



مركز الميزان لحقوق الإنسان  
Al Mezan Center for Human Rights



**Joint Submission to the United Nations Special Rapporteur on  
the Situation of Human Rights in the Palestinian Territories  
Occupied Since 1967, Mr Michael Lynk, on Accountability**

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## 1. Introduction

1. As previously noted by the United Nations (UN) Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967, Mr Michael Lynk, “Accountability – the duty to account for the exercise of power – is an indispensable cornerstone of the rule of law and a rules-based international order.”<sup>1</sup> Despite this, Israel, in its subjugation of the Palestinian people as a whole under an institutionalised regime of racial domination and oppression, amounting to the crime of apartheid,<sup>2</sup> and in the context of crimes committed during its belligerent occupation of the Occupied Palestinian Territory (OPT), enjoyed widespread and pervasive impunity for its repeated and ongoing breaches of international law. This impunity is enjoyed not solely by members of the Israeli military and State officials, but the State itself, due to a systematic failure on the part of the international community to take effective measures to cooperate to bring the illegal situation imposed upon the Palestinian people to an end, in line with their responsibility as Third States under international law.
2. Mindful of the legal and political responsibilities of States and international organisations to take positive actions when a State has manifestly failed to honour its obligations under international law, the present report, prepared by Al-Haq – Law in the Service of Man, Al Mezan Centre for Human Rights, Addameer Prisoner Support and Human Rights Association, the Cairo Institute for Human Rights Studies, and Habitat International Coalition – Housing and Land Rights Network (the “organisations”), aims to address and document this pervasive impunity in its various forms, including: the responsibility of Israel; the responsibility of Third States, including as members of international organisations such as the United Nations; the failure to pursue accountability in the arenas of individual criminal liability and corporate accountability, and how these failures may be addressed; and finally, the gross human rights violations, international crimes, and other forms of grave harm arising from the institutionalised impunity enjoyed by Israel. In doing so, the organisations trust that this report will be of use to the Special Rapporteur in his forthcoming follow-up October 2020 report to the General Assembly on this pertinent issue.
3. The organisations wish to stress that if genuine and meaningful accountability for widespread and systematic human rights violations, including international crimes, and corporate complicity for crimes committed during Israel’s prolonged military occupation is to be attained, Third States and multilateral organisations must take positive, effective, and coercive measures to ensure international justice and accountability and the fulfilment of the inalienable rights of the Palestinian people, including Palestinians on both sides of the Green Line and Palestinian refugees and exiles denied their right of return. Accordingly, it is paramount that States, *inter alia*, activate and honour their extraterritorial obligations *vis-à-vis* the Palestinian people, meaningfully engage, in good faith, with the UN machinery, support the Prosecutor of the International Criminal Court in opening a full and thorough criminal investigation into the Situation in the State of Palestine, activate universal jurisdiction mechanisms, and ensure that their multinational

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<sup>1</sup> UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967* (21 October 2019) UN Doc A/74/507, para 28.

<sup>2</sup> On this, see UN ESCWA, *Israeli Practices towards the Palestinian People and the Question of Apartheid, Palestine and the Israeli Occupation, Issue No. 1* (2017) UN Doc E/ESCWA/ECRI/2017/1 (henceforth the “*ESCWA Report*”); see also Al-Haq, *et al*, *Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel’s Seventeenth to Nineteenth Periodic Reports* (10 November 2019), available at: [http://www.alhaq.org/cached\\_uploads/download/2019/11/12/joint-parallel-report-to-cerd-on-israel-s-17th-19thperiodic-reports-10-november-2019-final-1573563352.pdf](http://www.alhaq.org/cached_uploads/download/2019/11/12/joint-parallel-report-to-cerd-on-israel-s-17th-19thperiodic-reports-10-november-2019-final-1573563352.pdf) (henceforth the “*CERD Report*”).

corporate entities refrain from commercial, and non-commercial, activity in illegal Israeli settler colonies in the occupied West Bank, including East Jerusalem, and in the occupied Syrian Golan.

## **2. State Responsibility**

### *2.1. Israel's Obligations Towards the Palestinian People*

4. As the Occupying Power in the West Bank, including East Jerusalem, the Gaza Strip, and the *de facto* governing authority over the OPT, and the Palestinian people, Israel has a wide-ranging suite of obligations towards the Palestinian people as a whole. These include obligations provided for under the governing framework of international humanitarian law in the OPT, enshrined under the *Hague Regulations*,<sup>3</sup> the *Fourth Geneva Convention*,<sup>4</sup> and customary international humanitarian law, including elements of *Additional Protocol I*,<sup>5</sup> insofar as it represents custom. It is important to note that human rights law continues to be fully applicable in the OPT, despite the engagement of international humanitarian law, specifically the law of occupation, which operates as the *lex specialis*.<sup>6</sup> Accordingly, Israel concurrently holds obligations under international human rights law to the indigenous population of the territories it occupies, to Palestinian refugees and exiles abroad, as well as Palestinian citizens of Israel beyond the Green Line.
5. The concurrent applicability of international humanitarian, human rights, and criminal law in the OPT has been well recognised by international bodies. In its 2004 Advisory Opinion on the Annexation Wall, the International Court of Justice (ICJ) noted that “the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict.”<sup>7</sup> Similarly, the UN Commission of Inquiry established to investigate the use of force against unarmed civilian protestors in Gaza as part of the Great Return March affirmed: “when [international humanitarian law] applies, human rights law applies concurrently... Over the last seven decades, [international human rights law and humanitarian law] evolved towards each other and towards the protection of the individual... A confluence of the human rights and humanitarian legal regimes is evident also in the prohibition on discrimination and respect for fair trial rights.”<sup>8</sup>
6. It is also important to note that Israel’s obligations under international humanitarian, human rights, and criminal law in the territory it occupies are universally recognised,

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<sup>3</sup> *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land* (adopted 18 October 1907, entry into force 26 January 1910) (henceforth the “*Hague Regulations*”).

<sup>4</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287 (henceforth the “*Fourth Geneva Convention*”).

<sup>5</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entry into force 7 December 1978) 1125 UNTS 3.

<sup>6</sup> See UN Human Rights Committee, *General Comment no. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004) UN Doc CCPR/C/21/Rev.1/add.13, para 11: “While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive”.

<sup>7</sup> ICJ, *Legal Consequences of the Construction of a Wall* (Advisory Opinion) (2004), para 106 (henceforth the “*Wall Opinion*”); see also ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996), para 25: “The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war”.

<sup>8</sup> UN Human Rights Council, *Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory* (25 February 2019) UN Doc A/HRC/40/74, para 80 (henceforth “*Commission of Inquiry Report*”).

despite the protestations of Israel itself.<sup>9</sup> Specifically, assessments to this effect have been made by the Human Rights Committee,<sup>10</sup> the Committee on Economic, Social and Cultural Rights,<sup>11</sup> the Committee on the Elimination of Discrimination against Women,<sup>12</sup> the Committee on the Rights of the Child,<sup>13</sup> and the Committee for the Elimination of Racial Discrimination.<sup>14</sup>

### 2.1.1. Israel's Obligations under International Humanitarian Law

7. The *lex specialis* in the OPT is the law of occupation, as codified under the *Hague Regulations* and the *Fourth Geneva Convention*, due to Israel's exertion of *de facto* governing authority over the entirety of the territory, including the Gaza Strip, wherein the criteria of military control and the substitution of *de facto* governance and authority continue to be met.<sup>15</sup> As persons who are not nationals of the Occupying Power under Article 4 of the *Fourth Geneva Convention*, Palestinians residing in the OPT qualify for special status as protected persons under international humanitarian law.<sup>16</sup>
8. The ICJ have further held that the Palestinian people have a collective right of self-determination, and acts which impede this right, such as the construction and maintenance of the Annexation Wall, along with acts altering the legal status, legal system, and demographic character and composition of the occupied territory, breach Israel's obligation to respect that right.<sup>17</sup> This stems from the temporary nature of occupation as the defined window of time preceding the cessation of hostilities, provisions of international humanitarian law which protect against the alteration of private and public immovable property during occupation, as well as a litany of UN resolutions condemning such alteration as unlawful, null, and void.<sup>18</sup> Israel's construction and maintenance of the Annexation Wall in the West Bank, including in around East Jerusalem,<sup>19</sup> and illegal Israeli colonial settlements constitute the most apparent method by which Israel is in breach of this obligation, through both the

<sup>9</sup> See *Commission of Inquiry Report*, para 21, 43-50.

<sup>10</sup> UN Human Rights Committee, *Concluding Observations: Israel* (18 August 1998) UN Doc CCPR/C/79/Add.93, para 10; UN Human Rights Committee, *Concluding Observations: Israel* (5 August 2003) UN Doc CCPR/CO/78/ISR, para 11; UN Human Rights Committee, *Concluding Observations: Israel* (3 September 2010) UN Doc CCPR/C/ISR/CO/3, para 5; UN Human Rights Committee, *Concluding Observations: Israel* (21 November 2014) UN Doc CCPR/C/ISR/CO/4, para 5.

<sup>11</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Israel* (16 December 2011) UN Doc E/C.12/ISR/CO/3, para 8; UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Israel* (12 November 2019) UN Doc E/C.12/ISR/CO/4, para 8-9.

<sup>12</sup> UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Israel* (17 November 2017) UN Doc CEDAW/C/ISR/CO/6, para 14.

<sup>13</sup> UN Committee on the Rights of the Child, *Concluding Observations: Israel* (4 July 2013) UN Doc CRC/C/ISR/CO/2-4, para 3.

<sup>14</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel* (3 April 2012) UN Doc CERD/C/ISR/CO/14-16, para 10; UN Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel* (27 January 2020) UN Doc CERD/C/ISR/CO/17-19, para 9-10.

<sup>15</sup> *Wall Opinion*, para 73, 101; on Gaza and its continued status as occupied territory despite the so-called "disengagement" of Israeli forces, see George E Bisharat *et al*, 'Israel's Invasion of Gaza in International Law' (2009) 38(1) *Denver Journal of International Law & Policy* 47-51; see also Shane Darcy and John Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law' (2010) 15(2) *Journal of Conflict & Security Law* 223-242.

<sup>16</sup> Article 4, *Fourth Geneva Convention*.

<sup>17</sup> *Wall Opinion*, para 122.

<sup>18</sup> UN Security Council Resolution 465 (1 March 1980) UN Doc S/RES/465, para 5; UN Security Council Resolution 2334 (23 December 2016) UN Doc S/RES/2334, para 3; on Jerusalem in particular, see UN General Assembly Resolution ES-10/19 (22 December 2017) UN Doc A/RES/ES-10/19, para 1; see also UN Security Council Resolution 252 (21 May 1968) UN Doc S/RES/252, para 2; UN Security Council Resolution 267 (3 July 1969) UN Doc S/RES/267, para 4; UN Security Council Resolution 298 (25 September 1971) UN Doc S/RES/1971, para 3.

<sup>19</sup> *Wall Opinion*, para 122.

fragmentation and displacement of the indigenous population facilitating such manipulation,<sup>20</sup> as well as the transfer of alien populations into occupied territory in order to erase and replace the indigenous Palestinian people, in breach of the prohibition of population transfer in the *Fourth Geneva Convention*, as well as numerous other preceding regional and international agreements.<sup>21</sup>

9. The publication of the so-called “Deal of the Century” by the United States,<sup>22</sup> and the recent commitments by the Israeli government to annex large portions of the occupied West Bank<sup>23</sup> have put renewed emphasis on the absolute prohibition of annexation under international humanitarian law,<sup>24</sup> as both an act of aggression<sup>25</sup> and the unlawful acquisition of territory by force.<sup>26</sup> This follows the previous and ongoing annexation of occupied East Jerusalem<sup>27</sup> and the occupied Syrian Golan,<sup>28</sup> to widespread international condemnation, amounting to a wilful and flagrant breach of international law.<sup>29</sup> It must be recalled that the ICJ considered that the considered that “the construction of the wall and its associated regime create a ‘fait accompli’ on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to a *de facto* annexation”.<sup>30</sup>
10. It is worth also recalling the principle of *usufruct* and the Occupying Power’s obligations to safeguard the capital of the immovable property of the occupied territory under Article 55 of the *Hague Regulations*.<sup>31</sup> In line with this principle, Israel is under an express obligation to respect the immovable property rights of the occupied Palestinian population,<sup>32</sup> and to moreover refrain from the crime of pillage.<sup>33</sup> Nonetheless, Israel, in cooperation with various Israeli and multinational corporate entities, has conducted an extensive campaign of pillage and resource appropriation, including, *inter alia*, Dead Sea

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<sup>20</sup> On demographic manipulation in the Occupied Palestinian Territory, see *CERD Report*, 91-95.

<sup>21</sup> See, *inter alia*, Article 49(6), *Fourth Geneva Convention*; Article 2(1), *Treaty of Lima (Treaty of Confederation)* (adopted 9 February 1848); Article 6(b), *Charter of the International Military Tribunal* (adopted 8 August 1945); Article 12(5), *African Charter on Human and Peoples’ Rights* (adopted 27 June 1981, entry into force 21 October 1986).

<sup>22</sup> United States of America, *Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People* (2020), available at: <https://www.whitehouse.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf> (henceforth the “Trump Plan”).

<sup>23</sup> See Times of Israel, ‘Unity deal allows PM to begin advancing West Bank annexation from July 1’ (21 April 2020), available at: <https://www.timesofisrael.com/unity-deal-allows-netanyahu-to-begin-advancing-annexation-from-july-1/>; Middle East Monitor, ‘US to recognise Israel’s annexation of 30% of West Bank area’ (9 May 2020), available at: <https://www.middleeastmonitor.com/20200509-us-to-recognise-israels-annexation-of-30-of-west-bank-area/>.

<sup>24</sup> Article 47, *Fourth Geneva Convention*.

<sup>25</sup> Article 8bis(2)(a), *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS 3 (henceforth the “Rome Statute”).

<sup>26</sup> Article 2(4), *Charter of the United Nations* (adopted 24 October 1945) 1 UNTS XVI; see also Wall Opinion, para 1; UN Security Council Resolution 2334 (23 December 2014) UN Doc S/RES/2334, preamble.

<sup>27</sup> See Al-Haq, *The Occupation and Annexation of Jerusalem through Israeli Bills and Laws* (5 March 2018), available at: <http://www.alhaq.org/advocacy/6263.html>; see also Al-Haq, *Annexing a City: Israel’s Illegal Measures to Annex Jerusalem Since 1948* (2020), available at: <http://www.alhaq.org/publications/16855.html>.

<sup>28</sup> See UN Security Council Resolution 467 (17 December 1981) UN Doc S/RES/497.

<sup>29</sup> This further indicates a clear belief that Israel does not consider itself to be bound by its obligations under neither international law or the Oslo Accords, see Pearce Clancy, ‘Vindicating Rights and Ending Impunity: Palestine, Statehood, and the International Criminal Court’ (22 April 2020) *Justice in Conflict*, available at: <https://justiceinconflict.org/2020/04/22/vindicating-rights-and-ending-impunity-palestine-statehood-and-the-international-criminal-court/>.

<sup>30</sup> *Wall Opinion*, para 121.

<sup>31</sup> Article 55, *Hague Regulations*.

<sup>32</sup> Article 46, *Hague Regulations*.

<sup>33</sup> Article 47, *Hague Regulations*.

minerals,<sup>34</sup> agricultural lands, ecosystems, water resources,<sup>35</sup> and construction materials,<sup>36</sup> as well as gas and oil reserves off the Gaza coast.<sup>37</sup> Palestinian human rights organisations have analysed such activities and concluded that they constitute the crime of pillage, and a direct breach of Israel's State obligations, as well as those as Occupying Power.<sup>38</sup>

11. Israel's illegal closure and diversion of the natural aquifer of the Gaza Strip have rendered the territory unfit for human habitation, violate the full spectrum of human needs and human rights of the Palestinian people in the Strip, and render Israel in flagrant breach of the norms and legal obligations of an Occupying Power. The State's discriminatory policies and practices that collectively make up the closure regime amount to unlawful collective punishment and evidence an institutionalised, continuous perpetration of the crime against humanity of persecution.<sup>39</sup>
12. In addition to illegal population transfer, demographic manipulation, and annexation of occupied territory and other breaches of international humanitarian, human rights, refugee and criminal law principles against the indigenous people have long been commonplace in the OPT, and against Palestinian refugees in their imposed exile. The use of deadly and excessive force against Palestinian civilians, resulting in 217 killings during the Great Return March demonstrations in the Gaza Strip between 30 March 2018 and the suspension of the protests in December 2019 according to documentation from Palestinian human rights organisations, was found to have been in contravention of such principles in virtually every instance.<sup>40</sup> In addition, lethal force is systematically used against Palestinians<sup>41</sup> opposing the continued expansion and maintenance of Israel's illegal settler-colonial enterprise,<sup>42</sup> and as part of a widespread collective punishment campaign directed towards Palestinian civilians, including Palestinian prisoners and their families.<sup>43</sup>
13. A recent, and particularly disturbing, example of disregard for Palestinian life and dignity is the abuse of Muhammad Al-Na'em by an Israeli bulldozer in the Gaza Strip on 23

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<sup>34</sup> Al-Haq, *Pillage of the Dead Sea: Israel's Unlawful Exploitation of Natural Resources in the Occupied Palestinian Territory* (3 September 2012), available at: <http://www.alhaq.org/publications/8076.html>.

<sup>35</sup> Al-Haq, *Water for One People Only: Discriminatory Access and 'Water Apartheid' in the Occupied Palestinian Territory* (8 April 2013), available at: <http://www.alhaq.org/publications/8073.html>.

<sup>36</sup> Al-Haq and SOMO, *Violations Set in Stone: Heidelberg Cement in the Occupied Palestinian Territory* (4 February 2020), available at: <http://www.alhaq.org/publications/16408.html>.

<sup>37</sup> Al-Haq, *Annexing Energy – Exploiting and Preventing the Development of Oil and Gas in the O.P.T.* (5 December 2015), available at: <http://www.alhaq.org/publications/8066.html>.

<sup>38</sup> Al-Haq, *Palestinian Human Rights Organisations Submit File to ICC Prosecutor: Investigate and Prosecute Pillage, Appropriation and Destruction of Palestinian Natural Resources* (26 October 2018), available at: <http://www.alhaq.org/advocacy/6144.html>.

<sup>39</sup> See Al Mezan et al., *Palestinian Human Rights Organizations & Victims' Communication to the International Criminal Court Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of The Illegal Closure of the Gaza Strip: Persecution and Other Inhumane Acts Perpetrated against the Civilian Population as Crimes against Humanity* (November 2016), available at: <http://mezan.org/en/post/21630>.

<sup>40</sup> See *Commission of Inquiry Report*, para 411-482.

<sup>41</sup> For a comprehensive overview of killings in 2019, see Al-Haq, Full Report: Al-Haq Report on Killings in 2019 (5 April 2020), available at: <http://www.alhaq.org/advocacy/16686.html>.

<sup>42</sup> See, for example, *CERD Report*, para 112.

<sup>43</sup> Al-Haq, Special Focus: IOF Kills Six Palestinians, including a Child, in the Second Week of December 2018 (23 January 2019), available at: <http://www.alhaq.org/monitoring-documentation/6114.html>; Al-Haq, Special Focus: Collective Punishment against the Barghouthi Family (30 January 2019), available at: <http://www.alhaq.org/monitoring-documentation/6110.html>;

Al-Haq, Al-Haq Sends Urgent Appeal to UN Special Procedures and Calls for Immediate Halt to Demolitions in Wadi Al-Hummus (22 July 2019), available at: <http://www.alhaq.org/advocacy/14686.html>;

Al-Haq, Israeli High Court of Justice Upholds Israel's Policy of Withholding the Bodies of Palestinians Killed (16 September 2019), available at: <http://www.alhaq.org/advocacy/15175.html>.

February 2020. While it is unclear whether Muhammad was alive or dead while abused by the bulldozer, the encroachment upon his dignity, and the subsequent withholding of his body by the Israeli occupying forces constitutes a clear breach of Israel's obligations under customary international humanitarian law,<sup>44</sup> including the *Fourth Geneva Convention*,<sup>45</sup> and an example of a clear and systemic policy of collective punishment.<sup>46</sup>

14. In light of the above, and under its obligations under the *Fourth Geneva Convention*, Israel is required to take necessary steps, including by enacting legislation, to provide penal sanctions for those responsible for the commission of grave breaches.<sup>47</sup> A “grave breach” is defined in the *Convention* as:

“those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”<sup>48</sup>

15. That Israel is responsible for the wilful, widespread, and systemic commission of grave breaches of the *Fourth Geneva Convention*, and is in violation of its obligations as Occupying Power, is clear. Accordingly, Israel is obligated, under Article 146 of the *Convention*, to take positive action to immediately halt such violations, and bring those responsible for ordering and carrying out these acts to justice. As will be outlined below, that Israel has failed to do so, and repeatedly showed an unwillingness to engage with its obligations, underscores urgency with which Third States must act, including through the arrest and domestic prosecution, or the extradition, of persons suspected of the commission of grave breaches of the *Fourth Geneva Convention*.

#### 2.1.2. Israel's Obligations under International Human Rights Law

16. Chief among Israel's obligations towards the Palestinian people is the respect for their collective right to self-determination, constitutive of a *jus cogens* norm,<sup>49</sup> giving rise to obligations *erga omnes*,<sup>50</sup> and “one of the essential principles of contemporary

<sup>44</sup> ICRC Customary Rules Study, Rule 114.

<sup>45</sup> Article 27, 130, *Fourth Geneva Convention*.

<sup>46</sup> See Al-Haq, Rights Groups submit to UN Special Procedures on the Abuse of Muhammad Al-Na'em by an Israeli Bulldozer and the Injury of Palestinians in Gaza (4 March 2020), available at:

<http://www.alhaq.org/advocacy/16549.html>.

<sup>47</sup> Article 146, *Fourth Geneva Convention*.

<sup>48</sup> Article 147, *Fourth Geneva Convention*.

<sup>49</sup> *Wall Opinion*, para 88, 156; Antonio Cassese, *International Law* (2nd edn, Oxford University Press, 2005) 65; Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press, 2008) 808; James Crawford, ‘Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories’ (25 January 2012) para 26, available at: <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>.

<sup>50</sup> ICJ, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain)* (Judgement) (1970), para 33: “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”; see also ICJ, *Case Concerning East Timor (Portugal v Australia)* (Judgement) (1995), para 29: “In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable”; ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius*



international law.”<sup>51</sup> This right is codified in common Article 1 of the *International Covenant on Civil and Political Rights (ICCPR)*<sup>52</sup> and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*,<sup>53</sup> as well as myriad UN resolutions.<sup>54</sup> As noted above, despite Israel exercising military control over the occupied Palestinian population, it does not enjoy sovereignty over the territory, which remains with the Palestinian people, and moreover is obligated to preserve the economic subsistence of the OPT for the indigenous Palestinian population.<sup>55</sup>

17. Israel’s breach of its obligations *erga omnes*, as well as its obligations as the effective authority over millions of Palestinians in the OPT, was clearly illustrated in the ICJ’s 2004 Advisory Opinion on the Annexation Wall: “construction [of the Annexation Wall], along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligations to respect that right.”<sup>56</sup>
18. Also closely linked to Israel’s obligations as Occupying Power under international humanitarian law, and thus similarly breached, is the principle of permanent sovereignty over natural resources inherent in the Palestinian people’s right to self-determination.<sup>57</sup> Israel has failed to acquire, or even seek to acquire, the necessary consent for the exploitation of renewable and non-renewable resources from the indigenous Palestinian people, and as such is in breach of its obligations under international human rights law on self-determination.<sup>58</sup>
19. The imposition of obligations of an *erga omnes* character upon Israel, and the breach thereof, is not solely limited to self-determination. The practice of enforcing “distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin” was recognised by the ICJ in the context of apartheid in South West Africa as a denial of fundamental principles of international human rights law and an inexcusable violation of the UN Charter.<sup>59</sup> Thus, the consequent “Namibia Doctrine” affirmed that such unlawful situations create obligations on all States to bring the illegal situation to an end, similar to the example of self-determination.<sup>60</sup> The principle of non-discrimination and prohibition of apartheid and

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*in 1965* (Advisory Opinion) (2019), para 180: “Since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right”.

<sup>51</sup> ICJ, *Case Concerning East Timor (Portugal v Australia)* (Merits) (Judgement) (1991) para 29.

<sup>52</sup> *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171 (henceforth the “*ICCPR*”).

<sup>53</sup> *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entry into force 23 January 1976) 993 UNTS 3 (henceforth the “*ICESCR*”).

<sup>54</sup> See, *inter alia*, UN General Assembly, *Declaration on the Rights of Indigenous Peoples* (2 October 2007) UN Doc. A/RES/61/295; UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations* (24 October 1970) UN Doc. A/RES/2625(XXV).

<sup>55</sup> Al-Haq, Palestinian Centre for Human Rights, Al Mezan, and Al-Dameer, *Review Paper: Arguments Raised in Amici Curiae Submissions in the Situation in the State of Palestine Before the International Criminal Court* (2020) para 21, available at: <http://www.alhaq.org/advocacy/16796.html> (henceforth the “*Review Paper*”).

<sup>56</sup> *Wall Opinion*, para 122.

<sup>57</sup> Common Article 1(2), *ICCPR* and *ICESCR*: “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

<sup>58</sup> See UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Israel* (12 November 2019) UN Doc E/C.12/ISR/CO/4, para 14-15.

<sup>59</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] Notwithstanding Security Council Resolution 276* (Advisory Opinion) (1970) para 131.

<sup>60</sup> See *CERD Report*, para 16.

racial segregation is further enshrined in Article 3 of the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*,<sup>61</sup> Article 55 of the *Charter of the United Nations*, Article 26 of the *ICCPR*, and Article 2(2) of the *ICESCR*, and under the *Apartheid Convention*.<sup>62</sup>

20. Israel's violations of this fundamental norm has been affirmed and reaffirmed by the UN Committee on the Elimination of Racial Discrimination in 2007,<sup>63</sup> 2012,<sup>64</sup> and 2019.<sup>65</sup> Further, the UN Human Rights Council has noted that the presence and maintenance of illegal Israeli colonial settlements to be incompatible with the principles of equality and non-discrimination<sup>66</sup> and "the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian Territory occupied since 1967."<sup>67</sup>
21. Notably, a 2017 report commissioned by the UN Economic and Social Commission for West Asia (ESCWA) argued that Israel had established, and continues to actively maintain, an apartheid regime in breach of international human rights law over the Palestinian people as a whole, encompassing Palestinians in the occupied Palestinian territory, including Palestinian residents of occupied East Jerusalem, Palestinian citizens of Israel, and Palestinian refugees and exiles abroad. The report noted that the international community has played a key role in normalising this fragmentation of the Palestinian people, as a main tool of apartheid, and thus has:

"unwittingly collaborated with this manoeuvre by drawing a strict distinction between Palestinian citizens of Israel and Palestinians in the occupied Palestinian territory, and treating Palestinians outside the country as 'the refugee problem'. The Israeli apartheid regime is built on this geographic fragmentation, which has come to be accepted as normative. The method of fragmentation serves also to obscure this regime's very existence."<sup>68</sup>
22. While moves towards the annexation of illegal Israeli colonial settlements in the occupied West Bank have, once again, brought Israel's obligations under international humanitarian law to the fore of international attention, the same ought to have been true of Israel's obligations under international human rights law following the outbreak of the novel coronavirus disease (COVID-19). As the UN Secretary-General issued a call for a global ceasefire, noting that "The most vulnerable – women and children, people with disabilities, the marginalized and the displaced – pay the greatest price. They are also at

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<sup>61</sup> *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 7 March 1966, entry into force 4 January 1969) 660 UNTS 195.

<sup>62</sup> *International Convention on the Suppression and Punishment of the Crime of Apartheid* (adopted 30 November 1973, entry into force 18 July 1976) UN General Assembly Resolution A/RES/3068(XXVIII).

<sup>63</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel* (14 June 2007) UN Doc CERD/C/ISR/CO/13, para 22, 23, 33, 34, 35.

<sup>64</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel* (3 April 2002) UN Doc CERD/C/ISR/CO/14-16, para 11, 15, 24, 25, 26, 27.

<sup>65</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel* (27 January 2020) UN Doc. CERD/C/ISR/CO/17-19, para 21, 22, 23, 24, 44.

<sup>66</sup> UN Human Rights Council, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East-Jerusalem* (7 February 2013) UN Doc A/HRC/22/63, para 49-75.

<sup>67</sup> *Ibid.* 32-38; see also UN General Assembly Resolution 67/19 (29 November 2012) UN Doc A/RES/67/19, para 1.

<sup>68</sup> *ESCWA Report*, para 24.

the highest risk of suffering devastating losses from COVID-19.”<sup>69</sup> Israel has instead opted to continue to violate the rights of Palestinians, including to the highest attainable standard of health.<sup>70</sup>

23. Palestine’s “fragmented and fragile” health system<sup>71</sup> has been purposely limited in its capacity to react to the COVID-19 crisis. This includes through Israel’s existing “water-apartheid” regime,<sup>72</sup> ensuring a scarcity of water for hygiene purposes, thereby rendering the simple instruction of frequently and thoroughly cleaning one’s hands largely impossible for millions of Palestinians.<sup>73</sup> Particularly stark is the situation in the besieged Gaza Strip, wherein, as noted by the World Health Organization (WHO) in 2018, “The risk to public health in Gaza is considerable, both in terms of poor hygiene and in terms of potential biological and chemical contamination of water for consumption or food preparation.”<sup>74</sup>
24. The continued detention of Palestinian prisoners in unsanitary and unsafe conditions during the COVID-19 pandemic,<sup>75</sup> the prevention of Palestinian health authorities from taking positive steps to contain the outbreak,<sup>76</sup> Israel’s continued denial of the right of return of millions of Palestinian refugees living in overcrowded refugee camps,<sup>77</sup> and the ongoing practice of punitive house demolitions,<sup>78</sup> exacerbate the pre-existent and systematic violation of the Palestinian right to health as part of Israel’s wider regime of oppression and domination over the Palestinian people.<sup>79</sup>

## 2.2. Third State Responsibility

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<sup>69</sup> UN, Statement by Secretary-General António Guterres: “The fury of the virus illustrates the folly of war” (23 March 2020), available at: <https://www.un.org/en/un-coronavirus-communications-team/fury-virus-illustrates-folly-war>.

<sup>70</sup> See Al-Haq, Israel’s Gross Violations of Human Rights in the Face of COVID-19 (Reporting Period 8-29 March 2020) (3 April 2020), available at: <http://www.alhaq.org/advocacy/16676.html>.

<sup>71</sup> World Health Organisation, occupied Palestinian territory, *Right to Health 2018*, pg. 16, available at: [http://www.emro.who.int/images/stories/palestine/documents/who\\_right\\_to\\_health\\_2018\\_web-final.pdf?ua=1](http://www.emro.who.int/images/stories/palestine/documents/who_right_to_health_2018_web-final.pdf?ua=1) (henceforth the “2018 WHO Report”).

<sup>72</sup> See Al-Haq, *Water For One People Only: Discriminatory Access and ‘Water-Apartheid’ in the OPT* (2013), available at: <http://www.alhaq.org/publications/8073.html>; Stop the Wall, *Israel’s water company Mekorot Nurturing Water Apartheid in Palestine*, available at:

<https://stopthewall.org/sites/default/files/Mekorot%20Factsheet%20Final.pdf>; Al-Jazeera, ‘How Israel engages in “water apartheid”’ (21 October 2017), available at: <https://www.aljazeera.com/news/2017/10/israel-engages-water-apartheid-171013110734930.html>.

<sup>73</sup> See Al-Haq, On World Water Day, Al-Haq Recalls Israeli Water-Apartheid Amidst a Global Pandemic (23 March 2020), available at: <http://www.alhaq.org/advocacy/16625.html>.

<sup>74</sup> 2018 WHO Report, pg. 57.

<sup>75</sup> Addameer, Palestinian Prisoner’s Day ... Prisoners Fight Imprisonment and COVID-19 (16 April 2020), available at: <http://www.addameer.org/publications/palestinian-prisoners%E2%80%99-day-%E2%80%A6-prisoners-fight-imprisonment-and-covid-19>; UN, COVID-19: Israel must release Palestinian prisoners in vulnerable situation, say UN experts (24 April 2020), available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25822&LangID=E>.

<sup>76</sup> Middle East Monitor, ‘Israel closes coronavirus testing centre in occupied East Jerusalem’ (16 April 2020), available at: <https://www.middleeastmonitor.com/20200416-israel-closes-coronavirus-testing-centre-in-occupied-east-jerusalem/>; B’Tselem, During the Coronavirus crisis, Israel confiscates tents designated for clinics in the Northern West Bank (26 March 2020), available at:

[https://www.btselem.org/press\\_release/20200326\\_israel\\_confiscates\\_clinic\\_tents\\_during\\_coronavirus\\_crisis](https://www.btselem.org/press_release/20200326_israel_confiscates_clinic_tents_during_coronavirus_crisis).

<sup>77</sup> See Anne Irfan, ‘COVID-19 in the Palestinian Refugee Camps’ (12 May 2020), available at:

<https://www.rsc.ox.ac.uk/covid-19-resources/covid-19-blog/covid-19-in-the-palestinian-refugee-camps>.

<sup>78</sup> PCHR, As part of Application of Collective Punishment Policy, IOF Demolish Palestinian Detainee’s House in Ramallah (11 May 2020), available at: <https://www.pchrgaza.org/en/?p=14562>; Middle East Eye, ‘Coronavirus: Amid lockdown, Israel delivers demolition orders to Palestinian village’ (30 April 2020), available at:

<https://www.middleeasteye.net/news/coronavirus-palestinian-village-israel-demolition-order-amid-lockdown>.

<sup>79</sup> Rania Muhareb and Nada Awad, ‘COVID-19 and Apartheid’ (April 2020) *This Week in Palestine*, available at: <http://www.thisweekinpalestine.com/covid-19-and-apartheid/>.

25. The organisations have previously stressed the need for continued commitment and respect for principles of the law of Third State responsibility,<sup>80</sup> and as such it was with great interest that our organisations read the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967's focus on this pertinent issue in his October 2019 report to the UN General Assembly.<sup>81</sup> Obligations on Third States are triggered in a number of ways, depending on the contextual realities of a given situation or conflict; nonetheless, fundamental to the international legal responsibility regime for States is the obligation to take action when the State with primary responsibility fails to take meaningful steps towards ending a serious breach of international law.
26. Israel is bound by international humanitarian law to “ensure respect for the... [Fourth Geneva] Convention in all circumstances”,<sup>82</sup> including through measures of international criminal justice.<sup>83</sup> As Israel has singularly failed to do so, it is therefore incumbent on the international community to take action to end the unlawful situation, within the framework of, *inter alia*, the *Fourth Geneva Convention*.<sup>84</sup>
27. The ICJ in its 2004 Advisory Opinion referred directly to the obligations of Third States under common Article 1 of the *Geneva Conventions*:
- “Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.”<sup>85</sup>
28. The principles of cooperation and non-recognition for acts amounting to breaches of *jus cogens* norms referred to by the ICJ in this passage are mirrored in the International Law Commission (ILC)'s *Draft Articles on State Responsibility*, under Article 41:
- “(1) States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

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<sup>80</sup> Al-Haq, Open Letter: The Marginalization of Third State Responsibility in IHL is a Threat to the Rule of Law-Based System of International Relations (19 December 2019), available at:

<http://www.alhaq.org/advocacy/16318.html>.

<sup>81</sup> UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967* (21 October 2019) UN Doc A/74/507 (henceforth the “Accountability Report”).

<sup>82</sup> Article 1, *Fourth Geneva Convention*; this Article is common to all four of the Geneva Conventions.

<sup>83</sup> Article 146, *Fourth Geneva Convention*.

<sup>84</sup> See generally, Laurence Boisson de Chazournes and Luigi Condrelli, ‘Common Article 1 of the Geneva Conventions revisited: Protecting collective interests’ (2000) 837 *International Review of the Red Cross*.

<sup>85</sup> *Wall Opinion*, para 159; see also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Se. Serbia and Montenegro)* (Judgement) (2007), para 162.

(2) No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.”<sup>86</sup>

29. Similarly, Article 48 provides for the invocation of the responsibility of a State other than that which was injured, a provision which may attain significance as a secondary rule of responsibility in the case of a breach of *jus cogens* norms.<sup>87</sup>
30. As the ILC’s attached commentaries note, international law does not proscribe what measures States must take in such instances, however the *Draft Articles* do call for such measures to be carried out as part of a joint and coordinated effort by all States, particularly through the aegis of international organisations.<sup>88</sup> What is required, however, is non-recognition of the illegal situation, and to refrain from aiding or assisting in its continued maintenance; the ILC notes that to this effect the obligation “extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one.”<sup>89</sup>
31. The obligations of Third States in this regard are thus threefold: first, States are bound to refrain from recognising as legitimate measures such as the construction and maintenance of illegal Israeli colonial settlements and the Annexation Wall, the annexation of any part of the occupied territory, and the ongoing and illegal closure of the Gaza Strip; second, States must ensure that they do not contribute toward the maintenance of such situations, including through corporate entities domiciled within their territory<sup>90</sup> and their local and regional authorities,<sup>91</sup> for example, by banning trade with illegal Israeli colonial settlements, as currently proposed in Ireland’s Occupied Territories Bill;<sup>92</sup> and finally, States must take positive steps, which may include but are not necessarily limited to, economic sanctions,<sup>93</sup> in accordance with their responsibility under international law. In this sense, there is a positive obligation on Third States to apply countermeasures in response to Israel’s non-performance, and active violation, of its obligations *erga omnes*, owed to the international community as a whole.<sup>94</sup> Yet, when it comes to Israeli breaches

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<sup>86</sup> Article 41(1)-(2), *Draft Articles on State Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (henceforth the “*Draft Articles on State Responsibility*”); note also Article 40: “(1) This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. (2) A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.”

<sup>87</sup> Article 48, *Draft Articles on State Responsibility*.

<sup>88</sup> Article 41, para 3, *Draft Articles on State Responsibility*.

<sup>89</sup> Article 41, para 11, *Draft Articles on State Responsibility*.

<sup>90</sup> Al-Haq and Global Legal Action Network, *Business and Human Rights in Occupied Territory: Guidance for Upholding Human Rights* (2020) 79-80, available at: <http://www.alhaq.org/publications/16786.html>.

<sup>91</sup> On this, see Al-Haq, Al-Haq Submits Legal Position Paper to European Union on the Membership of Mr Haim Bibas, Mayor of Modi’in-Maccabim-Re’ut, in the Euro-Mediterranean Regional and Local Assembly (ARLEM) (2 March 2020), available at: <http://www.alhaq.org/advocacy/16547.html>.

<sup>92</sup> Houses of the Oireachtas, Control of Economic Activity (Occupied Territories) Bill 2018, available at: <https://www.oireachtas.ie/en/bills/bill/2018/6/>.

<sup>93</sup> Al-Haq, Al-Haq Response to ‘Regulation’ Bill: Time for Actions, Time for Sanctions (7 February 2017), available at: <http://www.alhaq.org/advocacy/6357.html>; Al-Haq, Al-Haq Condemns as Illegal Prime Minister Netanyahu’s Stated Plans to Annex West Bank Settlements and Calls on Third States to Apply Economic Sanctions on Israel (10 September 2019), available at: <http://www.alhaq.org/advocacy/15096.html>; Al-Haq, Al-Haq’s Open Letter to the UN Security Council on Israel’s Plans to Annex the West Bank (23 April 2020), available at: <http://www.alhaq.org/advocacy/16769.html>; see also James Crawford, ‘Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories’ (25 January 2012), available at:

<https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>.

<sup>94</sup> Article 49, *Draft Articles on State Responsibility*.

of peremptory norms, Third States have systematically failed to cooperate to bring the illegal situation to an end.

### 2.2.1. Extraterritorial Obligations

32. Closely linked to the notion of Third State responsibility is that of extraterritorial obligations. As noted in the ICJ's *Wall Opinion*, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory."<sup>95</sup> This transcendence is of particular importance in the context of human rights obligations, "the *travaux préparatoires* of the [ICCPR] show that, in adopting the wording chosen, the drafters of the [ICCPR] did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory."<sup>96</sup> The gold-standard for understanding the extent of obligations that may apply extraterritorially may be found in the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*,<sup>97</sup> wherein Principle 9 observes that:

"A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;

b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;

c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law."<sup>98</sup>

33. In the commentaries to the *Maastricht Principles*, it is noted that, in the context of Principle 9(b), "the obligations of a state under international human rights law may effectively be triggered when its responsible authorities know or should have known the conduct of the state will bring about substantial human rights effects in another territory," and in the context of Principle 9(c), "that there are situations where a state is required to take measures in order to support the realization of human rights outside its national territory."<sup>99</sup>

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<sup>95</sup> *Wall Opinion*, para 109.

<sup>96</sup> *Ibid.*; quoted in ESCR-Net, *Global Economy, Global Rights: A practitioner's guide for interpreting human rights obligations in the global economy* (2014) para 3, available at: <https://www.escr-net.org/sites/default/files/e7f67ea7483fd5bad2dd4758b597d8ff/Global%20Economy%20Global%20Rights.pdf>.

<sup>97</sup> ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (2013), available at: [https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23) (henceforth the "*Maastricht Principles*").

<sup>98</sup> Principle 9, *Maastricht Principles*; while this principle does not explicitly evoke the concept of State Responsibility, it has been observed that the two are closely intertwined, and share a "clear link", see Cedric Ryngaet, 'The Maastricht Principles And Extraterritorial Obligations in the Area of ESC Rights: A Response to Margot Salomon' (18 November 2012) *EJIL:Talk!*, available at: <https://www.ejiltalk.org/the-maastricht-principles-and-extraterritorial-obligations-in-the-area-of-esc-rights-a-response-to-margot-salomon/>.

<sup>99</sup> Olivier De Schutter, Ashbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1109 (henceforth the "*Maastricht Commentary*").

34. This is supported by the analysis of the UN Human Rights Committee:

“With regard to the Covenant, such obligations may exist where a jurisdictional link is established with persons affected by such activities. Such a link of jurisdiction may be established, as the Committee suggests in this case, on the basis of: (a) the effective capacity of the State to regulate the activities of the businesses concerned and (b) the actual knowledge that the State had of those activities and their necessary and foreseeable consequences in terms of violations of human rights recognized in the Covenant.”<sup>100</sup>

35. These obligations, in conjunction with those of Third State responsibility,<sup>101</sup> further extend to States’ roles as members of international organisations:

“As a member of an international organisation, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competences to, or participates in, an international organisation must take all reasonable steps to ensure that the relevant organisation acts consistently with the international human rights obligations of that State.”<sup>102</sup>

36. Thus, a State’s extraterritorial obligations as a member of an international organisation under the *Maastricht Principles* are closely aligned with those under the *Draft Articles on the Responsibility of International Organizations*:

“A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State’s international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.”<sup>103</sup>

37. Accordingly, States have a positive obligation, particularly arising from the two primary human rights Covenants, which encompass the right to self-determination, to ensure that their acts and omissions do not result in breaches of their human rights obligations to respect and protect self-determination in foreign territories, including through their actions in international and regional organisations. Read in parallel with analogous obligations under the law of State responsibility, it is abundantly clear that States must take active measures to ensure that they do not contribute, both in their own individual acts or omissions or those done in their capacity as Member States of institutions such as the European Union, World Bank, or UN, towards the violations of the rights of the Palestinian people, and the continued maintenance of an apartheid regime which systematically violates the gamut of human rights enshrined under the *ICCPR* and *ICESCR*. Nonetheless, many States have systematically failed in this regard.

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<sup>100</sup> UN Human Rights Committee, *Decision adopted by the Committee under article 5(3) of the Optional Protocol, concerning communication No. 2285/2013: Concurring opinion of Committee members Olivier de Frouville and Yadh Ben Achour* (7 December 2017) UN Doc CCPR/C/120/D/2285/2013, para 10.

<sup>101</sup> See Principle 11, *Maastricht Principles*.

<sup>102</sup> Principle 15, *Maastricht Principles*.

<sup>103</sup> Article 61, *Draft Articles on the Responsibility of International Organizations* (2011); *Maastricht Commentary*, 1120.

### 3. Failure of Third States to Cooperate to Bring an End to the Illegal Situation as Members of the UN

#### 3.1.1. Failure to Adopt Effective Measures at the UN Security Council

38. Beyond the obligation of non-recognition, when it comes to Israel's serious breaches of international law, Third States have systematically failed to adopt effective measures, such as sanctions, to bring an end to the illegal situation. At each critical juncture, for example following Israel's annexation of occupied East Jerusalem and the occupied Syrian Golan, and with Israel's construction of the Annexation Wall in the West Bank, including in and around East Jerusalem, members of the UN Security Council fell short of adopting sanctions to bring the illegal situation to an end. Instead, one permanent member in particular, the United States (US), has played an active role in repeatedly shielding Israel from accountability, thereby entrenching Israeli impunity for manifest breaches of international law.<sup>104</sup>
39. In 1980, when Israel adopted its 'basic law' on Jerusalem, the Security Council adopted resolution 478, in which it determined "that all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent 'basic law' on Jerusalem, are null and void and must be rescinded forthwith."<sup>105</sup> The Security Council decided not to recognise the 'basic law' and called on "All Member States to accept this decision"<sup>106</sup> and on "Those States that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City."<sup>107</sup> Yet, besides requesting "the Secretary-General to report... on the implementation of the present resolution before 15 November 1980," the Security Council did not adopt any effective coercive measures towards that end.
40. Similarly, on 17 December 1981, the Security Council reaffirmed "that the acquisition of territory by force is inadmissible,"<sup>108</sup> and declared Israel's decision to impose its laws, jurisdiction, and administration on the occupied Syrian Golan to be "null and void and without international legal effect."<sup>109</sup> On 19 January 1982, the Security Council met to discuss a revised draft resolution introduced by Jordan, which sought to decide "that all Member States should consider applying concrete and effective measures in order to nullify the Israeli annexation of the Syrian Golan... and to refrain from providing any assistance or aid and co-operation with Israel, in all fields, in order to deter Israel in its policies and practices of annexation."<sup>110</sup> Meeting on 20 January 1982, the Security Council failed to adopt the draft as a result of a US veto. At the time, the representative of the Syrian Arab Republic stated:

"The annals of the Council should register the veto cast today by the United States of America as a supreme act of irony, a clear dichotomy between words and deeds, between obligations undertaken under the Charter of the United Nations and the non-observance of those same obligations. The outcome of

<sup>104</sup> A list of American vetoes to draft Security Council resolutions challenging Israeli impunity is included in Majid Bozorgmehri and Alireza Mohammad Khani, 'Palestinian Issue and the Security Council of UN: Use of Veto Prevents the Establishment of International Peace' (2011) 7(4) *Geopolitics Quarterly* 90-94 (translated).

<sup>105</sup> UN Security Council Resolution 478 (20 August 1980) UN Doc S/RES.478, para. 3.

<sup>106</sup> *Ibid.*, para. 5(a).

<sup>107</sup> *Ibid.*, para. 5(b).

<sup>108</sup> UN Security Council Resolution 497 (17 December 1981) UN Doc S/RES/497, Preamble.

<sup>109</sup> *Ibid.*, para. 1.

<sup>110</sup> UN Security Council Draft Resolution (19 January 1982) UN Doc S/14832/Rev.1, para. 3.



this voting has totally and fully unmasked the real face of the United States which, along with other States, is entrusted to act as guarantor of the Charter, protector of the Charter and of the international system... ”<sup>111</sup>

41. In October 2003, in reference to Israel’s construction of the Annexation Wall in the West Bank, including in and around East Jerusalem, the Security Council met to discuss a draft resolution that would recognise “that the construction by Israel, the occupying Power, of a wall in the Occupied Territories departing from the armistice line of 1949 is illegal under relevant provisions of international law and must be ceased and reversed.”<sup>112</sup> The US vetoed the draft, stating: “senior United States Administration officials are engaging directly with Israel on the matter of the fence.”<sup>113</sup> The representative of Palestine stated at the time: “The inability of the Security Council to take a firm stand on a matter of strategic importance — namely, the expansionist separation wall — is very alarming in the context of the fate of the region.”<sup>114</sup>
42. In December 2017, following the US recognition of Jerusalem as Israel’s capital, in violation of the city’s status under international law, the Security Council met to discuss a draft resolution introduced by Egypt, which would have affirmed “that any decisions and actions which purport to have altered, the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded in compliance with relevant resolutions of the Security Council,”<sup>115</sup> calling “upon all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to resolution 478 (1980) of the Security Council.”<sup>116</sup> The draft was, once again, vetoed by the US. The representative of Palestine at the Security Council stated: “It is truly paradoxical that the same State casting its veto today asserts the Council’s authority in all other cases, demanding respect for resolutions on every other issue aside from Palestine... We refuse to accept that Palestine be the exception to every rule.”<sup>117</sup> The Palestinian representative added: “The United States decision encourages Israel to persist in its crimes against our Palestinian people and to continue its occupation of our territory. No rhetoric will hide that complacency in prolonging the occupation. No veto can conceal those facts, nor can it legitimize any provocative, unilateral decisions or actions in violation of Security Council resolutions.”<sup>118</sup>
43. In June 2018, within the context of the Great Return March demonstrations in the Gaza Strip, the US vetoed another draft Security Council resolution introduced by Kuwait that would have called “for immediate steps towards ending the closure and the restrictions imposed by Israel on movement and access into and out of the Gaza Strip, including through the sustained opening of the crossing points of the Gaza Strip...”<sup>119</sup> Instead, the US introduced another draft resolution that “include[d] no reference to protecting

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<sup>111</sup> UN Security Council Minutes of the 2329<sup>th</sup> Meeting (20 January 1982) UN Doc S/PV.2329, para 201, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/906E017E71607D778525737E004F33AA> and [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PV.2329\(OR\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.2329(OR)).

<sup>112</sup> UN Security Council Draft Resolution (14 October 2003) UN Doc S/2003/980, para. 1.

<sup>113</sup> UN Security Council Minutes of the 4842<sup>nd</sup> Meeting (14 October 2003) UN Doc S/PV.4842, available at: <https://unispal.un.org/UNISPAL.NSF/0/04FD9A2A24773D4585256DC0005281DE>.

<sup>114</sup> *Ibid.*

<sup>115</sup> UN Security Council Draft Resolution (18 December 2017) UN Doc S/2017/1060, para. 1.

<sup>116</sup> *Ibid.*

<sup>117</sup> UN Security Council Minutes of the 8139<sup>th</sup> Meeting (18 December 2017) UN Doc S/PV.8139, pg.13, available at: [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PV.8139](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.8139).

<sup>118</sup> *Ibid.*

<sup>119</sup> UN Security Council Draft Resolution (1 June 2018) UN Doc S/2018/516, para. 10.

Palestinian civilians, lifting the blockade on Gaza or even reducing the restrictions on the movement of goods and people.”<sup>120</sup> It was vetoed by the Russian Federation, which stated: “Our vote is connected to the fact the document represents the latest attempt by the United States to revise the international legal basis for a settlement in the Middle East.”<sup>121</sup> Commenting on the US veto, which prevented the adoption of the resolution on Gaza, the representative of Palestine stated:

“We deeply regret the Council’s continued paralysis on our issue due to the recurrent negative and biased position of one permanent member of the Security Council. We deplore the use of the veto to continue shielding Israel from censure and accountability for its crimes against our people and to wrongly prevent the Council from upholding its Charter duties in the maintenance of international peace and security, including by actions aimed at saving civilian lives.”<sup>122</sup>

### 3.1.2. The General Assembly’s Emergency Special Sessions on Palestine

44. It is within the context of pervasive Israeli impunity and the continued paralysis of the Security Council on Palestine that we must examine the role the UN General Assembly has played historically and until today in adopting resolutions on Palestine, where a negative vote prevents collective action from being taken at the Security Council. Under the General Assembly’s ‘Uniting for peace’ resolution 377(V) of 3 November 1950, the General Assembly resolved:

“that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security... the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor.”<sup>123</sup>

45. In the case of Palestine, the General Assembly first met in emergency special session in 1956 to discuss the Suez war. At the time, the Assembly called on Israel, the United Kingdom, and France, to withdraw their armed forces from Egyptian territory.<sup>124</sup> The General Assembly met again to discuss measures taken by Israel to change the status of the city of Jerusalem at its fifth emergency special session in 1967, adopting General Assembly resolutions 2253 (ES-V) of 4 July 1967, which considered Israel’s measures invalid<sup>125</sup> and called on Israel “to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem.”<sup>126</sup> The resolution also requested “the Secretary-General to report to the General Assembly and the Security Council on the situation and on the implementation of the present resolution

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<sup>120</sup> UN Security Council Minutes of the 8274<sup>th</sup> Meeting (1 June 2018) UN Doc S/PV.8274, pg. 12, available at: [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PV.8274](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.8274).

<sup>121</sup> *Ibid.*, pg. 12.

<sup>122</sup> *Ibid.*, pg. 14.

<sup>123</sup> UN General Assembly Resolution 337(V) (3 November 1950) UN Doc A/RES/377(V)A, para 1.

<sup>124</sup> UN General Assembly Resolution 1002 (ES-I) (7 November 1956) UN Doc A/RES/1002(ES-I), para 2-3.

<sup>125</sup> UN General Assembly Resolution 2253 (ES-V) (4 July 1967) UN Doc A/RES/2253(ES-V), para 1.

<sup>126</sup> *Ibid.*, para 2.

not later than one week from its adoption.”<sup>127</sup> Ten days later, the annexation not having been reversed, the same emergency special session adopted resolution 2254 (ES-V) of 14 July 1967, which, “taking note with the deepest regret and concern of the non-compliance by Israel with resolution 2253 (ES-V),”<sup>128</sup> reiterated “its call to Israel... to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem.”<sup>129</sup>

46. The seventh emergency special session of the General Assembly met on five occasions between July 1980 and September 1982 to discuss the human rights of the Palestinian people.<sup>130</sup> On 29 July 1980, the General Assembly adopted resolution ES-7/2, in which it reaffirmed the inalienable rights of the Palestinian people, including the right of Palestinian refugees to return to their homes and property in Palestine,<sup>131</sup> the right of the Palestinian people to self-determination,<sup>132</sup> and the right of the Palestine Liberation Organization (PLO), as the legal representative of the Palestinian people, to participate in deliberations and conferences within the framework of the UN.<sup>133</sup>
47. During its ninth emergency special session in January and February of 1982, the General Assembly adopted resolution ES-9/1, following the failure of the Security Council to impose sanctions on Israel for imposing its laws, jurisdiction, and administration to the occupied Syrian Golan. The resolution declared “that Israel’s decision of 14 December 1981 to impose its laws, jurisdiction and administration on the occupied Syrian Golan... constitutes an act of aggression”<sup>134</sup> and is null and void,<sup>135</sup> and “Strongly deplore[d] the negative vote by a permanent member of the Security Council which prevented the Council from adopting against Israel, under Chapter VII of the Charter, the ‘appropriate measures’ referred to in resolution 497 (1981) unanimously adopted by the Council.”<sup>136</sup> In addition, resolution ES-9/1 declared “that Israel’s record and actions confirm that it is not a peaceloving Member State,”<sup>137</sup> and called:

“upon all Member States to apply the following measures:

- (a) To refrain from supplying Israel with any weapons and related equipment and to suspend any military assistance which 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 cooperation with Israel;
- (d) To sever diplomatic, trade and cultural relations with Israel.”<sup>138</sup>

Finally, the resolution called “upon all Members States to cease forthwith, individually and collectively, all dealings with Israel in order to totally isolate it in all fields,”<sup>139</sup> also

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<sup>127</sup> *Ibid.*

<sup>128</sup> UN General Assembly Resolution 2254 (ES-V) (14 July 1967) UN Doc A/RES/2254(ES-V), Preamble.

<sup>129</sup> *Ibid.*, para 2.

<sup>130</sup> See <https://www.un.org/en/ga/sessions/emergency.shtml>.

<sup>131</sup> UN General Assembly Resolution ES-7/2 (29 July 1980) UN Doc A/RES/ES-7/2, para 3.

<sup>132</sup> *Ibid.*, para 4.

<sup>133</sup> *Ibid.*, para 5.

<sup>134</sup> UN General Assembly Resolution ES-9/1 (5 February 1982) UN Doc A/RES/ES-9/1, para 2.

<sup>135</sup> *Ibid.*, para 3.

<sup>136</sup> *Ibid.*, para 7.

<sup>137</sup> *Ibid.*, para 11.

<sup>138</sup> *Ibid.*, para 12.

<sup>139</sup> *Ibid.*, para 13.

calling on non-member States<sup>140</sup> and the UN system at large, as well as international institutions<sup>141</sup> to comply with the terms of the resolution.

48. In similar language, the General Assembly's 7th emergency special session, which resumed in April 1982, adopted resolution ES-7/4, which reaffirmed "the fundamental principle of the inadmissibility of the acquisition of territory by force,"<sup>142</sup> demanded that Israel comply with the relevant Security Council resolutions,<sup>143</sup> expressed "its rejection of all policies and plans aiming at the resettlement of the Palestinians outside their homeland,"<sup>144</sup> and condemned "all policies which frustrate the exercise of the inalienable rights of the Palestinian people, in particular providing Israel with military, economic and political assistance and the misuse of the veto by a permanent member of the Security Council, thus enabling Israel to continue its aggression, occupation and unwillingness to carry out its obligations under the Charter and the relevant resolutions of the United Nations."<sup>145</sup> Accordingly, the General Assembly called on all States to "recognize the inalienable rights of the Palestinian people,"<sup>146</sup> and to "renounce the policy of providing Israel with military, economic and political assistance, thus discouraging Israel from continuing its aggression, occupation and disregard of its obligations."<sup>147</sup>
49. In resolution ES-7/6 of 19 August 1982, the seventh emergency special session further condemned "Israel for its non-compliance with resolutions of the Security Council, in defiance of Article 25 of the Charter of the United Nations,"<sup>148</sup> and urged "the Security Council, in the event of continued failure by Israel to comply... to meet in order to consider practical ways and means in accordance with the relevant provisions of the Charter."<sup>149</sup> On 24 September 1982, following the Sabra and Chatila massacres, the General Assembly adopted resolution ES-7/9 during the same emergency special session, in which it condemned "the criminal massacre of Palestinian and other civilians in Beirut on 17 September 1982,"<sup>150</sup> urged "the Security Council to investigate, through the means available to it, the circumstances and extent of the massacre of Palestinian and other civilians,"<sup>151</sup> and resolved "that, in conformity with its resolution 194 (III) and subsequent relevant resolutions, the Palestinian refugees should be enabled to return to their homes and property from which they have been uprooted and displaced, and demands that Israel comply unconditionally and immediately with the present resolution."<sup>152</sup> Finally, the resolution similarly urged "the Security Council, in the event of continued failure by Israel to comply... to meet in order to consider practical ways and means in accordance with the Charter of the United Nations."<sup>153</sup>
50. The tenth emergency special session of the General Assembly on Palestine, in session since 1997, has been the longest-running emergency session convened under the 'Uniting for peace' resolution. Between 1997 and 2003, the tenth emergency special session was

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<sup>140</sup> *Ibid.*, para 14.

<sup>141</sup> *Ibid.*, para 15.

<sup>142</sup> UN General Assembly Resolution ES-7/4 (28 April 1982) UN Doc A/RES/ES-7/4, para 2.

<sup>143</sup> *Ibid.*, para 5.

<sup>144</sup> *Ibid.*, para 6.

<sup>145</sup> *Ibid.*, para 8.

<sup>146</sup> *Ibid.*, para 9(a).

<sup>147</sup> *Ibid.*, para 9(b).

<sup>148</sup> UN General Assembly Resolution ES-7/6 (19 August 1982) UN Doc A/RES/ES-7/6, para 7.

<sup>149</sup> *Ibid.*, para 8.

<sup>150</sup> UN General Assembly Resolution ES-7/9 (24 September 1982) UN Doc A/RES/ES-7/9, para 1.

<sup>151</sup> *Ibid.*, para 2.

<sup>152</sup> *Ibid.*, para 6.

<sup>153</sup> *Ibid.*, para 7.

held 14 times to address illegal Israeli actions in the occupied Palestinian territory, including East Jerusalem. In resolution ES-10/2 of 25 April 1997, the General Assembly demanded “immediate and full cessation of the construction in Jebel Abu Ghneim and of all other Israeli settlement activities, as well as of all illegal measures and actions in Jerusalem”<sup>154</sup> and called “for the cessation of all forms of assistance and support for illegal Israeli activities... in particular settlement activities.”<sup>155</sup> The resolution also recommended “to the States that are High Contracting Parties to the [*Fourth Geneva Convention*] to take measures, on a national or regional level, in fulfilment of their obligations under article 1 of the Convention, to ensure respect by Israel, the occupying Power, of the Convention.”<sup>156</sup> On 15 July 1997, the General Assembly adopted resolution ES-10/3 in which it condemned “the failure of the Government of Israel to comply with the demands made by the General Assembly”<sup>157</sup> and strongly deplored “the lack of cooperation of the Government of Israel.”<sup>158</sup> The General Assembly demanded “that Israel, the occupying Power, make available to Member States the necessary information about goods produced or manufactured in the illegal settlements,”<sup>159</sup> and stressed “the need for actions in accordance with the Charter, to continue to ensure respect for international law and relevant United Nations resolutions.”<sup>160</sup>

51. On 13 November 1997, the General Assembly again condemned Israel’s failure to comply.<sup>161</sup> In addition to reiterating its previous calls, the General Assembly recommended that Switzerland, as the depository of the *Geneva Conventions*, convene a meeting of experts to follow-up on the recommendation to convene a conference of High Contracting Parties of the *Geneva Conventions* by the end of February 1998.<sup>162</sup> By the time the tenth emergency special session met again in March 1998, such a meeting had not taken place and the target date was extended another month.<sup>163</sup> In resolution ES-10/5, the General Assembly reiterated “all the demands made in resolutions ES-10/2, ES-10/3 and ES-10/4, and stresse[d] the necessity of the full and immediate implementation by Israel, the occupying Power, of those demands.”<sup>164</sup> The resolution remained unimplemented and, on 9 February 1999, the General Assembly adopted resolution ES-10/6, reiterating the calls and condemning Israel’s lack of compliance. The Conference of High Contracting Parties to the Fourth Geneva Convention was finally convened on 15 July 1999 and issued a statement, which provided:

“The participating High Contracting Parties reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem. Furthermore, they reiterated the need for full respect for the provisions of the said Convention in that Territory.

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<sup>154</sup> UN General Assembly Resolution ES-10/2 (25 April 1997) UN Doc A/RES/ES-10/2, para 4.

<sup>155</sup> *Ibid.*, para 7.

<sup>156</sup> *Ibid.*, para 8.

<sup>157</sup> UN General Assembly Resolution ES-10/3 (15 July 1997) UN Doc A/RES/ES-10/3, para 1.

<sup>158</sup> *Ibid.*, para 2.

<sup>159</sup> *Ibid.*, para 7.

<sup>160</sup> *Ibid.*, para 12.

<sup>161</sup> UN General Assembly Resolution ES-10/4 (13 November 1997) UN Doc A/RES/ES-10/4, para 1.

<sup>162</sup> *Ibid.*, para 5.

<sup>163</sup> UN General Assembly Resolution ES-10/5 (17 March 1998) UN Doc A/RES/ES-10/5, para 5.

<sup>164</sup> *Ibid.*, para 2.

... the Conference was adjourned on the understanding that it will convene again in the light of consultations on the development of the humanitarian situation in the field.”<sup>165</sup>

52. On 5 December 2001, the Conference reconvened and adopted a declaration in which:

“The participating High Contracting Parties call[ed] upon all parties, directly involved in the conflict or not, to respect and to ensure respect for the Geneva Conventions in all circumstances, to disseminate and take measures necessary for the prevention and suppression of breaches of the Conventions. They reaffirm[ed] the obligations of the High Contracting Parties under articles 146, 147 and 148 of the Fourth Geneva Convention with regard to penal sanctions, grave breaches and responsibilities of the High Contracting Parties.”<sup>166</sup>

53. In the same declaration, the High Contracting Parties also:

“welcome[d] and encourage[d] the initiatives by States Parties, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring the respect of the Convention, and they underline[d] the need for the Parties, to follow up on the implementation of the present Declaration.”<sup>167</sup>

54. On 20 December 2001, the General Assembly called on “all members and observers of the United Nations as well as the Organization and its agencies to observe [this] declaration” in resolution ES-10/9.<sup>168</sup> On 7 May 2002, the General Assembly again called for the declaration’s implementation in resolution ES-10/10,<sup>169</sup> whereas resolution ES-10/11 of August 2002 stressed “the need for the High Contracting Parties to follow up on the implementation of the declaration adopted on 5 December 2001.”<sup>170</sup>

55. In 2017, the tenth emergency special session was reconvened following the US’s recognition of Jerusalem as Israel’s capital, and the Security Council’s failure, due to a US veto, to adopt a resolution opposing any alteration to the status of Jerusalem. Resolution ES-10/19, which was overwhelmingly adopted by 128 votes in favour and nine votes against, with 35 abstentions,<sup>171</sup> affirmed “that any decisions and actions which purport to have altered the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded,” and called on “all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to Council resolution 478 (1980).”<sup>172</sup> The tenth emergency special session was last held in June 2018, during the Great Return March in the Gaza Strip. “Reaffirming the right to peaceful assembly and protest, and freedom of expression and of association,”<sup>173</sup> and “Emphasizing the need to pursue measures of accountability,”<sup>174</sup>

<sup>165</sup> See Conference of High Contracting Parties to the Fourth Geneva Convention, Statement (15 July 1999), available at: <https://www.un.org/unispal/document/auto-insert-194091/>.

<sup>166</sup> Conference of High Contracting Parties to the Fourth Geneva Convention, Declaration (5 December 2001), para 4, available at: <https://www.un.org/unispal/document/auto-insert-199888/>.

<sup>167</sup> *Ibid.*, para 17.

<sup>168</sup> UN General Assembly Resolution ES-10/9 (20 December 2001) UN Doc A/RES/ES-10/9, para 2.

<sup>169</sup> *Ibid.*, para 2.

<sup>170</sup> UN General Assembly Resolution ES-10/11 (5 August 2002) UN Doc A/RES/ES-10/11, para 6.

<sup>171</sup> UN General Assembly Minutes of the Emergency Special Session 37th Meeting (21 December 2017) UN Doc A/ES-10/PV.37, pg. 18, available at: [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/ES-10/PV.37](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/ES-10/PV.37).

<sup>172</sup> UN General Assembly Resolution ES-10/19 (21 December 2017) UN Doc A/RES/ES-10/19, para 1.

<sup>173</sup> UN General Assembly Resolution ES-10/20 (13 June 2018) UN Doc A/RES/ES-10/20, Preamble.

<sup>174</sup> *Ibid.*

Resolution ES-10/20, which was adopted on 13 June 2018 with 120 votes in favour and eight votes against, with 45 abstentions,<sup>175</sup> called “for immediate steps towards ending the closure and the restrictions imposed by Israel on movement and access into and out of the Gaza Strip...”<sup>176</sup>

56. Over the years, the General Assembly, through its emergency special sessions convened under the “Uniting for Peace” resolution, has allowed the international community to overcome the political deadlock within the Security Council, as a result of the US’s systematic use of its veto powers to block measures of accountability when it comes to ongoing Israeli breaches of international law. Instead, the General Assembly has sought to address Israel’s pervasive impunity, which shields perpetrators from accountability, and to call for effective measures to be taken by all Member States to bring the illegal situation to an end, including through coercive measures, where the Security Council has failed to do so. As seen in the latest UN General Assembly votes on Palestine under the “Uniting for Peace” procedure, there is overwhelming support for the inalienable rights of the Palestinian people as well as for the need to ensure justice and accountability for Israel’s continued failure to comply with its international law obligations within a context of institutionalised impunity. Ultimately, it is the responsibility of all States to cooperate, including through the UN, to bring an end to serious breaches committed with respect of the Palestinian people and to adopt effective coercive measures, including sanctions, towards that end. While the US remains complicit in its support for Israeli colonisation and annexation, it is incumbent upon the international community as a whole, through the General Assembly, to adopt effective measures in this regard.

### 3.1.3. The ICJ Advisory Opinion on the Annexation Wall

57. In October 2003, the tenth emergency special session of the General Assembly convened to address Israel’s construction of the Annexation Wall in the West Bank. It demanded, in resolution ES-10/13, “that Israel stop and reverse the construction of the wall... which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law,”<sup>177</sup> and requested “the Secretary-General to report on compliance with the present resolution periodically... to be submitted within one month and upon receipt of which further actions should be considered.”<sup>178</sup> In December 2003, after no action had been taken, the General Assembly, “Bearing in mind that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences,” adopted resolution ES-10/14 and decided under Article 96 of the *Charter of the United Nations* to request the ICJ to urgently render an advisory opinion on the legality of the Annexation Wall.<sup>179</sup>
58. The ICJ rendered its seminal advisory opinion on 9 July 2004, holding that:
- “... the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council... There is also a risk of further alterations

<sup>175</sup> UN General Assembly Minutes of the Emergency Special Session 38th Meeting (13 June 2017) UN Doc A/ES-10/PV.38, pg. 20, available at: [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/ES-10/PV.38](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/ES-10/PV.38).

<sup>176</sup> UN General Assembly Resolution ES-10/20 (13 June 2018) UN Doc A/RES/ES-10/20, para 10.

<sup>177</sup> UN General Assembly Resolution ES-10/13 (21 October 2003) UN Doc A/RES/ES-10/13, para 1.

<sup>178</sup> *Ibid.*, para 3.

<sup>179</sup> UN General Assembly Resolution ES-10/14 (8 December 2003) UN Doc A/RES/ES-10/14.

to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing... to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right."<sup>180</sup>

59. Accordingly, the ICJ concluded that "The construction of the wall... and its associated régime, are contrary to international law,"<sup>181</sup> and that Israel is under an obligation to terminate its breaches and cease the works of construction of the Annexation Wall,<sup>182</sup> to dismantle the structure,<sup>183</sup> and "to make reparation for all damage caused by the construction of the wall."<sup>184</sup> The Court also held that:

"All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention... have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law..."<sup>185</sup>

60. Finally, the ICJ also concluded 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 resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion."<sup>186</sup>

61. On 20 July 2004, the General Assembly, convened in its tenth emergency special session, adopted resolution ES-10/15. After recalling resolutions ES-10/13 and ES-10/14, the General Assembly called on Israel<sup>187</sup> and all Member States<sup>188</sup> to comply with their obligations as mentioned in the ICJ advisory opinion. Critically, the resolution requested "the Secretary-General to establish a register of damage caused to all natural or legal persons concerned in connection with... the advisory opinion."<sup>189</sup> The General Assembly also decided "to reconvene to assess the implementation of the present resolution, with the aim of ending the illegal situation resulting from the construction of the wall."<sup>190</sup>
62. Within two years of the ICJ's conclusion that further action was required, in March 2006, the General Assembly adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human rights Law and Serious violations of International Humanitarian Law*.<sup>191</sup> Adopted without a

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<sup>180</sup> *Wall Opinion*, para 122.

<sup>181</sup> *Ibid.*, para 163(3)(A).

<sup>182</sup> *Ibid.*, para 163(3)(B).

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*, para 163(3)(C).

<sup>185</sup> *Ibid.*, para 163(3)(D).

<sup>186</sup> *Ibid.*, para 163(3)(E).

<sup>187</sup> UN General Assembly Resolution ES-10/15 (20 July 2004) UN Doc A/RES/ES-10/15, para 2.

<sup>188</sup> *Ibid.*, para 3.

<sup>189</sup> *Ibid.*, para 4.

<sup>190</sup> *Ibid.*, para 5.

<sup>191</sup> See UN General Assembly Resolution 60/147 (21 March 2006) UN Doc A/RES/60/147.



vote, the resolution codifies substantive requirements for restorative justice arising from both the material and non-material losses, costs, and damages incurred by victims.

63. On 15 December 2006, the tenth emergency special session reconvened and adopted resolution ES-10/17, which established the UN Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory.<sup>192</sup> The UN Register of Damage was set up “to serve as a record, in documentary form, of the damage caused to all natural and legal persons concerned as a result of the construction of the wall,”<sup>193</sup> with the General Assembly having resolved that the Register will “remain open for registration for the duration of existence of the wall.”<sup>194</sup> According to the UN Register of Damage (UNRoD), “By 16 June 2019, 69,554 claim forms for registration of damage and more than 1 million supporting documents had been collected and delivered to the Office of the Register of Damage in Vienna... As of June 2019, the Board of UNRoD reviewed and decided on 35,370 of the collected claims for its inclusion in the Register.”<sup>195</sup>
64. Between 2009 and 2011, concerned members of civil society, including organisations involved in the submission of this report, highlighted severe shortcomings in the UN Register of Damage, as established by the General Assembly, including numerous structural weaknesses, with cessation and reparations not having been addressed.<sup>196</sup> Al-Haq also highlighted the absence of a field presence in the OPT for the Register and the lack of assessment of damages or compensation, stating: “Mere listing or recording of damages is insufficient. Evaluation of damages is essential for compensation and must take into consideration the fact that the damage created by the Wall is continuous in time, until the dismantling of the Wall.”<sup>197</sup> Al-Haq argued that “A claims mechanism that does not address cessation, restitution, compensation or any other forms of reparation has no remedial value.”<sup>198</sup> In addition, Al-Haq noted that registration is limited to material claims and that only individual, but not collective, claims could be made.<sup>199</sup> At the time, Al-Haq concluded that:

“If and when a future Register of Damage is adopted... it is essential that the primary obligations of cessation and restitution not be forgotten. In the Palestinian context of continuous dispossession since 1948, any talk about compensation must be very clearly accompanied by an explanation that, under international law... compensation goes hand in hand with restitution and does not replace it.”<sup>200</sup>

65. On the 10<sup>th</sup> anniversary of the ICJ’s Opinion, the Palestinian Stop the Wall Campaign and the Housing and Land Rights Network coordinated with some 87 international law experts, and 32 legal networks from 29 countries to address the UN Secretary-General and High Contracting Parties to the *Fourth Geneva Convention* regarding the

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<sup>192</sup> UN General Assembly Resolution ES-10 (15 December 2006) UN Doc A/RES/ES-10/17, para 3.

<sup>193</sup> *Ibid.*, para 3(a).

<sup>194</sup> *Ibid.*, para 9.

<sup>195</sup> UN Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, About UNRoD, available at: <http://www.unrod.org/>.

<sup>196</sup> Al-Haq, Problems with the Proposed Register of Damage – Al-Haq Intervention to the President of the UN General Assembly (11 October 2010), available at: <http://www.alhaq.org/advocacy/7328.html>; Al-Haq, *The UN Register of Damage for the Wall: Al-Haq’s Legal Analysis of the Proposal of the Secretary-General* (2016), pg. 1, available at: <http://www.alhaq.org/publications/8138.html>.

<sup>197</sup> *Ibid.*, pg. 2.

<sup>198</sup> *Ibid.*, pg. 3.

<sup>199</sup> *Ibid.*, pg. 3-4.

<sup>200</sup> *Ibid.*, pg. 5.

shortcomings of the UNRoD, and the failure of the UN and its Member States to carry out their duty with regard to effective measures.<sup>201</sup> None of the addresses responded.

66. Over 15 years since the adoption of the ICJ’s 2004 advisory opinion, Israeli impunity has continued to prevail for widespread and systematic human rights violations committed against the Palestinian people. The Annexation Wall remains standing, as a testament to Israel’s longstanding impunity, while it reflects “the damning failure of the international community to act in accordance with their obligations as Third States to respect and to ensure respect for international humanitarian law, to ensure the realisation of the right of the Palestinian people to self-determination, and to cooperate to bring to an end serious breaches of international law.”<sup>202</sup> Despite the critical importance of the ICJ’s 2004 advisory opinion in determining the illegality of the Annexation Wall and highlighting the obligations of States to bring that illegality to an end, no effective measures have been taken to ensure Israel ceases construction and dismantles the existing parts of the Wall. Instead, the past 15 years have seen further construction on the Annexation Wall, and the accompanying displacement, dispossession, and fragmentation of the Palestinian people. In light of the above, we must reflect on the persistent failure to hold Israel to account, to cease violations, and to remedy Palestinian victims. This conclusion carries significant bearings on the relevance and efficacy of a future advisory opinion on Israeli breaches of international law, where there is no political will to ensure compliance.

#### 3.1.4. UN Investigatory Mechanisms and Accountability at the Human Rights Council

67. Over the past two decades, the UN has set up ten different commissions of inquiry and fact-finding missions to investigate serious human rights violations committed in the occupied Palestinian territory. These investigatory mechanisms play an important role in truth-telling surrounding incidents and patterns of human rights abuses. However, to date, no UN investigation on Palestine has ever led to genuine accountability for suspected war crimes and crimes against humanity committed against Palestinians. This is despite the fact that the findings and recommendations of various investigatory bodies were adopted by UN Member States, with a view to implementation. In fact, of the ten UN investigatory mechanisms on Palestine, no recommendation has ever been implemented and, instead, impunity has meant the continuation of serious human rights violations.<sup>203</sup>
68. Since 2000, the UN has created ten investigatory mechanisms on Palestine. These have included the following commissions of inquiry and fact-finding missions:
- i. The UN Human Rights Inquiry Commission established pursuant to Commission on Human Rights resolution S-5/1 of 19 October 2000;

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<sup>201</sup> Housing and Land Rights Network, *10 Years after the Advisory Opinion on the Wall in Occupied Palestine: Time for Concrete Action* (9 July 2014), available at:

[http://www.hlrn.org/img/cases/legal%20letter\\_icj10final%20july9.pdf](http://www.hlrn.org/img/cases/legal%20letter_icj10final%20july9.pdf)

<sup>202</sup> Al-Haq, *15 Years Since the ICJ Wall Opinion: Israel’s Impunity Prevails Due to Third States’ Failure to Act* (9 July 2019), available at: <http://www.alhaq.org/advocacy/14616.html>.

<sup>203</sup> See Al-Haq, *International Commissions of Inquiry and Palestine: Overview and Impact* (2016), available at: <http://www.alhaq.org/publications/8062.html>.

- ii. The UN Fact-Finding Team into events in the Jenin refugee camp established at the initiative of the UN Secretary-General, which was welcomed by Security Council resolution 1405 (2002),<sup>204</sup>
  - iii. The UN Urgent Fact-Finding Mission on the events in Gaza following the commencement of ‘Operation Summer Rains’ established pursuant to Human Rights Council resolution S-1/1 of 6 July 2006 and headed by the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967;
  - iv. The UN High Level Fact-Finding Mission to Beit Hanoun established pursuant to Human Rights Council resolution S-3/1 of 15 November 2006;
  - v. The UN Fact-Finding Mission on the Gaza Conflict established pursuant to Human Rights Council resolution S-9/1 of 12 January 2009;
  - vi. The Committee of Independent Experts to assess legal actions undertaken by Israeli and Palestinian authorities to investigate alleged violations during ‘Operation Cast Lead’ established pursuant to Human Rights Council resolution 13/9 of 14 April 2010;
  - vii. The UN Independent International Fact-Finding Mission to investigate violations resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance established pursuant to Human Rights Council resolution 14/1 of 2 June 2010;
  - viii. The UN Independent International Fact-Finding Mission to investigate the implications of the Israeli settlements on the rights of the Palestinian people established pursuant to Human Rights Council resolution 19/17 of 22 March 2012;
  - ix. The UN Independent Commission of Inquiry on the 2014 Gaza Conflict established pursuant to Human Rights Council resolution S-21/1 of 23 July 2014; and
  - x. The UN Commission of Inquiry on the 2018 protests in the occupied Palestinian territory established pursuant to Human Rights Council resolution S-28/1 of 18 May 2018.
69. Since its establishment in 2006, the Human Rights Council has increasingly used investigatory mechanisms into incidents and contexts of systematic human rights violations. When it comes to Palestine, also of relevance are the Human Rights Council’s accountability resolutions adopted under Item 7 on the human rights situation in Palestine and other occupied Arab territories.
70. In 2013, the Independent International Fact-Finding Mission (IFFM) to investigate the implications of illegal Israeli colonial settlements on the rights of the Palestinian people presented its findings to the Human Rights Council. The mission reported that it had

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<sup>204</sup> In resolution 1405 (2002), the Security Council welcomed “the initiative of the Secretary-General to develop accurate information regarding recent events in the Jenin refugee camp through a fact-finding team and requests him to keep the Security Council informed”, *see* UN Security Council Resolution 1405 (19 April 2002) S/RES/1405, para 2.

considered, where necessary, international legal frameworks and principles beyond human rights instruments. The independent experts found that:

“In a situation of prevailing impunity, the law on State responsibility for internationally wrongful acts, including third-State responsibility, is relevant. International criminal law enables the pursuit of individual criminal responsibility for conduct that amounts to international crimes.” In this regard, on 3 December 2012, Palestine addressed identical letters to the Secretary-General and the Security Council. Citing article 8(2)(b)(viii) of the Rome Statute of the International Criminal Court, it stated that —Israeli settlement activities constitute war crimes, and that Israel must be held accountable for such acts.”<sup>205</sup>

71. Concerning the Israeli parastatal institutions establishing, executing, and maintaining the system of apartheid in Palestine, the mission reported to the council that “Quasi-governmental organizations, funded by the Government, including the World Zionist Organization, also provide funds to the settlements.”<sup>206</sup> Further entrenching the impunity enjoyed by Israel, the speed of construction and expansion of colonial settlements, and the resulting denial of the Palestinian people’s right to self-determination, States refrained from taking effective measures to reverse these illegalities. At the same time, of the over 50 Member States hosting such quasi-governmental organisations as charitable organisations, 18 were sitting members of the Human Rights Council.
72. The Palestinian Human Rights Organisations Council (PHROC) expressed to the Council the importance of ensuring that the recommendations of the report are implemented through effective and coercive measures aimed at advancing the rights of the Palestinian people. To that end, PHROC urged the Council to adopt a strong resolution fully endorsing the report of the FFM. Moreover, PHROC requested a further report by the UN Secretary-General specifying the means by which States could fulfil their obligations to cease recognition, aid, and assistance to Israel’s colonial-settler enterprise and to cooperate to bring the unlawful situation to an end. PHROC noted:

“...the Council merely welcomed, rather than endorsed, the report. While the resolution “requests that all parties concerned, including United Nations bodies, implement and ensure the implementation of the recommendations” of the report, the absence of any clear indication of how parties must implement such broad recommendations allows continued inaction by the international community....

PHROC deeply regrets the influence of European States in dictating that a stronger, more detailed resolution would not have received consensus support at the Council and that, without this support, the resolution risked stalling due to a lack of political impetus.”<sup>207</sup>

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<sup>205</sup> UN General Assembly, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem* (7 February 2013) UN Doc A/HRC/22/63, para 17.

<sup>206</sup> *Ibid.*, para 21.

<sup>207</sup> PHROC, UN resolution on settlements: another missed opportunity to advance the rights of the Palestinian people (25 March 2013), available at: <http://www.alhaq.org/advocacy/6772.html>.

73. On 22 March 2019, the Human Rights Council adopted its latest accountability resolution 30/14, in which Member States welcomed the report of the UN Commission of Inquiry on the 2018 protests in the occupied Palestinian territory<sup>208</sup> and:

“Call[ed] upon all duty bearers and United Nations bodies to pursue the implementation of the recommendations contained in the reports of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory, the independent commission of inquiry on the 2014 Gaza conflict, the independent international fact-finding mission to investigate the implications of Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, and the United Nations Fact-Finding Mission on the Gaza Conflict, in accordance with their respective mandates.”<sup>209</sup>

74. Over a year since resolution 30/14 was adopted, no measures have been taken by Member States to ensure the implementation of the Commission of Inquiry’s recommendations, which highlighted the root causes of widespread and systematic Israeli human rights violations committed against the Palestinian people in the Gaza Strip and recommended that Israel, the Occupying Power, “Lift the blockade on Gaza with immediate effect.”<sup>210</sup> The Commission of Inquiry also recommended that “the United Nations High Commissioner for Human Rights manage the dossiers on alleged perpetrators, to be provided to national and international justice mechanisms, including the International Criminal Court,”<sup>211</sup> that UN Member States “consider imposing individual sanctions, such as a travel ban or an assets freeze, on those identified as responsible by the commission,”<sup>212</sup> and that “States parties to the Geneva Conventions and/or to the Rome Statute carry out their duty to exercise criminal jurisdiction and arrest persons alleged to have committed, or who ordered to have committed, the international crimes described in the present report, and either to try or to extradite them.”<sup>213</sup>
75. It is telling that, despite the multitude of commissions of inquiry and fact-finding missions created on Palestine and the crucial role they play in establishing the facts of human rights violations committed against Palestinians, the Human Rights Council has repeatedly failed to adopt effective measures to ensure the implementation of the recommendations of various UN investigatory bodies, with the exception of Human Rights Council resolution 31/36, which requested the Office of the High Commissioner for Human Rights, “in follow-up to the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements... to produce a database of all business enterprises involved in the activities detailed in paragraph 96 of the afore-mentioned report, to be updated annually, and to transmit the data therein in the form of a report to the Council at its thirty-fourth session.”<sup>214</sup>

#### **4. International Justice and Accountability**

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<sup>208</sup> Human Rights Council Resolution 30/14 (22 March 2019) UN Doc A/HRC/RES/30/13, para 1.

<sup>209</sup> *Ibid.*, para 2.

<sup>210</sup> *Commission of Inquiry Report*, para 122(a).

<sup>211</sup> *Ibid.*, para 126.

<sup>212</sup> *Ibid.*, para 127.

<sup>213</sup> *Ibid.*, para 128.

<sup>214</sup> UN Human Rights Council Resolution 31/36 (24 March 2016) A/HRC/RES/31/36, para 17.

#### 4.1. Individual Criminal Responsibility

##### 4.1.1. Israel's Judicial System

76. As outlined above, Israel has the primary legal responsibility to investigate and prosecute suspected war crimes and crimes against humanity perpetrated by the Israeli occupying forces. Yet, its investigatory system for such crimes fails to meet the international legal standards of independence, effectiveness, promptness, and impartiality. Article 17(2) of the *Rome Statute* provides a yardstick by which the willingness of a State to conduct appropriate investigations may be measured, with reference to an intention to shield persons from criminal responsibility,<sup>215</sup> an unjustified degree of delay,<sup>216</sup> and a lack of independence and impartiality.<sup>217</sup>
77. The key figure within the Israeli investigatory mechanism is the Military Advocate General (MAG). The MAG wears a number of hats simultaneously: as the commander of the MAG Corps, “responsible for implementing the rule of law within the [Israeli army],”<sup>218</sup> he serves as the chief legal advisor to, *inter alia*, the Israeli army chief of staff and Israeli Civil Administration, sets the parameters as to when the Military Police Criminal Investigative Division carry out criminal investigations into Israeli military conduct, as well as making the ultimate decision as to whether or not to prosecute<sup>219</sup> depending on whether he believes there to be a “reasonable chance of conviction,”<sup>220</sup> although such decisions may be challenged by the Attorney General.<sup>221</sup> The MAG thus represents a consolidation of a legislative function through its issuing of military orders, an executive function through its role in their implementation, and a quasi-judicial function through its role in the enforcement of military orders and proper military conduct. The MAG therefore operates in a “quasi-constitutional vacuum,” wherein it is responsible for the creation of law, investigating breaches, and setting criteria for prosecution, all with little to no effective civilian oversight.<sup>222</sup>
78. Investigations by the MAG may, in theory, be initiated following the submission of external complaints by the families or legal counsel of victims. However, as will be explored in detail below, this system is riddled with challenges. This MAG-centric investigation system has been roundly criticized as being “without proper preparation or an orderly work procedure, casting doubt on its effectiveness,”<sup>223</sup> and making it “difficult to avoid the conclusion that the MAG Corps has yet to accept the implications of accountability.”<sup>224</sup> The system has therefore been the subject of multiple reports and

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<sup>215</sup> Article 17(2)(a), *Rome Statute*.

<sup>216</sup> Article 17(2)(b), *Rome Statute*.

<sup>217</sup> Article 17(2)(c), *Rome Statute*.

<sup>218</sup> See Israel Defense Forces, About the MAG Corps, available at: <https://www.idf.il/en/minisites/military-advocate-generals-corps/about-the-mag-corps/>.

<sup>219</sup> UN Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory* (18 March 2019) UN Doc A/HRC/40/CRP.2 at para 718; see also State of Israel, *Israeli's Investigation of Alleged Violations of the Law of Armed Conflict* at paras 416-421, available at: <https://mfa.gov.il/ProtectiveEdge/Documents/IsraelInvestigations.pdf>.

<sup>220</sup> See Israel Defense Forces, The IDF Military Justice System, available at: <https://www.idf.il/en/minisites/military-advocate-generals-corps/the-idf-military-justice-system/>; see also, *inter alia*, *Yahav v State Attorney*, HCJ 2534/97 (30 June 1997).

<sup>221</sup> *Ibid.*

<sup>222</sup> See FIDH, *Shielded From Accountability: Israel's Unwillingness to Investigate and Prosecute International Crimes* (2011), available at: [https://www.fidh.org/IMG/pdf/report\\_justice\\_israel-final.pdf](https://www.fidh.org/IMG/pdf/report_justice_israel-final.pdf).

<sup>223</sup> UN Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory* (18 March 2019) UN Doc A/HRC/40/CRP.2 at para 725.

<sup>224</sup> *Ibid.*, 726.

inquiries, including the UN's various investigatory mechanisms, highlighted in the *Goldstone*, *Tomuschat*, and *McGowan Davis* reports, and by the Israeli *Turkel Commission*, all of which criticized the system's inaction, and in the case of the *Turkel Commission*, proposed dramatic changes.<sup>225</sup>

#### 4.1.1.1. Engaging with Israel's Military Advocate General

79. Israel's military investigative system has been well-recognised to fall exceptionally short of international standards of due process; it is neither independent nor impartial, fails to provide a prompt response to complaints, and lacks any form of transparency. The empirical record clearly demonstrates that it consistently provides for impunity for Israeli military and political officials, which dangerously emboldens and normalizes the recurrence of serious violations of international human rights and humanitarian law against Palestinians. The output of Israel's military judiciary following Israel's 2014 aggressive military campaign on Gaza, so-called "Operation Protective Edge" (OPE), serves as a clear and telling example of the extent of widespread impunity for pervasive and serious violations of international law by Israel, the occupying power.
80. Conducted between 7 July and 26 August 2014, OPE resulted in the killing of at least 2,251 Palestinians. The vast majority of those killed were civilians and included 556 children. During the 51-day bombardment, the Israeli occupying forces caused massive destruction to over 31,000 homes and other civilian properties, including components of Gaza's vital infrastructure, which has not been fully repaired to this day. Monitoring of the military assault by civil society organisations such as Al Mezan gave rise to serious concern that Israel's actions had violated, *inter alia*, the fundamental humanitarian principles of distinction and proportionality. Amongst Al Mezan's documentation are examples of direct attacks on residential buildings, causing civilian deaths, injuries, and wanton destruction, attacks on children, attacks on UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) schools that were sheltering civilians, and on hospitals, ambulances, mosques, and a shelter for persons with disabilities.
81. Yet, six years on from this massive destruction and flagrant disregard for international law with total impunity, no criminal charges, prosecutions, or convictions have been issued by Israel's military judiciary concerning the killing or serious injury of Palestinian civilians. Following the receipt of 500 criminal complaints by the MAG, three Israeli soldiers were eventually indicted for looting, and the aiding and abetting of looting, which illustrates a deliberate focus of proceedings on low-level or marginal perpetrators. Israeli military commanders and politicians, those most responsible for the massive destruction and loss of life seen in 2014, have never been held accountable for their role in OPE. It must be emphasized that the institutionalised impunity documented after OPE fits a longstanding pattern of failure and unwillingness by the Israeli occupying authorities to conduct credible investigations into suspected crimes with a view to holding those most responsible of international crimes to account, as required by international law.
82. During and in the immediate aftermath of OPE, Al Mezan submitted 122 criminal complaints<sup>226</sup> to the MAG, 28 of which are joint cases with partner organisation Adalah

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<sup>225</sup> *Ibid.*, 720.

<sup>226</sup> In addition to the 122 complaints, in 2019 the MAG prompted Al Mezan to file three additional complaints concerning cases into which the MAG had already opened criminal investigations. These three cases are dealt with outside of the original 122 complaints filed by Al Mezan.

- The Legal Center for Arab Minority Rights in Israel.<sup>227</sup> These complaints addressed a wide array of incidents occurring during OPE. Each complaint was submitted on behalf of one or more civilian victims. Of Al Mezan’s total of 122 criminal complaints, 72 were closed without criminal investigation and 18 criminal investigations were opened. Fifteen of these investigations were subsequently closed and three cases remain under investigation nearly six years on from the attacks, concerning:
- a) The attack on the Jabalia UNRWA shelter that killed 20 people on 30 July 2014;
  - b) The killing of a man on 24 July 2014; and
  - c) The attack, resulting in grievous injury, of a seven-year-old boy who died after his medical evacuation was obstructed by the Israeli occupying forces.
83. To date, the MAG has failed to take substantive measures concerning 32 criminal complaints which remain suspended under the Fact-Finding Assessment Mechanism (FFAM). The FFAM was purportedly intended to thoroughly and promptly investigate alleged violations of international law, in as close a timeframe as possible to the date of the incident in question. In reality, complaints remain effectively frozen under the FFAM’s purview and are later closed unceremoniously, typically without resulting in criminal investigation by the MAG.
84. Al Mezan (in some cases jointly with partner organisations) appealed the closure of 24 cases with the Israeli Attorney General. Two of these appeals have been rejected and 22 remain pending. The appeals process has no clear or transparent procedures and has no accompanying or suggested timeframe for the rendering of decisions; thus, appeals linger within this purgatorial state for years. Directives issued by Israel’s Attorney General in April 2015 set a deadline of 60 days for submitting appeals against the MAG’s decisions; however, the directives contain no provisions regarding a timeline for the Attorney General to issue his decision on the appeal.
85. Finally, in the well-documented and straightforward cases presented by Al Mezan and Adalah across 122 criminal complaints concerning OPE, not a single indictment was issued for members of the Israeli military.
86. Israel’s investigations into OPE appallingly fall far short of international standards. The handling of the complaints submitted by Al Mezan and Adalah clearly indicate the following:<sup>228</sup>
- a) There is a lack of an independent and impartial investigatory mechanism, clearly illustrated by the Israeli military’s role as the authorised investigative body into its own conduct. The MAG performs a “dual role”: providing the military with legal advice prior to, and during military operations, and subsequently decides whether to initiate criminal investigations and proceedings. This dual role could lead to a situation in which the MAG would decide whether to investigate its own conduct, or that of its subordinates. The

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<sup>227</sup> See <https://www.adalah.org/en>.

<sup>228</sup> Al Mezan and Adalah, *Gaza 3 Years On: Impunity Over Accountability – Israel’s unwillingness to investigate violations of international law in the Gaza Strip* (Issued 28 August 2017) available at: <http://mezan.org/en/uploads/files/15039098601678.pdf>.



possibility, and likelihood, of such a situation clearly violates the requirement of independence;

- b) The MAG dismisses complaints by providing unfounded and unsubstantiated arguments regarding the supposed existence of military necessity and legitimate military targets;
- c) The MAG has failed to investigate issues of military policy and rules of engagement, including the policy of targeting inhabited family homes, which facilitated the Israeli military's killing of hundreds of Palestinian civilians, the policy of indiscriminate artillery fire at inhabited areas, and the policy of destroying civilian farmland and thousands of homes;
- d) The MAG has failed to investigate government officials and senior military commanders, who devised the aforementioned policies, and were responsible for the orders and operational decisions resulting in the loss of life and destruction of civilian property;
- e) The MAG is unwilling to disclose information regarding investigative materials, witnesses, and testimonies;
- f) There is no timeframe for the conduction of criminal examinations and investigations;
- g) There is an unreasonable amount of delay in the criminal examination and investigation processes, and thus the process is not prompt, but unnecessarily lengthy; and
- h) There are still no guidelines under which a criminal investigation should be opened in cases involving alleged violations of international humanitarian and human rights law. These observations from OPE add to a longer experience that shows that:
  - i. To date, the Israeli Supreme Court has never issued any order to the MAG to open a criminal investigation or to indict any individual suspected of the commission of war crimes in the Gaza Strip, and in a 2011 decision stated that such intervention in military decisions is rare and exceptional,<sup>229</sup>
  - ii. There is still an absence of war crimes legislation in domestic Israeli law and there is no Israeli penal law imposing direct criminal liability on individuals, including military commanders and political leaders for grave breaches, as required by Article 146 of the *Fourth Geneva Convention*; and
  - iii. Israel has repeatedly and systematically refused to cooperate with international investigative bodies, thus UN and independent investigators have been denied physical access to Israel and the occupied Palestinian territory. This lack of cooperation effectively

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<sup>229</sup> *Adalah – The Legal Center for Arab Minority Rights in Israel v. Attorney General*, HCJ 3292/07 (8 December 2011).

thwarts attempts to gather information first-hand and investigate the scenes of relevant incidents and violations.

87. These findings clearly demonstrate Israel's unwillingness to genuinely investigate allegations of war crimes, crimes against humanity, and other serious violations of international law, as well as its lack of intent to bring those responsible at all levels of the political and military establishment to justice. Even in the few cases where investigations have been conducted, it is clear that they are not done independently or impartially, and in the end, fail to produce any results that contribute towards the pursuit of accountability or an end to impunity. The extent to which legal accountability and justice is systemically denied by Israel's military investigation system is clearly illustrated through the results of Al Mezan's 122 criminal complaints.
88. Of crucial significance is the fact that no meaningful legislative, procedural, or structural reforms have been adopted by the Israeli judiciary that would enable the State to meet the international standards of independence, impartiality, effectiveness, promptness, thoroughness, and transparency within the investigation processes. The Israeli investigative mechanisms instead are designed to shield Israel's armed forces and allow impunity to remain the status quo.
89. The MAG's handling of the hundreds of criminal complaints regarding the killing, and serious injury, of Palestinian civilians resulting from Israel's military force within the context of the "Great March of Return", further demonstrates Israel's continued unwillingness to undertake genuine and meaningful investigations into the alleged commission of serious international crimes.
90. With 215 protesters, medics and journalists killed, including 47 children and nine people with disabilities, only one conviction was issued by the MAG, with the sentence widely considered to be woefully derisory. In a case filed by Al Mezan, concerning the shooting of 14-year-old Othman Hillis,<sup>230</sup> examined by the UN Commission of Inquiry as an unlawful use of force,<sup>231</sup> the court issued a 30-day prison sentence to be served through military-related labour, a suspended 60-day sentence, and a demotion in rank for the charge of "disobeying an order leading to a threat to life or health", per Article 72 of the Israeli Military Justice Law (1955).<sup>232</sup> The sentence handed down by the court for failure to follow orders and show discipline is not commensurate with the gravity of the crime of wilful killing of a child and demonstrates rampant, continued impunity and a lack of effective means of redress for Palestinian victims and their families.
91. It is thus exceedingly clear that Israel is not only in violation of its Article 146 obligations under the *Fourth Geneva Convention*, but is moreover, in the language of the *Rome Statute*, "unwilling or unable to genuinely carry out the investigation or prosecution" necessary.<sup>233</sup> As comprehensively outlined above, Israel's system falls short of each of the criteria for an independent, effective, prompt, thorough and impartial investigatory system, and has instead opted to further entrench a pervasive culture of impunity and

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<sup>230</sup> Al Mezan, *85th Friday of the Great Return March Demonstrations: 44 Wounded, Including 18 Children, One Woman and One Journalist* (20 December 2019) available at: <http://mezan.org/en/post/23660>.

<sup>231</sup> See *Commission of Inquiry Report*, pg. 145-146.

<sup>232</sup> Al Mezan, *Israeli Soldier Sentenced for Failure to Follow Orders Instead of Killing of Child Al Mezan: Leniency Attests to Entrenched Impunity* (31 October 2019) available at: <http://mezan.org/en/post/23599>.

<sup>233</sup> Article 17(1)(a), *Rome Statute*.

consistently disregard civilian life, dignity, and wellbeing, a reality which is safeguarded and reinforced by both the Israeli military investigatory system and the Supreme Court.

92. For further analysis by Al Mezan and Adalah regarding OPE cases, see *Gaza 3 Years On: Impunity over Accountability – Israel’s unwillingness to investigate violations of international law in the Gaza Strip*.<sup>234</sup> For more information regarding Israeli impunity for attacks on medical personnel and infrastructure, see Al Mezan, Lawyers for Palestinian Human Rights (LPHR) and Medical Aid for Palestinians’ report;<sup>235</sup> regarding the Israeli military’s practice of using human shields, see Al Mezan and LPHR’s joint report;<sup>236</sup> and regarding the Israeli military’s targeted destruction and damage to family homes, see Al Mezan and LPHR’s submission to UN Special Procedures.<sup>237</sup>

#### 4.1.1.2. Engaging with Israel’s Law on Civil Liability

93. At the beginning of the second Intifada in 2000, the Israeli legislature, military, and judicial system began establishing procedural and legislative obstacles for Palestinians seeking to pursue civil claims in Israeli courts. These barriers continue to block Palestinian claimants from accessing effective remedies, including reparations, for Israeli military misconduct that may amount to serious breaches of international law, including killings, injury, and the destruction of civilian property.
94. International human rights law requires States to ensure that effective remedies, including reparations, are available to victims of violations<sup>238</sup>—an obligation with extraterritorial application. However, as a result of Israel’s legal and policy framework, civil claims from Palestinian petitioners in Gaza are routinely dismissed.
95. In July 2005, the Israeli Parliament (the Knesset) amended Israel’s Civil Wrongs (State Liability) Law (1952) with the intention of releasing the State from all liability for compensation to Palestinians due to violations of international humanitarian and human rights law by the Israeli military and other occupying forces in areas designated as “conflict zones,” a designation which encompasses virtually all of the occupied West Bank and Gaza Strip. Adalah and other human rights organisations challenged the law, and in 2006, the Israeli High Court of Justice invalidated the provision, ruling that it was

<sup>234</sup> Al Mezan and Adalah, *Gaza 3 Years On: Impunity Over Accountability – Israel’s unwillingness to investigate violations of international law in the Gaza Strip* (Issued 28 August 2017), available at: <https://www.adalah.org/en/content/view/9082>.

<sup>235</sup> Al Mezan, Lawyers for Palestinian Human Rights, and Medical Aid for Palestinians, *Chronic Impunity: Gaza’s Health Sector under Repeated Attack* (March 2020), available at: <http://mezan.org/en/uploads/files/chronic-impunity-gazas-health-sector-under-repeated-attack.pdf>.

<sup>236</sup> Lawyers for Palestinian Human Rights and Al Mezan, *Justice Denied: Gaza human shield survivors and the systemic failure of Israel’s military investigation system to provide accountability* (September 2018), available at: <http://mezan.org/en/uploads/files/15361292681880.pdf>.

<sup>237</sup> Al Mezan and Lawyers for Palestinian Human Rights, *December 2016 update to September 2014 complaint concerning destruction and damage to family houses in the Gaza Strip with associated loss of life and injury to Palestinian residents, during Israel’s military operation between 7 July 2014 and 26 August 2014*, available at: <http://mezan.org/en/uploads/files/14815404001307.pdf>.

<sup>238</sup> UN Human Rights Committee, *General Comment no. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004) UN Doc CCPR/C/21/Rev.1/add.13, para. 15; UN Human Rights Committee, *Rodger Chongwe v Zambia* (9 November 2000) UN Doc CCPR/C/70/D/821/1998, para. 5.3; UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (10 March 1992), para. 14; the right to an effective remedy is contained within: Article 2(3), ICCPR; Article 6, ICERD; Article 14, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entry into force 26 June 1987) 1465 UNTS 85 (henceforth the “CAT”); Article 83, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (adopted 18 December 1990, entry into force 1 July 2003) UN Doc A/RES/45/158.

- unconstitutional as it granted absolute and unjustified immunity to the State.<sup>239</sup> The Court also recognised Palestinian victims’ right to submit tort lawsuits against the State in Israeli courts in cases where harm was caused to their lives, physical integrity, and property.
96. Following this decision, Palestinian petitioners could again submit tort cases for compensation in Israeli courts against the military and other occupying forces for killing, injury, or property damage committed outside the context of a “combat situation.” However, the scope of what constituted a “combat situation” was not determined and the door was left open for further restrictions on compensation claims.
  97. Following the 2006 case, the State looked for ways to bypass the Court’s decision and to once again exempt itself from civil liability. Accordingly, Amendment No. 8 to the Israeli Civil Wrongs (State Liability) Law of 1952 was enacted in 2012 and became the primary legal obstacle faced by Palestinian victims in the Gaza Strip bringing civil claims before Israeli courts. The Amendment, passed into law by the Israeli Parliament on 16 July 2012 with retroactive application to 12 September 2005, gives the courts the power to dismiss civil cases at the preliminary stage, without hearing witnesses or considering evidence, if the damage occurred in “combat situations”—legislated under the term “combat action.”<sup>240</sup>
  98. The definition of “combat action” includes any military operation, “including any action against terrorism, hostilities, or uprising, and any preventative action against terrorism, hostilities, or uprising that is combatant in nature, considering all circumstances, including the action’s purpose, geographic location, or the threat to the operation forces.”<sup>241</sup> The definition does not take into account the compatibility of the military conduct with Israeli or international law.
  99. The law further stipulates in Article 5b(a)(1) that Israel will not be liable for damages caused to non-Israeli residents residing in a territory located outside Israel that has been declared as “enemy territory.”<sup>242</sup> Residents of “enemy territory” are therefore not eligible for compensation from Israel for any reason. When Hamas took control over the Gaza Strip in June 2007, the Israeli Security Cabinet declared the Gaza Strip a “hostile territory,”<sup>243</sup> and subsequently upgraded its status to “enemy territory” in 2014.<sup>244</sup>
  100. While there is a long list of barriers for Palestinian petitioners from Gaza bringing civil claims before Israeli courts,<sup>245</sup> the exemptions to State liability relating to “combat

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<sup>239</sup> *Adalah v. The Minister of Defense*, HCJ 8276/05 (12 December 2006).

<sup>240</sup> Article 5, Civil Wrongs (State Liability) Law, 5712-1952, as amended in 2012; for more details see *Adalah et al, Memorandum of the Civil Torts Law (Liability of the State) (Amendment No. 8), 5767-2007: Position Paper* (September 2007), available at: <https://www.adalah.org/uploads/oldfiles/features/compensation/positionpaper-e.pdf>.

<sup>241</sup> Article 1, Civil Wrongs (State Liability) Law, 5712-1952, as amended in 2012.

<sup>242</sup> Section 5B(a)(1), The Civil Wrongs (State Liability) Law, 5712-1952.

<sup>243</sup> Israel, MFA, Behind the Headlines: Israel Designates Gaza a “Hostile Territory” (24 Sep 2007), available at: <https://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Gaza%20designated%20a%20%E2%80%9CHostile%20Territory%E2%80%9D%2024-Sep-2007.aspx>.

<sup>244</sup> Declaration of the Gaza Strip as “Enemy Territory” according to the Civil Wrongs (State Liability) Law, 5712-1952, available at: [http://www.hamoked.org/files/2015/1159681\\_eng.pdf](http://www.hamoked.org/files/2015/1159681_eng.pdf).

<sup>245</sup> Al Mezan, Update: No Reparations in Israel For Palestinians – How Israel’s Amendment No. 8 Leaves No Room For Recourse Gaza (December 2015), available at: <http://mezan.org/en/post/20954>.

action” and “enemy territory” are now the two primary legal obstacles faced by these petitions.<sup>246</sup>

101. In a case brought by Al Mezan concerning a Palestinian resident of Gaza, Attiya Al-Nabaheen, who was shot by Israeli soldiers on his fifteenth birthday in November 2014, an Israeli court dismissed the case in November 2018 on the basis that the petitioners, being residents of Gaza, were not eligible for compensation under the “enemy territory” exception. Al-Nabaheen was shot returning from school in the front yard of his family home, about 500 metres from Gaza’s perimeter fence. He was not armed or involved in any violent activity, and evidence clearly indicates that the shooting occurred without there being any violence in the area, a fact not challenged by the State. As a result of the shooting, the child is a quadriplegic.<sup>247</sup> Al Mezan, joined by Adalah, appealed this ruling to the Israeli Supreme Court.<sup>248</sup> The case is pending, and a new hearing date has not yet been set.
102. Of the November 2018 ruling, the UN Commission of Inquiry on the 2018 protests in the occupied Palestinian territory, wrote:

“The [Al-Nabaheen] ruling, and the law on which it is based, excludes Gazan residents from eligibility for compensation under the law, without examining the harm itself. In doing so, Gazan victims of violations are denied the main avenue to fulfil their right to ‘effective legal remedy’ from Israel that is guaranteed to them under international law. The Commission is unaware of any alternative mechanism employed by Israel to compensate Palestinian victims for damage caused unlawfully by the [occupying] forces. The importance of this ruling is thus difficult to overstate.”<sup>249</sup>

103. The Commission of Inquiry recommended that the Israeli government:

“(a) Investigate promptly, impartially and independently every protest-related killing and injury in accordance with international standards, to determine whether war crimes or crimes against humanity have been committed with a view to holding those found to be responsible accountable;

(b) In accordance with General Assembly resolution 60/147, ensure prompt, adequate and effective remedies for those killed or injured unlawfully, including timely rehabilitation, compensation, satisfaction and guarantees of non-repetition;

(c) Amend the law on civil liability to provide a remedy to Gazans through Israeli courts for breaches of international human rights law or international humanitarian law by the Israeli [occupying] forces.”<sup>250</sup>

104. Another notable, related case is that of the Abu Is’ayid family. The case arises from two military attacks on the family home near the perimeter fence in Johr Al Deek in the Gaza

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<sup>246</sup> Adalah, *Obstacles for Palestinians in Seeking Civil Remedies for Damages before Israeli Courts* (May 2013) available at: <https://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/Obstacles-Palestinians-Court-Fatmeh-EIAjou-05-13.pdf>.

<sup>247</sup> Al Mezan, Israel gives itself immunity from all damage claims filed by Gazans harmed by Israeli troops; Adalah, Al Mezan appeal to Supreme Court (10 February 2019), available at: <http://mezan.org/en/post/23370>.

<sup>248</sup> *Ibid.*, fn. 19.

<sup>249</sup> *Commission of Inquiry Report*, para 756.

<sup>250</sup> *Ibid.*, para 800.

Strip. In the first attack, on 13 July 2010, members of Israel’s artillery forces shelled Naser Abu Is’ayid’s house, killing his wife Ne’ma and wounding four family members. The house was attacked again on 28 April 2011, causing the injury of three of Naser’s sons and the total destruction of the house.

105. In 2012, Al Mezan filed a compensation claim on behalf of the Abu Is’ayid family in the Beer Sheva District Court. In November 2017, despite evidence of serious wrongdoing on the part of the military, the court rejected the liability of the State, citing Amendment No. 8.<sup>251</sup> The court ruled that the killing of Ne’ma, the injury of family members, and the destruction of the family home “occurred during combat action”<sup>252</sup>—despite the fact that the soldiers who conducted the attack had not faced any threat to life or injury, a foundational requirement of the law. The District Court’s ruling therefore removed even this broad parameter and in effect the Israeli government became exempt from liability for all military activity occurring in and around Gaza *vis-à-vis* its Palestinian residents.
106. Al Mezan appealed this ruling to the Israeli Supreme Court. The Supreme Court’s July 2019 ruling on appeal supported the lower court’s application of Amendment No. 8 and clarified that while the military force used in the second incident might have resulted from negligence, the Court did not consider this second matter to be within its purview.<sup>253</sup> According to the Supreme Court’s ruling:

“The Court has investigated the incident meticulously and assessed that the second attack [the subject of the appeal] was perpetrated with dereliction, which the court does not deal with. This dereliction is part of individual acts by the soldiers rather than being part of the incident itself. As such, the attack was launched per the standards of self-defense and according to the provisions of the law. We regret the results of the attack. At the legal level, however, the appeal is rejected.”<sup>254</sup>

107. As the highest court of appeal in the country, the Supreme Court’s decision effectively deprives Palestinian petitioners in the Gaza Strip of all redress from within the entire Israeli judicial system, regardless of the severity of the conduct and/or violations committed by Israeli forces or State organs. The decision also overlooks the implications of such conduct on civilians. The Palestinian survivors and family members in Gaza are left to seek remedies internationally, in a situation where the State is not cooperative with international mechanisms.

#### 4.1.1.3. Torture and Ill-Treatment in Israel’s Court System

108. Impunity for widespread and systematic human rights violations committed against the Palestinian people is exemplified by the Israeli courts’ sanctioning of the use of torture and other ill-treatment. In fact, confessions extracted through torture are admissible in Israeli courts.<sup>255</sup> According to Israeli military laws, a detainee must stand before a judge within the first four days of the arrest, and interrogation may last for a total of 75 days before a list of charges is submitted. During the interrogation period, detainees can be

<sup>251</sup> Al Mezan, Israeli Court Dismisses Civil Case for Gaza Family, Further Entrenching Impunity (23 November 2017), available at: <http://mezan.org/en/post/22132>.

<sup>252</sup> Bersheva District Court’s ruling on 20 Nov. 2017 in case no. 17-07-21677.

<sup>253</sup> Al Mezan, Israeli Supreme Court Rejects Appeal in Abu Is’ayid Case (7 July 2019), available at: <http://mezan.org/en/post/23552>.

<sup>254</sup> Appeal no. 5149/18 to the High Court of Justice (sitting as a Court of Appeal) – Jerusalem.

<sup>255</sup> Addameer, The Torture and Ill Treatment of Palestinian Detainees (31 December 2009), available at: <http://www.addameer.org/publications/torture-and-ill-treatment-palestinian-detainees>.

denied access to a lawyer for a total of 60 days, as such in many cases confessions are extracted from detainees before they receive legal counsel. Moreover, over the past decades, the Israeli judiciary and executive has incrementally legitimised the widespread and systematic use of torture and other forms of ill-treatment against Palestinian detainees.

109. In 1987, the *Landau Commission* was established by the Israeli government following the killing of two Palestinian detainees held in Israeli custody. The Commission found that the Israeli intelligence agency “Shabak” routinely used physical force during the interrogation of Palestinian detainees. The Commission concluded that under the “defence of necessity,” moderate measures of physical pressure are permissible to be used on individuals suspected of so-called “hostile terrorist activity.” This conclusion was approved by the Israeli Cabinet in November 1987.<sup>256</sup>
110. In 1999, the Israeli Supreme Court, in Decision No. 94/5100,<sup>257</sup> ruled that the Israeli intelligence agency could no longer use “moderate physical pressure” against suspects under interrogation, except in the case of the so-called “ticking bomb” scenario, in which Israeli intelligence officials believe that a suspect is withholding information that could prevent an impending threat. This exception constitutes a grave legal loophole, which legitimises the use of torture and other forms of ill-treatment by interrogators from the Israeli intelligence agency, providing them with wide-reaching legal immunity for their actions, thereby further enabling a complete lack of criminal liability and accountability.
111. From 2001 until 2017 more than 1,000 complaints alleging torture during Israeli interrogations were filed, and all of them have been closed without a single indictment.<sup>258</sup> Similarly, further judicial decisions confirmed the legitimisation of torture and broadened the definition of the “ticking bomb” scenario to widen the cases falling under this definition. The two main rulings were in 2017 and 2018.
112. In September 2007, the Israeli occupying forces arrested As’ad Abu Gosh. During interrogation, Israeli intelligence agents used excessively cruel methods, amounting to torture, causing severe physical and psychological harm to Abu Gosh. These methods included beatings, slamming him against the wall, forcing him into stress positions, sleep deprivation, and severe psychological stress by threatening to demolish his home and harm his family members if he did not confess or cooperate with the interrogators. In 2012, the Public Committee Against Torture in Israel (PCATI) petitioned the Israeli High Court to open a criminal investigation and prosecute the interrogators who tortured Abu Gosh. In response, the Israeli Attorney General admitted that interrogators had used “certain pressure methods” on Abu Gosh, but refused to recognise that they constitute torture.<sup>259</sup>
113. In July 2015, the Supreme Court requested the Attorney General to provide an explanation justifying the closing of the Abu Gosh file without conducting an investigation, marking the first instance in which the High Court has made such a request regarding a complaint on torture. In light of the request, the Israeli Attorney General

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<sup>256</sup> Mordechai Kremnitzer, ‘The Landau Commission Report – Was the Security Service Subordinated to the Law, or the Law to the “Needs” of the Security Service?’ (1989) 23(2-3) *Israel Law Review* 216-279.

<sup>257</sup> *Public Committee Against Torture in Israel et al. v. Government of Israel et al.*, HCJ Decision No. 94/5100.

<sup>258</sup> Amnesty International, *Amnesty International Report 2017/18 – Israel and the Occupied Palestinian Territories* (22 February 2018) available at: <https://www.refworld.org/docid/5a9938e46.html>.

<sup>259</sup> Addameer, *I’ve Been There: A study of torture and inhumane treatment in Al Mascabiyyeh interrogation center* (2018) pg. 12-13, available at: [http://www.addameer.org/sites/default/files/publications/al\\_moscabiyyeh\\_report\\_0.pdf](http://www.addameer.org/sites/default/files/publications/al_moscabiyyeh_report_0.pdf).

produced a detailed explanation regarding the State's decision, stating that the use of pressure techniques in this case is covered by the "ticking bomb" exception, enshrined in Article 34 of the Israeli Penal Code of 1977. Following the presentation of PCATI's arguments, and after extensive deliberations between a committee of three judges, the court issued its ruling on 12 December 2017.<sup>260</sup> The Supreme Court's ruling stated that the "pressure techniques" used by the interrogators against Abu Gosh did not amount to torture because "they had not caused sufficiently severe pain or suffering." The Court further upheld the Attorney General's decision not to open a criminal investigation into the treatment of Abu Gosh, deeming the decision "reasonable." The Court also accepted the "necessity defence" as the interrogation, according to the Court, concerned life-threatening "militant activities," which was deemed to constitute an imminent threat.<sup>261</sup>

114. This ruling by the highest Court of the State reiterated the immunity of interrogators for criminal accountability. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, expressed his utmost concern following the ruling, stating it "sets a dangerous precedent, gravely undermining the universal prohibition of torture... the Supreme Court has essentially provided them with a judicially sanctioned 'license to torture.'"<sup>262</sup> Special Rapporteur Melzer urgently appealed "to all branches of Israel's Government to carefully consider not only its own international obligations, but also the consolidated legal and moral views of the international community, before whitewashing methods of interrogation that are more closely associated with barbarism than with civilization."<sup>263</sup>
115. On 26 November 2018, the Israeli Supreme Court issued a ruling in the case of Firas Tubayesh, aged 40. Firas was arrested by Israeli occupying forces in 2012 and was subjected to harsh measures amounting to torture during interrogation by the intelligence agency at the Asqalan interrogation centre.<sup>264</sup> In its decision, the Court once more undermined the absolute prohibition on torture by further expanding the definition of the so-called "ticking bomb" scenario. In doing so, the Court in effect returned to its 1999 Decision No. 94/5100, which linked the applicability of the "necessity" defence, in accordance with Article 34(11) of the Penal Law, to the immediacy or impending nature of the act, rather than its gravity or seriousness. With this recent ruling, however, the Court interpreted the "ticking bomb" scenario as broader still, extending the "necessity" justification for the use of torture and other ill-treatment to include cases that are not imminent threats, thus changing the element of immanency.
116. As such, it is clear that the Israeli judicial system has itself become a tool by which the pervasive impunity imposed by Israel is maintained and entrenched; accordingly, some Palestinian organisations, such as Al-Haq, have adopted a policy of non-engagement with Israeli judicial mechanisms, in particular the Supreme Court. The Israeli judiciary, and in particular the Supreme Court, routinely disregards established and fundamental principles and peremptory norms of international law, including the absolute prohibition on torture, in order to perpetuate the situation of impunity in which no accountability may be expected for State violations and crimes. As noted by David Kretzmer in his study of the Supreme Court's jurisprudence:

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<sup>260</sup> *As 'ad Abu Gosh vs. the Attorney General*, HCJ Decision 15/5722.

<sup>261</sup> *Ibid.*

<sup>262</sup> UN News, UN expert alarmed at Israeli Supreme Court's "license to torture" ruling (20 February 2018), available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22675&LangID=E>.

<sup>263</sup> *Ibid.*

<sup>264</sup> *See Tbeish v. Attorney General*, HCJ Decision No. 17/9018 (decision delivered 26 November 2018).



“In almost every legal crossroad, in almost every point where the court had to interpret international law, to establish the boundaries of authority, to declare the legality of a policy... [it] has chosen the path which strengthened the powers of the military commander, broadened the borders of his authority and legitimized his... decisions. [It] dismissed legally well-established petitions in the cost of breaking basic tenants of legal interpretation and it even sacrificed the consistency of its own decisions when it had to.”<sup>265</sup>

#### 4.1.2. The International Criminal Court

117. The International Criminal Court (ICC) is a permanent international court, based in The Hague, the Netherlands, which was established to investigate and prosecute persons suspected of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>266</sup> Following the State of Palestine’s accession as a State Party to the *Rome Statute* in January 2015,<sup>267</sup> a preliminary examination was opened by the Prosecutor into the Situation in the State of Palestine.<sup>268</sup> In December 2019, the Prosecutor announced that she was satisfied that international crimes were taking place in Palestine, and signalled an intention to open a criminal investigation into the Situation in the State of Palestine,<sup>269</sup> pending a confirmation on territorial jurisdiction from the Pre-Trial Chamber.<sup>270</sup> Regrettably, as part of this confirmation process before the Court, a total of seven States—Australia,<sup>271</sup> Austria,<sup>272</sup> Brazil,<sup>273</sup> the Czech Republic,<sup>274</sup> Germany,<sup>275</sup> Hungary,<sup>276</sup> and Uganda<sup>277</sup>—have elected to submit *amici curiae* briefs in opposition to the opening of an investigation into the Situation in Palestine.

118. Following the Prosecutor’s 30 April 2020 reaffirmation of her position that the Court enjoys territorial jurisdiction over the West Bank, including East Jerusalem, and the Gaza

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<sup>265</sup> David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002); quoted in Al-Haq, *Legitimising the Illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory* (2010) pg. 28, available at: [http://www.alhaq.org/cached\\_uploads/download/alhaq\\_files/publications/Legitimising%20the%20Illegitimate.pdf](http://www.alhaq.org/cached_uploads/download/alhaq_files/publications/Legitimising%20the%20Illegitimate.pdf).

<sup>266</sup> ICC, *Understanding the International Criminal Court*, pg. 3, available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.

<sup>267</sup> See UN, State of Palestine: Accession (6 January 2015) Ref. C.N.13.2015.TREATIES-XVIII.10 (Depositary Notification).

<sup>268</sup> OTP, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine (16 January 2015), available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>.

<sup>269</sup> See ICC, Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction (20 December 2019), available at: <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>.

<sup>270</sup> For a comprehensive explainer of the Situation in the State of Palestine as it currently stands, see Al-Haq, *Palestine and Territorial Jurisdiction at the International Criminal Court* (29 April 2020), available at: <http://www.alhaq.org/advocacy/16792.html>.

<sup>271</sup> Australia, *Situation in the State of Palestine: Observations of Australia* (16 March 2020) ICC01/18-86, available at: [https://www.icc-cpi.int/CourtRecords/CR2020\\_01034.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01034.PDF).

<sup>272</sup> Republic of Austria, *Situation in the State of Palestine: Amicus curiae observations of the Republic of Austria* (15 March 2020) ICC-01/18-76, available at: [https://www.icc-cpi.int/CourtRecords/CR2020\\_01018.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01018.PDF).

<sup>273</sup> Federative Republic of Brazil, *Situation in the State of Palestine: Brazilian Observations on ICC Territorial Jurisdiction in Palestine* (16 March 2020) ICC-01/18-106, available at: [https://www.icc-cpi.int/CourtRecords/CR2020\\_01083.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01083.PDF).

<sup>274</sup> Czech Republic, *Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103* (12 March 2020) ICC-01/18-69, available at: [https://www.icc-cpi.int/CourtRecords/CR2020\\_00996.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00996.PDF).

<sup>275</sup> Federal Republic of Germany, *Situation in the State of Palestine: Observations by the Federal Republic of Germany* (16 March 2020) ICC-01/18-103, available at: [https://www.icc-cpi.int/CourtRecords/CR2020\\_01075.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01075.PDF).

<sup>276</sup> Hungary, *Situation in the State of Palestine: Written Observations by Hungary Pursuant to Rule 103* (16 March 2020) ICC-01/18-89, available at: [https://www.icc-cpi.int/CourtRecords/CR2020\\_01047.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01047.PDF).

<sup>277</sup> Republic of Uganda, *Situation in the State of Palestine: The observations of the Republic of Uganda Pursuant to rule 103 of the Rules of Evidence and Procedure* (16 March 2020) ICC-01/18-119, available at: [https://www.icc-cpi.int/CourtRecords/CR2020\\_01112.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01112.PDF).

Strip as the occupied Palestinian territory,<sup>278</sup> it is worth consideration that the Court enjoys full subject-matter jurisdiction over war crimes and crimes against humanity taking place in the occupied Palestinian territory, including population transfer,<sup>279</sup> wilful killing,<sup>280</sup> extensive destruction of property not justified by military necessity, the establishment and maintenance of an apartheid regime over the Palestinian people,<sup>281</sup> persecution,<sup>282</sup> pillage,<sup>283</sup> and more.

119. In light of the above experiences engaging with Israel's domestic judicial system, as well as the occupation's military court regime, it has become clear that the ICC may very well be the final opportunity for accountability for the injustices suffered by the Palestinian people. The current process underway at the ICC represents a movement toward a genuine attempt to pursue accountability and an end to impunity for Israel's suspected crimes, as opposed to a previous, less palatable era wherein Palestinians were told the attainment of justice was complicated by "complex legal issues,"<sup>284</sup> a situation which continues in the *Mavi Marmara* case.<sup>285</sup> Moreover, it is exceptionally clear that Israel is entirely unwilling to hold illegal Israeli settlers and members of its military and other occupying forces accountable for manifest breaches of international law, while simultaneously shackling the Palestinian authorities from being able to do so.<sup>286</sup>
120. This flagrant disregard for international legal obligations and accountability is bolstered by a regrettable degree of international support and complicity; in addition to the above-named States which have submitted *amici* to the Court, further States have threatened sanctions<sup>287</sup> and cuts to the funding of the Court due to its activities in both Afghanistan and Palestine,<sup>288</sup> as well as, disturbingly, directly threatening members of the Office of the Prosecutor's staff.<sup>289</sup> Such attacks also include smears and accusations of anti-Semitism<sup>290</sup> as part of a wider silencing, delegitimation, and harassment campaign,

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<sup>278</sup> See ICC, *Situation in the State of Palestine: Prosecution Response to the Observations of Amici Curiae, Legal Representatives of Victims, and States* (30 April 2020) ICC-01/18-131, available at: [https://www.icc-cpi.int/CourtRecords/CR2020\\_01746.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01746.PDF).

<sup>279</sup> Article 7(1)(d), 8(2)(b)(viii), *Rome Statute*.

<sup>280</sup> Article 7(1)(a), 7(2)(a), 8(2)(b)(i), *Rome Statute*.

<sup>281</sup> Article 7(1)(j), *Rome Statute*.

<sup>282</sup> Article 7(1)(h), *Rome Statute*.

<sup>283</sup> Article 8(2)(b)(xvi), *Rome Statute*.

<sup>284</sup> Al-Haq, *After Five Years the Prosecutor of the International Criminal Court Finally Advances the Situation of Palestine from Preliminary Examination to the Pre-Trial Chamber for questions on Territorial Jurisdiction* (20 December 2019), available at: <http://www.alhaq.org/advocacy/16323.html>.

<sup>285</sup> See Al-Haq, *Al-Haq Welcomes Decision of Appeals Chamber to Reconsider the Comoros Case and Calls on the Prosecutor to Open Both the Comoros Case and an Investigation into the Situation in Palestine* (10 September 2019), available at: <http://www.alhaq.org/advocacy/15088.html>.

<sup>286</sup> *Review Paper*, para 11.

<sup>287</sup> BBC, 'John Bolton threatens ICC with US sanctions' (11 September 2018), available at: <https://www.bbc.com/news/world-us-canada-45474864>.

<sup>288</sup> See Palestine Chronicle, 'On the ICC and Canadian Government Hypocrisy' (4 March 2020), available at: <https://www.palestinechronicle.com/on-the-icc-and-canadian-government-hypocrisy/>; Amnesty International, *Open letter: Canada must support International Criminal Court decision to investigate war crimes in Palestine* (28 February 2020), available at: <https://www.amnesty.ca/news/open-letter-canada-must-support-international-criminal-court-decision-investigate-war-crimes>.

<sup>289</sup> CNN, 'Pompeo slams International Criminal Court decision to authorize Afghanistan war crimes investigation' (5 March 2020), available at: <https://edition.cnn.com/2020/03/05/politics/icc-afghanistan-pompeo/index.html>; Human Rights Watch, *US Again Threatens International Criminal Court* (19 March 2020), available at: <https://www.hrw.org/news/2020/03/19/us-again-threatens-international-criminal-court>; Times of Israel, 'Pompeo warns ICC of "consequences" for potential war crimes probe of Israel' (16 May 2020), available at: <https://www.timesofisrael.com/pompeo-warns-icc-against-potential-illegitimate-war-crimes-probe-of-israel/>.

<sup>290</sup> Reuters, 'Netanyahu accuses ICC of anti-Semitism in pursuit of war crimes probe' (22 December 2019), available at: <https://www.reuters.com/article/us-icc-palestinians-israel/netanyahu-accuses-icc-of-anti-semitism-in-pursuit-of-war-crimes-probe-idUSKBN1YQ0KC>.

which extends to civil society organisations.<sup>291</sup> The clear objective, and potential outcome, of this campaign is the frustration of the Court’s ability to fulfil its mandate in Palestine; accordingly, the spread of such disinformation has been criticised by the Prosecutor herself.<sup>292</sup>

121. As noted above, Third States are under a positive legal obligation under the *Fourth Geneva Convention* to see that perpetrators of grave breaches are brought to justice, whether in their own territories or elsewhere, an end which may be met on their behalf through the processes of the ICC. Support for a criminal investigation, and ultimately trials, in The Hague of such persons are also in line with their obligations under the law of Third State responsibility. It is therefore difficult to see how the conduct of certain States with regards the Situation in the State of Palestine before the ICC may be in conformity with their international legal obligations—more likely, the intentional obstruction thereof would appear to be contrary to their responsibilities as Third States, and High Contracting Parties to the *Fourth Geneva Convention*. It is incumbent on Third States to ensure that a full and free investigation into suspected war crimes and crimes against humanity be conducted across the West Bank, including East Jerusalem, and the Gaza Strip, including through the prosecution or extradition of persons present in their jurisdictions who are suspected of committing international crimes and grave breaches of the *Fourth Geneva Convention*, to co-operate fully with the Office of the Prosecutor as it does so, and to ensure that Israel does the same.

#### 4.1.3. Universal Jurisdiction

122. Over the past few decades, universal jurisdiction has grown in relevance as a mechanism to hold perpetrators of serious human rights violations amounting to suspected crimes accountable, especially where domestic courts are unable or genuinely unwilling to do so. Along with the ICC, which in the Palestinian context is truly a court of last resort, universal jurisdiction has emerged as an important avenue to put an end to Israel’s pervasive impunity. While the obligation to try suspected perpetrators of, *inter alia*, grave breaches of the *Fourth Geneva Convention* as enshrined as an obligation of all High Contracting Parties under Article 146, and torture under the *Convention Against Torture*,<sup>293</sup> universal jurisdiction has been deeply politicised over the years, especially when it comes to trying Israeli perpetrators of suspected human rights violations and international crimes. Instead, Third States have repeatedly shown reluctance to try suspected crimes committed against Palestinians and have been heavily pressured not to carry out their legal duty to exercise criminal jurisdiction to try or extradite alleged perpetrators. Moreover, Palestinian organisations and claimants who have sought justice through universal jurisdiction mechanisms have been accused of “forum-shopping”, painting their use as illegitimate, and frustrating their use as means for genuine and effective accountability.<sup>294</sup>

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<sup>291</sup> Al-Haq, Al-Haq Condemns Attempt to Smear Al-Haq, Its Staff, and Partners in Recent Report (11 May 2020), available at: <http://www.alhaq.org/advocacy/16854.html>; Electronic Intifada, ‘Smear campaign targets Palestinians working with ICC’ (13 May 2020), available at: <https://electronicintifada.net/blogs/maureen-clare-murphy/smear-campaign-targets-palestinians-working-icc>; <https://online.ucpress.edu/jps/article/49/2/65/107373/Delegitimizing-Solidarity-Israel-Smears-Palestine>.

<sup>292</sup> See <https://twitter.com/IntlCrimCourt/status/1258789325292081153/photo/1>.

<sup>293</sup> Article 5(2), CAT.

<sup>294</sup> See *Bil’In (Village Council) v. Green Park International Inc.* (18 September 2009) QCCS 4151, para 328; for more on the case, see, *inter alia*, Al-Haq, Update on the case of Bil’In v. Green Park in Canada – Hearings scheduled 22-25 June (13 October 2010), available at: <http://www.alhaq.org/advocacy/7205.html>; Al-Haq, Bil’In Seeks Permission to Appeal to the Supreme Court of Canada the dismissal of its case (11 December 2010), available at:

123. One of the most prominent failures of universal jurisdiction in the case of Palestine, which must be seen within the broader context of Israeli impunity, was the case in Belgium against Ariel Sharon, the Israeli Prime Minister at the time, for his involvement in the Sabra and Shatila massacres in Beirut in September 1982. On 18 June 2001, 23 survivors of the Sabra and Shatila massacres lodged a criminal complaint in Belgium against “Ariel Sharon, Amos Yaron and other Israelis and Lebanese responsible for the massacres, murders, rapes and disappearances of civilian populations which occurred in Beirut (Lebanon) from Thursday 16 to Saturday 18 September 1982 in the region of the Sabra and Shatila camps.”<sup>295</sup> On 26 June 2002, the Brussels Appeals Court found the complaints inadmissible, holding that proceedings could only be held in Belgium if the perpetrators were residing in Belgian territory. On 12 February 2003, Belgium’s highest jurisdiction in criminal cases, the Cour de Cassation, affirmed that physical presence in Belgium was not a requirement under Belgian law and that proceedings on international crimes could be pursued. However, the court held that Ariel Sharon could not be tried so long as he remained in office.<sup>296</sup>
124. On 23 June 2003, following serious international pressure by the US and Israel, the Belgian Parliament modified its universal jurisdiction law, which allowed for international crimes committed outside of Belgian territory to be tried in Belgian courts. The Belgian Parliament instead adopted restrictions, which essentially made it impossible to initiate proceedings in relation to suspected crimes when they had no direct connection to Belgium.<sup>297</sup> At the time, both Israeli and US officials were facing criminal charges in Belgian courts. As Richard Falk writes, the US “threatened to move the headquarters of NATO away from Brussels and to take punitive economic action if Belgium did not immediately abandon criminal proceedings against foreign leaders. As was widely reported in 2003, Belgium backed down, amending Belgian law to severely restrict its application regarding accountability for such crimes, and duly terminated proceedings against American and Israeli officials.”<sup>298</sup> Israel itself “was formally and officially outraged by the idea that the behavior of their elected leader (at the time) would be legally challenged in a foreign court of law, disrupted diplomatic relations and threatened Belgium with adverse economic consequences if it persisted with the legal proceedings.”<sup>299</sup> Victor Kattan further observed “that a number of prominent individuals who partook in the killings [were] murdered in different countries, around the same time, after threats were made to ‘speak the truth.’”<sup>300</sup>
125. As noted by Valentina Azarova and Triestino Mariniello, “Thus far, many of the attempts to trigger the universal jurisdiction of third states under their domestic laws, have been thwarted by political pressures and legislative amendments to ensure political vetting.”<sup>301</sup> However, universal jurisdiction remains an important avenue for Palestinians to seek

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<http://www.alhaq.org/advocacy/7069.html>; Al-Haq, Bil’in Village Council v. Green Park (12 October 2011), available at: <http://www.alhaq.org/advocacy/6986.html>.

<sup>295</sup> TRIAL International, Ariel Sharon, available at: <https://trialinternational.org/latest-post/ariel-sharon/>.

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

<sup>298</sup> Richard Falk, ‘Book Review: The Case of Ariel Sharon and the Fate of Universal Jurisdiction’, pg. 104, available at: <https://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Review/5/Adalahs-Review-5-101-Falk-Universal-Jurisdiction.pdf>.

<sup>299</sup> *Ibid.*, pg. 103.

<sup>300</sup> Victor Kattan, ‘From Beirut to Brussels: Universal jurisdiction, Statelessness and the Sabra and Chatila Massacres’ (2004-2005) 11 Yearbook of Islamic and Middle Eastern Law 61-62.

<sup>301</sup> Valentina Azarova and Triestino Mariniello, ‘Why the ICC Needs A ‘Palestine Situation’ (More Than Palestine Needs the ICC): On the Court’s Potential Role(s) in the Israeli-Palestinian Context’ (2017) 1 Diritti umani e diritto internazionale 115.

accountability, where Israeli courts are not only genuinely unwilling to do so but have systematically legitimised widespread and systematic human rights violations committed against the Palestinian people. Moreover, while the ICC is an important avenue for accountability for suspected crimes committed in the Situation in Palestine, its jurisdiction is limited temporally, to events taking place after and since 13 June 2014, geographically, to the occupied Palestinian territory, and substantively, to those crimes enumerated in the *Rome Statute*. As such, for well over a decade, civil society organisations both in Palestine and abroad have continued to seek accountability for Palestinian victims of international crimes on the basis of universal jurisdiction, including in relation to corporations complicit in grave breaches of international law committed in the occupied Palestinian territory.

#### 4.2. Corporate Accountability

##### 4.2.1. Corporate Complicity in Israel's Prolonged Military Occupation

126. On 23 December 2016, the UN Security Council adopted resolution 2334, which condemned all measures taken by Israel, in violation of international humanitarian law and prior UN resolutions, in order to alter the demographic composition of the occupied Palestinian territory, including the construction, maintenance, and expansion of illegal Israeli colonial settlements, the transfer of Israeli settlers into the occupied territory, the confiscation of land, and the demolition of homes and displacement of Palestinians.<sup>302</sup> The Security Council also reiterated Israel's obligation to "scrupulously" abide by its legal obligations and responsibilities under the *Fourth Geneva Convention* and the 2004 ICJ advisory opinion regarding the Annexation Wall. The resolution further called on Israel to freeze all settlement activities, including "natural growth," and dismantle all settlement outposts established since March 2001.
127. Businesses play a key role in the sustainability and profitability of Israel's occupation and its illegal settlement enterprise in the OPT, which is in flagrant violation of the *Fourth Geneva Convention* prohibiting the Occupying Power from transferring its own civilian population into occupied territory, as noted above. Israel's illegal settlement enterprise violates the human rights of the Palestinian people in numerous ways, namely by denying Palestinians the right to self-determination, including permanent sovereignty over their land and other natural resources, including access to water. As a result of Israel's occupation and continued settlement expansion, Palestinians suffer dispossession and displacement in addition to various restrictions on their freedom of movement and residency. In addition, the loss of land and restricted access to natural resources due to settlement expansion, compounded by Israeli-imposed impediments on labour, trade, and fiscal relations and agreements, has resulted in a captive Palestinian economy.<sup>303</sup>
128. The UN Guiding Principles on Business and Human Rights (UNGPs) establish that *all* business enterprises have a responsibility to protect human rights, which includes avoiding "infringing on the human rights of others" and addressing "adverse human rights impacts with which they are involved."<sup>304</sup> In line with the UNGPs, corporations

<sup>302</sup> UN Security Council Resolution 2334 (23 December 2016) UN Doc S/RES/2334.

<sup>303</sup> See State of Palestine, Negotiations Affairs Department, Paris Protocol (9 January 2016), available at: <https://www.nad.ps/en/publication-resources/agreements/paris-protocol>; see also WhoProfits, *Codifying Occupation: The Paris Protocol* (2019), available at: <https://whoprofits.org/infographics/codifying-occupation-the-paris-protocol/>.

<sup>304</sup> UN OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011), pg. 13, available at: [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).

should take steps to formally commit to respecting human rights, conduct due diligence to assess actual and potential human rights impacts, communicate their efforts to address human rights impacts transparently, and provide for cooperation in the provision of remediation through legitimate processes when their business activities have had adverse impacts on human rights.<sup>305</sup> In situations of conflict and occupation, business enterprises should conduct mandatory enhanced human rights-based due diligence to ensure compatibility with responsibilities under international law, including international humanitarian law. States, whether as home or host States, remain obliged to protect against human rights abuses in their territory or within their jurisdiction by third parties, including by business enterprises. This means that States are required to take steps in order to “prevent, investigate, punish and redress” human rights violations in the context of business activities,<sup>306</sup> with specific regard given to their obligations in conflict-affected situations,<sup>307</sup> where the risk of serious human rights abuses is particularly high.

129. Meanwhile, the revised draft of the Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (LBI), has positively evolved to encompass conflict-affected settings, by emphasising the applicability of international humanitarian law to business activities therein, potentially guaranteeing corporate accountability once ratified and enforced as an international treaty. The 2019 revised draft of the LBI includes additional provisions on prevention and enhanced human rights due diligence, encompassing situations of conflict and occupation, which should be elevated to mandatory enhanced human rights due diligence.<sup>308</sup> In this regard, enhanced human rights due diligence for corporate activities in settings of conflict and occupation should also include divestment and disengagement policies in order to ensure compliance with international humanitarian and human rights law.
130. More specifically relevant to corporate activities linked to illegal Israeli colonial settlements in the occupied Palestinian territory,<sup>309</sup> Human Rights Council resolution 19/17<sup>310</sup> established the FFM to investigate the implications of the illegal Israeli colonial settlements on the human rights of the Palestinian people throughout the OPT, including East Jerusalem. The 2013 report of the FFM investigated the implications of illegal Israeli colonial settlements on the civil, political, economic, social, and cultural rights of the Palestinian people and concluded that business enterprises have both directly and indirectly “enabled, facilitated, and profited from the construction and growth” of Israel’s illegal colonial settlements.<sup>311</sup> The mission identified, in paragraph 96 of its report,

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<sup>305</sup> *Ibid.*, pg. 16-24.

<sup>306</sup> *Ibid.*, Principle 1; the duty to protect is also set out in Principle 2 of the UNGPs relevant to extraterritorial activities of businesses domiciled in their territory, Principle 4 on State-owned enterprises, Principle 5 on privatisation cases, Principle 6 on State commercial transactions with companies, Principle 7 on conflict-affected areas, and Principle 9 on domestic policy space and bilateral agreements.

<sup>307</sup> *Ibid.*, Principle 7.

<sup>308</sup> For more analysis on this point, see Al-Haq, Al-Haq’s Additional Textual Suggestions on the Revised Draft Legally Binding Instrument (LBI) (29 February 2020), available at: <http://www.alhaq.org/advocacy/16546.html>.

<sup>309</sup> Al-Haq, Al-Haq Participates in Fifth Session of the IGWG on Transnational Corporations and other Business Enterprises on the Revised Draft of the Legally Binding Instrument on Business and Human Rights (31 October 2019), available at: <http://www.alhaq.org/advocacy/16148.html>.

<sup>310</sup> UN Human Rights Council Resolution 19/17 (10 April 2012) UN Doc A/HRC/RES/19/17.

<sup>311</sup> United Nations, Human Rights Council, *Report of the independent international fact-finding mission to investigate the implications of Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, A/HRC/22/63 (7 February 2013), pg. 20.

specific business activities that raised human rights concerns, which include the following:

- (a) The supply of equipment and materials facilitating the construction and the expansion of settlements and the wall, and associated infrastructures;
- (b) The supply of surveillance and identification equipment for settlements, the wall and checkpoints directly linked with settlements;
- (c) The supply of equipment for the demolition of housing and property, the destruction of agricultural farms, greenhouses, olives groves and crops;
- (d) The supply of security services, equipment and materials to enterprises operating in settlements;
- (e) The provision of services and utilities supporting the maintenance and existence of settlements, including transport infrastructure;
- (f) Banking and financial operations helping to develop, expand or maintain settlements and their activities, including loans for housing and the development of businesses;
- (g) The use of natural resources, in particular water and land, for business purposes;
- (h) Pollution, and the dumping of waste in or its transfer to Palestinian villages;
- (i) Captivity of the Palestinian financial and economic markets, as well as practices that disadvantage Palestinian enterprises, including through restrictions on movement, administrative and legal constraints;
- (j) Use of benefits and reinvestments of enterprises owned totally or partially by settlers for developing, expanding and maintaining the settlements.<sup>312</sup>

131. Notably, the FFM observed that businesses embark on these activities “with the full knowledge of the current situation and the related liability risks... and contribute to their maintenance, development and consolidation and that some companies have allegedly concealed the origin of their products,” which poses challenges to the ability of States to meet their international obligations, and denies consumers the right to important information.<sup>313</sup>

132. Thus, it is imperative that States take positive steps to genuinely promote corporate accountability for associated violations of human and environmental rights, by supporting and effectively engaging with the negotiations on the LBI to regulate the activities of multinational corporations and other businesses enterprises under international law, especially in situations of conflict and occupation where such violations are heightened and accountability is lacking.

#### 4.2.2. The UN Database of Businesses Operating with Israeli Settlements

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<sup>312</sup> *Ibid*, pg. 20.

<sup>313</sup> *Ibid*, para 96, pg. 20-22.

133. In its 2013 report, the FFM issued important recommendations to companies and States to take effective measures to ensure that businesses do not “have an adverse impact on the human rights of the Palestinian people, in conformity with international law as well as the Guiding Principles on Business and Human Rights.”<sup>314</sup> It called on companies to “assess the human rights impact of their activities” and “take all necessary steps – including by terminating their business interests in the settlements.”<sup>315</sup> The FFM also called on States to take effective measures to ensure that “business enterprises domiciled in their territory and/or under their jurisdiction, including those owned or controlled by them, that conduct activities in or related to the settlements respect human rights throughout their operations.”<sup>316</sup>
134. Building on the findings and recommendations of the FFM, the Human Rights Council adopted resolution 31/36 on 24 March 2016,<sup>317</sup> which requested the UN High Commissioner for Human Rights “to produce a database of all business enterprises involved in the activities detailed in paragraph 96” of the FFM report.<sup>318</sup> Human Rights Council resolution 31/36 mandated the High Commissioner to transmit the report of the database in the 34th regular session of the Council, which took place between 27 February to 24 March 2017. The Council’s mandate also requires the Office of the High Commissioner for Human Rights (OHCHR) to annually update the database of companies involved in illegal Israeli colonial settlements.<sup>319</sup>
135. Palestinian, regional, and international civil society organisations worked persistently between 2017 and 2020 to ensure the fulfilment of the UN Database mandate. For example, in August 2019, over 100 civil society organisations from around the world sent a letter to the High Commissioner expressing deep concern that the release of the Database, including the names of companies facilitating Israel’s settlement enterprise, was once again delayed, with the Database not having been published more than two years after its initial scheduled release, at the 34th regular session of the Human Rights Council.<sup>320</sup> The signatories stressed that no other mandate given to OHCHR by the Human Rights Council had been subject to such a prolonged and open-ended delay. Political pressure from States, notably Israel and the US, as well as lobby groups, were likely the cause for the Database’s delay.<sup>321</sup> The organisations stressed the importance of OHCHR’s independence in the face of undue political pressure and reiterated the critical role of the Database in ensuring transparency and accountability for businesses operating in the occupied Palestinian territory and in other situations of occupation and conflict.<sup>322</sup>

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<sup>314</sup> *Ibid.*, para 117.

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*

<sup>317</sup> UN Human Rights Council Resolution 31/36 (20 April 2016) UN Doc A/HRC/RES/31/36.

<sup>318</sup> *Ibid.*, para 17.

<sup>319</sup> *Ibid.*

<sup>320</sup> Cairo Institute for Human Rights Studies, More than 100 Organisations Call for the Release of the UN Database of Businesses Engaged in Activities with Israeli Settlements (30 April 2019), available at: <https://cihrs.org/more-than-100-organisations-call-for-the-release-of-the-un-database-of-businesses-engaged-in-activities-with-israeli-settlements/?lang=en>.

<sup>321</sup> Associated Press, ‘Israel races to head off UN settlement “blacklist”’ (26 November 2017), available at: <https://apnews.com/9f910e5a7b264c38aad504a6147d9898/Israel-races-to-head-off-UN-settlement-'blacklist>; New York Times, ‘Clash Over Israeli Settlements Has a New Front: A Delayed U.N. Report’ (5 March 2019), available at: <https://www.nytimes.com/2019/03/05/world/middleeast/israel-united-nations-boycott-companies.html>.

<sup>322</sup> Cairo Institute for Human Rights Studies, More than 100 Organisations Call for the Release of the UN Database of Businesses Engaged in Activities with Israeli Settlements (30 April 2019), available at: <https://cihrs.org/more-than-100-organisations-call-for-the-release-of-the-un-database-of-businesses-engaged-in-activities-with-israeli-settlements/?lang=en>.



136. UN Member States have called on OHCHR to fulfil all mandates entrusted to the Office by the Human Rights Council. During the 41st regular session of the Council, 27 UN Member States reiterated that the High Commissioner and her Office must “operate and execute their mandates in an independent manner and without interference.”<sup>323</sup> During the same session, 65 Member States requested that the High Commissioner urgently fulfil the Database mandate in its entirety.
137. On 12 February 2020, OHCHR published the Database report.<sup>324</sup> While civil society organisations provided important submissions to OHCHR documenting a large number of companies involved in illegal Israeli colonial settlements, and while the Office reviewed 321 business enterprises involved in illegal Israeli colonial settlements and contacted 206 of these businesses, the released report included a mere 112 Israeli and international companies. More than 75 organisations welcomed the release of the UN Database in a letter to the High Commissioner on 17 March 2020.<sup>325</sup> The organisations noted that the release of the Database, although not comprehensive in scope, demonstrates OHCHR’s commitment to upholding human rights standards and the rule of law in the pursuit of justice and accountability for the oppressed around the world, while reaffirming OHCHR’s independence and impartiality in the face of undue political pressure.
138. In its report, OHCHR reiterated that the mandate provided by Human Rights Council resolution 31/36 included removing businesses from the Database:

“A business enterprise may provide information indicating that it is no longer involved in the relevant listed activity. Where there are reasonable grounds to believe that, based on the totality of the information available, the business enterprise is ceasing or no longer involved in the relevant activity, the business enterprise would be removed from the database.”<sup>326</sup>

However, it did not provide for a mechanism to add businesses which are not already listed, and that are involved with illegal Israeli colonial settlements.

139. The importance of fulfilling the mandate of Human Rights Council resolution 31/36 in its entirety is fundamental. Annual updates will ensure that the Database remains a living and public document, serving as a platform for transparency and accountability.

#### 4.2.3. Measures Taken to End Corporate Complicity

##### 4.2.3.1. Universal Jurisdiction for Corporate Crimes

140. In the face of longstanding impunity for human rights violations committed by Israel, multinational corporate entities, and the alignment of the two, and due to the lack of

<sup>323</sup> Albania, Austria, Belgium, Bulgaria, Chile, Croatia, Denmark, Estonia, Finland, Germany, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, Mexico, Montenegro, Netherlands, Norway, Panama, Peru, Portugal, Slovenia, Spain, Sweden, Switzerland, and Uruguay, *Joint Statement*, delivered at 41<sup>st</sup> Session of UN Human Rights Council.

<sup>324</sup> UN Human Rights Council, *Database of all business enterprises involved in the activities detailed in paragraph 96 of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem* (12 February 2020) UN Doc A/HRC/43/71 (henceforth the “Database”).

<sup>325</sup> Cairo Institute for Human Rights Studies, Palestine: Over 75 Organizations Commend the UN High Commissioner for Publishing the Database of Businesses Involved in Illegal Israeli Settlements (19 March 2020), available at: <https://cihrs.org/palestine-over-75-organizations-commend-the-un-high-commissioner-for-publishing-the-database-of-businesses-involved-in-illegal-israeli-settlements/?lang=en&>.

<sup>326</sup> *Database*, para 32.

effective remedy within Israel's judicial system for Palestinians,<sup>327</sup> the principle of universal jurisdiction remains among the fundamental last resorts to the enforcement of international legal standards and ensuring accountability for grave breaches of international humanitarian law and international crimes,<sup>328</sup> including war crimes and crimes against humanity.<sup>329</sup> Activating universal jurisdiction as a means to pursue corporate accountability in the occupied Palestinian territory is key, particularly considering the countless documented cases of sustained corporate involvement in grave breaches and internationally recognised crimes.<sup>330</sup>

141. One striking example is the criminal complaint filed by Al-Haq against Lima Holding, the parent company of Riwal, in the Netherlands in 2010, for its involvement in war crimes and crimes against humanity in the OPT, particularly the construction of the Annexation Wall and illegal Israeli colonial settlements.<sup>331</sup> While the Dutch National Prosecutor's Office did not prosecute Riwal due to the supposed "small scale" and "occasional" nature of the use of equipment, it nonetheless carried out investigations into the case and searched relevant corporate offices. In addition, the Prosecutor acknowledged that Dutch companies must refrain from being involved in international crimes or violations of the *Geneva Conventions*, as well as the ICJ's 2004 advisory opinion on the Annexation Wall.<sup>332</sup>
142. It should be noted that, among 147 other States, France, the Netherlands, Luxembourg, the United Kingdom, and Germany provide the authority to national courts to investigate and prosecute grave breaches and international crimes committed extraterritorially by foreign nationals.<sup>333</sup> This mechanism and principle should therefore be activated in relation to companies that are listed in the UN Database of businesses involved in illegal Israeli colonial settlements, as well as others that commit, or are otherwise involved in, serious breaches of international law. This encompasses, but is not limited to, companies such as Egis Rail, Alstom S.A. and Egis S.A. (France), Booking.com B.V., Tahal Group International B.V., Altice Europe N.V. and Kardan N.V. (the Netherlands), eDreams ODIGEO S.A. (Luxembourg), JCB, Opodo Ltd. and Greenkote P.L.C (United Kingdom), and HeidelbergCement (Germany). Third States should activate and support

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<sup>327</sup> See Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction: PCHR's Work in the Occupied Palestinian Territory* (8 April 2010), available at: <https://www.pchrgaza.org/en/?p=4717>; Al-Haq, *Legitimising the Illegitimate: The Israeli High Court of Justice and the Occupied Palestinian Territory* (20 July 2011), available at: <http://www.alhaq.org/publications/8085.html>.

<sup>328</sup> See ICRC, 'Universal Jurisdiction over war crimes', available at:

<https://www.icrc.org/en/download/file/1086/universal-jurisdiction-icrc-eng.pdf>.

<sup>329</sup> UN Meetings Coverage, Experts Suggest Invoking Universal Jurisdiction among Legal Options to Address Israeli Settlements, as International Meeting on Palestine Question Continues (8 September 2015), available at:

<https://www.un.org/press/en/2015/gapal1346.doc.htm>.

<sup>330</sup> See, for example, Al-Haq and SOMO, *Violations Set in Stone: HeidelbergCement in the Occupied Palestinian Territory* (4 February 2020), available at: <http://www.alhaq.org/publications/16408.html>; Lawyers for Palestinian Human Rights, LPHR files OECD Guidelines Complaint against JCB for involvement in human rights breaches in the occupied Palestinian territory (10 December 2019), available at: <https://lphr.org.uk/latest-news/lphr-files-oecd-guidelines-complaint-against-jcb-for-involvement-in-human-rights-breaches-in-the-occupied-palestinian-territory/>; OHCHR, UN rights office issues report on business activities related to settlements in the Occupied Palestinian Territory (12 February 2020), available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25542&LangID=E>.

<sup>331</sup> Al-Haq, *The Case Against Riwal: Corporate Complicity in International Crimes* (16 October 2010), available at: <http://www.alhaq.org/advocacy/7137.html>.

<sup>332</sup> Marya Farah and Maha Abdallah, 'Security, Business and Human Rights in the Occupied Palestinian Territory' (2018) 4(1) *Business and Human Rights Journal* 17.

<sup>333</sup> Amnesty International, *Universal Jurisdiction – A Preliminary Survey of Legislation Around the World – 2012 Update* (October 2012), available at: <https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf>; see also Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29(2) *European Journal of International Law* 427-456.

domestic avenues of universal jurisdiction for serious breaches and crimes committed by Israel and private actors within its jurisdiction, including business enterprises, in order to ensure accountability, justice, and redress for Palestinian victims.

#### 4.2.3.2. Prohibiting Trade with Illegal Israeli Settlements

143. Illegal Israeli colonial settlements, comprising residential, agricultural, and industrial settlements, constructed on Palestinian land and exploitative of Palestinian natural resources, have found external markets in Europe, the US, Canada, and beyond to be a vital and lucrative source for their sustainability and expansion.<sup>334</sup> In fact, as the main trading partner with Israel, it is estimated that settlement exports to the European Union (EU) are valued at \$USD 300 million per year as of 2012.<sup>335</sup> The labelling and mandatory labelling<sup>336</sup> guidelines for settlement products have proven ineffective at deterring the selling of settlement products and services, consequently contributing to Israel's settlement enterprise and its continued expansion. Therefore, States must take steps toward banning illegal settlement products and services from entering their markets, while ensuring that businesses within their jurisdiction are not involved in illegal Israeli colonial settlements.
144. While numerous consumer,<sup>337</sup> citizen,<sup>338</sup> and municipal<sup>339</sup> initiatives have been utilised in order to implement a ban against settlement products from entering international markets, the Irish Parliament has been advancing the Control of Economic Activities (Occupied Territories) Bill 2018<sup>340</sup> to ban trade between Ireland and Israel's illegal colonial settlements in the occupied West Bank—supported by Irish, Palestinian and international civil society organisations.<sup>341</sup> In addition, this measure is consistent with Ireland's responsibility under international law, as codified in domestic Irish law, which prohibits appropriation and destruction of property and population transfers—both listed as crimes under the International Criminal Court Act 2006 and the Geneva Conventions Act 1962.<sup>342</sup> The Bill is also compatible with EU law.<sup>343</sup> In its latest developments, the Bill passed the Joint Committee on Foreign Affairs and Trade and Defense on 12

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<sup>334</sup> Al-Haq, *Business and Human Rights in Palestine* (7 December 2016), available at: <http://www.alhaq.org/publications/8063.html>.

<sup>335</sup> UN Secretary General, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, (16 March 2017) UN Doc. A/HRC/34/39, para 35; see also Trócaire *et al.*, *Trading Away Peace: How Europe helps sustain illegal Israeli settlements* (October 2012) pg. 20, available at: <https://www.trocaire.org/sites/default/files/resources/policy/trading-away-peace.pdf>.

<sup>336</sup> Al-Haq, EU Takes a Step Forward with CJEU Ruling in Favour of Accurate Labelling (19 December 2019), available at: <http://www.alhaq.org/advocacy/16316.html>; Al-Haq, Al-Haq Welcomes Advocate General Hogan's CJEU Opinion Explicitly Requiring Labelling of Settlement Goods, but calls on States and the EU to Prohibit the Import of Illegal Settlement Goods (4 July 2019), available at: <http://www.alhaq.org/advocacy/14485.html>.

<sup>337</sup> See, for example, <https://bdsmovement.net/>.

<sup>338</sup> EU Observer, 'EU rejects public call to ban Israeli settler products' (30 April 2019), available at: <https://euobserver.com/foreign/144767>.

<sup>339</sup> Middle East Monitor, 'Norway's capital Oslo bans Israel settlement goods, services' (29 October 2019), available at: <https://www.middleeastmonitor.com/20191029-norways-capital-oslo-bans-israel-settlement-goods-services/>.

<sup>340</sup> Houses of the Oireachtas, Control of Economic Activity (Occupied Territories) Bill 2018, available at: <https://www.oireachtas.ie/en/bills/bill/2018/6/>.

<sup>341</sup> Trócaire, What You Need to Know About the Occupied Territories Bill (4 December 2019), available at: <https://www.trocaire.org/news/what-you-need-know-about-occupied-territories-bill>.

<sup>342</sup> Al-Haq, Al-Haq Presents on Ireland's Control of Economic Activities (Occupied Territories) Bill 2018, to Prohibit the Import of Settlement Products and Services to Ireland and Urges Support of all Parties (27 November 2018), available at: <http://www.alhaq.org/advocacy/6132.html>.

<sup>343</sup> Journal.ie, 'New legal advice finds Occupied Territories Bill is "fully compliant with EU trade rules"' (23 November 2018), available at: <https://www.thejournal.ie/occupied-territories-bill-4354083-Nov2018/>.

December 2019, and is now awaiting a final vote and will then proceed to the Lower House, Dáil Éireann.<sup>344</sup>

145. Such a Bill would demonstrate a practical implementation of Ireland's commitment to international law and to its obligations under international law, including under the law on State responsibility, to bring an end to the illegal situation and not render aid or assistance in its maintenance. The illegality of Israel's settler-colonial enterprise has been reaffirmed over the past five decades without any concrete effective measures being taken by the international community to reverse settlement construction, leading to their expansion, with about 240 colonial settlements and outposts and over 650,000 Israeli colonial settlers currently residing in the OPT. Support for Israel's expansionist colonial settlement enterprise has facilitated the illegal and illegitimate attempts to exert an Israeli sovereign claim over key parts of the occupied West Bank, a campaign which thereby amounts to annexation, prohibited under international law, and further undermines the right of the Palestinian people to self-determination, including permanent sovereignty over natural wealth and resources. As such, the Occupied Territories Bill would help bring this illegality to an end. Moreover, the Irish Bill, once adopted and implemented, would bring Ireland into conformity with UN Security Council resolution 2334, which specifically calls on States to differentiate, including in their economic dealings, between the State of Israel and the occupied Palestinian territory.

## 5. Dangers of Institutionalised Impunity

146. Over the years, civil society organisations, practitioners, and UN officials have repeatedly called for international justice and accountability for widespread and systematic human rights violations committed against the Palestinian people, stressing that impunity has allowed for the continued commission and recurrence of serious abuses without consequence. Israel has openly and actively refused to cooperate with international justice mechanisms, having signed but failed to ratify the *Rome Statute*, consistently denied UN special rapporteurs and investigatory mechanisms access to the occupied Palestinian territory to carry out their mandates, and repeatedly delegitimised the work of the Human Rights Council, including by smearing appointed mandate holders and calling for the removal of Item 7 on the human rights situation in Palestine and other occupied Arab territories from the Council's agenda. This institutionalised impunity carries grave implications for the effectiveness of international mechanisms which, despite a multitude of reports, resolutions, and recommendations, have been unable to hold Israel and Israeli perpetrators to account.

### 5.1. Institutionalised Impunity as a Tool to Maintain Israel's Apartheid Regime

147. In November 2019, a group of Palestinian, regional, and international civil society organisations submitted a comprehensive report to the UN Committee on the Elimination of Racial Discrimination (CERD) ahead of its review of Israel in December 2019,<sup>345</sup> arguing that Israel has established and continues to maintain an institutionalised regime of systematic racial oppression and domination over the Palestinian people as a whole, which amounts to the crime of apartheid within the meaning of the *Rome Statute*.<sup>346</sup>

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<sup>344</sup> Al-Haq, Al-Haq Welcomes the Passing of the Occupied Territories Bill through Detailed Scrutiny and thanks Niall Collins, TD and Senator Frances Black for their Continued Commitment to the Bill (17 December 2019), available at: <http://www.alhaq.org/advocacy/16308.html>.

<sup>345</sup> Al-Haq, Palestinian, regional, and international groups submit report on Israeli apartheid to UN Committee on the Elimination of Racial Discrimination (12 November 2019), available at: <http://www.alhaq.org/advocacy/16183.html>.

<sup>346</sup> Article 7(2)(h), *Rome Statute*.

Highlighting fragmentation of the Palestinian people as the main tool of Israel’s apartheid regime, the organisations observed that:

“Embedded in a system of impunity, Israel has maintained its apartheid regime by entrenching fragmentation, coupled with the creation of a coercive environment designed to drive Palestinian transfer and weaken the ability of Palestinians to effectively challenge the many facets of Israel’s apartheid regime, including through mass arbitrary detention, torture and other ill-treatment sanctioned by Israeli courts, widespread collective punishment, denial of access to healthcare, and a Government-led effort to silence opposition to Israel’s apartheid regime.”<sup>347</sup>

148. In their joint parallel report to CERD ahead of Israel’s review, the organisations showed that Israeli apartheid is entrenched within an overarching framework of impunity, which ensures Israel’s continued domination and oppression over the Palestinian people, including Palestinians on both sides of the Green Line and Palestinian refugees and exiles denied their right of return,<sup>348</sup> arguing that:

“facilitating the continued perpetuation of [Israeli] policies and practices... is a legal framework that is designed to produce impunity and prevent Palestinians from effectively challenging the many facets of the apartheid regime. Israel’s legislation and military orders, which codify the apartheid regime and its pursuant inhumane acts in domestic law, render courts enablers of the system which confer legitimacy on the regime’s legal foundations. Instead of upholding its obligation as a State Party [of *ICERD*] to ‘condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature,’ the Israeli Government has instituted a system that secures impunity for the very same practices, in line with the ultimate goal of securing its exclusionary *raison d’État*.”<sup>349</sup>

149. As such, institutionalised impunity allows Israel to continue to entrench its apartheid regime and the wide range of systematic human rights violations apartheid entails. That the State and Israeli officials enjoy institutionalised impunity, allowing for serious violations to continue to be perpetrated without consequence, is a central element in the maintenance of Israel’s apartheid regime over the Palestinian people.

## 5.2. *The Responsibility of Third States to End Israel’s Impunity*

150. In a context of institutionalised Israeli impunity, Third States act as direct enablers of serious breaches of international law. This is particularly so when they actively oppose<sup>350</sup> an ICC investigation into the Situation in Palestine and fail to hold Israeli perpetrators of suspected war crimes and crimes against humanity accountable in their own jurisdictions, in fulfilment of their responsibility as Third States to cooperate to bring serious breaches of international law to an end.
151. The recent months have seen a culmination of Third State failure to act, following the publication of the US administration’s so-called “Peace to Prosperity” plan,<sup>351</sup> which

<sup>347</sup> Al-Haq, Joint Oral Intervention to the 100<sup>th</sup> Session of CERD for the Review of Israel (2 December 2019), available at: <http://www.alhaq.org/advocacy/16266.html>.

<sup>348</sup> CERD Report, para 5.

<sup>349</sup> CERD Report, para 48.

<sup>350</sup> See Review Paper.

<sup>351</sup> See Trump Plan.

serves to entrench Israeli apartheid over the Palestinian people.<sup>352</sup> As a testament to the important role accountability mechanisms play in bringing an end to Israeli colonisation and apartheid, the US plan seeks to block avenues for Palestinians to pursue international justice and accountability, stating that, in the event of negotiations, the Palestinian Authority would be required to dismiss all pending actions against “the State of Israel, the United States, and any of their citizens before the International Criminal Court, the International Court of Justice, and all other tribunals” as well as any action against Israeli or US citizens in the courts of Third States under universal jurisdiction.<sup>353</sup>

152. Palestinian and regional civil society organisations have highlighted that “Such impunity rewards violations, and invites further assaults on the rights and dignity of the Palestinian people.”<sup>354</sup> Yet, instead of rejecting the Israeli-US plan to further Israel’s illegal colonisation and annexation, a number of Third States have welcomed the plan, while none have taken effective measures to oppose it. In this regard, and as the Israeli government plans to move forward with *de jure* annexation of large parts of the occupied West Bank starting 1 July 2020, Third States must be reminded of their own responsibilities not to aid or assist in the maintenance of an illegal situation and to cooperate, including through the UN, to bring the illegal situation to an end.

### 5.3. *Silencing and Delegitimization Campaign Against Civil Society Organisations*

153. Civil society organisations play a critical role in shining a light on violations of international human rights law and international humanitarian law through their monitoring, documentation, and advocacy. As civil society played an instrumental role in ending apartheid in South Africa and Namibia through such activities, it is clear that for the widespread and systematic violation of international human rights and humanitarian law, and the commission of international crimes, to come to an end in the context of Palestine, civil society must enjoy the freedom to fully fulfil their mandate without fear of retaliation from the State of Israel. For decades, the Israeli government has enjoyed deeply entrenched impunity for violations and grave breaches committed against the Palestinian people, including against representatives of civil society organisations and human rights defenders. The work of civil society organisations to illuminate these violations against Palestinians and call for justice and accountability poses a significant threat to the maintenance of Israel’s apartheid regime. Recent years have seen an ongoing escalation of the Israeli government’s efforts to silence opposition and further restriction of civic space for Palestine advocacy, reinforced by right-wing lobby groups and government-operated organisations.<sup>355</sup>
154. The Israeli occupying authorities have pursued a campaign of intimidation, harassment, and delegitimization of human rights defenders and those calling for justice and accountability for Israel’s widespread and systematic human rights violations.<sup>356</sup> The Israeli government, through its Ministry of Strategic Affairs and affiliated groups, has carried out ongoing, systematic, and organised attacks amounting to a concerted smear and delegitimization campaign against human rights defenders and organisations advocating for the rights of the Palestinian people through incitement to racial hatred and

<sup>352</sup> Al-Haq, Palestine: United States Plan to Entrench Israel’s Apartheid Regime Must be Rejected (5 February 2020), available at: <http://www.alhaq.org/advocacy/16429.html>.

<sup>353</sup> *Ibid.*

<sup>354</sup> *Ibid.*

<sup>355</sup> See Ben White, ‘Delegitimizing Solidarity: Israel Smears Palestine Advocacy as Anti-Semitic’ (2020) 49(2) *Journal of Palestine Studies* 65.

<sup>356</sup> *CERD Report*, pg. 51-52.

violence, character assassinations, defamation, and seeking to brand Palestinian human rights defenders as “terrorists.” Such attacks on human rights organisations may be direct or indirect through attacking organisations’ funding in order to undermine their human rights and accountability work.<sup>357</sup>

155. Critically, Palestinian human rights organisations seeking international accountability for Israel’s suspected crimes, including at the ICC, have been severely targeted by Israeli government-led smear and delegitimization campaigns. They have experienced attacks against staff members, including death threats against themselves and their families as a direct result of their work with the ICC. Moreover, the Israeli government, and its surrogate groups, including NGO Monitor and the Lawfare Project, have stepped up their international efforts to conflate Palestine advocacy with anti-Semitism and terrorism in order to silence them and undermine their funding. The international advocacy of Palestinian human rights organisations and human rights defenders to bring light to Israel’s violations of international humanitarian law and international human rights law and to call for accountability is smeared as “diplomatic terrorism” by the Israeli government. In February 2020, Brad Parker,<sup>358</sup> a representative of Defense for Children International – Palestine (DCI-P) was invited to speak on the situation of Palestinian children by the Belgian Representative to the Security Council. Belgium rescinded the invitation to Mr Parker following a smear campaign by the Israeli government and its surrogate groups, attempting to delegitimise Mr Parker and DCI-P through unfounded allegations of links to terrorism.<sup>359</sup>
156. As global support for cultural, academic, and economic boycotts of Israel continues to grow, the Israeli government and its surrogate groups continue to mobilize efforts to criminalize the right to boycott Israel under the pretence of combating anti-Semitism. In 2016, Israel’s ambassador to the UN in New York, Danny Danon, said that Israel “was advancing legislation in many countries... so that it will simply be illegal to boycott Israel.”<sup>360</sup> For instance, in the US, 27 States have already adopted laws or policies that penalise businesses, organisations, and individuals that engage in or call for boycotts of Israel.<sup>361</sup> Similar measures have been proposed and passed in European countries.<sup>362</sup>
157. Failure to respond to Israel’s attacks and efforts to silence and delegitimise Palestinian human rights defenders and organisations poses an existential risk to the ability of Palestinian civil society to continue to bring violations to light and pursue justice and accountability. This could lead to further shrinking of civil society space for Palestinian civil society organisations. It also poses a threat to the resources of these organisations not only in the attempts to undermine relationships with donors and the international

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<sup>357</sup> See, for example, Al-Haq, Al-Haq submits a joint urgent appeal to the United Nations Special Procedures on the ongoing Israeli smear campaign against Al-Haq (24 August 2019), available at: <http://www.alhaq.org/advocacy/14857.html>; see also Al-Haq, Israeli Ministry of Strategic Affairs Campaign of Institutionalised Harassment Continues with the Alleged Closure of Palestinian NGOs’ Financial Accounts (19 June 2019), available at: <http://www.alhaq.org/advocacy/6039.html>.

<sup>358</sup> Brad Parker, ‘I was meant to talk about Palestinian kids at the UN. Israel forced me out’ (24 February 2020) +972 Magazine, available at: <https://www.972mag.com/palestinian-children-security-council/>.

<sup>359</sup> NGO Monitor, Letter to Belgian Foreign Minister Regarding Brad Parker at the UN Security Council (11 February 2020), available at: <https://www.ngo-monitor.org/nm/wp-content/uploads/2020/02/Belgiums-Invitation-of-Brad-Parker-DCIP-to-Appear-at-the-UN-Security-Council-2.pdf>.

<sup>360</sup> Ynetnews, ‘UN Envoy Danon Lauds Anti-BDS Successes’ (17 November 2016), available at: <https://www.ynetnews.com/articles/0,7340,L-4880517,00.html>.

<sup>361</sup> Human Rights Watch, US: States Use Anti-Boycott Laws to Punish Responsible Businesses (23 April 2019), available at: <https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses>.

<sup>362</sup> Human Rights Watch, Anti-Boycott Measure Wrong Way to Combat Anti-Semitism (28 May 2019), available at: <https://www.hrw.org/news/2019/05/28/anti-boycott-measure-wrong-way-combat-anti-semitism>.

community but also in the time and resources the organisations must expend to defend their reputations. In the end, it compounds an already unsafe environment without sufficient protection for human rights defenders and organisations, which could undermine their ability to monitor, document, and conduct advocacy. In his recent report on conflict and post-conflict settings, the UN Special Rapporteur on the situation of human rights defenders called on stakeholders to “publicly acknowledge the critical role that defenders play in conflict and post-conflict contexts and step up efforts to support defenders and their organisations targeted with disinformation and smear campaigns.”<sup>363</sup>

## 6. Conclusions and Recommendations

### 6.1. Conclusions

158. The organisations offer the following conclusions:

- i. Israel is in manifest and wilful breach of its obligations under international humanitarian law, as Occupying Power over the OPT, and international human rights law, including through the denial of the Palestinian right to self-determination, and the creation and maintenance of an institutionalised regime of racial domination and oppression, amounting to the crime of apartheid, directed toward the Palestinian people as a whole;
- ii. Israel’s military and civilian justice systems are a driving force in the continued protection and entrenchment of the pervasive impunity enjoyed by members of the Israeli military, and Israeli State officials and politicians. The office of the MAG, and the effective prohibition on Palestinian residents of Gaza from pursuing civil suits in Israeli courts, and the wanton and widespread use of torture and ill-treatment by State actors for use in judicial proceedings collectively illuminate the Israeli justice system as little more than a façade;
- iii. Third States have systematically failed to honour their responsibilities and obligations toward the Palestinian people, in breach of the principle of non-recognition, and the obligation to cooperate to bring the unlawful situation to an end, and have moreover failed to take positive steps to investigate breaches of the *Fourth Geneva Convention* in the OPT, in line with their obligations as High Contracting Parties to that *Convention*;
- iv. Third States have failed, in their capacity as members of international institutions such as the UN General Assembly and Security Council, to take positive, effective, and coercive measures to ensure the protection of peace and security in Palestine, and have moreover failed to action critical resolutions, including those enacted as part of Emergency Special Sessions of the General Assembly. In this regard, the organisations find the record of the United States of America to be particularly regrettable, in its persistent, habitual, and systematic use of its veto in the Security Council to frustrate matters relating to Palestinian self-determination, and the vindication of the inalienable rights of the Palestinian people;
- v. Third States have failed to hold multinational corporate entities domiciled in their jurisdictions accountable for their complicity and contribution to the expansion and maintenance of Israel’s illegal settlement enterprise in the occupied West Bank,

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<sup>363</sup> Human Rights Council, *Human rights defenders operating in conflict and post-conflict situations: Report of the Special Rapporteur on the situation of human rights defenders* (30 December 2019) UN Doc A/HRC/43/51, para 63.



including East Jerusalem, including through regional organisations such as the EU. While noting the publication by the UN High Commission for Human Rights of the Database of companies engaged in settlement activities, and initiatives such as the Irish Occupied Territories Bill, the organisations note that there is much work to be done to ensure adherence and accountability in line that the vision of the UNGPs;

- vi. The ICC appears to be the final means by which genuine and meaningful accountability and an end to impunity for international crimes, including war crimes and crimes against humanity, in particular the crime of apartheid, may be attained. Thus, the organisations note that, in addition to the activation and meaningful harnessing of universal jurisdiction mechanisms in Third State jurisdictions, support and cooperation with the Prosecutor of the ICC in a future criminal investigation into the Situation in the State of Palestine represents a means for States to comply with their obligations under Article 146 of the *Fourth Geneva Convention*; and
- vii. Widespread and institutionalised impunity for international crimes and violations of international humanitarian and human rights law and severely undermined the effectiveness of international mechanisms otherwise designed to combat impunity gaps, such as that enjoyed by the State of Israel and its agents, and has empowered a widespread campaign of delegitimisation and smears directed against, *inter alia* Palestinian civil society, the ICC, the UN Human Rights Council, and the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967.

## 6.2. Recommendations

159. The organisations recommend that Third States:

- i. Abide by their responsibility of non-recognition of the unlawful situation with regards the ongoing denial of the Palestinian right to self-determination, the construction and maintenance of an institutionalised regime of racial domination and oppression, amounting to the crime of apartheid, directed toward the Palestinian people as a whole, the continued expansion and maintenance of Israel's illegal settlement enterprise and the Annexation Wall, and the current and imminent annexation, in flagrant violation of international humanitarian law, of East Jerusalem and large swaths of the West Bank, respectively. In so doing, Third States must take positive and effective steps to overcome the strategic fragmentation of the Palestinian people by the State of Israel, instituted through, *inter alia*, the imposition of parallel, discriminatory legal systems, discriminatory permit regimes and arbitrary residency revocations in East Jerusalem, and the continued denial of the right of Palestinian refugees to return to their homes, lands and properties;
- ii. Conform with the responsibility of non-assistance in the maintenance of said unlawful situation, either through direct or indirect means, including by adopting legislation to prohibit trade with illegal Israeli colonial settlements, in line with the example of the Irish Occupied Territories Bill, by ensuring that corporate entities domiciled in their jurisdictions are not facilitating or otherwise complicit in serious and manifest breaches of international law in the OPT. Moreover, Third States must adhere to their extraterritorial obligations and activate their domestic universal jurisdiction mechanisms to address the widespread commission of corporate crimes,

- and their broader complicity in Israel’s apartheid regime, by multinational corporations and private bodies and individuals in Palestine;
- iii. Honour their responsibility to cooperate to bring the unlawful situation to an end, including through such measures as the severing of diplomatic, cultural, and trade ties with the State of Israel until such a time as it is in compliance with its obligations under international law. In order to do so, Third States must cooperate through the aegis of the UN, including the Security Council, General Assembly under the “Uniting for Peace” resolution, and the Human Rights Council, and other international and regional organisations, to adopt effective and coercive measures, including but not limited to economic sanctions, the implementation of the full suite of obligations identified by the ICJ in its *Wall Opinion*,<sup>364</sup> and convening a Conference of the High Contracting Parties to the *Fourth Geneva Convention* to discuss the pressing and ongoing issue of the incremental annexation of the OPT;
  - iv. Address the root causes of the undermining of the individual and collective rights of the Palestinian people, including the ongoing occupation, and incremental annexation, of Palestinian territory, the maintenance and expansion of Israel’s illegal settlement enterprise in the West Bank, including East Jerusalem, the prolonged and unlawful closure of the Gaza Strip, amounting to ill-treatment and collective punishment, and the creation and maintenance of an apartheid regime over the Palestinian people as a whole;
  - v. Recognise the key role played by the Israeli civilian and military court system, including the Israeli Supreme Court, in the normalisation and entrenchment of the pervasive impunity enjoyed by the State of Israel, its military, and State officials, including through the centralisation of power in the MAG, the *de facto* prohibition on civil cases being brought by Palestinian victims of Israeli crimes, and the widespread and systematic use of torture and other measures amounting to ill-treatment by State bodies in the unlawful extraction of information for use in judicial proceedings;
  - vi. Support the critical role of Palestinian local, regional, and international civil society in their monitoring and documentation of human rights violations and the commission of international crimes on the ground, as well as their advocacy at the local, regional, and international levels, particularly in the face of an ongoing and protracted smear campaign by the State of Israel and its affiliated bodies targeting human rights defenders;
  - vii. Ensure and protect the right to engage in boycotts as a legitimate and effective means of peaceful protest, and to immediately repeal all legislation or measures which aim to criminalise boycotts of the State of Israel, in contravention with the right to freedom of expression;
  - viii. Refrain from contributing toward the shrinking of civic space for human rights defenders and human rights organisations, including censorship, and the mounting of smear and delegitimization campaigns, and to staunchly oppose, both as individual States and in their role as members of international organisations, such measures wherever they are introduced;

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<sup>364</sup> *Wall Opinion*, para 149-163.

- ix. Support the Prosecutor of the ICC in opening a criminal investigation into the Situation in the State of Palestine and the *Mavi Marmara* flotilla attacks in the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, and urge her to conduct these investigations in a full, thorough, and comprehensive manner with a view to proceeding to the case stage without any undue delay. Third States must also stand with the Prosecutor in the face of undue and insidious threats and smear campaigns, orchestrated by the State of Israel, the United States of America, and their affiliated bodies, and directed toward her, her staff, and her Office. These States must immediately cease their attacks, cooperate fully with the Prosecutor and the Court, and refrain from further attempts to undermine the independence and effectiveness of the Office of the Prosecutor;
  - x. Support the publication of the UN Database on corporate entities involved in illegal Israeli colonial settlements, and take effective steps to ensure that the list of companies is continued to be updated in order to ensure it comes, and then remains, a comprehensive and living instrument and tool in the pursuit for corporate accountability in the OPT; and
  - xi. Legislate, in their individual domestic legal systems, for mandatory human rights due diligence procedures for all corporate entities engaging in activities within and outside their jurisdictions.
160. The organisations recommend that the United Nations:
- i. Refrain from such actions, in particular by permanent members of the Security Council, including the systematic and reckless use of veto powers, which have the effect of the denial, frustration, and undermining of the inalienable rights of the Palestinian people to self-determination and permanent sovereignty over natural resources, freedom from domination and oppression, the right to return to their homeland, and all other rights enshrined in the *Charter of the United Nations*, and international human rights and humanitarian treaties and conventions;
  - ii. Adopt, in the General Assembly, effective and coercive measures under the “Uniting for Peace” resolution, and take other prudent and necessary steps to ensure accountability and an end to impunity for human rights violations and international crimes committed in the OPT, such as supporting the Prosecutor of the ICC in opening a full, thorough, and comprehensive investigation into the Situation in the State of Palestine, and reconstituting the UN Special Committee against Apartheid, and the UN Centre against Apartheid, in line with the recommendations but toward in the UN ESCWA report,<sup>365</sup>
  - iii. Request, through the General Assembly, an Advisory Opinion from the ICJ on the treatment of the Palestinian people and the OPT, including, *inter alia*, the ongoing annexation of East Jerusalem, and the imminent annexation of vast swaths of the West Bank, the ongoing and prolonged closure of the Gaza Strip, the construction and maintenance of an institutionalised regime of racial domination and oppression, amounting to the crime of genocide, over the Palestinian people as a whole, the systematic denial of the right of return of Palestinian refugees and exiles abroad,

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<sup>365</sup> See ESCWA Report, pg. 51-55.

and the responsibilities of Third States of non-recognition, non-assistance, and the obligation to cooperate to bring the unlawful situation to an end;

- iv. Ensure the implementation of the Human Rights Council's existing mandates, including those pertaining to the Database, the various Commissions of Inquiry, in particular with regards to the attacks on unarmed civilian protestors in the Gaza Strip, and its Fact-Finding Missions, and its various resolutions on the point of accountability, in order to ensure that their recommendations and findings are followed;
- v. Highlight, through the Office of the Secretary-General, the pervasive and entrenched culture of impunity undermining the pursuit of accountability for Israeli human rights violations and international crimes in the OPT, call for this impunity to be combatted, via both the processes underway at the ICC and through the activation of universal jurisdiction mechanisms, the strategic fragmentation of the Palestinian people, and recognise the human rights-based root causes of the ongoing threats to peace and security in Palestine. In so doing, the Secretary-General should recognise the ongoing annexation of East Jerusalem, and the imminent annexation of vast swaths of the occupied West Bank, as acts of aggression triggering obligations under the *Charter of the United Nations* to ensure peace and security;
- vi. Call for, through the Office of the High Commissioner for Human Rights, genuine accountability for human rights violations and international crimes at the ICC. Moreover, the High Commissioner must commit to the continuity and annual update of the Database, and follow up on the implementation of the recommendations of the UN Commission of Inquiry into the attacks on unarmed civilian protestors in the Gaza Strip, as well as the recommendations of previous Commissions of Inquiry and Fact-Finding Missions;
- vii. Adopt, in the Human Rights Council, the recommendations of the UN ESCWA report, including the recognition of Israeli apartheid over the Palestinian people as a whole, and the expansion of the mandate of the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 to include the Palestinian people as a whole, not simply those in the OPT;
- viii. Adopt, in the Human Rights Council, the concluding observations of CERD's 2019 review of Israel, regarding the violation of the Article 3 prohibition on measures amounting to racial segregation and apartheid, on both sides of the Green Line;
- ix. Recognise, through the UN Special Procedures mechanisms, the existence and active maintenance of an apartheid regime over the Palestinian people, and to take appropriate and necessary steps to address the situation; and
- x. Continue, through the intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, in its drafting and preparation of the LBI on business and human rights. The future revised drafts of this proposed instrument must moreover recognise the unique issues and challenges of corporate complicity in contexts of conflict, and in particular, occupation.<sup>366</sup>

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<sup>366</sup> See Pearce Clancy, 'Corporate Capture and Solidarity during Occupation: The Case of the Occupied Palestinian Territory' (20 February 2020) *Business and Human Rights Journal Blog*, available at:

161. The organisations recommend that the International Criminal Court:
- i. Recognise that the territory of the State of Palestine, and thus the territory over which the Court may exercise territorial jurisdiction, is the entirety of the West Bank, including East Jerusalem, and the Gaza Strip;
  - ii. Immediately open full, thorough, and comprehensive investigations into suspected war crimes and crimes against humanity, including, *inter alia*, the crimes of apartheid, population transfer, appropriation and destruction of property, pillage, persecution, wilful killing, and the denial of the right to return of Palestinian refugees and exiles committed by Israeli military and State officials in the Situation in the State of Palestine, and in the context of the *Mavi Marmara* flotilla attacks in the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia;
  - iii. Commit to investigating the Situation in the State of Palestine, and the *Mavi Marmara* flotilla attacks in the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, without compromise due to the ongoing campaign of attempted political interference in the independence and effectiveness of the Court and the Office of the Prosecutor;
  - iv. Commit to investigating the full array of suspected crimes committed in the Situation in the State of Palestine, in particular widespread and systematic the crimes against humanity of apartheid, population transfer, wilful killing in the Great Return March, unnecessary, excessive and disproportionate use of force in OPE, and the denial of the right to return of Palestinian refugees and exiles abroad; and
  - v. Recognise that the State of Israel, and its military and civilian judicial systems, including the Supreme Court, are genuinely and categorically unwilling to prosecute *Rome Statute* crimes committed in the OPT, nor to pursue justice and accountability to bring an end to institutionalised impunity for international crimes committed by Israeli officials against the Palestinian people.
162. The organisations recommend that all corporate entities including, *inter alia*, Airbnb,<sup>367</sup> Booking.com,<sup>368</sup> HeidelbergCement,<sup>369</sup> and those named above:
- i. Disengage from all activities which may render them complicit, or otherwise contributing, toward serious violations of international human rights and humanitarian law, or the commission of international crimes, most notably operating within illegal Israeli colonial settlements in the occupied West Bank, including East Jerusalem, and otherwise doing business with such colonial settlements;
  - ii. Use the Database published by OHCHR as a living instrument in order to bring their conduct in line with international legal obligations, and ensure that they refrain from

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<https://www.cambridge.org/core/blog/2020/02/20/corporate-capture-and-solidarity-during-occupation-the-case-of-the-occupied-palestinian-territory/>.

<sup>367</sup> Al-Haq, To Humanitarian Groups and Non-Profits Receiving Airbnb Funds: Say No to Dirty Money (19 November 2019), available at: <http://www.alhaq.org/advocacy/16195.html>.

<sup>368</sup> Al-Haq, Press Release: Al-Haq and Other Send Letter to Booking.com (26 January 2019), available at: <http://www.alhaq.org/advocacy/6111.html>.

<sup>369</sup> Al-Haq and SOMO, *Violations Set in Stone: HeidelbergCement in the Occupied Palestinian Territory* (4 February 2020), available at: <http://www.alhaq.org/publications/16408.html>.

acting in violation of these obligations in Palestine, and all other situations of conflict and occupation; and

- iii. Commit to undertaking rigorous internal human rights due diligence in order to ensure that they are in full compliance with their international legal obligations, as envisioned in the UNGPs.