

Date: 2 March 2020

For the attention of:

Acting Head of Delegation, Tomas Niklasson
The Office of the European Union Representative (West Bank and Gaza Strip, UNRWA)
5 George Adam Smith, P.O. Box: 22207
East Jerusalem, Occupied Palestinian Territory

Re: Al-Haq Legal Position Paper to the European Union on the Membership of Mr Haim Bibas, Mayor of Modi'in-Maccabim-Re'ut, in the Euro-Mediterranean Regional and Local Assembly (ARLEM)

It has come to the attention of Al-Haq that Mr Haim Bibas, the current president of the Federation of Local Authorities of Israel and mayor of Modi'in-Maccabim-Re'ut is a member of the Euro-Mediterranean Regional and Local Assembly (ARLEM). Parts of Modi'in-Maccabim-Re'ut lie beyond the Green Line, and as such constitute an illegal Israeli settlement in the occupied Palestinian territory under international law.¹

Modi'in-Maccabim-Re'ut has been recognised by the European Union (EU) as being outside of Israel, and thus ineligible for preferential treatment for the purposes of the EU-Israel Technical Arrangement.² Moreover, the Federation of Local Authorities in Israel, which Mr Bibas chairs, includes illegal settlements in the occupied West Bank, including Ma'ale Adumim and Beit El.³ As a body intending to foster cooperation and cohesion between the EU and its Mediterranean partners, it is regrettable that ARLEM has admitted, as members,

¹ See Haaretz, 'European Union: Parts of Modi'in Do Not Belong to Israel' (14 August 2012), available at: <https://www.haaretz.com/eu-part-of-modi-in-isn-t-israel-1.5283892>.

² See European Commission, EU-Israel Technical Arrangement, available at: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/eu-israel-technical-arrangement_en; see also https://ec.europa.eu/taxation_customs/sites/taxation/files/technical_arrangement_postal_codes_2019_en.pdf.

³ See Federation of Local Authorities in Israel, available at: http://www.en.masham.org.il/html5/?_id=9015&did=8834&G=9015.



representatives of illegal Israeli settlements, constructed in violation of international law, and in contravention of EU law and policy.

The construction of illegal Israeli settlements in the occupied Palestinian territory has resulted in the commission of international crimes including: the transfer of Israeli civilian nationals into occupied territory,⁴ the forcible transfer of the indigenous Palestinian people, the appropriation of Palestinian public and private lands for settlement construction and expansion,⁵ and the wanton destruction of Palestinian civilian property in the absence of military necessity.⁶ Further, these acts amount to war crimes and crimes against humanity under the *Rome Statute of the International Criminal Court*⁷ and have been considered as such by the Prosecutor of the International Criminal Court as part of her preliminary examination into the situation in Palestine.⁸ Notably, the Prosecutor has warned that “extensive destruction of property without military necessity and population transfers in an occupied territory constitute war crimes under the Rome Statute.”⁹

Israel’s illegal settlement enterprise has been repeatedly condemned by the international community as violations of international law, including by the United Nations (UN) Security

⁴ Article 49(6), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention).

⁵ Articles 46, 52, 53, and 55, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land* (adopted 18 October 1907, entry into force 26 January 1910) (Hague Regulations).

⁶ Article 53, Hague Regulations.

⁷ Articles 8(2)(b)(viii), and 7(1)(d), *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

⁸ ICC, The Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2018’ 269, available at: <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>.

⁹ ICC, The Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the Situation in Palestine (17 October 2018), available at: <https://www.icc-cpi.int/Pages/item.aspx?name=181017-otp-stat-palestine>.



Council,¹⁰ and notably, the International Court of Justice (ICJ),¹¹ the latter of which, in its 2004 advisory opinion on the construction of the Annexation Wall in the occupied Palestinian territory, noted that the construction and maintenance of Israeli settlements constitute a breach of *jus cogens* norms, and thus trigger obligations *erga omnes*, binding upon all States, to take positive action to end the illegal Israeli settlement enterprise, and refrain from contributing to its maintenance or proliferation.¹² At the same time, the UN Security Council has called, in Resolution 2334 (2016), on all States to “distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967,” recalling the inadmissibility of the acquisition of territory by force.¹³

The EU has repeatedly acknowledged the presence and maintenance of illegal Israeli settlements as eroding the viability of the two-state solution, and their being dismantled as fundamental to Israel’s obligations as Occupying Power under international law.¹⁴ Moreover, in December 2019, the Court of Justice of the European Union (CJEU) reiterated that settlements have been established in contravention of international humanitarian law, ruling that produce originating therein must be properly labelled in order to be sold within the EU.¹⁵

Accordingly, by recognising Modi’in-Maccabim-Re’ut through the membership of its mayor, who moreover is the President of the Federation of Local Authorities of Israel, which includes

¹⁰ UN Security Council Resolutions 446 (22 March 1979) UN Doc. S/RES/446; 452 (20 July 1979) UN Doc. S/RES/452; 465 (1 March 1980) UN Doc. S/RES/465, 2334 (23 December 2016) UN Doc. S/RES/2334.

¹¹ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 9 July 2004, at para 120: “... the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”

¹² *Ibid.*, 88, 156.

¹³ UN Security Council Resolution 2334 (23 December 2016) UN Doc. S/RES/2334, para 5.

¹⁴ See European External Action Service, Statement by High Representative/Vice-President Federica Mogherini on Israeli settlement policy (18 November 2019), available at: https://eeas.europa.eu/headquarters/headquarters-homepage/70610/statement-high-representativevice-president-federica-mogherini-israeli-settlement-policy_en; this view is shared by the vast majority of EU Member States, see The Guardian, ‘Letters: Europe must stand by the two-state solution for Israel and Palestine’ (15 April 2019), available at: <https://www.theguardian.com/world/2019/apr/14/europe-must-stand-by-the-two-state-solution-for-israel-and-palestine>.

¹⁵ CJEU, Organisation juive européenne and Vignoble Psagot (13 December 2019) Judgement C-363/18.



illegal Israeli settlements in the occupied Palestinian territory, ARLEM is not only complicit in violations of international law, but is also acting contrary to the established policies and practices of the EU,¹⁶ which have been instituted in pursuit of the attainment of a just and lasting peace in the occupied Palestinian territory. Critically, third States, including EU member States, have a positive legal obligation not to recognise as lawful any breaches of peremptory norms of international law, and must further ensure that they do not aid or assist in the maintenance or proliferation of the illegal situation. Third States must cooperate to bring Israel's illegal settlement enterprise, and prolonged occupation at large, to an immediate end, in compliance with their obligations *erga omnes* under international law.

Finally, Al-Haq notes that the conduct of local and regional authorities, such as those which are members of ARLEM, is directly attributable to their respective States, as they constitute State agents for the purposes of the law on State responsibility. This has been recognised by the International Law Commission (ILC) in its Draft Articles on State Responsibility, which are constitutive of customary international law and binding on all States.¹⁷ As such, States must ensure that their local and regional authorities comply with the State's obligations under international law.

In light of the above, Al-Haq calls on:

- i. The EU to comply with provisions of international law, including the *Fourth Geneva Convention*, the law of self-determination, as outlined by the International Court of Justice, and the law on State responsibility, and to ensure that no illegal Israeli settlements are represented in ARLEM;
- ii. The EU to take further care in ensuring that its agencies and subsidiary entities do not contribute to the normalisation of relations with illegal Israeli settlements in the occupied Palestinian territory, including East Jerusalem;

¹⁶ For further analysis on this, see Al-Haq, *Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law* (2013), available at: <http://www.alhaq.org/publications/8075.html>.

¹⁷ Article 4, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), also Commentary, para 8.



- iii. The EU, its member States, and other third States, to take effective steps to exclude produce, companies, and services originating from illegal Israeli settlements from their markets, in compliance with the differentiation requirement, as enshrined in UN Security Council Resolution 2334 (2016), and to ensure respect for international humanitarian law in the occupied Palestinian territory, in compliance with Common Article 1 of the *Geneva Conventions*;
- iv. ARLEM to recognise Modi'in-Maccabim-Re'ut and all other illegal Israeli settlements as amounting to grave breaches of international humanitarian law, including violations of Article 49(6) of the *Fourth Geneva Convention*, in line with recognised principles of international law, practice, and EU law and policy;
- v. ARLEM to immediately expel from the Assembly Mr Haim Bibas, and all other representatives of illegal settlements in the occupied Palestinian territory, and to ensure that its membership regulations are revised to ensure compliance with recognised principles of international law;
- vi. The Pre-Trial Chamber of the International Criminal Court to rule in the affirmative on the Prosecutor's jurisdiction to investigate suspected war crimes and crimes against humanity committed in the occupied Palestinian territory, including the proliferation and maintenance of Israel's illegal settlement enterprise in the occupied West Bank, including East Jerusalem; and
- vii. Third States, including EU member States to recognise and uphold their responsibilities under international law, including under the *Fourth Geneva Convention*, and their obligations *erga omnes* in line with the 2004 advisory opinion of the ICJ, to take positive and meaningful steps to bring to an end the proliferation and maintenance of Israel's illegal settlement enterprise in the occupied Palestinian territory, including East Jerusalem, and to refrain from such acts and omissions which would aid its continuation, including by its regional and local authorities.

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