

# LETTER TO POLICY MAKERS IN THE EUROPEAN UNION AND ITS MEMBER STATES

*Calling for*

## COMPLIANCE WITH INTERNATIONAL LEGAL OBLIGATIONS

*Related to*

### WITHHOLDING TRADE FROM AND TOWARD ISRAELI SETTLEMENTS

We request the legislators in the European Union and its Member States to recognize and comply with their fundamental legal obligations resulting from the duty of non-recognition and non-assistance related to Israeli settlements and their economic activity.

As legal experts, we ask the European Union to withhold incoming as well as outgoing trade with settlements in compliance with the duty of non-recognition. Individual EU Member states do not only have the right, but the legal obligation to respect the duty of non-recognition if the central authority for trade (the European Commission) does not comply.

Any policy related to the labelling of products and services, however engrained in EU law, remains a wholly inadequate measure that fails to recognize the international legal obligations of third states. The only legally correct measure is to rectify the error in international trade relations by withholding from trading with settlements. Trading with settlements constitutes implicit recognition and is a violation of international law. It is also contradictory to the EU and EU Member States public policy positions on settlements, and to their domestic legal obligation to ensure consistency between such positions and government conduct.

We note that the European Union was very quick to impose an import ban from Crimea in the wake of the Russian annexation of the territory. It explicitly confirmed this ban as an integral part of its non-recognition policy. We ask no more than consistency in the application of the European Union's non-recognition policy.

We call for the European Union and its individual Member States to take up this obligation not only in order to aid the Middle East peace process, but also to respect fundamental legal norms that are the only means to safeguard international peace and security and the rule of international law.

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## ANNEX: LEGAL PROVISIONS

### **On the Israeli violations of international law relevant to settlement trade**

The Israeli Occupation of the Palestinian Territory and Israeli settlements violate multiple norms of international law, among which:

- (1) Obstruction of the fundamental right to Palestinian self-determination<sup>1</sup>
- (2) De facto annexation<sup>2</sup>
- (3) Illegal transfer of civilian population into occupied territories<sup>3</sup>
- (4) Illegal exploitation of property to benefit the occupying state's economy<sup>4</sup>

The status of these obligations is of the highest nature in international law. The right to self-determination has been recognized as *jus cogens* (also known as a peremptory norm of international law).<sup>5</sup> As for core humanitarian legal obligations, the International Court of Justice confirmed that they were to “be observed by all States” because “they constitute intransgressible principles of international customary law”, and are “fundamental to the respect of humanity” and “elementary considerations of humanity”.<sup>6</sup>

Legal scholars and individual judges of the ICJ have explicitly indicated that these fundamental norms of humanitarian law such as the prohibition on transferring civilians to occupied territories constitute either *jus cogens in statu nascendi* or *jus cogens*.<sup>7</sup> In both cases, third parties have specific obligations in case such a norm is violated.

We conclude that Israel continues to violate international law.

### **On the economic activity of Israeli settlements in Occupied Territories**

Fundamental norms of international humanitarian law that evolved from the 1907 Hague Convention (IV) and the 1949 Geneva Convention (IV) have unambiguously confirmed that the fundamental prohibition of the transfer of civilian population *ipso facto* implies an equally strong prohibition on the economic activity of transferred civilians for the benefit of the occupying state.

Legally, there are only two conditions under which restricted use of public and private properties, and economic activity by the occupying state are allowed: (1) If they are justified for military needs or (2) If they benefit the occupied population. Under no other circumstances is economic activity by civilian settlements that benefit the occupant allowed under international law.

This prohibition is not only recognized in international law, but also in Israeli domestic law. In the *Beth El Case*<sup>8</sup>, the Israeli Supreme Court argued that Settlements were acceptable if they were temporary and served the military and security needs of the Israeli State. In the *Elon Moreh and Cooperative Society Case*<sup>9</sup>, the Supreme Court ruled that the security needs of the army in occupation (the main legitimization for the existence of settlements) could never include national, economic or social interests.

We conclude that economic activities within civilian settlements almost exclusively benefit the occupant, and that in consequence thereof Israel continues to violate fundamental norms of international law.

### **On the multilateral reaction to trade with settlements**

United Nations Security Council Resolution (UNSC) 465, signed on 01 March 1980, “calls upon all States not to provide Israel with any assistance to be used specifically in connection [sic] with settlements in the occupied territories”. A *bona fide* interpretation of the term ‘assistance’ based on the objective of this resolution and the function of trade set forward in the WTO Agreements, reveals that trading with settlements indeed is an act of ‘assistance’ to the viability of the settlement project.

United Nations resolutions referring to Chapter VII or Article 15 of the UN Charter are by definition binding. The absence of such an explicit reference does not preclude the binding nature of a resolution such as UNSC Res. 465. In this case, the rules of interpretation of UNSC resolutions based on the 1971 ICJ Namibia Advisory Opinion and Articles 31-33 of the Vienna Convention on the Law of Treaties determine whether a resolution is binding or not. A *bona fide* analysis of these rules of interpretation in the case of UNSC. Res. 465 conclude the high probability of its binding nature under international law.<sup>10</sup>

We conclude that despite UNSC Res. 465, States have continued to trade with settlements, thereby violating their obligation under international law.

### **On the obligation of non-recognition related to trade with settlements**

Because the United Nations Security Council is a political body in which five permanent members can exercise heavy political influence because of veto-power, it is fully in the interests of maintaining international peace and security to respect the obligation of non-recognition. This obligation is laid down in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts. The duty of non-recognition holds that states shall neither recognize as lawful a situation created by a serious breach of a peremptory norm of international law, nor render aid or assistance in maintaining the situation created by the breach.

The ICJ and other authoritative sources of international law have recognized that the duty of non-recognition applies as a result of the breach of the Palestinian right to self-determination. This duty of non-recognition and non-assistance also applies toward illegal settlements in occupied territories. Allowing trade with settlements is an act counter to the obligation of non-recognition and non-assistance, if such trade primarily benefits the occupant.

Withholding from trading with settlements is not a reprisal or a sanction, but rather a peaceful and legally-justified act of retortion. The fact that there is such trade is an error in international trade relations, namely trading with internationally recognized illegal settlements. This trade should have never occurred in the first place and to correct this error is no more than an issue of realizing the duty of non-recognition.

This duty of non-recognition has two fundamental characteristics:

- (1) It is a customary obligation on all States
- (2) It is a self-executing obligation

This means that (1) EU Member States incur this obligation, even if the European Commission holds the exclusive competence for trade policy, and (2) no explicit UN Security Council action is needed to trigger the obligation.

We conclude that the EU and its Member States are in non-compliance with their legal obligation of non-recognition and non-assistance by continuously allowing the existence of trade with illegal settlements in occupied territories.

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## References

The legal analysis in this letter has been extensively explained in: T. Moerenhout, *The Obligation to withhold from trading in order not to recognize and assist settlements and their economic activity in occupied territories*, in "Journal of International Humanitarian Legal Studies", Vol. 3 (2012) 1-42.

<sup>1</sup> Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004.

<sup>2</sup> J. Dugard and J. Reynolds, *Apartheid, International Law, and the Occupied Palestinian Territory*, in "The European Journal of International Law", Vol. 24, n°3 (2013) 900,908.

<sup>3</sup> 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Art. 59(5).

<sup>4</sup> 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulation Concerning the Laws and Customs of War on Land (The Hague Regulation) Art. 55. ; Y. Arai-Takahashi, *The Law of Occupation* (2009) at 169. ; S. Koury, *The European Community and Member States' duty of non-recognition under the EC-Morocco association agreements: state responsibility and customary international law*, in Karin Arts and Pedro Pinto Leite (eds.), *International Law and the Question of Western Sahara* (2007) at 165.

<sup>5</sup> International Law Commission, *Yearbook of the International Law Commission 1966-Volume II (1966)*, at 248.

<sup>6</sup> Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, at para. 79, 83. ; Merits, *United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania (Corfu Channels Case)*, ICJ, 9 April 1949, at 22.

<sup>7</sup> Declaration of President Bedjaoui, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, at para. 21. ; Dissenting Opinion of Judge Weeramantry, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, at para 10. ; Dissenting Opinion of Judge Koroma, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, at 574. ; A. Cassese, *International Law* (2005) at 203. ; V. Chetail, *The Contribution of the International Court of Justice to International Humanitarian Law*, in Bernard et al (eds.), *IRRC 235* (2003) at 251.

<sup>8</sup> Judgement, *Ayoub [or Sulayman Tawfiq Ayyub] et al. v Minister of Defense et al. ("Beth El Case")*, HC 606/78 and HC 610/78, 33(2), Israeli Supreme Court. 1978. English summary in: Y. Dinstein (ed.), *Israel Yearbook on Human Rights* (1979), at 337.

<sup>9</sup> Judgement, *Mustafe Dweikat et al., v the Government of Israel et al. ("the Elon Moreh Case")*, H.C. 390/7934(1), 34(1), Israeli Supreme Court, 22 October 1979. English summary in: Y. Dinstein (ed.), *Israel Yearbook on Human Rights* (1979), at 345. Judgement, *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region et al. ("A teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region")*, H.C. 393/82, 37(4), Israeli Supreme Court, 1984. English summary in: Y. Dinstein (ed.), *Israel Yearbook on Human Rights* (1984), at 306.

<sup>10</sup> T. Moerenhout, *The Obligation to withhold from trading in order not to recognize and assist settlements and their economic activity in occupied territories*, in "Journal of International Humanitarian Legal Studies", Vol. 3 (2012) 9-11.