The EU-Egypt-Israel Gas Memorandum: Pillage and Denial of Palestinian Self-Determination

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The EU-Egypt-Israel Gas Memorandum:
Pillage and Denial of Palestinian Self-Determination

In a bid to end its reliance on Russian energy following the invasion of Ukraine, the European Union (EU) signed a memorandum of understanding (MOU) in June 2022 with Egypt and Israel to facilitate the import of natural gas from the Middle East to Europe. The MOU sets parameters for an international treaty, to be finalized at a later time, under which Israel will pipe gas to liquefaction plants in Egypt; from there it will be subsequently exported to Europe.¹ In striking such a deal with Israel, the EU stands to incriminate itself in Israeli international law violations and serious breaches: both generally through its complicity in and demonstrable support for the Israeli colonial-apartheid regime, and specifically through its involvement and tacit approval of the illegal use of Palestinian natural resources in the occupied territory, amounting to pillage. The MOU is a statement of the EU’s hypocritical and contradictory stance with regards to Israel, representing active involvement in the Israeli colonial–apartheid regime’s theft of resources. The purchase of gas stolen from occupied territory would trigger legal responsibility for Egypt, the EU, and its member states under binding principles and norms of international and EU law.

A. INTERNATIONAL HUMANITARIAN LAW: PROHIBITION ON THE UNLAWFUL EXPLOITATION OF NATURAL RESOURCES

The international community, including the EU, has regarded Israel as an occupying power in the occupied Palestinian territory (oPt) since 1967, when Israel placed that territory under its effective control.² As such, it has

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² “Territory is considered occupied when it is actually placed under the authority of the hostile army.” The Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, art. 42. [hereinafter the Hague Regulations 1907].
specific binding legal obligations in the territory which are derived from
the Fourth Geneva Convention, the Hague Regulations, and customary
international law.³

An occupying power’s use of the natural resources of an occupied territory
is governed by the principle of usufruct, pursuant to Article 55 of the 1907
Hague Regulations. This article makes clear that “[t]he occupying state shall
be regarded only as an administrator and usufructuary of public buildings,
real estate, forests, agricultural estates belonging to the hostile state and
situation in occupied territory. It must safeguard the capital of these
properties and administrate them in accordance with the rules of usufruct.” The
wording of the provision reflects a central principle of the law of occupation:
that an occupying power is a temporary custodian of the occupied territory
and does not acquire sovereign powers. Specifically, usufruct rights permit
the occupying power to derive benefit and profit from the resources of the
occupied territory but prevents any usage that alters the substance of these
resources.⁴

Although international humanitarian law (IHL) allows occupying powers to
use the natural resources of the occupied territory, it also asserts that this use
should not be greater than that which the territory can reasonably be expected
to bear.⁵ If natural resources are used beyond the degree necessary to serve
the needs of the occupying army and the occupied population, then that
usage is excessive and will qualify as pillage under Article 47 of the Hague
Regulations.⁶ Pillage is defined as “extensive destruction and appropriation

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³ Whilst Israel has not signed or ratified the Hague Regulations, they are recognised as
customary in nature and therefore binding on all states.

⁴ Aeyal Gross, The Writing on the Wall: Rethinking the International Law of Occupation
(Cambridge University Press, 2017) 199; Iain Scobie, Natural Resources and Belligerent
Occupation: Mutation Through Permanent Sovereignty (Brill Nijhoff, 1997) 238.

⁵ See The Flick Trial, In United Nations War Crimes Commission, Law Reports of Trials of
War Criminals, Vol. IX, 22; 14 AD 226, available at: https://tile.loc.gov/storage-services/

⁶ Pillage is often understood as appropriation of private property only by private persons for
personal use, but this definition contradicts a wealth of international criminal jurisprudence
and runs contrary to modern understandings of the offence. In practice, individuals acting
pursuant to state policy, as well as corporations, have been prosecuted for pillage of natural
resources. For more, see Democratic Republic of the Congo v. Uganda (n 6) para 246;
James Stewart, ‘Corporate War Crimes: Prosecuting Pillage of Natural Resources’ [2010]
All Faculty Publications, 20-22, available at: https://commons.allard.ubc.ca/fac_pubs/339
[accessed 9 August 2022]; Carsten Stahn, A Critical Introduction to International Criminal
Law (Cambridge University Press, 2018) 86.
of property” in the Fourth Geneva Convention. In contrast to the act of pillaging, Article 43 of the Hague Regulations also maintains that the property of the occupied population, be it private or public (immovable public property including natural resources), must be protected by the occupying power.

These provisions mean that Israel may hypothetically make use of Palestinian natural resources only as required to meet the needs of its forces or the needs of the occupied population. It cannot use these resources to enrich itself, to increase its domination, or to benefit the occupying population. Israel, however, has long exploited Palestinian natural resources in the West Bank to the point of pillaging, with prominent examples including the diversion of Palestinian spring water to Israeli colonies and the quarrying of stone.

In relation to natural gas, Israel extracts this resource from a number of sites, including the ‘Meged’ field which lies on the ‘Green Line’ between 1948 Palestine and the 1967 territory. Subterranean oil and gas reserves at Meged extend deep into the occupied Palestinian West Bank, notably around the village of Rantis. Through actions such as those stipulated in EU-Israel MOU, Israel would be committing acts that amount to pillaging given that the extent of the extraction far exceeds the amount which could be considered legitimate under the rubric of military necessity. These resources are extracted for the benefit of the Israeli economy and colonial population, whether they are consumed domestically or exported. No gas, nor profit therefrom, flows to the Palestinians as a result of this extraction and use of Palestinian resources, implying that Israel is not using the natural resource to benefit the occupied

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8 Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), (Request for the Indication of Provisional Measures) General List no. 116 [2000] ICJ.


population either. Israeli exploitation of Palestinian natural gas for the benefit of Israel, private companies, or the Israeli population thus breaches Israeli IHL obligations.

Under Article 147 of the Fourth Geneva Convention, pillage constitutes a grave breach of IHL, meaning that it belongs to the most serious category of war crimes.11 As such its commission triggers additional responsibilities on third party states to address the breach if the offending state, here Israel, has failed to remedy the breach themselves.12 The commission of grave breaches places a binding obligation on states to respond to the act by providing appropriate penal measures. In its cooperation with Israel under the MOU’s provisions, the EU, which recognizes the oPt as occupied territory, would not only fail to uphold its obligation to address the breach, but it would also aid an unlawful act. In fact, it would further encourage Israel to continue its extensive exploitation of Palestinian natural resources in the occupied territory wherein Israel is acting as a de facto sovereign power.

Unsurprisingly, the Israeli High Court of Justice (HCJ) – which acts as an essential contributor to deepening the Israeli colonial-apartheid regime – has claimed that the prolonged nature of the occupation justifies depleting the capital of finite resources. Experts agreed that this view was wholly inconsistent with the overriding principles of the law of occupation, designed as it is to protect the rights and property of the occupied population.13 If non-renewable resources are depleted, they cannot be fully returned to public ownership at the termination of the occupation. Critically, though, the fact that the Israeli HCJ has sanctioned the pillage of Palestinian resources clears the way for such acts to be brought within the jurisdiction of the International Criminal Court’s (ICC) ongoing investigation in the oPt.14

14 The principle of complementarity dictates that the ICC cannot investigate acts that the relevant state has properly investigated and, if necessary, prosecuted. As the Israel HCJ, the highest court in Israel, has already ruled that the act is legal, the breach can be prosecuted at the international level. For more on the principle of complementarity, see the Rome Statute of the International Criminal Court, arts. 17 & 20, available at: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf [accessed 9 August 2022]
B. INTERNATIONAL HUMAN RIGHTS LAW: NATURAL RESOURCES AND SELF-DETERMINATION

Israeli theft of Palestinian natural resources should also be understood as a breach of the Palestinian people’s right to self-determination, a peremptory norm of international law reflected in Common Article 1 of the Human Rights Conventions.\textsuperscript{15} Article 1(2) ICCPR and ICESCR makes reference to the right of peoples to freely dispose of their natural resources. State parties to these conventions have third party obligations to respect, protect, and fulfil the rights laid down therein. Furthermore, Article 1(3) explicitly outlines the duty of state parties to promote the realization of self-determination. The Natural Resources Declaration (NRD) of 1962 which is accepted as customary international law,\textsuperscript{16} additionally establishes permanent sovereignty rights to peoples and nations alike over their natural resources.\textsuperscript{17}

In 2019, the Committee on Economic, Social and Cultural Rights concluded that Israeli policies regarding the exploitation of Palestinian oil and gas were inconsistent with Israel’s treaty obligations.\textsuperscript{18} By depleting Palestinian hydrocarbon reserves, Israel is illegally altering the conditions under which Palestinian self-determination should be realized in the future by all Palestinians, including the refugees, within the borders of Mandatory Palestine. Israeli pillaging ensures that when Palestinians are in a position to exercise self-determination, their natural resources “will no longer be available in the same form for the people to determine how [they] should be used.”\textsuperscript{19}

\textsuperscript{15} The right to self-determination has been recognised as peremptory in nature by the ICJ in \textit{East Timor (Portugal v Australia)}, General List no. 84 [30 June 1995], ICJ, available at: \url{https://www.refworld.org/cases.ICJ.40239bff4.html} [accessed 8 August 2022]


\textsuperscript{19} Matthew Saul, ‘The Right to Self-Determination and Prolonged Occupation’ in G Zyberi (ed), \textit{Protecting Community Interests Through International Law} (Intersentia Uitgevers NV 2021) 240
UN General Assembly has repeatedly affirmed the sovereignty of the Palestinian people over their own natural resources.\textsuperscript{20} Most recently in 2015, the UN called on all states and international organizations “to ensure respect for their obligations under international law with regard to all illegal Israeli practices and measures in the Occupied Palestinian Territory, including East Jerusalem, particularly Israeli settlement activities and the exploitation of natural resources.”\textsuperscript{21}

As a settler-colonial regime, Israel has no right to seize or exploit natural resources across Mandatory Palestine: those resources which are extracted from lands appropriated and colonized since 1948 are the property of the Palestinian refugees and internally displaced persons (IDPs) who were forcibly transferred from that land during the Nakba (1947-1949), as well as their descendants, who today number over 9.1 million people.\textsuperscript{22} The UN has asserted the right of Palestinian refugees and IDPs to their property and the income generated from it from the time of their forcible transfer.\textsuperscript{23}

\section*{C. Obligations of Third Party States and the Legal Responsibilities of the EU and its Member States}

Violations of peremptory norms of international human rights law trigger obligations on third states. The Israeli regime flagrantly violates both the peremptory prohibition on colonialism\textsuperscript{24} and acts contrary to the inalienable


right of the Palestinian people to self-determination.\textsuperscript{25} These norms are \textit{erga omnes}, meaning that all states have a duty to uphold them. This encompasses a positive duty to pursue the cessation of the violations, and a negative duty to not assist or help to maintain the situation in which the violations are taking place.\textsuperscript{26} Additionally, as a matter of both customary and treaty law, states are obligated to ensure respect for international humanitarian law.\textsuperscript{27} Yet the abovementioned violations perpetuated by Israel with regards to both IHRL and IHL have not prevented the EU and Egypt from striking a deal which stands to contradict these legal responsibilities. In so doing, they stand to breach their own third party obligations, and to implicate themselves directly in Israeli international crimes.

The EU’s internal legal regime dictates that its relations with non-member states should be informed by “the universality and indivisibility of human rights.”\textsuperscript{28} Yet, through its routine failure to stop Israel’s international law violations, it clearly has fallen short of this guiding principle. The MOU, which stands to see the EU directly benefit from Israel’s illegal exploitation of Palestinian resources, is patently inconsistent with the EU’s stated values. \textbf{While the MOU outlines at section 7 that its implementation shall not contradict any of the parties’ international legal obligations,\textsuperscript{29} for reasons highlighted above, its implementation would necessitate a host of international legal violations, encompassing both the EU’s own legal responsibilities and those of its 27 member states.}

EU-Israel relations are also governed by the 2000 EU-Israel Association Agreement, Article 2 of which stipulates that dealings between the parties

\begin{itemize}
  \item \textsuperscript{27} Fourth Geneva Convention supra note 8, art. 1; ICRC, Customary IHL Database, ‘Rule 139. Respect for International Humanitarian Law,’ available at: \url{https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule139} [accessed 22 July 2022].
  \item \textsuperscript{28} European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, Article 21, available at: \url{https://www.refworld.org/docid/4b17a07e2.html} [accessed 8 August 2022].
  \item \textsuperscript{29} ‘EU Egypt Israel Memorandum of Understanding’ supra note 1.
\end{itemize}
should be grounded in respect for human rights. The EU is patently failing to meet even the standards which it has set for itself. Despite official policy professing a commitment of the EU to a ‘two state solution’ based on ending the occupation of the 1967 territory, in practice “the EU has incentivised Israel’s continued commitment to prolonged occupation” by ignoring Israeli crimes in the interests of maintaining economic relations with Israel. Importing natural resources which have been illegally extracted by Israel would at the very least be consistent with the EU’s longstanding failure to prevent the import and sale of goods produced in colonies located in the West Bank. It demonstrates that the EU’s official anti-occupation stance is nothing but empty posturing.

The expropriation and illegal exploitation of Palestinian natural resources by the Israeli colonial-apartheid regime should be understood as a violation that serves to degrade and deny the Palestinian people’s inalienable right to self-determination. The EU and its member states have a responsibility not to render aid or assistance in the maintenance of Israeli breaches of international law. Yet the MOU represents precisely these things, with the EU willingly assisting Israeli efforts to derive financial gain from its international crimes. In implicating itself in the denial of the inalienable right to self-determination of the Palestinian people, the EU may incur direct responsibility on itself: systematic failure to uphold obligations arising under peremptory norms will engage international responsibility for international organizations. Non-assistance in violations of international law was recognised as a rule of

customary international law by the International Court of Justice (ICJ) in the *Bosnian Genocide case*.\(^{35}\)

While the EU as an entity distinct from its individual member states is not itself a signatory to the primary IHL treaties, it is still bound to abide by the rules of IHL when involved in conflict, or a third party to a conflict. Its member states are all signatories to the four Geneva Conventions, and the EU itself has repeatedly emphasized its commitment to personally comply with IHL and promote its compliance among third parties.\(^{36}\) It is additionally bound by the customary rules of IHL\(^{37}\) including those rules relating to usufruct, public property, and natural resources.\(^{38}\) It is also bound by the customary rule of ensuring respect for IHL\(^{39}\) as reflected at Common Article 1 of the Geneva Conventions. The responsibilities derived from this article are compulsory and cannot be derogated from. It is noteworthy that when Crimea was annexed by Russia in 2014, the EU was quick to impose sanctions and to ban EU businesses from dealing with Russian authorities, whom they considered to be bound by the laws of occupation.\(^{40}\) In that scenario, the EU was keen to avoid complicity in Russian material breaches of, among other legal regimes, the law


of occupation. The failure to implement similar policies in relation to Israeli violations including the illegal extraction of natural resources from occupied territory is evidence of an extremely biased approach to the application of international law. The International Committee of the Red Cross (ICRC) has highlighted that it is a matter of customary law that states should not encourage violations of IHL;\(^41\) the silence of EU member states over a gas deal with Israel which actively rewards IHL violations would clearly breach this rule.

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\(^{41}\) ICRC, Customary IHL Database, 'Rule 144. Ensuring Respect for International Humanitarian Law Erga Omnes,' available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144) [accessed 3 August 2022].
D. CONCLUDING REMARKS

It is profoundly ironic that the EU’s desire to wean itself off Russian gas on account of Russia’s war against Ukraine has led it to forge new ties with Israel, given its deplorable human rights record, including the commission of international crimes. The MOU is an indication from the EU to Israel that its ongoing oppression of the Palestinian people and disregard for international human rights and humanitarian law will not prejudice EU-Israel relations. The EU’s highly partial approach to adhering to its international legal obligations speaks to a demotion of the Palestinian cause, contrary to the internationally recognized rights of the Palestinian people, including the inalienable right to self-determination in their land, and the refugees’ right to return to their homes pursuant to the full implementation of UN General Assembly Resolution 194. The announcement of the MOU closely coincided with an announcement that the EU will be unfreezing hundreds of millions of Euros in funds which had been withheld from the Palestinian Authority (PA) since 2020, a fact which does not justify the silence of the PA with regards to the major violations against Palestinians that would ensue from any upcoming EU-Israel gas treaty. While the leaders of the PA are treated internationally as the representatives of the Palestinian people, this does not entitle them to implicitly or explicitly “consent to actions that will pre-empt [the people’s] right to self-determination.” In essence, the Palestinian Liberation Organization (PLO) and PA may have acquiesced to the deal for their own reasons, but this does not mean that the Palestinian people’s right to control their own natural resources has been derogated from. A gas treaty between the EU and Israel would plainly violate Palestinian self-determination, with or without the acquiescence of the PLO or PA. Acts which ensue from such a treaty would plainly be illegal, and should be responded to as such.


44 Matthew Saul, supra note 20, 234
E. RECOMMENDATIONS

In view of the above, BADIL calls on:

- The EU to cancel its MOU with Israel and Egypt, and warns that failure to do so will see it incur direct and indirect international legal responsibility for sanctioning IHL grave breaches, and for tacitly approving Israel’s denial of Palestinian self-determination through exploitation of Palestinian natural resources.

- European civil society groups to mobilize in opposition to this deal, and to reassert the internationally recognized right of the Palestinian people to their own natural resources.

- European civil society to pressure the EU, either directly or through the conduit of their member state’s governments, to highlight the hypocrisy of economically rewarding Israel, a major violator of international humanitarian law, as an alternative to trading with Russia.

- European civil society to seek to challenge the legality of this MOU, and any ensuing treaty, before the European Court of Justice.

- The Palestinian Authority to strongly oppose the MOU and any treaty that may arise in due course which will facilitate the illegal extraction and exporting of Palestinian natural resources.
In a bid to end its reliance on Russian energy following the invasion of Ukraine, the European Union (EU) signed a memorandum of understanding (MOU) in June 2022 with Egypt and Israel to facilitate the import of natural gas from the Middle East to Europe. The MOU is an indication from the EU to Israel that its ongoing oppression of the Palestinian people and disregard for international human rights and humanitarian law will not prejudice EU-Israel relations.