Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for Advisory Opinion)

International Court of Justice

Written Submission of the League of Arab States

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TABLE OF CONTENTS

PART 1: THE QUESTION 6
1. The question 6
2. Two aspects to the question on legality/illegality of the occupation 7
2.a. Is the *existence* of the occupation lawful? 7
2.b. Is the *conduct* of the occupation lawful? 7
PART 2 : APPLICABLE LAW 8
3. Introduction 8
4. Self-determination 8
4.a. Introduction 8
4.b. Existence and basis for the right 8
4.c. External self-determination 9
4.d. Internal self-determination 10
4.e. Right of return 10
4.e.i. General position based on the right of self-determination 10
4.e.ii. Affirmations by the UN General Assembly and Security Council 10
4.e.iii. As a matter of other areas of human rights law (human rights law generally is addressed further below) 11
5. The law on the use of force 11
6. The law of armed conflict (LOAC) including occupation law, including the prohibition on implanting settlements 12
7. International human rights law (IHRL) 13
7.a. Generally, and applicability extraterritorially, and in times of war 13
7.b. Prohibitions on apartheid and racial discrimination more broadly 13
8. Special status of certain rules: *jus cogens*/non-derogable/peremptory obligations; *erga omnes*/community obligations 16
8.a. *Jus cogens*/non-derogable/peremptory obligations 16
8.b. *Erga omnes*/community obligations 16
8.c. Why rules of international law have these two special forms of status; relationship between the two forms; which rules are covered. 17
PART 3: ILLEGALITY AND LEGAL STATUS OF THE OCCUPATION 19
9. Introduction and summary 19
10. Existential legality/illegality 1: Significance of the right of external self-determination 20
11. Existential legality/illegality 2: Annexation, including ‘de facto’ annexation. 21
11.a. Meaning of annexation 21
11.b. Areas where Israel has purported to annex territory—East Jerusalem and other areas of the West Bank 21
11.c. ‘de facto’ annexation 21
11.c.i. What is ‘de facto’ annexation? 21
11.c.ii. Illegality 22
11.d. Why the violation of self-determination involved in the occupation goes beyond the issue of annexation 22

12. Existential legality/illegality 3: The occupation as a form of self-defence; the relevance of Security Council Resolution 242 23
12.a. Ostensible security-basis for the occupation and the applicable framework of international law 23
12.b. Security Council Resolution 242 (1967) 24
12.c. Self-defence 24
12.d. Conclusion—the occupation is an illegal use of force, an aggression 25
13. Illegality of the conduct of the occupation 26
13.a. Overview 26
13.b. Violations of freedom of expression, association, and assembly in particular 27
13.c. Settlements 28
13.d. Self-determination more broadly 29
13.e. Violations of the rights of women and girls 30
13.f. Apartheid 32
14. Different forms of illegality 34
15. Importance of the correct starting point: *everything* Israel does in the West Bank and the Gaza Strip lacks a valid international legal basis and is an illegal exercise of authority, not just those things that violate the rules applicable to the conduct of the occupation 34
15.a. Illegal exercise of authority as a general matter 34
15.b. Interplay between *ad bellum* and *in bello* legality 34
15.c. Example: the 2022 killing of Shireen Abu Akleh and the attack on her pallbearers 36
15.d. Different actors and different obligations 36
16. Israel's violations are 'serious' breaches of peremptory/*jus cogens*/non-derogable obligations 37
PART 4: CONSEQUENCES 38
17. Invalidity, and implications for individual rights 38
17.a. Invalidity generally 38
17.a.i. All unlawful acts are invalid 38
17.a.ii. Everything Israel does in the OPT is invalid because the occupation is existentially illegal 39
17.a.iii. Affirmations of invalidity by the UN General Assembly and Security Council 40
17.b. Individual rights 40
17.b.i. The 'Namibia exception' 40
17.b.ii. Settlers 41
18. Consequences for the Palestinian people: the right to resist 41
19. Consequences for Israel 43
19.a. Introduction 43
19.b. Cessation: Israel must put an end to the unlawful situation immediately 43
19.b.i. General duty 43
19.b.ii. Immediacy 44
19.b.iii. Immediacy in ending violations of the use of force including when this involves an occupation 44

19.b.iv. Immediacy in ending violations of self-determination through unlawful territorial control....45
19.b.v. Israel's position....45
19.b.v.α. General requirement....45
19.b.v.β. Ending the occupation immediately....45
19.b.v.γ. Return and freedom of movement....47
19.b.v.δ. Settlements....47
19.b.v.ε. Apartheid and racial discrimination generally....48
19.b.v.στ. The wall....48
19.c. Circumstances require that Israel must offer appropriate assurances and guarantees of non-repetition....48
19.d. Reparation....51
19.d.i. General obligation....51
19.d.ii. Restitution....52
19.d.iii. Compensation....54
19.d.iv. Satisfaction....55
20. Consequences for third States....55
20.a. Non-recognition....55
20.a.i. Illegality—invalidity—non-recognition....55
20.a.ii. The 'Namibia exception' revisited....55
20.a.iii. Aspects of the obligation....56
20.a.iii.α. Obligation not to recognize the validity of Israel's presence in the OPT in and of itself....56
20.a.iii.β. Obligation not to recognize Israel's purported annexation of any part of the OPT, including East Jerusalem and, relatedly, not to treat the OPT as if it were the sovereign territory of Israel....57
20.a.iii.γ. Obligation of non-recognition: economic matters in particular....58
20.b. No aid or assistance....59
20.b.i. General principle....59
20.b.ii. As invoked in other contexts....59
20.b.iii. As invoked in the present context....59
20.c. General duty to ensure the realization of Israel's compliance with the law of self-determination and the core/basic protective rules of IHL....61
20.c.i. Introduction....61
20.c.ii. Self-determination....61
20.c.iii. The core/basic protective rules of IHL....61
20.c.iv. Practical significance....62
20.d. Three specific duties to suppress Israel's violations of international law....62
20.d.i. Introduction....62
20.d.ii. Two different bases for these rules....62
20.d.ii.α. Basis 1: For all violations, of rules that a) operate erga omnes, and b) in relation to which States bear the foregoing obligation to ensure implementation....62
20.d.ii.β. Basis 2: For 'serious' violations, of rules that have jus cogens status....63

20.d.ii.γ. Consolidating the treatment of these bases, and the violations by Israel covered by the three duties 63
20.d.iii. Duty (1): Obligation to cooperate to bring to an end, through lawful means, the violations 64
20.d.iv. Duty (2): Obligation of non-recognition 65
20.d.v. Duty (3): Obligation not to render aid or assistance in maintaining the illegal situation 66
20.e. Entitlement to invoke a breach of obligations *erga omnes partes* and *erga omnes* 67
20.e.i. Introduction 67
20.e.ii. Two bases 67
20.e.ii.α. (1) Erga omnes partes 67
20.e.ii.β. (2) Erga omnes obligations (and by association, jus cogens obligations) 68
20.e.iii. What States can do 68
20.e.iii.α. Call upon Israel—cessation, assurance of non-repetition, reparation..... 68
20.e.iii.β. Take measures to induce cessation and reparation..... 68
20.e.iii.γ. Bring a claim..... 69
21. Consequences for the United Nations..... 70
21.a. General legal framework..... 70
21.b. Examples 71
21.b.i. Indications from the present Court on the role of the UN in taking action to bring illegality to an end..... 71
21.b.ii. Example from the General Assembly of non-recognition and non-assistance in the maintenance of unlawful situation 71

PART 1: THE QUESTION

1. The question

1. In Resolution A/RES/77/247 on 30 December 2022, the United Nations General Assembly asked the present Court to:

> …render an advisory opinion on the following questions, considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:
>
> (a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
>
> (b) How do the policies and practices of Israel referred to in paragraph … (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?[1]

2. Question (a) asks what the legal consequences are of three related matters, which are described in question (b) as "policies and practices of Israel":

   (1) First, "the ongoing violation by Israel of the right of the Palestinian people to self-determination".

   (2) Second, "its [Israel's] prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem".

   (3) Third, "its [Israel's] adoption of related discriminatory legislation and measures".

3. A determination of the legal consequences of these "policies and practices" requires a determination of two sub-questions:

   (1) The first sub-question is, in each case, how, international law has been/is being violated—the question of legality/illegality.

   (2) The second sub-question is, in each case, and cumulatively, what the legal consequences of the answer to the first sub-question are for international legal persons legally implicated in the situation.

4. Question (b) asks:

[1] GA Res. 77/247, 30 December 2022, https://www.un.org/en/ga/77/resolutions.shtml.

> How do the policies and practices of Israel referred to in paragraph … (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?

The Court must address how the "policies and practices" referred to in paragraph (a) affect the legal status of the occupation in order to address the question put to it in paragraph (b). The significance of paragraph (b), then, is to expressly reference this determination as something to be emphasised in its own right, rather than being merely implicitly included, as a precursor, to the express determination being sought (the legal consequences of the three "policies and practices").

5. Paragraph (a) expressly posits the third "policy and practice" as relational to what comes before it, i.e. both the denial of the right of the Palestinian people to self-determination and Israel's prolonged occupation, settlement and annexation. Also, the matters covered in the second set of "policies and practices" are directly implicated in the illegality posited in the first. Thus, an essential matter determining the question of the legality or illegality of the matters covered in the second is the right of self-determination expressly referenced in the first.

6. In paragraph (b) the General Assembly has, in effect, asked the Court to offer a full-spectrum legal appraisal of the legality, as a general matter (not, for example, limited to a particular area of law, such as the law of self-determination, or occupation law) of the occupation of the Palestinian Territory since 1967. This includes a legal appraisal of the further elements stipulated in the first, second and third "policies and practices", viz. "the ongoing violation by Israel of the right of the Palestinian people to self-determination" "settlement and annexation", including "measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem", and "the adoption of related discriminatory legislation and measures".

2. Two aspects to the question on legality/illegality of the occupation

2.a. Is the *existence* of the occupation lawful?

7. The first legality/illegality question is whether the *existence* of the occupation, in and of itself, has a legal basis. If it does not, then it is *existentially illegal*. This question falls to be determined according to the law of self-determination and, because the occupation is a use of force, the law on the use of force.

2.b. Is the *conduct* of the occupation lawful?

8. The second related legality/illegality question is whether the way the occupation is *conducted* is unlawful. Various areas of international law regulate the exercise of authority by a State over people in such contexts, viz. self-determination including the right to return, the laws of war (variously referred to as the *jus in bello*, law of armed conflict, international humanitarian law/occupation law), and international human rights law generally, including the prohibition of racial discrimination generally and apartheid in particular.

PART 2 : APPLICABLE LAW

3. Introduction

9. The General Assembly requested that the Court render its Opinion

> …considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004.

This is a request to apply all relevant areas of international law, including, but not limited to, the particular areas of law mentioned.

10. The present Part explains what these areas of law are. It covers certain relevant features of their substantive content. It also explains the position of certain of these rules having *jus cogens* and *erga omnes* status.

4. Self-determination

4.a. Introduction

11. The right to self-determination exists in customary international law, is recognized by the UN Charter and is enshrined in international human rights law, in the latter case in common Article 1 of the ICCPR and ICESCR.[2]

4.b. Existence and basis for the right

12. The Palestinian people have a legal right of self-determination. This has been universally accepted and affirmed by States and UN organs as well as the present Court.

13. The Palestinian people have this legal right on two bases.

(1) In the first place, there is a *sui generis* treaty-based right derived from the provisions of Article 22 of the League of Nations Covenant of 1919 applicable to Palestine as a particular type of Mandate.[3]

(2) In the second place, the right stems from the '(anti-)colonial' basis that became part of customary international law, because of the Palestinian people having been subjected to colonial rule by the British empire, and the continued denial of their ability to exercise self-determination since the creation of Israel in 1948, and the occupation of the West Bank, including East Jerusalem and Gaza since 1967.[4]

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[2] International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 ("ICCPR"), Art. 1; International Covenant on Economic, Social and Cultural Rights, 16 December 1996, 993 U.N.T.S. 3 ("ICESCR"), Art. 1.

[3] See Ralph Wilde, 'Tears of the Olive Trees: Mandatory Palestine, the UK, and accountability for colonialism in international law', *Journal of the History of International Law* (2022).

[4] See Ralph Wilde, 'Using the master's tools to dismantle the master's house: international law and Palestinian liberation' 22 *Palestine Yearbook of International Law* 3-74 (2021), Sections IV-VI and sources cited therein.

14. The right of self-determination of the Palestinian people has two elements, based on the general international legal framework of external self-determination and internal self-determination. It encompasses, in part pursuant to this general framework, a right to return.

4.c. External self-determination

15. External self-determination is the right of a people to be self-governing 'externally', or 'internationally,' i.e., in a manner that is free from certain forms of foreign domination by another international legal person such as a State, including through occupation, which of its nature prevents the full *de facto* exercise of the right, including through effective self-government. In consequence, the Palestinian people have an international legal entitlement for the domination that prevents their exercise of self-determination to end. Correspondingly, Israel, which exercises this domination in the form of occupation, has a legal obligation to end this domination—to end the occupation. In the words of the UN General Assembly Resolution on Friendly Relations and Co-operation, regarded as reflecting customary international law on this point,

> Every State has the duty to refrain from any forcible action which deprives peoples… of their right to self-determination and freedom and independence.[5]

16. Particular features of this right to be free/obligation to enable such freedom, or, put differently, the right for the occupation to be terminated/the obligation to terminate the occupation, are as follows:

(1) It operates and exists simply and exclusively by virtue of the Palestinian people being entitled to it. It is not, therefore, something that depends on anyone else agreeing to it, whether Israel, or any State, organization or entity, etc. It is a right.

(2) The anti-colonial form of external self-determination adopted in international law in the first half of the 20th Century, applicable to the Palestinian people, was a repudiation of the concept of 'trusteeship over people'.[6] According to this concept, people were, ostensibly, potentially to be granted their freedom by colonial authorities only if and when they were deemed 'ready', ostensibly because of their stage of 'development', by those authorities. The anti-colonial self-determination rule, which was the international legal basis for recognizing decolonization, constitutes a repudiation and removal of this approach, replacing it with an automatic right. The new rule was and is rooted in the basic entitlement of people to freedom, not 'readiness' or reaching a certain stage of development. In the words of the United Nations General Assembly in Resolution 1514(XV) of 1960, 'inadequacy of preparedness should never serve as a pretext for denying independence'.[7] Furthermore, the right operates regardless of whether the authority depriving the people of their ability to exercise self-rule agrees to relinquish control.

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[5] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970 ("Friendly Relations and Co-operation Declaration").

[6] See Ralph Wilde, International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away (OUP 2008), Ch. 8, Sec. 8.5.

[7] GA Res. 1514 (XV), 14 December 1960, para. 3.

(3) Necessarily, then, this form of 'freedom'—the end of external control—is to be realized immediately and automatically, without preconditions, such as standards, of whatever character, having to be met first.

(4) This fundamental character of self-determination, when compared to other considerations that do not share this fundamental character, is reflected in the way that it has *jus cogens*—non-derogable—status in international law: it takes precedence over other rules of international law (which would be most of them) that do not have the same status. Thus, the United Nations Human Rights Council, in Resolution 49/28 of 11 April 2022, emphasised "that this *jus cogens* norm of international law [self-determination as vested in the Palestinian people] is a basic prerequisite for achieving a just, lasting and comprehensive peace in the Middle East".[8] *Jus cogens* is addressed further below in the present Part.

4.d. Internal self-determination

17. This is a right, both individually and at a group level, to be treated equally, when it comes to group-identity, as citizens in States where they have citizenship (e.g., Palestinian citizens of Israel), and to have their distinct group-based identity respected and protected in such States (and, linking the two, equal treatment including freedom from discrimination based on their distinct identity). Relatedly, this also includes the enjoyment of rights by virtue of group identity, both individually and collectively. These rights are also covered additionally in various general areas of international human rights law concerned with non-discrimination in general and the prohibition of apartheid in particular; political rights; the rights of minorities generally and the rights of indigenous people in particular.

4.e. Right of return

4.e.i. General position based on the right of self-determination

18. The Palestinian people, individually and collectively, have a legal right to return to their homes and land. The right to return is integral to the right of self-determination itself.

4.e.ii. Affirmations by the UN General Assembly and Security Council

19. The right to return of Palestine refugees has been repeatedly affirmed by the UN General Assembly since 1948.

20. In Resolution 194 (III), 11 December 1948, passed in the context of and relating to the Nakba at the time of 1948, the General Assembly resolved that:

> …refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage

[8] Human Rights Council Res. 49/28, 11 April 2022, preamble, para. 7

> to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.[9]

In Resolution 3236 (XXIX), 22 November 1974, the General Assembly recognized "the inalienable right of Palestinians to return to their homes and property from which they have been displaced and uprooted and calls for their return".[10] In Resolution 35/169, 15 December 1980, the General Assembly reaffirmed "the inalienable right of the Palestinians to return to their homes and property in Palestine, from which they have been displaced and uprooted, and calls for their return".[11]

4.e.iii. As a matter of other areas of human rights law (human rights law generally is addressed further below)

21. Art. 12(4) of the ICCPR states that "[n]o one shall be arbitrarily deprived of the right to enter his own country".[12] The term "his own country" is broad. It is not limited to a State where the individual has citizenship. For example, it has been understood to apply to "nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied to them".[13] Indeed, as the present Court held in the *Nottebohm* case, "nationality" is a relationship to a State more capacious than formal citizenship.[14] It comprises factors such as an individual's "family ties" and "attachment shown to him for a given country and inculcated in his children".[15] The term "enter" is broader than the term "return", indicating that an individual need not have been present in historic Palestine in the past.[16] Therefore, it is possible to "enter" one's own country for the first time, indicating that Palestinian people who have never been to historic Palestine have the right to enter it.

22. Israel has the duty to ensure the right of return for Palestinian refugees on a non-discriminatory basis. According to Article 5(d)(ii) of the ICERD, States must

> …eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of … [t]he right to leave any country, including one's own, and to return to one's country.[17]

5. The law on the use of force

23. The occupation is, in the terminology of international law, a 'use of force', and its existential legality therefore falls to be determined in part by the application of the law on the use of force (a.k.a. the *jus ad bellum*), including the prohibition on aggression.

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[9] GA Res. 194 (III), 11 December 1948, para. 11.
[10] GA Res. 3236 (XXIX), 22 November 1974, para. 2.
[11] GA Res. 35/169 (A), 15 December 1980, para. 5.
[12] ICCPR, Art. 12(4).
[13] Human Rights Committee, General Comment 27, CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 20.
[14] *Nottebohm Case (second phase)*, Judgment of April 6th, I.C.J. Reports 1955, p. 4 at p. 22.
[15] Ibid.
[16] Kathleen Lawand, 'The Right to Return of Palestinians in International Law,' (1996), 8 *International Journal of Refugee Law* p. 533, at p. 547.
[17] International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 U.N.T.S. 195 ("ICERD"), Art. 5.d.ii.

6. The law of armed conflict (LOAC) including occupation law, including the prohibition on implanting settlements

24. The legality of the conduct of the occupation falls to be determined by the law of armed conflict (LOAC), also referred to as the *jus in bello*, international humanitarian law (IHL), and the laws of war, including the law of occupation. In the case of occupation law in particular, Israel is a party the fourth Geneva Convention, and so is Jordan, Egypt, Lebanon, Syria and the State of Palestine.[18] Whereas it is not party to the fourth 1907 Hague Convention, the present Court considered in the *Wall Advisory Opinion*, that "the provisions of the Hague Regulations have become part of customary law".[19]

25. One key stipulation of occupation law relevant to the present case is the prohibition of implanting settlers into occupied territory. Under Article 49, paragraph 6 of the fourth Geneva Convention of 1949, "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies".[20] In the words of the ICRC:

> This means that international humanitarian law prohibits the establishment of settlements, as these are a form of population transfer into occupied territory. Any measure designed to expand or consolidate settlements is also illegal. Confiscation of land to build or expand settlements is similarly prohibited.[21]

26. The term 'transfer', therefore, includes settlement that is voluntary on the part of the individuals involved. In the *Wall* Advisory Opinion, the present Court observed that the provision

> prohibits not only deportations or forced transfers of population…but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.[22]

27. The Security Council has called upon "Israel, as the occupying Power, to abide scrupulously" by the Fourth Geneva Convention, and "to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories".[23]

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[18] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 ("GC I"); Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 ("GC II); Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GC III"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("GC IV"). ICRC, Databases for State Parties to GC I, II, III, IV, (listing Israel as a State Party, signed 8 Dec.1949; ratified 6 July 1951). Available respectively at: https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/state-parties?activeTab=default; https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/state-parties?activeTab=default; https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/state-parties?activeTab=default; https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/state-parties?activeTab=default.

[19] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136 at p. 172, para. 89.

[20] GC IV, Art. 49, para. 6.

[21] International Committee of the Red Cross ("ICRC"), "What does the law say about the establishment of settlements in occupied territory?", 5 Dec. 2010, available at: https://www.icrc.org/en/doc/resources/documents/faq/occupation-faq-051010.htm.

[22] *Wall* Advisory Opinion (2004), p. 183, para. 120.

[23] SC Res. 446, 22 March 1979, para. 1.

7. International human rights law (IHRL)

7.a. Generally, and applicability extraterritorially, and in times of war

28. Israel is bound by human rights law obligations in treaty law and customary international law.[24] As affirmed by the present Court in the *Wall* Advisory Opinion in connection to the ICCPR, ICESR and CRC in particular, Israel's human rights obligations apply to it extraterritorially in the OPT.[25] As also affirmed by the present Court in that Opinion, and in its earlier *Nuclear Weapons* Advisory Opinion and other decisions, these human rights obligations continue to operate in wartime situations, including occupations, alongside IHL.[26] As the UN Security Council stated in the context of the 1967 war that began Israel's occupation of the Palestinian Territory, "essential and inalienable human rights should be respected even in the vicissitudes of war".[27]

7.b. Prohibitions on apartheid and racial discrimination more broadly

29. The prohibition of apartheid, and of racial discrimination more broadly,[28] is well-established under international law, both as a matter of treaty law and customary international law.

30. In 1966, the UN General Assembly passed Resolution 2202 (XXI), which condemned the policies of apartheid practiced by the Government of South Africa as a crime against

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[24] The following is a list of treaties ratified by, and therefore binding on, the State of Israel: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85 ("CAT") (ratified by Israel on 3 October 1991); Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 13 ("CEDAW") (ratified by Israel on 3 October 1991); Convention on the Political Rights of Women, 31 March 1953, 193 U.N.T.S. 135 ("CPRW") (ratified by Israel on 6 July 1954); Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277 ("Genocide Convention") (ratified by Israel on 9 March 1950); Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3 ("CRC") (ratified by Israel on 3 October 1991); Optional Protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflict, 25 May 2000, 2173 U.N.T.S. 222 ("CRC-OP-AC") (ratified by Israel on 18 July 2005); Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution, and child pornography, 25 May 2000, 2171 U.N.T.S. 227 ("CRC-OP-SC") (ratified by Israel on 23 July 2008); Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 U.N.T.S. 3 ("CPRD") (ratified by Israel on 28 September 2012); International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 U.N.T.S. 195 ("ICERD") (ratified by Israel on 3 January 1979); International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 ("ICCPR") (ratified by Israel on 3 October 1991); International Covenant on Economic, Social and Cultural Rights, 16 December 1996, 993 U.N.T.S. 3 ("ICESCR") (ratified by Israel on 3 October 1991).

[25] *Wall* Advisory Opinion (2004), paras. 111-112, para. 131, and para. 134. See more generally Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' *Chinese Journal of International Law* (2013) 12(4) 639-677.

[26] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 at p. 240, para. 25; *Wall* Advisory Opinion (2004), p. 178, para. 106; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168 at p. 244, para. 218; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Request for the Indication of Provisional Measures, I.C.J. Reports 2008, p. 353 at p. 38, para. 112.

[27] SC Res. 237, 14 June 1967, preamble, para. 2

[28] The prohibition of racial discrimination is enshrined primarily in ICERD, which defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (ICERD, Art. 1, para. 1). In General Recommendation 8, The Committee on the Elimination of All Forms of Racial Discrimination ("CERD") affirmed that "such identification [as being members of a particular racial or ethnic group or groups] shall, if no justification exists to the contrary, be based on self-identification by the individual considered" (CERD, General Recommendation VIII, U.N. Doc. A/45/18, 21 August 1990).

humanity,[29] and in 1968 it reiterated this condemnation in Resolution 2396.[30] In 1980, the Security Council unanimously reaffirmed this condemnation and declared that apartheid is "a crime against mankind and is incompatible with the rights and dignity of man, the Charter of the United Nations, and the Universal Declaration of Human Rights, and seriously disturbs international peace and security",[31] and in 1984 it reaffirmed that it is a crime against humanity.[32] In the *Namibia* Advisory Opinion, the present Court ruled that the policy of apartheid in Namibia by South Africa constituted a "flagrant violation of the purposes and principles of the [UN] Charter".[33]

31. A prohibition of apartheid is contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to which both Israel and the State of Palestine are parties.[34] Article 3 of ICERD affirms that State Parties "condemn apartheid and undertake to prevent, prohibit and eradicate all such practices in their territories".[35] In 1995, the Committee on the Elimination of All Forms of Racial Discrimination (CERD) confirmed in General Recommendation 19 that Article 3 "prohibits all forms of racial segregation in all countries".[36]

32. The Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention), to which the State of Palestine is a party, declares that apartheid is a crime against humanity and that "inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination…are crimes violating the principles of international law".[37] The Apartheid Convention defines the crime of apartheid as "similar policies and practices of racial segregation and discrimination as practised in southern Africa," which include "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them".[38]

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[29] GA Res. 2202 (XXI) A, 16 December 1966, para. 1.
[30] GA Res. 2396, 2 December 1968, para. 1. In 1963, the General Assembly had called for an end "without delay" to policies of racial segregation and apartheid in South Africa (GA Res. 1904 (XVIII), 20 November 1963, para. 5).
[31] SC Res. 473, 13 June 1980, para. 3.
[32] SC Res. 556, 23 October 1984, para. 1.
[33] *Namibia* Advisory Opinion (1971), p. 57, para. 131.
[34] ICERD, Art. 3. See UN Treaty Collection, Status of Treaties, ICERD, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.
[35] ICERD, Art. 3. In General Recommendation 8, The Committee on the Elimination of All Forms of Racial Discrimination ("CERD") affirmed that "such identification [as being members of a particular racial or ethnic group or groups] shall, if no justification exists to the contrary, be based on self-identification by the individual considered" (CERD, General Recommendation VIII, 21 August 1990).
[36] CERD, General Recommendation XIX, U.N. Doc. A/50/18, 18 August 1995, para. 1.
[37] Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243 ("Apartheid Convention"), Art. 1. For a database of State ratifications, see United Nations Treaty Collection, Status of Treaties, Apartheid Convention, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-7&chapter=4&clang=_en.
[38] Apartheid Convention, Art. 2. Article 2 of the Convention outlines "inhuman acts" that may amount to apartheid, when committed systematically for the purpose of establishing or maintaining domination by one racial group over another, including murder; infliction of serious bodily or mental harm; subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups; any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof; exploitation of the labour of the members of a racial group or groups; and exploitation of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

33. The Rome Statute of the International Criminal Court, to which the State of Palestine is a party, recognizes apartheid as a crime against humanity, giving rise to individual criminal liability.[39] The Rome Statute defines the crime of apartheid as "inhumane acts of a character similar to those in paragraph 1 [crimes against humanity], committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime".[40]

34. The Palestinian people constitute a distinct racial group for the purposes of the apartheid definition under international law.[41] In its definition of racial discrimination, article 1 of the ICERD clarifies that "race" is not the sole indicator of racial discrimination, but that it may cover "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin".[42] CERD General Recommendation VIII further affirms that the identification of individuals as being members of a particular racial or ethnic group "shall, if no justification exists to the contrary, be based on self-identification…"[43] In international criminal law, multiple international criminal tribunals have used a similar approach in addressing the definition of "racial group" in the context of genocide, persecution, and other war crimes based on harms perpetrated by one racial group against another. For example, in *Rutaganda*, the International Criminal Tribunal for Rwanda (ICTR) held that group membership under the Genocide Convention was to be understood as "a subjective rather than an objective concept" where "the victim is perceived by the perpetrator as belonging to a group slated for destruction".[44] In *Blagojević and Jokić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) held that "a national, ethnical, racial or religious group is identified by using as criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics".[45]

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[39] Rome Statute of the International Criminal Court, 1998, U.N. Doc. A/CONF.183/9, 2187 UNTS 90, entered into force 1 July 2002 ("Rome Statute"), Art. 7. Earlier in 1968, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity declared that "inhuman acts resulting from the policy of apartheid" are considered crimes against humanity (Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 21 November 1968, 754 U.N.T.S. 73, Art. 1).

[40] Rome Statute, Art. 7, para. 1(j). Acts enumerated in para. 1 of Article include: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender… or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (Rome Statute, Art. 7, para. 1).

[41] For a discussion of the issue of "racial groups" in the context of Israel-Palestine, see, e.g., Dugard, John and Reynolds, John, "Apartheid, International Law, and the Occupied Palestinian Territory," 24(3) *EJIL* 2013, pp. 885-891.

[42] ICERD, Art. 1.

[43] CERD, General Recommendation VIII, 21 August 1990.

[44] *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Judgment, 6 Dec. 1999, para. 56.

[45] *Prosecutor v. Blagojević and Jokić*, Case No. I-02-60-T, Trial Judgment, 17 Jan. 2005, para. 667.

8. Special status of certain rules: *jus cogens*/non-derogable/peremptory obligations; *erga omnes*/community obligations

8.a. *Jus cogens*/non-derogable/peremptory obligations

35. As already indicated in relation to self-determination, some of the foregoing rules of international law have *jus cogens/*peremptory status. They occupy a higher normative position compared to other rules of international law.[46]

36. The position of certain norms in this category has two consequences:

    (1) In the first place, as indicated, insofar as there is any contradiction between rules with this status, and other rules that lack this status, the rules with this status prevail.[47]

    (2) In the second place, because of their fundamental character, special obligations exist on the part of all States to ensure that these rules are not violated in any given instance. This is relevant to the 'legal consequences' for other States of their violation by Israel, addressed below in Part 4.

8.b. *Erga omnes*/community obligations

37. Some of the foregoing rules of international law operate *erga omnes*, against all. *Erga omnes* rights are those which are opposable to all States. This is not simply a matter of legal norms operating universally—that would be a characteristic of all areas of generally-applicable law. Rather, it denotes a sub-set of generally-applicable law, where in any given situation, not only do those directly affected by compliance with the particular legal norm at issue, as rights holders, have a legitimate interest in the matter of this compliance. Also, *all* States are understood to have a legitimate interest in compliance in this case, since such compliance constitutes a community interest that all are thereby implicated in. There is thus a legal link between compliance with an *erga omnes* right/obligation in any given situation, and the position of all States, even though these other States do not have their direct rights affected by the compliance at issue. In the *Barcelona Traction* decision that is the origin of this concept, the present Court stated that *erga omnes* obligations are "the concern of all States"[48] and that "all States can be held to have a legal interest in their protection."[49] Thus, in any instance where such obligations are violated, all States have a

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[46] See, e.g., International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, U.N. Doc. A/56/10, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf ("ARSIWA"), Art. 41, para. 2; International Law Commission, Draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries, adopted at its seventy-third session, A/77/10, 2022, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf ("ILC *jus cogens* Draft Conclusions & Commentaries") and sources cited therein.

[47] Vienna Convention on the Law of Treaties, 23 May 1969, entry into force 27 January 1980, http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf ("VCLT 1969"), Art. 53. See also UN Charter, Art. 103.

[48] *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports, 1970, p. 3 at p. 32, para. 33, affirmed by the Court in the *Wall* Advisory Opinion (2004), p. 199, para. 155.

[49] Ibid., again affirmed by the Court in *Wall* Advisory Opinion (2004), p. 199, para. 155. In the *Chagos* Advisory Opinion, the Court stated that "all States have a legal interest in protecting" an *erga omnes* right (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95 at p. 139, para. 180). In the *East Timor* case, the Court cited Portugal's argument, that because the right in question had *erga omnes* status, "accordingly Portugal could require it [Australia, the State that, it was argued, had breached the right by entering into an agreement with Indonesia

legal interest at stake, not just the State(s), whose rights are being violated. Like the second consequence of *jus cogens* status, this feature of *erga omnes* norms is relevant to the 'legal consequences' for other States of their violation by Israel, addressed below in Part 4.

8.c. Why rules of international law have these two special forms of status; relationship between the two forms; which rules are covered.

38. Obligations have *jus cogens* and *erga omnes* status because they are regarded to be of fundamental importance. The ILC study on the former category of obligations has suggested that all obligations that have this status also have the latter status;[50] additional obligations may exist that have the latter status and lack the former status.[51]

39. For present purposes, it is sufficient to focus on rules that have both *jus cogens* and *erga omnes* status. These are:

(1) The right of self-determination.[52]

(2) The prohibition on the use of force that is not legally justified in international law, and is aggression, including when force is used to purportedly acquire title over, aka 'annex', territory.[53]

(3) Some of the core protections of human rights in addition to self-determination, including as a matter of IHL and IHRL.[54] In particular:

- The core/basic protective rules of IHL, which include the aforementioned prohibition on implanting settlements onto occupied land.[55]

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which was predicated on Indonesia's violation of the right], to respect" the right, but dismissed this possibility being realized through the case before it, for jurisdictional reasons [Indonesia had not consented to the Court's adjudication of the legality of its actions] (*East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90 at p. 102, para. 29). The ILC Commentary on ARSIWA describes the concept of *erga omnes* obligations as addressing "the legal interest of all States in compliance – i.e., ….in being entitled to invoke the responsibility of any State in breach" (ARSIWA, Part Two, Ch. III, Art. 39 Commentary, para. 7).

[50] ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 17, para. 1.

[51] ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 17 Commentary, paras. 3-4.

[52] On the right of self-determination having *jus cogens* status, see ARSIWA, Part One, Ch. IV, Art. 26 Commentary, para. 5, and Part Two, Ch. III, Art. 40 Commentary, para. 5; ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 23, Annex; Human Rights Council Res. 49/28 of 11 April 2022, Right of the Palestinian people to self-determination, U.N. Doc. A/HRC/RES/49/28, Preamble, para. 7; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1988, para. 147; *Mornah v. Benin*, Application no. 028/2018, Judgment, African Court of Human and Peoples' Rights ("ACtHPR"), 22 September 2022, para. 289. On it having *erga omnes* status, see *East Timor* Judgment (1995), p. 102, para. 29; *Wall* Advisory Opinion (2004), p. 171-172, para. 88 and p.199, paras. 155-156; *Chagos* Advisory Opinion (2019), p. 139, para. 180, and the fact that it has *jus cogens* status (which according to the ILC study means it also has *erga omnes* status).

[53] On the prohibition on the use of force that is not legally justified in international law, and is therefore aggression, having *jus cogens* status, see ARSIWA, Part One, Ch. IV, Art. 26 Commentary, para. 5, and Part Two, Ch. III, Art. 40 Commentary, para. 4; ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 23, Annex; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports, 1986, p. 14 at p. 90, para. 190; *Barcelona Traction* Judgment (1970), p. 33, para. 34; Friendly Relations and Co-operation Declaration (1970). On it having *erga omnes* status see the fact that it has *jus cogens* status (which according to the ILC study means it also has *erga omnes* status). On the particular prohibition of the use of force to purportedly acquire title over/annex territory having *jus cogens* status, see, e.g., Human Rights Council Res. 49/28, 11 April 2022, Preamble, para. 7, characterizing the "prohibition of the acquisition of territory by force" as a breach of a peremptory norm of international law; *Furundžija* Trial Chamber Judgment (1988), para. 147.

[54] In the context of *erga omnes* obligations, the Court in *Barcelona Traction* referred to "the principles and rules concerning the basic rights of the human person" (*Barcelona Traction* Judgment (1970), p. 32, para. 34).

[55] On the core/basic protective rules of IHL having *jus cogens* status, see ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 23, Annex, and the fact that the present Court referred to them in the *Nuclear Weapons* Advisory Opinion as "intransgressible" (see below in the present note), leading the ILC ARSIWA Commentary to observe that "[i]n the light of the

- The prohibition of crimes against humanity.[56]
- The prohibition of racial discrimination generally.[57]
- The prohibition of apartheid.[58]

description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory" (ARSIWA, Part Two, Ch. III, Art. 40 Commentary, para. 7). On such rules having *erga omnes* status see the fact that they have *jus cogens* status (which, as indicated, according to the ILC study means they also have *erga omnes* status). In the *Wall* Advisory Opinion, the Court stated that "With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* it 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 are "to 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" (*Nuclear Weapons* Advisory Opinion (1996), p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character" (*Wall* Advisory Opinion (2004), p. 199, para. 157). As to which protective rules are 'core/basic' and therefore have *jus cogens* and *erga omnes* status, notably the present Court referred 'a great many' rules of IHL. Certainly, they include, and are not limited to, rules which, if violated, are classified as 'serious violations' of IHL and 'war crimes' (the terms being used interchangeably) by the ICRC. Such a classification includes rules which, if violated, constitute 'grave breaches' of the four Geneva Conventions and Protocol I. And, also, insofar as this makes a difference (supplementing the coverage of grave breaches in the aforementioned treaties in general, and for those states who are not a party to one or more of them, as with Israel and Protocol I), breaches classified as 'war crimes' in the Rome Statute and customary international law. See ICRC, "What are "serious violations of international humanitarian law"? Explanatory Note", https://www.icrc.org/en/doc/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf. Note that the ICRC emphasises that 'serious violations' is a wider category of violations than those violations that constitute 'grave breaches' (See ICRC, Updated Commentary on GC III (2020), Art. 130 Commentary, para. 5173). The prohibition of implanting settlements in occupied land falls into this 'core/basic' category and, within this, into the 'serious violations' category. This is illustrated by, but not exclusively based on, the fact that a breach of this prohibition is included in the 'grave breaches' category of Protocol I, and as a 'war crime' in the Rome Statute. See Protocol I, Art. 85(4)(a), and Rome Statute, Art. 8, para. 2(b)(viii). It is also notable that, as explained herein, implanting settlements in the territory of a self-determination unit is also a breach of the right of external self-determination. That right exists in customary international law and itself has *jus cogens* and *erga omnes* status. Given that it is, to borrow the phrase of the Court to describe the 'intransgressible' rules of IHL, "fundamental to the respect of the human person [on an individual and a collective level] and 'elementary considerations of humanity'", it follows that the prohibition of implanting settlements shares this characteristic as an essential element of it.

[56] On the prohibition of crimes against humanity having *jus cogens* status, see ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 23, Annex; ARSIWA, Part One, Ch. IV, Art. 26 Commentary, para. 5; *The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States*, Advisory Opinion OC-26/20 of 9 November 2020, Inter-American Court of Human Rights ("IACtHR"), para. 105; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, para. 520. On this having *erga omnes* status see the fact that it has *jus cogens* status (which, as indicated, according to the ILC study means they also have *erga omnes* status).

[57] On the prohibition on racial discrimination generally having *jus cogens* status, see ARSIWA, Part One, Ch. IV, Art. 26 Commentary, para. 5 and Part Two, Ch. III, Art. 40 Commentary, para. 4; ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 23, Annex; *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003, IACtHR, para. 101; *Furundžija* Trial Chamber Judgment (1988), para. 147. On it having *erga omnes* status, see *Barcelona Traction* Judgment (1970), p. 32, para. 34 and the fact that it has *jus cogens* status (which, as indicated, according to the ILC study means it also has *erga omnes* status). Article 6 of the ICERD obliges States Parties to "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination". The CERD Committee has confirmed that this contains the obligation to investigate and prosecute acts of racial discrimination, see *L.K. v. Netherlands*, Communication No. 4/1991, CERD, U.N. Doc. A/48/18, paras. 6.4-6.6 (interpreting Art. 4 of the ICERD).

[58] On the prohibition of apartheid having *jus cogens* status, see ARSIWA, Part Two, Ch. III, Art. 40 Commentary, para. 4; ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 23, Annex; *Obligations of a State that has Denounced the ACHR* IACtHR Advisory Opinion (2020), para. 105. On it having *erga omnes* status, see the fact that it has *jus cogens* status (which, as indicated, according to the ILC study means it also has *erga omnes* status). Article IV of the Apartheid Convention obliges States to "supress as well as to prevent any encouragement of the crime of apartheid" and to "prosecute, bring to trial and punish and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons" (Apartheid Convention, Art. IV).

- The prohibition of slavery.[59]
- The prohibition of genocide.[60]
- The prohibition of torture[61] and cruel, inhuman, and degrading treatment and punishment.[62]

PART 3: ILLEGALITY AND LEGAL STATUS OF THE OCCUPATION

9. Introduction and summary

40. This Part clarifies what the terms 'legal'/'illegal' mean, according to the relevant, multiple areas of applicable international law. It explains how the different forms of 'legality'/ 'illegality' relate to each other, and how they apply to the occupation.

41. As to existential legality/illegality, the occupation, simply by virtue of exercising control over the West Bank (including East Jerusalem) and Gaza, and consequently preventing the Palestinian people from full and effective self-governance, constitutes a fundamental impediment to the realization of the right of self-determination of the Palestinian people enshrined in international law.

42. As the occupation is a use of force, the legality of its existence falls to be determined according to the *jus ad bellum.* The only permissible justification for the occupation in the *jus ad bellum* is through a right of self-defence.

43. Israel's use of force against Egypt, Jordan and Syria in 1967 was not a legally valid exercise of a right to self-defence, and the occupation of the Palestinian Territory, under

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[59] On the prohibition of slavery and the slave trade having *jus cogens* status, see ARSIWA, Part One, Ch. IV, Art. 26 Commentary, para. 5 and Part Two, Ch. III, Art. 40 Commentary, para. 4 (slavery and slave trade); ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 23, Annex (slavery only); *Obligations of a State that has Denounced the ACHR* IACtHR Advisory Opinion (2020), para. 105; *Furundžija* Trial Chamber Judgment (1988), para. 147. On the prohibition of slavery having *erga omnes* status, see *Barcelona Traction* Judgment (1970), p. 32, para. 34, and the fact that it has *jus cogens* status (which, as indicated, according to the ILC study means it also has *erga omnes* status).

[60] On the prohibition of genocide having *jus cogens* status, see ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 23, Annex; ARSIWA, Part One, Ch. IV, Art. 26 Commentary, para. 5 and Part Two, Ch. III, Art. 40 Commentary, para. 4; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595 at p. 615-616, para. 31; *Obligations of a State that has Denounced the ACHR* IACtHR Advisory Opinion (2020), para. 105; *Furundžija* Trial Chamber Judgment (1988), para. 147; *Kupreškić* Trial Chamber Judgment (2000), para. 520. On it having *erga omnes* status see the fact that it has *jus cogens* status (which, as indicated, according to the ILC study means it also has *erga omnes* status). Article I of the Genocide Convention obliges States Parties to prevent genocide, whereas Article VI obliges States Parties to prosecute acts of genocide. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at p. 113, para. 165 and p. 120, para. 184, respectively.

[61] On the prohibition of torture having *jus cogens* status, see ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 23, Annex; ARSIWA, Part One, Ch. IV, Art. 26 Commentary para. 5; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422 at p. 457, para. 99; *Furundžija* Trial Chamber Judgment (1988), para. 147, and the fact that it is a non-derogable right in human rights treaties. On it having *erga omnes* status see the fact that it has *jus cogens* status (which, as indicated, according to the ILC study means it also has *erga omnes* status); *Furundžija* Trial Chamber Judgment (1988), para. 151. Article 7 of the Convention Against Torture reads, "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution". This Court held that Article 7 of the Convention Against Torture obliges all States to prosecute acts of torture when the perpetrator is within the territory (*Belgium v. Senegal* Judgment (2012), pp. 456-457, p. paras. 95-99).

[62] On the prohibition of cruel, inhuman and degrading treatment and punishment having *jus cogens* status, see *Obligations of a State that has Denounced the ACHR* IACtHR Advisory Opinion (2020), para. 106 and sources cited therein, note. 155; *Al-Adsani v. The United Kingdom*, Application No. 35763/97, Judgment, ECtHR, 21 November 2001, para. 59, and the and the fact that it is a non-derogable right in human rights treaties. On it having *erga omnes* status see the fact that it has *jus cogens* status (which, as indicated, according to the ILC study means it also has *erga omnes* status).

Egyptian and Jordanian administration up until that point, was, therefore, a part of an unlawful use of force. Thus, the occupation was itself an illegal use of force, an aggression, from the outset. As a result, there is no valid international law basis for the existence of the occupation.

44. The existential illegality of the occupation thus arises out of the simple fact of the occupation as a system of control and domination without a valid legal basis. This is then compounded by the occupation's prolonged duration, its link to *de jure* and *de facto* annexation, and the egregious abuses perpetrated against the Palestinian people. The use of military force to annex territory is an independent basis for existential illegality: also a violation of the international law on the use of force, an aggression. The prolonged length of the occupation, and its abusive nature, are relevant, as aggravating factors, to the question of existential legality as a matter of the law on the use of force. The abusive nature of the occupation is also relevant to the separate matter of legality/illegality of conduct. Any purported annexations are without legal effect. Israel is not and cannot be sovereign over any part of the OPT, including East Jerusalem, through the assertion of a claim to this effect based on the exercise of effective control enabled through the use of force. The occupation is thus an internationally wrongful act of an ongoing nature, the legal consequences of which – including its termination immediately, unconditionally and completely – to be addressed later.

45. As to the illegality of the conduct of the occupation, there are multiple, egregious breaches of the relevant areas of applicable international law: self-determination including the right to return; IHL including occupation law; international human rights law generally, and, within this, the prohibition of racial discrimination generally and the prohibition of apartheid in particular, and the prohibition of torture and cruel, inhuman and degrading treatment and punishment.

46. The occupation is thus illegal in both its existence and its conduct.

47. All the main areas of international law violated—the prohibition on the use of force other than in self-defence/the prohibition of aggression; the right of self-determination; the prohibition of racial discrimination generally and apartheid in particular; the core/basic protections of IHL; the prohibition of torture and cruel, inhuman and degrading treatment and punishment—have *jus cogens* and *erga omnes* status.

10. Existential legality/illegality 1: Significance of the right of external self-determination

48. The right of Palestinian self-determination in international law, and the necessary consequence of this, that the Palestinian people should be able to exercise the right, free of Israeli control, is near-universally accepted.

49. The impact of the existence of the occupation as a drastic impediment to the realisation of the self-determination entitlement of the Palestinian people renders the occupation existentially illegal as a matter of the law of self-determination. The aggravating factors linked to the unlawful purposes, related practices, and objectionable conduct of the occupying Power—settler-colonialism, apartheid, annexation, prolonged duration, bad faith, and abusive treatment of the Palestinian people—do have important legal consequences, including for the existential legality of the occupation. But none of them needs to be established/invoked in order for the question of existential legality to be determined. The fundamental denial of Palestinian self-determination created by the

existence of the occupation is, by itself, sufficient as a basis for rendering the existence of the occupation illegal.

11. Existential legality/illegality 2: Annexation, including 'de facto' annexation.

11.a. Meaning of annexation

50. In international law, 'annexation' represents a situation of purported acquisition of territory by force. Whereas occupation is, by definition, temporary and without prejudice to the legal status of the territory concerned, the aim of annexation is to exercise permanent dominion and sovereignty over that territory, thereby altering its legal status. This is illegal in international law.

11.b. Areas where Israel has purported to annex territory—East Jerusalem and other areas of the West Bank

51. For various reasons, notably Israel's extension of its national law to apply to East Jerusalem (e.g., the Basic Law of 1980), Israel has purported to annex that territory.

52. This constitutes two separate violations of international law concerned with the existential legality of the occupation:

    (1) Israel's attempt to assert sovereignty is a violation of its legal obligations to respect the right of self-determination of the Palestinian people and the sovereignty of the State of Palestine.

    (2) Because it has been enabled and is maintained through the use of military force, and according to the law on the use of force, the annexation of territory is not a legally valid basis for using military force, Israel's use of force in order to annex East Jerusalem is a violation of the international law on the use of force. As the General Assembly observed in the Friendly Relations and Co-operation Declaration, "the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force".[63] Thus, in the context of the occupation of the Palestinian Territory in 1970, the General Assembly stated that "the acquisition of territories by force is inadmissible".[64]

53. The same logic applies to any other parts of the Occupied Palestinian Territory where purported annexation has happened or may happen in the future.

11.c. 'de facto' annexation

11.c.i. What is 'de facto' annexation?

54. It is sometimes said that Israel is practising 'de facto' annexation in the West Bank. This means the exercise of control over the West Bank on one or both of the following bases:

[63] Friendly Relations and Co-operation Declaration (1970).
[64] GA Res. 2628 (XXV), 4 November 1970, para. 1.

(1) In the first place, acting as if it were the sovereign even while not formally claiming sovereignty, what might be called 'performing sovereignty', e.g. through asserting a monopolization on the legitimate use of violence, and enabling Jewish Israeli citizens, who view the land as part of Israel as a Jewish State, to move to and live on it—settlement—on the basis of their view that they are living in the Jewish State of Israel. Another way of putting this, legally, is a distinction sometimes made between 'sovereignty-as-administration', and 'sovereignty-as-title'. Whereas performance of the former usually presupposes the enjoyment of the latter—and so making a distinction between them serves no purpose—in some cases, as here, there can be the first without the second.

(2) In the second place, establishing 'facts on the ground' through control and implanting settlers that could then pave the way for the eventual declaration of *de jure* sovereignty over the land in question. It is perhaps this meaning of *de facto* annexation that the present Court was invoking when it held that

> the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case … it would be tantamount to *de facto* annexation.[65]

11.c.ii. Illegality

55. Implanting settlers on occupied land is in and of itself, including as a form of de facto annexation understood as a performance of sovereignty/'sovereignty-as-administration' only and/or as a means of establishing facts on the ground to enable territorial acquisition, a violation of occupation law and the law of self-determination. The prohibition here is a general one, however, not specific to any kind of de facto annexation context.

56. Occupying non-sovereign territory as a form of de facto annexation understood as a performance of sovereignty/'sovereignty-as-administration'-only and/or as a means of establishing facts on the ground to enable territorial acquisition is not a valid international legal basis for conducting such a military occupation according to the international law on the use of force. In consequence, as with de jure purported annexation, occupation for these reasons is:

(1) a violation of Israel's legal obligation to respect the sovereignty of the State of Palestine and a violation of Israel's legal obligation to respect the right of self-determination of the Palestinian people;

(2) a violation of Israel's obligations in the international law on the use of force.

11.d. Why the violation of self-determination involved in the occupation goes beyond the issue of annexation

57. The foregoing determinations about the illegality of the occupation are necessarily specific to its link to annexation. The control Israel exercises over territory on the basis of purported annexation is unlawful on this basis — since Israel cannot annex territory in this way, the purported annexation has not been legally effective, and thus Israel has no valid legal basis to control the territory on the basis that it is the sovereign. The control Israel exercises over

[65] *Wall* Advisory Opinion (2004), p. 184, para. 121.

the West Bank on the basis of 'de facto' annexation as defined above is also legally invalid, since international law does not permit a State to use force to control the territory of a self-determination unit (and also, in this case, a State) for these purposes.

58. However, the right of the Palestinian people to be free of the occupation on the basis of the right of self-determination includes, but goes beyond, impediments to this which are linked to annexation. Ultimately, it is the occupation as a general regime of control, wherever that exists, and regardless of the purpose for it, that is at issue. The foregoing analysis in this section, then, is significant as far as it goes. Which is to say, addressing certain elements of existential illegality but not providing a complete treatment of the matter.

12. Existential legality/illegality 3: The occupation as a form of self-defence; the relevance of Security Council Resolution 242

12.a. Ostensible security-basis for the occupation and the applicable framework of international law

59. Some commentators and policy makers who accept the Palestinian right of self-determination and the implications of this for the existence of the occupation (and the aforementioned bar on annexation), nonetheless resile from proceeding through to the seemingly logical conclusion that the occupation should end immediately. Such a position is sometimes adopted on the basis of a view that the occupation can and should be maintained by Israel for security purposes, and/or, relatedly, that its end should depend on a peace agreement that would include security guarantees for Israel obviating the need to maintain the occupation for these purposes.

60. Does international law permit Israel to maintain the occupation, notwithstanding the necessary impediment this causes to the realization of self-determination by the Palestinian people, on this basis?

61. The Israeli occupation of the Palestinian Territory is a military occupation. As such it is, to use the language of international law, a 'use of force'. In international law, 'use of force' is a euphemism for war, including the conduct of military occupation. With Gaza in particular, although Israel removed its 'boots on the ground' presence in 2005, its military occupation of that territory has endured, through existing and new means and methods: an overall siege, the exclusive control of airspace and maritime territory, control of the water and electricity supply, and the ability to re-introduce boots on the ground from its own territory without any impediment, as has happened. The foregoing constitutes an ongoing use of force exercised by Israel over the Gaza Strip. This is then periodically supplemented by further means and methods taken by Israel involving other forms of force, such as military incursions and firing missiles. However, incidents involving the latter are not the only moments when Israel is using force in the international law sense with respect to the Gaza Strip – this is an ongoing situation.

62. The only legal grounds for a State being entitled to control territory that does not form part of its sovereign territory, and which is either the territory of another State, or a non-State self-determination unit, through the use of force in the foregoing way, is if one or more of the following are present: (a) the host sovereign entity has validly given its permission; (b) the UN Security Council has given its authority for this under Chapter VII of the UN Charter; (c) it is a legally-valid exercise of self-defence according to the international law

on the use of force. Such grounds do not exist in relation to Israel's occupation of the Palestinian Territory.

12.b. Security Council Resolution 242 (1967)

63. In Resolution 242 of 1967, the United Nations Security Council affirmed that:

> …the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles: (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity, and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.[66]

64. By invoking the withdrawal of occupation forces—i.e., the end of the occupation—in the context of a "just and lasting peace", is the Security Council stipulating that the occupation can continue until there is a "just and lasting peace"—perhaps in the form of a peace agreement—which, moreover, must include a resolution of/provision for the matters set out in the second paragraph? And, if so, did this stipulation provide legal grounds for the occupation to continue from 1967? The answer to both these questions is no.

65. The Council was merely stating that a "just and lasting peace" would require both an end to the occupation and the resolution of all the matters in the second paragraph. It does not follow from this that the occupation can therefore continue *until* there is the "just and lasting peace" that also covers the resolution of all the matters in the second paragraph. Or, put differently, that, in the absence of any of the elements of a "just and lasting peace" it requires as set out in the second paragraph, an absence of the element it sets out in the first paragraph—the end to the occupation—is thereby *justified*. That would be a *non sequitur*.

66. Security Council Resolution 242 therefore provides no legal basis for the existence or continuation of the occupation.

12.c. Self-defence

67. The use of force in self-defence (reason (c) above) is only legally permitted according to the international law on the use of force—the *jus ad bellum*—if there is an actual or imminent threat of an armed attack, and the use of force involved—here, a military occupation—is necessary and proportionate to that attack/imminent threat of attack.

68. In 1967 there was no actual or imminent threat of armed attack that justified the use of force, including the occupation, in self-defence. Israel's use of force then, which led to the introduction of the occupation, had no valid basis in international law. In consequence, the occupation has lacked a valid legal basis, as a form of self-defence, in the law on the use of force from the outset, and has therefore been an illegal use of force, an aggression, from the beginning.

69. For the sake of hypothetical argument, the present submission will address the alternative starting position in 1967, which, as indicated, the submission rejects, that Israel had a valid

[66] SC Res. 242, 22 November 1967, para. 1.

legal right to use force in 1967 in self-defence, and a further hypothetical argument (which is moot if there was no valid legal right to self-defence in the first place), that the introduction of the occupation was necessary and proportionate in legal terms.

70. The requirement to meet the general *ad bellum* test is an ongoing one in any continuing use of force, including a military occupation. Importantly, the use of force requiring justification is not simply the initial period of invasion that precedes and enables an occupation. It is also then the operation of the occupation, since the conduct of an occupation, quite separately from the circumstances of its introduction, is itself a use of force. In consequence, the test remains, on an ongoing basis, needing to establish an actual or imminent threat of an armed attack, and the type of force being used—here an occupation—being necessary and proportionate to that. If this test is not met, then the occupation is illegal. Does the occupation meet the test?

71. Continuing with the hypothesis, which the submission rejects, that Israel had the legal right to use force on the grounds of self-defence against Egypt, Jordan and Syria in 1967 and that this justified, legally, the introduction of the occupation in the short period of active hostilities, that justification can only have persisted very briefly. When active hostilities ended, the justification ended—there was no longer an actual or imminent threat that would justify a continued use of force—and Israel therefore had no lawful basis to continue the occupation. From this point onwards, then—very soon after active hostilities ended—the occupation had no lawful basis according to the law on the use of force. It was, therefore, from that moment on, an unlawful use of force, an aggression.

72. The occupation is in part a mechanism to prevent the existence of another fully-autonomous Arab State at Israel's borders, out of a generalized defensive concern in relation to this State (thus the point of the occupation is, in effect, to prevent a fully-functioning Palestinian State). In addition to this, the use of force in the West Bank is sometimes explained in self-defence terms as a means of preventing threats from emerging against settlements and settlers. However, preventative self-defence is not a valid basis for using force in self-defence in international law. Thus, the occupation cannot be legally justified on this basis.

73. Moreover, when it comes to the settlements and settlers, the use of force to protect them, even from actual or imminent attacks, is legally invalid, bearing in mind the extraterritorial and illegal nature of the settlements. There is no legal right to use force in self-defence to protect a State's nationals outside its territory (e.g., nationals cannot be legally assimilated into the State in this extraterritorial context, so that an attack on them is an attack on the State). Protection of the settlers from threats to them in the West Bank, including East Jerusalem, could be achieved by ending their illegal presence there.

12.d. Conclusion—the occupation is an illegal use of force, an aggression

74. The effect of the foregoing analysis in this section is that there is no lawful basis for Israel to maintain the occupation or, put differently, to lawfully impede the Palestinian right of self-determination through maintaining the occupation. In consequence, the occupation of Gaza and the West Bank (including East Jerusalem) is existentially illegal as a breach of the international law on the use of force and the law of self-determination.

75. The nature of the breach of the international law on the use of force covered in the previous paragraph is such as to meet the definition of 'aggression' in international law. The term 'aggression' is usually as a synonym for a breach of the international law on the use of

force, and, occasionally, a sub-set of such breaches that are of a particular grave nature. Insofar as the latter definition is concerned, the breach here meets and exceeds the threshold. It meets it with the existence of an unlawful, in *jus ad bellum* terms, occupation (the UN General Assembly has affirmed that an occupation can be an aggression). It then exceeds it through the aggravating factors of a link to annexation, prolonged duration and egregiously abusive conduct. The individual crime of aggression in the Rome Statute for the International Criminal Court is limited to aggression which because of its "character, gravity and scale constitutes a manifest violation of the Charter of the United Nations".[67] For the same reasons that the breach of international law here falls within the (occasionally-used) definition of aggression covering a sub-set of breaches of the law on the use of force, the illegal nature of the use of force meets this Rome Statute definition of the individual crime of aggression.

13. Illegality of the conduct of the occupation

13.a. Overview

76. There have been and continues to be widespread violations of self-determination, other areas of international human rights law, and IHL, including occupation law, by Israel in its conduct of the occupation in the West Bank, including East Jerusalem, and the Gaza Strip. These have included violations of the core/basic protective norms of IHL, torture and cruel, inhuman and degrading treatment and punishment, racial discrimination generally, and apartheid in particular. Thus, the conduct of the occupation involves violations of the following norms of international law that have *jus cogens* and *erga omnes* status:

    (1) The right of self-determination.

    (2) The prohibition of apartheid.

    (3) The core/basic protective rules of IHL, including the prohibition of implanting of settlers on occupied land.

    (4) The prohibition of racial discrimination generally.

    (5) The prohibition of torture and cruel, inhuman and degrading treatment and punishment.

    This has been widely documented, including by various United Nations bodies, the evidence of which having been submitted to the Court by the United Nations in the present proceedings.[68]

77. These include violations arising out of positive actions by Israeli agents, including soldiers, as well as the failure to protect the Palestinian people from harm perpetrated against them by Israeli settlers. Israel's behaviour in East Jerusalem, acting as the sovereign when it is not, violates those areas of occupation law which rule out such behaviour, notably the

[67] Rome Statute, Art. 8*bis*, para. 1

[68] See United Nations, Dossier, 'Materials Compiled Pursuant to Article 65, Paragraph 2 of the Statute of the International Court of Justice (Request for an advisory opinion by the International Court of Justice pursuant to General Assembly Resolution 77/247),' in two Parts (I and II), 31 May 2013, posted on the ICJ Website, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem,* Latest Developments, https://www.icj-cij.org/case/186 (list of documents contained in the Annex to the Dossier: https://www.icj-cij.org/sites/default/files/case-related/186/186-20230531-req-01-01-en.pdf) ('UN Dossier').

prohibition on altering the existing domestic law unless absolutely prevented, which Israel's purported extension of its own national legal system over the area amounts to an egregious violation of.

78. Rights violations, which breach IHL and IHRL, have been and are widespread and cover the full spectrum of rights, in terms of civil and political rights (e.g., the right to life; freedom from torture and cruel, inhuman and degrading treatment and punishment; freedom of movement) and economic, social and cultural rights (e.g. the rights to housing, education, and cultural heritage).

13.b. Violations of freedom of expression, association, and assembly in particular

79. Israel violates the freedom of expression, association, and assembly of the Palestinian people through policies and practices that target the individual exercise of civil and political rights, and the activities of Palestinian civil society organizations. For example, the Israeli military occupation forces enacted several military orders that criminalize peaceful expressions of opposition to the occupation, displays of Palestinian flags or political symbols, any "act or omission which entails harm, damage, disturbance to the security of the area or of the Israeli Defense Forces," in addition to a wide range of vaguely defined so-called security offences.[69] The suppression of Palestinian freedom of expression, association, and assembly has intensified in recent years, culminating in the 2021 criminalization of six prominent Palestinian civil society and human rights organizations – Al-Haq, Addameer Prisoner Support and Human Rights Association, Bisan Center for Research and Development, Defense for Children International-Palestine (DCIP), Union of Agricultural Work Committees, and Union of Palestinian Women's Committees.[70] The Israeli designation, without evidence, of these civil society organizations as "terrorist groups"–which was rejected by the UN High Commissioner for Human Rights and UN human rights mandate holders, EU governments, and rights organizations in Israel and around the world[71]–has had a devastating impact on the freedom

[69] Human Rights Watch, *Born Without Civil Rights*, December 2019, https://www.hrw.org/report/2019/12/17/born-without-civil-rights/israels-use-draconian-military-orders-repress#. In 2010, the Israeli military commander in the West Bank enacted Military Order No. 1651 of 2009, which consolidated a number of previously issued orders into an integrated "criminal code" that defines security offenses and governs criminal procedures in Israeli military courts in the West Bank. The Order has been amended several times, with the up-to-date Hebrew version available at https://www.nevo.co.il/law_html/law65/666_027.htm.

[70] On October 22, 2021, the Israeli Defense Minister declared six Palestinian civil society organizations (Addameer Prisoner Support and Human Rights Association, Al-Haq, Bisan Center for Research and Development, Defense for Children International-Palestine (DCIP), Union of Agricultural Work Committees, and Union of Palestinian Women's Committees) unlawful under the 2016 Israeli Counterterrorism Act (Designations No. 371-376, Israeli Minister of Defense, 19 October 2021, https://nbctf.mod.gov.il/en/Pages/211021EN.aspx). Two weeks later, the Israeli military commander in the West Bank declared them "illegitimate in accordance with defense regulations" (Declarations 11790-11794, 3 November 2021); see also Union of Palestinian Women's Committees, https://upwc.org.ps.

[71] *See, e.g.*, "Israel's "terrorism" designation an unjustified attack on Palestinian civil society – Bachelet," 26 October 2021, UN Human Rights Office of the High Commissioner, 26 October 2021, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27708&LangID=E; "UN Special Rapporteurs Condemn Israel's Designation of Palestinian Human Rights Defenders as Terrorist Organizations – Press Release," United Nations, 25 October 2021, https://www.un.org/unispal/document/un-special-rapporteurs-condemn-israels-designation-of-palestinian-human-rights-defenders-as-terrorist-organisations-press-release/; "EU questions Israeli decision to ban Palestinian NGOs," *Brussels Times*, 26 October 2021, https://www.brusselstimes.com/news/eu-affairs/190653/eu-questions-israeli-decision-to-ban-palestinian-ngos; "252 Human Rights Networks and Organizations Condemn the Decision of the Occupation and Apartheid Government Concerning Six Palestinian Civil Society and Human Rights Organizations," Addameer, 27 October, 2021, https://www.addameer.org/news/4549; Joint Statement by Israeli Human Rights Organizations: Draconian Measures Against Human Rights, 25 October 2021, https://www.btselem.org/press_releases/20211025_draconian_measure_against_human_rights.

of expression and assembly, and the exercise of civil and political rights, of the Palestinian people.[72] Earlier, in January 2021, Israel had designated the Palestinian Health Work Committees, a key provider of healthcare services in the West Bank, as a terrorist group.[73] In 2022, the UN Human Rights Committee noted with concern the use by Israel of terrorism legislation to "oppress and criminalize legitimate political or humanitarian acts", in addition to other measures aimed at targeting the exercise of free expression, such as residency revocations and denial of entry into Israel.[74] Specifically, the Human Rights Committee stated that it was "deeply concerned" at the declaration of the six Palestinian civil society organization as "unlawful" and the designation of them as "terrorist organizations", describing this as "serious restrictions on the right of freedom of expression".[75]

13.c. Settlements

80. The present Court held in the *Wall* Advisory Opinion that:

> Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49 paragraph 6 [of GCIV].[76]

The General Assembly has held that Israel's establishment of settlements in the OPT "constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace".[77] The Security Council considered that "the policy of Israel in establishing settlements in the occupied Arab territories…constitutes a violation" of the Fourth Geneva Convention.[78] The Council also determined that, in the context of Israel's measures to "change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem" that

> Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.[79]

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[72] See, e.g., Amnesty International, Israel/OPT: The stifling of Palestinian civil society organizations must end, 18 August 2022, https://www.amnesty.org/en/latest/news/2022/08/israel-opt-the-stifling-of-palestinian-civil-society-organizations-must-end/.
[73] See Al-Haq, *Israel's Attack on the Palestinian Health Work Committees is Part of its Systematic Targeting of Palestinian Civil Society*, 19 June 2021, https://www.alhaq.org/advocacy/18527.html; Amnesty International, *Israeli Army Shutdown of Health Organization Will Have Catastrophic Consequences for Palestinian Healthcare*, 9 June 2021, https://www.amnesty.org/en/latest/news/2021/06/israeli-army-shutdown-of-health-organization-will-have-catastrophic-consequences-for-palestinian-healthcare/).
[74] Human Rights Committee, Concluding observations on the fifth periodic report of Israel, CCPR/C/ISR/CO/5, 5 May 2022, para. 18, https://digitallibrary.un.org/record/3977037?ln=en.
[75] Ibid., para. 48.
[76] *Wall* Advisory Opinion (2004), pp. 183-184, para. 120.
[77] GA Res. 2334, 23 December 2016, para. 1.
[78] SC Res. 452 (1979), 20 July 1979, preamble.
[79] SC Res. 465 (1980), 1 March 1980, para. 5.

13.d. Self-determination more broadly

81. Israel violates the right of self-determination through various measures that undermine the ability of the Palestinian people to freely participate in and live under a system of legitimate and effective self-government together with a fully functional and effective civil society. And it violates this right, the right to return, the right of freedom of movement and residence and the right to religious freedom and expression by preventing Palestinian people from freely entering and leaving the Gaza Strip and the West Bank (including East Jerusalem) and moving within/between these territories and sub-divisions with them (e.g. the division between East Jerusalem and the rest of the West Bank). The right of religious freedom of expression is particularly affected in the case of access to holy sites, such as in the Old Cities in Al-Quds/Jerusalem and Al-Khalil, where issues of access are multiple, in terms of both entry to wider territorial units (e.g. for the Al-Quds/Jerusalem Old City sites, access to East Jerusalem generally, and the Old City in particular) and then access restrictions (whether episodic or ongoing) that are holy-site-specific (e.g. the Al-Masjid Al-Aqsa compound and the Church of the Holy Sepulchre in Al-Quds/Jerusalem; the Al-Masjid Al-Ibrahimi in Al-Khalil).

82. The fundamentally harmful and abusive nature of the conduct of the occupation on the life of the Palestinian people as a general matter not only involves continual, systematic and widespread violations of the areas of international law as outlined above. Also, this has an acutely detrimental effect on the very continued existence of the Palestinian people as residents in the OPT itself. As such, this is a violation of the right of self-determination of the Palestinian people, and, relatedly, the sovereign rights of the State of Palestine, because it is a fundamental attack on the *sine qua non* for the realization of these rights: a direct, sovereign, self-governing relationship between the Palestinian people, on the one hand, and the land of Palestine, on the other.

83. An example of how Israel's harmful and abusive practices have this effect is the implanting, existence and maintenance of settlements and their associated supportive infrastructure including separate roads providing essential direct links to Israel, environmental harm, and natural resource use. In addition to violating the specific legal prohibition in occupation law, as indicated above, this practice constitutes a violation of the legal right of self-determination because of its essentially colonial nature and effect. The commentary to GC IV Article 49 indicates that the provision

> …is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.[80]

The foregoing considerations indicate that settlements violate the legal right of the Palestinian people to self-determination, and the related sovereign rights of the State of Palestine, because of the following factors:

(1) They involve taking land from the Palestinian people and/or the State of Palestine

[80] GC IV, Art. 49 Commentary, para. 6.

(2) They alter the demographic composition of Palestine to reduce, proportionately, the number of Palestinian people living there.

(3) They are established and operate (e.g. the connecting settler-only roads to Israel, enabling people to commute to work there) on the basis of a claim by the individuals involved, linked to their identity as Israelis, that the territory where they live is the land of Israel, and not, therefore, the territory of the Palestinian people as a self-determination unit and the sovereign territory of the State of Palestine.

84. When considering the settlements in the context of the construction of the wall, the present Court held that

> the route chosen for the wall gave expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, with a risk of further alterations to the demographic composition of the occupied territory: consequently, the construction of the wall along with measures taken previously severely impeded the exercise by the Palestinian people of its right to self-determination, and was therefore a breach of Israel's obligation to respect that right.[81]

13.e. Violations of the rights of women and girls

85. Israel violates the rights of Palestinian women and girls through multiple discriminatory laws, policies, and measures. In addition to extensively documented violent Israeli practices in the OPT that deprive Palestinian women of their right to life, liberty, and security, Israel enforces a complex web of discriminatory laws and rules that have a particularly severe gendered impact.[82] Examples include movement restrictions, discriminatory residency laws, restrictions on family reunification, home demolitions, arbitrary detention, and targeting of human rights and women's rights defenders.[83]

86. In 2017, the CEDAW Committee expressed concern that Palestinian women and girls in the OPT "continue to be subjected to excessive use of force and abuse" by Israeli occupation forces and settlers, "including physical, psychological and verbal abuse and sexual harassment and violations of their right to life", and noted that "[t]he practice of night raids employed by the Israeli security forces disproportionately affects women and

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[81] *Wall* Advisory Opinion (2004), p. 184, para. 122.

[82] See, e.g., UN Women, *Gender and Wars in Gaza Untangled: What Past Wars Have Taught Us?* June 2021, https://palestine.unwomen.org/en/digital-library/publications/2021/06/gender-and-wars-in-gaza-untangled; UN Women, *In the Absence of Justice: Embodiment and the Politics of Militarized Dismemberment in Occupied East Jerusalem*, December 2016, https://palestine.unwomen.org/sites/default/files/Field%20Office%20Palestine/Attachments/Publications/2016/In%20the%20Absence%20of%20Justice_Report.pdf; UN Women, *Access Denied: Palestinian Women's Access to Justice in the West Bank of the occupied Palestinian Territory*, March 2014, https://palestine.unwomen.org/en/digital-library/publications/2014/12/access-denied; Norwegian Refugee Council, *Gaza: The Impact of Conflict on Women*, November 2015, p. 24, https://www.nrc.no/globalassets/pdf/reports/gaza---the-impact-of-conflict-on-women.pdf; Gisha-Legal Center for Freedom of Movement, *Discrimination by Default: A Gender Analysis of Israel's Criteria for Travel Through Erez Crossing*, December 2020, https://gisha.org/UserFiles/File/publications/Discrimination_by_Default_EN.pdf; Gisha-Legal Center for Freedom of Movement, *The Concrete Ceiling: Women in Gaza on the Impact of the Closure on Women in the Workforce*, March 2017, https://www.gisha.org/UserFiles/File/publications/women_gaza_17/women_gaza_17_en.pdf; Al-Haq, *Submission to the Committee on the Elimination of All Forms of Discrimination Against Women Regarding Israel's Sixth Periodic Report*, 68th Session, October 2017, https://www.alhaq.org/cached_uploads/download/alhaq_files//images/thumbnails/images/stories/Images/1146.pdf.

[83] For an analysis of the experience of occupation from a gender perspective, see. e.g., Fionnuala Ni Aolain, "The Gender of the Occupation", *Yale Journal of International Law* 45.2, 336-376.

girls".[84] The Committee demanded that Israel "put an end to all human rights abuses and violations perpetrated against women and girls", including policies and practices of evictions, punitive home demolitions, restriction on the movement, night raids, and abuses at Israeli check points, which "disproportionately affect women and girls".[85] The CEDAW Committee also expressed concerns with respect to the "increased number of Palestinian women and girls who are subjected to prolonged administrative detention and forcible transfers" from the OPT to detention centers in Israel and about reports of their limited access to justice and health-care services".[86] These concerns were raised by CEDAW earlier, in its 2011 review of Israel,[87] which also deplored Israel's failure to document, prosecute, and punish attacks on Palestinian women by both State and non-State actors.[88] In 2022 the UN Human Rights Committee raised further concerns about the intersecting forms of violence that Palestinian women face as a result of Israeli policies in the OPT, noting that "Palestinian women whose residency status depends solely on that of their spouses may be reluctant to report domestic violence or file for divorce", implicating violation by Israel of Articles 17, 23, 24, and 26 of the ICCPR.[89]

87. In the Gaza Strip, in particular, the severe restrictions on the movement of Palestinian people imposed by Israel, and repeated Israeli military attacks, have had severe cumulative gendered impacts, and exacerbated gender-specific risks and vulnerabilities. As UN Women observed in 2021, the escalation of Israeli violence in the Gaza Strip, already suffering under a "suffocating blockade,"[90] and its associated widespread destruction of homes and infrastructure,[91] has "hit female household members the hardest" in terms of their economic, health, and traumatic psychological impact, in addition to loss of personal security and privacy, a stressful experience for girls especially.[92] Moreover, nearly two decades of Israeli movement restrictions have had uniquely devastating impact on Palestinian women Gaza in terms of their ability to access education, employment, and

[84] Committee on the Elimination of Discrimination Against Women ("CEDAW Committee"), Concluding Observations on the Sixth Periodic Report of Israel, CEDAW/C/ISR/CO/6, 17 November 2017, para. 30, https://www.ohchr.org/en/documents/concluding-observations/cedawcisrco6-concluding-observations-sixth-periodic-report-israel.
[85] Ibid., paras. 30, 32-33.
[86] Ibid., para. 52. In a 2018 report, Addameer Prisoner Support and Human Rights Association noted that "over the last 50 years, an estimated 10,000 Palestinian women have been arrested and/or detained under Israeli military orders. In 2015, occupation forces arrested 106 Palestinian women and girls, representing an increase by 70% compared with the number of women and girls arrested in 2013. The year 2017 ended with 58 Palestinian women in detention including minor detainees" (Addameer, *Imprisonment of Women and Girls,* November 2018, https://www.addameer.org/the_prisoners/women).
[87] CEDAW Committee, Concluding Observations on the Fifth Periodic Report of Israel, CEDAW/C/ISR/CO/5, 5 April 2011, paras. 22-29, 40, https://undocs.org/Home/Mobile?FinalSymbol=CEDAW%2FC%2FISR%2FCO%2F5&Language=E&DeviceType=Desktop&LangRequested=False.
[88] Ibid., para. 22.
[89] Human Rights Committee, Concluding observations on the fifth periodic report of Israel, CCPR/C/ISR/CO/5, 5 May 2022, para. 44, https://www.ohchr.org/en/documents/concluding-observations/ccprcisrco4-concluding-observations-fourth-periodic-report-israel.
[90] UN Women, *Gender and Wars in Gaza Untangled: What Past Wars Have Taught Us?* June 2021, p. 21, https://palestine.unwomen.org/en/digital-library/publications/2021/06/gender-and-wars-in-gaza-untangled.
[91] Preliminary UN data indicate that Israel's attacks on Gaza destroyed 1,148 housing units and severely damaged 1,026 beyond repair. A further 14,918 housing units suffered varying degrees of partial damage (Ibid., quoting Shelter Cluster: Palestine. Escalation of Hostilities – Gaza, May 2021 Dashboard. May 2021, https://www.un.org/unispal/document/shelter-cluster-palestine-escalation-of-hostilities-gaza-may-2021-update-3-non-un-document/).
[92] Ibid., p. 8.

vital healthcare services, including reproductive and maternal healthcare.[93] In 2014, the Human Rights Committee noted with concern that the Gaza blockade "continues … to negatively impact on Palestinians' access to all basic and life-saving services such as food, health, electricity, water and sanitation", in violation of Articles 1, 6, 7, and 12 of the ICCPR.[94]

88. Israel's escalation of its suppression of Palestinian civil society, and in particular the aforementioned criminalization of Palestinian civil society organizations, including Union of Palestinian Women's Committees, has had a considerable adverse impact on Palestinian women's ability to organize, engage in collective action, and advocate for their rights and freedoms.[95] Even prior to this criminalization, the CEDAW Committee had raised concerns in 2017 with respect to Palestinian (and Israeli) women human rights defenders and non-governmental organizations working on gender equality and women's empowerment being "subjected to severe restrictions on their activities, including through limitations on their financing".[96]

13.f. Apartheid

89. Israel is in violation of the international law prohibition of apartheid through the creation and perpetuation of discriminatory policies and practices that are systematically applied to the Palestinian people, with the intention of creating a regime of Jewish supremacy over the Palestinian people. This conclusion was affirmed by multiple Palestinian, Israeli and international human rights organizations in reports that have documented, in great detail,

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[93] Norwegian Refugee Council, *Gaza: The Impact of Conflict on Women*, November 2015, p. 24, https://www.nrc.no/globalassets/pdf/reports/gaza---the-impact-of-conflict-on-women.pdf; Gisha-Legal Center for Freedom of Movement, *Discrimination by Default: A Gender Analysis of Israel's Criteria for Travel Through Erez Crossing*, December 2020, p. 13 https://gisha.org/UserFiles/File/publications/Discrimination_by_Default_EN.pdf; see also, Gisha-Legal Center for Freedom of Movement, *The Concrete Ceiling: Women in Gaza on the Impact of the Closure on Women in the Workforce*, March 2017, p. 10 https://www.gisha.org/UserFiles/File/publications/women_gaza_17/women_gaza_17_en.pdf (noting, for example, that "Ever since 2007, travel in and out of Gaza has been limited to what Israel considers to be exceptional humanitarian circumstances. Israel has also restricted the transport of goods into and out of Gaza, leading to the near complete collapse of Gaza's economy, some of the highest unemployment rates in the world and a growing dependency on humanitarian aid. One of the exceptions to the closure is a small number of businesspeople who are able to exit Gaza in order to sell goods outside it. Women, however, who are more likely to work in civil society organizations or the public service sector, or manage small businesses, do not meet Israel's criteria for permits to exit or sell goods. As a result, women who, in the past, worked or sold their goods outside Gaza have found themselves without work and without a livelihood.").

[94] Human Rights Committee, Concluding observations on the fourth periodic report of Israel, CCPR/C/ISR/CO/4, 21 November 2014, para. 12, https://www.ohchr.org/en/documents/concluding-observations/ccprcisrco4-concluding-observations-fourth-periodic-report-israel.

[95] The Union of Palestinian Women's Committees is an umbrella organization for Palestinian women's groups in the OPT (Union of Palestinian Women's Committees, https://upwc.org.ps).

[96] CEDAW Committee, Concluding Observations on the Sixth Periodic Report of Israel, CEDAW/C/ISR/CO/6, 17 November 2017, para. 38-39, https://www.ohchr.org/en/documents/concluding-observations/cedawcisrco6-concluding-observations-sixth-periodic-report-israel.

Israeli policies and practices that amount to apartheid, including Al-Haq,[97] Al-Mezan,[98] B'Tselem,[99] Yesh Din,[100] Human Rights Watch,[101] Amnesty International,[102] and others.[103]

90. The Mandate of the United Nations special rapporteur on human rights in the Palestinian territories occupied since 1967, and the United Nations Economic and Social Commission for Western Asia, have concluded that Israel's discriminatory policies and practices amount to the crime of apartheid.[104]

91. Multiple UN treaty bodies have expressed grave concerns with regards to Israeli discriminatory policies and practices against the Palestinian people. For example, the CERD, in its 2012 review of Israel, expressed grave concerns at the consequences of policies and practices which amount to de "facto segregation", [105] and called on Israel "to eradicate all forms of segregation between Jewish and non-Jewish communities," and to "to take immediate measures to prohibit and eradicate any such policies or practices which severely and disproportionately affect the Palestinian population in the Occupied Palestinian Territory," finding them to be in violation of article 3 of ICERD.[106] More recently in 2020, the CERD noted with concern the "existence in the OPt of two entirely separate legal systems and sets of institutions for Jewish communities in illegal settlements on the one hand and Palestinian populations living in Palestinian towns and villages on the other hand".[107] The UN Human Rights Committee also expressed concerns in 2014 that "the Jewish and non-Jewish population are treated differently in several regards".[108]

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[97] Al-Haq, *Israeli Apartheid: Tool of Zionist Settler Colonialism*, 29 November 2022, https://www.alhaq.org/advocacy/20931.html; Al-Haq, Addameer, and Habitat International Coalition – Housing and Land Rights Network, *Entrenching and Maintaining an Apartheid Regime over the Palestinian People as a Whole*, January 2022, https://www.alhaq.org/advocacy/19415.html.

[98] Al-Mezan, *The Gaza Bantustan: Israeli Apartheid in the Gaza Strip*, November 2021, https://mezan.org/uploads/upload_center/kLAkShfIAra2.pdf.

[99] B'Tselem, A Regime of Jewish Supremacy: This is Apartheid, 12 January 2021.

[100] Yesh Din, *The Occupation of the West Bank and the Crime of Apartheid: A Legal Opinion*, 9 June 2020, https://www.yesh-din.org/en/the-occupation-of-the-west-bank-and-the-crime-of-apartheid-legal-opinion/.

[101] Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and* Persecution", 27 April 2021, https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution.

[102] Amnesty International, *Israel's Apartheid against Palestinians*, 1 February 2022, https://www.amnesty.org/en/latest/campaigns/2022/02/israels-system-of-apartheid/.

[103] See, e.g., International Human Rights Clinic at Harvard Law School and Addameer, *Apartheid in the Occupied West Bank: A Legal Analysis of Israel's Actions*, 28 February 2022, http://hrp.law.harvard.edu/wp-content/uploads/2022/03/IHRC-Addameer-Submission-to-HRC-COI-Apartheid-in-WB.pdf.

[104] See Report of the Special Rapporteur on the situation of Human Rights in the Palestinian territories occupied since 1967, S. Michael Lynk, A/HRC/49/87, 21 March 2022 (advanced unedited version), paras. 51-56 (Conclusions), https://www.ohchr.org/en/documents/country-reports/ahrc4987-report-special-rapporteur-situation-human-rights-palestinian; Report of the Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967, Francesca P. Albanese, A/77/356, 21 September 2022, paras. 40, 70, 74, https://www.ohchr.org/en/documents/country-reports/a77356-situation-human-rights-palestinian-territories-occupied-1967; Economic and Social Commission for Western Asia ("ESCWA"), *Israeli Practices towards the Palestinian People and the Question of Apartheid*: *Palestine and the Israeli Occupation, Issue No. 1,* E/ESCWA/ECRI/2017/1, 2017, https://oldwebsite.palestine-studies.org/sites/default/files/ESCWA%202017%20%28Richard%20Falk%29%2C%20Apartheid.pdf.

[105] CERD, Consideration of reports submitted by States parties under article 9 of the Convention: Concluding Observations, CERD/C/ISR/CO/14-16, 19 March 2012, para. 24, https://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ISR.CO.14-16.pdf.

[106] Ibid., para. 11.

[107] CERD, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel, CERD/C/ISR/CO/17-19, 27 January 2022, para. 22, https://www.ohchr.org/en/documents/concluding-observations/cerdcisrco17-19-committee-elimination-racial-discrimination.

[108] Human Rights Committee, Concluding observations on the fourth periodic report of Israel, CCPR/C/ISR/CO/4, 21 November 2014, para. 7, https://www.ohchr.org/en/documents/concluding-observations/ccprcisrco4-concluding-observations-fourth-periodic-report-israel.

14. Different forms of illegality

92. The terms 'illegal occupation' and 'unlawful occupation' are ambiguous. They can denote existential illegality, illegality of conduct, or both. Existential illegality can denote the basic fact of the occupation as a denial of self-determination, or the purposes associated with the existence of the occupation, such as annexation and/or self-defence, being invalid. Illegality in conduct can be specific to a sub-set of the staggeringly wide-ranging and multi-faceted breaches of international law involved in that conduct. What all this suggests is that it is important to address the complete legal picture when assessing legality, to situate key features of the occupation in their correct place in the applicable legal frameworks, to acknowledge when legality/illegality is being used in a non-comprehensive sense, and be alive to the possibility of such specificity when the terms are invoked by others.

15. Importance of the correct starting point: *everything* Israel does in the West Bank and the Gaza Strip lacks a valid international legal basis and is an illegal exercise of authority, not just those things that violate the rules applicable to the conduct of the occupation

15.a. Illegal exercise of authority as a general matter

93. A fundamental consequence of the existential illegality of the occupation is that, necessarily, everything Israel does in Gaza and the West Bank (including East Jerusalem) lacks a valid international legal basis, and is an illegal exercise of authority, not just those things which violate the law regulating the conduct of the occupation. Just as the existence of the conduct-regulatory framework does not provide a basis for Israel to maintain the occupation, so too, if the occupation is maintained by Israel, as it is currently, the fact that the substantive norms of this regulatory framework do then entitle and indeed require Israel to do certain things does not alter the more fundamental position that Israel lacks any legal authority to do anything, and whatever it therefore does is illegal, even if it is compliant with and pursuant to the rules of the conduct-regulatory framework. Thus, the United Nations Human Rights Committee observed in para. 70 of its 2019 General Comment 36 on the right to life in the International Covenant on Civil and Political Rights (to which Israel is a party) that a State engaging in a use of force that constitutes aggression—i.e., one that is existentially illegal in this way according to the *jus ad bellum*, as in the present case—violates ipso facto the obligation in the Covenant not to engage in the arbitrary deprivation of life.[109] In other words, in an illegal use of force, every violation of the right to life is, necessarily, 'arbitrary' (i.e. lacking in legally valid justification) and therefore illegal as a violation of the Covenant.

15.b. Interplay between *ad bellum* and *in bello* legality

94. How can international law simultaneously say that the very existence of the occupation is illegal, and that Israel is required and entitled to do certain things during it? How can, for example, Israel be understood to be entitled to use necessary and proportionate force to promote public order in the West Bank (according to IHL and potentially also IHRL) if its very presence there, including when it comes to public order functions, is an illegal use of

[109] Human Rights Committee, General Comment 36, CCPR/C/GC/36, 3 September 2019, para. 70.

force (according to the *jus ad bellum*)—and in consequence, following the logic of the UN Human Rights Committee, a particular public order action, involving lethal force that is necessary and proportionate, and otherwise also IHL compliant, is illegal in human rights law?

95. The law does this because it operates at two different levels, dealing with matters of relatively different significance, both of which have to be taken into account to arrive at the complete legal picture. The pragmatic objective of having IHL—to rein in the excesses of war regardless of whether it has a just cause—necessarily means its rules apply equally to a State engaged in a use of force that is lawful in *jus ad bellum* terms, and one that is unlawful in such terms. (Human rights law is, similarly, applicable extraterritorially regardless of the legality of the activity at issue.) But this does nothing to alter the more fundamental matter being dealt with by the law on the use of force. Instead, a sub-set of the violence that is illegal as a matter of the *jus ad bellum* is then rendered unlawful a second time for that State, in the *jus in bello*, in order for there to be rules in operation that would also render the same type of violence, if perpetrated by a State acting otherwise lawfully under the *jus ad bellum*, illegal. Put more crudely, to ensure that neither State acts in a manner considered to be 'inhumane', both States have to be subject to rules against 'inhumanity', even if, separately, the recourse to force by one such State is also to be treated as unjust on a more fundamental level, thereby prohibiting 'inhumane' and (supposedly) 'non-inhumane' acts alike by that State. This also has the benefit of enabling a more detailed set of requirements to be stipulated, with dedicated mechanisms of enforcement, operating universally between belligerents, for the sub-set of force that is to be impermissible on all sides.

96. Thus, for Israel, the rules of IHL, including occupation law, ultimately offer no legal cover for anything it does during the occupation, since there is a more fundamental set of rules that it is still violating simply by being there, even if it is IHL-compliant. Moreover, when Israel violates IHL in particular incidents, framing things as only involving an IHL violation misses the point that that the acts in question are in any case illegal for a more essential and comprehensively applicable reason than the matters IHL is concerned with (such as public order/military necessity, proportionality, protected persons etc.). And this illegality therefore subsists even if IHL is complied with. Appraising individual incidents only in terms of IHL compliance misses this, and, indeed, rests on a false premise that, once the question of such compliance has been resolved, the question of the legality/lawfulness of the incident has been determined. When the outcome of the exclusively IHL-based appraisal is that the incident was IHL-compliant, such an approach leads to an incorrect overall conclusion that the incident was lawful, when actually it was not. When the outcome of the exclusively IHL-based appraisal is that the incident was unlawful, this leads to an incorrect overall suggestion that those aspects of the incident that led to the violation of IHL are the only basis for illegality—a misleading, distorted picture. It is the difference between saying that soldiers abusing and killing Palestinian people at checkpoints in the West Bank in ways that violate IHL is illegal because of the IHL-non-compliant abuse and killing only, and saying that it is illegal also because Israel has no valid right to even exercise any form of authority, including the operation of restrictions at checkpoints, in the first place.

15.c. Example: the 2022 killing of Shireen Abu Akleh and the attack on her pallbearers

97. In May 2022, the world was shocked when Palestinian-American Al-Jazeera journalist Shireen Abu Akleh was killed by a shot fired by Israeli soldiers in Jenin, and subsequently the pallbearers of her coffin were attacked by Israeli soldiers at St Joseph hospital in Sheikh Jarrah, Al-Quds/Jerusalem. The common approach taken by both critics of these incidents, and Israel in its defence of them, was to analyse the incidents in terms of whether or not, in each case, the force used was justified according to IHL and IHRL. So with the killing, the analysis focused on whether, if the shot had been fired by an Israeli soldier, it is permissible to target journalists or whether somehow the killing might have been permissible as collateral damage. And in the violence against the pallbearers, the analysis focused on whether there was legitimate security concern in that situation and whether, if so, the response was necessary and proportionate. On the basis of these lines of enquiry, critics claimed that the norms of IHL and IHRL were breached; Israel seemingly claimed these areas of law were complied with. What united everyone was that this was the way to think about the incidents, as a general matter, and as far as which areas of international law are relevant and need to be applied to them.

98. But focusing only on this level of analysis ignores a more fundamental point: that the killing of Shireen Abu Akleh, and the violence against her pallbearers, were only possible because Israeli soldiers were in Jenin and Sheikh Jarrah in the first place. It is necessary to alter the level of analysis, to take in the broader context—the occupation itself—and understand it, in and of itself, as a form of oppression and an act of violence. And to conceptualize it as an exercise of authority that is illegitimate. This is rooted in the legal position, once the *jus ad bellum* and the law of self-determination (which is part of IHRL) is brought into the picture.

15.d. Different actors and different obligations

99. It might be said that the foregoing legal position creates potential confusion and contradiction, with soldiers acting on the basis of IHL only (or IHL plus IHRL minus self-determination only), thus not following the complete set of standards that need to be taken into account to ensure lawful behaviour. However, as a general matter, individual soldiers are not the direct subjects of the areas of international law applicable here, whether the *jus ad bellum* or the *jus in bello*; it is the State of Israel. A sub-set of these obligations are then made directly applicable to them on the basis of individual criminal responsibility. This is, with one exception, limited to certain standards concerned with the conduct of the occupation only. And it is those standards only that are typically the basis on which soldiers are trained and which they are expected to follow in theatre. The exception to the foregoing occupation-conduct-specificity of international criminal responsibility is the crime of aggression, which does indeed deal with the existential illegality of the occupation. However, this is limited only to individuals in senior positions who are in a position to determine its existence—in the words of the Rome Statute for the ICC, "in a position effectively to exercise control over or to direct the political or military action of a State".[110]

100. The effect of these differences is to disaggregate the legal framework in a manner that corresponds to the different determinative roles that actors play. Those in a position to determine the continued existence of the occupation, whether in civilian or military

[110] Rome Statute, Art. 8*bis* 1.

positions, are potentially subject to an international criminal sanction—the crime of aggression—for their role in this continued existence. The State of Israel is also itself legally responsible here, as a matter of the *jus ad bellum* and the law of self-determination (setting aside the question of whether States can commit crimes), and, linking the individual and State responsibilities, it is for the leaders of that State to ensure it complies with that responsibility. If they do not do this, and the occupation continues, then it is these individuals, and the State of Israel, who are legally responsible for the fact that the soldiers in the West Bank have no right to be there, and, within this, no right to exercise any form of authority—whether or not IHL-compliant—in the first place. These individual soldiers, by contrast, are not internationally-legally-responsible in this way, their responsibilities in international law being limited narrowly to areas of international criminal law concerned with IHL compliance, as reflected in the specificity of their training, and the limitations of their capacities within the chain of authority. Any deprivations of life by these soldiers pursuant to the occupation which does not involve a breach of IHL will still be an unlawful violation of the right to life in human rights law. But that violation will be one committed by the State in whose name they acted (and, in terms of the crime of aggression, individual leaders). The State's obligation to ensure its agents do not act in this way so as to lead to violations of its obligations in human rights law would require the State to end the occupation. Thus, the constructive effect of the prohibition of the arbitrary deprivation of life in international human rights law is to require the State subject to such an obligation not to engage in the illegal use of force. Equally, leaders seeking not to commit the crime of aggression must use their power to direct State policy in this way.

16. Israel's violations are 'serious' breaches of peremptory/*jus cogens*/non-derogable obligations

101. A serious breach of a peremptory norm of international law is defined in Article 41, paragraph 2, of the ARSIWA as being "a gross or systemic failure by the responsible State to fulfil the obligation" concerned.[111] The commentary notes:

> To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations, and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.[112]

102. Violations of the following peremptory norms are of their nature 'systemic', necessarily involving an intentional violation on a large scale. Their violation by Israel is, thus, by definition 'serious'.

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[111] ARSIWA, Art. 41(2). See also ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, para. 3, and ARSIWA, Part Two, Ch. III, Art. 41 Commentary; ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19 Commentary.
[112] ARSIWA, Part Two, Ch. III, Art. 40 Commentary, para. 8.

(1) Self-determination.[113]

(2) Aggression.[114]

(3) Apartheid.

103. Violations of the following peremptory norms are of their nature 'gross', necessarily being of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. Their violation by Israel is, thus, by definition 'serious'.

(1) The 'core/basic' protective rules of IHL, which are classified as 'serious violations' (and in consequence states bear special obligations to suppress them through individual criminal responsibility, and international criminal jurisdiction for them is provided by the ICC—the concept of 'war crimes'). As indicated above, the prohibition of implanting settlements in occupied territory is one such rule.

104. Israel's violations of the following two peremptory norms have been both gross and systematic, as has been widely documented, including by various United Nations bodies, the evidence of which having been submitted to the Court by the United Nations in the present proceedings.[115] These violations are, therefore, 'serious.'

(1) The prohibition of racial discrimination generally (beyond what is covered by apartheid).

(2) The prohibition of torture and cruel, inhuman and degrading treatment and punishment.

PART 4: CONSEQUENCES

17. Invalidity, and implications for individual rights

17.a. Invalidity generally

17.a.i. All unlawful acts are invalid

105. A basic postulate of law is that actions which are unlawful or which are not pursuant to a valid legal entitlement are invalid—without legal effect. This is linked to the general legal principle of *ex injuria jus non oritur*—legal rights cannot arise out of an illegal act.

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[113] The commentary to article 41 of the ARSIWA, regarding the consequences for serious breaches, notes that there is an obligation of "collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches". As a direct example, it provides "[t]he obligation applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples". In this example, then, a denial of the right of self-determination is being posited as a 'serious breach' (ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 5).

[114] On the particular breach here involved in Israel's use of force for annexation purposes, it is notable that the UN Human Rights Council referred to the "serious breaches of peremptory norms of international law by Israel…the prohibition of the acquisition of territory by force" (Human Rights Council Res. 49/28, 11 April 2022, preamble, para. 7).

[115] See UN Dossier.

17.a.ii. Everything Israel does in the OPT is invalid because the occupation is existentially illegal

106. The illegal nature of Israel's presence and exercise of authority in the West Bank, including East Jerusalem, and Gaza, necessarily means that, a general matter, everything that Israel has done and is doing there—including, in the case of certain parts of the West Bank, decisions involving the full-spectrum of territorial administration matters, from the question of land ownership to issues of cultural heritage—on whatever basis (including, potentially, an ostensibly purportedly sovereign basis when it comes to East Jerusalem) is legally invalid.

107. The interplay between the existential illegality of the occupation generally (not, then, simply the illegality of Israel's seemingly purported exercise of sovereignty in East Jerusalem, but its exercise of authority over the Palestinian territories as a whole) and what the applicable regulatory legal framework—chiefly, occupation law—permits and requires, needs to be addressed here. As indicated above, it is important to put things in their correct order, and not jump to what occupation law might permit and even require Israel to do as if somehow there is not a more fundamental matter concerning whether it should be engaged in the occupation in the first place which needs to be addressed first. Moreover, when attention turns to occupation law, it is necessary to interpret the meaning of this law in the context the broader, more fundamental legal position. So, for example, the occupation law rules requiring an occupier to maintain the status quo in occupied territory unless absolutely prevented have to be interpreted in the light of what is potentially at stake if the status quo is altered—the right of self-determination of the Palestinian people—the existence of this right in international law, and the *jus cogens* nature of the right.

108. On the specific issue of freedom of movement within, and freedom of entry and exit to and from, the West Bank (including East Jerusalem) and Gaza, of people and goods (including aid), it is important to note the following.

(1) As indicated above, many of the decisions Israel makes and practices it engages in that impact on this matter violate the relevant conduct-regulatory applicable law. But in any case, more fundamentally, as Israel has no legal entitlement to exercise authority over these territories in the first place, necessarily, it has no legal entitlement to be making decisions about movement, entry and exit of people and goods (including aid) at all. Beyond, then, such decisions which violate the conduct-regulatory law—or, put differently, those decisions which may be understood to fall within what is permitted by such law, such as occupation law— all such decisions violate international law, since they are part and parcel of Israel's exercise of authority over these territories which is a violation of the law on the use of force and the law of self-determination. And this illegality is evident, as explained above, simply by virtue of the exercise of authority itself, not simply, where it exists, illegality based on an invalid purported exercise of sovereignty. Put differently, Israel's imposition of restrictions on freedom of movement of people and goods (including aid) within, and entry and exit from, the West Bank (including East Jerusalem) and Gaza is illegal not just because Israel is not the territorial sovereign authority in these areas. It is also illegal because Israel lacks a legal entitlement to exercise authority in those areas on a non-sovereign basis.

(2) The consequence of the foregoing is that any and all decisions and actions Israel takes to purportedly regulate and restrict freedom of movement of people and goods (including aid) within, and entry and exit from, the West Bank (including East Jerusalem) and Gaza are legally invalid. In other words, it has no international legal entitlement to do these things. Thus, Israel has no international legal capacity to prevent anyone, or any goods (including aid), from entering, leaving or moving within and between the West Bank (including East Jerusalem) and Gaza, for whatever reason. This is an entirely different situation, then, from one where a State is making decisions on movement within, and entry to and from, its own territory, or such decisions in relation to non-sovereign territory where that State has an internationally-lawful basis to exercise authority there.

17.a.iii. Affirmations of invalidity by the UN General Assembly and Security Council

109. The invalidity of that which Israel has done which is illegal has been confirmed as such by the General Assembly and the Security Council. On settlements, for example, the General Assembly deemed Israel's establishment of settlements in the OPT to have "no legal validity".[116] The Security Council "determined that the policies and practices of Israel in establishing settlements in the Palestinian and Arab territories occupied since 1967 have no legal validity".[117] On the broader annexationist, settler-colonial enterprise, the Security Council found that measures taken by Israel to "change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, have no legal validity".[118]

17.b. Individual rights

17.b.i. The 'Namibia exception'

110. Whereas everything done by Israel under the occupation has been and is invalid as a general matter, human rights law requires that certain consequences of this be treated as legally valid for individuals, if to do otherwise would violate their rights in human rights law. This approach was adopted by the present Court in the *Namibia* Advisory Opinion, in the context of one of the key consequences of validity and invalidity—the position that should be taken by third States in terms of recognition. The Court observed that:

> …the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[119]

[116] GA Res. 2334, 23 December 2016, para. 1.
[117] SC Res. 446, 22 March 1979, para. 1. See also SC Res. 452 (1979), 20 July 1979, preamble.
[118] SC Res. 465, 1 March 1980, preamble.
[119] *Namibia* Advisory Opinion, p. 56, para. 125.

17.b.ii. Settlers

111. This matter is complicated because of the presence of Israeli settlers in the OPT, whose rights in human rights law need to be correctly appraised. It is sometimes mistakenly suggested that the application of human rights law to Israel in the West Bank including East Jerusalem somehow enables such settlers to claim, on the basis of human rights law, things (e.g. land and real property) which they would otherwise have no right to and which in some cases have been purportedly acquired on the basis of administrative and judicial decisions by Israel made on a discriminatory basis and pursuant to overall authority that is illegal. Thus, human rights law somehow enables certain key components of settler colonialism and undermines or dilutes the impact of international law in rendering this practice illegal in the ways outlined above.

112. This is mistaken in multiple respects. The operative legal regime applicable to the occupation is arrived at by taking into account human rights law together with the rules of IHL, including occupation law, which contains important normative distinctions between the Palestinian population, on the one hand, and Israeli settlers, on the other. Moreover, in any case, individuals do not have the human right to benefit from unlawful discrimination—quite the reverse, the breach of human rights law involved in that discrimination requires individuals benefiting from that breach to be deprived of the benefit. More generally, it is a basic legal principle that if something is illegally taken from its owner, valid title cannot be passed on to a third party. Furthermore, most of human rights law, and certainly when it comes to freedom from interference in enjoyment of land and property, freedom of movement and freedom of residence in human rights law, is concerned with context-specific balancing, of both conflicting rights and also between rights and legitimate restrictions on such rights. Necessarily, contextualism means that sometimes very different substantive legal positions are arrived at in relation to superficially similar situations, in relation to different groups of people, because of the context and how this context cuts differently as between the different groups.

113. Context for present purposes includes, in addition to the aforementioned legal regime of IHL in general and occupation law in particular, the prohibition on racial discrimination generally and apartheid in particular, and the right of self-determination, areas of human rights law which, as indicated, have special non-derogable status, something which most other rights in human rights law (including freedom from interference in property use, freedom of movement and freedom of residence) do not. To state the obvious, in the West Bank (including East Jerusalem) the right of self-determination belongs to the Palestinian people, who are living on land that constitutes the territorial basis for their right to self-determination as Palestinian people. By contrast, the presence of Israeli settlers in the West Bank is illegal in international law. Treating these two groups of people as if the human rights they have in the West Bank have an identical substantive meaning misses this. This does not mean that Israeli settlers, as human beings, do not have human rights in the West Bank just as they would have them anywhere in the world. It is just that for those rights whose substantive meaning is dependent on context, the status of settlers *as settlers* is legally relevant.

18. Consequences for the Palestinian people: the right to resist

114. One of the main legal consequences for the Palestinian people of Israel's violation of their right to self-determination through the occupation is that they have a legal right, as a matter

of customary international law, arising out of their right to self-determination, to resist the occupation.

115. The fact that this right exists for a people in such a situation was assumed when the General Assembly stated, in the Friendly Relations and Co-operation Declaration, that

> In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.[120]

In its earlier General Assembly in Resolution 2105 (XX), dated 20 December 1965, the General Assembly recognized

> …the legitimacy of the struggle of peoples under colonial rule to exercise their right of self-determination, and invites all states to provide material and moral assistance to the national liberation movements in colonial territories.[121]

In Resolution 2649 (XXV), 30 November 1970, the General Assembly

> Affirms the legitimacy of the struggle of peoples under colonial and foreign domination recognized as being entitled to the right of self-determination to restore to themselves that right by any means at their disposal … [and] Recognizes the right of peoples under colonial and alien domination in the legitimate exercise of their right to self-determination to seek and receive all kinds of moral and material assistance, in accordance with the resolutions of the United Nations and the spirit of the Charter of the United Nations.[122]

In Resolution 3070 (XXVIII) of 30 November 1973, the General Assembly

> …reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation by all available means, including armed struggle … [and] calls upon all States, in conformity with the Charter of the United Nations and with relevant resolutions of the United Nations, to recognize the right of all peoples to self-determination and independence and to offer moral, material and any other assistance to all peoples struggling for the full exercise of their inalienable right to self-determination and independence.[123]

In Resolution 35/35A, dated 14 November 1980, the General Assembly

> Reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation by all available means, including armed struggle.[124]

116. The Assembly has invoked the right in the particular context of the Palestinian struggle. In Resolution 2787 (XXVI), dated 6 December 1971, it

> Confirms the legality of the people's struggle for self-determination and liberation from colonial and foreign domination and foreign subjugation … in particular that of … the

[120] Friendly Relations and Co-operation Declaration (1970).
[121] GA Res. 2105 (XX), 20 December 1965, para. 10.
[122] GA Res. 2649 (XXV), 30 November 1970, paras. 1-2.
[123] GA Res. 3070 (XXVIII), 30 November 1973, paras. 2-3.
[124] GA Res. 35/35, 14 November 1980, para. 2.

Palestinian people by all available means consistent with the Charter of the United Nations.[125]

117. In his separate opinion in the *Namibia* case before the present Court, Judge Ammoun wrote that it is "beyond dispute" that "the conscious action of the peoples themselves, engaged in a determined struggle … for the purpose of asserting … the right of self-determination," is a "general practice" which might be held, beyond dispute, to constitute law within the meaning of Article 38, paragraph 1 *(b)*, of the Statute of the [present] Court".[126]

19. Consequences for Israel

19.a. Introduction

118. As the present Court explained in the 1971 *Namibia* Advisory Opinion, "the qualification of a situation as illegal does not by itself put an end to it". [127] Rather, it is a "first, necessary step in an endeavour to bring the illegal situation to an end".[128] A determination of illegality cannot remain without consequences, and thus when a State violates its international obligations, as the present Court indicated in the *Wall* Advisory Opinion: "it follows that the responsibility of that State is engaged under international law".[129]

119. This section addresses the three obligations Israel must fulfil as the State responsible for the internationally wrongful acts set out in the previous Part. These obligations are:

(1) Cessation;[130]

(2) making guarantees of non-repetition;[131]

(3) reparation,[132] which can come in the form of restitution,[133] compensation,[134] and/or satisfaction.[135]

19.b. Cessation: Israel must put an end to the unlawful situation immediately

19.b.i. General duty

120. Israel as the State responsible for the internationally wrongful acts set out in the previous Part must cease these acts and end the violations.[136] This duty is vital. Not only is it a necessary step on the path to eliminating the consequences of Israel's wrongful conduct. Also, it safeguards the continuing validity and effectiveness of the rules that have been

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[125] GA Res. 2787 (XXVI), 6 December 1971, para. 1.
[126] *Namibia* Advisory Opinion (1971), Separate Opinion of Judge Ammoun, p. 74.
[127] *Namibia* Advisory Opinion (1971), p. 52, para. 111.
[128] Ibid.
[129] *Wall* Advisory Opinion (2004), p. 197, para.147. This is reflected in Article 1 of the ARSIWA: "Every internationally wrongful act of a State entails the international responsibility of that State" (ARSIWA, Art. 1).
[130] See ARSIWA, Art. 30(a).
[131] See ARSIWA, Art. 30(b).
[132] See ARSIWA, Art. 31.
[133] See ARSIWA, Art. 35.
[134] See ARSIWA, Art. 36.
[135] See ARSIWA, Art. 37.
[136] See ARSIWA, Art. 30(a).

violated. In this way, in the words of the ILC ARSIWA Commentary, it "protects both the interests of the injured State or States and the international community as a whole in the preservation of, and reliance on, the rule of law".[137]

121. As the present Court indicated in the *Wall* Advisory Opinion, the duty of cessation "is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation".[138]

19.b.ii. Immediacy

122. The present Court has repeatedly affirmed that the duty of cessation constitutes an obligation to take immediate steps to put an end to the continuing wrongful act. In the 1980 *United States Diplomatic and Consular Staff in Tehran* case, the present Court held that Iran had violated, and was continuing to violate, several obligations owed to the USA under international law,[139] and ordered Iran to "*immediately* terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran" (emphasis added).[140] In the 2009 *Navigational and Related Rights* case, the present Court explained:

> [I]t should be recalled that when the Court has found that the conduct of a State is of a wrongful nature, and in the event that this conduct persists on the date of the judgment, the State concerned is obliged to cease it *immediately* [emphasis added].[141]

123. The immediate nature of the cessation requirement is further illustrated when the requirement has been affirmed in the context of the following situations: first, illegality as a matter of the use of force and, second, illegality as a matter of self-determination.

19.b.iii. Immediacy in ending violations of the use of force including when this involves an occupation

124. In the *Military and Paramilitary Activities in and against Nicaragua* case, in the context of a finding that the USA violated international law through its use of force and military and paramilitary activities within Nicaragua, the present Court held that the USA is "under a duty *immediately* to cease and to refrain from all such acts as may constitute breaches" of its legal obligations (emphasis added).[142]

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[137] ARSIWA, Part Two, Ch. I, Art. 30 Commentary, para. 5.
[138] *Wall* Advisory Opinion (2004), p. 197, para. 150. See also, *Haya de la Torre Case,* Judgment of June 13th, 1951, I.C.J. Reports 1951, p. 71 at p. 82 ("This decision entails a legal consequence, namely that of putting an end to an illegal situation"); *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment of 3 February, 12, I.C.J. Reports 2012, p. 99 at p. 153, para. 137 (referring specifically to ARSIWA Article 30(*a*)); see also *Rainbow Warrior (New Zealand v. France)*, Arbitration Award, 30 April 1990, para. 114; *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi*, Arbitration Award, 4 March 1991, para. 61 (noting that the obligation to put to an end a wrongful act that constitutes a violation of customary international law is "not in doubt").
[139] United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980, p. 3 at pp. 41-42, para. 90.
[140] Ibid., p. 44, para. 95.
[141] Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 213 at p. 267, para. 148.
[142] Military and Paramilitary Activities in and against Nicaragua Merits Judgment (1986), p. 149, para. 292, sub-para. 12.

19.b.iv. Immediacy in ending violations of self-determination through unlawful territorial control

125. In the 1971 *Namibia* Advisory Opinion concerning South Africa's unlawful control over the territory and people of Namibia, the present Court held that "South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it" and "the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia *immediately* and thus put an end to its occupation of the Territory" (emphasis added).[143]

126. In the 2019 *Chagos* Advisory Opinion, the present Court, having determined that the UK's exercise of control over the Chagos Archipelago was a violation of the law of self-determination, held that "the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago *as rapidly as possible*..." (emphasis added).[144] Following the Court's decision, the General Assembly adopted Resolution 73/295, demanding that, in accordance with the Court's Advisory Opinion, the United Kingdom "withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution, thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible".[145]

19.b.v. Israel's position

19.b.v.α. General requirement

127. Based on the foregoing general principles of State responsibility, Israel must immediately end all the violations of international law outlined in the previous Part.

19.b.v.β. Ending the occupation immediately

128. Fundamentally, this means Israel is under obligation to withdraw its presence and administration entirely from the occupied Palestinian territory immediately. As indicated above, the right of self-determination being violated by the existence of the occupation is to be realized immediately. This realization cannot therefore be made subject to any qualifications, in terms of its temporal character, on any basis. There is, then, no back-door legal basis on which Israel can avoid a requirement to terminate the occupation immediately.

129. This is a material, physical and kinetic requirement of a complete and total end to the Israeli presence and exercise of control and authority in and over the OPT. It includes personnel, notably the armed forces, and also the infrastructure and technology of the occupation, notably checkpoints and surveillance.

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[143] *Namibia* Advisory Opinion (1971), p. 54, para. 118 and p. 58, para. 133.
[144] *Chagos* Advisory Opinion (2019), p. 139, para. 178.
[145] GA Res. 73/295, 24 May 2019, para. 3.

130. It is also a requirement applicable to Israeli law and policy: the State should immediately terminate all its political, administrative and legal arrangements that purport to apply in and exercise authority over the OPT. This includes immediately ceasing to apply laws, jurisdiction, and administration—including military and court orders—within the OPT.

131. Within the foregoing is an obligation to cease any activity concerned with altering the legal status of any part of the OPT, including East Jerusalem. Thus, the General Assembly called upon Israel to "rescind all measures already taken and to desist forthwith from taking action which would alter the status of Jerusalem".[146]

132. The legal requirement to immediately terminate the occupation is reflected in and reinforced by determinations by the United Nations General Assembly and Security Council.

133. The General Assembly has on numerous occasions called for the end of the occupation. In Resolution 2628 of 4 November 1970, for instance, it stated that it:

> 1. *Reaffirms* that the acquisition of territories by force is inadmissible and that, consequently, territories thus occupied must be restored;
>
> 2. *Reaffirms* that the establishment of a just and lasting peace in the Middle East should include the application of both the following principles:
>
> (a) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;
>
> (b) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and its right to live in peace within secure and recognized boundaries free from threats or acts of force.[147]

In Resolution 3414, the Assembly likewise stated that it:

> 1. *Reaffirms* that the acquisition of territory by force is inadmissible and therefore all territories thus occupied must be returned;
>
> 2. *Condemns* Israel's continued occupation of Arab territories in violation of the Charter of the United Nations, the principles of international law and repeated United Nations resolutions.[148]

The call for Israel to withdraw from the OPT has been reiterated in numerous other General Assembly resolutions, including Resolutions 32/20 (1977), 33/29 (1978), 34/70 (1979), 35/207 (1980), 36/226A (1981), 38/180A (1983), 45/83A (1990), ES-10/18 (2009), and 77/247 (2022).[149]

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[146] GA Res. 2253, 4 July 1967, para. 2.
[147] GA Res. 2628, 4 November 1970, paras. 1-2
[148] GA Res. 3414, 5 December 1975, paras. 1-2.
[149] GA Res. 32/20, 25 November 1977, preamble, para. 2 (calling for Israeli "withdrawal from all Arab territories occupied since 5 June 1967"); GA Res. 33/29, 7 December 1978, paras. 2-3 (calling for "Israeli withdrawal from all the occupied Palestinian and other Arab territories"); GA Res. 34/70, 6 December 1979, paras. 2, 4 (calling for "Israeli withdrawal from all the occupied Arab and Palestinian territories, including Jerusalem); GA Res. 35/207, 16 December 1980, para. 1 (calling for "immediate, unconditional, and total withdrawal of Israel from all these occupied territories") and para. 4 (calling for "complete and unconditional withdrawal from all the Palestinian and other Arab territories since June 1967); GA Res. 36/226A, 17 December 1981, preamble ("*reiterating* that… Israel must withdraw unconditionally from all occupied Palestinian and other Arab territories, including Jerusalem), para. 1 ("demands immediate unconditional and total withdrawal of Israel from all these

134. The Security Council has, on several occasions, called for the withdrawal of Israeli forces from the OPT.[150] As indicated earlier, in Resolution 242 of 22 November 1967, the Council stated that it:

> 1. *Affirms* that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:
>
> (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
>
> (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.[151]

19.b.v.γ. Return and freedom of movement

135. Israel must immediately stop preventing Palestine refugees from exercising their right to return to their homes, land, villages and towns. It must also stop preventing them from moving freely between Gaza and the West Bank, by providing automatic, safe and free passage through Israeli territory. This is necessary in order to reverse the violations of the rights of self-determination, freedom of movement, freedom of religion and worship, and return created for Palestinian people in the OPT who wish to move between Gaza and the West Bank, and are prevented from doing this by the creation and continued existence of Israeli territory interposed between and thereby separating out the two territories.

136. The Security Council has demanded, in Resolution 799 of 18 December 1992, that Israel "ensure the safe and immediate return to the occupied territories of all those deported".[152]

19.b.v.δ. Settlements

137. All settlement activity should cease. The Security Council, having referenced the legal invalidity of Israel establishing the settlements, called upon "Israel, as the occupying Power, to abide scrupulously by the Fourth Geneva Convention…" and to "rescind its

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occupied territories"), and para. 4 (calling for "complete and unconditional withdrawal of Israel from the Palestinian and other Arab territories occupied since 1967, including Jerusalem"); GA Res. 38/180A, 19 December 1983, para. 11 (calling for "total and unconditional withdrawal by Israel from all the Palestinian and other Arab territories occupied since 1967, including Jerusalem"); GA Res. 45/83A, 13 December 1990, preamble ("Israel must withdraw unconditionally from the Palestinian territory occupied since 1967, including Jerusalem, and the other occupied Arab territories"), para. 1 (reaffirming the necessity of "immediate, unconditional, and total withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and the other occupied Arab territories"), para. 3 (calling to ensure "the complete and unconditional withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and the other occupied Arab territories"), and para. 5 (demanding "immediate, unconditional, and total withdrawal of Israel from all the territories occupied since 1967); GA Res. ES-10/18, 16 January 2009, para. 1 (demanding "full withdrawal of Israeli forces from the Gaza strip"); GA Res. 77/247, 30 December 2023, para. 6 (affirming the right of the Palestinian people to achieve "without delay an end to the Israeli occupation that began in 1967").

[150] SC Res. 242, 22 November 1967; SC Res. 267, 3 July 1969 (Concerning the status of Jerusalem and reaffirming that the acquisition of territory by military conquest is inadmissible); SC Res. 271, 15 September 1969 (reaffirming that the acquisition of territory by military conquest is inadmissible); SC Res. 298, 25 September 1971 (noting with concern Israeli non-compliance with previous resolutions); SC Res. 476, 30 June 1980 (e.g., Art. 1 reaffirms the "overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem"); SC Res. 1860, 8 January 2009 (e.g. Art. 1 "stresses the urgency of and calls for an immediate, durable and fully respected ceasefire, leading to the full withdrawal of Israeli forces from Gaza").

[151] SC Res. 242, 22 November 1967, para. 1.

[152] SC Res. 799, 18 December 1992, para. 4.

previous measures" [i.e., establishing the settlements].[153] It further called upon Israel "to cease, on an urgent basis, the establishment, construction and planning of settlements".[154] It later demanded "that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respect all of its legal obligations in this regard".[155]

138. The General Assembly has repeatedly "Reiterate[d] its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem".[156]

139. The Security Council and the General Assembly have called on Israel to reverse these policies which requires the dismantlement of the settlements and the withdrawal of Israeli settlers from the Occupied Palestinian Territory, including East Jerusalem.

19.b.v.ε. Apartheid and racial discrimination generally

140. Israel is required to immediately cease all discriminatory policies and practices that amount to a violation of the prohibition of apartheid as outlined above. More broadly, Israel is required to immediately put an end of all discriminatory practices that privilege Jewish Israelis over the Palestinian people, on both sides of the Green Line and as regards Palestine refugees.[157]

19.b.v.στ. The wall

141. As for the wall, Israel is required to fulfil the present Court's own finding that Israel "has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in an around East Jerusalem".[158] Moreover, the Court held that Israel must dismantle "those parts of the structure situated within the Occupied Palestinian Territory, in and around East Jerusalem".[159]

19.c. Circumstances require that Israel must offer appropriate assurances and guarantees of non-repetition

142. The circumstances of Israel's breaches of international law are such as to require that Israel is obliged to offer assurances and guarantees of non-repetition.[160] These circumstances are:

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[153] SC Res. 446, 22 March 1979, para. 3.
[154] SC Res. 452, 20 July 1979, para. 3; SC Res. 465, 1 March 1980, para. 6.
[155] SC Res. 2334, 23 December 2016, para. 2.
[156] GA Res. 2334, 23 December 2016, para. 2; GA Res. 36/226/A, 17 December 1981, para. 1; GA Res. 45/83A, 13 December 1990, paras. 5,7.
[157] See, e.g., CERD, Consideration of reports submitted by States parties under article 9 of the Convention: Concluding Observations, CERD/C/ISR/CO/14-16, 19 March 2012; CERD, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel, CERD/C/ISR/CO/17-19, 27 January 2022; Human Rights Committee, Concluding observations on the fourth periodic report of Israel, CCPR/C/ISR/CO/4, 21 November 2014.
[158] *Wall* Advisory Opinion (2004), p. 197, para. 151
[159] Ibid., pp. 197-198, para. 151.
[160] On this obligation, see ARSIWA, Art. 30(b), and ARSIWA, Part Two, Ch. I, Art. 30 Commentary.

(1) The nature of the obligations breached: rules of international law of a fundamental character—peremptory norms, as outlined above.[161]

(2) The nature of the breaches,[162] which can be divided into six factors:

- The *duration* of the breaches that spans over 75 years, through the policies and practices of all governments of Israel during that period.
- The *widespread, systematic and structural* nature of the breaches.
- The *consistently repeated* nature of the breaches, and *repeated refusal to heed the calls to end them* made by the Palestinian people generally and the Palestinian leadership and the State of Palestine in particular, the General Assembly, the Security Council, the Human Rights Council, the Economic and Social Council, the present Court, other UN bodies and office-holders including multiple Secretaries-General, other international organizations, and many States from all regions in the world, over a more than a half-century period covering, for the United Nations, almost two thirds of the time the organization has been in existence.
- The *link between the breaches and unlawful claims that underlie and explain their commission including*: that Israel is entitled to the entire land between the Jordan river and the Mediterranean sea and that the Palestinian people do not have the right of self-determination.
- The way the *breaches have worsened* over decades, including in the course of the occupation, for example the quantum of settlements; the introduction of the Wall and the apartheid road system; the pillage of natural resources.
- The *seriousness* of the breaches as indicated above.

(3) The foregoing nature of the breaches suggest a real risk of future repetition even if they are initially brought to an end.

143. Bearing in mind what has been reviewed above, the situation is manifestly one where the injured party—the State of Palestine and the Palestinian people as a self-determination unit— and the international community have "reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily".[163] Israel must, therefore, in addition to implementing the above obligations concerning cessation, give guarantees to the Palestinian people and the State of Palestine concerning non-repetition.

144. The present Court has taken seriously the need for injured States to be given guarantees of non-repetition. In the *Armed Activities on the Territory of the Congo* case, the Court held that it

> …considers that, if a State assumes an obligation in an international agreement to respect the sovereignty and territorial integrity of the other States parties to that

[161] Cf. ARSIWA, Part Two, Ch. I, Art. 30 Commentary, para. 13, the "nature of the obligation" is relevant to whether guarantees are appropriate.
[162] Cf. ARSIWA, Part Two, Ch. I, Art. 30 Commentary, para. 13, the "nature of the…breach" is relevant to whether guarantees are appropriate.
[163] See ARSIWA, Part Two, Ch. I, Art. 30 Commentary, para. 9.

> agreement (an obligation which exists also under general international law) and a commitment to cooperate with them in order to fulfil such obligation, this expresses a clear legally binding undertaking that it will not repeat any wrongful acts. In the Court's view, the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law...[164]

In the *Application of the Genocide Convention* (*Bosnia and Herzegovina v. Serbia and Montenegro*) case, the Court assumed that there was a potentially valid general legal basis for requiring guarantees of non-repetition, holding that there were not sufficient grounds for this requirement to be triggered in the circumstances of the case:

> In its final submissions, the Applicant also requests the Court to decide "that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court". As presented, this submission relates to all the wrongful acts, i.e. breaches of the Genocide Convention, attributed by the Applicant to the Respondent, thus including alleged breaches of the Respondent's obligation not itself to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement. Insofar as the Court has not upheld these claims, the submission falls. There remains however the question whether it is appropriate to direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide. The Court notes the reasons advanced by counsel for the Applicant at the hearings in support of the submission, which relate for the most part to "recent events [which] cannot fail to cause concern as to whether movements in Serbia and Montenegro calling for genocide have disappeared". It considers that these indications do not constitute sufficient grounds for requiring guarantees of non-repetition. … In the circumstances, the Court considers that the declaration referred to in paragraph 465 above is sufficient as regards the Respondent's continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate.[165]

There would have been no need to consider whether "grounds" for guarantees were "sufficient" if there was no legal requirement to give such guarantees in the first place. Thus the Court clearly assumed the existence of such a requirement. For the foregoing reasons, and to borrow the words of the Court, the present case is one in which a direction for guarantees of non-repetition would be appropriate.

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[164] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 256, para. 257.

[165] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 235, para. 466.

19.d. Reparation

19.d.i. General obligation

145. Israel is obliged to make adequate reparation for its breaches of international law. In the words of the Permanent Court,

> [t]he essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[166]

146. This obligation has been applied by the present Court in varying contexts, including the current one.[167] In the *Wall* Advisory Opinion, the Court held:

> [G]iven that the construction of the wall in the Occupied Palestinian Territory has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. [168]

147. The obligation has been applied in circumstances in which the act is unlawful in terms of the international law on the use of force—one of the headings of Israel's illegality. In the *Military and Paramilitary Activities in and against Nicaragua* case, the present Court held that the unlawful use of force attracted reparation "for all injury caused" to Nicaragua by the USA.[169] Reparation for injuries caused by the wrongful act can take a variety of forms, including restitution, compensation, and/or satisfaction. As the Commentary to the ILC ARSIWA indicates:

> [F]ull reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.[170]

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[166] *See Factory at Chorzów (Claim for Indemnity) (Merits)*, Judgment of 13 September 1928, P.C.I.J., Series A, No. 17, 1928, p. 47.
[167] See, e.g., *Application of Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment (2007), p. 232, para. 460-63; *Jurisdictional Immunities of the State* Judgment (2012), p. 153, para. 136 ("There is no doubt that the violation by Italy of certain of its international legal obligations entails its international responsibility and places upon it, by virtue of general international law, an obligation to make full reparation for the injury caused by the wrongful acts committed"). ARSIWA, Art. 31 ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act").
[168] *Wall* Advisory Opinion (2004), p. 198, para. 152.
[169] *Military and Paramilitary Activities in and against Nicaragua* Merits Judgment (1986), p. 149.
[170] ARSIWA, Part Two, Ch. II Art. 34 Commentary, para. 2.

19.d.ii. Restitution

148. Restitution is the prime means of reparation.[171] It is related to but distinct from cessation in that it is aimed at the re-establishment of the situation that existed before the breach—reverting to the *status quo ante*. In the *Chorzów Factory* case, the Permanent Court underscored the primacy of restitution over other forms of reparation.[172] According to Article 35 of the ILC ARSIWA:

> A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
>
> (*a*) is not materially impossible;
>
> (*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[173]

149. Examples of restitutionary acts would be:

(1) Restoring full control over the occupied territory to the sovereign—the State of Palestine and the Palestinian people. In the words of the General Assembly in the context of the OPT, "the acquisition of territories by force is inadmissible and that, consequently, territories thus occupied must be restored".[174]

(2) The annulment or rescission of legislative acts, decrees, or administrative acts or orders in connection with the occupation, subject to the application of a human rights-based consideration akin to the 'Namibia exception' concerning invalidity and non-recognition. In the *Wall* Advisory Opinion, the present Court specified that

> [a]ll legislative and regulatory acts adopted with a view to [the] construction [of the wall], and to the establishment of its associated regime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with [its] obligations.[175]

(3) Permitting, enabling and assisting with the safe and immediate return of all displaced Palestinian people and Palestinian refugees to their homes and land and providing compensation;[176]

(4) Releasing all Palestinian prisoners and detainees and non-Palestinian nationals imprisoned for Palestine-related reasons;

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[171] *Factory at Chorzów* Judgment (1928), p. 47; ARSIWA, Part Two, Ch. II, Art. 35 Commentary, para. 3.
[172] *Factory at Chorzów* Judgment (1928), p. 47.
[173] ARSIWA, Art. 35.
[174] UN General Assembly Resolution 2628 (XXV), 4 November 1970, para. 1.
[175] *Wall* Advisory Opinion (2004), p. 197, para. 151; GA Res. 60/107, 18 January 2006, para. 8; SC Res. 465, 1 March 1980, para. 6 ("The Security Council … Strongly deplores the continuation and persistence of Israel in pursuing those policies and practices and calls upon the Government and people of Israel to rescind those measures").
[176] Human Rights Council, Res. 49/29, 11 April 2022, para. 4 ("The Human Rights Council [demands that Israel] … repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, and to make reparation for the damage caused to all natural or legal persons affected by the construction of the wall"); GA Res. 60/107, 18 January 2006, para. 8 ("*The General Assembly* [demands that Israel] … … repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, and to make reparation for the damage caused to all natural or legal persons affected by the construction of the wall").

(5) Returning seized land and property;[177]

(6) Dismantling the Wall and removing its settlers and occupation forces.[178]

150. The ARSIWA Commentary recognizes that

> Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution. Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.[179]

This logic would apply equally to an existentially unlawful occupation generically, including where this illegality is in part, as here, due to purported annexation, and would therefore apply to the entirety of the OPT, and to matters arising out of the entire course

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[177] *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, I.C.J. Reports 1962, p. 6 at p. 37.

[178] See Human Rights Council, Res. 49/29, 11 April 2022, para. 4 (The Human Rights Council "Also demands that Israel, the occupying Power, comply fully with its legal obligations, as mentioned in the advisory opinion rendered on 9 July 2004 by the International Court of Justice, including to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated"); GA Res. 77/247, 30 December 2022, para. 6 ("*The General Assembly … Demands* that Israel, the occupying Power, cease all of its settlement activities, the construction of the wall and any other measures aimed at altering the character, status and demographic composition of the Occupied Palestinian Territory, including in and around East Jerusalem…"); GA Res. 74/88, 13 December 2019, para. 3. ("*The General Assembly … Reiterates its demand* for the immediate and complete cessation of all Israeli settlement activities in all of the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan..."), para. 4 ("*Stresses* that a complete cessation of all Israeli settlement activities is essential"), para. 7 ("*Condemns* in this regard settlement activities in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan"), and para. 13 ("*Calls for* measures of accountability, consistent with international law, in the light of continued non-compliance with the demands for a complete and immediate cessation of all settlement activities..."); GA Res. 60/107, 18 January 2006, para. 8 ("*The General Assembly … Demands also* that Israel, the occupying Power, comply with its legal obligations under international law, as mentioned in the advisory opinion rendered on 9 July 2004 by the International Court of Justice and …that it immediately cease the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, dismantle forthwith the structure situated therein…"); GA Res. ES-10/15, 20 July 2004, paras. 1-2 (*The General Assembly ... Acknowledges* the advisory opinion of the International Court of Justice of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem" and "*Demands* that Israel, the occupying Power, comply with its legal obligations as mentioned in the advisory opinion"). GA Res. ES-10/13, 21 October 2003, para. 1 ("*The General Assembly ... Demands* that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem…"); GA Res. 45/83A, 13 December 1990, para. 8 ("*The General Assembly … Condemns* Israel's aggression, policies and practices against the Palestinian people in the occupied Palestinian territory and outside this territory, including expropriation, establishment of settlements…"); GA Res. 36/226A, 17 December 1981, para. 7 ("*The General Assembly … Condemns* Israel's aggression and practices against the Palestinian people in the occupied Palestinian territories and outside these territories, particularly … the establishment of settlements"); SC Res. 2334, 23 December 2016, para. 2 (*"The Security Council ... Reiterates* its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem…"), para. 4 ("*Stresses* that the cessation of all Israeli settlement activities is essential for salvaging the two-State solution, and calls for affirmative steps to be taken immediately to reverse the negative trends on the ground that are imperilling the two-State solution"); SC Res. 476, 30 June 1980, para. 5 (*The Security Council … Urgently calls* on Israel, the occupying Power, to abide by the present and previous Security Council resolutions and to desist forthwith from persisting in the policy and measures affecting the character and status of the Holy City of Jerusalem"); SC Res. 465, 1 March 1980, para. 6 ("*The Security Council …* calls upon the Government and people of Israel to … dismantle the existing settlements and in particular to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem); SC Res. 446, 22 March 1979, para. 4 ("*The Security Council … Calls once more upon* Israel to … desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories").

[179] ARSIWA, Part Two, Ch. II, Art. 35 Commentary, para. 6.

of the occupation, not just, as in the example, in the initial phase (if this is what the word 'invasion' is referring to).

19.d.iii. Compensation

151. As the present Court affirmed in the *Gabčikovo-Nagymaros* case, "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it".[180] This entitlement applies equally to the Palestinian people, both individually and collectively, and in the form of the State of Palestine, for the damage caused to them by Israel's violations of their rights. The relationship between the compensation and restitution requirements is indicated in ILC ARSIWA Article 36: "[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution".[181]

152. The injury which reparation is due "includes any damage, whether material or moral, caused by the internationally wrongful act".[182] As the ILC explained:

> Material damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. 'Moral' damage includes such things as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life.[183]

This can thus capture compensation for the following (a non-exhaustive list) caused by the existence and conduct of the occupation throughout the entire period of its existence: death, personal injury, mental pain and anguish; the taking of movable or immovable property (including the deprivation of the effective use, control and benefits of property); the loss or injury to intangible property, loss of business profits, and loss or damage to livelihoods.

153. Compensation means, in the words of the Permanent Court in the *Chorzów Factory* case, the "payment of a sum corresponding to the value which a restitution in kind would bear"[184] and, according to ILC ARSIWA Article 36, "shall cover any financially assessable damage including loss of profits insofar as it is established".[185]

154. In the 2004 *Wall* Advisory Opinion, the present Court outlined Israel's obligations in relation to that particular context in the following terms:

> [Israel must] return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or

[180] *See Gabčikovo-Nagymaros Project (Hungary/Slovakia),* Judgment, I.C.J. Reports 1997, p. 7 at p. 81, para. 152.
[181] ARSIWA, Art. 36(1).
[182] ARSIWA, Article 31(2).
[183] ARSIWA, Part Two, Ch. II, Art. 31(2) Commentary, para. 5.
[184] *Factory at Chorzów* Judgment (1928), p. 47.
[185] ARSIWA, Art. 36(2).

legal persons having suffered any form of material damage as a result of the wall's construction.[186]

19.d.iv. Satisfaction

155. As indicated in ILC ARSIWA Article. 37, "[t]he State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation".[187] The Article goes on to indicate that satisfaction may "consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality".[188]

20. Consequences for third States

20.a. Non-recognition

20.a.i. Illegality—invalidity—non-recognition

156. Earlier it was indicated that the general consequence of the existence and conduct of the occupation being illegal is that everything done by Israel in relation to this activity is legally invalid. The chief significance of this for third States is that they should not recognize as valid that which is legally invalid. To do otherwise would be to implicitly endorse illegality or to mistakenly treat as lawful something which is illegal. This would run contrary to the legal maxim that is, as indicated above, the basis for the invalidity itself—*ex injuria jus non oritur*—legal rights cannot arise out of an illegal act. As Judge Higgins indicated in her Separate Opinion to the present Court's *Wall* Advisory Opinion, the proposition "[t]hat an illegal situation is not to be recognized…by third parties is self-evident".[189] This is, then, a general principle of law in the sense that it is inherent in the concept of law and the rule of law itself.[190]

157. An obligation of non-recognition also exists in international law in relation to breaches of particular fundamental rules. This has the effect of reinforcing, and concretizing as a specific obligation, the operation of this more general principle in the particular context of the breaches covered. It is addressed separately below.

20.a.ii. The 'Namibia exception' revisited

158. To repeat what was said earlier in the context of the invalidity that is the basis for non-recognition: human rights law requires that certain acts should be recognized if this is necessary to secure the rights of individuals in human rights law. To repeat from above the extract from the *Namibia* case of the present Court:

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[186] *Wall* Advisory Opinion (2004), p. 198, para. 153.
[187] ARSIWA, Art. 37.
[188] Ibid.
[189] *Wall* Advisory Opinion (2004), Separate Opinion of Judge Higgins, p. 216, para. 38.
[190] Cf. Statute of the International Court of Justice, 24 October 1945, 33 U.N.T.S. ("I.C.J. Statute"), Art. 38.1.c.

> …the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[191]

159. To reiterate what was also said earlier in the context of invalidity: this rights-based exception to recognition does not somehow require Israeli settlers to be recognized as validly present in and owners of land and property in the oPt, since this presence, and 'ownership', is legally invalid, including, as indicated above, as a matter of human rights law.

20.a.iii. Aspects of the obligation

20.a.iii.α. Obligation not to recognize the validity of Israel's presence in the OPT in and of itself

160. States must not recognize the validity of Israel's presence in and exercise of control over the OPT as a general matter, in and of itself, not only its specific association with any claims to sovereignty (which, as indicated below, must also not be recognized). This includes not recognizing as valid Israel's justificatory claims for this presence/exercise of control, of whatever kind. Notably, any recognition that Israel has a right to maintain the existence of the occupation for security purposes is tantamount to recognizing that Israel has a valid basis to do this according to the international law on the use of force, when, as indicated above, it does not. In other words, it is recognition of an aggression and violation of self-determination or, put differently, it is a denial that something is an aggression and a violation of self-determination. This amounts to a fundamental repudiation of two of the core areas of international law, as a general matter, and as they apply in the present situation.

161. The general obligation not to recognize the validity of Israel's presence in the OPT is reflected in the present Court's holding, in the *Namibia* Advisory Opinion, that there was an obligation on the part of all States "to recognize the illegality and invalidity of South Africa's continued presence" in Namibia.[192] The Security Council stated that

> States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia.[193]

In paragraphs 2 and 5 of Resolution 276, 1970 the Security Council called upon all States

[191] *Namibia* Advisory Opinion, p. 56, para. 125.
[192] *Namibia* Advisory Opinion (1971), p. 54, para. 119.
[193] SC Res. 301, 20 November 1971, para. 6(2).

> [p]articularly those which have economic and other interests in Namibia to refrain from any dealings with the Government of South Africa which are inconsistent with…[194]

…the Council's determination that

> …the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia…are illegal and invalid.[195]

162. The present Court held that

> Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.[196]

163. The Security Council subsequently called upon all States

> to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration[197]

And it called upon States maintaining diplomatic or consular relations with South Africa to take the following concrete steps:

> issue a formal declaration to the Government of South Africa to the effect that they do not recognize any authority of South Africa with regard to Namibia and that they consider South Africa's continued presence in Namibia illegal…[and] terminate existing diplomatic and consular representation as far as they extend to Namibia, and to withdraw any diplomatic or consular mission or representative residing in the Territory.[198]

20.a.iii.β. Obligation not to recognize Israel's purported annexation of any part of the OPT, including East Jerusalem and, relatedly, not to treat the OPT as if it were the sovereign territory of Israel

164. In the Friendly Relations and Cooperation Declaration, the General Assembly affirmed that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal".[199]

165. States are obliged not to recognize Israel's purported acquisition of territory (purported annexation) over any part of the OPT, including East Jerusalem. Relatedly, States must not

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[194] SC Res. 276, 30 January 1970, para. 5.
[195] SC Res. 276, 30 January 1970, para. 2.
[196] See *Namibia* Advisory Opinion (1971), p. 55, para. 123.
[197] SC Res. 301, 20 October 1971, para. 6.

[199] Friendly Relations and Co-operation Declaration (1970).

treat any part of the OPT, including East Jerusalem, as if it were the sovereign territory of Israel, whether or not this treatment is based on or linked to any claim made by Israel in this regard. In Resolution 2334 of 2016, the Security Council reaffirmed the obligations of non-recognition and distinction.[200]

166. On Israel's illegal purported annexation of East Jerusalem in particular, Security Council in Resolution 478 (1980) responded to the adoption of the basic law in the following terms:

> Decides not to recognize the "basic law" and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem and calls upon:
>
> (a) All Member States to accept this decision;
>
> (b) Those States that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City.[201]

20.a.iii.γ. Obligation of non-recognition: economic matters in particular

167. The duty of non-recognition includes a requirement not to enter into economic dealings with Israel concerning the occupied territories since they would presuppose, at a minimum, that Israel has legitimate authority with respect to them (whether on a sovereign or a non-sovereign basis). This position was adopted in relation to South Africa with respect to Namibia, where the present Court held:

> The restraints which are implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of paragraph 5 of resolution 276 (1970) impose upon Member States 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.[202]

168. The duty of non-recognition requires States to ensure that that no State companies are involved in corporate activity operating in or more broadly linked to the OPT, insofar as this activity concerns Israel or Israeli companies, including those owned by or linked to settlers and/or operating in settlements, bearing in mind that such companies operate on an illegal basis in the OPT. In the context of South Africa and Namibia, the Security Council called on States to ensure that companies and enterprises under the direct ownership or control of the State cease all dealings with or in Namibia, and cease investment activity therein.[203]

169. All States must also regulate other companies registered in their jurisdictions to ensure that they are not involved in the corporate activity outlined in the previous paragraph. Otherwise, such States would be failing in their duty not to recognize as lawful the occupation itself, and the presence of and activities of Israeli settlers, including those who run and own companies operating there, notably in settlements. The duty of non-recognition is engaged here because it is impossible for foreign companies to comply with local law and/or the rule of law when engaged in the corporate activity outlined in the

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[201] SC Res. 478, 20 August 1980, para. 5.
[202] See *Namibia* Advisory Opinion (1971), p. 55, para. 124.
[203] SC Res. 283, 29 July 1970, paras. 4-7.

previous paragraph, since such law is either non-existent or, because it operates on a basis that involves a violation of international law, invalid.

20.b. No aid or assistance

20.b.i. General principle

170. A further general principle of law arising out of the concept of illegality is that States must not provide aid or assistance to Israel's illegal behaviour. This was again indicated by Judge Higgins in her Separate Opinion to the present Court's *Wall* Advisory Opinion, in her observation, made in conjunction with the earlier observation concerning non-recognition, "[t]hat an illegal situation is not to be…assisted by third parties is self-evident".[204] As with non-recognition, this is a general principle of law in the sense that it is inherent in the concept of law and the rule of law itself.[205]

171. As with the obligation of non-recognition, an obligation not to aid or assist illegality also exists in international law in relation to breaches of particular fundamental rules. This has the effect of reinforcing, and concretizing as a specific obligation, the operation of this more general principle in the particular context of the breaches covered. It is addressed separately below.

20.b.ii. As invoked in other contexts

172. In the context of South Africa's illegal presence in Namibia, the present Court found that member States of the United Nations are "under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia".[206]

173. In the context of territories under Portuguese colonial control in 1965, the Security Council resolved to:

> [Request] all States to refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the people of the Territories under its administration; and to take all the necessary measures to prevent the sale and supply of arms and military equipment to the Portuguese Government for this purpose, including the sale and shipment of equipment and materials for the manufacture and maintenance of arms and ammunition to be used in the Territories under Portuguese administration.[207]

20.b.iii. As invoked in the present context

174. In General Assembly Resolution 3414, 5 December 1975, it

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[204] *Wall* Advisory Opinion (2004), Separate Opinion of Judge Higgins, p. 216, para. 38.
[205] Cf. I.C.J. Statute, Art. 38.1.c.
[206] *Namibia* Advisory Opinion (1971), p. 54, para. 119. See also p. 56, para. 126.
[207] SC Res. 218, 23 November 1965, para. 6.

> Request[ed] all States to desist from supplying Israel with any military or economic aid as long as it continues to occupy Arab territories and deny the inalienable national rights of the Palestinian people.[208]

In Resolution 36/27 of 13 November 1981, the General Assembly "[r]eiterates its call to all States to cease forthwith any provision to Israel of arms and related material of all types which enable it to commit acts of aggression against other States".[209] In Resolution 36/226A, 17 December 1981, the Assembly called on all States "to put an end to the flow to Israel of any military, economic, and financial resources that would encourage it to pursue its aggressive policies against the Arab countries and the Palestinian people".[210] The Assembly also

> *Considers* that the agreements on strategic co-operation between the United States of America and Israel signed on 30 November 1981 would encourage Israel to pursue its aggressive and expansionist policies and practices in the Palestinian and other Arab territories occupied since 1967, including Jerusalem, would have adverse effects on efforts for the establishment of a comprehensive, just and lasting peace in the Middle East and would threaten the security of the region.[211]

In Resolution 38/180A of 1983, the General Assembly deplored "any political, economic, financial, military and technological support to Israel that encourages Israel to commit acts of aggression and to consolidate and perpetuate its occupation and annexation of occupied Arab territories",[212] and called "once more" upon all Member States:

> (a) To refrain from supplying Israel with any weapons and related equipment and to suspend any military assistance that Israel receives from them;
>
> (b) To refrain from acquiring any weapons or military equipment from Israel;
>
> (c) To suspend economic, financial and technological assistance to and co-operation with Israel;
>
> (d) To sever diplomatic trade and cultural relations with Israel.[213]

The General Assembly further declared, in Part E of the Resolution, "the international responsibility of any party or parties that supply Israel with arms or economic aid that augments its war potential"[214] and condemned "all steps which may result in augmenting the capability of Israel and contributing to its policy of aggression against countries in the region".[215] In particular, it demanded that all States, and particularly the United States of America, "refrain from taking any step that would support Israel's war capabilities and consequently its aggressive acts",[216] and called upon States to "review… any agreement, whether military, economic or otherwise, concluded with Israel".[217]

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[208] GA Res. 3414, 5 December 1975, para. 3.
[209] GA Res. 36/27, 13 November 1981, para. 3.
[210] GA Res. 36/226A, 17 December 1981, para. 13.
[211] Ibid., para. 12.
[212] GA Res. 38/180A, 19 December 1983, para. 9.
[213] Ibid., para. 13.
[214] GA Res. 38/180E, 19 December 1983, para. 1.
[215] Ibid., para. 2.
[216] Ibid., para. 3.
[217] Ibid., para. 4.

175. On settlements in particular, in Resolutions 465 (1980) and 471 (1980) the Security Council called on all States "not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories".[218] The General Assembly has reiterated this call on an annual basis.

20.c. General duty to ensure the realization of Israel's compliance with the law of self-determination and the core/basic protective rules of IHL

20.c.i. Introduction

176. Two of the fundamental areas of international law violated by Israel in the existence and conduct of the occupation have a special obligation attached to them, reflective of the underlying idea of a generalized interest that is the basis for the obligations having *erga omnes* status: all States bear a general obligation to ensure they are not violated by Israel. These areas of international law are, first, the right of self-determination, and, second, the core/basic protective obligations of IHL.

20.c.ii. Self-determination

177. According to the Friendly Relations and Co-operation Declaration,

> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples… and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . .[219]
>
> […]
>
> Every State bas the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, *such peoples are entitled* to seek and *to receive support* [emphasis added].[220]

20.c.iii. The core/basic protective rules of IHL

178. Article 1 common to the four Geneva Conventions reads as follows: "[t]he High Contracting Parties undertake to respect *and to ensure respect* for the present Convention in all circumstances" (emphasis added).[221] Common Article 1 was confirmed as customary international law in the *Nicaragua* decision of the present Court.[222] The present Court held in the *Wall* Advisory Opinion that "[i]t follows from that provision [common Article 1]

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[218] SC Res. 465, 1 March 1980, para. 7; SC 471, 5 June 1980, para. 5.
[219] Friendly Relations and Co-operation Declaration (1970).
[220] Ibid.
[221] GC I, Art. 1; GC II, Art. 1; GC III, Art. 1; GC IV, Art. 1.
[222] *Military and Paramilitary Activities in and Against Nicaragua* Merits Judgment (1986), pp. 114-115, para. 220.

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" (emphasis added).[223]

20.c.iv. Practical significance

179. This general duty takes on a practical significance in the form of three specific duties borne by States to suppress Israel's violations of the two areas of international law covered by it.

20.d. Three specific duties to suppress Israel's violations of international law

20.d.i. Introduction

180. States bear a tripartite set of specific suppression obligations (one positive, two, related (based on the overall concept of abstention), negative) relating to Israel's breaches of international law. These are:

(1) To co-operate to bring them to an end.

(2) Not to recognize the situation that gives rise to them.

(3) Not to aid or assist in them.

As indicated above, States are already required to follow (2) and (3) as a matter of legal principle concerning illegality as a general matter. Here, they are subject to the same requirement as a matter of a specific set of legal obligations tied to breaches of certain fundamental rules.

20.d.ii. Two different bases for these rules

181. These obligations arise on two separate bases in relation to two different types of violations of the relevant rules.

20.d.ii.α. Basis 1: For all violations, of rules that a) operate erga omnes, and b) in relation to which States bear the foregoing obligation to ensure implementation

182. In the case of violations of the right of self-determination, and core/basic protective norms of IHL, in particular, the present Court indicated in the *Wall* Advisory Opinion that States bear the foregoing obligations in relation to these violations, given that the rules violated have the following two characteristics: (1), they operate *erga omnes*, and (2), as indicated above, linked to this status, primary obligations to promote the realization of these obligations by all States exist in international law (in the case of self-determination, in the Friendly Relations and Co-operation Resolution of the General Assembly; in the case of

[223] *Wall* Advisory Opinion (2004), p. 136, para. 157.

the core/basic protective rules of IHL, in common Article 1 to the four Geneva Conventions).[224]

183. It follows, then, following the present Court's approach in the *Wall* Advisory Opinion, that for these two areas of international law, Israel's violations engage the tripartite suppression obligations on the part of third States covered in the present section. This amounts to a fleshing out, through three particular, specific duties, the general duty to ensure the realization of Israel's implementation of these areas of international law as previously identified.

20.d.ii.β. Basis 2: For 'serious' violations, of rules that have jus cogens status

184. As indicated above, one of the two consequences of certain obligations in international law having *jus cogens* status is that, as a matter of the law of State responsibility as articulated in the ILC's ARSIWA and its draft conclusions on *jus cogens* obligations, 'serious breaches' of such obligations, in the words of the Commentary on the ARSIWA, "attract additional consequences, not only for the responsible State but [also] for all other States".[225] These additional consequences are the three suppression-related obligations being addressed presently, which all States bear in the case of a serious breach of a peremptory norm of general international law by any State. This is reflected in the following stipulation by the UN Human Rights Council in resolution 49/28 of 11 April 2022:

> Calls upon all States to ensure their obligations of non-recognition, non-aid or assistance with regard to the serious breaches of peremptory norms of international law by Israel… and also calls upon them to cooperate further to bring, through lawful means, an end to these serious breaches and a reversal of Israel's illegal policies and practices.[226]

As indicated above, the existence and conduct of the occupation involves serious breaches of peremptory norms of general international law by Israel. In consequence, the suppression obligations borne by other States on the present basis are engaged.

20.d.ii.γ. Consolidating the treatment of these bases, and the violations by Israel covered by the three duties

185. The first basis for States bearing suppression obligations is limited to Israel's violations of the law of self-determination and the core/basic protective rules of IHL. The second basis arises out of Israel's violations of a wider set of rules, including these two areas of law, based on the rules having *jus cogens* status. This second basis, however, only covers 'serious' violations, whereas the first basis covers all violations. That said, given that

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[224] The Court emphasises these two elements of each of the two areas of international law (*Wall* Advisory Opinion (2004), p. 199, para. 156 for self-determination; pp. 199-200, paras. 157-158 for IHL), follows this with "Given the character and…importance of the rights and obligations involved", and affirms the three obligations in relation to these two areas of international law (Ibid., p. 200, para. 159).
[225] ARSIWA, Part Two, Ch. III Commentary, para. 7. On this area of State responsibility, see ARSIWA, Arts. 40-41; ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19. See also ARSIWA, Part Two, Ch. III Commentary.
[226] Human Rights Council Res. 49/28, 11 April 2022, preamble, para. 7.

Israel's violations of international law are, in all the categories of rules, 'serious' (as indicated above) they all fall into the category that would trigger States' tripartite suppression obligations on the second basis. For present purposes, then, there is no need to address the suppression obligations differently in terms of the two different bases on which they operate, since in this instance the difference has no material significance. Given this, the following coverage of the three obligations is based on a consolidation of the treatment of each as a matter of the particular bases for them.

186. What follows, then, relates to the violations of the following rules of international law by Israel, based on the earlier characterization of these areas of law as having *jus cogens* status, the violations by Israel being 'serious' and, in the case of the right of self-determination and the core/basic protective rules of IHL, the rules operating *erga omnes*, and States being subject to a general obligation to ensure their realization by Israel.

(1) The right of self-determination.

(2) The prohibition of aggression, including the prohibition of the acquisition of territory by threat or use of force.

(3) The prohibition of apartheid.

(4) The core/basic protective rules of IHL.

(5) The prohibition of racial discrimination generally (beyond apartheid in particular).

(6) The prohibition of torture and cruel, inhuman and degrading treatment and punishment.

20.d.iii. Duty (1): Obligation to cooperate to bring to an end, through lawful means, the violations

187. In the *Wall* Advisory Opinion, the present Court stated that:

> It is…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.[227]

188. For the sub-set of these violations and violations of other *jus cogens* norms that are 'serious', as a matter of the law of State responsibility States bear the duty to cooperate with one another—"a joint and coordinated effort by all States"—to bring the breaches to an end.[228]

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[227] *Wall* Advisory Opinion (2004), p. 200, para. 159.

[228] ARSIWA, Art. 41(1); Quotation from ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 3. See also ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, para. 1; On this duty existing in customary international law, see ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, Commentary, para. 2.

189. No particular form of cooperation is prescribed by international law, given the multiplicity of possibilities that exist. Such possibilities include both institutionalized cooperation (for instance, through the United Nations) and non-institutionalized cooperation.[229]

190. On the United Nations, in the *Chagos* Advisory Opinion the present Court held, in the context of self-determination and its status as an *erga omnes* right, that "while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect" and also "that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius".[230]

191. One aspect of international cooperation would be to seek to give effect to those resolutions of the General Assembly and Security Council which have on numerous occasions called for Israel's violations of international law to end, as outlined above. Some of these resolutions have expressly called upon third States to support the Palestinian people,[231] and to withhold military and economic aid to Israel.[232] Regardless of whether or not there are express stipulations addressed to member States of this kind, States can use the determinations as a part guide when determining what they must focus on in discharging their present obligation to bring Israel's breaches to an end.

192. States may also deploy a regime of sanctions aimed at curbing economic activity with Israel generally. These sanctions can also be deployed against key government officials involved in supporting and or promoting illegal activity. This may extend to freezing bank accounts and assets abroad, and restrictions on travel.

20.d.iv. Duty (2): Obligation of non-recognition

193. In the *Wall* Advisory Opinion, the present Court, in the context of the law of self-determination and IHL, stated 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 Jerusalem.[233]

194. For the sub-set of these violations and violations of other *jus cogens* norms that are 'serious', as a matter of the law of State responsibility States are obliged not to "recognize as lawful" the "situation created by" the breaches.[234] This is reflected in the dictum of the

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[229] ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 2. and ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19 Commentary, para. 10.
[230] *Chagos* Advisory Opinion (2019), p. 139, paras. 180, 182.
[231] GA Res. 3236, 5 November 1974, para. 6 ("*The General Assembly … Appeals* to all States and international organizations to extend their support to the Palestinian people in in its struggle to restore its rights, in accordance with the Charter").
[232] GA Res. 3414, 5 December 1975, para. 3 (*The General Assembly … Requests* all States to desist from supplying Israel with any military or economic aid as long as it continues to occupy Arab territories and deny the inalienable national rights of the Palestinian people"; GA Res. 36/226A, 17 December 1981, para. 13 (*The General Assembly … Calls upon* all States to put an end to the flow to Israel of any military, economic and financial resources that would encourage it to pursue it aggressive policies against the Arab countries and the Palestinian people").
[233] *Wall* Advisory Opinion (2004), p. 200, para. 159.
[234] ARSIWA, Art. 41(2). See also ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, para. 2. See also ARSIWA, Part Two, Ch. III, Art. 41 Commentary, *passim*. On the status of this obligation in customary international law, see ARSIWA, Part Two, Ch. III, Art. 41 Commentary, paras 6 and 12 and sources cited therein and ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 13, para. 13 and sources cited therein.

International Criminal Court in *The Prosecutor v. Bosco Ntaganda* that "as a general principle of law, there is a duty not to recognize situations created by certain serious breaches of international law".[235] According to the commentary to the ARSIWA,

> The obligation applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.[236]

195. However, as Judge Higgins observed in relation to the aforementioned dictum from the *Wall* Advisory Opinion, "[t]hat an illegal situation is not to be recognized…is self-evident".[237] Coverage of specific duty of non-recognition as indicated in the present section has therefore been folded into the general position of non-recognition addressed above.

20.d.v. Duty (3): Obligation not to render aid or assistance in maintaining the illegal situation

196. In the *Wall* Advisory Opinion, the present Court, in the context of the law of self-determination and IHL, stated that

> all States…are under an obligation not to render aid or assistance in maintaining the [illegal] situation created by [the construction of the Wall].[238]

For the sub-set of these violations and violations of other *jus cogens* norms that are 'serious', as a matter of the law of State responsibility, States are obliged to refrain from rendering aid or assistance to Israel in maintaining the situation that constitutes these breaches.[239]

197. However, again as Judge Higgins observed in relation to the aforementioned dictum from the *Wall* Advisory Opinion, "[t]hat an illegal situation is not to be…assisted is self-evident".[240] As with the related duty of non-recognition, then, coverage of the present specific duty not to aid or assist Israel's violations of certain norms has been folded into the general position concerning the requirement not to aid or assist Israel in relation to its illegality as a general matter above.

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[235] *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1707, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, of January 2017, Trial Chamber VI, International Criminal Court, para. 53.
[236] ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 5.
[237] *Wall* Advisory Opinion (2004), Separate Opinion of Judge Higgins, p. 216, para. 38.
[238] *Wall* Advisory Opinion (2004), p. 200, para. 159.
[239] ARSIWA, Art. 41(2). See also ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, para. 2; ARSIWA, Part Two, Ch. III, Art. 41 Commentary. On the status of this obligation in customary international law, see ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 12, and ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 13, para. 13 and sources cited therein.
[240] *Wall* Advisory Opinion (2004), Separate Opinion of Judge Higgins, p. 216, para. 38.

20.e. Entitlement to invoke a breach of obligations *erga omnes partes* and *erga omnes*

20.e.i. Introduction

198. All States have the legal right to invoke the responsibility of Israel for breaching obligations that are a) binding on a particular group of States including Israel (if they are in this group), established for the protection of a collective interest (an *erga omnes partes* obligation),[241] and/or b) exist generally (i.e. are applicable to all States) and are owed to the international community as a whole, i.e. obligations with *erga omnes* status.[242]

20.e.ii. Two bases

20.e.ii.α. (1) Erga omnes partes

199. Obligations *erga omnes partes* apply to a particular group of States and exist for the purpose of protecting a collective interest.[243] Usually, such obligations exist in a treaty, although they can also exist in customary international law.[244] Such obligations "are owed by any State party to all the other States"[245] such that when any given State breaches them, all other States within the group can invoke the breach even if they were not directly injured or they do not have some other special interest in it (e.g. it concerned harm to their nationals).[246]

200. Whether a treaty contains *erga omnes partes* obligations depends on its text. Interpreting the Treaty of Versailles in *S.S. Wimbledon*, the Permanent Court identified a common legal interest in "the intention of the authors … to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind".[247] In *Belgium v. Senegal*, the present Court identified the *erga omnes partes* nature of obligations under the Convention Against Torture in the treaty's preambular call "to make more effective the struggle against torture…throughout the world".[248] Consequently, "the obligations in question are owed by any State party to all the other States Parties to the Convention"[249] and States have "a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, the authors do not enjoy impunity".[250] In *Reservations to the Convention Against Genocide,* the Court emphasised that States had a common interest in each other's compliance with the Genocide Convention, because its "object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality".[251] In *Gambia v. Myanmar*, the Court

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[241] ARSIWA, Part Three, Ch. I, Art. 48 Commentary, para. 6.
[242] ARSIWA, Art. 48(b); ARSIWA, Part Three, Ch. I, Art. 48 Commentary, para. 8.
[243] ARSIWA, Art. 48.
[244] ARSIWA, Part Three, Ch. I, Art. 48 Commentary, para. 6.
[245] *Belgium v. Senegal* Judgment (2012), p. 439, para. 68.
[246] Belgium v. Senegal Judgment (2012), p. 450, para. 69; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar), Preliminary Objections, I.C.J. Reports 2022, p. 36, para. 109.
[247] *Case of the S.S. "Wimbledon"*, Judgment of 17 August 1923, P.C.I.J., Series A, No. 1, 1923, p. 23.
[248] *Belgium v. Senegal* Judgment (2012), para. 68.
[249] Ibid.
[250] Ibid.
[251] Reservations to the Genocide Convention Advisory Opinion (1951), p. 12.

affirmed the "right of all other Contracting Parties to assert the common interest in compliance with the obligations *erga omnes partes* under the Convention".[252]

201. Israel's breaches include of treaty obligations that operate *erga omnes partes*. The aforementioned approach taken by the present Court and its predecessor would indicate that all Israel's obligations in human rights treaties that have been breached have this character, as do certain core/basic protective IHL treaty norms.

20.e.ii.β. (2) Erga omnes obligations (and by association, jus cogens obligations)

202. All States can also invoke Israel's breach of *erga omnes* obligations as a matter of general international law.[253] Such obligations are owed to the international community as a whole and, therefore, as the present Court held in the *Barcelona Traction* case, "by their very nature … are the concern of all States" and "[a]ll States can be held to have a legal interest in their protection...".[254] The ILC Draft conclusions on *jus cogens* norms (the Commentary of which, as already indicated, observing that norms with *jus cogens* status also have *erga omnes* status) holds that "any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*)".[255]

20.e.iii. What States can do

20.e.iii.α. Call upon Israel—cessation, assurance of non-repetition, reparation

203. States are legally entitled to call on Israel to perform the three breach-consequence-related obligations outlined above: cessation, assurances of non-repetition, and reparation.

20.e.iii.β. Take measures to induce cessation and reparation

204. States are also entitled to take lawful measures against Israel to induce the aforementioned cessation and reparation.[256] (They are of course also obliged to take such measures under the separate obligation reviewed earlier, which, as it covers breaches of *jus cogens* obligations, necessarily covers obligations that also have *erga omnes* status).

205. In addition, countermeasures—acts that are ordinarily wrongful, but where wrongfulness is precluded by the fact that they are taken in response to another State's wrongful act—against Israel on the same grounds may also be legal permissible. The 2001 ARSIWA Commentary noted that State practice on countermeasures by non-injured States "is limited and embryonic," mentioning the use of trade embargoes, asset freezes, travel bans, boycotts, and other unilateral and multilateral sanctions.[257] The conclusion then was that

[252] *Gambia v. Myanmar* Preliminary Objections (2022), para. 113.
[253] ARSIWA, Art. 48(b).
[254] *Barcelona Traction* Judgment (1970), p. 32, para. 33.
[255] ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 17, para. 2.
[256] ARSIWA, Art. 54.
[257] ARSIWA, Part Three, Ch. II, Art. 54 Commentary paras. 3 and 4 (quotation from para 3).

> the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 [concerning *erga omnes* obligations] to take countermeasures in the collective interest.[258]

206. Notably, the Commentary did not hold that that such countermeasures would be unlawful—the position was left open. In the over-two-decade-period since the Commentary was completed, a right to take such measures may have crystallized.[259]

20.e.iii.γ. Bring a claim

207. States have potential standing to bring a claim before a court or tribunal against Israel for its breaches of obligations *erga omnes partes* and *erga omnes*. Examples of standing established on the basis of obligations in the former category are the Permanent Court in the aforementioned *S.S. Wimbledon*, allowing Italy and Japan to bring a claim against Germany for refusing to grant access to the Kiel Canal, despite not being individually injured;[260] and the present Court permitting Gambia to bring a claim against Myanmar under the Genocide Convention despite being uninjured by Myanmar's actions.[261]

208. The possibility of such a claim would depend *inter alia* on whether a court or tribunal would have jurisdiction to hear it. One potential option here is the Committee on the Elimination of Racial Discrimination under the International Convention on the Elimination of Racial Discrimination, of which Israel is a party.[262] Article 11(1) of the ICERD reads,

> If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee.[263]

This mechanism does not require Israel's prior consent for the Committee to be seized, and no reservation has been made to Articles 11 and 13 by any Party to the Convention.[264] Indeed, in a decision in a 'communication' (as such complaints are termed) brought by the State of Palestine against Israel, the CERD has, in tandem with the jurisprudence and interpretations of the ECtHR, the IACtHR, and HRC, emphasised that human rights obligations are "non-synallagmatic".[265] They impose collective obligations, rather than a "web of inter-State exchanges of mutual obligations".[266] Consequently, "any State party may trigger the collective enforcement machinery created by the respective treaty, independently from the existence of correlative obligations between the concerned

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[258] ARSIWA, Part Three, Ch. II, Art. 54 Commentary paras 6.
[259] Martin Dawidowicz, 'Third-Party Countermeasures: A Progressive Development of International Law?', (2016) 29 QIL Zoom-In 3.
[260] *S.S. "Wimbledon"* Judgment (1923), pp. 20-23
[261] *Gambia v. Myanmar* Preliminary Objections (2022), p. 37, para. 113,
[262] See United Nations Treaty Collection, Status of Treaties, ICERD, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.
[263] ICERD, Art. 11(1).
[264] See CERD, Inter-State communication submitted by the State of Palestine against Israel: decision on jurisdiction, U.N. Doc. CERD/C/100/5, 2021, para. 56 and UN Treaty Collection, Status of Treaties, ICERD, Declarations and Reservations, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.
[265] Ibid, para. 50.
[266] Ibid, para. 48.

parties".[267] Such an approach advances the "object and purpose" of human rights treaties,[268] rooted as they are "in superior common values shared by the international community as a whole".[269]

209. Therefore, under the ICERD, any of the 182 State Parties to the ICERD may bring a communication (complaint) against Israel for its violations of the ICERD in the OPT.[270]

21. Consequences for the United Nations

21.a. General legal framework

210. The aforementioned general principles of law concerning non-recognition, and non-aid and assistance, apply to the United Nations, as an international legal person, as they do to States. From this, the legal consequences of Israel's violations of international law for the United Nations are that it must not recognize or aid or assist this illegality.

211. The commentary to the ILC draft Conclusions on peremptory norms also indicates that the aforementioned tripartite suppression obligations arising in the circumstances of serious breaches of *jus cogens* norms apply "as appropriate, to international organizations". [271] In consequence, the foregoing requirements of non-recognition and non-aid/assistance apply again on this basis, supplemented by an obligation to take action to bring the illegal situation to an end, in the particular context of breaches of *jus cogens* norms by Israel. On the obligation of non-recognition, according to the commentary,

> …if States are under an obligation not to recognize as lawful situations created by a serious breach of a peremptory norm or to assist in the maintenance of such situations, it stands to reason that international organizations are under a similar obligation. [272]

On the obligation to take action, according to the commentary,

> The obligation of States to act collectively to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*) has particular consequences for cooperation within the organs of the United Nations and other international organizations. It means that, in the face of serious breaches of peremptory norms of general international law (*jus cogens*), international organizations should act, within their respective mandates and when permitted to do so under international law, to bring to an end such breaches. Thus, where an international organization has the discretion to act, the obligation to cooperate imposes a duty on the members of that international organization to act with a view to the organization exercising that discretion in a manner to bring to an end the breach of a peremptory norm of general international law (*jus cogens*). A duty of international organizations to exercise discretion in a manner that is

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[267] Ibid, para. 50.
[268] Ibid, para. 51 (cf. VCLT, Art. 31).
[269] Ibid, para. 51. CERD, Inter-State communication submitted by the State of Palestine against Israel: decision on jurisdiction, U.N. Doc. CERD/C/100/5, 16 June 2021, para. 51.
[270] See UN Treaty Collection, Status of Treaties, ICERD, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.
[271] ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19 Commentary, para. 19 (footnote omitted)
[272] Ibid.

intended to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*) is a necessary corollary of the obligation to cooperate.[273]

21.b. Examples

21.b.i. Indications from the present Court on the role of the UN in taking action to bring illegality to an end

212. In the *Wall* Advisory Opinion, the present Court stated that it "is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation…taking due account of the present Advisory Opinion".[274]

213. In the *Chagos* Advisory Opinion, the present Court noted that "[t]he modalities necessary for ensuring the completion of the decolonization of Mauritius fall within the remit of the United Nations General Assembly, in the exercise of its functions relating to decolonization" and that "it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius", and "all Member States must co-operate with the United Nations to put those modalities into effect".[275]

21.b.ii. Example from the General Assembly of non-recognition and non-assistance in the maintenance of unlawful situation

214. In the context of the UK's continued exercise of authority over the Chagos archipelago on a purported basis of enjoying sovereignty, in violation of the law of self-determination, the General Assembly affirmed an obligation of non-recognition of any act by the UK that presupposed the enjoyment of sovereignty over the Chagos Islands by that State, including dealing with the UK on the basis of the name it gave to the Islands implying such sovereignty, the 'British Indian Ocean Territory'. It called

> …upon the United Nations and all its specialized agencies … to refrain from impeding that process [of decolonization] by recognizing, or giving effect to any measure taken by or on behalf of, the 'British Indian Ocean Territory[276]

And called

> ….upon all other international, regional and intergovernmental organizations … to refrain from impeding that process by recognizing, or giving effect to any measure taken by or on behalf of, the 'British Indian Ocean Territory'. [277]

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[273] Ibid.
[274] *Wall* Advisory Opinion (2004), p. 200, para. 160.
[275] *Chagos* Advisory Opinion (2019), p. 139, paras. 179-180.
[276] GA Res. 73/295, 22 May 2019, para. 6
[277] Ibid., para. 7.

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Signed by Ambassador Abdelhamid ZEHANI

Chief of the Permanent Mission of the League of Arab States in Brussels