of the State of Israel to clearly prohibit the use of torture and ill-treatment in its domestic legislation as recommended by the UN Committee.

The UAT Coalition concludes in its Annual Report that the use of torture and ill-treatment by Israeli authorities against Palestinians is both widespread and systematic. The State is either unwilling or unable to fulfil its treaty obligations under CAT.

The UAT Coalition has observed and recorded evidence of acts, omissions and complicity by agents of the State at all levels, including the army, the intelligence service, the police, the judiciary and other branches of government. The UAT Coalition is of the view that until this culture of impunity is addressed the situation is unlikely to improve.

Contact a DCI-Palestine if you wish to receive a hard copy of the report or read it online in English, Arabic or Hebrew.

Source: UAT

8. Appendix

This is a to-be-published academic paper which provides a snapshot of post-'Cast Lead' Gaza in 2009. It is based on epidemiological fieldwork conducted under the aegis of the Institute of Community and Public Health, Bir Zeit University, Ramallah. An extensive reference list follows the paper.

Escalating humanitarian crisis and social suffering in the Gaza Strip?

Living conditions, human security and health following the Israeli army attack on the Gaza Strip of December 28-2008- January 18 2009

INTRODUCTION

The three week Israeli Defence Force's devastating bombing campaign of the Gaza Strip from December 28, 2008 to January 18-2009 was launched at the height of midday activities with schoolchildren returning home from the morning shift (Rabbani, 2009). The Israeli air force, army and navy were all part of this attack (UN Fact Finding Mission on Gaza conflict, September 2009). Without warning (Amnesty International, 2009), the attack targeted an overcrowded 139 square miles piece of land with indiscriminate acts of violence directed against an already subjugated, destitute, and helpless 1.5 million Gaza Palestinians.

Described by the Israeli press as the harshest Israeli military assault on the Strip since the territory was captured during the 1967 War (Haaretz, 2008), the attack was planned several months before with long term preparation, information gathering and secret discussions while misleading the public (Haaretz, 2009). Contrary to Israel's allegations that Hamas violated the six-month truce, and justifying the attacks, the truce was violated on November 4, when the Israeli army entered the Strip and killed six members of Hamas (Siegman, 2009).

The scale and intensity of the attacks were unprecedented (Amnesty International, 2009).By the end of the campaign, some 1,400 Gazans had been killed, including many civilians, over 400 children and 100 women, and at least 5,380 had been injured, including some 1,800 children and 800 women (WHO Feb 09). There were 3 Israeli civilian fatalities, and 182 were injured during the period (World Bank, June 2009). Reports indicate that the population suffered severe psychological injury, stress, and grief on a broad scale, making the task of mental health care workers daunting in the aftermath (Bulletin of the World Health Organization, 2009).

The campaign also caused massive destruction of vital infrastructure and utilities, resulting in a lack of shelter and energy sources, deterioration of water and sanitation services, food insecurity and overcrowding. Businesses, factories and farmland were levelled, and more than 100,000 people were newly displaced, with over 15,000 homes damaged or destroyed (WHO Feb 09). This too was an intended de-development.

The immediate effects of the war on the Gaza Strip have been disseminated by media outlets and various humanitarian agency reports, revealing the extent of atrocities. For example, the International Committee of the Red Cross discovered shocking scenes when allowed to enter the Gaza Strip for the first time, including finding small children next to their mothers' corpses; and the Israeli English daily Haaretz revealed astonishing stories of how Israeli soldiers vandalized Gaza homes.

The war against the Gaza Strip was described as pointless and leading to a moral defeat for Israel (The Observer, 2009); having succeeded in punishing the Palestinians but not in making Israel more secure (Mearshmeir, 2009); and ending in utter failure for Israel (Haaretz Jan 22 09). As early as December 29, 2008, as the attacks were beginning, Richard Falk, the United Nations Special Rapporteur for Human Rights in the OPT maintained that the attacks entailed severe and massive violations of international humanitarian law, with violations including the collective punishment of the 1.5 million people who live in the Strip for actions of a few militants; targeting civilians, and the disproportionate military response. Testimonies by Israeli soldiers soon substantiated charges that the assault entailed grave violations of international law (Bisharat, 2009). By September 2009, the United Nations Fact-Finding

Mission, led by Judge Richard Goldstone, found evidence of war crimes and crimes against humanity committed during the assault on the people of Gaza, and called for holding Israel accountable before international law(UN Fact Finding Mission on Gaza conflict, September 2009).

The incapacitation of the Gaza Strip began with Israeli military occupation in 1967, which has devastated its economy and people. While economic restrictions preceded the Hamas electoral victory of January 2006, since then the siege and blockade have intensified over time (Roy, June 2 2009). The siege and blockade are part of a policy of isolation forbidding most Gazans from leaving or exporting anything to the outside world, and importing a narrowly-restricted number of basic humanitarian goods.

In December of 2009, a consortium of 16 international humanitarian, development and human rights groups published a report indicating that there has been no rebuilding and no recovery in the Gaza Strip (Amnesty International UK and 15 other international organizations, 2009). Over $ 4 billion had been pledged in March 2009 by the international community to help reconstruction and support the economy, but little of this money had been spent, because of the Israeli governments has continued a blockade and siege policy. This policy has prevented the importing of construction materials, including cement, glass and iron bars, leaving the Gaza Strip to rot in ruins.

Every week, 10 or so officers from the Coordinator of Government activities in the Territories of the Israeli army decide even about food products which can be brought into the Gaza Strip. Various food items have been prohibited entry, such as tinned meat, tomato paste, pasta, clothing, shoes, and notebooks. The policy is subject to change, and there is no list of permitted and prohibited items (Haaretz 15/6/2009).

The Consortium's and other reports demonstrate the impact of the blockade on an already devastated ordinary people. The report also deems the blockade an act of collective punishment which violates international law, which is destroying the hopes of Gazans for social and economic development, and the key foundations for a just and sustainable peace. Thus an escalating and large scale, man-made, humanitarian crisis continues in the Strip because of the massive destruction legacy of the operation, and the continued border blockade coming in the way of reconstruction. The Egyptian government has colluded with Israel in imposing its own restrictions, including of humanitarian aid, at the Rafah crossing.

This paper focuses on the consequences on imprisoned Palestinians who have little control over their lives (FAFO, 2009) of the Israeli assault of the Gaza Strip. Utilizing the results of a living and health conditions survey conducted in the Strip during the middle of June-middle of July 2009, and other relevant reports, the paper aims to reveal the human insecurity and social suffering of ordinary people who live in the ruined and un-reconstructed Strip, and in the context of pre-existing and continued closures and siege; their views regarding their health and quality of life; and the most pressing needs as people express them.

METHODOLOGY

A cross sectional survey was designed to assess the post war consequences of the attacks on the Gaza Strip on population living conditions, health and human security, and to identify longer term health and health promoting needs. The sampling frame was obtained from the Palestinian Central Bureau of Statistics based on its 2007 census, and included all Palestinian households living in the Gaza Strip in the aftermath

of the December 08 January 09 attacks. The instrument was composed of three parts: a roster, which included demographic, socio-economic and health information on all members of the household; a household questionnaire, which included information on housing characteristics, amenities, access to basic services, and other variables related to events taking place during and after the attacks; and a quality of life/ distress questionnaire focusing on adults 18 years or over. A total of 3102 household were visited with 3017 household questionnaires completed. There were some difficulties faced in completing the information gathering process. The results below reflect the initial analysis of the data.

RESULTS

Demographic and socio-economic characteristics of the study population

There were 18,838 people living in 3,017 households, with the average family size to 6.24 persons. The population under 30 years of age comprised 74.1% of the total. 2.5% were 65 years old or over. 61% were refugees and the rest original inhabitants. The large majority (82.3%) lived in urban areas, 2.6% in rural areas, and 15.1% in refugee camps.

Of all adults who are not of school age (>18 years old), 24.9% had up to primary schooling, 55.8% up to secondary schooling, and 19.3% post secondary schooling.

Excluding students, housewives, retired and imprisoned people, 52.3% of those over 10 years old were working full time at the time of the survey, 16.9% part time with varied hours, and 30.7% were unemployed. People between 15-29 years comprised 63.7% of the total unemployed.

Displacement

Almost a third were reported as having to find shelter outside their residence during the war. Weighted for the Strip population, 462,732 persons left their homes for shelter during the war, and 22,729 persons or 4.8% of the displaced were reported as not living in their original residence and remained displaced at the time of the survey.

Households

Basic Characteristics

The survey covered 3017 households, with 81.6% located in urban, 2.8% in rural, and 15.5% in refugee camp locales.

68.9% have to purchase water for drinking and cooking, and the rest receive water tanks from the municipality. People in the Strip are aware that the public network water is below acceptable standards required for human use, and so must resort to purchasing water to maintain their health.

Re Standard of Living index, rural areas were the most deprived of the entire Strip, more so than camps.

Outcomes of war

Financial and food insecurity

Of the total number of households 12.2% reported a decrease in income after the attack, mostly due to reduction in income from work. 19.6% of families reporting income reduction due to agricultural damage, 7.8% due to loss or damage of animal wealth, 15.1% due to the loss or damage of household projects, 14.8% due to the scarcity of production materials such as fertilizers and other supplies, 8.1% due to inability to reach the workplace, and 34.9% due to the loss of work altogether.

Among those who reported reduced family expenditure after the war, a high of 91.9% (14,573 families weighted for Gaza) reported a reduction in the purchasing of food, 89.2% clothing, 36.9% in educational expenses, 53.3% in residential expenses and equipment, and 46.6% in health expenditures.

Property destruction

1.3% of households reported complete destruction of homes (2957 homes weighted for all of Gaza), 9.3% partial destruction (21,288 weighted for Gaza), and 29.3% minor damages (67,324) total 39.9% of households. Total number of homes damaged scaled to all Gaza =115,832 homes.

22.3% of those reporting commercial project damaged reported complete repair, 24.1% partial, and 53.6% no repair at all since the war on Gaza.

Only 3.9% of those reporting damage to crops and agricultural products reported complete repair, 6.6% partially, and 89.5% none at all. 7.1% of those reporting damage of animal products/animals reported partial repair and 92.9% not at all.

Rural areas have been the hardest hit.

There were other types of destruction. 15.2% reported complete, partial or minor damage to schools where the children of the family study, 6.9% to the clinic the family usually attends,6.9% to the commercial stores the family uses, 10.2% to the roads leading to home, 9.1% to universities attended by children at home; and3.1% to gardens and public recreation places children visit. Of the total reporting destruction, 50% reported complete or partial repair of schools, with 50% not at all; 69.2% complete or partial repair of clinics.

References

Rabbani M. Birth Pangs of a New Palestine. 2009. Middle East Report. http://www.merip.org/mero/mero010709.html (accessed January 8 09).

Human rights in Palestine and other occupied Arab territories. Report of the United Nations Fact Finding Mission on the Gaza conflict. Executive summary. United Nations. General Assembly. Human Rights Council. Twelfth Session. Agenda item 7. A/HRC/12/48 (ADVANCE 1)/ 23 September 2009. http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48 _ADVANCE1.pdf (accessed December 25 2009(the Goldstone report).

Amnesty International. Israel/Gaza. Operation Cast Lead: 22 days of death and destruction. 2009. http://www.amnesty.org/en/library/asset/MDE15/015/2009/en/

8f299083-9a74-4853-860f-0563725e633a/mde150152009en.pdf (accessed July 3 2009).
Harel A. ANALYSIS / IAF strike on Gaza is Israel's version of 'shock and awe.' Haaretz 27/12/2008. http://www.haaretz.com/hasen/spages/1050405.html (accessed 1/1 2009)
Ravid B. Disinformation, secrecy and lies: How the Gaza offensive came about. Haaretz June 2 2009. http://www.haaretz.com/hasen/spages/1050426.html (accessed January 2 2010)
Siegman H. Israel's Lies. London Review of Books, January 29, 2009. http://www.lrb.co.uk/v31/n02/sieg01_.html (accessed January 29 2009).
World Health Organization. Gaza Strip. Initial Health Needs Assessment. Gaza. 15 February 2009. http://www.emro.who.int/Palestine/reports/monitoring/WHO_special_monitoring/gaza/Gaza%20Strip%20Early%20Health%20Assessment%20(final)16Feb2009.pdf (accessed February 16, 2009)
The World Bank. Palestinian Economic Prospects: Gaza Recovery and West Bank Revival. Economic Monitoring Report to the Ad Hoc Liaison Committee. June 8 2009. http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/AHLCJune09Reportfinal.pdf (accessed December 30 2009).
News. Rebuilding lives, healing minds. Bulletin of the World Health Organization 2009;87:408-409.
Editorial. The Observer. A pointless war has led to a moral defeat for Israel. The Guardian Sunday 18 January 2009. http://www.guardian.co.uk/commentisfree/2009/jan/18/gaza-israel-palestinian (accessed January 28 2009)
Hass A. Pots of urine, faeces on the walls how IDF troops vandalized Gaza homes. Haaretz, March 6, 2009. http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=1068989 (accessed March 8 2009).
Mearsheimer JJ. Another War, Another Defeat. The Gaza offensive has succeeded in punishing the Palestinians but not in making Israel more secure. The American Conservative, January 26 2009. http://www.amconmag.com/index.html (accessed Jan 27 09)
Levy G. Gaza war ended in utter failure for Israel. Haaretz, January 22, 2009 http://www.haaretz.com/hasen/spages/1057670.html (accessed January 23 09)
Falk R. Israel's War Crimes. The Nation, December 29 2008. http://www.thenation.com/doc/20090112/falk?rel=hp_currently (accessed January 3 2009)
Bisharat G. Israel on Trial. The New York Times April 4, 2009. http://www.nytimes.com/2009/04/04/opinion/04bisharat.html (accessed April 11, 2009)
Roy S. The peril of forgetting Gaza. The Harvard Crimson, June 2 2009. http://www.thecrimson.com/article.aspx?ref=528434 (accessed June 12 2009).
Failing Gaza: No rebuilding, no recovery, no more excuses. A report one year after operation Cast lead. Amnesty International UK and 15 other humanitarian and development aid organizations, December 2009. http://www.amnesty.org.uk/uploads/documents/doc_20012.pdf (accessed December 30 09)
Feldman Y, Blau U. Gaza bonanza. Ha'aretz, June 15, 2009. http://www.haaretz.com/hasen/spages/1092196.html (accessed January 2 2010).
Living conditions in the Gaza Strip during and after Israel's military campaign in the winter of 2008/2009. Evidence from interviews with 2,000 households. UNFPA (United Nations Population Fund) and FAFO (Institute for Applied International Studies, Oslo, Norway), 2009. http://www.fafo.no/pub/rapp/10092/10092.pdf (accessed December 30 2009).

G) THE COMPLIANCE BY THE EUROPEAN UNION OF ITS INTERNATIONAL OBLIGATIONS IN CONNECTION WITH THE CONSTRUCTION BY ISRAEL OF THE WALL IN OCCUPIED PALESTINIAN TERRITORY

In its Advisory Opinion rendered in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[1] (hereafter "the Advisory Opinion"), the International Court of Justice arrived at clear conclusions with respect to the illegality of the construction by Israel of the "Wall" in the occupied Palestinian territory and the associated regime. In fact, the Wall was found to be in violation of international humanitarian law, of different instruments regarding human rights, as well as of the principle of people's right to self-determination. The Court drew a series of legal conclusions regarding both the State of Israel and third Parties. Israel is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, to dismantle forthwith the structure therein situated, and to make reparation for all damage caused by the construction of the wall.

With respect to third party States and the United Nations, the Court concluded that they were under the following obligations:

- "All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction;
- All States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;
- The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion".

As can be noted, the implementation by States of the Advisory Opinion is essentially based on *obligations* identified by the International Court of Justice[2].

1. I.C.J., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (9 July 2004) (http://www.icj-cij.org)

2. *See* R. O'Keefe, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary*, 37 Belgian Rev. Int'l L. (R.B.D.I.), 142-146 (2004); V. Lowe, *The significance of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Legal Analysis*, in Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Pal-

Following the rendering of the Advisory Opinion, the General Assembly adopted, with a large majority[3], a resolution by which it "*acknowledges* the advisory opinion of the International Court of Justice of 9 July 2004".[4] Furthermore, the General Assembly, "calls on all States Members of the United Nations, to *comply with their legal obligations* as mentioned in the advisory opinion".[5] This element of the resolution is fundamental, as it indicates that States which voted in favour – including the EU Members States, acknowledge to be bound by the obligations attributed to them in the Advisory Opinion.[6]

The Opinion of the ICJ and United Nations General Assembly resolution ES10/15 thus, as a legal consequence of Israel's unlawful construction of the wall in the Occupied Palestinian Territory, stipulate the following international obligations for States Members of the European Union:

- the obligation not to recognize the illegal situation resulting from the construction of the wall;
- the obligation not to render aid or assistance in maintaining the situation created by such construction;
- the obligation to ensure compliance by Israel with international humanitarian law as embodied in the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949;
- the obligation to ensure an end to restrictions on the exercise by the Palestinian people of its right to self-determination resulting from the construction of the wall;
- the obligation to consider, within the United Nations, what further action is required to bring to an end the illegal situation resulting from the construction of the wall.

While the first two obligations constitute a duty to refrain (an obligation not to act), the last three imply that States must actively "ensure" compliance by Israel with international law. Later in this report, we shall consider fulfilment of these obligations by, respectively, the EU and its Member States.

estinian Territory – The role of Governments, intergovernmental organizations and civil society, Geneva, 8 and 9 march 2005, (http://domino.un.org/UNISPAL.NSF/frontpage5!OpenPage), 22-24; P. Weckel, *Chronique de jurisprudence internationale*, 108 *R.G.D.I.P.* 1035 (2004).

3. 150 against 6 (US, Israel, Australia, Palau, Micronesia, Marshall Islands), with 10 abstentions.

4. 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, U.N.G.A. Res. A/RES/ES-10/15 (20 July 2005).

5. Emphasis added.

6. *See* P. 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, *op. cit.*, 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, *op. cit.*, 53-60.

1. The compliance by the European Union with its obligations to refrain resulting from the illegal character of the construction of the wall in Occupied Palestinian Territory

As has already been indicated, the EU and its Member States have a duty to refrain consisting of two distinct obligations: not to recognize the illegal situation resulting from the construction of the wall (A); and not to render aid or assistance in maintaining this situation (B).

A. THE COMPLIANCE BY THE EUROPEAN UNION AND ITS MEMBERS STATES WITH THEIR OBLIGATION NOT TO RECOGNIZE THE ILLEGAL SITUATION RESULTING FROM THE CONSTRUCTION OF THE WALL

The unlawfulness of the wall construction implies that States accord no legal effect to the situation arising from its construction. This obligation arises from the fact that, as the ICJ observed, "the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council" and that the building of the wall "thus severely impedes the exercise by the Palestinian people of its right to self-determination[7]" as it breaches humanitarian international law and the International Covenant on Civil and Political Rights[8]. According to the International Law Commission, this obligation "not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition"[9].

Any consideration of compliance with this obligation requires an analysis of the positions adopted by the EU and its Member States *vis-à-vis* the construction of the wall by Israel. In this respect, no declarations or acts by the EU and its Member States appear to reflect any legal recognition of the illegal situation resulting from construction of the wall. As already mentioned, the EU Member States voted in favour of United Nations General Assembly resolution ES10/15, which takes note of the Opinion of the ICJ, and have since, within the EU, adopted several declarations reaffirming the unlawfulness of the construction of the wall by Israel.

Thus, the Council of the European Union, during the summit held in Brussels in June 2005, stated:

> "The European Council, while recognising the right of Israel to protect its citizens from attacks, remains concerned by the continuing construction of the separation barrier in the occupied Palestinian territory, including in and around East Jerusalem, *which is contrary to the relevant provisions of international law*. [...]

7. Advisory opinion, § 122.
8. Advisory opinion, § 137.
9. International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* 2001, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, 114.

The European Council reiterates the importance it attaches to compliance with international law by the parties. In particular, *no party should undertake unilateral measures or prejudge questions relating to final status. The European Union will not recognise any change to the 1967 borders other than those negotiated between the parties*. A just, lasting and comprehensive settlement of the conflict must be based on United Nations Security Council Resolutions 242, 338 and 1515, the terms of reference of the Madrid Conference and the principle of land-for-peace.[10]"

In the same way, Foreign Affairs Council's conclusions of 8 December 2009 has reiterated 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"[11].

Accordingly, we may conclude that the EU and its Member States have fulfilled their obligation not to recognize and validate the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory.

B. THE COMPLIANCE BY THE EUROPEAN UNION AND ITS MEMBERS STATES WITH THEIR OBLIGATION NOT TO RENDER AID OR ASSISTANCE IN MAINTAINING THE ILLEGAL SITUATION RESULTING FROM THE CONSTRUCTION OF THE WALL

Since the construction of the wall by Israel gives rise to an illegal situation, third States may not render any aid or assistance in maintaining this situation. This obligation "deals with conduct "after the fact" which assists the responsible State in maintaining a situation" which is maintained in violation of international law[12]. This would, for example, be the case if States rendered financial aid or technical assistance to Israel in connection with work on construction of the wall. To our knowledge, no aid of this sort is provided to Israel by the EU or its Member States; hence, they may be considered to be in compliance with their international obligations in this regard.

2. The compliance by the European Union and its Members States with the obligation to ensure compliance by Israel with international law

The second set of obligations relates to the duty of States to ensure the compliance by Israel with international humanitarian law and the right to self-determination. The Opinion of the ICJ stresses that these obligations must be fulfilled by States, whether individually or collectively, *inter alia*, within the United Nations.

10. Council of the European Union, Presidency Conclusions, Brussels (16 and 17 June 2005), Annex IV, Declaration on the Middle East Peace Process, 10255/05, (http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/85349.pdf). *See also* Council of the European Union, External Relations, Conclusions, Brussels (25 April 2005), 8036/05, (http://www.europa.eu.int/comm/external_relations/gac/date/2005/04_250405_er.pdf#mepp).

11. Council conclusions on the Middle East Peace Process, 2985th Foreign Affairs Council meeting, Brussels, 8 December 2009

12. International Law Commission, *op. cit.*, 115

The obligation to require compliance with international humanitarian law originates from common article 1 of the Geneva Conventions[13], that provides that "the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". According to the *Commentary* to the Conventions of Geneva, "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 of respect for the Convention".[14] This implies that States "*should do everything in their power* to ensure that the humanitarian principles underlying the Conventions are applied universally".[15]

The obligation to guard over the implementation of the Palestinian people's right to self-determination derives, according to the Court, from its *erga omnes* character, and from the principle set forth by the General Assembly Resolution 2625 (XXV), according to which "every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples".[16]

The difficulty of implementing these two obligations lies in the fact that they constitute obligations of means, consisting in using a due diligence to obtain the compliance with the relevant international obligation. Measures that can be adopted to induce a State to comply with its obligations are not defined and depend on the means available to States in the particular circumstances of each case.[17] So, if the Court indicates in its Advisory Opinion that "the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime", it does not determine the nature of such "further action".[18]

Regarding the obligation to ensure respect for humanitarian law, the measures that could contribute to its implementation referred to by the authors are varied with respect to their coercive impact, and go from public condemnation to countermeasures, and may even include retaliatory measures (interruption of diplomatic relations, not renewing benefits, ...) or even bringing the matter to the Security Council.[19] In addition, there are several measures inherent to international humanitarian law, such as the convening of a Conference of the High Contracting Parties, the constitution of an international fact-finding Commission or the repression of grave breaches of humanitarian law.[20] As far as the implementation of the right to self-determination of the Palestinian people is concerned, the obligation is limited, according to the text of the

13. *See* Advisory Opinion, § 158. *See also* I.C.J., Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits), *I.C.J. Reports* 1986, § 220; L. Boisson de Chazournes & L. 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 17-35 (1984); L. Boisson de Chazournes & L. Condorelli, *Common Article 1 of the Geneva Conventions revisited: Protecting collective Interests*, 837 *I.R.R.C.* 67-89 (2000); N. Levrat, *Les conséquences de l'engagement pris par les Hautes Parties contractantes de "faire respecter" les Conventions humanitaires*, in Implementation of International Humanitarian Law 267-269 (F. Kalshoven & Y. Sandoz, eds. 1989); E. David, Principes de droit des conflits armés (3rd ed.) 562-569 (2002).

14. J. Pictet (ed.), Les Conventions de Genève du 12 août 1949, Commentaire (Vol. IV) 21 (1956).

15. *Ibid* (emphasis added).

16. Advisory Opinion, para. 156. *See* M. Chemiller-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, *op. cit.*, 71.

17. *See* N. Levrat, *op. cit.*, 275-281.

18. *See* P. Weckel, *op. cit.*, 1036.

19. *See* U. Palwankar, *Mesures auxquelles peuvent recourir les Etats pour remplir leur obligation de faire respecter le droit international humanitaire*, 805 *I.R.R.C.* 11-27 (1994); L. Boisson de Chazournes & L. Condorelli, *op. cit.*, 76-84.

20. *See* L. Boisson de Chazournes & L. Condorelli, *op. cit.*, 77; N. Levrat, *op. cit.*, 281-293.

aforementioned Resolution 2625, to a "duty to promote" this right "through joint and separate action".

It must be concluded that the exact impact of the obligation to act imposed on States by the Advisory Opinion remains very vague as to the precise measures that need to be adopted in order to comply.[21] It is therefore far from easy to establish the minimum expected of States in order to comply with their obligation to "ensure" respect for humanitarian law or to "promote" the right to self-determination. However, since these are genuine *obligations*, we may consider that States are required, while respecting international law, to take any reasonable measures which may effectively encourage the State concerned to comply with international law. Furthermore, States are required to refrain from acts which would run counter to the objective of encouraging respect for humanitarian law and the right to self-determination.

Israel has not, until now, put an end to the construction of the wall, which has been ongoing since 2004. This means that the measures taken so far have proved ineffective. In the following paragraphs, we will first examine the actions effectively carried out by the EU and its Members States in order to comply with the obligations imposed on them by the Advisory Opinion (1). Subsequently, we will briefly set out the other measures available to the EU to ensure respect by Israel of its international obligations (2). Finally, we shall consider whether the EU and its Member States have adopted measures likely to run counter to the objective of ensuring compliance by Israel with international humanitarian law and the right to self-determination of the Palestinian people (3). Combining these three elements will allow us to evaluate how the EU and its Member States have fulfilled their obligations in ensuring Israel's compliance with humanitarian law and promotion of the right to self-determination.

1. Actions taken by the EU and its Members States to ensure compliance by Israel with international law in connection with the building of the wall

The first measure to be taken by EU States was the vote in favour of United Nations General Assembly resolution ES 10/15 of 20 July 2004. This resolution provides two specific measures: the demand addressed to the Secretary-General to create a registry of the damages suffered by the Palestinian people, and the invitation to Switzerland, in its quality of depositary of the Geneva Conventions, to report on the means to ensure compliance with humanitarian law in this case.

The Registry was created in December 2006 by resolution ES-10/17, for which the EU Members States have voted[22]. As stated in the preamble to the resolution, this action was taken in conformity with the Opinion of the ICJ, particularly paragraph 153, and the principles of humanitarian law and human rights.[23] By June 2009, some 1,500 complaints had been registered.[24] However, in the absence of any cooperation by Israel, effective reparation for the Palestinian populations affected by the construction of the wall is likely to remain a pious intention.

The second demand, addressed to Switzerland, led to the publication by the latter of a report in July 2005. The report contains the results from the consultations with the Member States in relation to the means available to ensure Israel's respect of the

21. *See* A. Imseis, *op. cit.*, 114-117.
22. A/RES/ES-10/17 15 December 2006.
23. Article 3 of the Regulations concerning the Laws and Customs of War on Land. 18 October 1907, and article 29 of the 4th Geneva Convention of 1949.
24. Voy. OCHA, *Five Years after the International Court of Justice Advisory Opinion. A Summary of the Humanitarian Impact of the Barrier*, United Nations, July 2009, p. 30.

4th Geneva Convention, and in particular in relation to the construction of the wall.[25] Without going into detail[26], the Swiss report did not produce any precise recommendation for the adoption of specific measures to ensure compliance by Israel with humanitarian law, due to a lack of consensus among States.

Apart from support for measures under resolution ES10/15, EU policy has been restricted to reiterating condemnation of the construction of the wall in several declarations concerning the Middle East peace process.[27]

2. Failure to take other measures available to the EU and its Member States which may help ensure compliance by Israel with its international obligations.

Since the aforementioned EU policy, basically consisting of condemnatory statements, has proved ineffective, there is a need to see whether there might be other reasonable measures which might have been more effective in persuading Israel to comply with the provisions of international law.

The "sanctions" available to States wishing to signal their disapproval of a serious violation of human rights include retaliatory measures, which can be defined as unfriendly actions which are legal in themselves and are taken as a reaction to an unfriendly or illegal action.[28] In the present case, these measures could consist of curtailing commercial benefits. In particular, there is the possibility of the suspension or the termination of the Association Agreement entered into by the European Union with Israel[29], which provides Parties with a number of economic and customs advantages. Such a measure would hardly give rise to any legal difficulties, since article 82 authorizes each of the Parties to "denounce the Agreement by notifying the other Party". In that case, the Agreement "shall cease to apply six months after the date of such notification". Denunciation of the Association Agreement is also logical since article 2 provides that "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" while the preamble highlights "the importance which the Parties attach [...] to the principles of the United Charter". The fact that an ICJ decision finds Israel responsible of multiple violations of human rights and humanitarian law and the persistent refusal by this State to end such violations makes it difficult to justify failure by the EU to make continued application of the Agreement dependent on respect for international law.

We observe that measures are available to the EU under international law, but that it makes a political choice - officially in order to promote the negotiation process - not to apply them.[30] The continuation of the peace process is in this respect frequently in-

25. Report by Switzerland, in its capacity as the depositary of the Geneva Conventions, pursuant to U.N.G.A. Res. ES-10/15 (27 June 2005), Annex to the letter dated 30 June 2005 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/ES-10/304 (5 July 2005).

26. For a deeper analysis of the Report, see Fr. 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, 2007, 27-54.

27. See a.o. Conclusions of the Foreign Affairs Council on the Middle-East peace process, 8 December 2009, 17281/09, § 6 ; Conclusions of the Foreign Affairs Council on the Middle-East peace process, 23 April 2007, 8768/07, § 7; Conclusions of the General Affairs and External Relations Council on the Middle-East, 22 January 2007, 5548/07, § 6 ; Conclusions of the General Affairs and External Relations Council on the Middle-East, 10 April 2006, 8228/06, p. 3; Conclusions of the General Affairs and External Relations Council on the Middle-East, 21 November 2005, 14754/05, § 7.

28. *See* J. Salmon (ed.), Dictionnaire de droit international public, 1007 (2001).

29. Euro-Mediterranean Agreement, establishing an Association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, *O.J.* 2001 (L147/3) (21 June 2001). On this matter, see also M. CHEMILLER-GENDREAU, *op. cit.*

30. See, for instance, the answer given by the Belgian Minister of Foreign Affairs to a parliamentary question on the means that Belgium and EU intended to implement the International Court of Justice's decision:

voked to tolerate the continuation of violations of international obligations[31], of which the Court has highlighted the *erga omnes* character.[32] This strategy has been severely criticised by a group of eight human rights experts and special rapporteurs for the UN, in a declaration published in August 2005:

> "In large measure it seems that the ICJ's Opinion has been ignored in favour of negotiations conducted in terms of the Road Map process. The exact nature of these negotiations is unclear but it seems that they are not premised on compliance with the Opinion of the ICJ. They seem to accept the continued presence of some settlements, which were found by the ICJ to be unlawful, and by necessary implication the continued existence of some parts of the wall in Palestinian territory. In short, there seems to be an incompatibility between the Road Map negotiations and the Court's Opinion [...]"[33].

It is therefore essential that the EU, *inter alia* within the Quartet, promote a negotiation process based on immediate compliance by Israel with its international obligations, particularly by halting the construction of the wall in the Occupied Palestinian Territory, which, as noted by the ICJ, encourages the unlawful establishment of settlements and entails a "risk of further alterations to the demographic composition of the Occupied Palestinian Territory"[34]. By failing to insist that any peace process be premised on prior compliance by Israel with its international obligations, the EU is failing in its duty to ensure respect for humanitarian law and to promote the right to self-determination of the Palestinian people.

3. The adoption by the EU of measures running counter to the objective of compliance by Israel with international law

Since the ICJ rendered its Opinion, the EU has not considered any retaliation against

"The European Council, held on 16 and 17 June 2005, in its Declaration on the peace process in the Middle-East, stressed that "although acknowledging Israel's right to ensure the security of its citizens, the Council was preoccupied by the continuation of the construction of the wall in the occupied Palestinian territory, including East Jerusalem and surroundings, in contradiction with the relevant dispositions provided by international law".

As a member of the Union, Belgium complies with the abovementioned Declaration and remains vigilant with respect to all developments possibly threatening the peace process in the Middle-East. The continuation of the construction, contributing to the degradation of the living conditions of the Palestinians and risking to create facts on the ground is such as to render even more difficult the efforts of the international community and in particular those of the Quartet US-EU-UN-Russia, in favour of a just and durable peace in the Middle-East.

Nor sanctions, nor any activation of the EU-Israel association agreement clause relating to the respect of the Human Rights seem appropriate. The reason for this is that positive developments, although relative, have been reached since the summits of Sharm el-Sheikh between Mahmoud Abbas and Ariel Sharon, last February. The European Council of 16 and 17 June 2005, in its Declaration on the Middle-East, takes note of these positive developments" (Reply to a Parliamentary Question by Christian Brotcorne to Minister of Foreign Affairs about the Advisory Opinion of the International Court of Justice of 9 July 2004 concerning the Separation Wall constructed by Israel (n° 3-960), 15 July 2005, Belgian Senate).

31. On that point, voy. M. KOHEN, "The Advisory Opinion provides the legal framework for the Israeli-Palestinian conflict", *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, *op. cit.*, pp. 88-92.

32. Advisory Opinion, §§ 155-157.

33. Un Experts Mark Anniversary of ICJ "Wall Opinion": Call on Israel to Halt Construction of the Wall, HR/05/092, 4 August 2005, Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 Prof. John Dugard, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living Mr. Miloon Kothari, Special Rapporteur on violence against women, its causes and consequences Ms. Yakin Erturk, Special Rapporteur on the right to education Mr. Vernor Munoz Villalobos, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health Mr. Paul Hunt, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Mr. Doudou Diène, Chairperson, Rapporteur, Working Group on arbitrary detention Ms. Leila Zerrougui, Special Rapporteur on trafficking in persons, especially in women and children Ms. Sigma Huda.

34. Advisory Opinion, § 122.

Israel but has, on the contrary, actually granted it additional political and economic advantages. On 8 December 2008, the Council of the EU decided to upgrade its bilateral relations with Israel, with a view to strengthening the structures for political dialogue with that State.[35] This upgrading of relations includes an annual summit meeting at the level of Heads of State; three meetings at the level of Ministers of Foreign Affairs; an invitation to Israeli experts to attend meetings of working groups dealing with issues such as the Middle East peace process, human rights or counter-terrorism; an invitation to Israel to align itself with the EU's positions on joint foreign and security policy; and efforts to normalize the status of Israel within the institutional system of the United Nations. Quite paradoxically, the Council's decision stresses "that building-up must be based on the shared values of both parties, and particularly on democracy, respect for human rights, the rule of law and fundamental freedoms, good governance and international humanitarian law", whereas, at the same summit meeting, the Council condemned Israel's settlement policy as being "contrary to international law and a hindrance to the creation of a viable Palestinian State". An agreement which gives Israel a privileged status with respect to the EU, supposedly based on respect for human rights and international humanitarian law, in parallel with a determination that the State seriously violates these rights and has no intention of ending such violations, appears to be clearly inconsistent with the obligation of the EU and its Member States to ensure respect for the fourth Geneva Convention and to promote the right of the Palestinian people to self-determination. Since the government set up by B. Netanyahu came into function, it seems that the implementation of the upgrade of the relations with Israel was slowed down by the European authorities.[36] But in the absence of an official decision to suspend or postpone the decision to upgrade Europe's bilateral relationship with Israel, the latter remains in its principle and continues to be a problem regarding international engagements of the EU and its Member States.

3. Conclusions

This report allows us to draw the following conclusions concerning the international responsibility of the EU and its Member States with respect to the construction of the Wall by Israel in the Occupied Palestinian Territory:

- *the international obligations of the EU and its Member States:*
  In accordance with the relevant principles of international law as applied in the Opinion of the ICJ of 9 July 2004 and reflected in United Nations General Assembly resolution ES 10/15, the EU and its Member States are obliged not to recognize the unlawful situation resulting from construction of the wall nor to render aid or assistance in maintaining the situation created by such construction. They are also obliged to ensure compliance by Israel with international humanitarian law and an end to restrictions on the exercise by the Palestinian people of its right to self-determination. There is, finally, an obligation to consider, within the United Nations, what further action is required to put

35. Conclusions du Conseil – Renforcement des relations bilatérales de l'Union européenne avec ses partenaire méditéranéens, 2915e session, 8-9 décembre 2008.

36. Voy. "EU-Israel meeting ends with no progress on 'upgrade'", 16 juin 2009, http://euobserver.com/9/28310.

an end to the unlawful situation resulting from the construction of the wall.

- *the international responsibility of the EU and its Member States pursuant to these obligations:*
  1. Following their repeated declarations condemning the construction of the wall as unlawful, the EU and its Member States have fulfilled their obligation not to recognize and validate the unlawful situation resulting from the construction of the wall in the Occupied Palestinian Territory;
  2. There are no grounds to conclude that the EU and its Member States have failed in their obligation not to render aid or assistance in maintaining the situation created by the construction of the wall;
  3. By failing to take effective measures to encourage Israel's compliance with international law, such as suspension of the Association Agreement, the EU and its Member States are violating their obligation to ensure respect for international humanitarian law and to promote the right of the Palestinian people to self-determination;
  4. By promoting within the Quartet a peace process which does not require that Israel immediately halt construction of the Wall, and instead allows construction to continue, the EU and its Member States are violating their obligation to ensure respect for international humanitarian law and to promote the right of the Palestinian people to self-determination;
  5. By according additional advantages to Israel under an upgrade agreement, supposedly based on respect for international humanitarian law, when such law is in fact violated seriously and persistently by that State, the EU and its Member States are violating their obligation to ensure respect for international humanitarian law and to promote the right of the Palestinian people to self-determination.

PART III

Conclusions of the First International Session of the Russell Tribunal on Palestine

"May this Tribunal prevent the crime of silence"
(B. Russell)

Barcelona
1-3 March 2010

1. Meeting in Barcelona from 1 to 3 March 2010 (first session), the Russell Tribunal on Palestine (hereinafter "the RTP") was composed of the following members:

- Mairead Corrigan Maguire, Nobel Peace Laureate 1976, Northern Ireland
- Gisèle Halimi, lawyer, former Ambassador to UNESCO, France
- Ronald Kasrils, writer and activist, South Africa
- Michael Mansfield, barrister, President of the Haldane Society of Socialist Lawyers, United Kingdom
- José Antonio Martin Pallin, emeritus judge, Chamber II, Supreme Court, Spain
- Cynthia McKinney, former member of the US Congress and 2008 presidential candidate, Green Party, USA
- Alberto San Juan, actor, Spain
- Aminata Traoré, author and former Minister of Culture of Mali

It adopted these conclusions, **covering** the following points:

- Establishment of the Tribunal (**I)**
- Mandate of the Tribunal (**II**)
- Procedure (**III**)
- Admissibility (**IV**)
- Merits (**V**)
- Continuation of the proceedings (**VI**)

I. Establishment of the Tribunal

2. The Russell Tribunal on Palestine is an international citizen-based Tribunal of conscience created in response to the demands of civil society. These past years, **noting** the failure to implement the Advisory Opinion of 9 July 2004 of the International Court of Justice concerning the construction of a wall in the Occupied Palestinian Territory; **noting the failure to implement** resolution ES-10/15 confirming the **International Court's** Opinion, adopted by the United Nations General Assembly on 20 July 2004; **noting** the Gaza events in December 2008 – January 2009, committees have been created in different countries to promote and sustain a citizen's initiative in support of the rights of the Palestinian people.

3. The Russell Tribunal on Palestine is imbued with the same spirit, and espouses the same rigorous rules as those inherited from the Tribunal on Vietnam (1966-1967), which was **established** by the eminent scholar and philosopher Bertrand Russell, and the **second** Russell Tribunal on Latin America (1974-1976), organized by the Lelio Basso International Foundation for the Rights and Liberation of Peoples.

4. Supporters of the Russell Tribunal on Palestine include Nobel Prize laureates, a former United Nations Secretary-General, a former United Nations Under-Secretary-General, two former heads of state, other persons who held high political office and many representatives of civil society, writers, journalists, poets, actors, film directors, scientists, professors, lawyers and judges.

5. Public international law constitutes the legal frame of reference **of the Russell Tribunal on Palestine**.

6. The **Tribunal** proceedings will comprise a number of sessions. The Tribunal held its first session on 1, 2 and 3 March **2010** in Barcelona. It was hosted and supported by the Barcelona National Support Committee and the Office of the Mayor of Barcelona, under the honorary presidency of Stéphane Hessel, Ambassador of France.

II. The mandate of the Russell Tribunal on Palestine

7. The **Tribunal** takes it as an established fact that some aspects of Israel's behaviour have already been characterized as violations of international law by a number of international bodies, including the Security Council, the General Assembly and the International Court of Justice (*infra* § 17). The question that has been referred to the first session of the **Tribunal** by the Organising Committee is whether the relations with Israel of the European Union and its member states can be characterised as wrongful acts within the meaning of international law and, if so, what the practical implications are, and what means may be used to remedy them.

8. At this session, the **Tribunal** will focus on the following six questions:

- the principle of respect for the right of the Palestinian people to self determination;
- the settlements and the plundering of natural resources;
- the annexation of East Jerusalem;
- the blockade of Gaza and operation "Cast Lead";
- the construction of the Wall in the Occupied Palestinian Territory;
- the European Union/Israel Association Agreement.

III. Procedure

9. The Organising Committee submitted the aforementioned questions to experts who had been selected on the basis of their familiarity with the facts of the situation. With a view to respecting the adversarial principle, the questions were also submitted to the European Union and its member states so that they could express their opinion. The experts submitted written reports to the Tribunal.

10. In the case of the European Union, the President of the Commission, Mr. Barroso, wrote a letter to the **Tribunal** which arrived during the first session **in Barcelona.** President Barroso referred to the conclusions adopted by the Council of Ministers of Foreign Affairs on 8 December 2009 (annex A).

11. Only one member state of the European Union responded to the Tribunal's request. In a letter dated 15 February 2010, Germany drew attention, as President Barroso had done (see above), to the Council conclusions of December 2009 (annex B).

12. While the Tribunal takes note of these letters, it regrets that other member states and the European Union itself have proved reticent in presenting their arguments concerning the issues that are addressed at this first session, and that the Tribunal was unable to benefit from the assistance that their arguments and supporting evidence might have provided.

13. The written stage of proceedings was followed by an oral stage during which statements by nine experts introduced by the Organising Committee were heard by members of the Tribunal. The experts were:

Madjid Benchikh (Algeria) - Professor of Public International Law at the University of Cergy Pontoise and former dean at the Law Faculty of Algiers Agnes Bertrand (Belgium) - researcher and Middle East specialist with APRODEV
David Bondia (Spain) - Professor of Public International Law and International Relations at the University of Barcelona
Patrice Bouveret (France) - President of the Armaments Observatory, Lyon
François Dubuisson (Belgium) - Law Professor at the Free University of Brussels
James Phillips (Ireland) – Lawyer
Michael Sfard (Israel) - Lawyer
Phil Shiner (United Kingdom) -lawyer
Derek Summerfield (United Kingdom) - honorary senior lecturer at London's Institute of Psychiatry

14. Having listened to their reports, the Tribunal heard the following witnesses, who were also designated by the Organising Committee:

Veronique DeKeyser (Belgium) - Member of the European Parliament
Ewa Jasiewicz (United Kingdom) - Journalist and eyewitness of Operation "Cast Lead"
Ghada Karmi (Palestine) - Author and physician
Meir Margalit (Israel) - Israeli Committee Against House Demolitions and member of the Jerusalem City Council

Daragh Murray (Ireland) – legal advisor at the Palestinian Committee for Human Rights; in place of Raji Sourani (Palestine), Vice-President of the International Federation for Human Rights. The Tribunal expresses grave concern that its witness, Raji Sourani, Director of the Palestinian Centre for Human Rights, was unable to attend because, as part of the general blockade of Gaza and the closure of the Erez and Rafah border crossings, he has not been allowed to leave Gaza;
Raul Romeva (Spain) -Member of the European Parliament
Charles Shamas (Palestine), MATTIN Group
Clare Short (United Kingdom) - Member of Parliament and former Secretary of State for International Development
Desmond Travers (Ireland) - retired Colonel and member of the UN fact-finding mission that produced the Goldstone report
Francis Wurtz (France) - former Member of the European Parliament

15. The procedure followed by the Tribunal is neither that of the International Court of Justice, nor that of a domestic or international criminal court, but is based on the methodology applicable by any judicial body in terms of the independence and impartiality of its members.

IV. Admissibility

16. When considering the relations of the European Union and its member states with Israel, the Tribunal will rule on a number of alleged violations of international law by Israel. Israel's absence from the present proceedings is not an impediment to the admissibility of the expert reports on the violations. In passing judgment on violations of international law allegedly committed by a state that is not represented before the Tribunal, the Tribunal is not breaching the rule of mutual agreement among the parties that is applicable before international judicial bodies responsible for the settlement of disputes between states (see the *Monetary Gold* and *East Timor* cases, *ICJ Reports*, 1954 and 1995). The work of this body is not comparable to that involved in a dispute referred, for instance, to the International Court of Justice: the facts presented as violations of international law committed by Israel in the Occupied Palestinian Territories have been characterized as such by the United Nations General Assembly and the Security Council, and also by a number of reports such as those of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories. Hence, at this stage, the Tribunal will simply draw attention to circumstances that are already widely recognized by the international community.

V. The merits

17. In these conclusions the Tribunal has used, depending on the context, the terms Palestine, occupied Palestinian territories, Palestinian territory, Occupied Palestinian Territory and Palestinian people without prejudice to the judgment that will be rendered at the final session.

18. The conclusions of the Tribunal will deal, in turn, with:

- violations of international law committed by Israel (A)
- breaches by the European Union and its member states of certain specific rules of international law (B)
- breaches by the European Union and its member states of certain general rules of international law (C)
- failure by the European Union and its member states to take measures against the violations of international law committed by Israel and to identify what remedies may be available (D)

A. VIOLATIONS OF INTERNATIONAL LAW COMMITTED BY ISRAEL

19. Having taken note of the experts' reports, and having heard the witnesses summoned by the latter, the Tribunal finds that Israel has committed, and continues to commit, grave breaches of international law against the Palestinian people. In the Tribunal's view, Israel violates international law by the conduct described below:

19.1 By maintaining a form of domination and subjugation over the Palestinians that prevents them from freely determining their political status, Israel violates the right of the Palestinian people to self-determination inasmuch as it is unable to exercise its sovereignty on the territory which belongs to it; this violates the Declaration on the granting of independence to colonial countries and peoples (A/Res. 1514(XV), 14 Dec. 1960) and all UN General Assembly resolutions that have reaffirmed the right of the Palestinian people to self-determination since 1969 (A/Res. 2535 B (XXIV), 10 Dec. 1969, and, inter alia, A/Res. 3236 (XXIX), 22 Nov. 1974, 52/114, 12 Dec. 1997, etc);

19.2 By occupying Palestinian territories since June 1967 and refusing to leave them, Israel violates the Security Council resolutions that demand its withdrawal from the territories concerned (SC/Res. 242, 22 Nov. 1967; 338, 22 Oct. 1973);

19.3 By pursuing a policy of systematic discrimination against Palestinians present in Israeli territory or in the occupied territories, Israel commits acts that may be characterized as apartheid; these acts include the following:

- closure of the borders of the Gaza Strip and restrictions on the freedom of movement of its inhabitants;
- prevention of the return of Palestinian refugees to their home or land of origin;
- prohibition on the free use by Palestinians of certain natural resources such as the watercourses within their land;

19.4 given the discriminatory nature of these measures, since they are based, *inter alia*, on the nationality of the persons to whom they are applied, the Tribunal finds that they present features comparable to apartheid, even though they do not emanate from an identical political regime to that prevailing in South Africa prior to 1994; these measures are characterized as criminal acts by the Convention on the Suppression and Punishment of the Crime of Apartheid of 18 July 1976 which, though it is not binding on Israel, does not exonerate Israel in that regard;

19.5 By annexing Jerusalem in July 1980 and maintaining the annexation, Israel violates the prohibition of the acquisition of territory by force, as stated by the Security Council (SC/Res. 478, 20 August 1980);

19.6 By constructing a Wall in the West Bank on Palestinian territory that it occupies, Israel denies the Palestinians access to their own land, violates their property rights and seriously restricts the freedom of movement of the Palestinian population, thereby violating article 12 of the International Covenant on Civil and Political Rights to which Israel has been a party since 3 October 1991; the illegality of the construction of the Wall was confirmed by the International Court of Justice in its Advisory Opinion of 9 July 2004, which was endorsed by the UN General Assembly in its resolution ES-10/15;

19.7 By systematically building settlements in Jerusalem and the West Bank, Israel breaches the rules of international humanitarian law governing occupation, in particular article 49 of the Fourth Geneva Convention of 12 August 1949, by which Israel has been bound since 6 July 1951. This point was noted by the International Court of Justice in the above-mentioned Advisory Opinion;

19.8 By pursuing a policy of targeted killings against Palestinians whom it describes as "terrorists" without first attempting to arrest them, Israel violates the right to life of the persons concerned, a right enshrined in article 6 of the International Covenant on Civil and Political Rights;

19.9 By maintaining a blockade on the Gaza Strip in breach of the provisions of the Fourth Geneva Convention of 12 August 1949 (art. 33), which prohibits collective punishment;

19.10 By inflicting extensive and serious damage, especially on persons and civilian property, and by using prohibited methods of combat during operation "Cast Lead" in Gaza (December 2008 – January 2009).

20. While the European Union and its member states are not the direct perpetrators of these acts, they nevertheless violate international law, either by failing to take the measures that Israel's conduct requires them to take, or by contributing directly or indirectly to such conduct. Moreover, the European Union and its member states do not comply with the relevant provisions of its own constitution, which confirms the attachment of the European Union to fundamental rights and freedoms, states its willingness to uphold and promote the respect of International Law and take appropriate initiatives to that end (European Union Lisbon Treaty, preamble, art. 2, 3, 17 and 21).

B. BREACHES BY THE EUROPEAN UNION AND ITS MEMBER STATES OF SPECIFIC RULES OF INTERNATIONAL LAW THAT REQUIRE THE EUROPEAN UNION AND ITS MEMBER STATES TO RESPOND TO VIOLATIONS OF INTERNATIONAL LAW COMMITTED BY ISRAEL

21. Certain rules of international law require the European Union and its member states to take action to prevent Israel from committing specific violations of international law. Thus, - with regard to the right of peoples to self-determination, the UN General Assembly Declaration on friendly relations (A/Res. 2625 (XXV), 24 Oct. 1970) states, as its fourth principle (2nd para.):

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples [...] and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle" in the *Wall* case, the International Court of Justice also referred to this clause (ICJ, *Reports 2004*, § 156); similarly, the 1966 Covenant on Civil and Political rights, that binds Israel since October 1991, stipulates that: "The States parties [...] shall promote the realization of the right to self-determination:"

With regard to human rights, the aforementioned Declaration on friendly relations states, in its fourth principle (3rd para.):

> "Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter" (see also the 5th principle, 2nd para.);

Furthermore, the Euro-Mediterranean Association Agreement of 20 November 1995 (*OJEC* L 147/1 of 21 June 2000), states that: "Respect for democratic principles and fundamental human rights [...] shall inspire the domestic and international policies of the Parties and shall constitute an essential element of this Agreement" (art. 2); this provision requires the European Union and its member states to ensure that Israel respects fundamental rights and freedoms, and it follows that, by refraining to do so, the European Union and its member states are violating the agreement; as shown by the Court of Justice of the European Communities in the *Brita* case (CJEC, 25 February 2010), European Union law is also applicable to the EU's relations with Israel; while the agreement also stipulates that this does not prevent "a Party from taking any measures [...] (c) 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" (art. 76), the Tribunal does not consider that this possibility accorded to the contracting parties can be invoked to justify the failure of the European Union and its member states to fulfil their obligation of due diligence to ensure respect for human rights by the other party; on the contrary, fulfilment of the obligation in question may contribute to the maintenance of "peace and international security";

With regard to international humanitarian law, common article 1 of the four Geneva Conventions of 1949 stipulates that "The High Contracting Parties undertake to respect and to ensure respect" for the Conventions, as noted by the International Court of Justice in the *Wall* case: "It follows from that provision that every State party to that Convention [the fourth Geneva Convention], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with." (ICJ, *Reports, 2004*, § 158);

The official International Committee of the Red Cross commentary emphasized the significance of common article 1, stating as follows:

> "It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations vis-à-vis itself and at the same time vis-à-vis the others. The motive of the Convention is such a lofty one, so universally recognized as an imperative call of civilization, that the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from an opponent, indeed perhaps even more for the former reason than for the latter.

The Contracting Parties do not undertake merely to respect the Convention, but also to *ensure respect* for it. The wording may seem redundant. When a State contracts an engagement, the engagement extends *eo ipso* to all those over whom it has authority, as well as to the representatives of its authority; and it is under an obligation to issue the necessary orders. The use in all four Conventions of the words 'and to ensure respect for' was, however, deliberate: they were intended to emphasize the responsibility of the Contracting Parties.

[....]

In view of the foregoing considerations and the fact that the provisions for the repression of violations have been considerably strengthened, it is clear that Article 1 is no mere empty form of words, but has been deliberately invested with imperative force. It must be taken in its literal meaning." the fact that the European Union is not a party to the Geneva Conventions does not preclude the applicability of their rules to the European Union; thus, in the aforementioned *Wall* case, the International Court of Justice held that an international organization such as the United Nations, which was not a party to the Conventions either, should take action to ensure that they were respected; according to the Court, the UN and "especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion." (ICJ, *Reports. 2004*, § 160);

Moreover, the International Committee of the Red Cross study on customary international humanitarian law notes that states: "must exert their influence, to the degree possible, to stop violations of international humanitarian law" (rule 144);

As this is a rule of customary law, it is also applicable to international organizations.

Pursuant to international humanitarian law, beyond common article 1, the member states of the EU are under a specific duty to apply universal jurisdiction to individual criminal suspects, especially in the light of the recommendations of the UN Fact-Finding Mission at paragraphs 1857 and 1975 (a) of its report to the UN Human

Rights Council of September 2009. (UN Doc. A/HRC/12/48, 12 September 2009, paragraph 1857 and 1975)

Further, article 146[37] of the 4th Geneva Convention provides that each state "shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in [Article 147]"[38]

It should be noted that Austria, France, Greece and Italy are four European Union countries that have failed to comply with Article 146 (1) in that their internal legal order does not enable universal jurisdiction to be exercised over those suspected of violations of the crimes listed in article 147.

Article 146 (3) not only requires that parties of the 4th Geneva Convention apply universal jurisdiction to those suspected of criminal liability for grave breaches defined in article 147, but that they take effective measures to repress non-grave breaches too, which is explained in the official International Committee of the Red Cross commentary to the Convention as follows: "under the terms of this paragraph, the Contracting Parties must also suppress all other acts contrary to the provisions of this Convention."

The wording is not very precise. The expression "faire cesser" used in the French text may be interpreted in different ways. In the opinion of the International Committee, it covers everything which can be done by a State to avoid acts contrary to the Convention being committed or repeated. ...[T]here is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention."

C. BREACHES BY THE EUROPEAN UNION AND ITS MEMBER STATES OF THE GENERAL RULES OF INTERNATIONAL LAW WHICH REQUIRE THE EUROPEAN UNION AND ITS MEMBER STATES TO RESPOND TO VIOLATIONS OF INTERNATIONAL LAW COMMITTED BY ISRAEL

22. Israel's violations of international law are frequently violations of "peremptory norms" of international law (*jus cogens*): targeted killings that violate the right to life, deprivation of the liberty of Palestinians in conditions that violate the prohibition of

37. "Art. 146: The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defense, which shall not be less favorable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

38. Art. 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

torture, violation of the right of peoples to self-determination, living conditions imposed on a people that constitute a type of apartheid.

23. The peremptory character of these norms is attributable to the fact that they cannot be derogated from (see, for the right to life and the prohibition of torture, the International Covenant on Civil and Political Rights, art. 4, § 2, and the Convention of 10 December 1984 against torture, art. 2, §§ 2-3) or that they have been explicitly assimilated to "peremptory norms" by the most authoritative scholarly opinion, namely that of the International Law Commission (ILC) (on the prohibition of apartheid and respect for the right of peoples to self-determination, see the ILC draft articles on state responsibility, commentary on article. 40, *ILC Report,* 2001, pp. 305-307).[39]

24. When they witness a violation of such norms, even at a considerable distance, states and international organizations cannot remain passive and indifferent. In article 41 of the draft articles on state responsibility, the International Law Commission adopted a provision to the effect that:

> "1. States shall co-operate to bring to an end through lawful means any serious breach within the meaning of article 40." [breach of a peremptory norm of international law].
> In its commentary, the International Law Commission makes it clear that: "the obligation to co-operate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and co-ordinated effort by all States to counteract the effects of these breaches." (*ILC Report*, 2001, p. 114).

25. The European Union and its member states are therefore under an obligation to react in application of international law to prevent violations of peremptory norms of international law and to counteract their consequences. By failing to take appropriate action to that end, the European Union and its member states are breaching an elementary obligation of due diligence pertaining to respect for the most fundamental rules of international law.

26. The Russell Tribunal on Palestine considers that this obligation to react implies, in accordance with the rules of good faith and due diligence, the obligation to ensure that the reaction against violations of peremptory norms of international law complies with the principle of reasonable effectiveness. To that end, the European Union and its member states must use all available legal channels to ensure that Israel respects international law. It therefore calls for a response that goes beyond mere declarations condemning the breaches of international law committed by Israel. Of course, the Tribunal takes note of these declarations, but they are no more than a first step when it comes to meeting the international obligations of the European Union and its member states; they are not fully performing the duty of reaction imposed by the rules of international law.

27. Lastly, the Russell Tribunal on Palestine wishes to emphasize that the obligation to react against violations of peremptory norms of international law must be subject to

39. As a reminder, the International Law Commission is a subsidiary organ of the UN General Assembly, created in 1947 to codify international law. It comprises 34 members "of recognized competence in international law" A/Res-174(II) on 21 November 1947, 2nd para.

rules of non-discrimination and of the unacceptability of double standards: the Tribunal is perfectly well aware that states have not codified a rule of equidistance in respect of the obligation to react, but it holds that such a rule is inferable as a matter of course from the principles of good faith and reasonable interpretation of international law. Refusing to accept it will inevitably lead to "a result which is manifestly absurd or unreasonable" and which is ruled out by treaty law (1969 Convention on the Law of Treaties, art. 32 b). In these circumstances, the Tribunal considers that it is unacceptable and contrary to the aforementioned juridical logic for the European Union to suspend its relations, *de facto*, with Palestine when Hamas was elected in Gaza and to maintain them with a state that violates international law on a far greater scale than Hamas.

D. FAILURE OF THE EUROPEAN UNION AND ITS MEMBER STATES TO REFRAIN FROM CONTRIBUTING TO THE VIOLATIONS OF INTERNATIONAL LAW COMMITTED BY ISRAEL

28. The Tribunal notes that reports by experts have brought to light passive and active forms of assistance by the European Union and its member states for violations of international law by Israel. Attention has been drawn, for instance, to the following:

- exports of weapons and components of weapons by European Union states to Israel, some of which were used during the conflict in Gaza in December 2008 and January 2009;
- exports of produce from settlements in occupied territories to the European Union;
- participation by the settlements in European research programmes;
- failure of the European Union to complain about the destruction by Israel of infrastructure in Gaza during the Cast Lead operation;
- failure of the European Union to demand Israeli compliance with clauses concerning respect for human rights contained in the various association agreements concluded by the European Union with Israel;
- the decision by the European Union to upgrade its relations with Israel under the Euro-Mediterranean Partnership Agreement;
- tolerance by the European Union and its member states of certain economic relations between European companies and Israel involving commercial projects in the occupied territories, such as the management of the Tovlan landfill site in the Jordan valley and the construction of a tramline in East Jerusalem.

29. For these acts to qualify as unlawful assistance or aid to Israel, two conditions must be met: the state providing assistance must do so with the intention of facilitating the wrongful act attributable to Israel and it must do so knowingly; article 16 of the International Law Commission draft articles on state responsibility 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."

In its commentary the International Law Commission makes it clear that the state which assists the perpetrator of the wrongful act must intend to facilitate the wrongful conduct and the assisted state must effectively engage in such conduct; the assisting state incurs responsibility even if such assistance is not essential to the performance of the wrongful act; it is sufficient if it "contributed significantly to that act" (*ILC Report*, 2001, p. 66). The assisting state must therefore be aware of the fact that Israel is violating international law and that the assistance given to Israel was intended to facilitate such violations.

30. *In casu*, the European Union and its members states could not have been unaware that some forms of assistance to Israel contributed or would perforce have contributed to certain wrongful acts committed by Israel. This is applicable to:

- exports of military equipment to a state that has maintained an illegal occupation for more than forty years;
- imports of produce from settlements located in occupied territories and no real control by the customs authorities of European Union member states of the origin of such produce save in exceptional circumstances (Court of Justice of the European Communities, 25 February 2010, *Brita*), whereas the exception should become the rule;
- evidence of a report repressed in 2005 and repeated internal reports by European Union officials to EU bodies listing violations accurately, only to be ignored by those bodies.

In both cases, this conduct contributed "significantly" to the wrongful acts committed by Israel even if they did not directly cause such acts, and it is reasonable to assume that the European Union could not possibly have been unaware of this. In these cases, the European Union may be held to have been complicit in the wrongful act committed by Israel and hence to incur responsibility.

31. The participation of the settlements in European research programmes, the failure of the European Union to complain during the "Cast Lead" operation about the destruction by Israel of infrastructure that the EU had funded in Gaza, and the (proposed) upgrading of bilateral relations between the European Union and Israel are characterized by a number of experts as assistance to Israel in its alleged violations of international law. The International Law Commission considers that one must, in cases of this kind, "carefully" examine whether the state accused of wrongful assistance was aware that it was facilitating the commission of the wrongful act. According to the International Law Commission:

> "Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct." (*ILC Report 2001*, p. 68)

Even if the acts of the European Union and its member states do not contribute directly to the violations of international law committed by Israel, they provide a form of security for Israel's policy and encourage it to violate international law because they

cast the European Union and its member states in the role of approving spectators. As the International Criminal Tribunal for the Former Yugoslavia put it:

> "While any spectator can be said to be encouraging a spectacle – an audience being a necessary element of a spectacle - the spectator in these cases [German cases cited by the Chamber] was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals." (ICTY, *Furundzija* case IT-95-17/1-T, 10 Dec. 1998, § 232).

32. The European Court of Human Rights (ECHR) has held that lack of effort by a State party to the European Convention on Human Rights to ensure respect for the Convention in a territory under its jurisdiction may engage its responsibility for violations of the Convention committed in the territory concerned, even if the state does not exercise de facto authority there. *In casu*, the Court found that Moldova had failed to exercise due diligence *vis-à-vis* the secessionist government of Transdniestria and *vis-à- vis* Russia, which supported it, in order to halt the violations of the Convention that were being committed by the Transdniestrian authorities.

Thus, the Court noted that:

> "In their negotiations with the separatists, the Moldovan authorities have restricted themselves to raising the question of the applicants' situation orally, without trying to reach an agreement guaranteeing respect for their Convention rights" (European Court of Human Rights, *Ilaşcu and others* v. *Moldova and Russia*, 8 July 2004, § 348).

It added:

> "the Court notes that the negotiations for a settlement of the situation in Transdniestria, in which the Russian Federation is acting as a guarantor State, have been ongoing since 2001 without any mention of the applicants and without any measure being taken or considered by the Moldovan authorities to secure to the applicants their Convention rights" (*ibid*, § 350).

The Court also noted that the Russian Federation has signed military and economic agreements with Transdniestria, which show that "it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation", that the latter has "made no attempt to put an end" to violations of the Convention and that even if its agents have not participated directly in them, "its responsibility is engaged with regard to the acts complained of" (*ibid.*, §§ 392-394). Although the Russian Federation is clearly much more involved in the events in Transdniestria than the European Union in those occurring in Palestine, it is significant that the European Court of Human Rights bases the responsibility of the Russian Federation and Moldova for violations of the European Convention on Human Rights committed by a third-party authority – Transdniestria – on their inaction or passivity with respect to the violations concerned. This inaction is broadly similar to that of the European Union and its member states with respect to the violations of international law committed by Israel in Palestine.

In a partly dissenting opinion in which he was joined by four other judges, Judge Casadevall adopts a similar approach:

"I consider that the efforts made by the Moldovan authorities with a view to securing the rights set forth in the Convention after its ratification in 1997 were not pursued with the firmness, determination and conviction required by the serious situation in which the applicants found themselves. [...] It should be noted that, while taking steps to promote co-operation with the secessionist regime with the avowed aim of making life easier for the population of Transdniestria, the Moldovan authorities have not displayed the same diligence with regard to the fate of the applicants. In their negotiations with the separatists, whether before or after May 2001, the Moldovan authorities have restricted themselves to raising the question orally, without trying to reach a written agreement providing for the applicants' release" (*ibid*., Partly dissenting opinion, Casadevall, Ress, Tulkens, Birsan and Fura-Sandström, §§ 9-10).

Similarly, according to Judge Ress, "if one recognises that the Russian Federation had jurisdiction over Transdniestria at the material time, and continues to exercise control, then one realises that there was an obvious lack of formal protests, declarations or other measures towards the Russian Federation, third countries, the United Nations and other international organisations, in an attempt to influence them to bring the illegal situation in Transdniestria and the applicants' unacceptable situation to an end" (*ibid*., Partly dissenting opinion. Ress, § 6). The situation of the European Union and its member states with respect to Israel is, of course, entirely different from that of Russia and Moldova with respect to Transdniestria; nevertheless, the reasoning of the European Court of Human Rights in this case is perfectly applicable, *mutatis mutandis*, to the responsibilities of the European Union and its member states *vis-à-vis* Israel.

33. In the light of the foregoing, and as noted by an expert, it is logical to interpret the silence of the European Union and its member states as tacit approval or a sign of acceptance of violations of international law by Israel. As it is inconceivable that the European Union and its member states are unaware of the violations of international law being committed by Israel, the Tribunal concludes that the acts in question constitute wrongful assistance to Israel within the meaning of aforementioned article 16 of the International Law Commission draft articles on state responsibility.

34. At this stage of the proceedings, the Russell Tribunal on Palestine calls on:

(i) the European Union and its member states to fulfil their obligations forthwith by putting an end to the wrongful acts specified in section C and D of this document;
(ii) the European Union, in particular, to implement the European Parliament's resolution calling for the suspension of the EU-Israel Association Agreement, thereby putting an end to the context of irresponsibility that Israel continues to enjoy;
(iii) European Union member states to implement the recommendations set out in paragraph 1975 (a) of the UN Fact-Finding Mission Report on the Gaza Conflict (Goldstone Report) regarding the collection of evidence and the exercise of universal jurisdiction in respect of the crimes attributed to Israeli and Palestinian suspects;
(iv) European Union member states to repeal any restriction under domestic

law that would impede compliance with the duty to prosecute or extradite (*judicare vel dedere*) any alleged perpetrator of a war crime or a crime against humanity;

(v) European Union member states to strengthen mutual legal assistance and cooperation in criminal matters through the EU contact points, EUROPOL, INTERPOL, etc.;

(vi) European Union member states to refrain from limiting the scope of universal jurisdiction so as to ensure that no EU member state becomes a safe haven for suspected perpetrators of war crimes or crimes against humanity;

(vii) the Parliaments of Austria, France, Greece and Italy to enact laws which, in conformity with Article 146 of the Fourth Geneva Convention, would facilitate the exercise of universal jurisdiction in those states;

(viii) individuals, groups and organizations to take all necessary measures to secure compliance by the European Union and its member states with their aforementioned obligations including, in particular, the exercise of universal jurisdiction in civil and criminal matters against any alleged perpetrator – an individual or a state agent -- of a war crime or a crime against humanity;

(ix) the existing legal actions in the context of the Boycott, Divestment and Sanctions campaign (BDS) to be stepped up and expanded within the European Union. The Russell Tribunal on Palestine calls on the European Union and on each of its member states to impose the necessary sanctions on its partner - Israel - through diplomatic, trade and cultural measures in order to end the impunity that it has enjoyed for decades. Should the European Union and its member states lack the necessary courage to do so, the Tribunal counts on the citizens of Europe to bring the necessary pressure to bear on the EU by all appropriate means.

VI. Continuation of the proceedings

35. These conclusions close the first session of the Russell Tribunal on Palestine in Barcelona. As announced by the Tribunal, these are provisional conclusions: they are the result of a *prima facie* assessment of the facts brought to its notice and are without prejudice to the final verdict that the Tribunal will deliver at its closing session. The Tribunal hopes that the European Union and its member states will participate more actively in future sessions of the proceedings by making known their views, thereby preventing the Tribunal from drawing erroneous conclusions due to their silence and their absence.

Annexes

ANNEX A: SUMMARY OF WITNESSES TESTIMONIES

"The right to self determination of the Palestinian people"

Daragh Murray

Legal advisor at the Palestinian Centre for Human Rights – PCHR, witness for the RToP

Mr. Murray attended as a witness, standing in of Raji Sourani, Director of the Palestinian Centre for Human Rights - PCHR, who was unable to attend this session of the Russell Tribunal on account of the general blockade of Gaza imposed by Israel and the closure of border crossings. His evidence focused on the fundamental importance which international Law bestows upon the right to self-determination and gave examples of how Israeli occupation policy has systematically violated this right. He offered a panoramic vision of the current situation in Gaza, and the living conditions of its population, pointing out that those living there have no control over their very existence. They do not possess ID, 85% of the inhabitants of the OPT depend on international humanitarian aid to survive and 80% live in conditions of poverty, which means that we are faced with a humanitarian crisis. Unemployment levels are at 42%. Prior to the beginning of the blockade in 2007, there were 65,000 people working in industry. This figure dropped to 35,000 before Operation Cast Lead. Currently, only 1,878 people are employed in the industrial sector in Gaza. The Palestinians do not have access to their own natural resources: Israel restricts access to water and diverts water supply to the exclusive benefit of its own citizens.

The witness pointed out that figures from the Palestinian Centre for Human Rights show that 26 people have died as a direct consequence of the blockade but the number may be much higher, as many people have died from chronic diseases and cancers that can be cured with access to medical treatment, which in this case is denied to the Palestinians.

The witness stated that the international boycott imposed on Hamas, legitimate representative of the Palestinian people, is in direct violation of their right to self-determination. Summing up, the negation of the Palestinian people's right to self-determination is an attack against the people's dignity and freedom.

"The Annexation of East Jerusalem"

Meir Margalit

Member of the Jerusalem city council and the Israeli Committee against House Demolition, Israel, RTP witness

This witness described the ambiguity of EU relations with Israel regarding the annexation of Jerusalem, whereby the disparate voices from within the EU failed to take a strong position of condemnation. It is unclear whether the European presence in Is-

rael is there to assist the peace movement or not; the speaker presented anecdotal evidence of the European priority of maintaining good diplomatic relations with Israel over denouncing them for their actions. In response to a question posed by the jury, the witness contended that the shadow of the Holocaust presides over the EU's stance towards Israel constricting their capacity or will to speak out against the unlawful actions of the state.

The witness presented the annexation of Jerusalem as a process through which incrementally the city's demographic face is being changed. There is great discrimination in the level of government funding that exists between East and West Jerusalem. The EU does not come and discuss these actions with the Israeli administration; the witness claimed that the mayor of Jerusalem is very sensitive to the opinions of the European delegation and whether or not good relations are maintained. This acknowledgement has not enticed the EU to take a defined critical stance towards the annexation and treatment of Jerusalem.

The response of the EU can take the shape of sanctions or incentives. The witness explained that sanctions need to be mixed with incentives. Otherwise Israel could take a more hardened position towards Palestine which could make things worse. The jury questioned the witness on this point arguing that perhaps the sanction itself acts as an incentive as when the sanction is imposed the initial reaction is anger, and then annoyance; the incentive works when the perpetrator gives up the crime and is let back into the international community. An example of limiting travel documentation to Israelis who do not disclose their military history was proposed by another member of the jury as a possible sanction. The witness agreed but insisted that such actions must be coupled with incentives. EU should focus on influencing the peace movement in Israel and Palestine, assist in the battle for peace and be present at peace marches. The EU needs to focus on changing the mindset of the Israeli administration by creating the political will for them to change. As it currently stands Israel does not feel isolated and the goal of the tribunal, the witness remarked, should be to make it so.

Charles Shamas

Founder of the MATTIN group and former legal advisor to the ICRC, Palestine, RTP witness

The witness's focus was on how existing law can be used to force Israel and the EU Member States to act accordingly. The introductory observation was that law is typically used by the weaker party in a conflict to force the stronger party to respond to the law; thus the law acts as an egalitarian mechanism if applied well. International Public Law and International Humanitarian Law become enforceable through judicial review and they become integrated into the Member States' national courts. Once law has been made political decision makers are constrained by its legal parameters. Once rulings on certain cases have been reached and precedents have been set it becomes increasingly harder for the Member States to act in a manner contrary to that which has been decided as legal. Additionally, once law has been made and followed a politician must un-enact the law to disobey it; politically, it is very difficult to do so. Thus, the focus must be on highlighting existing laws which clearly identify certain actions as illegal and pursuing an indictment through national courts. A member of the jury raised the question whether there exists a UN statute which declares the annexation of Jerusalem as illegal. In order to answer this, the witness responded, one must look at how state practice has treated the issue. The witness gave other examples whereby law forced Member States to act accordingly.

In 1986 the courts ruled against Brita a German importer which gave preferential treatment to a company located in the Occupied Territories OTs. The law had previously decided that such beneficial treatment could not be awarded to a company located in the OTs; without this existing law such a decision would have been more difficult. Another such example is that related to the decision regarding the illegality of spending money in the settlements. This act forced the World Food Program to close some of its offices located in the illegal settlements due to the fact that funding assistance and projects must be implemented in accordance with International Humanitarian Law which had ruled on the illegality of the matter in hand.

Settlements and the plundering of natural resources

Charles Shamas

Founder of the group MATTIN and former legal advisor to the International Red Cross Committee, witness for the RToP

This session focused on the issue of settlements and the exploitation of natural resources. Charles Shamas explained that under the framework of European Neighbourhood Policy, it was proposed that all financially supported projects and agreements should be planned and executed pursuant to the European Union's own obligations. Notwithstanding, this has never happened. The Commission and the Council have consistently blocked this initiative because they do not wish it to give rise to specific regulations. If a genuine political movement were to exist, this could change. Israel must therefore introduce amendments to its internal legislation in order to adapt to European regulations. Or, to the contrary, it should be European legislation that is applied directly to evaluate compliance with its agreements with Israel.

The speaker mentioned several examples of violations of European Community law. Firstly, he pointed out that European Investment Bank legislation demonstrates one very clear example of European legislation which establishes that in order to benefit from its capital, the applicant State is required to be in compliance with the parameters established under European Law. Another example consists of the fact that in Jerusalem, real estate in the settlements sold on the European market must be financed by mortgages granted by Israeli banks which operate in Europe subject to European legislation. In this regard, legally speaking, in Jerusalem, the territories where these colonies have been built were expropriated by the Israeli Ministry of Finance under military order. Neither the United Kingdom nor any other Member States of the European Union should recognise these administrative acts.

The witness summed up by pointing out that pressure is far more effective with regard to private companies where the pressure of public opinion can influence the corporate image of these companies.

Michael Sfard

Lawyer, witness for the RToP

The witness began by reminding the audience of some revealing data: currently there are 120 settlements in The West Bank, with 300,000 colonists, while the number in Jerusalem is 190,000. There are 2,270,000 Palestinians living in the same region. More than half of these colonists moved to or were born in the settlements after the Oslo Accords.

The witness went on to describe how each settlement is an epicentre for multi-dimensional human rights' abuses. Examples of these abuses include the land grab, the infinity of invisible borders which are changed day-to-day and the plundering of natural resources.

The settlements, in essence are a monster that seeks only to grow, to claim more and more land. Moreover, settlements are protected by an Israeli "legal bubble" given that they are subject to Israeli law even though they are not in Israeli territory.

All of these restrictions and human rights violations mentioned have led the witness to the conclusion that Israel carries out policies of apartheid and colonialism against the Palestinian people.

One of the most evident examples of this colonialism is the exploitation of Palestinian natural resources for the benefit of Israel. One example of this is the extraction of gravel from Palestinian quarries, which represents one of the colonists' economic activities: removing land from The West Bank to transport to Israel. Twelve million tones of gravel are extracted from The West Bank, 75% of which is sent to Israel to be used in construction. This constitutes a violation of the Palestinian people's human rights. The sovereign right of a people to their natural resources is enshrined in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, a right which Israel violates.

If, instead of gravel we were to talk about gold or diamonds, perhaps the international community would react in the face of this violation of the rights of the Palestinian people. But really it is neither here nor there whether we are dealing with gold or gravel. The fact is that the Palestinian people's right to their natural resources is being violated.

The EU is Israel's principal trade partner and here the witness stated that all products produced in the settlements should be withdrawn from European markets. Before deciding on sanctions or embargos, the debate should revolve around far more basic issues, such as disinvestment in the settlements.

The EU-Israel Association Agreement

Phil Shiner

RTP expert

The expert in this case addressed what laws exist, both international and European, what breaches of these laws by Israel and the EU have taken place and what action can be taken in order to bring these transgressions under review. Israel is in clear breach of top tier, peremptory norms of international law, those of the right to self-determination, the unlawful acquisition of land and violations of human rights. The violation of these norms is clearly marked in the Goldstone Report and in the Opinion of the ICJ in The Wall (July 2004). However, what is also stressed in the ruling is the obligation which is placed on other states to act in reaction to violations committed. The expert emphasized the breaches to international law that are being perpetuated by the EU in their failure to react to Israeli violations, such as that which declares no state shall render aid or assist any state in breach of the articles and states shall co-operate to lawfully change the situation.

Other instances of violation of the obligation to act exist under the Universal Jurisdiction of the Geneva Conventions, which require states to take action when war crimes have transpired and violations of the Conventions have occurred; such breaches by Israel have been made clear through the rulings on Operation Cast Lead. Another example is found in the conditionality clause of the EU-Israel AA, whereby all mem-

ber parties of the AA must obey human rights law as a first order and if not they are in breach of the agreement and it therefore, must be suspended.

The expert emphasized what action can be taken in order to address the failure of European states to react to the breaches carried out by Israel. The expert suggested that the justiciability of breaches to international law may be a matter for domestic courts within the EU Member States' jurisdictions and the onus can be placed on individual states to enforce international law within their own courts. With regards to violations of European law and the AA, individuals or organisations may take the violations to the European Court of First Instance. The expert stated that civil society must play a leading role in making diplomats understand and forcing them to fulfil their obligation to act in order to bring Israel into line with international law and the AA.

Véronique de Keyser

Member of the European Parliament, witness for the RToP

The witness condemned in no uncertain terms the complicity of the EU with violations committed by Israel against the Palestinian people and described three specific moments when this occurred. The first of these was in 2006, after the victory of Hamas in the elections, when without consulting the European Parliament the EU took the decision to implement economic sanctions against the Palestinian authority. The second case also occurred in 2006 during Operation "Summer Rains" in June. Unfortunately, this Operation was eclipsed by the war in Lebanon which began the following month. Finally, the witness described how in December 2008, just days before the start of the attack on the Gaza Strip, the Israeli Minister of Foreign Affairs, Tzipi Livni spoke of the possibility of a military intervention in Gaza, without specifying a date, during her visit to the European Parliament. The EU preferred to maintain silence.

The witness warned of the dangers of forgetting, as is currently the case with the Goldstone Report, explaining that if we allow the Goldstone Report to be forgotten, we will have failed in our mission.

In response to a question from the panel regarding the alleged impartiality of the EU towards the parties involved in the Israel-Palestine conflict, and how the EU list of terrorist groups and individuals, far from being impartial, includes Hamas, legitimate representative of the Palestinian people, the witness stated that the EU's list of terrorist groups is vague, completely political and does not make any provision for an exit mechanism from the list.

Raül Romeva

EU Member of Parliament, witness for the RToP

The witness focused his attention on three main points: The EU-Israel Association Agreement, as this is one of the main problems in making advances in the resolution of the conflict; the EU's Common Position on Arms Exports and how significant the impact of this is on the situation in the entire region and the existence of the European list of terrorist organisations which makes for difficult relations with some organisations in the region.

On the first point, the witness described how EU-Israel Association Agreements (AA) are borne out of a will to provide a preferential relationship between the parties, in trade relations (establishing a free-trade area), cooperation between institutions (institutional and interinstitutional agreements aimed at furthering cooperation between

institutions) and cooperation. These agreements include a conditionality clause which is binding for both parties but also allowing either party to cancel the agreement when either party is found to be in breach of human rights or democratic principles. In the case of the Association Agreement with Israel, the EU as a stakeholder did not call for the annulment on the grounds of a breach of the conditionality clause but requests were submitted to the European Parliament calling for the suspension of the agreement based on reiterated infringements of fundamental rights and democratic principles. Every time the issue has been subject to vote in the European Parliament, the vast majority have voted against suspending the agreement arguing that this is the best way to ensure maintaining an open dialogue with Israel. Paradoxically, most of the arguments used to justify this attitude in relation to Israel are not used in the case of any other State in the world, which implies the existence of a double moral standard.

In relation to the EU Code of Conduct on Arms Exports, the witness explained that the text has been legally binding since 2008, when it was adopted as an EU Common Position and as such, represents a legal instrument of the European structure. From that moment and since its approval in 1998, it was no more than a code of conduct of voluntary compliance. This EU Common Position aims to prevent European arms from becoming fuel for the fires of war around the world. In order to achieve this, the common position establishes eight criteria which should be taken into account when authorising, monitoring and end-use of arms exports. The witness stated that Israel acts in flagrant violation of at least six of the eight criteria included under the Common Position.

The first of these criteria deals with the export of arms by EU Member States regarding respect for international commitments and obligations by the country of final destination of the arms. There is no question that the list of breaches of international law by Israel is extensive, which is reason enough for preventing arms exports. The second criterion treats the respect of human rights in the country or region of final destination, and in this case we have a clear and flagrant breach of the criterion. The third refers to the internal situation in the recipient country as a function of the existence of tension or armed conflicts. The fourth criterion deals with preservation of regional peace, security and stability. The fifth criterion refers to the national security of the EU Member States and the impact that these exports can have on their security. The sixth criterion deals with the behaviour of the buyer country with regard to the international community and in particular its attitude to the fight against terrorism and its alliances in terms of international law. According to the opinion of the witness, these are the criteria being breached by Israel.

On the basis of figures, the three principle exporters of arms to Israel are France, Germany and Romania. In the application of this Common Position, the United Kingdom adopted the decision to halt export of arms to Israel.

The final issue is the existence of the EU list of terrorist groups. Despite the fact that the list itself has already proved an obstacle to the management of some crises, it remains in force and there are even attempts to increase the list with the addition of new groups.

Clare Short

Member of Parliament and former Secretary of state for International Development, UK; RTP witness

This witness was unambiguously assertive on the capacity of law to demand that action be taken by the EU Member States in response to Israel's breach of both international law and the AA and to tackle individual states' own violations as well. Israel benefits

from tax free tariffs on all exports to the EU; this is a massive assistance not only in military sales but a big advantage in trade access. The witness concludes that this offers the EU great leverage in compelling Israel to comply with the human rights norms, which is a key element stipulated in the AA. The witness explained that a failure to condemn Israel for the clear breaches carried out through the settlements, collective punishment and aggression has grave consequences. Disregard for international norms and ICJ and UN rulings damages the confidence and therefore strength of these international institutions. Furthermore, the failure to resolve this conflict is spreading instability around the world and intensifying divisions with the Muslim world.

The witness explained that a solution to the conflict can be located in international and European law and pointed out where action can be taken in order to ensure the law is upheld. Particular Member States' judiciaries can bring other Member States to court for their illegal action; for example targeting the UK for their increase in arms sales to Israel prior to Operation Cast Lead. The focus of civil society may be on identifying certain Member States that have a suitable judiciary for handling such cases. Civil society needs to push their Member State to obey the articles of the AA and those of international law. Lawyers can also seek to get the issues to court in all Member States by focusing on overtly clear breaches to the AA which exist. Individual citizens can also use the principle of Universal Jurisdiction to bring the state to court. In response to a question posed by the jury the witness additionally agreed that the language and terminology of *apartheid* could be used to enact change; sanctions and boycotts could be used such as in South Africa, although the focus must be on existing jurisprudence. The EU is united by its morals and its respect for the rule of law and this must become evident in their response to Israel's crimes.

The Gaza Blockade and operation Cast Lead

Desmond Travers

Retired colonel and member of the United Nations fact-finding mission that produced the Goldstone Report, witness for the RToP

The witness is a retired colonel and member of the United Nations fact-finding mission that produced the Goldstone Report. The witness focused on the issue of the Israeli Defence Forces' use of certain weapons in Gaza, based on the findings of the report. The witness discussed the consequences entailed in the use of these weapons and the need for monitoring the toxic waste and environmental risks this generates. Special mention was made of the following weapons: white phosphorus, tungsten shrapnel and DIME (Dense Inert Metal Explosive) weaponry, "flechette" shells and other weapons.

On the issue of white phosphorus (WP), the witness discussed how, according to the Goldstone Report, 40,000 shells containing WP were fired in the city of Gaza and the surrounding areas. WP is an extremely unstable product and remains active indefinitely. It burns the skin to the bone on contact and given that it gives off an odour similar to fish, children would be drawn to it attracted by the smell of food. Tests show that the WP casing contains carcinogens. It is used for illuminating at night, signalling at sea, or to mask movement as a smoke-screening agent. However, other less damaging chemical products can be used for these purposes and therefore the argument that white phosphorus is an indispensable agent is unfounded.

As for tungsten, the witness explained that pursuant to The United Nations fact-finding Mission, shrapnel containing WP was found in two separate locations where

casualties and deaths occurred. It is a carcinogenic substance and all projectiles that contain WP as shrapnel should also be prohibited.

In relation to DIME, where explosives are mixed with an inert metal, normally tungsten alloy in powder, the witness explained that this type of ammunition presents the same risk to human life as tungsten itself and causes the same injuries as tungsten micro-shrapnel. The use of these weapons should also be prohibited.

When "flechette" shells are fired, they burst open and scatter thousands of tiny darts in every direction. The witness recalled several incidents in Gaza where unarmed civilians, women and children, were hit by flechettes. On entering a victim, they bend or the fins break off and, as such are anti-personal weapons, non-fatal but which inflict wounds and are indiscriminate towards their victims. The witness recalled that international humanitarian law forbids the use of military means or methods whose nature is to inflict unnecessary damage or suffering.

In concluding, the witness referenced other weapons suspected of having been used in Gaza. Among these is ammunition enriched using metals such as uranium and which embeds itself deep into the earth. As the Goldstone Report observed, environmental testing and monitoring is required given that the use of these weapons leaves traces in the environment that can cause a decrease in human reproductive health and deformities in foetuses and newborns.

All the above weapons, which have been in use for some time, may now be considered as unacceptable, especially when at least one of them –white phosphorus– is not considered a weapon per se.

In response to questions, the witness stated it was possible to identify the companies manufacturing these kinds of weapons.

Ewa Jasiewicz

Journalist, witness of Operation Cast Lead, witness for the RToP

This witness, one of the few representatives of Western media during Operation Cast Lead, supplied statistics and referred to her experience as a volunteer with emergency medical teams in Gaza.

During the first three years of the Intifada, 75% of Red Crescent ambulances in the West Bank and Gaza Strip were destroyed or rendered useless and twenty members of the medical teams were killed. This had neither political nor legal repercussions for Israel. Nothing has changed since then.

The witness recalled an event from 2006 in Beth Hanoun (Gaza Strip) during the Israeli siege and bombardment when an Israeli missile hit an ambulance killing three healthcare workers. The Israeli authorities stated that their actions were in accordance with international norms and the deaths were a case of collateral damage.

According to data supplied by the Palestinian Ministry for Health, 56 doctors have been killed by the Israeli Defence Forces during the past ten years which is an average of one doctor killed every two months.

The deaths of one in five of the people who died during Operation Cast Lead were due to lack of access to medical services.

This and other data supplied by the witness supported the fact, as she pointed out, that the Israeli authorities violate the Fourth Geneva Convention regarding the protection of medical personnel and hospitals, moving the sick and wounded and access to medical care.

Governments act as if there was a choice in the course of action to be taken. But in

reality there is only one, the correct one; to apply the norms of international law. The law is on the side of the Palestinian people and as a result of this, the action of civil society is very important. We are doing what governments prefer not to do.

Daragh Murray

Legal advisor at the Palestinian Centre for Human Rights – PCHR) witness for the RToP

Mr. Murray attended as a witness, standing in of Raji Sourani, Director of the Palestinian Centre for Human Rights - PCHR, who was unable to attend this session of the Russell Tribunal on account of the general blockade of Gaza imposed by Israel and the closure of border crossings. The final witness of this session referred to the human cost of the war. He recalled that the Israeli offensive in the Gaza Strip between December 27, 2008 and January 18, 2009 caused the death of 1,400 Palestinians: the vast majority of whom (82%) were civilians and at least a further 5,300 were injured. All of these people, as Murray reminds us, are protected under international humanitarian law.

The witness recalled various examples of civilian victims of Operation Cast Lead and related the case of a pregnant woman who, taking advantage of a three hour cessation of hostilities left her house to visit her doctor. On her way there, she was wounded and while still lying on the ground was hit again. She remained on the ground until someone noticed that she was pregnant and she was taken to hospital. The woman was believed dead but was nonetheless taken to hospital in an effort to save the life of her baby. While on the operating table, surgeons realised the woman was still alive and transferred her to a hospital in Cairo. While in the ambulance she had a heart attack but was resuscitated by the medical personnel. In the Cairo hospital she suffered another attack and was again resuscitated. After six months both mother and child were able to return to Gaza.

The victims have a right to the application and observation of the law. Without the law, there is no guarantee that the events which took place in the Gaza Strip during Operation Cast Lead will not reoccur.

In concluding, the witness indicated that it is necessary to call a new Conference of the High Contracting Parties of the Geneva Convention to discuss measures required to ensure the application of the Fourth Geneva Convention in the Palestinian Territories.

The Wall built in the occupied territories

Francis Wurtz

Former member of the European Parliament, France, RTP witness

The witness gave an account of the inconsistency of the European voice between their pledge to advance a two-state solution and their actions to make it a reality and further described the historical trend of Europe's increasing political disengagement in resolving the conflict. Thirty years back the EU's Member States showed support for the Palestinian movement; they maintained diplomatic relations with Palestinians leaders and even twenty years ago they stood up against the US in their support for the PLO, a two-state solution and in their declaration of Israel's actions as illegal. This situation has changed; over the years Europe's political support for the Palestinian cause has dwindled. They have pursued a policy of disengagement and have taken the

"back seat" in comparison to their American partner. After the Quartet was formed in 2003 the aim to construct peace between Israel and Palestine and the aim of the two-state solution was clearly defined; the EU failed to live up to its role in building a just peace.

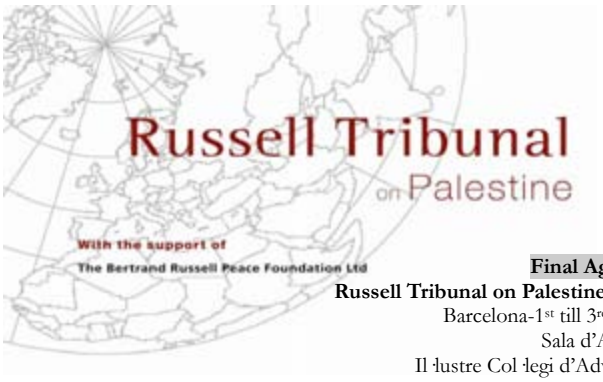
The EU's position towards the conflict is one marred by inconsistency, whereby they officially claim to support the self-determination of the Palestinians people and the construction of their state their actions do not mirror their words. The witness offered numerous examples from 2002 onwards in which Europe remained silent while Israel bombarded and politically and physically isolated the Palestinians, making the realization of a viable and peaceful two-state solution increasingly impossible. The witness explained that the EU continuously missed opportunities to construct peace in the region, for example the 2002 Arab Peace Initiative put forward in the Beirut Declaration was discarded by Israel and further disregarded by the EU. Despite Israel's continued heavy-handed position towards Palestine defined by war, discrimination and the violation of the human rights, the EU remains unengaged. To further aggravate matters the EU conversely continued to advance their relations with Israel. The same year Hamas won the European monitored elections in Palestine and thus became politically isolated by the international community the EU upgraded its relations with Israel. Israel continued to benefit from trading and commercial advantages with the EU.

The witness also accounted for consistent attempts made by individual diplomats and members of the European Parliament to convince the EU and its Member States to live up to its responsibility and actually support the two-state solution, beginning by suspending the AA. These claims were ignored and even now Europe continues to miss occasions for peace building while the American administration under President Obama is speaking out against Israel's illegal actions.

ANNEX B: LIST OF ABBREVIATIONS

UNGA: United Nations General Assembly
BDS: Boycott, Divestment and Sanctions
CDI: International Law Commission
ECHR: European Court of Human Rights
GC: Geneva Convention(s)
ICJ: International Court of Justice
CJEC: Court of Justice of the European Communities
Res.: Resolution
RTP: Russell Tribunal on Palestine
EU: European Union

ANNEX C: FINAL AGENDA BARCELONA



Final Agenda
Russell Tribunal on Palestine first International Session
Barcelona-1st till 3rd of March 2010
Sala d'Actes
Il·lustre Col·legi d'Advocats de Barcelona

Monday 1st March 2010

10am-11.30am: Opening speech by Stephane Hessel, Ambassador of France, and co-author of the Universal Declaration on Human Rights.
Intervention on the violations of international law and UN resolutions committed by the State of Israel by Felicia Langer (Germany), Human Rights attorney, author, recipient of the Right Livelihood award, Bruno Kreisky Award and German Federal Cross of Merit, Vicky Peña (Spain), Film, Theatre and Television Actress, Gustave Massiah (France), Economist, Urbanist and Policital analyst, founder of ATTAC France
Pilar Sampietro (Spain), Broadcaster, "Mediterráneo" on Radio Nacional de España (Radio 3) and Lluís Llach (Spain) composer and songwriter. One of the main representatives of "Nova Cançó" a movement of musicians and singers who defied Franco.
Presentation on the organisation and aims of the first session of the Russell Tribunal On Palestine by Pierre Galand (Belgium), on behalf of the International Organising Committee.

11.30am: Break

12noon-1.30pm: "The right to self determination of the Palestinian people"
Interventions by Madjid Benchikh (Algeria) Expert, Professor of Public International Law and former dean at the Faculty of Law, Algiers, David Bondia (Spain) Expert, Professor of Public International Law and International Relations at the University of Barcelona and Daragh Murray (Ireland/Palestine) Witness, Legal Advisor from the Palestinian Centre for Human Rights.

1.30pm-3.00pm: Lunch

3.00pm-4.45pm: "The Annexation of East Jerusalem"
Interventions by Ghada Karmi (Palestine) Expert, Author and Physician, Meir Margalit (Israel) Witness, Member of the Jerusalem city council and the Israeli Committee Against House Demolitions, Charles Shamas (Palestine) Witness, Founder of the MATTIN group and former legal advisor to the ICRC.

4.45pm: Break

5.15pm-7.00pm:"Settlements and the plundering of natural resources"
Interventions by James Phillips (Ireland) Expert, Barrister and Michael Sfard (Israel) Witness, Barrister and Charles Shamas (Palestine) Witness, Founder of the MATTIN group and former legal advisor to the ICRC.

End of day 1
Tuesday 2nd March 2010

9.30am-11.30am: "The EU-Israel Association Agreement"
Interventions by Agnes Bertrand (Belgium) Expert, Researcher and Middle East specialist with APRODEV, Patrice Bouveret (France) Expert, President of the Armaments Observatory, Veronique De Keyser (Belgium) Witness, Member of the European Parliament and Raül Romeva (Spain),Witness, Member of the European Parliament.

11.30am: Break

12.00am-1.30pm: "The EU-Israel Association Agreement"
Interventions by Phil Shiner (UK) Expert, Barrister and Clare Short (UK) Witness, Member of Parliament and former Secretary of State for International Development.

1.30pm: Lunch Break

3.00pm-4.45pm: "The Gaza Blockade and operation Cast Lead"

Interventions by Derek Summerfield (UK) Expert, Honorary senior lecturer at London´s Institute of Psychiatry and Desmond Travers (Ireland) Witness, Retired colonel and member of the UN fact-finding mission that produced the Goldstone Report, Ewa Jasiewicz (Poland) Witness, Journalist and volunteer with emergency medical services during Operation Cast Lead and Raji Sourani (Palestine) Witness, Founder and Director of The Palestinian Centre for Human Rights in Gaza.

4.45pm: Break

5.15pm-7.00pm: "The Wall built in the occupied Palestinian territories"
Interventions by Francois Dubuisson (Belgium) Expert, Law professor at the Universite Libre de Bruxelles and Francis Wurtz (France) Witness, Former Member of the European Parliament.

End of day 2
Wednesday 3rd March 2010

12am - 2pm: "Press conference"
The jury will announce its conclusions and recommendations and will answer the following 6 questions:

1. Have the European Union and its member states breached their obligation to promote and ensure respect for the Palestinian people's right of self-determination? Have they cooperated with a view to halting any serious violation of that right? Have they aided or abetted any violation of that right?

2. Have the European Union and its member states breached their obligation to ensure respect for international humanitarian law vis-à-vis the Palestinian people in the case of the blockade of the Gaza Strip and the "Cast Lead" military operation conducted by Israel from 27 December 2008 to 18 January 2009? Have they cooperated with a view to ending any serious violation of that law? Have they aided or abetted any violation of that law?

3. Have the European Union and its member states breached their obligation to ensure respect for international humanitarian law and the right of the Palestinian people to sovereignty over their natural resources in the context of Israel's building of settlements and pillage of natural resources in the Occupied Palestinian Territories? Have they cooperated with a view to ending any serious violation of the law and right in question? Have they aided or abetted any violation of the law and right in question?

4. Have the European Union and its member states breached their obligation to ensure respect for international humanitarian law, the principle of non-acquisition of territory by force and the Palestinian people's right of self-determination in the case of the annexation by Israel of East Jerusalem? Have they cooperated with a view to ending any serious violation of the law, principle and right in question? Have they aided or abetted any violation of the law, principle and right in question?

5. Have the European Union and its member states breached their obligation to ensure respect for international law in connection with the construction of the wall by Israel in the Occupied Palestinian Territories? Have they cooperated with a view to halting any serious violation of that law? Have they aided or abetted any violation of that law?

6. Have the European Union and its member states breached their obligation to ensure respect for international law and European law in the context of the agreements signed between the European Union and the State of Israel?

ANNEX D: LETTER OF FERNANDO ANDRESEN GUIMARÃES ON BEHALF OF J. M. BARROSO, PRESIDENT OF THE EUROPEAN UNION

EUROPEAN COMMISSION
Cabinet of President J.M. Barroso

Fernando Andresen Guimarães
Member of Cabinet

01. 03. 2010

Brussels,
BARROSO (2010) A/601
BARROSO (2010) D/ 444

Mr Pierre GALAND
Russell Tribunal on Palestine

Email: trp_int@yahoo.com

Dear Mr Galand,

The President of the European Commission, Mr José Manuel Barroso, has asked me to thank you for your letter of 20 January about the activities of the Russell Tribunal on Palestine.

The European Union (EU) consistently supports all efforts aimed at achieving peace in the region through negotiations. Its main objective remains the creation of an independent, democratic, contiguous and viable Palestinian state, living side by side in peace with Israel.

The EU outlined its position on the Middle East Peace Process in the Foreign Affairs Council Conclusions of 8 December 2009. Among other things, the Council reiterated its support for negotiations leading to Palestinian statehood, and its readiness, when appropriate, to recognise a Palestinian state. The Council stated that the 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 urged the government of Israel to end all settlement activities immediately, in East Jerusalem and the rest of the West Bank and including natural growth, and to dismantle all outposts erected since March 2001. The EU reiterated its calls for an immediate, sustained and unconditional opening of crossings for the flow of humanitarian aid, commercial goods and persons to and from Gaza.

These conclusions are available on the following website:
http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/111829.pdf

With respect to the EU actions on the Middle East Peace Process, and its relations with the Palestinian Authority and Israel, more information and the texts of previous Council conclusions are available on: http://ec.europa.eu/external_relations/mepp/index_en.htm

May I wish you well in the proceedings of your conference.

Yours sincerely,

Fernando ANDRESEN GUIMARÃES

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium.
Telephone direct line: +32-2- 29 881 59 Fax: 32.2.29 886 61. Office: BERL 13/111

E-mail : fernando.andresen-guimaraes@ec.europa.eu

ANNEX E: LETTER OF BORIS RUGE ON BEHALF OF GUIDO WESTERWELLE, FEDERAL FOREIGN MINISTER OF GERMANY

Auswärtiges Amt

Freiheit
Einheit
Demokratie

Auswärtiges Amt, 11013 Berlin

Russell Tribunal on Palestine
-Mr Pierre Galand-
Forum Nord Sud
115, rue Stévin
1000 Brussels

Belgien

BORIS RUGE
Head of Near East Division

OFFICE ADDRESS
Werderscher Markt 1
10117 Berlin

POSTAL ADDRESS
11013 Berlin

TEL +49 (0)30 18-17-2787
FAX +49 (0)30 18-17-5-2787

310-ri@diplo.de
www.auswaertiges-amt.de

SUBJECT **Middle East Peace Process, your letter dated January 20th, 2010**
ATTACH. EU Council conclusions, Middle East Peace Process, December 8, 2009
GZ 310.10 (please quote when responding)

February 15, 2010

Dear Mr Galand,

Thank you very much for your letter to Federal Foreign Minister Guido Westerwelle, who has asked me to reply to you.

Peace and stability in the Middle East are among Germany's and Europe's political priorities. The German Federal government is convinced that there's no alternative to a two-state solution, with the State of Israel and an independent, democratic, contiguous and viable State of Palestine, living side by side in peace and security.

In order to enable a resumption of comprehensive peace negotiations, Germany and its European partners urge both parties to the conflict to fullfil their roadmap obligations. In the latest Council conclusions on the Middle East peace process of December 8, 2009, the EU remained true to its well-known positions concerning future borders, the issue of Jerusalem and settlement construction. All these positions reflect the underlying goal of a two-state solution and the EU's respect for international law. The EU has reaffirmed that it doesn't recognize the annexation of East-Jerusalem and has underscored the necessity to deal with all final status issues in the framework of comprehensive negotiations. Germany and its European partners have underlined that settlements, the separation barrier where

VERKEHRSANBINDUNG: U-Bahn U2, Hausvogteiplatz, Spittelmarkt

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. They have urged the government of Israel to immediately end all settlement activities and to dismantle all outposts erected since March 2001.

Germany and the EU have also repeatedly called on Isreal to open the border-crossings to Gaza and to enable a regular flow of humanitarian aid, commercial goods and persons to and from Gaza. Concerted efforts for Gaza started immediately after the beginning of the operation „Cast Lead", took detailed form in the EU's Action Plan for Gaza of January 27, and continue to this day.

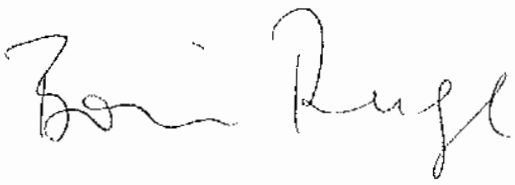
During the operation „Cast Lead", the European Commission and Israel agreed to temporarily suspend technical meetings meant to further deepen EU-Israel relations. But the Federal Foreign government remains convinced that in general, the EU's influence on developments in the region is best served by further developing the EU's relations with both Israel and the Palestinian Territories.

On a bilateral basis, the Federal Foreign government has undertaken numerous initiatives in order to improve the quality of life of the Palestinian population and to contribute to Palestinian state building. In addition to its bilateral development funding, Germany has pledged 150 million Euros for Gaza at the International Donor Conference in Sharm El Sheikh in March 2009. Most of our support for Gaza is channelled via UNRWA.

Only a meaningful political process with the goal of a two-state-solution will bring sustainable peace to this region. The German Federal government and its partners in the EU and the Middle East Quartett will continue to pursue this vision.

For ease of reference, I attach the December Council conclusions mentioned above.

Yours sincerely,



ANNEX F: COUNCIL OF THE EUROPEAN UNION. CONCLUSIONS ON THE MIDDLE EAST PEACE PROCESS

COUNCIL OF THE EUROPEAN UNION

Brussels, 8 December 2009

17281/09

COMEP 38
PESC 1706

NOTE

Subject : FAC of 8 December 2009
- Council Conclusions on the Middle East Peace Process

At its meeting on 8 December 2009, the Foreign Affairs Council adopted the Conclusions on the Middle East Peace Process annexed hereto.

ANNEX

Council conclusions on the Middle East Peace Process

(FAC, 8 December 2009)

1. The Council of the European Union is seriously concerned about the lack of progress in the Middle East peace process. The European Union calls for the urgent resumption of negotiations that will lead, within an agreed time-frame, to a two-state solution with the State of Israel and an independent, democratic, contiguous and viable State of Palestine, living side by side in peace and security. A comprehensive peace, which is a fundamental interest of the parties in the region and the EU, must be achieved on the basis of the relevant UN Security Council Resolutions, the Madrid principles including land for peace, the Roadmap, the agreements previously reached by the parties and the Arab Peace Initiative.

2. The Council reconfirms its support for the United States' efforts to resume negotiations on all final status issues, including borders, Jerusalem, refugees, security and water, respecting previous agreements and understandings. The European Union will not recognise any changes to the pre-1967 borders including with regard to Jerusalem, other than those agreed by the parties. The Council reiterates the EU's readiness to contribute substantially to post-conflict arrangements, aimed at ensuring the sustainability of peace agreements, and will continue the work undertaken on EU contributions on state-building, regional issues, refugees, security and Jerusalem. The Council underlines the need for a reinvigorated Quartet engagement and notes the crucial importance of an active Arab contribution building on the Arab Peace Initiative.

3. The EU stands ready to further develop its bilateral relations with the Palestinian Authority reflecting shared interests, including in the framework of the European Neighbourhood Policy. Recalling the Berlin declaration, the Council also reiterates its support for negotiations leading to Palestinian statehood, all efforts and steps to that end and its readiness, when appropriate, to recognise a Palestinian state. It will continue to assist Palestinian state-building, including through its CSDP missions and within the Quartet. The EU fully supports the implementation of the Palestinian Authority's Government Plan "Palestine, Ending the Occupation, Establishing the State" as an important contribution to this end and will work for enhanced international support for this plan.

4. Recalling the EU's position as expressed at the Association Council in June 2009, the Council reaffirms its readiness to further develop its bilateral relations with Israel within the framework of the ENP. The EU reiterates its commitment towards the security of Israel and its full integration into the region, which is best guaranteed through peace between Israel and its neighbours.

5. Encouraging further concrete confidence building measures, the Council takes positive note of the recent decision of the Government of Israel on a partial and temporary settlement freeze as a first step in the right direction and hopes that it will contribute towards a resumption of meaningful negotiations.

6. Developments on the ground play a crucial part in creating the context for successful negotiations. 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.

7. The EU welcomes Israel's steps to ease restrictions of movement in the West Bank which have made a contribution to economic growth. The Council calls for further and sustained improvements of movement and access, noting that many check points and road blocks remain in place. The Council also calls on the Palestinian Authority to build on its efforts to improve law and order.

8. The Council is deeply concerned about the situation in East Jerusalem. In view of recent incidents, it calls on all parties to refrain from provocative actions. The Council recalls that it has never recognised the annexation of East Jerusalem. If there is to be a genuine peace, a way must be found through negotiations to resolve the status of Jerusalem as the future capital of two states. The Council calls for the reopening of Palestinian institutions in Jerusalem in accordance with the Roadmap. It also calls on the Israeli government to cease all discriminatory treatment of Palestinians in East Jerusalem.

9. Gravely concerned about the situation in Gaza, the Council urges the full implementation of UNSCR 1860 and the full respect of international humanitarian law. In this context, the continued policy of closure is unacceptable and politically counterproductive. It has devastated the private sector economy and damaged the natural environment, notably water and other natural resources. The EU again reiterates its calls for an immediate, sustained and unconditional opening of crossings for the flow of humanitarian aid, commercial goods and persons to and from Gaza. In this context, the Council calls for the full implementation of the Agreement on Movement and Access. While extremists stand to gain from the current situation, the civilian population, half of which are under the age of 18, suffers. Fully recognising Israel's legitimate security needs, the Council continues to call for a complete stop to all violence and arms smuggling into Gaza. The Council calls on those holding the abducted Israeli soldier Gilad Shalit to release him without delay.

10. The Council calls on all Palestinians to promote reconciliation behind President Mahmoud Abbas, support for the mediation efforts by Egypt and the Arab League and the prevention of a permanent division between the West Bank, including East Jerusalem, and Gaza. The Council would welcome the organisation of free and fair Palestinian elections when conditions permit.

11. A comprehensive peace must include a settlement between Israel and Syria and Israel and Lebanon. Concerning the Syrian track, the EU welcomes recent statements by Israel and Syria confirming their willingness to advance towards peace and supports all efforts aimed at the reactivation of the talks between the two countries.

12. The EU recalls that a comprehensive settlement of the Arab-Israeli conflict requires a regional approach and will continue its work on this in line with the June 2009 Council Conclusions using all its instruments to this effect. The EU also calls on all regional actors to take confidence building measures in order to stimulate mutual trust and encourages Arab countries to be forthcoming, both politically and financially, in assisting the Palestinian Authority and to Palestinian refugees through UNRWA.

INTERNATIONAL CATALAN INSTITUTE FOR PEACE

GRAN VIA, 658 BAIX. 08010 BARCELONA
T. 93 554 42 70 | F. 93 554 42 80
ICIP@GENCAT.CAT | WWW.ICIP.CAT

Amb Palestina al Cor