



ELSC

European Legal Support Center

**The negative impact of the ‘anti-BDS motion’
adopted by the Vienna City Council on 27 June
2018 on the fundamental rights of freedoms of
expression, association and assembly**

Legal Opinion

January 2022



The European Legal Support Center (ELSC) is the first and only organisation mandated to defend and empower the Palestine solidarity movement in Europe through legal means. We provide free legal advice and assistance to associations, human rights organisations, groups and individuals advocating for Palestinian rights in Europe. The ELSC intervenes to end arbitrary restrictions and criminalization of peaceful advocacy and humanitarian work. It also develops legal tools and engages in strategic litigation to support civil society advocacy and campaigns. The Center was established in January 2019 as a joint initiative of European jurists, the Palestinian civil society network PNGO and the Dutch NGO The Rights Forum – which is kindly hosting the ELSC in Amsterdam.

As an organisation whose work is anchored in international human rights law, the ELSC rejects all forms of racism and racial and gender-based discrimination, including, antisemitism, Islamophobia, xenophobia, sexism and homophobia, as well as colonialism, apartheid, slavery and genocide, which are founded on racism.

If you would like to support the ELSC, visit our website 'elsc.support' to **make a donation** toward providing legal assistance to advocates for Palestinian rights.

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Date of publication: January 2022

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The negative impact of the ‘anti-BDS motion’ adopted by the Vienna City Council on 27 June 2018 on the fundamental rights of freedoms of expression, association and assembly

1. We are asked to advise the European Legal Support Center (ELSC), who is currently providing legal support to *BDS Austria* – the Austrian branch of the trans-national *Boycott, Divestment and Sanctions movement* (hereinafter, *BDS movement*) – on (I) the legitimacy of the *BDS movement* under international law and (II) the negative impact - with specific regard to the fundamental freedoms of expression, association and assembly - of the Vienna City Council ‘*anti-BDS motion*’ adopted on 27 June 2018 (hereinafter, *motion*) and of similar resolutions adopted by the Graz City Council on 14 November 2019 and currently under discussion in the Austrian parliament.

CIRCUMSTANCES OF THE CASE

2. On 27 June 2018, during the Vienna City Council 20th legislature’s 39th session, a wide coalition of political parties submitted a proposal for a *motion* (item no 27 of the agenda) concerning “**no cooperation with the anti-Semitic BDS movement (Boycott, Divestment and Sanctions)**”.¹ Following the approach of the Vienna City Council, on 14 November 2019 the Graz City Council adopted a similar motion, also equating the *BDS movement* to a form of anti-Semitism, but adding two more elements: (i) the opposition to all forms of anti-Zionism and (ii) the association of the *BDS movement* to political Islam.² Furthermore, the Austrian parliament unanimously passed a similar resolution at the national level on 27 February 2020.³
3. As stressed by the UN Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, “[a]nti-Semitism is toxic to democracy and mutual respect of citizens and threatens all societies in which it goes unchallenged”.⁴ Tackling anti-Semitism, just like any other form of racial or other discrimination, is therefore an imperative endeavour of any democratic society. This should be done by employing a **human rights-based approach** capable of advancing the entirety of human rights in their interrelatedness and interdependence. In other words, ensuring the right to freedom of religion to all religious communities should go without prejudice to the fundamental freedoms of others, including most notably freedom of expression.
4. In their introduction to the proposed *motion*, the abovementioned councillors express their concern at the increasing episodes of anti-Semitism within the Austrian society. However, they

¹ Vienna City Council, *Motion concerning no cooperation with the anti-Semitic BDS movement (Boycott, Divestment and Sanctions)*, item n. 27 of the agenda, 27 June 2018. See the *Protokoll* (literal transcription, ed.) of the Vienna City Council’s session held on 27 June 2018 available at www.wien.gv.at/mdb/gr/2018/gr-039-w-2018-06-27-081.htm (accessed 4 November 2019); and the *Sitzungsbericht* (minutes, ed.) available at www.wien.gv.at/mdb/gr/2018/gr-039-s-2018-06-27.pdf (accessed 4 November 2019).

² Graz City Council, *Motion concerning no cooperation with the anti-Semitic BDS movement (Boycott, Divestment and Sanctions)*, item n. 1 of the agenda, 14 November 2019, available at www.graz.at/cms/beitrag/10340140/7768145/Gemeinderatssitzung_vom_November.html, (last accessed 24 January 2020).

³ Austrian parliament, *Resolution concerning the condemnation of anti-Semitism and the BDS Movement*, 27 February 2020, available at https://www.parlament.gv.at/PAKT/VHG/XXVII/E/E_00012/index.shtml, (last accessed 19 January 2022).

⁴ UNGA, *Interim Report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed*, 23 September 2019, A/74/358, available at undocs.org/A/74/358, (last accessed 26 November 2019), Summary.

only equate the **BDS movement to a form of anti-Semitism**.⁵ Without providing any evidence, they claim that “neither the objectives of the BDS campaign nor the anti-Semitic propaganda that goes with it are compatible with a democratic, respectful and open urban society”.⁶

5. The *motion*, unanimously adopted, thus declares:

“The City of Vienna

- *strongly condemns the widespread anti-Semitism.*
- *opposes the anti-Semitic BDS campaign (“boycott, divestment and sanctions”).*
- *does not make urban spaces available for BDS campaigns or events, exhibitions or demonstrations which pursue the aims of BDS.*
- *does not support events that promote BDS.”⁷*

6. The *motion* establishes a political framework for the City of Vienna’s administration. By employing the notion of anti-Semitism, it **stigmatizes the BDS movement** and other advocates of Palestinian human rights, jeopardizing their enjoyment of the human rights to freedom of expression, association and assembly.

7. The *motion* has **already produced its intended effects**, including the arbitrary denial of the authorization to use public spaces to *BDS Austria* and affiliated civil society groups. A significant example is the cancelling by the *Volkskundemuseum* in March 2019 of a scheduled event featuring Mr Ronnie Kasrils, a renowned South African anti-apartheid activist of Jewish descent, former member of the National Executive Committee of the African National Congress and former member of the Central Committee of the South African Communist Party, on grounds that the City of Vienna had adopted the *motion* at hand.⁸ Moreover, in early September 2019 a privately-owned cinema in the City of Vienna (*Artis International cinema*, owned by *Cineplexx Ltd.*) cancelled the Austrian première of the film: “*Yallah! Yallah!*” - about the Palestinian football team - organized by a *BDS* group, allegedly citing the aforementioned *motion*.⁹

8. These developments are extremely concerning, since they are precisely the result of a **generalized stigmatisation of advocates of Palestinian rights**, which has to be seen in light of the global effort by the State of Israel and affiliated NGOs and private organizations in labelling the *BDS movement* as anti-Semitic and as a threat to the State of Israel’s national security.¹⁰

⁵ *Beschluss- (Resolutions-)Antrag betreffend keine Zusammenarbeit mit der antisemitischen BDS-Bewegung (“boycott, divestments and sanctions”)*, editors’ translation, see the original German version in Annex I.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Palestinian BDS National Committee, “Vienna museum cancels Palestine event with leader of South African anti-apartheid struggle” [21 March 2019], bdsmovement.net/news/vienna-museum-cancels-palestine-event-leader-south-african-anti-apartheid-struggle, (last accessed 19 November 2019). The event was organized by *BDS Austria* in the framework of the broader *Israeli Apartheid Week*, a peaceful cultural and political event that occurs every year in March and April in more than 200 cities worldwide, aimed at exposing the State of Israel’s blatant violations of international law, human rights law and its apartheid regime as well as recognising the Palestinian struggle for self-determination, by means of lectures, film screenings, direct actions, cultural performances, poster campaigns and other actions. See *Israeli Apartheid Week*, apartheidweek.org, (last accessed 19 November 2019).

⁹ Electronic Intifada, “Vienna cinema censors film about Palestinian football” [5 September 2019], electronicintifada.net/blogs/ali-abunimah/vienna-cinema-censors-film-about-palestinian-football, (last accessed 19 November 2019).

¹⁰ See for instance the media reports: The Guardian, “Israel brands Palestinian-led boycott movement a ‘strategic threat’” [3 June 2015], www.theguardian.com/world/2015/jun/03/israel-brands-palestinian-boycott-strategic-threat-netanyahu, (last accessed 20 November 2019); and Aljazeera, “From spying to lobbying, Israel’s fight against BDS intensifies” [20 June 2019],

9. The **chilling effect** that the notion of anti-Semitism has when attached to advocates of Palestinian rights, results in the silencing of Palestinian voices and the consequent worrisome **erasure of Palestine from the public debate**. The reality of the Palestinian people's ongoing dispossession belongs however to the public space: Palestinian people and supporters of their rights have the right to impart information about present and past injustices, just as every Austrian (and European) citizen has the right to hear this information, along with the ideas and arguments that emerge directly from it.

LEGAL FRAMEWORK

10. In this opinion, **we argue** that:

- I. The *BDS movement* is a trans-national human rights movement, whose call is grounded in international law, and it is therefore legitimate;
- II. The right of individuals and groups to promote, discuss and participate openly in boycott campaigns, as a means to raise awareness among the public and ultimately halt the State of Israel's violations of international law in Israel and Palestine, falls within the internationally accepted human rights to freedom of expression, association and assembly.¹¹

I. The legitimacy of the *BDS movement* as a human rights movement

11. In order to demonstrate the legitimacy of the *BDS movement* as a human rights movement **we argue** that:

- A. The State of Israel's grave violations of international law that the *BDS movement* aims at ending are well-documented and recognized by the international community. The State of Israel's policy towards the Palestinian people has developed into a regime of systematic discrimination in which all constitutive elements of apartheid are verified.
- B. Under international law, when a State commits serious violations of international law, other States have the duties not to recognize the unlawful situation created by such violations, nor to render assistance in maintaining it.
- C. The EU is bound by the obligation to a strict observance of international law. Accordingly, the Court of Justice of the European Union (hereinafter, CJEU) has developed a consolidated approach on the human right to self-determination of peoples, with specific reference to the occupied Palestinian territories (hereinafter, oPt).
- D. Private companies also have a responsibility to avoid negative human rights impact wherever they operate and a duty to respect international humanitarian law. Advocating for

www.aljazeera.com/news/2019/06/spying-lobbying-israel-fight-bds-intensifies-190620170711122.html, (last accessed 20 November 2019). [?Also the UK – Morning Star report of new Prime Minister moving to prevent local authorities divesting from Israel [16 December 2019]?]

¹¹ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN, (last accessed 21 November 2019).

corporates' respect of international law, including by means of boycott campaigns, is fully legitimate.

- E. The *BDS* agenda is rooted in universal human rights and international law.
- F. Because of its legitimate political aim and its non-violent approach, the *BDS movement's* legitimacy enjoys broad international recognition by scholars, organizations and institutions alike.

A. The State of Israel's grave violations of international law and the crime of apartheid

12. The situation in the Palestinian territories is dramatically deteriorating. Throughout 2019 the State of Israel continued to enforce severe and discriminatory restrictions on Palestinians' human rights; to restrict the movement of people and goods into and out of the Gaza Strip; and to facilitate the unlawful transfer of Israeli citizens to settlements in the occupied West Bank.¹²

13. The ongoing expansion of **Israeli settlements**¹³ in the oPt and the current **blockade of Gaza**, constitute **clear violations of peremptory norms of international law**,¹⁴ 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 Convention** (hereinafter, GCIV), which prohibits the occupying power from transferring its own population into the occupied territories,¹⁵ constituting **war crimes** under the *Rome Statute* of the International Criminal Court (hereinafter, ICC).¹⁶

14. The State of Israel's violations of the Palestinian people's right to self-determination and of Article 49 GCIV have been **steadily emphasized by**:

¹² Amnesty International, "Chapter 3: Israeli Settlements and International Law", available at www.amnesty.org/en/latest/campaigns/2019/01/chapter-3-israeli-settlements-and-international-law/, (last accessed 7 December 2019).

¹³ UN HRC, *Report of the independent fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, 7 February 2013, A/HRC/22/63, available at www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf, (last accessed 21 November 2019).

¹⁴ UN Country Team in the Occupied Palestinian Territory, *Gaza Ten Years Later*, July 2017, available at unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf, (last accessed 20 November 2019). See also UN Human Rights Council (HRC), Resolution 18 May 2018, A/HRC/RES/S-28/1, available at www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_hrc_res_s28_1.pdf, (last accessed 20 November 2019).

¹⁵ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at www.refworld.org/docid/3ae6b36d2.html, (last accessed 20 November 2019), Article 49.

¹⁶ UN HRC, *Report of the independent fact-finding mission to investigate the implications of the Israeli settlements*, available at www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf, (last accessed 20 November 2019); UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, available at www.refworld.org/docid/3ae6b3a84.html, (last accessed 20 November 2019), Article 8(2)(b)(vii).

- 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, *Wall Opinion*);¹⁷
 - ii. numerous **UN Security Council** (hereinafter, UNSC) Resolutions,¹⁸ the last of which is the *UNSC Resolution 2334* of 23 December 2016;¹⁹
 - iii. the **International Committee of the Red Cross**;²⁰
 - iv. the **UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967**;²¹
 - v. the **UN General Assembly** (hereinafter, UNGA) *Resolution 3236* of 22 November 1974;²²
 - vi. the **UN Special Coordinator for the Middle East Peace Process** in his address to the UNSC on 20 November 2019.²³
15. Moreover, the **well-documented systematic discrimination of Palestinians** living under *de jure* or *de facto* control of the State of Israel, has developed into a regime of **apartheid**.²⁴ Apartheid is an international crime established by the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*²⁵ (hereinafter, *Apartheid Convention*) and constitutes a **crime against humanity** under the *Rome Statute* of the ICC.²⁶ Its prohibition represents a *jus cogens* norm of customary international law with *erga omnes* effect.
16. Article 2(c) of the *Apartheid Convention* defines apartheid as the **denial of human rights and fundamental freedoms to the members of a racial group** by the hand of a distinct and dominating racial group.

¹⁷ ICJ, *Wall Opinion*, para 75, 120, 126, 135, 149.

¹⁸ 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.

¹⁹ UNSC, *Security Council Resolution 2334 [on cessation of Israeli settlement activities in the Occupied Palestinian Territory, including East Jerusalem]*, 23 December 2016, S/RES/2334 (2016), available at www.refworld.org/docid/587f347a4.html, (last accessed 20 November 2019).

²⁰ Conference of the High Contracting Parties to the Fourth Geneva Convention, *Statement by the International Committee of the Red Cross*, 05 December 2001, available at www.icrc.org/en/doc/resources/documents/statement/57jrgw.htm, (last accessed 21 November 2019).

²¹ UN HRC, *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, available at www.refworld.org/docid/531439c44.html, (last accessed 21 November 2019).

²² UNGA, *Resolution 3236, Question of Palestine*, 22 November 1974, A/RES/3236, available at [undocs.org/A/RES/3236\(XXIX\)](http://undocs.org/A/RES/3236(XXIX)), (last accessed 21 November 2019).

²³ UN News, “Israeli settlements remain ‘flagrant violation’ of international law, UN envoy tells Security Council” [20 November 2019], news.un.org/en/story/2019/11/1051781, (last accessed 7 December 2019).

²⁴ See John Dugard, John Reynolds, “Apartheid, International Law, and the Occupied Palestinian Territory”, *European Journal of International Law*, Volume 24, Issue 3, August 2013, pp. 867–913.

²⁵ UNGA, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, A/RES/3068(XXVIII), available at www.refworld.org/docid/3ae6b3c00.html, (last accessed 17 December 2019). Pursuant to Article II *Apartheid Convention*, apartheid is defined as including “similar policies and practices of racial segregation and discrimination as practised in southern Africa, [...] inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them”.

²⁶ UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, Article 7(1)(j).

17. Accordingly, the so-called ‘three pillars’ of apartheid identified in relation to the South African regime, i.e. **discrimination, territorial fragmentation and political repression**, are today recurring in the oPt (East Jerusalem, the West Bank and the Gaza Strip). The magnitude of the 15 years siege of the Gaza Strip, which effectively amounts to a besieged Palestinian ghetto, and of the settlement enterprise in the West Bank, have created a reality of distinct national communities living in a single geopolitical area. In the **Gaza Strip** there are two million Palestinians completely isolated in an open-air prison²⁷ and facing severe movement restrictions²⁸. Furthermore, they are constantly under threat of the Israeli army’s military attacks, that since 2014 have caused 1.793 casualties among innocent civilians.²⁹ **The West Bank** is an archipelago of non-contiguous and poorly connected enclaves for Palestinians who are living under Israeli military law that they have no say in formulating (notwithstanding the very limited legal powers of the Palestinian Authority) and where their basic civil rights are suspended by the occupation regime, while the Israeli settlers live in colonies built within Palestinian territory enjoying full political power.³⁰
18. This interpretation is firmly grounded into international law and has been confirmed by: **a)** the 2012 *UN Committee on the Elimination of Racial Discrimination* (hereinafter, CERD), that explicitly censored Israeli policies towards the Palestinians as an expression of apartheid and racial segregation³¹; **b)** leading Human rights organizations such as Human Rights Watch³², Al Haq³³, B’tselem³⁴ and the renowned Israeli human rights lawyer Michael Sfard who confirmed how: *“Israel has created not only an occupation that has persisted for generations but also a regime where one group oppresses and discriminates against the other for the sole purpose of*

²⁷ Use of this analogy has not been confined to journalists and activists, but has extended to such authorities as the UN Under-Secretary-General for Humanitarian Affairs and the British Prime Minister. See e.g. ‘UN humanitarian chief warns of disaster if Gaza siege continues’, *Ha’aretz*, 12 Mar. 2010, available at www.haaretz.com/news/un-humanitarian-chief-warns-of-disaster-if-gaza-siege-continues-1.266453, (last accessed 6 January 2020); ‘Gaza is a prison camp, says David Cameron’, *The Daily Telegraph*, 27 July 2010, available at www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/7912095/Gaza-is-a-prison-camp-says-David-Cameron.html, (last accessed 6 January 2020).

²⁸ For more specific information regarding the proceedings and the different categories of authorizations for the Palestinian Population in the Gaza Strip, see the study of the Israeli NGO “Gisha”, *Unclassified Status of Authorizations for the Entry of Palestinians into Israel, their Passage between Judea and Samaria and the Gaza Strip and their Travel Abroad*, available at www.gisha.org/UserFiles/File/LegalDocuments/procedures/general/50en.pdf, (last accessed 6 January 2020). See also “*The Israeli Permit Regime: Realities and Challenges*”, available at www.arij.org/files/arijadmin/2018/permits1.pdf, (last accessed 6 January 2020), p. 16: “*The Israeli Permit Regime is characterized by categorization, segregation and control. It vigorously classifies the Palestinian population due to various needs, regulated by a circulation process into many categories. It applies this process to the permit applicants so that every aspect of life is denied free movement without certain types of permits that are determined by the Israeli authorities. Another characteristic is “unpredictability,” that the Palestinians aren’t informed by the Israeli authorities regarding the reasons behind the approval and the disapproval of their permits*”.

²⁹ OCHA OPT, “*Casualties*”, available at www.ochaopt.org/data/casualties, (last accessed 6 January 2020).

³⁰ The Israeli settlement project include also a network of roads, infrastructures, factories and companies that enjoys generous subsidies from the Israeli government and contribute to the territorial fragmentation of the Palestinian territory. See: J. Dugard, J. Reynolds, *Apartheid, International Law, and the Occupied Palestinian Territory*, European Journal of International Law, 2012.

³¹ Committee on the Elimination of Racial Discrimination (CERD), *Consideration of reports submitted by States parties under article 9 of the Convention. Concluding observations. Israel* [9 March 2012], CERD/C/ISR/CO/14-16, available at www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ISR.CO.14-16.pdf, (last accessed 21 November 2019), para 24-25.

³² HRW (2021) A Threshold Crossed, Israeli Authorities and the Crimes of Apartheid and Persecution, available at: <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>

³³ Al-Haq, United Nations: In Response to Unprecedented Recognition of Israel’s Apartheid Regime, States Must Take Concrete Steps to End this “unjust reality” (18 June 2020), available at: <https://www.alhaq.org/advocacy/17012.html>.

³⁴ B’Tselem (2021), A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid, available at: https://www.btselem.org/publications/fulltext/202101_this_is_apartheid

preserving its control and supremacy. This is the very core of the legal definition of apartheid, which is an international crime [...]. This is the essence of separation, a physical and legal wedge between occupier and occupied, ruler and subject, with the terms dictated by the stronger party [...]. **But what is separation? How can we translate it? The answer is “apartheid”, the noun that describes a policy of creating “apartness”, the eponym for a regime of segregation.**”³⁵

B. The duties of Non-recognition and Non-assistance: Responsibility of all States within the international community

19. In light of the flagrant violations of international law committed by the State of Israel, other States are under obligations not to recognize nor to render assistance to maintaining a situation created by or constituting a serious violation of international law.
20. This is laid out in Article 41(2) of the International Law Commission *Draft Articles on State Responsibility* which requires 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**”.³⁶
21. Accordingly, the ICJ concluded in its *Wall Opinion* that “[g]iven 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**”.³⁷

C. The EU obligation to a strict observance of international law and its legal implications for the fundamental right to self-determination of the Palestinian people

22. At the European level, the European Union (hereinafter, EU) and its Member States have consistently affirmed, in compliance with their **obligation to respect and promote international law** under both articles 3(5) and 21 of the *Treaty on the European Union*³⁸ (hereinafter, TEU) and

³⁵ M. Sfar, *The wall and the gate*, metropolitan books, 2018, p. 123 – 131. The definition of the crime of apartheid has been widely used by Palestinian civil society, international organisations, international legal experts, and academics. See, inter alia, Virginia Tilley, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (Pluto Press, 2012); Ilan Pappé, *Israel and South Africa: The Many Faces of Apartheid* (Zed, 2015); Dugard, J. (2019) *Confronting Apartheid: A personal history of South Africa, Namibia and Palestine*, (ZED 2019); -, Sfar, M. (2020) *The Occupation of the West Bank and the Crime of Apartheid: Legal Opinion*, available at: <https://www.yesh-din.org/en/the-occupation-of-the-west-bank-and-the-crime-of-apartheid-legal-opinion/>

³⁶Article 41(2) ASRWA.

³⁷ ICJ, *Wall Opinion*, para 159.

³⁸ EU, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01, available at: www.refworld.org/docid/4b179f222.html, (last accessed 18 December 2019), Article 3(5).

the *UN Charter*³⁹, that the occupation and colonization policy implemented since 1967 by the State of Israel on Palestinian territories, including the West Bank and East Jerusalem, as well as the current blockade of the Gaza Strip, are flagrant violations of international law.

23. 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**”.⁴⁰ Likewise, the Grand Chamber of the CJEU, following the Opinion of Advocate General Wathelet, recently confirmed the aforementioned principle declaring that the EU bilateral agreements with Morocco are not applicable to Western Sahara because: **1)** the EU is bound to respect the *jus cogens* right to self-determination;⁴¹ **2)** the content of such a fundamental right is sufficiently precise and detailed to determine a positive obligation upon States;⁴² **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-determination.⁴³
24. In the 2019 judgement on the *Psagot* case⁴⁴ concerning the labelling of foodstuffs originating in the Israeli illegal settlements, the Grand Chamber of the CJEU grounded its reasoning in the EU obligation to respect and promote international law and in the **right of consumers to make informed purchase choices**, including with reference to **ethical considerations**.⁴⁵
25. In this regard, the Advocate General Hogan clarified in his opinion that **legitimate ethical considerations include violations of international law**. Accordingly he held that “[j]ust as many European consumers objected to the purchase of South African goods in the pre-1994 apartheid era, [...] in the context of the Israeli policies vis-à-vis the Occupied Territories and the settlements, there may be some consumers who object to the purchase of products emanating from the territories, precisely because of the fact that the occupation and the settlements clearly amount to a violation of international law”.⁴⁶

³⁹ UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at www.refworld.org/docid/3ae6b3930.html, (last accessed 18 December 2019), Preamble’s 3rd recital and Articles 1(1).

⁴⁰ Case C-104/16 P, *Council of the European Union v Front Populaire pour la liberation de la saguia-el hamra et du rio de oro (Front Polisario)*, Judgment, 21 December 2016, ECLI:EU:C:2016:973, para 88.

⁴¹ Case C-266/16, *Western Sahara Campaign UK*, Opinion of Advocate General Wathelet, 10 January 2018, para 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 para 101-109.

⁴² *Ibid.*, para 110-119.

⁴³ *Ibid.*, para 211: “[...] by the contested acts, the Union rendered aid and assistance in maintaining the illegal situation resulting from the breach of the right of the people of Western Sahara to self-determination. 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”.

⁴⁴ C-363/18, *Organisation juive européenne, Vignoble Psagot Ltd contre Ministre de l’Économie et des Finances*, 12 November 2019, ECLI:EU:C:2019:954.

⁴⁵ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, OJ L 304, Article 3(1); EU, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at www.refworld.org/docid/4b17a07e2.html, (last accessed 18 December 2019), Article 169(1).

⁴⁶ Case C-363/18, *Organisation juive européenne, Vignoble Psagot Ltd contre Ministre de l’Économie et des Finances*, Opinion of Advocate General Hogan, 13 June 2019, para 51.

26. The Court further highlighted that under international humanitarian law, occupied territories have an international status distinct from that of the occupying State.⁴⁷ Accordingly, “[t]he West Bank is a territory whose people, namely the Palestinian people, enjoy the right to self-determination, as noted by the International Court of Justice in its [Wall Opinion]”.⁴⁸
27. The CJEU also reaffirmed the EU obligation to respect and promote international law and in particular it held that “**the settlements [...] give concrete expression to a policy of population transfer conducted by that State outside its territory, in violation of the rules of general international humanitarian law, as codified in the sixth paragraph of Article 49 [GCIV] [...]. Moreover, that policy has been repeatedly condemned by the United Nations Security Council, [...] and by the European Union itself. In that context, it should be underlined that, in accordance with Article 3(5) TEU, the European Union is to contribute to the strict observance of international law, including the principles of the United Nations Charter.**”⁴⁹
28. Ultimately, the Court concluded that “*foodstuffs originating in a territory occupied by the State of Israel must bear not only the indication of that territory but also, where those foodstuffs come from a locality or a group of localities constituting an Israeli settlement within that territory, the indication of that provenance*”.⁵⁰
29. It is beyond doubt that the reasoning of the Advocate General and the conclusions of the CJEU in the *Psagot* case indicate that European citizens are entitled to a right of to decide whether or not to purchase a good produced within a situation that is deemed unlawful under international law. In other words, they have the **right to boycott a good out of ethical considerations**, and in order to ensure that they are enabled to do so, they have a right to be informed on the actual origin of a given good.
30. Reacting to the aforementioned judgement, a number of **former high-level Israeli officials including ambassadors and the former attorney general**, as well as award-winning public figures “welcome[d] the recent ruling of the European court of justice, which in confirming that Israeli settlement products cannot be labelled as originating in the State of Israel, reaffirmed the illegality of settlements and the importance of international law. [...] **Israeli settlements are the leading cause of human rights violations against Palestinians, and settlement expansion is destroying the possibility of a two-state solution**”.⁵¹ Accordingly, they “call upon the European Union to **ban the import of Israeli settlement goods**”.⁵²

D. The responsibility of companies to avoid negative human rights impact

31. The issue of private businesses conducting operations within the oPt has to be seen in light of the human rights responsibilities of business enterprises. The **UN Guiding Principles on Business and Human Rights** (hereinafter, UNGPs) provide the most authoritative statement of the human

⁴⁷ *Ibid.*, para 34.

⁴⁸ *Ibid.*, para 35.

⁴⁹ *Ibid.*, para 48.

⁵⁰ *Ibid.*, para 58.

⁵¹ The Guardian, *Letters*, “Ban import of Israeli settlement goods” [15 November 2019], www.theguardian.com/world/2019/nov/15/ban-import-of-israeli-settlement-goods, (last accessed 22 November 2019).

⁵² *Ibid.*

rights responsibilities of companies, based on international human rights law.⁵³ Adopted by the UN Human Rights Council in 2011, they have been endorsed by governments and business associations. While the UNGPs are non-legally binding, they are being gradually integrated into national laws and policies.

32. Under the UNGPs, companies have a responsibility to respect all internationally recognized human rights wherever they operate in the world.⁵⁴ Therefore, they are required to **“avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur”**.⁵⁵ If human rights abuses, caused or contributed to by a company, are identified and if, having addressed their impact, it is not possible to prevent them, the only possible course of action is not to undertake the relevant activity.
33. In Israel and the oPt, companies that operate in or with illegal Israeli settlements or are complicit with human rights abuses, unavoidably contribute to sustaining a situation which is deemed unlawful under international law, as well as a regime that is inherently discriminatory and abusive of the human rights of Palestinians. The very existence of **illegal settlements makes doing business in oPt likely to result in negative human rights impacts** in contrast with the UNGPs and international law. Given these circumstances, **any business activity by companies in or with Israeli settlements or complicit with human rights violations inexorably and unavoidably contributes to serious violations of international humanitarian and human rights law.**
34. With regard to business activities linked to illegal Israeli settlements, the **UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967**, Professor Richard Falk, concluded **“that all companies that operate in or otherwise have dealings with Israeli settlements should be boycotted, until such time as they bring their operations fully into line with international human rights standards and practice. In this regard, civil society efforts to pursue the implementation of the Guiding Principles establish a distinctive space between voluntary and obligatory action in the struggle to protect persons vulnerable to human rights abuse”**.⁵⁶
35. Calling on companies operating in or with Israeli settlements or complicit with human rights violations to cease their operations is therefore **in line with international standards on corporate responsibility**, which include requiring corporations to respect the rules of international humanitarian and human rights law. Advocating for the respect of international law and the UNGPs, including by means of boycott campaigns, is a **legitimate approach adopted and shared by many other human rights organizations worldwide.**

⁵³ Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (UN Guiding Principles)*, UN Doc. HR/PUB/11/04, 2011, available at www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf, (last accessed 21 November 2019).

⁵⁴ *UN Guiding Principles*, Pillar II: The Corporate Responsibility to Respect Human Rights.

⁵⁵ *UN Guiding Principles*, Principle 13(a).

⁵⁶ UN HRC, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk*, 19 September 2012, A/67/379, available at undocs.org/A/67/379, (last accessed 22 November 2019), para 91.

E. The BDS agenda is rooted in universal human rights and international law

36. Having established the State of Israel's violations of international law and the complicity of private companies, it is necessary to clarify the nature of the *BDS* agenda. It is out of doubt that, after the Oslo accords in 1993, all peace-making initiatives lead no concrete results and **the international community, as a whole, failed to comply with its duties**, under the Charter of the United Nations, to promote international peace and security in Israel and Palestine and to collectively promote, respect and fulfil the human rights of all, including the inalienable right to self-determination of the Palestinian people. The *BDS movement* was born as a result of this disillusion through the **Palestinian Civil Society's call**, on 9 July 2005 "*for Boycott, Divestment and Sanctions against Israel Until it Complies with International Law and Universal Principles of Human Rights*".⁵⁷
37. The call's preamble recalls the **Wall Opinion**⁵⁸ and the "**hundreds of UN Resolutions**" that since the 1948 have condemned as illegal the conduct of the State of Israel with regard to its colonial and discriminatory policies. Hence, the *BDS movement* is firmly **rooted in the respect for international law**.
38. The call addresses international civil society organizations and people of conscience all over the world, including conscientious Israelis.⁵⁹ By inviting everybody to join, the call is essentially inclusive,⁶⁰ and it "*categorically opposes as a matter of principle all forms of racism, including Islamophobia and anti-Semitism*".⁶¹ In fact, the *BDS movement* is precisely an **anti-racist movement** which finds inspiration in the movement against apartheid in South Africa.⁶²
39. Thus, the specific objectives of such **non-violent BDS measures**, to be maintained for as long as the State of Israel fails to meet its obligations under international law, are to convince or force that State to: "**1) end its occupation and colonization of all Arab lands**⁶³ **and dismantle the Wall; 2) recognize the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; 3) respect, protect and promote the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194**".⁶⁴
40. Accordingly, the *BDS movement* promotes **awareness-raising and advocacy activities** to push States to comply with their duties under international law, fostering a **public debate** at

⁵⁷ BDS, "Palestinian Civil Society Call for BDS" [9 July 2005], available at www.bdsmovement.net/call, (last accessed 20 November 2019).

⁵⁸ International Court of Justice (ICJ), *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, available at refworld.org/cases/ICJ_414ad9a719.html, (last accessed 20 Nov 2019).

⁵⁹ BDS, "Palestinian Civil Society Call for BDS" [9 July 2005], available at bdsmovement.net/call, (last accessed 20 Nov 2019).

⁶⁰ Micheal Bot, "The right to boycott: BDS, law, and politics in a global context", *Transnational Legal Theory*, 2019, p. 9.

⁶¹ BDS, "FAQs: Isn't a boycott of Israel anti-Semitic?", bdsmovement.net/faqs#collapse16241, (last accessed 20 Nov 2019).

⁶² Hilary Aked, "For the record, BDS is an anti-racist issue" [16 May 2016], bdsmovement.net/news/record-bds-anti-racist-issue, (last accessed 20 November 2019).

⁶³ The reference to "all Arab lands" is often interpreted by un-informed BDS critics as meaning that the BDS calls for the end of the State of Israel. However, further explanation to this reference is indeed given and easily accessible on the BDS international website: "*Ending its occupation and colonization of all Arab lands and dismantling the Wall. / International law recognises the West Bank including East Jerusalem, Gaza and the Syrian Golan Heights as occupied by Israel. As part of its military occupation, Israel steals land and forces Palestinians into ghettos, surrounded by checkpoints, settlements and watchtowers and an illegal apartheid Wall. Israel has imposed a medieval siege on Gaza, turning it into the largest open air prison in the world. Israel also regularly carries out large-scale assaults on Gaza that are widely condemned as constituting war crimes and crimes against humanity.*" See BDS, "What is BDS?", www.bdsmovement.net/what-is-bds, (last accessed 7 December 2019).

⁶⁴ *Ibidem*.

government and civil society levels. It also pushes individuals and States to carry out non-violent campaigns as means to compel the State of Israel to end the flagrant violations of international law and to respect the right to self-determination of the Palestinian people.

F. The broad international recognition of the BDS movement's legitimacy

41. 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.

- a)** Numerous experts and scholars have expressly supported *BDS* boycotts as legitimate and non-violent tools to counter the State of Israel's grave violations of international and human rights law. **UN Special Rapporteurs and international law experts**, including the American-Jewish Professor Richard Falk,⁶⁵ have voiced their concerns about the suppression of Palestinian rights and expressly called on States and civil society organizations to adopt *BDS* measures with the aim of ensuring compliance by the State of Israel with international law, in line with the ICJ's *Wall Opinion*.⁶⁶ In February 2018 the *BDS movement* was **nominated for the Nobel Peace Prize**,⁶⁷ a further element highlighting the legitimate nature of this movement. In addition, **240 Israeli and Jewish scholars** have recently strongly criticized the *Deutscher Bundestag's* motion⁶⁸ adopted on 17 May 2019 that equates 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*".⁶⁹ They stressed that equating the Boycott, Divestment and Sanctions (BDS) movement with anti-Semitism "*is incorrect, unacceptable and a threat to the liberal-democratic order*" and further clarified that "[o]ne should be considered an anti-Semite only according to the content and the context of one's words and deeds and not according to any institutional affiliation".⁷⁰
- b)** More than **350 European civil society organizations** have expressly called for respect of *BDS* as a legitimate human rights movement.⁷¹ Further, **Amnesty International** called on the international community to boycott Israeli settlements' products and to impose an arms

⁶⁵ Richard Falk and Virginia Tilley, *Israeli Practices towards the Palestinian People and the Question of Apartheid*, UN Economic and Social Committee for Western Asia (ESCWA), Report E/ESCWA/ECRI/2017/1, March 2017, Beirut, available at opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1013&context=ps_pubs, (last accessed 20 November 2019). See also UN HRC, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk*, 19 September 2012, A/67/379, available at undocs.org/A/67/379, (last accessed 22 November 2019), para 99.

⁶⁶ ICJ, *Wall Opinion*, para 159.

⁶⁷ BDS, "BDS Nominated for Nobel Peace Prize" [2 February 2018], bdsmovement.net/news/bds-nominated-nobel-peace-prize, (last accessed 20 November 2019).

⁶⁸ The *Deutscher Bundestag* has recently adopted a motion similar to the one at hand in this opinion titled "*BDS-Bewegung entschlossen entgegenzutreten – Antisemitismus bekämpfen*", available at www.bundestag.de/dokumente/textarchiv/2019/kw20-de-bds-642892, (last accessed 18 December 2019).

⁶⁹ Middle East Monitor, "240 Israel and Jewish professors urge Germany not to enforce anti-BDS law" [12 June 2019], www.middleeastmonitor.com/20190612-240-israel-and-jewish-professional-urge-germany-not-to-enforce-anti-bds-law/, (last accessed 20 November 2019).

⁷⁰ *Ibid.*

⁷¹ Petition to the President of the European Commission and the Director General of the DG Justice and Consumers of the European Commission, "Enough with the criminalisation of the BDS movement for justice in Palestine! Let's support right to boycott!", available at ecpalestine.org/wp-content/uploads/2016/05/endorsements-right2BDS.doc-28.pdf, (last accessed 20 November 2019).

embargo against Israel on the occasion of the 50 years anniversary of the occupation.⁷² It further campaigns for pushing digital tourism companies to refrain listing properties and tourist services in the occupied West Bank, in compliance with the *UN Guiding Principles on Business and Human Rights*, as this translates necessarily into making profit out of a situation that constitutes war crimes under international law.⁷³ In addition, **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, [...]*”.⁷⁴

- 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 Federica Mogherini, has expressly stated that “[t]he 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”.⁷⁵ Likewise, the **Swedish, Irish and Dutch foreign ministers** acknowledged that boycott campaigns are legitimate and protected under the rights to freedom of expression and of assembly.⁷⁶
- d) On 18 November 2019, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967; and Special Rapporteur on freedom of religion or belief have addressed an official letter of concern to the German authorities regarding the Deutsche Bundestag’s motion, similar to the one at hand in the present case, condemning the BDS movement as anti-Semitic. They affirm that “*the motion sets a worrying trend of unduly limiting the rights to freedom of opinion and expression, peaceful assembly and of association*”.⁷⁷ Stressing the legitimacy of the movement, the Special Rapporteurs further state that “*the motion may hinder the peaceful activities of human rights defenders, groups and organisations*

⁷² Amnesty International, “States must ban Israeli settlement products to help end half a century of violations” [7 June 2017], 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 accessed 20 November 2019).

⁷³ Amnesty International, “Destination: occupation” [Campaign, January 2019], www.amnesty.org/en/latest/campaigns/2019/01/destination-occupation-digital-tourism-israel-illegal-settlements/, (last accessed 20 November 2019); and Amnesty International, “Destination: Occupation: Digital tourism and Israel’s illegal settlements in the Occupied Palestinian Territories” [Report, Index: MDE 15/9490/2019], January 2019, available at www.amnesty.org/download/Documents/MDE1594902019ENGLISH.PDF, (last accessed 20 November 2019).

⁷⁴ Human Rights Watch, Press release, “Israel: Companies should stop settlement activities” [19 January 2016], www.hrw.org/news/2016/01/19/israel-businesses-should-end-settlement-activity, (last accessed 20 November 2019).

⁷⁵ European Parliament, Parliamentary questions, Question reference E-005122/2016, available at www.europarl.europa.eu/doceo/document/E-8-2016-005122-ASW_EN.html?redirect, (last accessed 20 November 2019); see also Independent, “EU declares right to boycott Israel is protected by free speech” [2 November 2016], www.independent.co.uk/news/world/middle-east/eu-right-bds-boycott-israel-palestine-protected-free-speech-federica-mogherini-a7394536.html, (last accessed 20 November 2019).

⁷⁶ Mondoweiss, “Irish and Dutch governments join Sweden in speaking out for right to call for BDS” [29 May 2016], mondoweiss.net/2016/05/governments-sweden-speaking/, (last accessed 20 November 2019).

⁷⁷ UN HRC, *Joint Communication from UN HRC Special Procedures*, AL/DEU 3/2019, 18 October 2019, available at spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24834, (last accessed 24 January 2019).

*denouncing human rights violations as part of the BDS movement by shrinking the civic space available to them to express legitimate grievances”.*⁷⁸

42. In light of the above, it is indisputable that **the BDS movement pursues a genuine and legitimate human rights agenda**. Therefore, States have not only **(i)** the obligation not to recognize nor to render aid or assistance to the State of Israel in its flagrant violations of international and human rights law, but also **(ii)** the obligation not to interfere with *BDS*' legitimate goals.

II. The right to promote, discuss and participate in boycott campaigns as an integral part of the human rights to freedom of expression, of association and of assembly

43. The right to promote, discuss and participate in boycott campaigns is protected under: **a)** international human rights instruments; and **b)** regional human rights instruments as an integral part of the rights to freedom of expression, association and assembly.

A. The rights to freedom of expression, association and assembly under international human rights law

44. At the international level, the rights to freedom of expression, association and assembly are: **i)** protected by Articles 19, 21 and 22 of the *International Covenant on Civil and Political Rights* (hereinafter, ICCPR);⁷⁹ and **ii)** articulated within the UN *Declaration on Human Rights Defenders*.⁸⁰ They are interrelated and interdependent and are essential to the enjoyment of several other human rights and to the functioning of democracy.⁸¹

i. ICCPR

45. The ICCPR is a legally binding human rights instrument protecting fundamental civil and political rights at the universal level. It was adopted by UNGA *Resolution 2200A (XXI)* on 16 December 1966 and entered into force on 23 March 1976. Austria ratified the ICCPR on 10 September 1978,⁸² and its Optional Protocol,⁸³ which provides a mechanism for individual communications, on 10 December 1987.⁸⁴

⁷⁸ *Ibid.*

⁷⁹ UNGA, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at www.refworld.org/docid/3ae6b3aa0.html, (last accessed 18 December 2019).

⁸⁰ UNGA, Resolution 53/144, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders)*, A/RES/53/144, available at www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf, (last accessed 20 November 2019).

⁸¹ UN Human Rights Committee (CCPR), *General comment no. 34, Article 19, Freedoms of opinion and expression (General comment no. 34)*, 12 September 2011, CCPR/C/GC/34, available at www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf, (last accessed 21 November 2019), para 2-4.

⁸² The only reservation made by Austria on Articles 19, 20 and 21 ICCPR is Reservation no. 5 providing that “Articles 19, 21 and 22 in connection with article 2(1) of the Covenant will be applied provided that they are not in conflict with legal restrictions as provided for in article 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”. This reservation however refers to possible restrictions, imposed by ECHR’s High Contracting Parties, on the political activity of *aliens only*.

46. Pursuant to Article 2(2) ICCPR, each State Party to the Convention is under the obligation “to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized [therein]”. Accordingly, **State Parties are under the obligation to refrain adopting laws or other measures that directly or indirectly hinder the full enjoyment of the rights contained in the Convention.**
47. The right to freedom of expression is contained in Article 19 ICCPR and protects the **right of people to seek, receive and impart information of any form**, including political discourse, commentary on one’s own and on public affairs, journalism, cultural and artistic expression, teaching, and religious discourse.⁸⁵ It applies not only to information and ideas that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the state or any sector of the population.⁸⁶
48. As noted by the UN Human Rights Committee in its *General comment No. 34*, the right to **freedom of expression is essential for the promotion and protection of human rights.**⁸⁷ It encompasses “the expression and receipt of communications of every form of idea and opinion capable of transmission to others [including] discussion of human rights”.⁸⁸
49. Any restriction on the right to freedom of expression must be narrowly construed. Article 19(3) ICCPR provides that the right to freedom of opinion and expression “may [...] be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals”.⁸⁹
50. In connection to the right to freedom of opinion and expression, Articles 21 and 22 ICCPR protect the rights of peaceful assembly and to freedom of association. Pursuant to Article 22, freedom of association protects **the right of individuals to form or join formal or informal groups to take collective action to pursue a common goal.** This include the right of individuals to form, join and participate in civil society organizations, associations or groups to promote or defend human rights.⁹⁰
51. In a democratic society, it is **particularly important that civil society organizations are able to freely exercise the rights to freedom of association and expression**, including through activities such as seeking, obtaining and disseminating ideas and information; advocating for human rights;

⁸³ UNGA, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at www.refworld.org/docid/3ae6b3bf0.html, (last accessed 18 December 2019).

⁸⁴ Austria has however submitted a declaration which limits the applicability of the Optional Protocol to only such cases that have not been dealt with at the European Court of Human Rights: “On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in Article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁸⁵ CCPR, *General comment no. 34*, para 11.

⁸⁶ CCPR, *General comment no. 34*, para 3; see also European Court of Human Rights (ECtHR), *Handyside v. United Kingdom*, Application no. 5493/72, 7 December 1976, para 49.

⁸⁷ CCPR, *General comment no. 34*, para 3.

⁸⁸ CCPR, *General comment no. 34*, para 30.

⁸⁹ Article 19(3) ICCPR.

⁹⁰ UNGA, *Declaration on Human Rights Defenders*, A/RES/53/144, Article 5.

engaging in governance and the conduct of public affairs; accessing and communicating with international human rights bodies; and submitting proposals for policy and legislative reform at the local, national and international levels.⁹¹ In this context, **States are under a positive obligation provide an adequate legal framework** that enables individuals and collectives to carry out their activities without undue interference by the State or third parties.

52. Article 21 and 22 only allow restrictions that are “*in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others*”. The latter ground of possible restriction is often invoked – and abused – with regard to national, ethnic and religious discrimination. It is therefore necessary to clarify, in the context of the case at hand in this opinion, what are the implications of invoking such provision.

ii. *The BDS Movement in light of the prohibition of discrimination under human rights law*

53. The *motions* at hand, **by applying the notion of anti-Semitism** (i.e. a form of discrimination) in the context of the *BDS* call, generates a **disproportionate limitation on the exercise of the right to freedom of expression**. In fact, by equating the *BDS movement* to a form of anti-Semitism, the Vienna and Graz City Councils **stigmatize** the movement and do not accept any possibility of justification of calling for a boycott of Israeli goods and institutions. **Any legitimate justification** that could underpin the national distinction operated in the call for boycott, namely putting pressure on a State that flagrantly violates international law, **is a priori discarded**.

54. However, the boycott of goods or institutions originating or belonging to a given State cannot be discriminatory, save when it lacks an objective and reasonable justification, that is when it does not pursue a legitimate aim or when there is no reasonable proportionality between the means employed and the aim pursued. **It is therefore of paramount importance to examine the reasons that underpin a call for boycott**. Only such an examination can provide guidance on how to strike a balance about the legitimacy of the aim pursued by a boycott campaign that targets a given State.

55. The **juridical notion of discrimination** that is generally accepted integrates the **criteria of legitimacy and proportionality**. The **Committee on the Elimination of Racial Discrimination**, the monitoring body of the *Convention on the Elimination of All Forms of Racial Discrimination* (hereinafter, CERD), in providing guidance as to the interpretation of Article 1(1) CERD, highlights that “**a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention**”.⁹² Similarly, the **European Court of Human Rights** (hereinafter, ECtHR) interprets the prohibition of discrimination under Article

⁹¹ UNGA, *Declaration on Human Rights Defenders*, A/RES/53/144, Articles 6, 7 and 8.

⁹² Committee on the Elimination of Racial Discrimination (CERD), *General recommendation XIV on article 1, paragraph 1, of the Convention*, 15 September 1993, [contained in A/48/18 at page 115], available at undocs.org/A/48/18, (last accessed 21 November 2019), para 2.

14 ECHR⁹³ in light of those two criteria. The Court held accordingly that “*a difference in treatment is discriminatory if it “has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”*”.⁹⁴

56. In light of this interpretation of the notion of discrimination, the following elements should be fully considered for the **assessment of the justified, legitimate and reasonable character** of the BDS call for “*boycott, divestment and sanctions against Israel*”:

- i. The objective of affecting the foreign commercial policy of a State who commits grave violations of international law, duly documented by many international instances, and, in so doing, pressuring that State to cease such violations;
- ii. The objective of targeting specifically those products that originate in illegal Israeli settlements in the oPt and those institutions, companies and individuals (in their institutional capacity) that are directly or indirectly involved or complicit with the State of Israel’s grave violations of international law;
- iii. The inciting character – and not instead constraining – of the campaign, that is limited to a call, through information campaigns, on the free choice of consumers.

57. When all these elements are considered, it is undisputable that **the objective of the BDS’ call for boycott** is not to advocate for an arbitrary discrimination of Israeli citizens, but to target a deliberate State policy and **to promote, through non-violent and non-constraining means, the application of international law** with the aim of ending the Israeli occupation of Palestine. The differential treatment of the State of Israel by the BDS Movement is entirely directed at its policies and practices, and not at the Jewish people. This defining feature of the BDS campaign is entirely overlooked in the anti-BDS motion.

58. Furthermore, it should be noted that – as underlined in this article published in the Harvard Law Review⁹⁵ - products originating from Israel are not necessarily produced by Israeli companies by also include foreign companies operating in Israel/Palestine. It is thus neither necessary nor sufficient that a company is Jewish or Israeli. Instead, a company is targeted due to its active complicity in Israel’s violations of Palestinian rights, a conduct that is not related to a specific national identity.⁹⁶

59. Refusing to consider the justifications underpinning a call for boycott of goods and institutions originating in a given State, would be to adopt a particularly **extensive interpretation of the notion of discrimination**, and particularly of anti-Semitism, that would contribute to making its application constitutive of a **disproportionate limitation of the right to freedom of expression** of the human rights groups concerned, namely *BDS Austria* in the case at hand.

⁹³ Article 14 ECHR: “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*”

⁹⁴ ECtHR, *Chassagnou and Others V. France*, Applications Nos. 25088/94, 28331/95 and 28443/95, 23 April 1999, para 91.

⁹⁵ harvardlawreview.org/2020/02/wielding-antidiscrimination-law-to-suppress-the-movement-for-palestinian-rights/

⁹⁶ *Ibid* at 1376.

iii. *The particular importance of the rights to freedom of expression, association and assembly, including the right to boycott, for human rights defenders*

60. The *Declaration on Human Rights Defenders*, was adopted by UNGA Resolution 53/144 on 8 March 1999. In its Preamble, it defines human rights defenders as “**individuals, groups and associations [...] contributing to [...] the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals**”.⁹⁷ Accordingly, given the *BDS*’ legitimate human rights agenda as established in the first section of this opinion, the ***BDS movement undoubtedly falls within the definition*** of human rights defenders.
61. The *Declaration* gives concrete expression to existing human rights (such as those contained in the ICCPR and other universal human rights instruments) in regard of the work carried out by human rights defenders. In articulating the right to freedom of expression, the *Declaration* affirms the **right of everyone to know, seek, obtain, receive and hold information about all human rights**.⁹⁸ Freedom of expression is essential for safeguarding the public’s right to know and the ability to hold State and non-State actors to account. As part of their obligations to protect human rights defenders and promote an enabling environment for their work, **States must refrain from harassing or sanctioning human rights defenders for their peaceful activities**.
62. The *UN Special Rapporteur on the situation of human rights defenders* highlighted that without the full enjoyment of fundamental freedoms, human rights defenders would not be able to promote and defend human rights, including by **discussing and developing new human rights ideas**.⁹⁹ It is up to individuals and organizations to determine which peaceful strategies to use in furtherance of human rights.
63. Hence, human rights defenders are entitled to the right, inherent to the right to freedom of expression, to develop and discuss new human rights ideas and principles, and to advocate for their acceptance, **including peaceful boycotts**.¹⁰⁰ Advocating for boycotts, divestment and sanctions is therefore a form of free expression that must be protected. Advocates of boycotts should be allowed to express their views freely and take forward their campaigns without harassment, threats of prosecution or criminalization, or other measures.
64. **Legal means** aimed at narrowing the scope of human rights defenders’ fundamental freedoms violate States’ obligations under international human rights law. **Non-legal means**, including administrative decisions and political resolutions such as the one at hand in this opinion, which *de facto* narrow the scope of the abovementioned freedoms, also **violate international human rights law**, *a fortiori* when they arbitrarily target a specific human rights group.
65. It follows that the right of individuals and groups to promote, discuss and participate openly in boycott campaigns as a means to raise awareness among the public and advocate for the respect and promotion of human rights, in Palestine or elsewhere, represents an integral part of the rights to freedom of expression, association and assembly. As highlighted by the *UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*,

⁹⁷ UNGA, *Declaration on Human Rights Defenders*, A/RES/53/144, Preamble’s recital 4.

⁹⁸ UNGA, *Declaration on Human Rights Defenders*, A/RES/53/144, Article 6.

⁹⁹ UNGA, *Report of the UN Special Rapporteur on the situation of human rights defenders*, 28 July 2011, A/66/203, available at undocs.org/A/66/203, (last accessed 21 November 2019), para 29, 43 and 56.

¹⁰⁰ UNGA, *Declaration on Human Rights Defenders*, A/RES/53/144, Article 7.

“calling for or participating in a peaceful boycott is a legitimate form of expression which is internationally recognized”.¹⁰¹ It is thus a legitimate measure to which activists, associations and groups may recur, either against States or private corporations, and it is **often used without its legality being questioned** as an abuse of freedom of expression, *safe in the case of the BDS call*.

66. A boycott is precisely a means of action **aimed at generating a debate on issues of public interest**. In the case of the *BDS* campaign, the call for boycott aims at promoting the respect of international law by the State of Israel and at proposing a tool deemed to be a last-resort-substitute to the failed attempts of the international community to bring about peace and security in Israel and the oPt, as demonstrated in the first section of this opinion.

67. The *UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Professor Richard Falk, explained with regard to the *BDS* movement that “[the] sense of an anti-occupation movement of worldwide scope has come to **resemble in many respects the anti-apartheid movement that made important contributions to the transformation of the political climate in South Africa in the late 1980s**”,¹⁰² and expressly called for a boycott of companies that take part in activities linked to the Israeli illegal settlements and for civil society to establish trans-national collaborative networks to this end.¹⁰³ It must be noted that, although the *BDS* campaign for South Africa faced minimal controversy regarding its appropriateness and effectiveness at the time, it faced little to no efforts to discredit or prohibit its support or supporters, comparable to the delegitimizing tactics currently used against the *BDS* Movement for Palestine. UNSC Resolution 591 (1986) in fact urged member states to fully participate in the arms embargo against South Africa in attempts to end apartheid.¹⁰⁴

68. In light of the above, it can be clearly established that the actions carried out by activists, associations and groups, including activities related to the promotion of **boycott campaigns, in contributing to a debate of general interest enjoy a reinforced protection in the exercise of freedom of expression**.

B. Freedom of expression, of association and of assembly under regional human rights instruments

¹⁰¹ UN HRC, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Addendum*, 11 June 2012, A/HRC/20/17/Add.2, available at undocs.org/A/HRC/20/17/Add.2, (last accessed 21 November 2019), para 34.

¹⁰² UN HRC, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk*, 7 June 2010, A/HRC/13/53/Rev.1, available at undocs.org/A/HRC/13/53/Rev.1, (last accessed 22 November 2019), para 38.

¹⁰³ UN HRC, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk*, 19 September 2012, A/67/379, available at undocs.org/A/67/379, (last accessed 22 November 2019), paras 99-100: “99. *The Special Rapporteur calls on civil society to vigorously pursue initiatives to boycott, divest and sanction the businesses highlighted in this report, within their own national contexts, until such time as they bring their policies and practices into line with international laws and standards, as well as the Global Compact.* 100. *The Special Rapporteur calls on civil society to share resources and information, including through establishing transnational collaborative networks and other initiatives, as a way of promoting transparency and accountability in relation to businesses involved in the Israeli settlement agenda*”

¹⁰⁴ UNSC Resolution 591 (28 November 1986).

69. At the European level, the rights to freedom of expression, association and assembly are protected by: **i)** Articles 10 and 11 *European Convention on Human Rights* (hereinafter, ECHR).

ECHR

70. The ECHR came into force on 3 September 1953. Austria ratified the Convention on 3 September 1958. Pursuant to Article 1 ECHR, “*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention*”.

71. **The Convention is thus part of the Austrian legal system** and is binding on the domestic courts and all public authorities. It further follows that all individuals in Austria derive rights and duties from the Convention, so that in the national procedures states may directly invoke its text and case law, which must be applied by the national courts. Moreover, **the Austrian national courts must give priority to the Convention over any national law conflicting with the Convention and the Court’s case law.**

72. **Article 10 ECHR** lays down the content and scope of the right to freedom of expression. Accordingly:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

73. The ECtHR has recognized the particular importance of protecting the right to freedom of expression.¹⁰⁵ According to Article 10(1) *ECHR* the right to freedom of expression 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 any democratic society, as the Court steadily upheld in its consolidated case-law.¹⁰⁶ Meaningful political debates are not possible in the absence of this freedom. Only the full exercise of the freedom to impart information and ideas

¹⁰⁵ ECtHR, *Vides Aizsardzibas Klubs v. Latvia*, Application No. 57829/00, 27 May 2004, para 42.

¹⁰⁶ ECtHR, *The Observer and The Guardian v. the United Kingdom*, Application No. 13585/88, 24 October 1991, para 59; ECtHR, *Informationsverein Lentia and Others v. Austria*, Application No. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, 28 October 1993, para 38. See also, *mutatis mutandis*: ECtHR, *Lingens v. Austria*, Application No. 9815/82, 8 July 1986, para 41; ECtHR, *Şener v. Turkey*, Application No. 26680/95, 18 July 2000; ECtHR, *Thoma v. Luxembourg*, Application no. 38432/97, 29 March 2001; ECtHR, *Maronek v. Slovakia*, Application No. 32686/96, 19 April 2001; ECtHR, *Dichand and Others v. Austria*, Application No. 29271/95, 26 February 2002.

allows to freely criticize the government, such possibility being the main indicator of a free and democratic society.¹⁰⁷

74. It is well established in the ECtHR's case-law that the "expression" protected under Article 10 is not limited to words, written or spoken, but it extends also to actions intended to express an idea or to present information.¹⁰⁸ It follows from this necessary preamble that support by individuals or groups for the *BDS movement* must be read in light of the **commitment to inform the public about the State of Israel's human rights violations** and to work together for peace, social justice, equality, human rights and respect of international law. The ECHR entitles *BDS* activists to impart information and ideas and, just like any other citizens, it allows them to criticize any government freely. The State of Israel is likewise not above criticism, any more than any other.
75. This has been confirmed in the recent ECtHR case of *Baldassi and Others v. France*,¹⁰⁹ where the Court reasserted that '**boycott is above all a means of expressing an opinion of protest**. The call for a boycott, which aims to communicate those views while also calling for specific action linked to them, therefore falls within the scope of the principle protected by Article 10 of the Convention'.¹¹⁰ This case concerned *BDS* activists campaigning for a boycott of Israeli products whom were criminally convicted for 'incitement to economic discrimination' by the France's highest court. The ECtHR unanimously found a violation of Article 10 ECHR arguing that the conviction of the applicants thus amounted to an unlawful interference with their freedom of expression, as it did not fulfill the requirement of being necessary in a democratic society.¹¹¹
76. This landmark judgement establishes principles that can be applied to the present case where a soft law instrument (the anti *BDS* motion) is employed to stigmatize and censor *BDS* activists.¹¹² One such principle is the fact that boycotting products originating in a State for the purpose of opposing their domestic and foreign policies is not in and of itself discriminatory and should be considered in light of all the circumstances. As stated by the Court, 'incitement to differential treatment does not necessarily amount to incitement to discriminate'.¹¹³ Methods of expressions such as support for *BDS* are a matter of public interest, particularly concerning the human rights

¹⁰⁷ In this regard, the ECtHR held in *Handyside v. the United Kingdom*, para 49, 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".

¹⁰⁸ *A guide to the implementation of Article 10 of the European Convention on Human Rights*, Human Rights Handbook n.2, Council of Europe, 2004, p.15; ECHR, *Stevens v. Uk*, n.11674/85.

¹⁰⁹ *Baldassi and Others v. France*, nos. 15271/16 and 6 others, ECHR 11 June 2020.

¹¹⁰ *Baldassi and Others v. France*, nos. 15271/16 and 6 others, ECHR 11 June 2020, para 63.

¹¹¹ *Ibid*, para 74 -77.

¹¹² Andreina De Leo, 'Conviction of *BDS* Activists Violate Freedom of Expression under the European Convention on Human Rights', 16 June 2020, available at opiniojuris.org/2020/06/16/baldassi-and-others-v-france-criminal-convictions-of-bds-activists-violate-freedom-of-expression-under-the-european-convention-on-human-rights/, (last accessed 24 June 2020). Kai Ambos, 'Freedom in the political struggle for opinion: The ECtHR judges on *BDS*', 16 June 2020, available at verfassungsblog.de/freiheit-im-politischen-meinungskampf/, (last accessed 24 June 2020). See also: Case Analysis, the Global Freedom of Expression, Columbia University available at: <https://globalfreedomofexpression.columbia.edu/cases/baldassi-others-v-france/>; Robert Wintemute, *Baldassi & Others v. France: Article 10 protects the right to call for a boycott of goods from Israel*, *Strasbourg Observer*, 17 July 2020 available at: <https://strasbourgobservers.com/2020/07/17/baldassi-others-v-france-article-10-protects-the-right-to-call-for-a-boycott-of-goods-from-israel/>; Andrea Longo, *The Use of Boycott as a Tool to Protect Fundamental Norms of International Law: the Baldassi Decision*, in "Diritti umani e diritto internazionale, Rivista quadrimestrale" 2/2021, pp. 489-499, doi: 10.12829/101657 available at: <http://www.sidi-isil.org/wp-content/uploads/2021/08/Osservatorio-Longo-SIDI.pdf>

¹¹³ *Baldassi and Others v. France*, nos. 15271/16 and 6 others, ECHR 11 June 2020, para 64.

situation in the occupied Palestinian territory, and are essential in a democratic society. To reiterate, “Article 10-2 leaves little room for restrictions on freedom of expression in the area of political discourse or matters of general interest.”¹¹⁴

77. Furthermore, the ECtHR grants a **reinforced protection to actions conducted by associations and activist groups**. As the Court held, “*in a democratic society even small and informal campaign groups [...] must be able to carry on their activities effectively and [...] there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest*”.¹¹⁵ As a result, “*“political expression”, including expression on matters of public interest and concern, requires a high level of protection under Article 10*”.¹¹⁶

78. Similarly, **Article 11 ECHR** lays down the content and scope of the freedoms of peaceful assembly and association:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

79. 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 processions,¹¹⁷ static assemblies or sit-ins¹¹⁸ and both public and private events,¹¹⁹ whether formal or informal.

80. 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*”.¹²⁰ In this regard, it held that “[s]uch a link is **particularly relevant where the authorities’ intervention against an assembly or an association**

¹¹⁴ Baldassi and Others v. France, nos. 15271/16 and 6 others, ECHR 11 June 2020, para 78.

¹¹⁵ ECtHR, *Steel and Morris v. United Kingdom*, Application No. 68416/01, 15 February 2005, para 89.

¹¹⁶ *Ibid.*; see also ECtHR, *Renaud v. France*, App. No. 13290/07, 25 February 2010, para 33, in which the Court held that in such cases where the contested speech is part of a debate of public interest and emerges from an activist political action, the margin of appreciation of national authorities with regard to the necessity of the restrictive measure on the speech concerned is particularly limited: “*Les propos litigieux trouvent par conséquent leur place dans un débat d'intérêt général et relèvent de l'expression politique et militante, de sorte que l'on se trouve dans un cas où l'article 10 exige un niveau élevé de protection du droit à la liberté d'expression. Il en résulte que la marge d'appréciation dont disposaient les autorités pour juger de la « nécessité » des sanctions prononcées contre le requérant était particulièrement restreinte (voir, entre autres, Lingens c. Autriche, 8 juillet 1986, § 42, série A no 103, Steel et Morris c. Royaume-Uni, no 68416/01, § 90, CEDH 2005-II, Mamère, précité, § 25, Lindon, Otchakovsky-Laurens et July, précité, §§ 46 et 56, et Brésilier c. France, no 71343/01, § 41, 11 avril 2006).*”

¹¹⁷ ECtHR, *Christians against Racism and Fascism v. the United Kingdom*, Application No. 8440/78, 16 July 1980.

¹¹⁸ ECtHR, *G. v. Germany*, Application No. 13079/87, Commission decision, 6 March 1989, para 60.

¹¹⁹ ECtHR, *Rassemblement jurassien et Unité jurassienne v. Switzerland*, Application No. 8191/78, 10 October 1979, para 17.

¹²⁰ ECtHR, *Ezelin v. France*, Application No. 11800/85, 26 April 1991, para 37.

was, at least in part, in reaction to views held or statements made by participants or members".¹²¹

81. In the case at hand, it is clear that there is a strong correlation between the aforementioned articles, since the Cities of Vienna and Graz have interfered with both the freedoms of expression and peaceful assembly of the *BDS movement*, precisely as a reaction to their political views.

82. 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 favorable environment in order for everyone to participate in public debate and express their opinions and ideas without fear.¹²²

In the case at hand, the City of Vienna acted in grave disregard of both these obligations.

A. Violation of the negative obligation

83. 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 at all levels of the public administration**, therefore including local councils.

84. 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. The restriction must be:

- I) prescribed by law:¹²³ any interference with the exercise of these freedoms must be grounded into national law; given the relevance of the freedoms of expression, association and assembly, any restriction to these rights should always receive the democratic legitimacy derived from parliamentary works and debates;
- II) 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 and rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary;¹²⁴
- III) necessary in a democratic society.¹²⁵

85. In the present case, the Vienna and Graz City Councils have arbitrarily interfered with *BDS Austria* members' and supporters' freedoms by adopting the *motion* equating *BDS* to a form of anti-

¹²¹ ECtHR *Stankov and the United Macedonia Organisation Ilinden v. Bulgaria*, Applications Nos. 29221/95 and 29225/95, 2 October 2001, para 85.

¹²² ECtHR, *Dink v. Turkey*, Applications Nos. 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09, 14 September 2010, para 137.

¹²³ ECtHR, *Gawęda v. Poland*, Application No. 26229/95, 14 March 2002; ECtHR, *The Sunday Times v. the United Kingdom*, Application No. 6538/74, 26 April 1979.

¹²⁴ ECtHR, *The Observer and The Guardian v. the United Kingdom*, Application No. 13585/88, 24 October 1991.

¹²⁵ ECtHR, *Długołęcki v. Poland*, Application No. 23806/03, 24 February 2009; ECtHR, *Tolstoy Miloslavsky v. the United Kingdom*, Application no. 18139/91, 13 July 1995.

Semitism. The **Vienna and Graz City Councils** – and by extension, Austria – are therefore **responsible for such interference**.

86. The motion clearly **does not meet the three-part test**.

1. As a matter of fact, the *motion* is a piece of soft law. The effects that it generates are therefore **not prescribed by law**. As a consequence, since the *Volkskundemuseum* relies upon this *motion*, their cancellation of a scheduled event has no valid legal ground.
2. The interference is clearly **not aimed at safeguarding any of the legitimate interests** or values laid down in the three-part test. As pointed out in Section I of this opinion, the *BDS movement's* goals are fully legitimate since they are grounded in international law. The *BDS* clearly condemns all forms of racism, including anti-Semitism, in the strongest terms. Accordingly, their demands for equality and respect for international law and fundamental rights cannot be considered anti-Semitic. Even if the Vienna and Graz City Councils did not agree with the *BDS'* political agenda, this cannot be a permissible basis for an arbitrary interference with *BDS* supporters' rights to express their views freely.
3. The interference is **not necessary in a democratic society**. As demonstrated in the second section of this opinion, in a democratic society there is a particular value in ensuring that any individual or group – and *a fortiori* a group of human rights defenders such as the *BDS movement* – is able to receive and most importantly to impart information on issues of public interest. According to the ECtHR's case-law, an interference must be justified by a "pressing social need", and "proportionate to the legitimate aim pursued", i.e. the minimum degree of interference necessary to achieve the result. Having established that the *BDS movement* pursues a legitimate human rights agenda and categorically refuses all forms of racism, there is absolutely no indication that an interference with Palestine solidarity activists' fundamental freedoms is necessary and proportionate to pursue the legitimate aim of fighting against racial discrimination and particularly anti-Semitism.

B. Violation of the positive obligations

87. As mentioned above, article 10 ECHR doesn't involve only negative obligations, but also requires member States to adopt the so called 'positive obligations'. Such obligations can be described as 'obligations to do something'¹²⁶, imposing on States the adoption of concrete measure of protection of the right at hand. The Strasbourg Court bases the positive obligations which it lays down on a combination of the substantial articles of the Convention and article 1 ECHR, which declares the general duty on States to 'secure to everyone within their jurisdiction the rights and freedoms' defined in the Convention. Accordingly, in the present case the positive obligations to take necessary measures to protect freedom of expression is drawn from article 10 in conjunction with article 1 ECHR¹²⁷.

¹²⁶ ECHR, *Belgian Linguistic case*, judgement of 23 July 1968.

¹²⁷ ECHR, *Vgt Verein Gegen Tierfabriken v. Switzerland*, Judgement of 28 September 2001.

88. It follows that the responsibility of contracting States arises not only because of direct violations or restrictions by national authorities (negative obligations), but also when **the breach of the freedom of expression stems from States inaction.**
89. In the case at hand, the Vienna and Graz City Councils have also clearly **failed to adopt the appropriate measures** to ensure that *BDS Austria's* members and supporters could express and impart their ideas and opinions in a safe environment. The Vienna and Graz City Councils' interference is based on the *motion* and has thus attached a stigma to the *BDS movement* and to all its supporters. Given the grievance of the accusation of anti-Semitism, the Vienna and Graz City Councils are seriously undermining *BDS Austria*, comprising of all its members and supporters, the right to speak out freely, without the fear to be shamefully accused of being anti-Semite.
90. It further indirectly interfered with *BDS Austria's* members' and supporters' freedoms by not adopting an appropriate legal framework aimed at protecting the rights to freedom of expression, association and assembly, instead creating a political framework enabling private entities to refuse any collaboration or contact with *BDS Austria*.
91. *The Artis International cinema's* cancelling of a scheduled première screening, allegedly citing the *motion* at hand in the present case, is a direct consequence of the violation of by Austrian authorities of their positive obligation to establish a legal framework that creates an enabling environment for human rights defenders, such as *BDS* activists, to carry out their work.

CONCLUSION

92. In conclusion, in the present memo we argued that:

- I. the *BDS movement* pursues a legitimate human rights agenda that is based on the respect for international law and fundamental rights;
- II. the Vienna and Graz City Councils violated both their negative and positive obligations arising from Articles 10 and 11 ECHR.

93. The '*anti-BDS motions*' at hand, which *de facto* narrow the scope of the human rights to freedom of expression, association and assembly of a group of human rights defenders, were adopted solely on the basis of a presumptuous allegation of anti-Semitism, by completely and deliberately ignoring *BDS Austria's* use of peaceful tools to advance human rights as well as its advocacy and awareness-raising activities. The motions are an **unreasonable, disproportionate and unlawful restriction** on the *BDS Austria* members' aforementioned rights, both as individuals and as a collective, and therefore **violates Austria's obligations under international and regional human rights law**.

94. Accordingly, we call on the Vienna and Graz City Councils:

- a. to repeal the motions immediately;
- b. to ensure to *BDS Austria* (comprising all its members and supporters) as well as other advocates of Palestinian human rights the full enjoyment of their rights to freedom of expression, assembly and association;
- c. to promote an enabling environment for human rights defenders, including *BDS Austria*, to carry out their human rights work.

SIGNATURES

Amsterdam, The Netherlands, January 2022.

Xavier Dupré De Boulois

Professor of Law of Fundamental Rights and Freedoms at the Université Paris 1 Panthéon-Sorbonne.



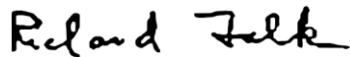
Eric David

Emeritus Professor of International Law at the Université Libre de Bruxelles (ULB), President of the Centre of international law (ULB).



Richard Falk

Emeritus Professor of International Law at Princeton University, and Chair of Global Law, Faculty of Law Queen Mary University London.



John Reynolds

Lecturer of Public International Law and Programme Director of the International Justice LL.M at the National University of Ireland Maynooth.



ANNEX

(Un official Translation via deepl.com)

Beschluss { Resolutions) application

of the Communities Peter Florianschütz (S:PO), David Etlingssohn (GRÜNE),
Mag. Gerald Ebinger (FPÖ), Mag. Manfred Jurczka (ÖVP) and
Christoph Wiederkehr, BA (NEOS)

brought to the post no. of the 27 day order in the meeting of the Vienna City Council „ri
21.6.2013

regarding no cooperation with the anti-Semitic BDS movement

(„boycott, divestment and sanctions“)

We note with concern the increase in anti-Semitic external movements in our society. The BDS (Boycott, Divestment and Sanctions) campaign plays a prominent role in this. Neither the objectives of the BDS campaign nor the anti-Semitic sentiment that accompanies it are compatible with a democratic, respectful and open city. The City of Vienna should therefore take all possible steps to send a clear signal against anti-Semitism and not support the BDS movement under any circumstances,

Therefore, in accordance with § 27 of the Rules of Procedure, the members of the municipal councils shall
of the Municipal Council of the City of Vienna the following

Resolution Antrag

The Vienna City Council shall resolve:

The city of Vienna

- strongly condemns widespread anti-Semitism.
- opposes the anti-Semitic BDS campaign („boycott, divestment and sanctions“).
- does not provide municipal premises for BDS campaign: or events, exhibitions or demonstrations that pursue the goals of BDS.
- Does not support events that promote BDS.

In formal terms, immediate approval is required.

Vienna, on 27.6.2018

ANNEX

Beschluss- (Resolutions-)Antrag

der GemeinderätInnen Peter Florianschütz (SPÖ), David Ellensohn (GRÜNE),
Mag. Gerald Ebinger (FPÖ), Mag. Manfred Juraczka (ÖVP) und
Christoph Wiederkehr, BA (NEOS)

eingebraucht zur Post Nr. 27 der Tagesordnung in der Sitzung des Wiener Gemeinderates am
27.6.2018

betreffend **keine Zusammenarbeit mit der antisemitischen BDS-Bewegung**
(„boycott, divestment and sanctions“)

Mit Sorge stellen wir die Zunahme antisemitischer Äußerungen in unserer Gesellschaft fest. Eine herausgehobene Rolle spielt hierbei die BDS-Kampagne (Boycott, Divestment and Sanctions). Weder die Zielsetzung der BDS-Kampagne noch die antisemitische Stimmungsmache, die mit dieser einhergeht, sind vereinbar mit einer demokratischen, respektvollen und offenen Stadtgesellschaft. Die Stadt Wien soll deshalb alle Möglichkeiten ergreifen, ein deutliches Zeichen gegen Antisemitismus setzen und die BDS-Bewegung keinesfalls unterstützen.

Die gefertigten GemeinderätInnen stellen daher gemäß § 27 Abs. 4 der Geschäftsordnung des Gemeinderates der Stadt Wien folgenden

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Der Wiener Gemeinderat wolle beschließen:

Die Stadt Wien

- verurteilt den weitverbreiteten Antisemitismus aufs Schärfste.
- stellt sich gegen die antisemitische BDS-Kampagne („boycott, divestment and sanctions“).
- stellt städtische Räume nicht für BDS-Kampagnen oder Veranstaltungen, Ausstellungen oder Demonstrationen zur Verfügung, welche die Ziele von BDS verfolgen.
- unterstützt keine Veranstaltungen, die für BDS werben.

in formeller Hinsicht wird die sofortige Abstimmung verlangt.

Wien, am 27.6.2018