



AL-HAQ



Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law

Position Paper

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AL-Haq - 54 Main Street 2nd & 3rd Fl. - Opp. Latin Patriarchate
Saint Andrew's Evangelical Church - (Protestant Hall)
P.O.Box: 1413 - Ramallah - West Bank - Palestine
Tel: + 970 (0)2 2954646/7/9
Fax: + 970 (0) 2 2954903
Website: www.alhaq.org

Authors: Alessandro Tonutti
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Table of Contents

Executive Summary	6
Introduction	8
1. Trade of Settlement Produce and the Entrenchment of the Settlement Enterprise	9
1.1 The Case of the Jordan Valley	11
2. Settlement Produce in the EU Market and the Issue of Labelling	14
2.1 The Brita Case	15
2.2 Labelling Produce Coming from Israeli Settlements	16
3. Why a Ban on Settlement Produce is Required	19
3.1 Israeli Settlements and the Violation of the Right of the Palestinian People to Self-Determination	19
3.2 Israeli Settlements and the Extensive Destruction and Appropriation of Palestinian Property	21
3.3 Israeli Settlements and the Violation of the Prohibition of Colonialism	26
3.4 Legal Consequences for Third States	27
4. Why a Ban on Settlement Produce Can Be Lawfully Implemented by EU Member States	32
4.1 Banning Settlement Produce under EU Law	32
4.2 Unilateral Ban on Trade in Settlement Produce by EU Member States	33
4.3 Banning Settlement Produce under the GATT Regulations	36
5. The Path Towards an International Ban of Settlements Produce: the Example of “Conflict Diamonds”	38
Conclusion and Recommendations	39

Executive Summary

The European Union (EU) is currently engaged in a debate over whether to adopt a tougher stance with regard to agricultural produce originating from Israeli settlements entering the European market.

Al-Haq's position paper 'Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law' examines the implications of trade in settlement produce and the entry of such produce into the EU market, in light of the obligations of EU Member States under international law.

The flourishing agricultural environment in the West Bank, particularly in the Jordan Valley area, coupled with the exploitation of water and other natural resources found in the occupied territory, has turned Israeli settlements into profitable enterprises. The success of such enterprises has been driven by the establishment of water infrastructure, crops and export companies at the expense of the occupied Palestinian population. As a result, the export of settlement produce to international markets can be considered an essential step in the process of reinforcing and consolidating

the settlement enterprise, while simultaneously ensuring the viability of the entire settlement strategy. Access to external markets provides a vital source of revenue that allows settlements to thrive. Without the economic support generated by trade with international stakeholders, the very existence of settlements, in particular in the Jordan Valley area, would be seriously threatened. Amongst international stakeholders, Europe finds itself in an extremely delicate position, because, due to the isolated position of Israel within the Middle East, the EU has become Israel's largest trade partner, receiving 20 per cent of total Israeli exports.

Israeli settlements in the Occupied Palestinian Territory (OPT) are illegal under international law and represent a breach of Israel's obligations as an Occupying Power in the OPT. Furthermore, they amount to serious breaches of peremptory norms of international law, including the right to self-determination, the prohibition against extensive destruction and appropriation of property and the prohibition against colonialism. Article 41 of the International Law Commission

Draft Articles on State Responsibility (hereinafter the ILC Draft Articles), which reflects customary international law, states that in case of breaches of peremptory norms of international law all States are under an obligation not to recognise the situation resulting from the illegal conduct as lawful, not to render aid or assistance in maintaining the illegal situation and to actively cooperate in order to bring it to an end.

This position paper will analyse how, by allowing settlement produce to enter their internal markets, Third Party States, and in particular EU Member States, implicitly recognise as legal a situation arising from a breach of peremptory norms of international law and thus violate their duty of non-recognition. In addition, by engaging in the trade of settlement produce, States are failing to comply with their obligation to actively cooperate in order to put the Israeli settlement enterprise to an end. Therefore, a ban on settlement produce must be considered amongst those actions that Third Party States should undertake in order to comply with their customary international law obligations. Such a ban can be lawfully implemented by EU Member States,

without contravening any provision of EU, national or General Agreement on Tariffs and Trade (GATT) law.

Therefore, in light of the serious breaches of peremptory norms of international law that settlements and their related infrastructure entail, Al-Haq calls upon the EU and individual EU Member States to comply with their customary international obligations, by banning produce originating from Israeli settlements in the OPT.

Concurrently, it calls upon the relevant United Nations (UN) bodies to recall the precedent set by 'conflict diamonds' and to set up an effective mechanism to investigate and report on the relationship between trade in settlement produce and the entrenchment of the settlement enterprise. UN bodies should pay particular attention to the role played by the settlement enterprise in maintaining the occupation and consequently explore the available grounds to enforce a ban on trade of settlement produce.

Introduction

The purpose of this position paper is to investigate whether there are grounds under international, EU or domestic law, for EU Member States to institute a ban on trade in agricultural produce originating from Israeli settlements in the West Bank, including East Jerusalem.

It is important to distinguish between labelling and banning trade in settlement produce. Labelling a product identifies its origin and source of production, thus helping to inform relevant authorities and consumers of the provenance of a certain product. As such, labelling leaves the final decision of whether or not to buy a product originating from a settlement entirely with the consumer. However, a ban on trade in settlement produce requires that their trade should be prohibited and would prevent their entry into a specific market.

This position paper focuses on the obligation of EU Member States to ban trade in goods originating from Israeli settlements. It also briefly analyses the issue of labelling settlement produce, which Al-Haq considers as an interim measure in the process of adopting a ban. Settlement industries produce a wide range of goods, varying from manufactured products to agricultural and raw materials. However, for the purpose of this position paper, the term 'settlement produce' is limited to agricultural products and raw materials. Manufactured products will not be part of our analysis.¹

1. Trade of Settlement Produce and the Entrenchment of the Settlement Enterprise

In order to explore the legal grounds for a ban on settlement produce, it is essential to highlight the links between the trade in such goods and the sustainability of the Israeli settlement enterprise. In general, trade of produce is not illegal under international law unless there is clear evidence that such trade is contributing to or sustaining serious breaches of international law or the unlawful situations they have created.

Israeli settlements in the occupied West Bank, including East Jerusalem, are illegal under international law and represent a breach of Israel's international obligations as an Occupying Power in the OPT. Article 49(6) of the Fourth Geneva Convention states that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." This provision aims to ensure that military occupation remains a temporary regime and does not lead to any claim of sovereignty by the Occupying Power, as is stipulated in Article 43 of The Hague Regulations Annexed to the Hague Convention IV Respecting the Law and Customs in War on Land of 1907 (hereinafter the Hague Regulations). Numerous United Nations (UN) Security Council (SC) and General Assembly (GA) resolutions² have confirmed the illegality of Israeli settlements in the OPT. Settlements are established, maintained and governed by a combination of Israeli legislative and executive acts that the EU and its Member States cannot recognise as lawful. These acts serve to implement and consolidate the transfer of parts of Israel's population into the territory it occupies, in violation of international humanitarian law, and thereby contributing to the denial of the right of the Palestinian people to self-determination. These findings were reiterated by the International Court of Justice (ICJ) in its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.³

² See UNSC Res 237 (14 June 1967) UN Doc S/RES/237; UNSC Res 271 (15 September 1969) UN Doc S/RES/271; UNSC Res 446 (22 March 1979) UN Doc S/RES/446; UNSC Res 465 (1 March 1980) UN Doc S/RES/465. See also, UNGA Res 56/60 (10 December 2001) UN Doc A/RES/56/60; UNGA Res 58/97 (17 December 2003) UN Doc A/RES/58/97.

³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Rep 2004, paragraphs 115-122 (hereinafter: *Advisory Opinion on the Wall*). In particular, the Court declared that Article 49 of the Fourth Geneva Convention prohibits not only forcible transfers, "but also any measures taken by an Occupying Power in order to organise or encourage transfers of parts of its own population into the occupied territory," see *Advisory Opinion on the Wall*, paragraph 120.

¹ For the purpose of this position paper, it is normally easier to establish the origin of those items whose production cycle is developed and concluded in a single determinate area.

The export of settlement goods to international markets reinforces and consolidates Israel's settlement enterprise. Together with the unlawful appropriation and exploitation of prime agricultural land, water and other natural resources in the occupied territory to the detriment of the Palestinian population and Palestinian economic development,⁴ this export trade has transformed illegally-established Israeli settlement-based production operations into sources of private commercial profit and sources of fiscal revenue for the Occupying Power. In 2011, trade between the EU and Israel, including settlement trade, amounted to 29.4 billion Euro, of which exports reached 12.6 billion Euro.⁵ The Government of Israel estimates that the value of goods produced in settlements located in the West Bank and exported to Europe amounts to approximately 300 million USD per year.⁶ A considerable portion of goods exported from the settlements – the exact percentage is unknown as the settlement economy has been fully integrated into the Israeli national economy – are agricultural products originating from the settlement agricultural enterprise.

A recent report produced by 22 European civil society organisations has highlighted that, while settlement exports may represent a relatively small proportion of Israel's total exports, they still amount to a considerable quantity in absolute terms and are of vital importance for the economic viability of many settlements. Trade with settlements bolsters their economy and contributes to their permanence and growth, while, at the same time, having an increasingly negative affect on Palestinian living conditions.⁷

Furthermore, the failure to restrict or prohibit trade in settlement goods may entail recognising as lawful a number of legislative and executive acts that the EU and its Member States consider not only contrary to international law but, in some cases, criminal. Products that have been obtained unlawfully and produced through an act that is defined as a serious crime under the national legislations of EU Member States cannot be lawfully traded.

⁴ World Bank, 'Fiscal Crisis, Economic Prospects – The Imperative for Economic Cohesion in the Palestinian Territories' (23 September 2012), paragraph 26.

⁵ See European Commission, 'Trade' <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/israel/>> accessed 3 January 2013.

⁶ In 2010 alone, Israel exported fruit and vegetables worth 2.1 billion USD, 66 per cent of which was exported to Europe. Who Profits, 'Made in Israel: Agricultural Export from Occupied Territories - A Flash Report' (May 2012), 1; World Bank (n 4).

⁷ Crisis Action, 'Trading Away Peace: How Europe helps sustain illegal Israeli Settlements' (October 2012), 20. In 2011, approximately 25.8 per cent of Palestinians suffered from poverty in OPT. More than one in four Palestinians is living below the poverty line, of whom 17.8 per cent were in the West Bank and 38.8 per cent in the Gaza Strip. Palestinian Central Bureau of Statistics, 'Levels of Living and Poverty in the Palestinian Territory' (10 June 2012).

Indeed, under the proceeds of crime law, the mere suspicion that a product may constitute the proceeds of a crime and that any commercial exchange of such a product may benefit the perpetrator warrants official action by relevant States' authorities until such point as they can determine if the product is indeed criminal and either confirm or vitiate the suspicion.



1.1 The Case of the Jordan Valley

Agriculture is the main source of income for Israeli settlements in the occupied Jordan Valley and Dead Sea area. The estimated value of agricultural goods produced by settlements in this area is 500 million NIS (approximately 128 million USD) per year.⁸ The Government of Israel actively sustains settlements located in this area by lavishing large financial incentives on both the settlements themselves and on foreign companies involved in the settlement enterprise.⁹

According to the settlement regional council of the Jordan Valley¹⁰ "about 30 per cent of the [Israeli settlements] are economically based directly on agriculture and an additional 30 per cent give agriculture related services – packing houses,

⁸ See Research and Development Center in the Jordan Valley, 'Agriculture in the Valley,' <http://www.mop-bika.org.il/130651/haklout_babika> (in Hebrew) accessed 3 January 2013. See also, Jordan Valley Regional Council's website at <<http://www.jordanvalley.org.il/?categoryId=38842>> accessed 3 January 2013.

⁹ Israeli Government measures involve benefits for agriculture, including grants of up to 25 per cent of the investment for the establishment of agricultural enterprises and tax benefits on profits ranging from 25 to 30 per cent. Moreover, between 2000 and 2006, settlements in the West Bank paid 60 per cent less tax per capita than Israeli citizens living in Israel proper, while foreign companies working within settlements also benefit from the tax system. See Crisis Action (n 7), 17; see also, Ma'an Development Centre, 'Parallel Realities: Israeli Settlements and Palestinian Communities in the Jordan Valley' (2012), 13.

¹⁰ Regional councils are one of the three types of *local government* entities in Israel; the others are cities and local councils. Israeli settlements in the West Bank are considered by Israel as part of its territory and they have been formalised through the establishment of regional councils.

refrigeration, transport, office services, etc.”¹¹ While most of the settlements in the West Bank have not developed a local economy and predominantly rely on economic activity and employment within Israel, the settlements in the Jordan Valley have developed a specialised agricultural industry, which is their key source of revenue.¹²

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The agricultural production of settlements in the occupied Jordan Valley and Dead Sea area includes a variety of produce.¹³ Herbs grown in the occupied Jordan Valley make up 40 per cent of Israel’s yearly export of fresh herbs. 80 per cent of Israel’s herbs are then exported to Europe, mainly to France, Switzerland, the Netherlands and Sweden.¹⁴

About 70 per cent of the grapes produced by Israeli settlements in the occupied Jordan Valley are exported, making up approximately half of all the grapes exported by Israel.¹⁵

The export of dates from Israel to the European and North American markets grew by 16 per cent in 2011. In the same year, approximately 40 per cent of the dates grown in Israel were exported, generating a profit of 265 million USD for Israeli trading companies.¹⁶ The vast majority of the date groves that Israel controls and exploits are located in the occupied part of the Jordan Valley and Dead Sea area. According to the Jordan Valley Regional Council website, over 80 per cent of the dates and 70 per cent of the table grapes harvested are exported as Israeli produce. In addition, the colonies in the Jordan Valley produce 60 per cent of the

¹¹ Jordan Valley Regional Council’s website (n 8).

¹² World Bank – Economic Monitoring Report to the Ad Hoc Liaison Committee, ‘The Underpinnings of the Future Palestinian State: Sustainable Growth and Institutions’ (September 2010), 16.

¹³ The main agricultural produce grown in the occupied Jordan Valley includes dates, olives, citrus fruit, figs, pomegranates, guavas, melons, watermelons, grapes, grapevines, peppers, cucumbers, onions, herbs, cherry tomatoes, eggplants, organic melons, sweet potatoes and flowers.

¹⁴ Who Profits (n 6), 4.

¹⁵ Crisis Action (n 7), 21; Research and Development Center in the Jordan Valley (n 8).

¹⁶ Who Profits (n 6), 5.

dates in Israel and 40 per cent of the exported dates.¹⁷ Further evidence of the contribution of settlements to Israel’s agricultural exports can be seen in the fact that while Israel manufactures over 50 per cent of the worlds’ *Medjool* dates, 51 per cent of these are grown in the occupied Jordan Valley.

On the basis of these figures, it can be proven that the trade in agricultural produce plays a major role in the sustainability of Israeli settlements and their entrenchment in the OPT. As such, external markets represent a vital source of revenue that allows settlements to thrive. Without economic support and trade with international stakeholders, the very existence of settlements, particularly in the Jordan Valley area, would be seriously threatened. Amongst international stakeholders, the EU is in a particularly instrumental position as the restrictive measures on trade of Israeli goods implemented by the majority of the member States of the Arab League means that it is vital to Israel that it integrates into a market beyond the Middle East.

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In addition, products obtained in Israeli settlements in the occupied Jordan Valley originate from entities that have been established as a result of a range of legislative, executive and judicial measures implemented by Israel in violation of its legal obligations as an Occupying Power. In particular, since 1967 Israeli authorities have utilised a series of methods that have resulted in the extensive destruction and appropriation of Palestinian land for the establishment and expansion of Israeli settlements.¹⁸

¹⁷ Jordan Valley Regional Council’s website (n 8).

¹⁸ For a more detailed overview of the measures enforced by Israel in the occupied Jordan Valley see sub-paragraph 3.2.

2. Settlement Produce in the EU Market and the Issue of Labelling

Due to the isolated position of Israel at the regional level, the EU has become Israel's largest trading partner, receiving 20 per cent of total Israeli exports.¹⁹ The EU's importance may be even more significant in the case of settlements because of the large proportion of fresh agricultural products they export. It has been estimated that 66 per cent of fruit and vegetables exported by Israel are sent to the European market, a figure believed to be comparable for fresh produce coming from the settlements.²⁰ The Israeli Ministry of Foreign Affairs has recently reported to the World Bank that settlement exports to the EU amount to 300 million USD per year (230 million Euro).²¹

The economic relations between Israel and the EU are regulated by the EU-Israel Association Agreement, which was signed in 1995 and entered into force in 2000. This agreement establishes a free trade regime, according to which trade is liberalised between Israel and the EU by the partial or general abolition of tariffs and non-tariff barriers that would otherwise be applied to goods entering the markets of the respective parties.²²

The Fourth Protocol of the Association Agreement (hereinafter the Fourth Protocol) deals with the Rules of Origin for preferential treatment in the free trade area. Article 2(2)(a) of the Fourth Protocol states that a product must be 'wholly obtained or produced' in one State in order to receive the preferential treatment outlined in the agreement. This rule is easily applied to agricultural goods, as they are wholly produced in the State in which they are harvested. Manufactured goods, however, are more likely to be composed of several parts obtained in different areas. Hence, it becomes more complicated to identify the exact location of their production.

According to the Fourth Protocol, products originating in Israel enjoy preferential

¹⁹ See Crisis Action (n 7), 20; Euro-Mediterranean Human Rights Network–Aprodev, 'EU-Israel Relations: Promoting and Ensuring Respect for International Law' (February 2012), 20.

²⁰ Who Profits (n 6).

²¹ Crisis Action (n 7), 11; World Bank (n 5).

²² C. Hauswaldt, 'Problems Under the EC-Israel Association Agreement: The Export of Goods Produced in The West Bank and the Gaza Strip under the EC-Israel Association Agreement' (2003) 14 *European Journal of International Law*, 594.

access to the European market. When analysing the Fourth Protocol in relation to the Israeli occupation of the OPT, it should be taken into account that, after the Palestinian elections of 1996, the EU concluded a Euro-Mediterranean Interim Association Agreement on Trade and Cooperation with the Palestine Liberation Organisation (PLO). The EU-PLO agreement mirrors the 1995 EU-Israel Association Agreement and includes a similar system governing the rules of origin.

Israel's extraterritorial application of the Association Agreement to its settlements in occupied territory results in the misapplication by Israel of the provisions of the EU-Israel Association Agreement and its Fourth Protocol. Under international law neither the Golan Heights nor the West Bank, including East Jerusalem, form part of the State of Israel. Therefore, if the EU-Israel Association Agreement were interpreted in conformity with international law, goods coming from Israeli settlements cannot be entitled to preferential treatment under the Agreement. At the same time, these products cannot profit from the EU-PLO Agreement, because the Palestinian National Authority (PA) has no authority or control over them.

Accordingly, produce coming from Israeli settlements cannot enjoy any preferential treatment as neither the EU-Israel nor the EU-PLO Association Agreements are applicable to such goods.

2.1 The Brita Case

In 2010, the European Court of Justice (ECJ), decided on a case concerning a German importer, Brita, and an Israeli supplier, Soda Club Ltd. (the Brita case).²³ The ECJ confirmed that "products originating from Israeli settlements do not fall into Israeli customs authority and therefore do not benefit from preferential treatment under the EU-Israel Association Agreement."²⁴ The Court further developed its reasoning by stating that Israeli goods can receive preferential treatment under the EU-Israel



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²³ ECJ C-386/08, *Brita GmbH v. Hauptzollamt Hamburg-Hafen* (Judgment, 25 February 2010).

²⁴ *Ibid.*, paragraphs 50-53.

Association Agreement, provided that they originate from Israel, but that the PA is the only actor entitled to confer preferential status and certify the origin of goods produced in the West Bank.²⁵

2.2 Labelling Produce Coming from Israeli Settlements

The conclusions reached by the ECJ in the *Brita* case have been repeatedly echoed in the statements of EU institutions. In December 2010, a group of 26 former European leaders addressed a letter to the President of the European Parliament stressing the importance “that the EU bring an end to the import of settlement products which are, in contradiction with EU labelling regulations, marketed as originating in Israel.”²⁶ In September 2012, the European Commission unequivocally stated that “Israeli settlements in the occupied territories are illegal and cannot be regarded as a part of the territory of Israel. Therefore, goods produced in these settlements by Israeli companies cannot be regarded as goods originating in Israel.”²⁷

It thus becomes extremely important to correctly label settlement produce in order to identify its origins, and to import the produce in a way that does not allow it to benefit from the preferential treatment regime established under the EU-Israel Association Agreement. On the basis of the 2005 technical arrangement between the EU and Israel, the Israeli authorities have provided the EU customs offices with a list of postcodes indicating where the produce has been obtained or manufactured. On this basis, the EU customs authorities should be able to distinguish between Israeli goods and settlement goods, thus ensuring that the latter do not benefit from preferential treatment.

However, a 2008 investigation by the British government on agricultural produce exported under the EU-Israel Association Agreement clearly exposed the limitations of the technical arrangement. The customs inspections in the United Kingdom (UK) revealed a lack of appropriate and effective mechanisms in place to guarantee that

²⁵ *Ibid.*

²⁶ Open letter to the President of the European Council, ‘EU must sanction Israel over its refusal to obey international law and must recognize the State of Palestine’ (2 December 2010) <http://www.romanoprodui.it/documenti/eumust-sanction-israel-over-its-refusal-to-obey-international-law-and-must-recognize-the-state-of-palestine_2401.html> accessed 3 January 2013.

²⁷ European Parliament, ‘Joint answer given by Mr. De Gucht on behalf of the Commission’ (26 September 2012) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-007239&language=DA>> accessed 3 January 2013.

the products were obtained in the area indicated by the postcode.²⁸ The inspectors discovered false claims, including a number of cases where the postcodes attached to particular goods did not correspond to the places of production.²⁹

The limitations of the technical arrangement are mainly due to the Israeli authorities’ ability to label settlement products at will. They have the ultimate responsibility for ensuring that Israeli settlement produce is not marked as originating from within Israeli territory. In a few documented cases, the Israeli exporters intentionally mixed produce coming from settlements with produce of Israel proper, and subsequently exported and sold them as ‘made in Israel.’³⁰ Moreover, due to the volume of Israeli goods that regularly enter the European market, the EU customs authorities lack the power and resources to consistently verify the customs documentation of all such products. As a result, the EU authorities are often unable to check and enforce the technical arrangement as required.

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”

The problem is that products originating from Israeli settlements commonly claim Israel as their country of origin on their information packages. Under international law, neither the Golan Heights nor the West Bank, including East Jerusalem, form part of the State of Israel, therefore such reference is misleading and contravenes a number of EU legal instruments. Article 7(1)(a) of EU Regulation No.1169 (2011)

²⁸ Debate at the House of Commons on the EU-Israel Trade, 27 January 2010, Column 313 WH, <<http://www.publications.parliament.uk/pa/cm200910/cmhansrd/chan31.pdf>> accessed 3 January 2013.

²⁹ For an overview of the limitations of the technical arrangement in terms of control of the certificate of origin of goods see Crisis Action (n 7) 26.

³⁰ Quaker Council for Humanitarian Affairs, ‘The Middle East Conflict - EU Trade with Israeli Settlements’ (21 September 2012), 10.

states that “food information shall not be misleading particularly as to [*inter alia*] the country of origin or place of provenance.” According to Article 9(1)(i) and 26 of the same regulation, the indication of the country of origin or the place of provenance should be mandatory “where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance.”³¹

Moreover, settlement produce labelled as being of ‘Israeli origin’ constitutes an unfair commercial practice within the meaning of Article 5(4) of EU Directive 29(2005) regulating unfair business-to-consumer commercial practices in the internal market. It should therefore be prohibited according to paragraph one of the same article.³²

The EU-Israel Bilateral Customs Cooperation Committee and the Association Council are organs created to supervise the interpretation and the application of the EU-Israel Association Agreement. Article 67 of the EU-Israel Association Agreement states that “[a]n Association Council is hereby established which shall meet at ministerial level once a year [...]. It shall examine any major issues arising within the framework of this Agreement and any other bilateral or international issues of mutual interest.” Article 33 of the Agreement states that “where disputes arise in relation to the verification [of proof of origin] which cannot be settled between the customs authorities [...] they shall be submitted to the Customs Cooperation Committee.”

The EU-Israel Bilateral Customs Cooperation Committee and the Association Council represent the most appropriate forums to refer to in cases where Israel may be in violation of its treaty obligations. Regrettably, until now, both mechanisms have proven to be ineffective in ensuring respect for the rule of origin for produce coming from Israeli colonies in the OPT. In light of such limitations, Member of the European Parliament Veronique De Keyser³³ called on the European Commission to put in place “an effective EU control mechanism to ensure that Israeli settlement products do not continue to get preferential access to the European market.”³⁴

31 Regulation (EU) No. 1169/2011 of the European Parliament and of the Council (25 October 2011) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0018:0063:EN:PDF>> accessed 3 January 2013.

32 Directive (EU) No. 2005/29/EC of the European Parliament and of the Council (11 May 2005) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>> accessed 3 January 2013.

33 Veronique De Keyser is also the foreign affairs spokesperson for the centre-left Socialist group.

34 B. Fox, ‘EU to Boost Israel trade relations despite settlements row’ *EU Observer* (24 July 2012) <<http://euobserver.com/economic/117045>> accessed 3 January 2013.

3. Why a Ban on Settlement Produce is Required

In order to investigate whether there is an obligation on EU Member States to enforce a ban on settlement goods, it is important to first understand their international legal obligations.

At the international level there is no convention banning the trade of settlement produce and no binding resolution of the UN Security Council has ever been adopted in this regard. However, if it is demonstrated that settlements themselves contribute to serious breaches of peremptory norms of international law, then a ban on settlement produce is to be considered amongst those actions that Third Party States should undertake to comply with their customary international law obligations.³⁵ This is particularly true given the fact that trade in settlement produce plays a crucial role in sustaining the economic growth of the settlements, and also constitutes an implicit recognition of them as lawful entities.

Section 1 of this report illustrated how trade in settlement produce entrenches and sustains the Israeli settlement enterprise and implicitly recognises the legality of the acts upon which the entire Israeli settlement enterprise is founded. In order to complement this argument, the following paragraphs will detail how the construction and expansion of Israeli settlements in the OPT violates a number of peremptory norms of international law, which entail specific obligations for both the offending State and Third Party States.

3.1 Israeli Settlements and the Violation of the Right of the Palestinian People to Self-Determination

The right to self-determination holds that the people of a defined territorial unit have the right “freely to determine their political status and to pursue their economic, social and cultural development and every State has the duty to respect this right in accordance with the provision of the UN Charter.”³⁶ Recognised as a

35 Peremptory norms of international law are also known as norms of *jus cogens*.

36 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV); see also, Common Article 1 to the International Covenant on Civil and Political Rights (ICCPR) and to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

peremptory norm of international law,³⁷ the obligation to respect the right to self-determination of a people is owed by each State to the international community as a whole (*erga omnes*). The right to self-determination includes the customary international law principle of permanent sovereignty over natural resources, including land and water.³⁸ This principle entitles a people to dispose freely of their natural wealth and resources, in accordance with their interests of national development and well-being.³⁹

Since 1948, the UNGA⁴⁰ and the UNSC⁴¹ have reiterated the right of the Palestinian people to self-determination and repeatedly acknowledged the continuous violation of this right by Israel. The establishment of settlements in the OPT is a stark indicator of Israel's intent to deny Palestinians their right to self-determination. Through the establishment and expansion of the settlements, Israel is illegally exercising sovereign rights over the occupied territory and is depriving the occupied population of their right to dispose freely of their land and resources and to pursue their own economic growth.⁴² In conclusion, the presence of Israeli settlements in the OPT aims to permanently deny the Palestinian population the exercise of their right to self-determination by fragmenting the territory of the OPT and preventing the Palestinian people from exercising sovereignty over their natural resources.⁴³



The presence of Israeli settlements in the OPT aims to permanently deny the Palestinian population the exercise of their right to self-determination by fragmenting the territory of the OPT and preventing the Palestinian people from exercising sovereignty over their natural resources.



3.2 Israeli Settlements and the Extensive Destruction and Appropriation of Palestinian Property

Settlement produce is a direct consequence of Israel's extensive illegal appropriation of Palestinian property, including water. In fact, according to different experts and scholars, the groundwater aquifer systems should qualify as public immoveable property, just as agricultural estates and forests are listed as examples of public immoveable property in Article 55 of The Hague Regulations.⁴⁴ The similarities between groundwater and oil deposits strengthen the argument that water should be considered immoveable property as defined by Article 55.⁴⁵

Nowadays, more than 42 per cent of the land in the West Bank, as well as the

37 A. Cassese, *International Law* (2nd ed.) (OUP, Oxford, 2005), 65; M. N. Shaw, *International Law* (6th ed.) (CUP, Cambridge, 2008), 808.

38 Common Article 1(2) to ICCPR and ICESCR.

39 UNGA Res 1803 (XVII) (14 December 1962) UN Doc A/RES/1803 (XVII); Preamble and Charter of Economic Rights and Duties of States, Article 2 adopted by UNGA Res 3281 (XXIX) UN Doc A/RES/3281 (XXIX).

40 For instance, UNGA Res 58/163 (22 December 2003) UN Doc A/RES/58/163.

41 UNSC Res 242 (22 November 1967) UN Doc S/RES/242.

42 Al-Haq, 'Exploring the Illegality of Land Swap Agreements Under Occupation' (2011), 16.

43 *Ibid.*, 17.

44 A. Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in E Playfair (ed.), *International Law and the Administration of the Occupied Territories* (Clarendon Press, Oxford, 1992), 431; H. Dichter, 'The Legal Status of Israel's Water Policies in the Occupied Territories' (1994) 35 *Harvard International Law Journal*, 565, 592-593; I. Scobbie, 'Natural Resources and Belligerent Occupation: Perspectives from international humanitarian and human rights law' in S. Akram – M. Lynk – I. Scobbie – M. Dumper (eds), *International Law and the Israeli-Palestinian Conflict: a rights-based approach to the Middle-East conflict* (Routledge Publishers, London/New York, 2010), 279. According to the most accredited interpretation, resources that are not renewable but finite, such as oil, minerals and hydrocarbons, cannot be considered as 'fruits,' but should rather be treated as immovable assets protected by Article 55 of the Hague Regulations.

45 H. Dichter (n 44), 582; M. Tignino, 'Water, International Peace, and Security' (2010) 92 *International Review of the Red Cross*, 633.

majority of its water and natural resources, have been seized from Palestinians and allocated to Israeli colonies. Since 1967 the Israeli authorities have utilised four complementary methods to justify the seizure of Palestinian land, particularly in areas such as the occupied Jordan Valley: (i) declaration of land as abandoned property; (ii) requisition for military needs; (iii) expropriation of land for public needs; and (iv) declaration of vast portions of land as ‘State land.’⁴⁶ Each of these methods rests on a distinct legal foundation that manipulates the legislation existing prior to the occupation. This legislation includes remnants of Ottoman and British Mandate law, which was subsequently absorbed into the Jordanian legal system, and military orders issued by the Israeli army.⁴⁷

A common characteristic of these methods is that they are implemented for the sole benefit of Israel, the Occupying Power. This is evidenced by the Israeli authorities’ constant refusal to allocate such land for Palestinian use.⁴⁸ These various methods are part of a single mechanism serving a single purpose: the appropriation of Palestinian land for the establishment and expansion of Israeli settlements in the OPT, and in particular in the Jordan Valley, as a form of annexation.⁴⁹

It is estimated that nearly 40 per cent of the total area of Israeli settlements, outposts and industrial zones in the West Bank are located on private Palestinian land. In the Jordan Valley, over 69 per cent of Israeli colonies are reportedly built on land declared ‘State land,’ while 11 per cent are on ‘private land’ and 19 per cent on ‘survey land.’⁵⁰



Since 1967, Israel has also implemented legislation on the allocation of water resources that is “at considerable variance with the legislation, whether written or customary, that used to prevail in the Palestinian [...] territories.”⁵¹ By means of military orders,⁵² the Israeli authorities have progressively developed a policy of transferring water from the aquifers by integrating the water system from the OPT into the Israeli system. This policy denies Palestinians control over this vital resource. These illegal policies have provided Israeli settlements in the West Bank with access to an unimpeded flow of underground water, capable of fully supplying the water-intensive agriculture of the settlements. Meanwhile, Palestinians’ lack of control over water resources has completely denied them the possibility of developing competitive farming techniques.⁵³

46 B’Tselem, ‘Land Grab – Israel’s Settlement Policy in the West Bank’ (May 2002), Chapter 3.

47 R Shehadeh, *The Occupier’s Law. Israel and the West Bank* (Institute for Palestine Studies, Washington D.C., 1985), 23.

48 Office for the Coordination of Humanitarian Affairs (OCHA), ‘Restricting Space: The Planning Regime Applied by Israel in Area C of the West Bank’ (15 December 2009), 5 <http://www.ochaopt.org/documents/special_focus_area_c_demolitions_december_2009.pdf> accessed 3 January 2013.

49 In a situation of occupation, international humanitarian law prescribes that no act of annexation can have any effect on the rights of the protected persons, who should continue to enjoy the rights and the protection afforded to them by the Geneva Conventions. Accordingly, a situation of occupation *per se* does not constitute or necessarily lead to annexation. However, when the latter occurs and a State starts exercising sovereign rights over the territory it has occupied, provisions of IHL and human rights law are unavoidably violated. Indeed, an Occupying Power does not acquire sovereignty over an occupied territory and is prohibited from disposing of it to its liking. See, Article 47 of the Fourth Geneva Convention; see also, J. Pictet (ed), *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), 247.

50 The Israeli Civil Administration categorises as ‘survey land’ areas whose ownership is still being examined and whose standing has still to be determined. According to Israeli law, such land cannot be developed; Peace Now, ‘Breaking the Law in the West Bank - One Violation Leads to Another: Israeli Settlements Building on Private Palestinian Property’ (October 2006), 15-20 <<http://peacenow.org/images/112106PNReport.pdf>> accessed 3 January 2013.

51 Special Document, ‘Permanent Sovereignty over National Resources in the Occupied Palestinian and other Arab Territories’ (1985) 14(2) *Journal of Palestine Studies* (Special Issue: The Palestinians in Israel and the Occupied Territories), 15; see also, J. Crawford, ‘Opinion: Third Party Obligations with respect to Israeli Settlements in the occupied Palestinian Territories’ (July 2012), 86.

52 In particular see Military Order No. 92 (15 August 1967) and Military Order No. 158 (19 November 1967) concerning jurisdiction over water regulations and supervision over water law.

53 Special Document (n 51), 37.

As of September 2011, some 313,000 Palestinians across 113 villages in the West Bank lacked access to water.⁵⁴ In stark contrast, all the Israeli settlements situated in the West Bank, including East Jerusalem, are connected to a water network and are serviced by wells in the West Bank (predominantly from the Jordan Valley).⁵⁵ The discrimination in allocation of water is even more pronounced in cases where water is used for agricultural purposes, since most of the water allocated to Israeli settlements is used to farm agricultural produce, which is then exported to foreign markets.

Additionally, the Israeli authorities regularly destroy Palestinian water collection systems, such as wells and cisterns - including those provided by humanitarian organisations - because they are constructed without the required Israeli building permits, which are virtually impossible to obtain. At least 70 water collection structures were demolished in 2011 alone.⁵⁶

The existence of and growth in settlement produce is thus made possible by Israel's extensive destruction and appropriation of Palestinian resources, including water, for the benefit of Israeli settlements and settlers. This is in direct violation of Israel's obligation as an Occupying Power to administer the OPT in the interest of the occupied Palestinian population, as enshrined in Article 43 of the Hague Regulations.

“ Settlement produce is thus the result of Israel's extensive destruction and appropriation of Palestinian resources, including water, for the benefit of Israeli settlements and settlers. ”

54 OCHA, 'How Dispossession Happens, The Humanitarian Impact of the Takeover of Palestinian Water Springs by Israeli Settlers' (March 2012), 13 <http://www.ochaopt.org/documents/ocha_opt_springs_report_march_2012_english.pdf> accessed 3 January 2013; Diakonia, 'Israel's Administrative Destruction of Cisterns in Area C of the West Bank' (September 2011) <http://www.diakonia.se/documents/public/IHL/IHLanalysis/Diakonia_Cisterns_Legal_Brief_28092011_LOW.pdf> accessed 3 January 2013.

55 Human Rights Watch, 'Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories' (December 2010), 17-18.

56 OCHA (n 54). According to data collected by Emergency Water Sanitation and Hygiene in the Occupied Palestinian Territory (EWASH), in 2011 Israel demolished 89 WASH structures and confiscated 45 WASH-related structures in the West Bank, affecting 977 Palestinians. These structures included 21 water wells, which farmers depended on for their livelihoods, and 34 rainwater harvesting cisterns located in Area C and unconnected to the water network. In particular, the cisterns were indispensable to the survival of marginalised Palestinian rural and herder communities in this area, who had to rely on them to provide water for livestock and crops, as well as for domestic usage in default of an adequate water network. EWASH, 'WASH Cluster oPt Monthly Situation Report: December 2011' (December 2011), 1.

As immovable property, land and water are part of the occupied territory's capital and are consequently protected by Article 55 of the Hague Regulations. According to this provision, Israel is regarded as the administrator and usufructuary of the OPT's natural resources and is therefore prohibited from damaging or destroying these resources, or undermining their capital. Furthermore, Israel may only use Palestinian natural resources to meet the needs of the local population and for the purpose of maintaining public order and safety in the OPT. Accordingly, the Israeli authorities are absolutely prohibited from exploiting Palestinian resources in a way that results in economic benefits for its own national economy and citizens, including settlers, at the expense of the occupied population.

Israel's widespread policy of appropriating Palestinian land and destroying Palestinian water wells, coupled with the continuous exploitation of the water aquifers in the West Bank, amounts to a grave breach of Article 147 of the Fourth Geneva Convention, which prohibits extensive destruction and appropriation of property. In this regard, the International Law Commission has observed that "some of [the rules of humanitarian law] are, in the opinion of the Commission, rules which impose obligations of *jus cogens*."⁵⁷ The prohibition against grave breaches

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of the Geneva Conventions protects fundamental values enshrined in such treaties, which enjoy universal ratification and are largely reflective of customary international law.⁵⁸ As such, the prohibition against grave breaches of the

57 See Report of the International Law Commission on the work of its thirty-second session, 35 UN GAOR Supp. (No. 10) at 98, UN Doc. A/35/10 (1980).

58 According to the ICJ, "[i]t is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (1.C. J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Rep 1996, paragraph 79.

Geneva Conventions should be considered amongst those rules of international humanitarian law that impose obligations of *jus cogens*.⁵⁹

3.3 Israeli Settlements and the Violation of the Prohibition of Colonialism

Under international law, colonialism entails a claim to sovereignty by the dominant power, by adopting measures that deliberately deny – or demonstrate an intention to permanently deny – the people of a territory the full exercise of their sovereign rights, including the right to self-determination.⁶⁰ According to this definition, Israeli policies concerning settlements in the OPT also amount to a form of colonialism.⁶¹

The prohibition of colonialism, included in the UN General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960⁶² (Declaration on Colonialism), rejects all forms of colonial domination on the grounds that it violates fundamental norms of human rights, including the collective and individual right to self-determination. It also states that colonialism represents a threat to international peace and security. Declaratory of customary international law, the Declaration on Colonialism reiterates that colonialism is absolutely contrary to international law, thereby implying that it is of a peremptory nature.⁶³

Both the establishment of major settlements blocs in the West Bank, including East Jerusalem, and the creation of a flourishing network of agricultural enterprises for the sole benefit of Israeli settlers, are indicative of Israel's colonialist policies in the OPT. If further protracted, these policies will permanently change the status

⁵⁹ In the *Kupreskic* case the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that "most norms of international humanitarian law, in particular those prohibiting war crimes [...] are also peremptory norms of international law or *jus cogens*." *Prosecutor v. Kupreskic et al.*, (Judgment, Trial Chamber) ICTY-95-16-T (14 January 2000), paragraph 520. For a similar opinion see Cassese, according to whom "the prohibition [of grave breaches of international humanitarian law] should be considered a peremptory norm of international law (*jus cogens*)." A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law,' (1998) 9 *European Journal of International Law*, 6. See also, T. Meron, 'The Geneva Convention as Customary Law,' (1987) 81 *American Journal of International Law*, 350; E. Schwebel, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967) 61 *American Journal of International Law*, 957.

⁶⁰ Human Science Research Council, 'Occupation, Colonialism, Apartheid? A Re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law' (Human Science Research Council, Cape Town, 2009), 120-121 (hereafter: *Occupation, Colonialism and Apartheid Study*).

⁶¹ *Occupation, Colonialism and Apartheid Study* (n 60), 118. See also Russell Tribunal on Palestine, 'Findings of the South African Session' (5-7 November 2011), 18.

⁶² UNGA Res 1514 (XV) (14 December 1960) UN Doc A/Res/1514(XV).

⁶³ *Occupation, Colonialism and Apartheid Study* (n 60), 42, 120.

of the occupied territory, and thereby undermine any final territorial solution.⁶⁴

3.4 Legal Consequences for Third States

Article 41 of the ILC Draft Articles,⁶⁵ which reflects customary international law, affirms that in case of breaches of peremptory norms of international law all States are under an obligation not to recognise the situation as lawful, not to render aid or assistance in maintaining the illegal situation, and to actively cooperate in order to bring the violation to an end.

The ICJ has also recognised the existence of these obligations for Third States. In its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (hereinafter *Namibia Advisory Opinion*),⁶⁶ the ICJ declared that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law."⁶⁷ Accordingly, all States, even those that were not members of the United Nations at that time and therefore not bound by Security Council Resolution 276, were deemed to be under an obligation not to recognise the validity or effects of South Africa's illegal presence in Namibia.⁶⁸

The same set of obligations was recalled by the Court with regard to Israel's construction of the Annexation Wall in the OPT. In its *Advisory Opinion on the Wall*, the ICJ stated that "[g]iven the character and the importance of the rights and obligations involved [...], [i]t is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end."⁶⁹ The Court further reiterated that "[a]ll 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

⁶⁴ *Al-Haq* (n 42), 16.

⁶⁵ Draft Article on Responsibility of States for Internationally Wrongful Acts with commentaries, International Law Commission, United Nations, 2001.

⁶⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) ICJ Rep 1971 (hereinafter *Namibia Advisory Opinion*).

⁶⁷ *Ibid*, paragraph 126.

⁶⁸ *Ibid*.

⁶⁹ *Advisory Opinion on the Wall* (n 3), paragraph 161.

maintaining the situation created by such construction.”⁷⁰

The same reasoning can be applied to the case of Israeli settlements.⁷¹ Israeli settlements in the West Bank, including East Jerusalem, entail the violation of peremptory norms of international law, including the right to self-determination, the prohibition against extensive destruction and appropriation of property and the prohibition against colonialism. Trading in settlement goods is an activity that implicitly recognises as

“ Trading in settlement goods is an activity that implicitly recognises as lawful the legislative, executive and judicial acts that facilitate the production of such goods and their consequent exchange. ”

lawful Israel’s legislative, executive and judicial acts that facilitate the production of such goods and their consequent export. In addition, trade in settlement produce helps to sustain the settlement enterprise in the OPT. As stated in Section 1 of this research, without interaction with foreign entities, the very existence of Israeli settlements in the OPT, particularly in the Jordan Valley, would no longer be sustainable.

The Commentary to the ILC Draft Articles states that the obligation not to recognise serious breaches of peremptory norms included in Article 41(2) “applies to ‘situations’ created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples.”⁷² Such a paradigm can be applied to the case of Israeli colonies in the OPT, which amount *inter alia* to a violation of the right to self-determination of the Palestinian people, and to Israel’s illegal exercise of sovereign rights over occupied territory.

⁷⁰ *Ibid*, paragraph 163.

⁷¹ See in particular J. Crawford (n 51), 10.

⁷² ILC Draft Articles (n 65), Article 41 comment 5. In addition, with specific regard to the right to self-determination, the Human Rights Committee, authoritatively interpreting Article 1 of the ICCPR in its General Comment No. 12 on the right to self-determination, stated that “[p]aragraph 3, in the Committee’s opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination.” Human Rights Committee, General Comment n 12: The right to self-determination of peoples (Art. 20), Twenty-first Session (13 March 1984), paragraph 6. See also, J. Crawford (n 51), 13.

In the *Namibia Advisory Opinion* case the ICJ provided a general outline of the obligation not to recognise a violation of peremptory norms of international law.⁷³

According to the Court, States shall abstain from entering into treaty relations with the non-recognised authority in respect of the territory acquired unlawfully and shall denounce existing bilateral treaties concerning the territory acquired unlawfully through active intergovernmental co-operation. In addition, States have the duty to refrain from sending diplomatic missions to the non-recognised regime and from entering into economic and other forms of relationship concerning the territory acquired unlawfully, which might entrench the non-recognised regime’s authority over the territory.

“ [e]conomic and commercial dealings between Israel and a third State may be considered as either a breach of the obligation of non-recognition [...] or they might be considered to amount to aid or assistance in the commission of an internationally wrongful act, contrary to Articles 16 and 41(2) of the ILC Draft Articles. ”

According to Professor James Crawford, “[e]conomic and commercial dealings between Israel and a third State may be considered as either a breach of the obligation of non-recognition [...] or they might be considered

“ By allowing settlement produce to enter their internal markets, national and regional authorities implicitly recognise as lawful the situation created by legislative, executive and judicial measures implemented by Israel in the OPT in breach of peremptory norms of international law. ”

to amount to aid or assistance in the commission of an internationally wrongful act, contrary to Articles 16 and 41(2) of the ILC Draft Articles.” Professor Crawford further refers to the purchase of agricultural produce from settlements as “pertinent examples of commercial dealings.”⁷⁴

In addition, the Commentary to the ILC Draft Articles notes that the obligation

⁷³ *Namibia Advisory Opinion* (n 66), paragraphs 122-124.

⁷⁴ J. Crawford (n 51), 35.

not to recognise refers not only to the formal recognition of these situations, but also prohibits acts that would imply such recognition.⁷⁵ In light of the above, by allowing settlement produce to enter their internal markets, national and regional authorities implicitly recognise as lawful the situation created by legislative, executive and judicial measures implemented by Israel in the OPT in breach of peremptory norms of international law. Such conduct violates their duty of non-recognition and the general legal principle according to which unjust acts cannot create rights (*ex injuria non oritur jus*).⁷⁶

The obligation to actively cooperate to bring any serious breach of peremptory norms of international law to an end through lawful means could be organised either in the framework of a competent international organisation or through means of non-institutionalised cooperation.⁷⁷ Article 41 of the ILC Draft Articles does not indicate what measures States should take in order to bring serious breaches to an end. Such measures should be lawful and shall result in joint and coordinated efforts by all States in order to appropriately respond to the challenge that serious breaches of peremptory norms represents for the international community as a whole.⁷⁸



Given that trading in settlement goods amounts to a form of recognition and supports the sustainability of entities that violate peremptory norms of international law, a ban on settlement produce is not only lawful for Third Party States, but is to be considered amongst those actions that Third Party States should undertake to comply with their customary international law obligations.



Given that trading in settlement goods amounts to a form of recognition and supports the sustainability of entities that violate peremptory norms of international law, a ban on settlement produce is not only lawful for Third Party States, but is to be considered amongst those actions that Third Party States

⁷⁵ ILC Draft Articles (n 65), Article 41 comment 5.

⁷⁶ I. Brownlie, *Principles of Public International Law*, (7th edn, Oxford University Press, Oxford, 2010), 509.

⁷⁷ ILC Draft Articles (n 65), Article 41 comment 2.

⁷⁸ *Ibid.*, comment 3.

should undertake to comply with their customary international law obligations. By purchasing products coming from settlements, and by allowing the trade of such goods in their national markets, Third Party States are in violation of their customary international law obligations under Article 41 of the ILC Draft Articles. Given that the EU has, on countless occasions, expressed its commitment to uphold international law,⁷⁹ the obligation not to recognise and to actively cooperate to bring serious breaches of peremptory norms of international law to an end is especially pertinent in the case of EU Member States.

Common Article 1 of the Geneva Conventions obliges the High Contracting Parties to ensure respect for the provisions of the Conventions. According to prominent scholars, this obligation should not be seen as merely reinforcing States' general obligation to respect, but entails a duty on States, whether engaged in a conflict or not, to take all possible steps to ensure that the rules enshrined in the Conventions are respected by all, and in particular by the parties to a conflict.⁸⁰

In light of the gravity of the violations of international humanitarian law represented by Israeli settlements in the OPT, States Parties to the Geneva Conventions must act to ensure respect for the Conventions by adopting measures aimed at putting an end to the violations of international humanitarian law perpetrated by Israel, and to deter further illegal conduct. This obligation is reinforced, for EU Member States, by the EU guidelines on promoting compliance with international humanitarian law,⁸¹ which affirm the responsibility of the EU to ensure compliance with international humanitarian law provisions and to enforce restrictive measures in case of their violation.

⁷⁹ The EU has in fact defined the promotion of human rights and international law as one of the core objects of its external policy. For a more detailed analysis of the importance of international law and human rights in the EU external action see Subsection 4.1.

⁸⁰ L Boisson and L Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests' (2000) 837 *International Review of the Red Cross*. According to the authors, while there were views that Article 1 was not drafted with the intention of imposing obligations on States which were not also derived from the other provisions of the Geneva Conventions, a more careful examination of the *travaux préparatoires* reveals that the negotiators clearly had in mind the need for the parties to the Conventions to do everything they could to ensure universal compliance with the humanitarian principles underlying the Conventions.

⁸¹ 'European Union Guidelines on promoting compliance with international humanitarian law' (23 December 2005) 2005/C 327/04.

4. Why a Ban on Settlement Produce Can Be Lawfully Implemented by EU Member States

In the previous Section of this paper it has been demonstrated how a ban on the trade in settlement produce should be implemented by Third Party States in order to comply with their customary international law obligations. The following sub-paragraphs will explain why such a ban can be lawfully implemented by EU Member States, as it does not contravene any provision of EU, national or GATT law.

4.1 Banning Settlement Produce under EU Law

The EU holds the promotion of human rights and international law as a primary objective in its external policy.⁸² Article 21 of the Treaty of Lisbon states that “[t]he 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.”⁸³



“[t]he 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



As the newly appointed EU Special Representative for Human Rights, Stavros Lambrinidis, recently reaffirmed, human rights must guide the EU’s activities in all

⁸² In the 2003 ‘Better World, European Security Strategy Document,’ the EU stated that “the development of a stronger international society, well functioning international institutions and a rule-based international order is our objective. We are committed to upholding and developing international law.” See European Council, ‘A Secure Europe in a Better World: European Security Strategy’ (December 2003), 9.

⁸³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007) <<http://eur-lex.europa.eu/JOhtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>> accessed 3 January 2013.

policy areas, including trade.⁸⁴ Accordingly, the EU shall seek to build up relations and partnerships with other countries and international, regional and global organisations that share the same principles and moral tenets.

The call for a ban on settlement produce finds its legal basis in Article 215(5) of the Treaty on the Functioning of the European Union (TFEU),⁸⁵ which authorises the use of restrictive measures against natural or legal persons, groups, or non-State entities. In light of this article, the EU has developed a practice of adopting restrictive measures to enforce its foreign-policy commitments.⁸⁶ Therefore, a strong stance taken by the EU on the illegality of settlements under international law⁸⁷ could lead to the adoption of restrictive measures, in the form of a ban on exported settlement produce. Such a ban would avoid produce resulting from illegal entities being sold in European markets. Under the TFEU and the Treaty on the European Union (TEU), such measures can only be implemented after a joint proposal of a resolution by the High Representative of the European Union and the Commission is unanimously adopted by the European Council.⁸⁸ In conclusion, in accordance with the EU’s foreign policy commitments, a ban on settlement produce can be legally enforced under general EU legislation.

4.2 Unilateral Ban on Trade in Settlement Produce by EU Member States

Should the EU prove unwilling to act collectively, individual EU Member States are still under an obligation to adopt measures to restrict trade of settlement produce under their domestic law. Although international trade falls within the competences of the EU, Article 24(2) of EU Regulation 260/2009 authorises individual Member States to adopt restrictive measures on trade on the grounds

⁸⁴ N Nielsen, ‘“Double Standards” No Reason Not to Talk about Human Rights, Says New Envoy’, *EU Observer* (4 September 2012) <<http://euobserver.com/foreign/117403>> accessed 3 January 2013.

⁸⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (n 83).

⁸⁶ The Council of the EU has used of Article 215 of the TFEU on different occasions in order to target States responsible for violations of international law like Burma, Iran, Libya, Syria and Sudan; European Union, ‘Restrictive Measures (sanctions) in Force (Regulations Based on Article 215 TFEU and Decisions Adopted in the Framework of the Common Foreign and Security Policy)’ (October 2012) <http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf> accessed 3 January 2013.

⁸⁷ The EU institutions have repeatedly expressed their condemnation for the policy of establishment and expansion of Israeli settlements in the West Bank as contrary to international law. For example, the European Council stated that “settlements [...] constitute an obstacle to peace [that] threatens to make a Two-State solution impossible.” European Council, ‘Council Conclusions on the Middle-East Peace Process, (8 December 2009),’ <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/111829.pdf> accessed 3 January 2013. The same position was reiterated by the Council in December 2010; European Council, ‘Council Conclusions on the Middle-East Peace Process’ (13 December 2010) <<http://www.consilium.europa.eu/uedocs/cmsUpload/118448.pdf>> accessed 3 January 2013.

⁸⁸ Article 215 of the TFEU and Articles 24 and 30 of the Treaty on the European Union (TEU).

of public morality, public policy or public security, provided that such measures do not conflict with EU law. The ECJ jurisprudence has already upheld the legality of some exceptional restrictions to the common market regime in the case where fundamental values such as human dignity were at stake.⁸⁹ Certainly, basic norms of international humanitarian and human rights law can constitute the basis for exceptional restrictions in the law of the country enforcing the ban. This is particularly true in light of the EU Guidelines on promoting compliance with international humanitarian law, which affirm that the EU is built upon these values.⁹⁰ Due to the gravity of the violations that Israel's settlement enterprise entails, States are not only entitled to take action to ensure respect for peremptory norms of international law, but are under a positive obligation to act in order to comply with their customary international law obligations, for example by adopting restrictive measures on the trade of settlement produce.

In addition, all EU Member States are bound by EU legislation to take the necessary measures that enable them to confiscate proceeds from criminal offences.⁹¹ Section 1 illustrated that, by permitting trade in settlement goods, EU Member States are implicitly recognising as lawful a number of legislative and executive acts of the Occupying Power that are not only contrary to international law but, in some cases, criminal. In particular, sub-paragraph 3.2 analysed how settlement products are the result of a policy of extensive destruction and appropriation of Palestinian property, including water, particularly in the area of the Jordan Valley. The extensive destruction and appropriation of property amount to a grave breach of the Fourth Geneva Convention and are criminalised by Article 146 of the Convention. This provision contains an obligation for each High Contracting Party to enact the necessary legislation to provide effective penal sanctions for

⁸⁹ See the case of Omega, a company which started laser-gun game facilities in Germany. In other EU countries such games are permitted, however in Germany, where human dignity is a constitutional principle, the Police imposed an order forbidding Omega from operating the shooting game. It was banned on the grounds that the acts simulating homicide and the normalising violence were contrary to fundamental values. As the equipment was lawfully made in the UK, the company argued that this order breached its rights under the EU principle of freedom to provide services. The case was transferred to the ECJ, which found that the protection of human dignity was a principle common to the EU Member States and that the protection of a fundamental right was a legitimate interest which justified "a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services." ECJ C-36/02, *Omega Spielhallen- und Automatenaufstellungs v. Oberbürgermeisterin der Bundesstadt Bonn* (Judgment, 14 October 2004). See also, Law Weblog, 'Law and Morality: ECJ Ruling in Laser Game Ban Re-opens Moral Exception. Art. 234 Reference' (October 2004) <<http://www.sixthform.info/lawblog/?p=136>> accessed 3 January 2013.

⁹⁰ 'European Union Guidelines on promoting compliance with international humanitarian law' (n 81), paragraph 3.

⁹¹ European Council Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (24 February 2005) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:EN:PDF>> accessed 3 January 2013.

persons responsible for grave breaches and to investigate and prosecute those persons, regardless of any nationality or territorial link, before their own courts in accordance with the principle of universal jurisdiction.

Settlements are a by-product of the criminal acts of extensive destruction and appropriation of property, and settlement produce amounts to an economic advantage derived from such acts.⁹² As a consequence, all EU Member States are under an obligation, as per Article 2 of the European Council Framework Decision, to confiscate settlement products entering their internal markets as proceeds derived from criminal offences.

EU Member States (via trade and customers' unions) could also adopt interim measures, such as formal guidelines to enact a 'certificate of origin' regime, which would be capable of properly labelling the produce entering their national markets. This practice has already been implemented in the United Kingdom (UK) in relation to agricultural goods. In line with EU Directive 2000/13 concerning labelling, the UK government issued guidelines for retailers on the labelling of agricultural produce grown in the OPT.⁹³ In October 2012, following the UK's example, Denmark also issued labelling guidelines, while an increasing number of European governments are considering taking similar action.⁹⁴ Outside the EU context, in August 2012 the government of South Africa decided that it would impose a labelling regime for goods coming from Israeli settlements, while in Switzerland the biggest retail chain 'Migros' announced that it would introduce labelling of all settlement products.⁹⁵

However, it should be emphasised that the adoption by individual Member States of an effective labelling regime for produce entering their national markets can only be considered an interim measure. In itself, such a measure does not satisfy the level of action required by EU Member States' legal obligations. States will

⁹² Article 1 of the European Council Framework Decision 2005/212 defines proceeds of crime as the economic advantage deriving from a criminal offence.

⁹³ United Kingdom Department for Environment, Food & Rural Affairs, 'Technical Advice: labeling of Produce Grown in the Occupied Palestinian Territories' (10 December 2009) <<http://archive.defra.gov.uk/foodfarm/food/pdf/labelling-palestine.pdf>> accessed 3 January 2013. See also, Euro-Mediterranean Human Rights Network-Aprodev (n 19), 47.

⁹⁴ Crisis Action (n 7), 27; A. Hass, 'Denmark to ban labeling West Bank products as 'Made in Israel'', *Haaretz* (19 May 2012) <<http://www.haaretz.com/news/diplomacy-defense/denmark-to-ban-labeling-west-bank-products-as-made-in-israel-report-says-1.431372>> accessed 3 January 2013.

⁹⁵ Palestine News Network, 'South Africa Decides to Label Settlement Products Amidst Israeli Anger' (23 August 2012) <<http://english.pnn.ps/index.php/international/2510-south-africa-decides-to-label-settlement-products-amidst-israeli-anger>> accessed 3 January 2013; Mondoweiss, 'Switzerland's largest supermarket chain to label products from Israeli settlements' (30 May 2012) <<http://mondoweiss.net/2012/05/switzerlands-largest-supermarket-chain-to-label-products-from-israeli-settlements.html>> accessed 3 January 2013.

only fully comply with their obligations under customary international law by enforcing a ban on the trade of produce coming from Israeli settlements.

National authorities can also direct their efforts towards discouraging companies from trading with and investing in settlement produce by issuing formal advice to importers and other businesses urging them to refrain from purchasing settlement goods, due to their disputable legality. An alternative measure to be adopted at the national level would be to exclude settlement produce and companies involved in their trade from public procurement. In tendering of public contracts, relevant national authorities should specify that no settlement produce may be supplied under the contract and that companies operating in settlements are to be excluded. Targeting corporations that profit from a situation that entails serious violations of peremptory norms of international law may play a substantial role in deterring future involvement of companies in the settlement enterprise.

4.3 Banning Settlement Produce under the GATT Regulations

Israel and all EU Member States are members of the World Trade Organisation (WTO) and have accepted the obligations derived from the General Agreement on Tariffs and Trade (GATT) Regulations.⁹⁶ As the obligations contained in this agreement are applicable to relations between Israel and EU Member States, it is necessary to discuss whether a ban on settlement produce would violate any basic principles of such a treaty.

The majority of legal scholars would immediately refer to GATT Article XX (moral exceptions) and GATT Article XXI (security exceptions) to justify a trade ban on settlement produce. Tom Moerenhout, an expert on trade law, however, argues that this is incorrect and would not be in accordance with the norms governing the applicability of the agreement. He asserts that in the first place, a WTO Panel or Appellate Body would scrutinise GATT Article



While it is self-evident that Israel has certain rights as Occupying Power, the State's rights under GATT are not extended to its settlements in occupied territory, because implying this would undermine the unitary character of public international law.



XXVI.5.(a), which determines the applicability of GATT. This article confirms that GATT is only applicable to the territory of the WTO Member States and to the areas under their international responsibility. Moerenhout finds that international responsibility as understood in GATT is different from international responsibility as understood under international humanitarian law. While it is self-evident that Israel has certain rights as Occupying Power, the State's rights under GATT are not extended to its settlements in occupied territory, because implying this would undermine the unitary character of public international law.⁹⁷

It has been established that Israeli settlements constitute serious breaches of peremptory norms of international law. Moerenhout concludes that, through Article XXVI.5.(a), WTO law does not prohibit Third States from abiding by their duty of non-recognition as enshrined in Article 41 of the ILC Draft Articles. However, if a Panel or Appellate Body would err and apply GATT discipline to Israel's re-export of produce originating from the OPT, there would still be two ways to legally justify a trade ban. Firstly, customary international law such as the duty of non-recognition of serious breaches of peremptory norms could be directly applied in WTO dispute settlement mechanisms. Secondly, if a Panel found an actual violation of GATT Article XI (import restrictions), then GATT Article XX and Article XXI would authorise such a violation, on the grounds of public morality and public security.⁹⁸ In particular, Article XX(a) of the GATT Regulations holds that the provisions included in the agreements cannot be construed to prevent the adoption or enforcement by any contracting Party of measures necessary to protect public morality. As a result, national authorities can invoke such a formula in order to justify a ban on settlement produce, based on ethical and moral grounds, by citing the fact that trade in settlement goods supports grave violations of international law.

In conclusion, it can be argued that the withdrawal of preferential trade terms and/or the adoption of a ban on specific products are not illegal actions and can be justified in terms of WTO/GATT obligations.

97 T. Moerenhout, 'Just Trade and Foreign Policy: A Case Study of the Legal Permissibility and Political Feasibility of Ceasing Trade with Israeli Settlements in Occupied Territories' (13 August 2012) <<http://ssrn.com/abstract=2168748>> accessed 3 January 2013. Of a similar opinion is James Crawford according to whom "[a]lthough GATT Article I requires that most favoured nation treatment be extended to Israel as a WTO Member, and GATT Article XI forbids the use of quantitative restrictions such as a ban on imports, both these provisions are phrased in terms of products originating in the 'territory' of another WTO Member. As a matter of international law, the West Bank and Gaza cannot be considered to be Israel's territory; thus the [EU] is not prevented by its GATT/WTO obligations from banning settlement trade;" see J. Crawford (n 51), 133.

98 *Ibid.*

96 General Agreement on Tariffs and Trade (Geneva, July 1986) <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> accessed 3 January 2013.

5. The Path Towards an International Ban of Settlement Produce: the Example of “Conflict Diamonds”

‘Conflict diamonds’ are diamonds that originate from areas controlled by forces or factions operating in opposition to legitimate governments. They are used to fund military action against such governments and to fuel armed conflicts, in contravention of UN Security Council resolutions.⁹⁹ In 1998, the UN Security Council, acting under Chapter VII of the UN Charter, adopted resolution 1173 prohibiting the direct and indirect import to third countries of all conflict diamonds originating from Angola.¹⁰⁰ In 2001, the UN General Assembly unanimously adopted a resolution on the role of diamonds in fuelling conflict. It aimed to break the link between trade in rough diamonds and armed conflict by prohibiting the trade of ‘conflict diamonds.’¹⁰¹

Similar to ‘conflict diamonds,’ settlement produce is intrinsically linked with the existence of an armed conflict and an illegal enterprise, namely that of Israeli settlements in the OPT. Israeli settlements violate international humanitarian law and basic principles of international law such as the right of the Palestinian people to self-determination. In perpetuating the occupation, they also represent one of the main obstacles to a sustainable and just solution to the Palestinian-Israeli conflict, thereby fuelling the climate of tension and instability in the area. The efforts of civil society, national and international stakeholders to limit the trade in settlement goods is crucial in order to generate a similar response by international bodies, including the UN General Assembly and the UN Security Council, to settlement goods as was enacted for ‘conflict diamonds’. These coordinated efforts may ultimately result in a ban on trade in settlement produce based on its role in sustaining an armed conflict and in preventing the conclusion of any peaceful agreement.

⁹⁹ In particular the Resolution adopted in 2001 by the UNGA defines conflict diamonds as “rough diamonds which are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate Governments;” UNGA Res 55/56 (29 January 2001) UN Doc A/RES/55/56. For more information on the trade of ‘conflict diamonds’ and its illegality under international law, see ‘Conflict Diamonds, Sanctions and War: The General Assembly Adopts Resolution on “Conflict Diamonds,” United Nations Department on Public Information in cooperation with the Sanctions Branch (21 March 2001).

¹⁰⁰ UNSC Res 1173 (12 June 1998) UN Doc S/RES/1173, paragraph 12(b).

¹⁰¹ UNGA Res 55/56 (29 January 2001) UN Doc A/RES/55/56.

Conclusion and Recommendations

This position paper has demonstrated how a ban on settlement produce is to be considered amongst those actions that Third Party States, and in particular EU Member States, should undertake to comply with their customary international law obligations.

Israeli settlements built on Palestinian land are not only illegal under international law, but also constitute serious breaches of peremptory norms of international law, thereby entailing specific obligations for Third Party States under customary international law. In particular, all States are under an obligation not to recognise as legal a situation arising from a serious breach of a peremptory norm, and to actively cooperate in order to bring the illegal conduct to an end. The export of agricultural produce from Israeli colonies in the OPT to international markets is a vital source of revenue allowing for the maintenance and sustainability of the colonies, especially in the Jordan Valley area. Trade in settlement produce also recognises as legal entities that are a direct result of measures that have established and expanded Israeli settlements at the expense of the inalienable rights of the occupied Palestinian population.

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Therefore, by allowing settlement produce to enter their internal markets, States are implicitly recognising an illegal conduct, as well as failing to take appropriate action to put serious breaches of peremptory norms of international law to an end. As a result, all States, including EU Member States, are under an obligation to enforce a ban on settlement produce.



Carmel Agrexco Warehouse, Jordan Valley ©Al-Haq

I. The European Union must:

- Comply with its customary international law obligations and act in accordance with Article 215(5) of the TFEU by banning produce originating from Israeli settlements in the OPT, because of the serious violations of peremptory norms of international law that settlements and their related infrastructure entail.
- Ensure that Israel does not apply EU agreements extra-territorially to its settlements in occupied territory and that Israeli entities based in or operating in the OPT do not participate and benefit from EU cooperation agreements. As such, the EU should ensure that appropriate safeguard clauses and mechanisms are included in EU-Israel cooperation instruments and agreements.
- Exclude settlement produce and companies involved in their trade from public procurement. In tendering of public contracts, EU institutions should specify that no settlement produce may be supplied under the contract and that companies operating in settlements are to be excluded. This must be done before Israel is allowed increased access to public procurement markets in the EU, as currently envisaged under the EU-Israel Action Plan.

II. National Authorities must:

- In case the EU fails to comply with its obligations, Member States must fulfil

their legal obligations stemming from customary norms of international law by adopting a ban on the import of Israeli produce coming from settlements in the OPT, because of the serious violation of peremptory norms of international law that settlements and their related infrastructure entail.

- Comply with their obligation under Article 2 of the European Council Framework Decision 2005/212 and confiscate settlement products entering the European common market, as they represent proceeds deriving from criminal offences.
- As an interim measure on the path towards the enforcement of a ban and following the example of the 2009 UK Guidelines, adopt binding guidelines on labelling for retailers. This will provide customers with clear information about the origin of agricultural produce sold in stores, thus enabling consumers to make a conscious and informed choice about the produce purchased.
- Discourage companies from trading with and investing in settlement produce, by issuing formal advice to importers and other businesses urging them to refrain from purchasing settlement goods. For this purpose, the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights can be used as the relevant international framework.
- Exclude settlement produce and companies involved in their trade from public procurement. In tendering of public contracts, relevant national authorities should specify that no settlement produce may be supplied under the contract and that companies operating in settlements are to be excluded.

III. Relevant UN bodies are urged to:

- Recommend the establishment of an independent expert panel, within the framework of the UN Working Group for Business and Human Rights, to investigate and report on the relations between the trade in settlements produce, the entrenchment of the settlements and their contribution to the maintenance of a situation of occupation, with reference to the precedent set by 'conflict diamonds.'
- On the basis of the conclusions and recommendations of the independent expert panel, explore the grounds to enforce a ban on settlement produce, on the grounds that trade with settlements:
 - fuels the conflict;
 - further entrenches the illegal presence of settlements in the OPT;
 - prolongs the Israeli occupation of the OPT, by contributing to the development and prosperity of the Occupying Power.

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AL-Haq - 54 Main Street 2nd & 3rd Fl. - Opp. Latin Patriarchate
Saint Andrew's Evangelical Church - (Protestant Hall)
P.O.Box: 1413 - Ramallah - West Bank - Palestine
Tel: + 970 (0)2 2954646/7/9
Fax: + 970 (0) 2 2954903