Grounds for Judicial Review

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

The Queen on the application of

AL-HAQ

Claimant

-v-

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS (1)
THE SECRETARY OF STATE FOR DEFENCE (2)
THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM (3)

Defendants

DETAILED GROUNDS

Page references are to the Claimant's Bundle (CB)

Introduction.

1. This challenge concerns the United Kingdom's ongoing failure to meet its obligations under customary international law in respect of Israel's actions since the launch of Operation Cast Lead in Gaza on 27 December 2008. The Claimant asserts that such failure is justiciable in municipal law and that the Defendants are liable before the domestic courts for that failure.

2. The Claimant is an independent Palestinian non-governmental human rights organisation based in Ramallah, West Bank, an occupied Palestinian territory (OPT). Al-Haq was established in 1979 to protect and promote human rights and the rule of law in the OPT and has special consultative status with the United Nations Economic and Social Council. It is *inter alia* the West Bank affiliate of the International Commission of Jurists based in Geneva, a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), and an NGO of considerable prominence and repute in the international legal community. In 2008, the Claimant submitted written evidence to the House of Commons Select Committee on International Development for its report on Development Assistance and the OPT.

3. Since Operation Cast Lead began, the Claimant has called repeatedly and publicly on many occasions for Israel to respect its obligations under international law and for the UK and other states to fulfil their legal duties in respect of those obligations.

4. Further particulars of the Claimant's standing in the international legal community and its role in documenting violations of the individual and collective rights of Palestinians are contained in the witness statement of Shawan Rateb Abdullah Jabarin submitted in support of this claim [CB 34-82].

5. In summary, the Claimant submits that the UK has four key obligations in customary international law arising from Israel's clear breaches of peremptory norms of international law. Those breaches are Israel's interference with the right of self determination of the Palestinian people, its acquisition of territory by force and its breaches of intransgressible principles of international humanitarian law. The obligations in customary international law on the UK which arise are:

(a) To denounce and not to recognise as lawful situations created by Israel's actions;

(b) Not to render aid or assistance or be otherwise complicit in maintaining the situation;

(c) To cooperate with other states using all lawful means to bring Israel's breaches to an end;

(d) To take all possible steps to ensure that Israel respects its obligations under the Geneva Conventions.

6. Since the Claimant's challenge concerns obligations arising in customary international law, it is - contrary to the bald assertion in the Treasury Solicitor's reply of 20 February 2009 to the Claimant's PAP letter [CB 116-117]- properly justiciable before the domestic courts since such obligations take effect at common law absent any statutory contra-indication: see eg. *Trendtex Trading Corp v. Central Bank of Nigeria* [1977] QB 529, 533. Nor is the Treasury Solicitor's assertion that the claims made are "wholly inapt for resolution in domestic proceedings" because they involve the actions of a foreign state and the conduct of foreign policy, a proper response to this challenge: see eg. *Kuwait Airways Corpn v. Iraqi Aiways Co (Nos 4 and 5)* [2002] 2 AC 883 at [22]-[23] (Lord Nicholls); *R (Abbasi) v. SSFCA* [2003] UKHRR 76 at [57] (Lord Phillips MR, as he then was). Rather, this claim concerns the *legality* of the UK's ongoing failures to comply with its obligations in the face of Operation Cast Lead, not the merits or expediency of the UK's foreign policy. As Richards LJ has noted, writing extra-judicially in relation to judicial review of matters concerning the conduct of foreign affairs[1],

> "When a legal challenge is made, the executive has to justify its position with detailed evidence and arguments; it cannot simply stick up a 'keep out' notice."

[1] "The International Dimension of Judicial Review"
www.judiciary.gov.uk/publications_media/speeches/2006/sp070606.htm

Hitherto the Defendants have signally failed to provide any detailed evidence or argument in response to the very detailed PAP letter submitted by the Claimant's solicitors, Public Interest Lawyers of 3 February 2009 [CB 83-104].

Factual Background.

7. On 27 December 2008 Israel launched Operation Cast Lead, an intensive bombardment of the Gaza strip area of the Occupied Palestinian Territories (OPT) followed by a full ground assault.

8. That assault has led to more than 1,285 Palestinian deaths between 27 December 2008 and 21 January 2009, including at least 895 civilians and 111 women[2]. The Disasters Emergency Committee reports that at least 412 children have been killed and 1865 injured, and that at least 4,000 residences have been completely destroyed and another 17,000 partially destroyed [3]. While numbers remain necessarily imprecise, given the conditions, on 6 February 2009 Medical Aid for Palestinians[4] put the death toll at "nearing 1,500" and the number of seriously injured Gazans at 5,450[5].

9. Despite the UN providing Israel with GPS coordinates of all of its installations in Gaza, and clearly marking them as such, on 5 January 2009 a UNRWA school sheltering civilians was directly bombarded[6], and on 15 January 2009 the central

[2] From the Palestinian Centre for Human Rights Weekly Report summary on 22 January 2009 accessed 23 February 2009 at http://www.pchrgaza.org/files/W_report/English/2008/22-01-2009.htm.
Further PCHR reports have documented at least 15 deaths, and at least 76 more injured people, including 27 children, since that date. All data from Reports available at http://www.pchrgaza.org/files/W_report/English/2007/weekly2007.html accessed 23 February 2009.
[3] See http://www.dec.org.uk/item/200 accessed 23 February 2009
[4] A British NGO of which Baroness Helena Kennedy QC is President of the Board of Trustees
[5] MAO Gaza Diary http://www.map-uk.org/regions/opt/gaza_diary/ accessed 23 February 2009.
[6] UN OCHA Situation Report No.4 http://www.reliefweb.int/rw/rwb.nsf/db900sid/MUMA-7N32NL?OpenDocument accessed 23 February 2009

UN compound, where 700 civilians were sheltering, was hit with white phosphorous shells[7]. Other UN buildings have similarly been attacked.

10. Investigations into the exact toll of the destruction in Gaza are ongoing, but the Palestinian Centre for Human Rights' examinations had by 30 January 2009 revealed the destruction of at least 28 public civilian facilities, including fishing harbours and the buildings of the Palestinian Legislative Council, 30 mosques, 121 industrial and commercial workshops and 5 concrete factories, 60 police stations, 5 media institutions and 2 health institutions. 29 educational institutions have been at least partially destroyed, as well as 21 private projects including hotels and wedding halls, and the offices of 10 charitable societies. Thousands of donums[8] of agricultural land have been razed[9].

11. There have been multiple credible reports of the targeting of ambulances and hospitals, with the Palestinian Red Crescent (under the ICRC umbrella) reporting the IDF shooting at health emergency workers attempting to treat injured people, and at ambulances carrying the wounded[10]. Medical Aid for Palestinians reports at least 6 ambulance drivers killed and 24 ambulances damaged or destroyed[11].

12. On 4 January 2009 an ambulance was hit by a tank shell carrying flechettes. Two paramedics were seriously injured, one later died. Flechettes are 4cm long darts, sharp at the front and with four fins at the back. 5,000 - 8,000 darts are packed into each 120 mm shell, usually fired, as here, by tanks. On firing the shell explodes, dispersing the flechettes over a 100 by 300m area. Amnesty International is currently investigating several deaths and injuries of civilians from flechettes in Gaza. It has recognised their use in dense civilian areas as a war

---

[7] "UN Headquarters in Gaza hit by Israeli white Phosphorous shells" http://www.timesonline.co.uk/tol/news/world/middle_east/article5521925.ece
[8] A unit of area equivalent to approximately 1000 square metres (1 donum = 1000 sqm).
[9] *Supra*, note 2.
[10] PRCS Gaza Situation Update at http://www.reliefweb.int/rw/rwb.nsf/db900sid/EDIS-7N4QGB?OpenDocument accessed 23 February 2009
[11] *Supra*, note 5.

crime[12]. Further, Amnesty International has reported the use of previously unseen weapons which disperse 2mm by 4mm sharp edged metal cubes, able to penetrate even thick metal doors, "designed to cause maximum injury" and found embedded in the dead bodies of civilians, including a 13 year old girl[13]. By their very nature, such weapons are indiscriminate.

13. According to statements gathered by the ICRC and UN, one incident on 4 January in Zeitoun saw the evacuation of 110 Palestinians (half of whom were children) by the IDF to a house where they were then shelled twenty four hours later by IDF soldiers, and medical teams prevented from entering the area to evacuate the wounded[14].

14. There have been widespread reports of intensive use by the IDF of white phosphorous bombs throughout the Gaza strip, and Israel has recently admitted its use in Gaza operations[15]. Carrier shell fragments have been found in residential homes[16]. Protocol III (on Prohibitions or Restrictions on the Use of Incendiary Weapons) to the Convention on Certain Conventional Weapons, Geneva 1980, prohibits "in all circumstances" the use of incendiary weapons such as white phosphorus – which sticks to human skin and burns through to the bone – in attacks involving civilians.

15. In a statement adopted on 12 January 2009 (A/HRC/S-9L.1/Rev.2), the UN Human Rights Council indicated that it

---

[12] All information from "Fuelling Conflict: foreign arms supplies to Israel/Gaza", Amnesty International, 23 February 2009, accessed 23 February 2009
[13] *ibid*
[14] UN Office for the Coordination of Humanitarian Affairs "Protection of civilians weekly report 1-8 January 2009" accessed 23 February 2009 at http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_2009_01_08_english.pdf
[15] as per Israeli spokesman Mark Regev on the BBC Today Programme 23 February 2009 where he stated "we never denied using white phosphorous" [7.54am], and when asked whether it had been used he replied "it has been" http://news.bbc.co.uk/today/hi/today/newsid_7846000/7846351.st.
See also "Phosophorous wounds alarm Gaza" at http://news.bbc.co.uk/1/hi/world/middle_east/7848768.stm accessed 23 February 2009.
[16] *Supra*, note 12.

"strongly condemns the ongoing Israeli military occupation carried out in the OPT, particularly in the Gaza strip which have resulted in massive violations of human rights of the Palestinian people and systematic destruction of the Palestinian infrastructure.

…

5. demands the occupying power, Israel, to stop the targeting of civilians and medical facilities and staff

…

8. Calls for urgent international action to put an immediate end to the grave violations committed by the occupying power Israel in the [OPT] in compliance with international human rights law and international humanitarian law".

16. The UN Secretary General on 20 January 2009 reiterated that he had "condemned from the outbreak of this conflict the excessive use of force by the Israelis in Gaza".

17. The International Criminal Court Prosecutor has begun a preliminary analysis of evidence of war crimes committed by Israel during Operation Cast Lead[17].

18. Israel commenced a unilateral ceasefire on 18 January 2009. There have been several violations by both Hamas and Israel since that date[18]. Latest reports by the competent bodies and credible NGOS indicate that although the conflict has continued with less intensity, Israel has continued to use disproportionate force with the result that there are continuing civilian casualties[19].

---

[17] "Prosecutor looks at ways to put Israeli officers on trial for Gaza 'war crimes' http://www.timesonline.co.uk/tol/news/world/middle_east/article5636069.ece

[18] See for example UN OCHA "Protection of civilians weekly report" 11-17 February 2009 accessed 23 February 2009 at http://domino.un.org/unispal.nsf/47d4e277b48d9d3685256ddc00612265/33e9b683dab4919185257563004cbe52!OpenDocument

[19] See for example PCHR Weekly Report of 12-18 February 2009 at http://www.pchrgaza.org/files/W_report/English/2008/19-02-2009.htm which reports the continued air bombardment of the strip, and the death of two Palestinian children

Before Operation Cast Lead

19. On 9 July 2004, the ICJ gave its advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004 p.136 (the Wall opinion) [CB 133-202]. This concerned Israel's decision of 14 April 2002 to construct a 'security fence' in three areas of the west bank, and later extended throughout the OPT.

20. The Opinion recognised that the UN has maintained responsibility for Palestine despite the termination of the mandate by the UN General Assembly in Resolution 181. The ICJ found Israel to have committed the following breaches:

    1. Israel settlements and the route taken by the wall breached:
        a. The inadmissibility of territory acquired by force (de facto annexation) [117, 121]
        b. The right of the Palestinian people to self determination [117-120, 122]
        c. The rule against altering the demographic make up of population in occupied territory GC IV [117-120]

    2. The wall's construction further breached IHL and human rights law in following ways
        a. The prohibition against demolition or requisition of property [132, 135]
        b. The enforcement of restrictions on the freedom of movement of the population [133, 134], impeding the right of free movement (art 12 ICCPR)
        c. The exercise of the rights to work, to health, to education and to an adequate standard of living under human rights law. [133]

The ICJ found that the obligations falling on other states were

1. not to recognise as lawful the illegal situation
2. not to render aid or assistance in maintaining it
3. to cooperate with a view to putting an end to alleged violations
4. to ensure any impediment of self determination is brought to an end [159]
5. to ensure reparation will be made
6. to ensure compliance with the Geneva conventions [159]
7. to prosecute or extradite authors of grave breaches.

21. Palestine's boundaries were determined to be the territory beyond the armistice lines of 1949 occupied by Israel since 1967 (see General Assembly resolution 43/177 legitimising the unilateral declaration of independence of a Palestinian state in 1988). The Gaza strip is within that territory. It is 25 miles long and 4-6 miles wide, and houses approximately 1.3million people. It is one of the most densely populated areas in the world.

<u>The UK and Israel</u>

Arms Related Trading and other arms related activity.

22. Pursuant to litigation in *R (Saleh Hasan) v SS for Trade and Industry* [2008] EWCA 1311, the Secretary of State provided to the claimant in that litigation details of Standard Individual Export Licenses (SIELs) in respect of the sale of military equipment by the UK to Israel for the periods April – June 2006 and July – September 2006.

23. In the first quarter of 2008, records show that there were approvals of SIELs to Israel of £18,847,795 (and other items leading to a total figure of £19,779,642) for

arms exports[20]. These compare with £12 million[21] in the whole of 2004, £24 million in the whole of 2005, £13.5 million[22] in 2006 and £7.5 million[23] in 2007. Items on that military list included components for aircraft military communications equipment, general military aircraft components, military firing sets, technology for the use of weapons sights, and military communications components. The total figure is eighteen times that for the second quarter of 2006[24], and four times that from the third quarter of that year[25], the periods in respect of which the Secretary of State provided details in the *Saleh Hasan* litigation, and a clear escalation which represents in one quarter almost a doubling of approvals for the whole of 2004.

24. Controversy remains over the range of military components supplied by UK based companies which have been found on Israel's Apache helicopters[26]. Such helicopters were involved in attacks on Gaza pursuant to Operation Cast Lead and may have been used since. Equally there is controversy as to the supply of naval components; the Israeli naval forces have been involved in attacks during Operation Cast Lead[27]. Treasury Solicitors acknowledge in their reply to the

---

[20] Department for Business, Enterprise and Regulatory Reform: Strategic Export Controls Quarterly Report January – March 2008, page 58 (http://www.fco.gov.uk/resources/en/pdf/4103709/5476465/5550005/5550012/export-1st-2008)

[21] Department for Business, Enterprise and Regulatory Reform: Strategic Export Controls Annual Report 2004, page 72 (http://www.fco.gov.uk/resources/en/pdf/strategic-export-controls-2004-5)

[22] Department for Business, Enterprise and Regulatory Reform: Strategic Export Controls Annual Report, pages 511-512 (http://www.fco.gov.uk/resources/en/pdf/6080789/2006_annual_report_annex)

[23] United Kingdom Strategic Export Controls Annual Report 2007, page 118 (http://www.fco.gov.uk/resources/en/pdf/4103709/2007-strat-exp-cont-data)

[24] Department for Business, Enterprise and Regulatory Reform: Strategic Export Controls Quarterly Report April – June 2006 (http://www.berr.gov.uk/files/file34276.pdf)

[25] Department for Business, Enterprise and Regulatory Reform: Strategic Export Controls Quarterly Report July – September 2006 (http://www.berr.gov.uk/files/file36415.pdf)

[26] Amnesty International "Fuelling Conflict: Foreign Arms Supplies to Israel/Gaza" (AI Index: MDE 15/012/2009), 23 February 2009. See also Bejamin Joffe-Walt, "Made in the UK, bringing devastation to Lebanon - the British parts in Israel's deadly attack helicopters", *The Guardian* (29 July 2006).

[27] United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) Field Update 10 – 16 February (http://www.ochaopt.org/gazacrisis/admin/output/files/ocha_opt_gaza_humanitarian_situation_report_2009_02_16_english.pdf)
See also Field Update for the 6 – 9 February (http://www.ochaopt.org/gazacrisis/admin/output/files/ocha_opt_gaza_humanitarian_situation_report_2009_02_16_english.pdf)
See also Mark Tran, "Israel Accused of Ramming Gaza Aid Boat", *The Guardian* (30 December 2008)

Claimant's PAP letter that licensed exports in 2008 included an item of "high value naval communications equipment" [CB 117].

25. Many UK companies have links with Israel and provide military components, such as the Martin Baler aircraft company which provides Golan industries with crash worthy helicopter seats, and The Airtechnology Group with supplies parts to IMI for the Merkavea Tank. BAE Systems has provided head-up displays for F16s. Many other UK arms firms have clearly documented relationships[28].

26. Serious concerns exist over the way that UK-produced arms can find their way to Israel via 'incorporation' in military equipment in a third country. In the second quarter of 2008, 16 SIELs for incorporation were listed, amounting to £755,924[29]. In 2006 52 SIEL's for incorporation were listed worth £3 million[30] and in 2007 there were 78 licences listed worth £3 million.[31] In July 2005 the Secretary of State for Defence, Foreign and Commonwealth Affairs, International Development and Trade and Industry had expressed this concern:

> "43. The lack of information about incorporation OIELs is worrying as it means we only have a partial picture of how British components and technology are being used abroad…"[32]

27. The UK Ministry of Defence has signed contracts with Israel (among many and wide ranging UK arms imports from Israel) for the purchase of 26,010 ground launched 20 cluster shells in 2003, and another 3009 in 2004, the purchase of Simon door-breaching grenades from Rafael (an Israeli arms company), and the awarding of a contract for armour protection for Chinook helicopters to Permali

---

[28] *ibid* note 23. See also Campaign Against the Arms Trade "UK Arms Companies known to have Supplied Israel" (http://www.caat.org.uk/issues/israel-suppliers.php)
[29] Department for Business, Enterprise and Regulatory Reform: Strategic Export Controls Quarterly Report April – June 2008, pages 71 - 72 (http://www.fco.gov.uk/resources/en/pdf/pdf1/export-controls)
[30] Source: Department for Business, Enterprise and Regulatory Reform: Strategic Export Controls Quarterly Reports
[31] *ibid*
[32] Quadrapartite Committee Report: Strategic Export Controls, HMG's Annual Report for 2003, Licensing Policy and Parliamentary Scrutiny, First Joint Report of Session 2004-05, para 43

Gloucester UK, who produced them under collaborative venture with Israel's Plasan Sasa.[33] Although difficult to obtain more recent statistics, the Stockholm International Peace Research Institute estimates that UK arms imports from Israel in 2007 totalled $26 million.[34]

28. At the most recent DSEI arms fair in 2007, eight Israeli military industries exhibited their wares, including Plasan Sasa and Rafael. The fair is subsidised by the UK taxpayer, as is its policing. The UK government plays an integral role in inviting and hosting delegations and providing the armed forces for support and demonstrations. It is notable that previously invitations have not been extended to states such as Indonesia and Somalia in light of their human rights records.[35]

The EU-Israel Association Agreement.

29. The EU-Israel Association Agreement (The Agreement) has been in force since June 2000. In 2007 the Agreement formed the basis of EU-Israel trading relations, whereby EU goods exported to Israel totalled 14 billion Euros, and Israel's exports to the EU amounted to 11.3bllion Euros. Services trade amounted to 5billion Euros, with a small surplus for the EU.

30. The Agreement is the legal basis for the EU Israel Action Plan, which includes a financial assistance element. Israel is eligible for 14 million Euros in EC financial cooperation over the next 7 years. The current Action Plan[36] includes the aim to work towards a comprehensive settlement of Middle East conflicts and specifically provides:

> "While recognising Israel's right of self-defence, <u>the importance of adherence to international law</u>, and the need to preserve the perspective of

[33] "Arms exports and collaborations: the UK and Israel", Campaign Against the Arms Trade, June 2005
[34] http://armstrade.sipri.org/arms_trade/values.php
[35] http://news.bbc.co.uk/1/hi/uk/3084090.stm
[36] http://ec.europa.eu/world/enp/pdf/action_plans/israel_enp_ap_final_en.pdf

a viable comprehensive settlement, minimising the impact of security and counter-terrorism measures on the civilian population, facilitate the secure and safe movement of civilians and goods, safeguarding, to the maximum possible, property, institutions and infrastructure" (emphasis supplied)

The Action plan also includes a general statement concerning shared values and the aim to "Work together to promote the shared values of democracy, rule of law and respect for human rights and international humanitarian law". (emphasis supplied).

31. The Recital to the Agreement affirms

"*the importance which the Parties attach to the principle of economic freedom and to the principles of the United Nations Charter, particularly the observance of human rights and democracy, which form the very basis of the Association."*

32. Article 2 of the Agreement provides that

Relations between the Parties, as well as all the provisions of the Agreement itself shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement"[37].

33. Article 79 further provides that:

"*1. The Parties shall take any general or specific measures required to fulfil their obligations under the Agreement. They shall see to it that the objectives set out in the Agreement are attained."*

[37] Euro-Mediterranean Agreement, establishing an association between the European communities and their member states and Israel, Official Journal of the European Communities 21.6.2000, L 147/32 to L 147/156.

2. If either Party considers that the other Party has failed to fulfil an obligation under the Agreement, it may take appropriate measures …".

34. A vote scheduled for 3 December 2008 in the EU parliament on extending and upgrading the agreement was suspended ostensibly because of a petition to this effect concerning Gaza. However, when asked by Chris Mullin MP on 19 January 2009 "How can we possibly justify allowing the Israelis preferential access to European markets, in view of the enormity of what they have done in Gaza and the relentless advance of the settlements across the West Bank on the 19th January"[38] David Miliband MP stated in reply that

> "the EU-Israel trade agreement is matched by an EU-Palestine trade agreement. It is vital that the access that the Palestinians are guaranteed under that agreement is fulfilled. It is also important that the produce from settlements does not get the benefit of the EU-Israel trade agreement, which was designed to ensure preferential access for Israel and not for the settlements, which we recognise as occupied Palestinian territory. It is for the benefit of both that the agreements that were last signed in 2004 are followed through."[39]

35. The petition concerning Gaza was debated before the European Parliament on 18-19 February 2009, and a resolution passed calling for a damage assessment in Gaza and an in-depth evaluation of the needs of the Gaza population.[40]

Legal Framework

The role of customary international law in the UK

[38] 19 January 2009 Hansard Col 515
[39] *Ibid* - David Miliband MP in the House of Commons.
[40] European Parliament Resolution RC\709399EN.doc (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P6-RC-2008-0066+0+DOC+PDF+V0//EN)

36. It has been well established since the decision in *Buvot v Barbut* in 1736 [3 Burr 1481], that the rules of customary international law are incorporated "into the English law automatically and considered to be part of English law unless they are in conflict with an act of parliament" [*Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 at 553]. In *R v Jones (Margaret)* [2006] UKHL 16 [2007] 1 AC 136 Lord Bingham stated that "the law of nations in its full extent is part of the law of England and Wales…I am content to accept the general truth of that proposition for present purposes" [at 11]

37. It is equally well established that such rules may be identified from state practice and *opinion juris*, ie. a "general and consistent practice of states followed by them from a sense of legal obligation": Lord Bingham in *R (ERRC) v. IO Prague* [2005] 2 AC 1 at [23]. Once identified, they form part of the common law, and bind decision makers accordingly.

38. Advisory opinions of the ICJ, although not creating *res judicata*, are declaratory of international law, and authoritative answers to the questions submitted to the Court. In the Wall case (main opinion summarised above at para 20) Judge Koroma stated in his separate opinion:

> "the Court's findings are based on the authoritative rules of international law and are of an *erga omnes* character…given the fact that all states are bound by those rules and have an interest in their observance, all states are subject to these findings" [separate opinion of Judge Koroma at para 8 page 205-206]

<u>Peremptory norms of customary international law</u>

39. Within the rules of customary international law, some principles have acquired a higher status. *Jus cogens* norms are defined in article 53 of the Vienna Convention on the law of treaties as those rules which are

> *"accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"*

40. In *Prosecutor v Furundzija* 121 ILR 213 it was recognised that

> "the most conspicuous consequence of this higher rank [of *jus cogens*] is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force" [at 153].

This passage was cited with approval as authoritative by Lord Bingham in *A v SSHD (No.2)* [2005] UKHL 71, [2006] 1 AC 221 at [33].

41. Peremptory norms give rise to obligations *erga omnes*, owed by and to the international community in general.

42. Two key principles with that jus cogens status were further enunciated in *Furundzija* and again cited by Lord Bingham. They are the principles "prohibiting the acquisition of territory by force and the forcible suppression of the right of peoples to self determination" [*Furundizja* at 147]. A further key principle with unquestionably such status is the norm of international humanitarian law prohibiting war crimes: *Prosecutor v. Kupreki*, ICTY, 14 January 2000, Case No. IT-95-16-T at [520].

Self determination and the Palestinians

43. General Assembly Resolution 2625 (XXV) enshrined the principle of self determination. The assertion that this right has an *erga omnes* character was held

to be “irreproachable” by the ICJ in the *East Timor Case* (ICJ reports 1995 p102 para 29)

44. In its Wall opinion, the ICJ confirmed that the existence of the “Palestinian people” is no longer an issue [at 118]. The Israelis recognised this in 1993, and the Israeli-Palestinian interim agreement of the West Bank and the Gaza strip of 28 September 1995 refers to the legitimate rights of the Palestinian people. “The Court considers that those rights include the right to self determination” [Wall opinion at 118].

45. The right of the Palestinian people to self determination has been the subject of consistent and authoritative recognition by the international community through the UN General Assembly (GA Res. 1514(XV) and 2625 (XXV) and on Palestine 2535(XXIV), 2628(XXV), 2672 C(XXV), since reaffirmed in countless resolutions.[41]

46. The legal consequences of that right are clear. Firstly, Palestine is a self-determination unit within the territorial boundaries discussed above. That territory’s integrity and unity must be respected, and its people must have permanent sovereignty over its natural resources.

47. Secondly, there is an obligation on all states to promote realisation of the right and respect it, in conformity with the UN Charter and the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights (Common Article 1).

48. Crucially, “every state has the duty to refrain from any forcible action which deprives people referred to [in UNGA Resolution 2625] of their right to self determination” [Wall opinion at 88].

[41] UN General Assembly Resolution A/RES/ES-10/14 of 12 December 2003

49. In the Wall opinion, the Court found that the construction of the Wall was tantamount to de facto annexation of Palestinian land, and severely impedes the Palestinian's exercise of the right to self determination [at 121-122].

50. In the Claimant's submission, there is an unanswerable case that Israel has been and continues to be in serious breach of the right of self-determination of the Palestinian people by reason of its actions in Gaza.

The prohibition on the acquisition of territory by force in the context of Palestine

51. Resolution 2625 also emphasised that "no territorial acquisition resulting from the threat or use of force shall be recognised as legal". In the Wall opinion the ICJ declared that this was a corollary of the principles on the use of force incorporated in the UN Charter, which reflect customary international law [see also the *Nicaragua v USA* case, ICJ reports 1986 p3, 76 ILR 349].

52. The occupation of Palestinian territories since 1967 has been recognised as contrary to this peremptory norm of international law, and thus illegal, by the UN Security Council (see Resolution 3314). It has repeatedly called for Israel to withdraw (resolution 242 (1967) and 338 (1973))[42] and prohibited any measures which purports to alter the character or status of the occupied Palestinian territories (OPT). Israel is thus in ongoing breach of *jus ad bellum* for its illegal occupation of Gaza.

The Intransgressible principles of international humanitarian law

[42] For the drafting history of SC Res. 242 which indicates that the Security Council had no intention of endorsing Israeli annexation of any part of the West Bank or Gaza Strip, see J.McHugo, "Resolution 242: A Legal Reappraisal of the Right-Wing Israeli Interpretation of the Withdrawal Phrase with Reference to the Conflict between Israel and the Palestinians", 51 *ICLQ*, 2002, 851-882.

53. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* ICJ Reports 1996 p226 the Court stated that

> "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and elementary considerations of humanity [that they must be] observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (p.257 at 79)

54. In Its Wall opinion, the Court found that these principles incorporate obligations *erga omnes* [at 157]. They can thus be considered akin to other peremptory norms. They are "elementary considerations of humanity" (*Nicaragua* case p.114 para 218) to which the conventions merely give specific expression.

55. In that respect, it is axiomatic that civilians may never be made the target of attacks (Nuclear Weapons opinion at 78).

56. The Trial Chamber II of the ICTY in *Prosecutor v Kupreki* 14 January 2000 stated clearly that:

> "most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character" [at 520] (underlining added)

57. Grave breaches of the Geneva Conventions, under article 147 Geneva Convention IV, necessarily constitute breaches of peremptory norms. Article 147 prohibits, in the case of protected persons:

"wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

State responsibility for breaches of peremptory norms

58. Where a breach of a peremptory norm is serious, Chapter Three of the International Law Commission's articles on State Responsibility is engaged:

Article 40. Application of this chapter
1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

59. For the breach to be 'serious' the breach must be of a flagrant nature "amounting to a direct and outright assault on the values protected by the rule" [Commentary to the ILC Draft Articles, James Crawford, 2002, Article 40 para 8]. Factors indicative of seriousness include intent to violate the norm, the number of individual violations, or the gravity of its consequences for the victims [Commentary para 8].

60. Article 41 then sets out the consequences of such a serious breach for third states:

Article 41. Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

61. This places one positive obligation, and two negative ones, on all states.

62. The positive obligation under paragraph 1 is to cooperate to bring to an end serious breaches. It may involve institutional or non institutional cooperation [*R (Binyam Mohammed) v SSFCO* [2008] UKHL 2048 at 178]. There is a clear duty to take all possible steps (from the customary law rule of due diligence) to end the breaches though cooperation, whatever form that may take.

63. The first negative obligation under paragraph 2 is one of non recognition. The duty identified by Lord Bingham in *A No.2* to reject the use of torture evidence [at 34] was explained by Lord Thomas in *Binyam Mohammed* as "one aspect of the duty…to deny recognition and effect to a state of affairs brought about in violation of the primary rule" [at 180].

64. The duty was elaborated upon in the earlier Namibia opinion (*Legal Consequences for States of the Continued Presence of South Africa in Namibia* ICJ Reports 1971 p16), where it was treated as flowing from customary international law. It includes abstention from any treaty or diplomatic relationship which might amount to or imply recognition of the illegal situation created by the serious breach [at 123]. It further imposes "the obligation to abstain from entering

into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the territory" [at 124]. In the dissenting opinion of Judge Petren in that case, it was suggested that this was a de facto obligation to mount economic sanctions.

65. The second negative obligation is not to render aid or assistance in maintaining the situation created by the breach, whether or not the breach is continuing. This was recognised in *Binyam Mohamed* at [173]. This is said to go beyond the duty laid out in article 16 ILC (see below) in that it applies after the fact.

66. As to the elements of "aid or assist", the prohibition is to be read "in connection with" the same words in article 16 [Paragraph 11 of the commentary to article 41]. It was felt unnecessary to set out that knowledge of the wrongful act is required, because "it is hardly conceivable that a state would not have had notice of the commission of a serious breach".

67. The obligation is not simply an extension of the duty of non recognition,

> "it has a separate scope of application in so far as actions are concerned which would not imply recognition of the situation created…this separate existence is confirmed for example in the security council's resolutions prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule" (Paragraph 12 of the Commentary). (emphasis added)

68. The separate opinion of Judge Ammoun in the Namibia case set out in detail what he considered such an obligation to entail, including the end of any supply of arms or technical or scientific military assistance to the state in breach [at 17], and the end of any assistance at all to South Africa (including financial or economic assistance) which would thereby further its designs in Namibia and tighten its hold [at 19]. The duty is a broad one.

69. Articles 40- 41 (together with Article 16) of the ILC articles are properly considered codificatory of customary international law: see *A (No.2)* where Lord Bingham relied upon Articles 40-41 in considering the consequences of the *jus cogens* prohibition on torture for the UK government [at 34]. Article 41 is as an accurate statement of a state's responsibilities under customary international law, and a "fairly cautious version of the subject matter present in [Brownlie, in] the first edition of 1966": Brownlie, *Principles of Public International Law*¸ 7th Ed., 2008, 514.

The Geneva Conventions and the obligation to respect and to ensure

70. As a High Contracting Party to the Geneva conventions, the UK has further duties than those envisaged under the ILC articles, which arise when it is made aware of another state breaching (or arguably about to breach) any of its Convention obligations, including but not restricted to breaches of the intransgressible principles of international humanitarian law.

71. Common Article 1 of the Conventions is stated by the ICJ to be derived from general principles of humanitarian law "to which the conventions merely give specific expression" [*Nicaragua* opinion at 220 p114] and is thus incorporated into the common law of the UK, and binding upon the government. The article states:

> *The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.*

72. The Judges in the Wall opinion found that

> "it follows from that provision that every state party to that Convention whether or not it is a party to a specific conflict is under an obligation to

ensure that the requirements of the instruments in question are complied with" [158 p.200]

73. Further, the customary law rule of due diligence involves a positive obligation on the UK to use all possible means to ensure that respect. The capacity of the UK to influence effectively the actions of those breaching the Conventions is clearly relevant to the reach of the obligation.

74. The UK must thus at a minimum actively take all possible steps to ensure compliance with the rules of the Convention, and react against any violations of those rules[43]. This necessarily entails denunciation of those violations (as forcefully put forward in the Report of John Dugard, Special Rapporteur of the UN Commission on Human Rights of 27 Feb 2004 E/CN.4/2004/6/Add.1 at [32]), and is an obligation which dovetails with the duty of non recognition of serious breaches of peremptory norms under article 41, crystallising in a requirement to avoid inferred assent from silence. More recently, Richard Falk, the current Special Rapporteur of the UN Commission on Human Rights stated:

> "The evidence of continuous and deliberate violation of that universally binding international treaty by Israel in its occupation of the Palestinian territory constitutes an ongoing grave situation that calls out for a unified response by the international community. It should be observed that article 1 of the Fourth Geneva Convention reads as follows: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". It is high time to heed the call of that provision."[44]

[43] "Action by the ICRC in the event of violations of international humanitarian law or other fundamental rules protecting persons in situations of violence" 87 IRRC 858 (June 2005), p396
[44] Report of Richard Falk, UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, 25 August 2008 (A/63/326), para 4

75. In the *Colozza* case [ECHR Series A No.89 (1985)] the ECtHR asked what more Italy could have done to make the applicant's right to be heard effective and examined steps taken [at 28]. The same approach is incumbent here:

> "It is difficult to reconcile the situation found by the Court with the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 (art. 6) are enjoyed in an effective manner"

76. The obligation applies "in all circumstances", and is thus unconditional.

77. Further, in the case of breaches of the Fourth Convention, the obligation is clarified and reinforced by article 146, which provides that

> *"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.*
> *Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own Courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ' prima facie ' case.*
> *Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.…"*

78. Article 147 defines those grave breaches, as set out above.

79. For the avoidance of doubt, the ICJ considers that the Fourth Geneva Convention is applicable in the OPT [Wall opinion at 101].

Complicity and Article 16

80. Article 16 of the ILC's articles on state responsibility, like articles 40- 41, codifies customary international law. It reads:

> *Article 16. Aid or assistance in the commission of an internationally wrongful act*
> *A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*
> > *(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*
> > *(b) the act would be internationally wrongful if committed by that State.*

81. The UK thus has a further obligation to avoid knowingly and intentionally facilitating (to any extent) another state's wrongful acts. Provision of material aid to a country in the full knowledge that it is likely to be used to commit human rights violations would violate the specific obligations not to assist, that are found in numerous Security Council and general assembly resolutions.

82. It should be noted that human rights law continues to be applicable in times of armed conflict, as confirmed by the ICJ in the Wall opinion (at 106) and in *Armed activities on the territory of the Congo, Democratic Republic of the Congo v. Uganda* ICJ Reports 19 December 2005, save where derogations are applicable. A wrongful breach of those obligations can thus occur even in times of war.

83. Article 12 of the ILC's articles is also important. It provides that

> *"There is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it, by that obligation, regardless of its origin or character" (my emphasis).*

The ILC's commentary on Article 12 notes :

> *"Conduct prescribed by an international obligation may involve an act or an omission or combination of acts and omissions…it may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition…the phrase "is not in conformity with" is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take" (125-6).*

The relevant duties on the UK

84. In the light of the above, where another state has committed a serious breach of peremptory norms of international law, including of the intransgressible principles of international humanitarian law (and thus breaches of the Geneva Conventions), there are four clear duties weighing upon the United Kingdom.

(a) to denounce and not to recognise as lawful situations created by the other state's actions;
(b) not to render aid or assistance in maintaining the situation;
(c) to cooperate with other states using all lawful means to bring the breaches to an end;
(d) to take all possible steps ensure that the state in question respects and complies with its obligations under the Conventions.

Submissions

Israel's serious breaches of peremptory norms.

85. In 2005, the ICJ in the Wall opinion declared that Israel remained in breach of the customary rule of inadmissibility of the acquisition of territory acquired by force. The Court recalled Security Council Resolution 242, whereby Israel was required to withdraw from the OPT [at 117]. In addition, the Court found that the construction of the Wall constituted a breach of Israel's obligations to respect the Palestinians' right to self determination, and that Israel was in breach of numerous provisions of international humanitarian law and human rights instrument [at 123-138]. The Wall remains. The same observations apply *mutatis mutandis* to Israel's actions in Gaza.

86. The Court further declared that article 51 of the UN Charter was irrelevant to the case before it, and could not be cited as an excuse for any apparent breaches of ordinary rules of customary international law, since the threat identified lay within territory effectively controlled by Israel rather than from a foreign state [at 139]. The same principle is in play here; Israel exercises effective control of Gaza. That control is exercised through the constant surveillance of Gaza from land, sea and air, the closure of its borders and the blockade of all goods entering and leaving at the will of Israel.

87. Nor could Israel rely on a right to self defence or state of necessity to preclude the wrongfulness of its actions in constructing the Wall (and causing the breaches identified) since the construction of the Wall along the chosen route was not "the only means to safeguard to interests of Israel against the peril which it has invoked as justification for that construction" [at 140].

88. The breaches of Israel's obligations identified by the ICJ as arising from the construction of the Wall have been extended and intensified by Operation Cast Lead. This is particularly salient in considering the breaches of the peremptory norms of self determination and non acquisition of territory by force, as the invasion necessarily further impinges on those rights. It is further salient in

considering grave breaches under the Geneva Conventions and the commission of war crimes.

89. Rather than withdraw from Gaza, a territory it effectively controls through force, Operation Cast Lead has seen Israel solidify that control through further use of military force. The sheer scale and depth of the incursion is clear evidence of the extent of Israel's control of the territory. In bombing tunnels giving means of access to Egypt, and establishing a naval blockade, Israel has strengthened its ability to control the borders of Gaza and rights of entrance and exit through force and signalled its continuing intent to do so.

90. Further, in its wanton destruction of civilian, cultural and governmental infrastructure, including factories, legislative buildings, farmland and civic institutions, Israel has further endangered the Palestinians' ability to realise their right to self determination. The demonstration of absolute control of that territory through such an operation necessarily excludes self determination.

91. Similarly, in the face of the clearest of evidence of breaches of the intransgressible principles of international humanitarian law, the violations of such principles and the Geneva Conventions already observed in the Wall opinion have been exceeded and extended.

92. The targeting of schools sheltering civilians, hospitals, private housing, ambulances and unarmed individuals is utterly forbidden by the *jus in bello*. Wilful killing or infliction of harm on protected persons, such as through the use of indiscriminate and inhuman weapons like white phosphorus in civilian areas, constitutes a grave breach of the Conventions. Such weapons necessarily breach the principle of distinction.

93. The razing of homes, infrastructure and farmland where not strictly justified by military necessity and carried out wantonly and unlawfully is similarly a grave breach of the Conventions, and there is a clear case that the scale and nature of the destruction seen here falls within that definition.

94. Not only do such actions constitute grave breaches of the Conventions, they are at the same time considered breaches of *jus cogens* norms.

95. They also amount to war crimes, as defined by article 8(2) of the Rome Statute of the International Criminal Court, which relevantly defines war crimes as:

> *(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:*
>
> *(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;*
>
> *(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;*
>
> *(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;*
>
> *(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;*
>
> *(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives.…"*

96. The breaches of peremptory norms in Operation Cast Lead are also "serious" breaches within the meaning of article 41.The violations have been numerous, flagrant, and have had the most serious consequences for the Palestinian people, causing death and suffering on a massive scale. Together, they amount to an outright assault on the values protected by the rules.

97. Further, Israel is in breach of numerous human rights norms through the nature and intensity of force used during the incursion, and operation Cast Lead thus encompasses a wealth of wrongful acts.

98. At paragraph 159 of the Wall opinion, the ICJ explained what it saw as the consequences of the breaches found for other states:

> "159. Given the character and the importance of the rights and obligations involved, the Court is of 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. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the Wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of war of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."

99. It is submitted that those obligations bound the UK before Operation Cast Lead. In the light of incontrovertible evidence of serious breaches in that Operation, they cannot continue to be brushed aside and apply with even more force.

100. It is submitted that the UK must therefore have regard to article 41 of the ILC's articles and the obligations thereby laid upon the government, as well as the duty to avoid complicity in Israel's wrongful acts under article 16. Similarly, in light of the evidence of war crimes and grave breaches of the fourth Geneva

Convention, the UK as a High Contracting Party is bound by Common Article 1 to ensure that Israel respects its obligations and thus prevent further breaches. The UK must respect the serious duties it has in such a context, and take action accordingly.

The Defendants' breach of the obligations to denounce and not to recognise situations created by such serious breaches.

101. On 12 January 2009 David Miliband MP told the House of Commons in a statement that: "The EU presidency also called for 'an immediate end to hostilities' and described the use of force as 'disproportionate'. The British Government support that view"[45]. He also on 19 January 2009 recognised that "it is important, too, that every signatory to any international convention adhere to its requirements and to international humanitarian law in general"[46] and on 20 January in the House of Lords the Foreign Office's Lord Malloch-Brown said that "the Government of Israel have made themselves party to the Geneva Conventions and must therefore expect to be judged by them."[47]

102. However, the Defendants' public statements have fallen far short of the weighty obligation to denounce and prosecute breaches of intransgressible principles of international humanitarian law when confronted by clear evidence that they are occurring. Silence and neutral pronouncements cannot be consistent with the duty to ensure respect for the Conventions.

103. The duty of non recognition of the situation created by a serious breach in the article 40 sense is similarly clear. It is incumbent upon the Defendants to avoid taking any step which might imply acceptance of the unlawful actions where assent may all too easily be inferred from silence, and particularly where the failure to refrain from arms trading is apt to carry the implication that Israel's

[45] 12 January 2009 Hansard Col 22
[46] 19 January 2009 Hansard Col 512
[47] 20 January 2009 Hansard Col 1557

military activities are lawful (since the UK's arms trading approval mechanisms purport only to approve transfers in those circumstances).

104. It is thus submitted that the failure of the defendants to stand up and denounce Israel's actions constitutes a breach of the UK's obligations under international law, as does the failure to abstain from any statements or actions which might imply acceptance of or acquiescence in the situation created by Israel's unlawful actions.

The Defendants' breach of the obligation not to aid or assist

105. The *jus cogens erga omnes* nature of the prohibitions violated by Israel "requires member states to do more than eschew the practice" of such violations [as per Lord Bingham in *A no.2* at 34]. The duty not to aid or assist such breaches under article 41 is an active and real obligation, and words of condemnation alone are not enough, even had they been made.

106. The Defendants must also ensure that the UK does not aid or assist any ongoing wrongful acts by Israel in Gaza, to avoid complicity in those acts by virtue of article 16.

Arms trading

107. It is submitted that the failure of the defendants to cease approving arms trading with Israel is a breach of the obligation not to aid or assist in serious breaches of the peremptory norms identified above. It is plain that there has been a huge recent expansion in the approval of export licences regarding the sale of military equipment to Israel; continued facilitation of military imports from Israel; continued facilitation of UK exports to Israel by private companies without those companies being made aware of the legal dangers inherent in supply such materials and services in contravention of the UK's international legal

obligations; and continuing invitations to Israeli military industries to attend Bi-Annual arms fairs in the UK (see paras 28 above). The issue of breach must be seen against the broad approach required when considering the issue of whether a state has complied with its international obligations (see article 12 at para 84 above).

108. The obligation to cease arms trading with and military aid to a state in such circumstances was explicitly recognised by Judge Ammoun in his separate opinion to the Namibia judgment. Any position other than absolute neutrality is unacceptable. Adding to the military capabilities of a nation using its military in serious breach of peremptory norms of international law cannot be consistent with an obligation not to aid such breaches, particularly where the UK cannot be taken to have no knowledge of Israel's conduct in Gaza (see para 66 above).

109. There is, at a minimum, a reasonable suspicion that any arms or funding provided to Israel's military would be used in further attacks on Gaza and its civilians. The defendants cannot claim not to have knowledge of the ongoing breaches identified in the Wall opinion, or their intensification and extension in Operation Cast Lead. In light of that knowledge, "Israel should be held to the same standards as other nation states"[48]. Absent evidence to the contrary, it must reasonably be inferred that providing military assistance to Israel in the current context constitutes knowingly and intentionally facilitating its military actions.

110. In approving further SIELs, and continuing to approve and facilitate through DsEi and other means, various UK companies' arms trading with Israel, and given the figures for 2006-7 as compared with those for the first two quarters of 2008, the defendants are thus in breach of the UK's obligation not to render aid or assistance under article 41(2).

[48] David Miliband in the House of Commons 12 January 2009 Hansard Col 31

111. This challenge is not precluded by the litigation in *Hasan* (above) which concerned transparency and the duty to give reasons in relation to the sale of military equipment by the UK to Israel. The substantive issue of the legality of that conduct, by reference to the Consolidated Critieria issued under the Export Controls Act 2002, was not determined in that litigation.

EU-Israel Association Agreement

112. It is further submitted that the defendants' failure to take all steps available to cease preferential trading with Israel under the EU-Israel Association Agreement constitutes a breach of its obligations not to aid or assist under article 41(2).

113. As was recognised in the context of South Africa by the Security Council and General Assembly, provision of financial aid and support to a state which is in breach of a peremptory norm is likely to have the effect of facilitating that breach by further entrenching the state's ability to continue the breach.

114. There must at a minimum be a reasonable suspicion that trade and aid benefits to Israel in the current context will have the effect of entrenching the illegal situation at hand.

115. In failing to call for suspension of the Agreement under the provisions of article 79, and thus a temporary cessation of preferential trading terms and the cutting off of financial aid, the defendants have failed to ensure that the UK does not materially assist Israel to maintain the situation arising from its illegal actions. It is submitted that the defendants have thus breached their obligations under article 41(2) not to aid or assist.

<u>The Defendants' breach of the obligation to cooperate with states to bring serious breaches to an end</u>.

116. The obligation to cooperate with other states to bring to an end serious breaches in the article 40 sense requires more than awaiting the outcome of any United Nations decision making.

117. The UK has several existing means at its disposal to actively cooperate with other states in this context such as requesting the convening of the Conference of the Parties of the Geneva Conventions, or introducing resolutions into the UN Security Council or taking other appropriate and lawful measures, as a Permanent Member, a member of G8 and a leading member state of the EU. None have been taken by the defendants.

118. It is submitted that in failing to take all possible lawful steps, the defendants have breached their duty to bring such breaches to an end through cooperation.

<u>The Defendants' breach of the obligation to ensure respect for and compliance with the Geneva conventions</u>

119. It is further submitted that the defendants have breached their obligations under article 1 read with articles 146-147 of the fourth Geneva Convention to ensure Israel respects its obligations under the Convention and complies with them.

120. As the former mandate power, a significant trading partner, permanent member of the Security Council, member of the G8, member of the European Union, high contracting party to the Geneva Conventions and member of the Quartet (comprising the UN, EU, US and Russia), the UK clearly has significant capacity to influence Israel's actions.

121. Possible steps could include

a. the exercise of universal jurisdiction to prosecute or extradite any individuals involved in grave breaches,
b. the enforcement of the system for suppression of such breaches,
c. significant diplomatic pressure,
d. the introduction of measures to the Security Council under Chapter VII of the UN Charter (the Security Council's powers to maintain peace);
e. clear public denunciation,
f. lawful sanctions,
g. application of pressure through withdrawal of preferential trading terms, or
h. convening a meeting of the Conference of the Parties.

122. Not only have none of these particular steps been taken, but the defendants have been unable to identify any significant steps taken to ensure Israel's compliance.

123. Further, where there may be a causal link between UK actions in approving arms trading and military assistance and grave breaches being perpetrated, the UK is under a duty derived from article 146 and article 147 of the Fourth Geneva Convention and common article 1 to the Geneva Conventions to investigate allegations of such actions. The defendants have taken no steps to meet this obligation, being content to assume that any investigative duty lies upon Israel itself or international bodies with no separate duty of their own.

124. In the light of the strength of the duty to ensure respect, it is submitted that the Court may examine what steps have been taken to see whether they are sufficient. This is not a case where the executive should be afforded deference simply because it involves, in part, questions of foreign relations. The obligations of the UK in this context are of the most serious and anxious kind under international law, and warrant a proper review by the Courts.

125. It is further submitted that any reasonable examination of the steps actually taken must lead to the conclusion that the defendants are in breach of their obligations under common article 1 and the *jus cogens* norms of international humanitarian law it codifies, as they are wholly inadequate.

Conclusion

126. In the face of such breaches by the defendants, it is submitted that relief is necessary and appropriate. The Claimant seeks a declaratory order to the effect that the defendants are in breach of the UK's international obligations as above. Further, the Claimant seeks a mandatory order for the defendants to use their best endeavours to meet those obligations, in particular, until such breaches are brought to an end and the Conventions are complied with:

(a) To publicly denounce Israel's actions in Operation Cast Lead and the construction of the Wall.

(b) To suspend all SIEL approvals to Israel

(c) To suspend all UK government financial or ministerial assistance directly given to UK companies exporting military technology or goods to Israel.

(d) To request that the EU suspend the EU-Israel Association Agreement on article 79 grounds and use best endeavours to ensure it is so suspended.

(e) To seek out and suspend any other financial or military assistance given by the UK government to Israel.

(f) To call for the Conference of the Parties to be convened to address Israel's grave breaches.

127. The Claimant considers such relief to be in the interests of justice and entirely consonant with the Court's judicial review jurisdiction.

Raza Husain
Matrix Chambers,
Gray's Inn, London

Phil Shiner
Public Interest Lawyers,
Birmingham

24 February 2009