

LEGAL MEMO IN SUPPORT OF THE PLAINTIFFS

Administrative Court of Cologne

The Plaintiffs: German-Palestinian Society, the Palestinian Community of Bonn and the German-Palestinian Women's Association.

V.

The Defendant: The Federal City of Bonn.

I. CIRCUMSTANCES OF THE CASE

1. Every year, the City of Bonn's Culture Office organizes the *Bonn Culture and Encounter Festival*. This is a public event which centers around the cultural and linguistic diversity of the city and where intercultural organizations as well as cultural, music and dance groups share their work and activities. The plaintiffs have always participated in the past editions, raising awareness about German-Palestinian identity and culture.
2. On May 14, 2019, the City Council of Bonn adopted the motion number 1911413 "*No place for the antisemitic BDS movement in Bonn*" (hereinafter: "the motion"). The motion equates the BDS movement to a new form of antisemitism and, consequently, calls upon any Bonn municipality institutions: a) to not provide facilities to BDS groups; b) to not support any event of the BDS campaign nor of groups pursuing BDS goals.
3. The motion had immediate consequences for the plaintiffs. As of May 2019 the city's Office of Culture of the festival denied the participation of the plaintiffs in this year's edition because of their support of BDS, making express references to the motion adopted by the City Council.

II. THE LAW

4. In the present memo I will argue that: **A)** the call to boycott the State of Israel is grounded in the compliance with international law and therefore perfectly legitimate; **B)** openly promoting and discussing boycott campaigns as a means to halt Israel's human rights violations in Palestine falls within the fundamental rights to freedom of expression, of assembly and of

association which are protected by articles 10 and 11 of the European Convention of Human Rights (hereinafter, “ECHR”).

a) The legitimacy of the right to boycott under International law

α) Israel’s grave violations of international customary norms and principles

5. The ongoing expansion of Israeli settlements in the Palestinian territory occupied by Israel (OPT) and the current blockade of Gaza, constitute¹ a clear violation of peremptory norms of international law, namely: a) The right to self-determination of the Palestinian People, which is a norm of *jus cogens* nature; b) The customary norm of international humanitarian law laid down in article 49 of the Fourth Geneva Conventions (hereinafter, “IV GC”), which prohibits to the occupying power to transfer its own population into the occupied territories.
6. Israel’s violation of the Palestinians’ right to self-determination and of art 49 IV GC have been steadily emphasized by: I) the International Court of Justice (hereinafter, “ICJ”) in its 2004 Advisory Opinion on the ‘Legal consequences of the construction of a wall in the Occupied Palestinian Territory’ (hereinafter, the “Wall Opinion”)²; II) numerous United Nations Security Council (UNSC) Resolutions³, the last of which is the UNSC Resolution n. 2334 of 23 December 2016⁴; III) the International Committee of the Red Cross⁵; IV) the United Nations Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967⁶.

¹ *Gaza Ten Years Later*, United Nations Country Team in the Occupied Palestinian Territory, July 2017, available at https://unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf, last access on July 25, 2019. See also Human Rights Council Resolution of 18 May 2018, A/HRC/RES/S-28/1, available at https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_hrc_res_s28_1.pdf, last access on July 25, 2019. See also

² Advisory Opinion, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, ICJ, 09 July 2004 at., Para. 75, 120, 126, 135, 149.

³ Among others: SC Res. 271, 15 September 1969; SC Res. 446, 22 March 1979; SC Res. 465, 01 March 1980; SC Res. 469, 20 May 1980; SC Res. 471, 05 June 1980; SC Res 476, 30 June 1980; SC Res. 478, 20 August 1980; SC Res. 484, 19 December 1980; SC Res. 592, 08 December 1986; SC Res. 605, 22 December 1987; SC Res. 607, 08 January 1988; SC Res. 636 of 06 July 1989, SC Res. 641, 30 August 1989; SC Res. 672, 12 October 1990; SC Res. 681, 20 December 1990; SC Res. 694, 24 May 1991; SC Res. 726, 06 January 1992; SC Res. 799, 18 December 1992; SC Res. 904, 18 March 1994; SC Res. 1322, 07 October 2000; SC Res. 1435, 24 September 2002; SC Res. 2334, 23 December 2016.

⁴ United Nations Security Council Resolution 2334, 23 December 2016.

⁵ Conference of the High Contracting Parties to the Fourth Geneva Convention: statement by the International Committee of the Red Cross, 05 December 2001.

⁶ United Nations Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 13 January 2014. A/HRC/25/67.

β) States' obligation of non-recognition and of non-assistance

7. The duties of non-recognition and non-assistance are laid out in Article 41(2) of the International Law Commission Articles on State Responsibility and require that “**States shall neither recognize as lawful a situation created by a serious breach of a peremptory norm of international law, nor render aid or assistance in maintaining the situation created by the breach**”⁷.
8. Accordingly, the ICJ concluded in their *Wall Opinion* that “**Given the character and the importance of the rights and obligations involved, the Court holds the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. All States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention**”⁸.

γ) The CJEU's consolidated approach

9. The same principles have been upheld at the EU level, where the Court of Justice of the EU (hereinafter, “the CJEU”) held that the *jus cogens* right to self-determination is “**a legally enforceable right erga omnes and one of the essential principles of international law**”⁹. Accordingly, in the context of the EU economic relationships with the State of Israel, the CJEU grounded its view on the duty of non-recognition and of non-assistance and found that the EU agreement at hand did not apply to the OPT¹⁰.
10. Likewise, the Grand Chamber of the CJEU has recently confirmed the above principles in two cases¹¹ concerning the applicability of the EU bilateral agreements with Morocco to the occupied Western Sahara territory¹². Following the Opinion of Advocate General Wathelet,

⁷ 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, at Art. 41.

⁸ Advisory Opinion, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, ICJ, 09 July 2004 at. 159.

⁹ Case C-104/16 P Council of the European Union v Front Populaire pour la liberation de la sagaia-el hamra et du rio de oro (case *Fronte Polisario*), Judgment, 21 December 2016, ECLI:EU:C:2016:973; par. 88

¹⁰ Case C---386/08 *Firma Brita GmbH v Hauptzollamt Hamburg--Hafen* [2010] ECLI:EU: C: 2010:91;

¹¹ Case *Front Polisario*, see footnote 8; Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, and Secretary of State for Environment, Food and Rural Affairs*, Judgment, 27 February 2018, ECLI:EU: C:2018:118 (case *Western Sahara Campaign UK*)

¹² *Front Polisario Case*, see footnote 8; case *Western Sahara Campaign UK*, see footnote 11

the Court adopted the same legal reasoning in both cases to declare that they are not applicable to Western Sahara because: **1)** the EU is bound to respect the *jus cogens* right of self-determination¹³; **2)** the content of such a fundamental right is sufficiently precise and detailed to determine a positive obligation upon States¹⁴; **3)** extending the application of the commercial agreement to the occupied territory of Western Sahara would have implied rendering aid and assistance in maintaining the illegal situation, consolidating the breach of the Saharawi people's right to self-determination¹⁵.

5) The BDS movement's human rights agenda and its legitimacy under international law

11. The BDS movement is rooted in the respect of international law and principles and of fundamental rights: it is anchored in the Universal Declaration of Human Rights and rejects all forms of racism, including Islamophobia anti-Semitism¹⁶. It calls for “**a)** the end of occupation and colonization of all Arab lands and for the dismantling of the Wall; **b)** the recognition of the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; **c)** the respect, protection and promotion of the rights of Palestinian refugees to return to their home and properties as stipulated in UN Resolution 194”¹⁷.
12. Accordingly, the BDS movement promotes awareness and advocacy activities to push States to comply with their duty of non-assistance and non-recognition, as upheld by the ICJ in its Wall Opinion, thus triggering a public debate at government and civil society levels. It therefore pushes individuals and States to carry out nonviolent campaigns (*i.e.*, boycott, divestment and sanctions) as a means to compel Israel to end the above-mentioned flagrant violations of international law and to respect the right to self-determination of the Palestinian People.

¹³ Opinion of Advocate General Wathelet delivered on 10 January 2018, Case C-266/16, (*Western Sahara Campaign UK*), par. 100 : « *As the Court held in paragraphs 284 and 285 of the judgment of 3 September 2008, Kadi and Al Barakaat International Foundation v Council and Commission (C-402/05 P and C-415/05 P, EU:C:2008:461), respect for human rights is a condition of the lawfulness of EU acts and measures incompatible with respect for human rights are not acceptable in the EU legal order. Thus, the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EU and FEU Treaties, such as Article 3(5) TEU and Article 21 TEU, which provide that the Union's external action is to respect human rights. It is therefore incumbent on the Court to ensure that human rights are respected in the context of the full system of remedies established by the EU and FEU Treaties* ». See also paragraphs 101 – 109.

¹⁴ *Ibid.*, see paragraphs 110 –119.

¹⁵ *Ibid.*, par. 211 : « *...That aid takes the form of economic advantages (in particular the financial contribution) which the Fisheries Agreement and the 2013 Protocol confer on the Kingdom of Morocco* ».

¹⁶ From <https://bdsmovement.net/faqs#collapse16241>, last access on July 24, 2019

¹⁷ From <https://bdsmovement.net/what-is-bds>, last access on July 24, 2019

13. The BDS movement's legitimacy has been further affirmed worldwide by a) experts and scholars; b) civil society organizations and c) States and public institutions, which all endorsed the movement's principles, tools and goals.

a) Numerous experts and scholars have expressly supported BDS' boycotts as legitimate and non-violent tool to counter Israel's grave violations of international law and fundamental rights. **UN Special Rapporteurs** and international law experts such as the South African Professor John Dugard¹⁸ and the American Jewish Professor Richard Falk¹⁹ have voiced out their concerns about the suppression of Palestinians' rights and expressly called States and civil society organizations to adopt BDS measures to ensure compliance by Israel with international law, in line with ICJ's 2004 Advisory Opinion on the Wall²⁰. In addition, no less than **240 Israeli and Jewish scholars** have recently strongly criticized the Bundestag motion of 17 May 2019 equating the BDS movement to a form of anti-Semitism, "*rejecting the deceitful allegation that BDS as such is anti-Semitic and maintaining that boycotts are a legitimate and nonviolent tool of resistance*"²¹. Finally, in February 2018 the BDS movement was nominated for the **Nobel Peace Prize**²², which is a further element highlighting the legitimate nature of this movement.

b) More than 350 civil society organizations, amongst which Amnesty International and Human Rights Watch, have expressly endorsed the BDS human rights agenda²³. For instance, **Amnesty International** called on the international community to boycott Siederler products and to impose an arms embargo against Israel on the occasion of the 50-year anniversary of occupation²⁴. In addition, as early as 2016, **Human Rights Watch** demanded that companies "*should not carry out activities in Israeli settlements, not finance them, not offer services there or trade with them. Only in this way can they fulfil their responsibility in the protection of human rights, [...]*"²⁵.

¹⁸ <https://www.aljazeera.com/news/2016/12/legal-experts-palestinian-bds-free-expression-161209121208916.html>, last access on July 25, 2019

¹⁹ Richard FALK and Virginia TILLEY, *Israeli Practices towards the Palestinian People and the Question of Apartheid*, UN Economic and Social Committee for Western Asia, Report, March 2017

²⁰ ICJ's 2004 *Wall Opinion*, par. 159

²¹ <http://www.middleeastmonitor.com/20190612-240-israel-and-jewish-professional-urge-germany-not-to-enforce-anti-bds-law/>, last access on July 25, 2019

²² <https://bdsmovement.net/news/bds-nominated-nobel-peace-prize>, last access on July 25, 2019

²³ <http://eccpalestine.org/wp-content/uploads/2016/05/endorsements-right2BDS.doc-28.pdf>, last access on July 25, 2019.

²⁴ <https://www.amnesty.org/en/latest/news/2017/06/states-must-ban-israeli-settlement-products-to-help-end-half-a-century-of-violations-against-palestinians/>, last access on July 29, 2019

²⁵ Human Rights Watch press release of 19.01.2016, "Israel: Companies should stop settlement activities"<https://www.hrw.org/news/2016/01/19/israel-businesses-should-end-settlement-activity>, last access on July 25, 2019

- c) Numerous States and public institutions openly affirmed the BDS movement's legitimacy. Notably, former **High Representative of the EU for Foreign Affairs and Security Policy Ms. Mogherini** has expressly stated that "*The EU stands firm in protecting freedom of expression and freedom of association in line with the Charter of Fundamental Rights of the European Union, which is applicable on EU Member States' territory, including with regard to BDS actions carried out on this territory*"²⁶. Likewise, in 2016 Swedish, Irish and Dutch foreign ministers acknowledged that boycott campaigns are legitimate and protected under the right of freedom of expression and of assembly²⁷.
14. In the light of the above it is indisputable that the BDS movement pursues a genuine and legitimate human rights agenda. Therefore, States have not only the legal obligation to not recognize nor assist Israel's flagrant violations of international law and fundamental rights, but also a moral obligation to not interfere with BDS legitimate goals.
- b) The right to openly promote and discuss boycott campaigns is protected under article 10 ECHR (freedom of expression) and article 11 ECHR (freedom of assembly and of association).**
15. According to **article 10 par. 1 ECHR**, everyone has the right to freedom of expression, which includes the following three components: "*(1) freedom to hold opinions; (2) freedom to receive information and ideas; (3) freedom to impart information and ideas*". The latter is of the greatest importance for the political life and democratic structure of a democratic country, as the Court steadily upheld in its consolidated case law²⁸. Meaningful political debates are not possible in the absence of this freedom. Only the full exercise of the freedom to impart information and ideas allows to freely criticize the government, which is the main indicator of a free and democratic society²⁹.
16. **Freedom of peaceful assembly under Article 11 ECHR** is broadly interpreted to cover any gathering of people for a common economic or political scope, including marches and

²⁶ <https://www.independent.co.uk/news/world/middle-east/eu-right-bds-boycott-israel-palestine-protected-free-speech-federica-mogherini-a7394536.html>, last access on July 25, 2019

²⁷ <https://mondoweiss.net/2016/05/governments-sweden-speaking/>, last access, July 26, 2019

²⁸ ECHR, *Observer and Guardian v. the United Kingdom*, 24 October 1991, § 59; ECHR, *Informationsverein Lentia and Others v. Austria*, 28 October 1993, § 38. See also, mutatis mutandis: ECHR, *Lingens v. Austria*, 8 July 1986, § 41; ECHR, *Şener v. Turkey*, 18 July 2000; ECHR, *Thoma v. Luxembourg*, 29 March 2001; ECHR, *Maronek v. Slovakia*, 19 April 2001; ECHR, *Dichand and Others v. Austria*, 26 February 2002.

²⁹ In this regard, the Court has stated that: "[its] supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man". ECHR, *Handyside v. the United Kingdom*, 7 December 1976, § 49.

processions³⁰, static assemblies or sit-ins³¹ and both public and private events³², whether formal or informal.

17. The Court identifies a connection between articles 10 and 11 ECHR since “*The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11*”³³. In this regard, it held that: “*Such a link is particularly relevant where – as here – the authorities’ intervention against an assembly or an association was, at least in part, in reaction to views held or statements made by participants or members.*”³⁴. Accordingly, there is a strong correlation between these articles also in the present case, where the city of Bonn has interfered with both freedoms of expression and peaceful assembly of the three civil society organizations at hand, in the light of their political views.
18. Articles 10 and 11 ECHR generate two different obligations on public authorities: **a) the negative obligation** to refrain from arbitrarily interfering with the full exercise of these freedoms; **b) the positive obligation** to adopt the necessary measures to prevent the prejudice to the rights at stake and to create a favourable environment in order for everyone to participate in public debate and express their opinions and ideas without fear³⁵.

In the case at hand, the city of Bonn acted in grave disregard of **both these obligations**.

19. **a) Violation of the negative obligations.** According to the Court’s case-law, “State’s interference” consists of any form of restriction (*i.e.*, “formality”, “condition”, or “penalty”) implemented by national authorities – including local councils – against freedom of expression and of assembly. This must be assessed in the light of the **three-part test** under paragraph 2 of both articles 10 and 11 ECHR, according to which States may interfere with the exercise of these rights only when three cumulative conditions are fulfilled: **I) the restriction is prescribed by law**³⁶. According to this requirement, any interference with the exercise of these freedoms must be grounded in national law. Indeed, given the relevance of freedom of expression and assembly, any restriction to these rights should always receive the democratic legitimacy derived from parliamentary works and debates **II) the interference is aimed at protecting one or more of the following interests or values: national security; territorial integrity; public safety; prevention of disorder or crime; health or morals; reputation of rights of others, preventing the disclosure of information received in confidence; and maintaining**

³⁰ ECHR, *Christians against Racism and Fascism v. the United Kingdom*, 16 July 1980

³¹ ECHR, *G. v. Germany*, no. 13079/87, Commission decision of 6 March 1989, § 60

³² ECHR, *Rassemblement jurassien et Unité jurassienne v. Switzerland*, 10 October 1979, § 17

³³ ECHR, *Ezelin v. France*, 26 April 1991, § 37

³⁴ ECHR *Stankov and the United Macedonia Organisation Ilinden v. Bulgaria*, 2 October 2001, § 85

³⁵ ECHR, *Dink v. Turkey*, 14 September 2010, § 137

³⁶ ECHR, *Gawęda v. Poland*, 14 March 2002; ECHR, *The Sunday Times v. the United Kingdom*, 26 April 1979

the authority and impartiality of the judiciary³⁷; **III**) the interference is necessary in a democratic society³⁸.

20. In the present case, the city of Bonn has arbitrarily interfered with the plaintiffs' freedoms through two different measures: **I) the City Council's motion equating BDS to a form of antisemitism; II) the Culture Office's denial preventing the plaintiffs' participation in the *Bonn Culture and Encounter Festival*.** The city of Bonn is responsible for both interferences, given that these were put in place by two of its bodies.
21. The two measures clearly do not meet the three-part test. As a matter of fact, **the motion is a piece of soft law**, that is, a mere non-legally binding political declaration. As a consequence, since the culture office merely refers to this motion, its refusal has no valid legal ground. In addition, the interference is clearly not aimed at safeguarding any of the legitimate interest or values laid down in the three-part test. As pointed out in paragraphs 11 – 14, the BDS movement's goals are fully legitimate since they are grounded in international law. The plaintiffs clearly condemn all forms of racisms, including antisemitism, in the strongest terms. Accordingly, their demands for equality and respect for international law and fundamental rights cannot be considered anti-Semitic. Should the defendant not agree with the plaintiffs' political agenda, then this can in no case give rise to an arbitrary interference with their rights.
22. **b) Violation of the positive obligations.** In addition to the above, the defendant has also clearly failed to adopt the appropriate measures to ensure that the plaintiffs could express and impart their ideas and opinions in a safe environment. **The city's denial is based on the motion and has thus attached a stigma to the BDS movement** and to all its supporters, including the plaintiffs. Given the grievance of the accusation of antisemitism, the city of Bonn is seriously undermining the plaintiffs' right to speak out freely, without the fear to be shamefully accused of being anti-Semite.

III. CONCLUSION

23. **In conclusion**, in the present memo we argued that: **A)** the BDS movement pursues a legitimate human rights agenda that is based on the respect for international law and fundamental rights; **B)** the City of Bonn violated both its negative and positive obligations arising from articles 10 and 11 ECHR, acting in complete disregard of the plaintiffs' rights to freedom of expression, assembly and association.

³⁷ ECHR, *Observer and Guardian v. the United Kingdom*, 26 November 1991

³⁸ ECHR *Długoński v. Poland*, 24 February 2009 and ECHR, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995

Therefore, given that the domestic courts are the first and most important instances to ensure the full exercise of the freedoms under the ECHR, we ask the Administrative Court of Cologne to urge the City of Bonn to cease its violations of the plaintiffs' freedoms of expression and of peaceful assembly and allow them to participate in the *Bonn Culture and Encounter Festival*.

Amsterdam (NL)

29.07.2019

Giovanni Fassina, *ELSC Coordinator*

Andrea Longo, *ELSC legal researcher*

Emma Morgan, *ELSC legal researcher*