CONCLUSIONS OF THE RUSSELL TRIBUNAL ON PALESTINE

First session in Barcelona

1-3 March 2010

These are the conclusions of the Jury pertaining to the Barcelona session of the Russell Tribunal on Palestine. However, the contents are subject to the normal processes of editing and corrections before a definitive edition is made public.

1. Meeting in Barclona from 1 to 3 March 2010, the Russell Tribunal on Palestine (hereinafter "the RTP"), composed of the following members:

- Mairead Corrigan Maguire, Nobel Peace laureate 1976, Northern Ireland
- Gisèle Halimi, lawyer, former Ambassador to UNESCO, France
- Ronald Kasrils writer and activist, South Africa
- Michael Mansfield, barrister, President of the Haldane Society of Socialist Lawyers, United Kingdom
- José Antonio Martin Pallin, emeritus judge, Chamber II, Supreme Court, Spain
- Cynthia McKinney, former member of the US Congress and 2008 presidential candidate, Green Party, USA
- Alberto San Juan, actor, Spain
- Aminata Traoré, author and former Minister of Culture of Mali

adopted these conclusions, which cover the following points:

- Establishment of the Tribunal (**I.)**
- Mandate of the RTP (**II.**)
- Procedure (**III.**)

- Admissibility (**IV.**)
- Merits (**V.**)
- Continuation of the proceedings (**VI.**)

I. Establishment of the Tribunal

2. The RTP is an international citizen-based Tribunal of conscience created in response to the demands of civil society. With the passage of time in recent years, especially since the failure to implement the Advisory Opinion of 9 July 2004 of the International Court of Justice concerning the construction of a wall in the Occupied Palestinian Territory and the adoption by the United Nations General Assembly of resolution ES-10/15 on 20 July 2004 concerning the application of the Opinion, and in response to the major escalation that followed the attack on Gaza (December 2008 – January 2009), committees have been created in different countries to promote and sustain a citizen's initiative in support of the rights of the Palestinian people.

3. The RTP is imbued with the same spirit and espouses the same rigorous rules as those inherited from the Tribunal on Vietnam created by the eminent scholar and philosopher Bertrand Russell on Vietnam (1966-1967) and the Russell Tribunal II on Latin America (1974-1976) organized by the Lelio Basso International Foundation for the right and liberation of peoples.

4. Its members include Nobel Prize laureates, a former United Nations Secretary-General, a former United Nations Under-Secretary-General, two former heads of state, other persons who held high political office and many representatives of civil society, writers, journalists, poets, actors, film directors, scientists, professors, lawyers and judges (annex …).

5. Public international law constitutes the legal frame of reference for the RTP.

6. The RTP proceedings will comprise a number of sessions. The Tribunal held its first session on 1, 2 and 3 March in Barcelona. It was hosted and supported by the Barcelona National Support Committee and the Office of the Mayor of Barcelona, under the honorary presidency of Stéphane Hessel.

II. The mandate of the RTP

7. The RTP takes it as an established fact that some aspects of Israel's behaviour have already been characterized as violations of international law by a number of international bodies, including the Security Council, the General Assembly and the ICJ (*infra* § 17). The question referred to the first session of the RTP by the Organising Committee is whether the relations of the EU and its member states with Israel are wrongful acts within the meaning of international law and, if so, what the practical implications are and what means may be used to remedy them.

8. At this session, the RTP will focus on the following six questions:
- the principle of respect for the right of the Palestinian people to self-determination;
- the settlements and the plundering of natural resources;
- the annexation of East Jerusalem;
- the blockade of Gaza and operation "Cast Lead";
- the construction of the Wall in the Occupied Palestinian Territory;
- the European Union/Israel Association Agreement.

III. Procedure

9. The Organising Committee submitted the aforementioned questions experts who had been selected on the basis of their familiarity with the facts of the situation.

With a view to respecting the adversarial principle, the questions were also submitted to the EU and its member states so that they could express their opinion.

The experts submitted written reports to the Tribunal.

10. In the case of the EU, the President of the Commission, Mr. Barroso, wrote a letter to the RTP which arrived during the first session of the Tribunal. President Barroso referred to the conclusions adopted by the Council of Ministers of Foreign affairs on 8 December 2009 (annex A).

11. Only one of the member states of the EU responded to the Tribunal's request. In a letter dated 15 February 2010, Germany drew attention, like President Barroso (see above), to the Council conclusions of December 2009 (annex B).

12. While the RTP takes note of these letters, it regrets that the other member countries of the EU and the EU itself have proved reticent in presenting their arguments concerning the issues that are being addressed at this first session and that the RTP was unable to benefit from the assistance that their arguments and supporting evidence might have provided.

13. The written stage of the proceedings was followed by an oral stage during which statements by the nine experts introduced by the Organising Committee were heard by the members of the Tribunal. The following experts were heard:

Madjid Benchikh (Algeria) - Professor of Public International Law at the University of Cergy-Pontoise and former dean at the Law Faculty of Algiers

Agnes Bertrand (Belgium) - researcher and Middle East specialist with APRODEV

David Bondia (Spain) - Professor of Public International Law and International Relations at the University of Barcelona

François Dubuisson (Belgium) - Law Professor at the Free University of Brussels

Patrice Bouveret (France) - President of the Armaments Observatory

James Phillips (Ireland) – Lawyer

Michael Sfard (Israel) - Lawyer

Phil Shiner (United Kingdom) -lawyer

Derek Summerfield (United Kingdom) - honorary senior lecturer at London's Institute of Psychiatry

14. Having listened to their reports, the Tribunal heard the following witnesses, who were also designated by the Organising Committee:

Veronique DeKeyser (Belgium) - Member of the European Parliament

Ewa Jasiewicz *(United Kingdom) - Journalist and eyewitness of Operation Cast Lead*

Ghada Karmi (Palestine) Author and physician

Meir Margalit (Israel) Israeli Committee Against House Demolitions and member of the Jerusalem City Council

Daragh Murray – legal advisor at PCHR in place of Rafi Sourani; the RTP expresses grave concern that the witness invited by it, Raji Sourani, Director of PCHR, was unable to attend due to the fact that as part of the general blockade of Gaza and the closure of the Erez and Rafah border crossings, he has not been allowed by Israel or Egypt to leave Gaza;

Raul Romeva (Spain) -Member of the European Parliament

Clare Short (United Kingdom) -Member of Parliament and former Secretary of State for International Development
Desmond Travers (Ireland) - retired Colonel and member of the UN fact-finding mission that produced the Goldstone report
Francis Wurtz (France) - former member of the European Parliament

15. The procedure followed by the RTP is neither that of the ICJ nor that of a domestic or international criminal court but is based on the methodology applicable by any judicial body in terms of the independence and impartiality of its members.

IV. Admissibility

16. In considering the relations of the EU and its member states with Israel, the RTP will rule on a number of alleged violations of international law by Israel. Israel's absence from the present proceedings is not an impediment to the admissibility of the expert reports on the violations. In passing judgment on violations of international law allegedly committed by a state that is not represented before the Tribunal, the RTP is not breaching the rule of mutual agreement among the parties that is applicable before international judicial bodies responsible for the settlement of disputes between states (see the *Monetary Gold* and *East Timor* cases, *ICJ Reports*, 1954 and 1995).. The work of this body is not comparable to that involved in a dispute referred, for instance, to the ICJ: the facts presented as violations of international law committed by Israel in the Occupied Palestinian Territory have been characterized as such by the United Nations General Assembly and the Security Council and also by a number of reports, such as those of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories. Hence, at this stage the Tribunal will simply draw attention to circumstances that are already widely recognized by the international community.

V. The merits

17. In these conclusions the RTP has used, depending on the context, the terms Palestine, occupied, Palestinian territories, Palestinian territory, Occupied Palestinian Territory and Palestinian people without prejudice to the judgment that will be rendered at the final session.

18. The conclusions of the RTP will deal in turn with:

- violations of international law committed by Israel (A.)
- breaches by the EU and its member states of certain specific rules of international law (B.)
- breaches by the EU and its member states of certain general rules of international law (C.)
- failure by the EU and its member states to take measures against the violations of international law committed by Israel and to identify what remedies may be available (D.)

A. Violations of international law committed by Israel

19. Having taken note of the experts' reports and having heard the witnesses summoned by the latter, the RTP finds that Israel has committed and continues to commit grave breaches of international law against the Palestinian people. In the view of the RTP, Israel violates international law by the conduct described below:

19.1 by maintaining a form of domination and subjugation over the Palestinians that prevents them from freely determining their political status, Israel violates the right of the Palestinian people to self-determination inasmuch as it is unable to exercise its sovereignty on the territory which belongs to it; this violates the Declaration on the granting of independence to colonial countries and peoples (A/Res. 1514(XV), 14 Dec. 1960) and all UNGA resolutions that have reaffirmed the right of the Palestinian people to self-determination since 1969 (A/Res. 2535 B (XXIV), 10 Dec. 1969, and, inter alia, A/Res. 3236 (XXIX), 22 Nov. 1974, 52/114, 12 Dec. 1997, etc);

19.2 by occupying Palestinian territories since June 1967 and refusing to leave them, Israel violates the Security Council resolutions that demand its withdrawal from the territories concerned (SC/Res. 242, 22 Nov. 1967; 338, 22 Oct. 1973) ;

19.3 by pursuing a policy of systematic discrimination against Palestinians present in Israeli territory or in the occupied territories, Israel commits acts that may be characterized as *apartheid*; these acts include the following:

- closure of the borders of the Gaza Strip and restrictions on the freedom of movement of its inhabitants;

- prevention of the return of Palestinian refugees to their home or land of origin;

- prohibition on the free use by Palestinians of certain natural resources such as the watercourses within their land;

19.4 given the discriminatory nature of these measures, since they are based, inter alia, on the nationality of the persons to whom they are applied, the RTP finds that they present features comparable to apartheid, even though they do not emanate from an identical political regime to that prevailing in South Africa prior to 1994; these measures are characterized as criminal acts by the Convention on the Suppression and Punishment of the Crime of Apartheid of 18 July 1976, which is not in fact binding on Israel, though this does not exonerate Israel in that regard;

19.5 by annexing Jerusalem in July 1980 and maintaining the annexation, Israel violates the prohibition of the acquisition of territory by force, as stated by the Security Council (SC/Res. 478, 20 August 1980).

19.6 by constructing a Wall in the West Bank on Palestinian territory that it occupies, Israel denies the Palestinians access to their own land, violates their property rights and seriously restricts the freedom of movement of the Palestinian population, thereby violating article 12 of the International Covenant on Civil and Political rights to which Israel has been a party since 3 October 1991; the illegality of the construction of the Wall was confirmed by the ICJ in its Advisory Opinion of 9 July 2004, which was endorsed by the UNGA in its resolution Executive Secretary-10/15.

19.7 by systematically building settlements in Jerusalem and the West Bank, Israel breaches the rules of international humanitarian law governing occupation, in particular article 49 of the Fourth General Convention of 12 August 1949, by which Israel has been bound since 6 July 1951. This point was noted by the ICJ in the above-mentioned Advisory Opinion;

19.8 by pursuing a policy of targeted killings against Palestinians whom it describes as "terrorists" without first attempting to arrest them, Israel violates the right to life of the

persons concerned, a right enshrined in article 6 of the Covenant on Civil and Political Rights;

19.9 by maintaining a blockade on the Gaza Strip in breach of the provisions of the Fourth Geneva Convention of 12 August 1949 (art. 33), which prohibits collective punishment;

19.10 by inflicting extensive and serious damage, especially on persons and civilian property, and by using prohibited methods of combat during operation "Cast Lead" in Gaza (December 2008 – January 2009).

20. While the EU and its member states are not the direct perpetrators of these acts, they nevertheless violate international law and the internal legal order of the EU as set down in the EU Treaty either by failing to take the measures that Israel's conduct requires them to take or by contributing directly or indirectly to such conduct. The relevant provisions of the EU treaty[1] include:

"PREAMBLE

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

Article 2

The Union shall set itself the following objectives:
[…]
— to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17,

Article 3

[1] http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.

Article 6

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

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

[…]

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Article 17

1. The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements…
The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments.

Article 177

1. Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster:

- the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them,

- the smooth and gradual integration of the developing countries into the world economy,

- the campaign against poverty in the developing countries.

2. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

3. The Community and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organizations."

]

B. Breaches by the EU and its member states of specific rules of international law that require the EU and its member states to respond to violations of international law committed by Israel

21. Certain rules of international law require the EU and its member states to take action to prevent Israel from committing specific violations of international law. Thus,

- with regard to the right of peoples to self-determination, the UNGA Declaration on friendly relations (A/Res. 2625 (XXV), 24 Oct. 1970) states, as its fourth principle (2nd para.):

"Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples […] and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle […]" [ICJ, *Reports 2004*, , § 156]

similarly, the 1966 Covenant on Civil and Political rights stipulates that:

"The States parties […] shall promote the realization of the right to self-determination:"

- with regard to human rights, the same UNGA Declaration states in the same context (4th principle, 3rd para.):

"Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter" (see also the 5th principle, 3rd para.);

- furthermore, the Euro-Mediterranean Association Agreement of 20 November 1995 (*OJEC* L 147/1 of 21 June 2000), states that:

"Respect for democratic principles and fundamental human rights […] shall inspire the domestic and international policies of the Parties and shall constitute an essential element of this Agreement" (art. 2);

this provision requires the EU and its member states to ensure that Israel respects fundamental rights and freedoms, and it follows that by refraining to do so the EU and its member States are violating the agreement; as shown by the CJEC in the *Brita* case (CJEC, 25 February 2010), EU law is also applicable to the EU's relations with Israel; while the agreement also stipulates that this does not prevent

"a Party from taking any measures […] (c) which it considers essential to its own security in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security" (art. 76),

the RTP does not consider that this possibility accorded to the contracting parties can be invoked to justify the failure of the EU and its member states to fulfil their obligation of due diligence to ensure respect for human rights by the other party; on the contrary, fulfilment of the obligation in question may contribute to the maintenance of "peace and international security";

- with regard to international humanitarian law, common article 1 of the four Geneva Conventions of 1949 stipulates that "The High Contracting Parties undertake to respect and to ensure respect" for the Conventions, as noted by the ICJ in the *Wall* case:

> "It follows from that provision that every State party to that Convention [the fourth Geneva Convention], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with." (ICJ, *Reports, 2004*, § 158);

The official ICRC commentary emphased the significance of common article 1, statting as follows:

> "It is.a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations ' vis-à-vis ' itself and at the same time ' vis-à-vis ' the others. The motive of the Convention is such a lofty one, so universally recognized as an imperative call of civilization, that the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from an opponent, indeed perhaps even more for the former reason than for the latter.
>
> The Contracting Parties do not undertake merely to respect the Convention, but also to ' ensure respect ' for it. The wording may seem redundant. When a State contracts an engagement, the engagement extends eo ipso to all those over whom it has authority, as well as to the representatives of its authority; and it is under an obligation to issue the necessary orders. The use in all four Conventions of the words "and to ensure respect for" was, however, deliberate: they were intended to emphasize the responsibility of the Contracting Parties.
> [….]
> In view of the foregoing considerations and the fact that the provisions for the repression of violations have been considerably strengthened, it is clear that Article 1 is no mere empty form of words, but has been deliberately invested with imperative force. It must be taken in its literal meaning."

the fact that the EU is not a party to the Geneva Conventions does not preclude the applicability of their rules to the EU; thus, in the aforementioned *Wall* case, the ICJ held that an international organization such as the United Nations, which was not a party to the Conventions either, should take action to ensure that they were respected; according to the Court, the UN and

> "especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the

associated régime, taking due account of the present Advisory Opinion." (ICJ, *Reports. 2004*, § 160);

moreover, the ICRC study on customary international humanitarian law notes that states:

" must exert their influence, to the degree possible, to stop violations of international humanitarian law (rules 144);

as this is a rule of customary law, it is also applicable to international organizations.

- Further, pursuant to IHL, beyond common article 1, the member states of the EU are under specific duties to apply universal jurisdiction to individual criminal suspects, especially in the light of the recommendations of the UN Fact Finding Mission at paragraphs 1857 and 1975 (a) of its report to the UNHRC of September 2009. .[2]

This arises in relation to civilians under occupation under articles 146-147 of the Fourth Geneva Convention of 1949, which provide as follows:

Art. 146
The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

[2] http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

Art. 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or
property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

It is to be noted that Austria, France, Greece and Italy are four EU countries that have failed to comply with Article 146 (1) in that their internal legal order does not enable universal jurisdiction to be exercised over those suspected of violations of the crimes listed in article 147.

Special emphasis is placed on the fact that article 146 not only requires universal jurisdiction to be applied to those suspected of criminal liability for grave breaches, but that pursuant to article 146 (3) states are required to take effective measures to repress non-grave breaches too, which is explained in the official ICRC commentary to the Convention as follows:

"under the terms of this paragraph, the Contracting Parties must also suppress all other acts contrary to the provisions of this Convention.

The wording is not very precise. The expression "faire cesser" used in the French text may be interpreted in different ways. In the opinion of the International Committee, it covers everything which can be done by a State to avoid acts contrary to the Convention being committed or repeated. […] There is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention."

C. Breaches by the EU and its member States of the general rules of international law which require the EU and its member states to respond to violations of international law committed by Israel

23. Israel's violations of international law are frequently violations of "peremptory norms" of international law (*jus cogens*): targeted killings that violate the right to life, deprivation of the liberty of Palestinians in conditions that violate the prohibition of torture, violation of the right of peoples to self-determination, living conditions imposed on a people that constitute a type of apartheid.

24. The peremptory character of these norms is attributable to the fact that they cannot be derogated from (see, for the right to life and the prohibition of torture, the International Covenant on Civil and Political Rights, art. 4, § 2, and the Convention of 10 December 1984 against torture, art. 2, §§ 2-3) or that they have been explicitly assimilated to "peremptory norms" by the most authoritative scholarly opinion, namely that of the International Law Commission (ILC) (on the prohibition of apartheid and respect for the right of peoples to self-determination, see the ILC draft articles on state responsibility, commentary on article. 40, *ILC Report,* 2001, pp. 305-307).

25. When they witness a violation of such norms, even at a considerable distance, states and international organizations cannot remain passive and indifferent: in article 41 of the draft articles on state responsibility, the ILC adopted a provision to the effect that:

> "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40." [breach of a peremptory norm of international law]."
>
> In its commentary, the ILC makes it clear that:
>
> « the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. (*ILC Report*, 2001, p. 114).

26. The EU and its member states are therefore under an obligation to react in application of international law to prevent violations of peremptory norms of international law and to counteract their consequences. By failing to take appropriate action to that end, the EU and its

member states are breaching an elementary obligation of due diligence pertaining to respect for the most fundamental rules of international law.

27. The RTP considers that this obligation to react implies, in accordance with the rules of good faith and due diligence, the obligation to ensure that the reaction against violations of peremptory norms of international law complies with the principle of reasonable effectiveness. To that end, the EU and its member states must use all available legal channels to ensure that Israel respects international law. It therefore calls for a response that goes beyond mere declarations condemning the breaches of international law committed by Israel. Of course, the RTP takes note of these declarations, but they are no more than a first step when it comes to meeting the international obligations of the EU and its member states; they are not fully performing the duty of reaction imposed by the rules of international law.

28. Lastly, the RTP wishes to emphasize that the obligation to react against violations of peremptory norms of international law must be subject to a rule of non-discrimination and of unacceptability of double standards: the RTP is perfectly well aware that states have not codified a rule of equidistance in respect of the obligation to react, but it holds that such a rule is inferable as a matter of course from the principles of good faith and reasonable interpretation of international law: refusing to accept it will inevitably lead to "a result which is manifestly absurd or unreasonable" and which is ruled out by treaty law (1969 Convention on the Law of Treaties, art. 32 (b). In these circumstances, the RTP considers that it is unacceptable and contrary to the aforementioned juridical logic for the EU to suspend its relations, *de facto*, with Palestine when Hamas was elected in Gaza and to maintain them with a state that violates international law on a far greater scale than Hamas.

D. Failure by the EU and its member states to refrain from contributing to the violations of international law committed by Israel

29. The RTP notes that reports by experts have brought to light passive and active forms of assistance by the EU and its member states for violations of international law by Israel. Attention has been drawn, for instance, to the following:

- exports of weapons and components of weapons by EU states to Israel, some of which were used during the conflict in Gaza in December 2008 and January 2009;

- exports of produce from settlements in occupied territories to the EU;
- participation by the settlements in European research programmes;
- failure of the EU to complain about the destruction by Israel of infrastructure in Gaza during the Cast Lead operation;
- failure of the EU to demand Israeli compliance with clauses concerning respect for human rights contained in the various association agreements concluded by the EU with Israel;
- the decision by the EU to upgrade its relations with Israel under the Euro-Mediterranean Partnership Agreement;
- tolerance by the EU and its member states of certain economic relations between European companies and Israel involving commercial projects in the occupied territories, such as the management of the Tovlan landfill site in the Jordan valley and the construction of a tramline in East Jerusalem.

30. For these acts to qualify as unlawful assistance or aid to Israel, two conditions must be met: the state providing assistance must do so with the intention of facilitating the wrongful act attributable to Israel and it must do so knowingly; article 16 of the ILC draft articles on state responsibility reads:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> b) The act would be internationally wrongful if committed by that State."

In its commentary the ILC makes it clear that the state which assists the perpetrator of the wrongful act must intend to facilitate the wrongful conduct and the assisted state effectively engages in such conduct; the assisting state incurs responsibility even if such assistance is not essential to the performance of the wrongful act; it is sufficient if it "contributed significantly to that act" (*ILC Report*, 2001, p. 66). The assisting state must therefore be aware of the fact that Israel is violating international law and that the assistance given to Israel was intended to facilitate such violations.

31. *In casu*, the EU and its members states could not have been unaware that some forms ofr assistance to Israel contributed or would perforce have contribution to certain wrongful acts committed by Israel. This is applicable to:

- exports of military equipment to a state that has maintained an illegal occupation for more than forty years;
- imports of produce from settlements located in occupied territories and no real control by the customs authorities of EU member states of the origin of such produce save in exceptional circumstances (CJEC, 25 February 2010, *Brita*), whereas the exception should become the rule;
- evidence of a report repressed in 2005 and repeated internal reports by EU officials to EU bodies listing violations accurately, only to be ignored by those bodies.

In both cases, this conduct contributed "significantly" to the wrongful acts committed by Israel even if they did not directly cause such acts, and it is reasonable to assume that the EU could not possibly have been unaware of this. In these cases, the EU may be held to have been complicit in the wrongful act committed by Israel and hence to incur responsibility.

32. The participation of the settlements in European research programmes, the failure of the EU to complain during the "Cast Lead" operation about the destruction by Israel of infrastructure that the EU had funded in Gaza, and the (proposed) upgrading of bilateral relations between the EU and Israel are characterized by a number of experts as assistance to Israel in its alleged violations of international law. The ILC considers that one must, in cases of this kind, "carefully" examine whether the state accused of wrongful assistance was aware that it was facilitating the commission of the wrongful act. According to the ILC:

> "Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct." (*ILC Report 2001*, p. 68)

Even if the acts of the EU and its member states do not contribute directly to the violations of international law committed by Israel, they provide a form of security for Israel's policy and encourage it to violate international law because they cast the EU and its member states in the role of approving spectators. As the ICTY put it:

> "While any spectator can be said to be encouraging a spectacle - an audience being a necessary element of a spectacle - the spectator in these cases [German cases cited by the Chamber] was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals." (ICTY, *Furundzija* case IT-95-17/1-T, 10 Dec. 1998, § 232).

As noted by an expert, the silence of the EU and its member states seems like tacit approval or a sign of acceptance of violations of international law by Israel. As it is inconceivable that the EU and its members states are unaware of the violations of international law being committed by Israel, the RTP concludes that the acts in question constitute wrongful assistance to Israel within the meaning of aforementioned article 16 of the ILC draft articles on state responsibility.

At this stage of the proceedings, the RTP calls on:

(i) the EU and its member states to fulfil its obligations forthwith by rectifying the breaches specified in section C and the failures specified in section D

(ii) the EU in particular to implement the EU Parliament resolution requiring the suspension of the EU-Israel Association Agreement and thereby putting an end to the impunity that Israel has benefited from until now.

(iii) EU Member states to implement the recommendation at para 1975 (a) of the UN Fact Finding Mission Report on the Gaza Conflict (Goldstone Report) regarding the collection of evidence and the exercise of UJ against Israeli and Palestinian suspects; and

(iv) EU Member states to repeal of any requirements in any member state that a suspect must be a resident of that member state or of any impediments to the compliance with the duty to prosecute or extradite for trial all suspected war criminals sought out by the member states

(v) EU Member states to ensure that UJ laws and procedures are made as effective as possible in practice, including through co-ordination and the implementation of agreements on the mutual co-operation of states on criminal matters, through the EU contact points on cross-border and international crime, EUROPOL and INTERPOL etc.

(vi) EU Member states to make no regressive changes that would blunt the effect of existing UJ laws, so as to ensure that no EU member state becomes a safe haven for suspected war criminals

(vii) The Parliaments of Austria, France, Greece and Italy to pass laws providing the penal legislation required by article 146 IVGC to enable UJ to be exercised in those countries.

(viii) individuals, groups and organisations to take all avenues open to them to achieve compliance by EU member states and the EU of their aforementioned obligations, as exemplified by the use of universal jurisdiction over individual criminal suspects, domestic civil

proceedings against individual governments and/or their departments or agencies and private companies, in respect of which it is the intention of the RTP to commission and/or encourage others to commission research into which countries and jurisdictions these matters can most effectively be pursued; and

(ix) the existing legal actions and campaigns in the context of BDS to be stepped up and widened within the EU and globally.

The Russell Tribunal on Palestine calls on the European Union and on each of its member states to impose the necessary sanctions on its partner Israel through diplomatic, trade and cultural measures in order to end the impunity that it has enjoyed for decades. Should the EU lack the necessary courage to do so, the Tribunal counts on the citizens of Europe to bring the necessary pressure to bear on it by all appropriate means.

VI. Continuation of the proceedings

34. These conclusions close the first session of the RTP in Barcelona. The RTP hopes that the EU and its member states will make known their views, whereupon the RTP can review and update its conclusions at future sessions of the Tribunal if necessary.