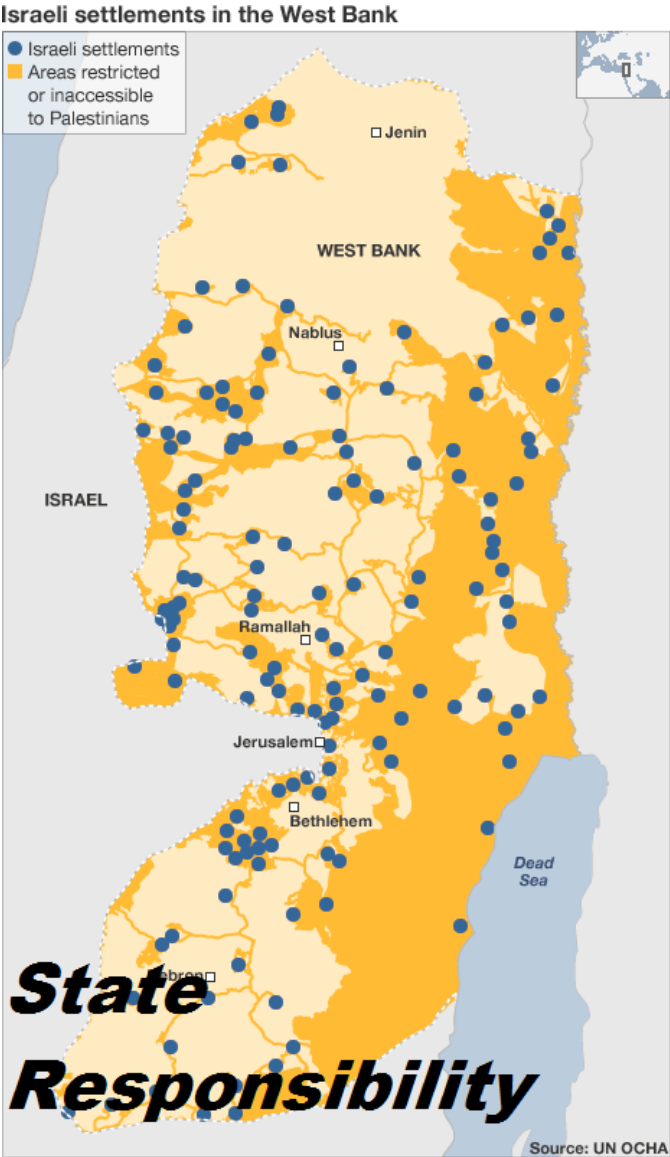


16 July 2012

Ref. No.: 151/2012

State Responsibility in Connection with Israel's Illegal Settlement Enterprise in the Occupied Palestinian Territory

An analysis of state responsibility in customary international law and the International Court of Justice Advisory Opinion of 2004, as guided by the International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts



About this paper:

This memorandum provides a legal framework for advocacy that seeks to hold States accountable to their legal obligations vis-à-vis the illegal Israeli settlement enterprise in the 1967 Occupied Palestinian Territory.

Prepared by:

Ingrid Jaradat Gassner, independent research and advocacy consultant in Palestine and former director of Badil Resource Center for Palestinian Residency and Refugee Rights. Substantial input was provided by al Haq, as well as by numerous scholars, including those who have endorsed the paper. The final responsibility for the content rests with the author.

Endorsed by:

Al-Haq, Ramallah

Prof. Susan Akram: Clinical Professor of Law, Boston University School of Law, Boston, Massachusetts

Prof. John Dugard: Professor of International Law, Universities of Leiden and Pretoria; former member of the International Law Commission (1997-2011); former UN Special Rapporteur on the Human Rights Situation in the Occupied Palestinian Territory (2001-2008)

Prof. Vera Gowlland-Debbas: Emeritus Professor of International Law, Graduate Institute of International and Development Studies, Geneva

Dr. Jeff Handmaker, ISS, Erasmus University, The Hague

Dr. Anis F. Kassim: Lawyer and Consultant, Amman

Dr. Michael Kearney: Fellow in Law, London School of Economics, London

Prof. Jonathan Klaaren: Head of School of Law, University of the Witwatersrand, Johannesburg

Prof. Paul De Waart: Professor Emeritus in International Law, Free University of Amsterdam and member of the Independent Fact-Finding Mission on Gaza

Comments and additional endorsements are being sought from legal scholars with the aim of strengthening the role of international law in efforts to end Israel's illegal settlement enterprise. For endorsement of this paper, please send an email to Neill Ó Cíoráin, Media & Advocacy Officer, Al-Haq at: neill@alhaq.org

Publisher: Al-Haq

Any quotation of up to 500 words may be used without permission provided that full attribution is given. Longer quotations or entire chapters or sections of this study may not be reproduced or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, or stored in any retrieval system of any nature, without the express written permission of Al-Haq.

© Al-Haq

Executive Summary

States are responsible for their breaches of international law. This memorandum provides a legal framework for advocacy aimed at holding States accountable to their legal obligations vis-à-vis the illegal Israeli settlements in the 1967 Occupied Palestinian Territory (OPT). Given the current context in which efforts are undertaken by many actors to end this illegal Israeli enterprise while the settlements continue to expand, the purpose of this memorandum is to raise awareness of the important implications of the International Court of Justice (ICJ) Advisory Opinion of 2004 and the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles).

The ILC Articles lay out the customary legal rules for the conduct of State organs, public and even private entities and persons for which a State is responsible. This memorandum reviews the broad spectrum of Israeli actors involved, since 1967, in the development and maintenance of the settlements, supportive infrastructure and services, and the associated regime of Israeli laws, policies and practices that compose the "settlement enterprise."¹ It concludes by finding that this settlement enterprise is institutionalised into the operations of all official organs, public and private entities and persons that make up the organisational fabric of the Israeli State and society. The memorandum illustrates how the conduct of these actors is attributable to the State under the rules of customary international law (ILC Articles 4, 5 and 7 – 9), and that the State of Israel is, therefore, in addition to the individual actors, responsible for the entire unlawful settlement enterprise in the OPT.

This memorandum also argues that the ICJ Advisory Opinion of 2004 is *the* most appropriate and authoritative legal framework for the analysis of the nature of the international breaches and the legal consequences resulting from Israel's settlement enterprise. Many international and local actors continue to believe that the legal obligations of States vis-à-vis the illegal settlement enterprise, which has been pursued in the context of Israel's prolonged occupation, are defined mainly by the humanitarian provisions of the Fourth Geneva Convention of 1949 (hereinafter Fourth Geneva Convention). This memorandum draws attention to the fact that the ICJ Advisory Opinion of 2004 has established a much broader legal foundation for Israel's and other States' obligations, based not only on the Fourth Geneva Convention, but also on a range of human rights treaties, as well as on customary international law.

The ICJ also recognised that Israel's Wall and its associated legislative and regulatory regime are a *component* of the larger settlement enterprise in the OPT. The Court analysed the Israeli violations on this basis and found that, by constructing the Wall, Israel is in breach of:

- the prohibition on the acquisition of territory by force and the right to self-determination of the Palestinian people, which are *peremptory norms* of customary international law, i.e., norms which are recognised to be binding on all States and from which no derogation is permitted, and,

¹ A definition of the settlement enterprise is provided in paragraph 13.

- additional obligations under humanitarian and human rights law, including the prohibition on forced population transfer; the obligation to respect Palestinian private and public property; the obligation to refrain from introducing changes in government or institutions of the OPT that deprive the Palestinian population of the status and rights enshrined in the Fourth Geneva Convention; the obligation to respect Palestinian freedom of movement; and the obligation to protect the rights enshrined in the ICESCR and CRC, in particular the rights of Palestinians to work, health, education and an adequate standard of living.

The Court also found that Israel's violation of the right to self-determination of the Palestinian people, as well as some of the above violations of international humanitarian law, constitute Israeli violations of obligations *erga omnes*, which are owed by Israel to the entire international community and that all States have a legal interest and duty to protect.

This memorandum highlights the manner in which the ICJ analyzed Israel's breaches and applied the ILC Articles on state responsibility in the ICJ Advisory Opinion of 2004. It also outlines how the Court's analysis and findings on the Wall can be applied to the much larger Israeli settlement enterprise as currently manifest in the OPT. The memorandum argues that the latter can be defined as a situation of *serious breaches of peremptory norms* of customary international law as codified in ILC Article 40. Under the ICJ's analysis, the legal norms violated by Israel with its settlement enterprise are norms that are essential for the protection of Palestinians as individuals, as well as for protection of the collective right to self-determination of the Palestinian people. Israel violates these norms by breaching, in a systematic manner, the prohibition of the acquisition of territory by force, as well as the prohibitions on racial discrimination, apartheid and colonial domination. Israeli breaches of the former are *composite acts* (ILC Article 15), i.e., a situation of continuing breaches in which each single act or omission may be unlawful, but which is always unlawful in the aggregate. This argument is supported by the findings of consecutive UN Special Rapporteurs on the situation of human rights in the OPT who have characterised Israel's regime of occupation, including the settlements, as "a regime of prolonged occupation with features of colonialism and apartheid."² The memorandum concludes that Israel's *serious breaches* resulting from the settlement enterprise in the OPT trigger the *heightened* legal responsibility of *all* States under customary international law, as set out in the ILC Articles and affirmed in the ICJ Advisory Opinion of 2004.

For Israel, the responsible State, the following legal obligations arise:

- to perform the obligations breached (ILC Article 29);
- to cease the settlement enterprise in the OPT and to offer appropriate assurances and guarantees of non-repetition, including the dismantlement of the settlements and related infrastructure (ILC Article 30); and,
- to make full reparation for all damage caused through restitution, compensation and satisfaction, including the return of displaced persons and property seized (ILC Articles 31 – 39). The ICJ Opinion reaffirms the principle that restitution is the

² See paragraphs 13 – 16.

primary form of reparation, particularly where breaches are of a *continuing and serious* character and violate *peremptory norms* under customary international law.³

All other States, individually and when acting in groups, have the legal obligations set out in ILC Article 41. All States are to take action as required in order to perform these obligations. When States fail to perform their legal obligations vis-à-vis Israel's settlement enterprise, these States become themselves responsible for internationally wrongful conduct. In this case, States incur the *additional obligations to cease* their breach and to make reparation for damage caused.

The following legal obligations arise for all States under customary international law as codified in ILC Article 41:

- to perform their obligations under treaties;
- to cooperate to bring to an end Israel's serious breaches and to act, separately and jointly to counteract the effect of these breaches; and,
- not to recognise, *i.e.*, give legal sanction to, the illegal situation created by Israel, nor to render aid or assistance in maintaining that situation.

These obligations are discussed in detail in Section IV of this memorandum. The obligation not to give legal sanction to Israel's unlawful settlement enterprise refers both to formal recognition as well as to acts implying such recognition. In addition, the obligation not to render aid or assistance in maintaining that situation arises because of the *continuing and composite* character of Israel's serious breaches; it extends beyond aid and assistance in the commission of the breach itself to the maintenance of the situation created by the breach. A necessary implication of the above is that all governments are obliged to ensure that State organs, public and private entities and persons whose activities attributable to the State under international law do not violate these obligations.

The ILC Articles also codify the rules to be observed in the implementation of state responsibility, as well as some of the mechanisms which States can and should use in order to perform their legal obligations vis-à-vis Israel's serious breaches. Implementation of state responsibility begins with a formal notice of claim (ILC Article 43). Usually, the right to invoke claims against another State for a wrongful act is reserved for the *injured* State (ILC Article 42). However, in situations of a *serious breach of a peremptory norm*, such as the situation created by Israel's settlement enterprise in the OPT, all States are presumed injured or affected, and, are therefore, entitled to act individually or collectively on behalf of the injured State and/or the victims (ILC Article 48). Moreover, since Israel, the responsible State, has failed to comply with its obligation of cessation and reparation, it is lawful for any injured party, including any affected State, to take "countermeasures" (Article 54). Countermeasures (reprisals, sanctions) are defined as actions of a State that would be unlawful if they were not taken in response to an internationally wrongful act and in order to remedy the breach of an obligation (ILC Article 49). Countermeasures must comply with the rules for threat or use of force in the UN Charter; respect fundamental human rights,

³ See paragraph 17-18 with references to the ICJ's argument and decision.

humanitarian obligations and peremptory norms (ILC Article 50); and be proportional (ILC Article 51).

The final section of the memorandum reviews existing State practice vis-à-vis Israel's settlement enterprise in the OPT based on facts compiled by local and international actors. It is noted briefly that States have not ensured Israel's compliance with the provisions of the Fourth Geneva Convention as stipulated in the ICJ Advisory Opinion of 2004, and have failed to meet additional special obligations arising from other treaties. The memorandum also finds that:

- many States are, in fact, complicit through the provision of unlawful recognition, aid or assistance in the maintenance of the illegal situation created by Israel in the OPT. Such States are to cease and remedy their internationally wrongful conduct.
- All States have yet to adopt the measures they can and should take in order to perform their legal obligations under customary international law, as set out in the ILC Articles. No State has, for example, presented a formal claim to Israel for cessation of its serious breaches and for reparation for the Palestinian victims. No State, or group of States, has taken appropriate countermeasures (sanctions) under the terms of ILC Article 54. States have cooperated in the peace process and the delivery of aid to the Palestinian people in the OPT, but such cooperation has been guided by the terms of the Oslo Accords, which protect Israeli interests and sideline international law. Consequently, all States have ignored their obligation to cooperate *to end Israel's serious breaches*.

In light of the above, the memorandum concludes that all States have failed, in a number of critical ways, to perform their legal obligations under customary international law, as codified in ILC Article 41 and affirmed in the ICJ Advisory Opinion of 2004. States have, thus, failed to end Israel's illegal settlement enterprise, which undermines the human rights of the Palestinian people, including the right to self-determination. States that fail to recognize and perform these obligations, or are complicit with Israel's *serious breaches*, incur the additional obligation to cease all unlawful recognition, aid or assistance, and to make reparation. However, when powerful States do not cease their wrongful conduct, other States lack the power and mechanisms to procure performance of this obligation from such States. Consequently, no State is held accountable for conducting "business as usual" with Israel. The resulting international climate of lawlessness and complicity is the environment that provides Israel with impunity and in which Israel's settlement enterprise thrives.

Index

Introduction 8

I. Who are “the settlers”? 11
On the attribution of the illegal settlement enterprise to the State of Israel in international law

II. The nature of Israel’s international law breaches16
On the situation of serious breaches of peremptory norms created by Israel’s settlement enterprise

III. The legal consequences for Israel, the responsible State 24

IV. The legal consequences for other States25

V. Concluding observations on State practice in response to Israel’s illegal settlement enterprise 28

Annex:
Quick guide to customary international law on state responsibility as codified in the ILC Articles

Introduction

The purpose of this memorandum is to provide a legal framework for advocacy aimed at holding States accountable to their legal obligations regarding Israel's violations of international law. The memorandum focuses on the responsibility of States in connection with Israel's illegal Jewish settlement enterprise in the 1967 Occupied Palestinian Territory (OPT), or, more precisely, in the occupied West Bank, including East Jerusalem. This particular focus was chosen because of the broad international consensus that Israeli settlements in the OPT are illegal; the grave adverse impact of the settlements on the Palestinian people; and the large number of actors engaged in efforts to end this Israeli enterprise -- from States acting in their individual and collective capacity to humanitarian and development organisations and human rights campaigners.

Given the current context in which these settlements continue to expand despite the efforts of many actors, the aim of this memorandum is to raise awareness about the fact that all States have specific legal obligations under customary international law, in addition to the obligations arising from international humanitarian and human rights treaties. The paper analyses how the rules of state responsibility in customary international law shed light on measures that can be taken by States in order to fulfil their legal obligations in a manner that is not only lawful, but also an appropriate and effective response to Israel's illegal settlement enterprise.

The legal analysis in this memorandum rests on the International Law Commission's *Draft Articles on State Responsibility for Internationally Wrongful Acts* (hereinafter ILC Articles), which lay out the general rules concerning the legal obligations of States when international law is violated.⁴ The general rules codified in the ILC Articles are widely considered to reflect current customary international law. They are derived from a comprehensive study of state responsibility as incorporated into the UN Charter and treaties, referred to and interpreted by the International Court of Justice (hereinafter ICJ) and other international tribunals, and practiced by States in UN initiatives and in their conduct of bilateral and multilateral relations.⁵ The second important source of analysis in this memo is the ICJ *Advisory Opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* of 9 July 2004 (hereinafter ICJ Advisory Opinion of 2004).⁶ Although ICJ advisory opinions have no technical force, States cannot ignore the fundamental and binding rules of international law that the Court has underlined. Moreover, the UN General Assembly, having requested and subsequently endorsed the Advisory Opinion, is bound to cooperate with the Court and to give effect to its recommendations. The Advisory Opinion is

⁴ *Draft Articles on Responsibility of States for Internationally Wrongful Acts* adopted by the International Law Commission at its 53rd session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The Draft Articles were commended to the attention of governments in UN General Assembly Resolution A/RES/56/83 of 12 December 2001.

⁵ The International Law Commission uses the term "general international law." Whereas customary law and general international law are sometimes distinguished, with the latter ranking higher in the hierarchy of international law, the ILC Articles may be described, for the sake of simplicity, as codification of customary international law.

⁶ Available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4>

important, because it constitutes the most relevant legal opinion from the most authoritative international legal tribunal about both the nature of Israel's international law breaches resulting from its settlement enterprise in the OPT, and the way in which the general rules of state responsibility are to be applied to this particular situation. Although non-binding in and of itself, the ICJ Advisory Opinion gives the most authoritative review of what obligations exist under customary law relevant to the key questions relating to the Israeli settlement enterprise that has been rendered to date.⁷

The first section of this memorandum addresses the apparent uncertainty among some humanitarian and human rights actors about whether Israel, the State, is legally responsible for the settlement activity in the OPT, or whether responsibility is limited to the institutions, businesses and persons operating in these settlements. It explains the broad definition of the State in customary international law as codified in the ILC Articles, and it demonstrates how the activities of a multitude of official Israeli organs, public and even private entities and persons in establishing and expanding settlements in the OPT are attributable to the State of Israel, and that the State of Israel is, therefore, responsible and accountable.

The second section defines Israel's settlement enterprise in the OPT and takes a closer look at the nature and legal consequences of related Israeli international law violations. It reviews the Israeli breaches identified in the ICJ Advisory Opinion of 2004 in connection with the Wall, and explains how these are not only violations of international humanitarian and human rights treaties, but also *serious breaches of peremptory norms* and obligations *erga omnes* under customary international law. It explains the meaning and important legal consequences of this finding for the responsibility of all States. The section ends with a tentative projection of the implications of the ICJ's analysis as applied to Israel's entire settlement enterprise, rather than only to the construction of the Wall and its associated regime.

Sections three and four discuss content and implementation of State responsibility. The legal obligations of the responsible State, Israel, are briefly summarized in the third section. The fourth section deals with the responsibility of **other** States in connection with Israel's *serious breaches*. It discusses their legal obligations under customary international law, as well as measures that all States can and should take, in order to fulfil these obligations.

The last section reviews how other States have responded to Israel's illegal settlement enterprise in practice. It shows that States have so far failed to perform their own legal obligations, and that they have not taken the measures they are required to adopt under customary international law, in order to end the unlawful situation created by Israel in the

⁷ Although there is significant academic debate about whether the ICJ's analysis of the relevant international treaty and customary law rules is 'correct,' the Opinion remains for now the consensus of what the justices on the ICJ perceive the state of the law to be. For a review of this debate, see, "Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory" in *American Journal of International Law*, 99 A.J.I.L. 1; The American Society of International Law, January 2005. See also, Susan Akram and Michael Lynk, "The Wall and the Law: A Tale of Two Judgments", in *Netherlands Quarterly of Human Rights*, 2006; and, Vera Gowlland-Debbas, "The Responsibility of the Political Organs of the UN for Palestine in Light of the ICJ's Wall Opinion", in Marcelo G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law*, Liber Amicorum Lucius Caflisch (Martinus Nijhoff, 2006), pp. 1095-1119.

OPT. A quick guide to customary international law on state responsibility as codified in the ILC Articles is attached as an Annex.

A final note on scope and terminology: legal issues not directly related to the Israeli settlement enterprise in the OPT, such as the institutionalized racial discrimination of the 1948 Palestinian refugees and Palestinian citizens of Israel, the illegal Israeli closure (blockade) of the occupied Gaza Strip, or unlawful Israeli (conduct in) military operations or warfare, such as in the Gaza Strip in 2008/9 and in Lebanon in 2006, are beyond the scope of this paper and will not be addressed.

It is important to emphasize that the focus of this memo is on the responsibility of all States in connection with the violations of international law resulting from Israel's settlement enterprise in the OPT. The memo, therefore, does not cover the full scope of obligations owed to the Palestinian people by States and the United Nations.⁸ Moreover, the precise focus is on state responsibility in *customary* international law as codified in the ILC Articles. There are many other important issues of responsibility which are beyond the scope of this paper, including the special legal obligations of States and inter-state organizations arising from treaties, such as the Fourth Geneva Convention and human rights conventions, or issues pertaining to non-state entities and persons, such as the responsibility of corporations and individuals for complicity in war crimes and serious human rights abuses committed in connection with Israel's settlement enterprise. Brief references to some of these issues are included in the paper where appropriate.

To be consistent with common English language usage and the terminology adopted by the United Nations, this paper refers to Israeli "settlements" and "the Wall" in the OPT. These neutral and descriptive terms do not *per se* indicate illegal activity; however, the unlawful character of both is analyzed and explained in the second section of the paper.⁹ Moreover, the term "settlement enterprise" is used throughout this paper because it incorporates the full scope of the policies and practices that comprise Israel's illegal settlement regime in the OPT in a more appropriate manner than other commonly used terms, such as "settlements" or "settlement activities." A tentative definition of the unlawful Israeli "settlement enterprise" is provided in paragraph 13.

⁸ Additional specific obligations arise, for example, for all States from the obligation to protect the right of self-determination of the Palestinian people, and for the United Nations from the "permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy." (GA Res. 57/107 of 3 December 2002, cited in the ICJ Advisory Opinion of 2004 at para. 49.)

⁹ The term "colonies" designates more appropriately the unlawful character of Israel's settlements in the OPT. This is, in fact, the terminology used in many other languages; however, it is rarely used in English and has not been adopted by the UN. The terms "Annexation Wall", "Apartheid Wall" or "Separation Wall" are often used in order to give expression to the illegal purpose and effect. In this paper, the plain term "the Wall" is used for easier reading. The latter is consistent with the language of the ICJ and designates the same meaning.

I. Who are “The Settlers”?

On the attribution of the illegal settlement enterprise to the State of Israel in international law

ILC Article 1:

Every internationally wrongful act of a State entails the international responsibility of that State.

ILC Article 2:

A State is responsible for internationally wrongful conduct, if the particular conduct:

- (i) is attributable to the State under international law; and,**
- (ii) constitutes a breach of an international obligation of that State.**

1. The international consensus about the unlawfulness of Israeli settlements in the OPT has been affirmed by the ICJ, which stated unanimously and unambiguously that these Israeli settlements have been established in breach of international law.¹⁰ Few references exist to the legal debate about whether the State of Israel is legally responsible for these settlements, most likely because the answer appears to be self-evident: States and the UN, including its Security Council, have held the State of Israel accountable at least since 1971,¹¹ and Israeli governments have never disputed being in charge. To the contrary, Israel officially announced the permanent annexation of occupied East Jerusalem in 1980, and settlement of its Jewish population in the OPT through the development of so-called settlement blocks has remained the State's declared policy until today, in particular in East Jerusalem and the Jordan Valley.¹² On the one hand, the responsibility of the State of Israel for the illegal settlements appears, thus, to be widely recognised. On the other hand, however, conventional wisdom considers these settlements to be largely the outcome of the activities of “the settlers” themselves. The “settlers” are seen primarily as persons and groups, including many religious fundamentalists,

¹⁰ ICJ 2004 at para 120. Judge Buergenthal, who disagreed with the majority of the ICJ judges on procedural and some substantial issues, accepted the illegality of settlements in his separate Declaration (para. 9).

¹¹ On relevant UN Security Council resolutions, *see below*, paragraph 10.

¹² For a historical overview of official Israeli settlement policy, *see*, for example, Btselem, at: http://www.btselem.org/publications/summaries/200205_land_grab. Initially, Israeli Labour governments justified Jewish settlement in the OPT as a measure required for reasons of “national security,” i.e., the need to move its military defence lines to the east, outside the State territory which was considered to be “too small.” Since the 1993 Oslo accords, Israeli governments have argued in international relations that the settlements must be expanded, in particular the areas of existing settlement blocks, in order to accommodate the natural growth of the settler population, that expansion is limited to that purpose, and that measures which limit the rights of the Palestinian population are necessary for “security reasons,” i.e., the need to protect the population in the settlements in the OPT and in Israel. An exception is the case of occupied East Jerusalem, where Israeli officials justify Jewish settlement for ideological reasons. For example: “Jerusalem is not a settlement; Jerusalem is the capital of the State of Israel. Israel has never restricted itself regarding any kind of building in the city ... Israel sees no connection between the peace process and the planning and building policy in Jerusalem, something that hasn't changed for the past 40 years.” (Attila Somfalvi, “PM responds to Obama: Jerusalem not a settlement,” *Yediot Aharonot*, 10 November 2010). Domestically, Israeli officials have always promoted Jewish settlement in the OPT for ideological reasons, i.e., the inherent “right” of the “Jewish people” to “redeem” or settle in all of *Eretz Israel*, i.e., in Israel and in the OPT.

or self-defined 'pioneers', who operate in the OPT with unclear connections to the State of Israel. In the popular view, Israel is not perceived as primarily responsible --if at all-- for their actions. This section revisits the multitude and broad spectrum of Israeli state organs, public and private entities involved in the settlement enterprise, and it explains how the settlement activities of these state and non-state actors are attributable to the State of Israel in customary international law.

2. Conduct, including a breach of an international obligation, is attributable to the State under international law if it is committed by an organ of that State, or by an entity or person empowered to exercise elements of governmental authority (ILC Article 4). Organs of the State are defined broadly as all the individual or collective entities that constitute the organisation of the State and act on its behalf under the State's internal law. State organs thus include not only the particular organs of government authorised to enter into commitments on behalf of the State, such as ministries of central government, but the entire range of legislative, judicial and executive entities at all levels, including provincial and local authorities.¹³ Entities empowered by the State to exercise elements of governmental authority include public corporations, para-statal and semi-public entities, former state-owned corporations, and even private companies, **to the extent that they exercise public or regulatory functions** (ILC Article 5).

3. Israeli governments, including the prime minister's office and inter-ministerial committees, the **Israeli military**, as well as the **Jewish Agency (JA)** and the **World Zionist Organization (WZO)** and affiliates, which are private entities with public status in Israel,¹⁴ have played a pivotal role in the strategic and operational planning of Jewish settlements in the OPT, in particular in its early stages. These organs and their specialized departments and experts have mapped Palestinian land allocated for confiscation, identified suitable locations for settlements, supported their construction, and facilitated populating them with Jewish Israeli settlers.¹⁵ Providing legal justification for this settlement enterprise, the **Israeli parliament (Knesset)** and the courts, in particular the **Israeli High Court of Justice**, have passed over the years the required legislation and jurisprudence.¹⁶ The combined activities of

¹³ ILC Article 4, comment 5.

¹⁴ Until 1992, the settlement divisions of the JA and WZO operated under joint administration. In 1993, the WZO settlement division was separated based on the decision of the Israeli government, in order to develop Jewish settlement in the OPT in the new context created by the Oslo accords. The WZO division also develops Jewish settlement of the occupied Syrian Golan Heights and, since 2004, also in the Galilee and Naqab (Negev), which are the two main Palestinian-populated areas in Israel. On the particular legal status and role of the JA, WZO and its affiliates, including the Jewish National Fund (JNF), *see*, W. Thomas Mallison, Jr., "The Zionist-Israel Juridical Claims to Constitute the 'Jewish People' Entity and Confer Membership in It: Appraisal in Public International Law," 32 *The George Washington Law Review* 5 (1964). *See also*, Joseph Schechla, "'Jewish Nationality', 'National Institutions' and Institutionalized Dispossession", in *al-Majdal magazine*, issue no. 24 (Winter 2004), Badil.

¹⁵ On the settlement activities of these actors in the period between 1967 and the early 1980s, *see*, Meron Benvenisti, *The West Bank Data Project; A Survey of Israel's Policies*, American Enterprise Institute for Public Policy Research, Washington and London, 1984. *See also*, *Land Grab: Israel's Settlement Policy in the West Bank*, B'tselem, 2002.

¹⁶ Concerning Israeli legislation and jurisprudence of Israeli courts, *see*, Raja Shehadeh: "Some Legal Aspects of Israeli Land Policy in the Occupied Territories", in Erik Fosse, Ebba Wergeland and Ibrahim Abu -Lughod (eds.), *Arab Studies Quarterly: Israel and the Question of Palestine*, Vol. 7, 2 & 3, Nov. 1985; p. 42 – 61; and, John Reynolds, *Legitimizing the Illegitimate*, Al Haq, at: <http://www.alhaq.org/publications/publications->

the above have been instrumental for the confiscation of public and private Palestinian land, the suppression of Palestinian resistance to dispossession, the declaration of confiscated land as 'Israel Land' (state land), its transfer to the Israel Land Authority, and the allocation of such land to the settlement regional and local councils operating in the OPT.¹⁷ A 2005 official Israeli report¹⁸ names the following organs and entities as those primarily driving settlement expansion in more recent times: the **Ministry of Construction and Housing**; the **Ministry of Defense**, including the Minister's Assistant on Settlement Affairs; the **Israeli military** and its **"Civil Administration"** in the OPT; **regional and local authorities**; and, the **Settlement Division of the WZO** whose activities are financed by the Israeli State budget.

4. Between 1967 and 2010, at least 17 billion USD in public funds were channelled through **municipal authorities**, the **Ministry of Construction and Housing** and the **Ministry of National Infrastructure** to 135 Israeli settlements in the OPT (excluding East Jerusalem). These funds were used to develop the infrastructure and services of 868 public facilities (kindergartens, schools, health services, synagogues) and 904 private businesses (shopping centers and industry).¹⁹ Additional economic incentives provided by the State of Israel to the settlers in the OPT include income tax reductions (until 2003) by the **Ministry of Finance**; land at reduced cost, privileged housing loans and grants by the **Ministry of Construction and Housing**; land leases at reduced cost by the **Israel Land Authority**; incentives for teachers and subsidised transportation to schools by the **Ministry of Education**; as well as grants for private investors, development of infrastructure for industrial zones, and indemnification for loss of income (resulting from customs duties imposed on settlement produce by EU countries) by the **Ministries of Industry and Trade and Tourism**.²⁰

5. **All of the above Israeli State organs and empowered entities pursue Jewish settlement in the OPT as a matter of operational routine; they cooperate with, contract or subsidise a wide array of other (partially state-owned) public and private actors to assist with certain public or regulatory functions.**²¹ Examples include Israel's national

[index/item/legitimising-the-illegitimate](#). See also, David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, 2002.

¹⁷ Settlement local and regional councils in the OPT are part of Israel's municipal system. Israel has established 6 regional councils in the occupied West Bank: *Gush Etzion, Har Hevron, Matte Benyamin, Megilot* (Dead Sea), *Shomron* and *Biq'at HaYarden* (Jordan Valley). Together with Israel's Jerusalem municipality, these local and regional councils administer approximately 50 per cent of the land in the occupied West Bank. They operate as a parallel system of Israeli local government that is separate from the indigenous Palestinian system of local government, including districts, municipalities and local councils. For sources on this, as well as other factual findings which support the argument made here, see below, paragraph 13.

¹⁸ Talya Sasson, "Opinion Concerning Unauthorized Outposts", Office of the Prime Minister of Israel, 2005. For the official summary, see:

<http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Summary+of+Opinion+Concerning+Unauthorized+Outposts+-+Talya+Sason+Adv.htm>

¹⁹ Macro Center for Political Economics, project "Settlement Encyclopedia" at:

<http://www.macro.org.il/settlements-en.html>. See also, Chaim Levinson, "Settlements have cost Israel \$17 billion, study finds", in *Haaretz*, 23 March 2010.

²⁰ B'Tselem, [Encouragement of Migration to the Settlements](#), 6 May 2010.

²¹ In order to be attributable to the State, the conduct of these public and private actors must be related to a governmental authority, which is conferred to them by law. See, ILC Article 5, comment 1 and 2. In the context of Israel's settlement enterprise in the OPT, this means that the specific link of the settlement activities of public and private actors with the State, i.e., their legal authorisation and public or regulatory function, must be established on a case-by-case basis. Activities which are attributable to the State may be related, for example, to

water company Mekorot, a major player in the discriminatory supply of water to the Israeli settlements and Palestinian communities in the OPT, Israeli banks, postal authorities, academic institutions and the Israeli labor union (Histadrut).²² Also included are (semi) public and private Israeli security, trade and export companies, such as Elbit, Agrexco and Mehadrin, and businesses and associations providing services essential for the maintenance and development of the settlements, including construction, transport, supply and services in health, education, culture and sports.²³ Private Israeli security companies operating in Israeli projects in the OPT, such as G4S Israel, for example, are contracted to perform tasks that were traditionally executed by the Israeli security forces, such as the provision of equipment and services for the incarceration of Palestinians or the operation of checkpoints and the police headquarters in occupied Jerusalem, while IT companies like “EDS Israel”, a local subsidiary of Hewlett-Packard, provide and maintain surveillance and other security-related technology for the Israeli army and settlements. Israeli banks, for example, control the Palestinian banking market and provide the financial infrastructure and services for all settlement activity of state organs, public and private entities, and individuals.²⁴

The conduct of all of these State organs and empowered entities in connection with the settlement enterprise in the OPT is attributable to the State of Israel under international law, when they pursue their authorised function, and also when they act in excess or contravention of the instructions given by the State (ILC Article 7).²⁵ Examples of the latter are harassment and acts of violence against the Palestinian population by soldiers and private security personnel, and the conduct of the ministries, military, local authorities and the WZO who, according to the official investigation of 2005, have provided funding, infrastructure and services to approximately 100 new settlements (so-called outposts) without governmental authorisation.²⁶ The responsibility of the State for these new “outpost” settlements, which have been established since 2000, allegedly on the private initiative of Israeli settlers, also arises from their retroactive *adoption* by the State (ILC Article 11). These settlements have, with very few exceptions, not been dismantled, and public services continue

functions of security or the control of property and markets, the movement of persons and goods, extraction of natural resources and the allocation/regulation of the distribution of natural resources, goods and services.

²² See, for example, www.hityashvut.org.il/PageCat.asp?id=16 (in Hebrew only), the WZO webpage which explains that the WZO Settlement Division routinely cooperates with: the Office of the Prime Minister; the Ministries of Construction and Housing, Infrastructure, Absorption, Education, Agriculture, Tourism, Industry and Trade, Defence, Labour and Welfare; regional and local councils; the Jewish National Fund (JNF); the Water Authority (Mekorot); ‘Hamamot Tayarut’ (an agency that supports the development of tourist sites); the Center for Assistance and Promotion of Business (MASKIM); the Israel Land Authority/Abandoned Property in Yehuda and Shomron; academic institutions and NGOs; the Nature Reserves and National Parks Authority; the Authority of Small Business Enterprises; and the SELA Administration for Assistance to the Settlers from the Gaza Strip.

²³ On public transport, see: <http://mondoweiss.net/2012/07/what-israeli-settlement-bus-routes-teach-us-about-the-occupation.html> On Israeli academic and cultural institutions, see, Uri Yacobi Keller, *Academic Boycott of Israel and the complicity of Israeli Academic Institutions in Occupation of Palestinian Territories*, AIC, 2009. On business companies, see: www.whoprofits.org; and www.business-humanrights.org (country page on Israeli and the OPT).

²⁴ See, Coalition of Women for Peace, *Financing the Israeli Occupation* (October 2010), at: www.whoprofits.org/sites/default/files/WhoProfits-IsraeliBanks2010.pdf

²⁵ In order to be attributable to the State, conduct in excess or contravention of instructions must be “official”, *i.e.*, performed in the context of the public function they are empowered to perform, and not be a “private” act. This is to be established on a case-by-case basis. See, ILC Article 7, comment 7 and 8.

²⁶ Talya Sasson, 2005 (*supra*, note 18).

to be provided to them. An option for official recognition has been granted by government to some. The existence of other "outposts" appears to be *de facto* acknowledged by the State, while official debate is underway about the appropriate way to achieve their legalisation.²⁷

6. Finally, also **attributable to the State of Israel is the conduct of private settlers and groups of settlers who are directed, controlled or act on the instructions of the State** (ILC Article 8),²⁸ **or who *de facto* exercise elements of governmental authority in the absence or default of the official authorities** (ILC Article 9).²⁹ One example of such conduct is the destruction and expropriation of Palestinian public and private property in occupied East Jerusalem for archaeological excavations and Jewish tourism development, which have been "outsourced" by Israeli authorities to the private Jewish settler organisation El'ad.³⁰ Another example are acts of settler violence committed by paramilitary "settlement guards" or private settler militias in order to control, punish, or forcibly relocate the Palestinian population.³¹ Such regular acts as armed raids against communities, the destruction of Palestinian orchards or the burning of mosques by settlers normally enjoy impunity. Approximately 78 per cent of cases of violence against Palestinians, and 93 per cent of cases of damage to property, have been closed on grounds suggesting that investigations were not competently conducted. In 90 per cent of complaints filed against settlers for acts of violence, investigation was closed because files were lost or due to other investigatory shortcomings.³² Such systematic lack of due diligence and impunity suggest that the unlawful private conduct is sanctioned or endorsed by the Israeli authorities.

7. In light of the above, the settlements are not merely the work of "the settlers" in the OPT, or of Israeli governments and their political and demographic strategies alone. Implemented in the context of Israel's 45-year-old occupation, the settlement enterprise is largely the outcome of the **operational routine** of all those organs, entities and persons that constitute

²⁷ See, for example, Barak Ravid, Jonathan Lis and Oz Rosenberg, "Netanyahu: Bill legalizing Ulpana neighbourhood would harm settlement construction. Right wingers propose bill that would authorize settlement construction on privately owned Palestinian land; Ministers Yishai, Lieberman say they support the bill", Haaretz, 4 June 2012; and, David Kretzmer, "Bombshell for the settlement enterprise in Levy report. The far-reaching consequences of the Levy report mean Israeli must either recognize that the legal system in the West Bank resembles apartheid - or extend political rights for all," Haaretz, 10 July 2012. See also, Amnesty International, *Enduring Occupation. Palestinians Under Siege in the West Bank*, 2007 p. 18; and, B'tselem, *By Hook and by Crook. Israeli Settlement Policy in the West Bank*, 2010, p. 19.

²⁸ This was confirmed by the International Court of Justice. See, *ICJ Reports 43* at 207-211 (genocide case 2007).

²⁹ Failure of the State to prevent unlawful acts of its citizens, or to protect the occupied population, for example through lack of due diligence, invokes the responsibility of the State. However, proof of a more direct link with State organs is required to make the unlawful private acts themselves attributable to the State. Such links are, for example, the supply of training, weapons, other support by official Israeli organs, evidence of the fact that the leaders of such private settler groups are also government officials who are involved in official planning and decision making, or evidence of official endorsement/retroactive adoption of these unlawful acts. See, C. Chinkin, "State Responsibility in International Law: A Critique of the Public/Private Dimension", 10 *European Journal of International Law* 2 (1999), p. 475-477; and, G. Townsend, "State responsibility for acts of de facto agents", 14 *Arizona Journal of International Law* 635 (1997) 673-676. See also, I. Brownlie, *System of the Law of Nations, State Responsibility*, Part I (Oxford, Clarendon Press, 1986) 161.

³⁰ See, for example, EU Heads of Mission Jerusalem Report 2011 (para. 24).

³¹ See, for example, OCHA-OPT "Fact Sheet on Israeli Settler Violence in the West Bank", November 2011, at: http://www.ochaopt.org/documents/ocha_opt_settler_violence_FactSheet_October_2011_english.pdf

³² Yesh Din, *A Semblance of Law: Law enforcement upon Israeli citizens in the West Bank*, June 2006.

the organisational fabric of the Israeli State and society. Whereas all of those involved are individually responsible for their acts, and may be held legally accountable,³³ **most of these acts are also attributable to the State of Israel, and that State is, therefore, responsible under international law.**

This conclusion is, moreover, supported by the fact that the State of Israel and Israeli non-state actors involved in the settlement enterprise share the same ideology that provides its conceptual underpinning: Zionism, which is the official ideology of the State incorporated into Israeli law, holds that the “Jewish people” have a “natural right to its homeland” in “Eretz Israel”, i.e., pre-1967 Israel and the OPT. In this context, Jewish settlement of the OPT is widely considered to be an effort to “make up for what was not accomplished in 1948” in order to complete the “Zionist mission”.³⁴ In the words of the current head of the WZO Settlement Division, for example, “the re-establishment of the people of Israel in its homeland is directly linked to the practice of settlement which has determined the borders of the State, the character of its society, and the economic capacity and security of the State.”³⁵

II. The nature of Israel's international law breaches:

On the situation of *serious breaches of peremptory norms* created by Israel's settlement enterprise

8. International law on state responsibility as codified in the ILC Articles lays out the general rules on the obligations of States when international law is violated; it does not provide rules for determining the specific violations of a State that result in such responsibility. Rules for the latter are provided by international humanitarian and human rights law. Therefore, this section revisits the 2004 ICJ Advisory Opinion, which examined Israel's obligations under international humanitarian and human rights law, identified the violations resulting from the construction of the Wall in the OPT and applied the ILC Articles to determine the legal consequences for the State of Israel and other States.³⁶

With regard to Israel's obligations, the ICJ restated that the West Bank, including East Jerusalem, and the Gaza Strip remain occupied territory and that the State of Israel continues to have the status of Occupying Power.³⁷ It unanimously affirmed that the right to self-determination of the Palestinian people is universally recognised,³⁸ and that Israel, as the Occupying Power, is bound by customary international law and by the humanitarian and

³³ See below, Section II, paragraph 16.

³⁴ See, for example, Tom Segev, *1967: Israel, the War, and the Year that Transformed the Middle East*, Metropolitan Books, 2007. Under the terms of Zionist ideology and the law of the State of Israel, the “Jewish people,” or the “People of Israel”, designates Jewish persons worldwide.

³⁵ Statement by the Head of the WZO Settlement Division published on the WZO website (in Hebrew only; last visited: January 2012)

³⁶ The ICJ also made explicit reference to the ILC Articles. See, for example, ICJ 2004 at para. 140 and 150.

³⁷ *Ibid*, para. 78.

³⁸ *Ibid*, para. 118.

human rights treaties it has ratified with respect to the OPT.³⁹ Most important for the issues examined in this memorandum, **the ICJ recognised that the Wall and the associated legislative and regulatory regime are a component of the larger Israeli settlement enterprise, and it analysed the Israeli violations resulting from the construction of the Wall on this basis. The ICJ's findings regarding the nature of Israel's breaches and the particular manner in which the Court applied the ILC Articles** (see paragraph 10 – 12) **confirm beyond doubt that the ICJ considered Israel to be in *serious breach of peremptory norms of customary international law*** (see paragraph 10 - 12).

9. *Peremptory norms* are defined as norms of customary international law that are accepted and recognised as binding by the international community as a whole, and from which no derogation is permitted.⁴⁰ These norms are obligations *erga omnes*, because they are owed to the entire international community. *Serious breaches of peremptory norms*⁴¹ may also amount to international crimes when they involve, *inter alia*, aggression, genocide or crimes against humanity. Although there is uncertainty about which norms constitute *peremptory norms*, it is generally accepted that the following constitute such norms:

- a) norms of essential importance for the maintenance of international peace and security, such as the prohibition of aggression;
- b) norms of essential importance for safeguarding the right to self-determination of peoples, such as the prohibition on the acquisition of sovereignty over territory by force or the establishment/maintenance of colonial domination;
- c) norms of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, racial discrimination, apartheid, other crimes against humanity and torture.⁴²

10. In examining the Wall in the broader context of Israel's illegal settlement enterprise in the OPT, the ICJ revisited and acknowledged the findings reflected in a series of UN Security Council resolutions adopted between 1971 and 1980.⁴³ These resolutions condemn and call for the cessation of Israel's unlawful settlement measures -- in particular the annexation of occupied Palestinian land, the forcible transfer of people and the expropriation of Palestinian land and properties -- which change the legal, demographic and geographic status of the OPT. The Court reaffirmed that these measures violate the *peremptory prohibition on the acquisition of territory by force*,⁴⁴ which is essential for safeguarding the **right to self-**

³⁹ *Ibid*, para. 86 - 113. The Court affirmed Israel's obligations under the Hague Convention and Regulations (1907), the Fourth Geneva Convention (1949), the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the UN Convention on the Rights of the Child. The ICJ did not discuss other human rights treaties Israel is a party to, including the International Convention on the Elimination of Racial Discrimination, the International Convention against Torture, and the International Convention on the Elimination of Discrimination against Women.

⁴⁰ The 1969 Vienna Convention on Treaties, Article 53.

⁴¹ For a definition of "serious breaches", see paragraph 14, below.

⁴² ILC Article 40, comment 8 and footnote 651.

⁴³ ICJ 2004 at para. 75, 120, 134 – 135. The Court cites UNSCR 298 (1971), 446 (1979), 452 (1979), 465 (1980) and 478 (1980) in this context.

⁴⁴ *Ibid*, para. 74, 87 and 117. The ICJ refers to the UN Charter, Article 2(4), UN Security Council Resolution 242 (1967) and General Assembly Resolution 2625 of 24 October 1970.

determination of the Palestinian people.⁴⁵ On this basis, the ICJ found that the Wall would serve to annex or integrate areas of Israeli settlements into the territory of the State and encourage the departure of Palestinian population from certain areas.⁴⁶ The Court concluded that **by constructing the Wall, Israel is violating the above *peremptory norms*, as well as additional obligations under international humanitarian and human rights law,**⁴⁷ in particular:

- the prohibition on forced population transfer (Fourth Geneva Convention, Article 49);⁴⁸
- the obligation to respect Palestinian private and public property (Hague Regulations, Article 46; Fourth Geneva Convention, Article 53);
- the obligation to refrain from introducing changes in government or institutions of the OPT that deprive the Palestinian population of the status and rights enshrined in the Fourth Geneva Convention (Fourth Geneva Convention, Article 47);
- the obligations to respect Palestinians' freedom of movement (ICCPR, Article 12, paragraph 1) and to protect from arbitrary and unlawful interference in privacy, family, home or correspondence, and from unlawful attacks on honour and reputation (ICCPR, Article 17), and,
- the obligation to protect the rights enshrined in the ICESCR and CRC, in particular the rights of Palestinians, including children to family, health, education, work and to an adequate standard of living.⁴⁹

The Court also concluded that Israel's violation of the right to self-determination of the Palestinian people, as well as some of the above violations of international humanitarian law, constitute Israeli violations of obligations *erga omnes*, which are owed by Israel to the entire international community and that all States have a legal interest and duty to protect.⁵⁰

11. The importance attributed by the ICJ to the *peremptory norms* and obligations *erga omnes* violated by Israel is illustrated by the manner in which the Court dismissed the substantial defenses submitted by the State. Under international law on state responsibility (ILC Articles 20 – 26), a State may invoke defenses that preclude the wrongfulness of its conduct, including self defense, *force majeure*, distress and necessity. However, a State

⁴⁵ *Ibid*, para. 88. The Court refers to the UN Charter, UN General Assembly Resolution 2625 (1970), and the ICESCR, Article 1.

⁴⁶ *Ibid*, para. 119 – 122, 133.

⁴⁷ *Ibid*, para. 123 – 134, 136.

⁴⁸ *Ibid*, para. 126, 133 – 134. The ICJ refers in particular, but not exclusively, to the prohibition of any measures taken by an Occupying Power in order to organise or encourage transfer of parts of its own civilian population into the occupied territory (Article 49(6) of the Fourth Geneva Convention).

⁴⁹ The ICJ refers in particular to ICCPR Article 17 (1), ICESCR Articles 6, 7, 10, 11, 12, 13 and 14, and CRC Articles 16, 24, 27 and 28.

⁵⁰ ICJ 2004 at para. 155 - 157.

cannot invoke defenses against situations caused partially or entirely by its own conduct, and the use of force must in all cases be proportional and in conformity with the UN Charter. Moreover, a State may not take recourse to measures that are absolutely prohibited under the international obligations of that State. Even treaty provisions cannot preclude the wrongfulness of a State's act that does not conform with an obligation arising under a *peremptory norm*.⁵¹

In the 2004 Advisory Opinion, the ICJ concluded that Israel cannot rely on a right to self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the Wall, because:

- a) no exceptions are permitted by some of the humanitarian and human rights provisions violated by Israel (Hague Regulations, Article 46; Fourth Geneva Convention, Articles 47 and 49(6); ICCPR, Article 17),⁵² and,
- b) the grave infringement on the human rights (civil, political, social, economic and cultural rights) of the Palestinian population under Israel's occupation is not justified by Israel's exigencies of military necessity, national security and public order.⁵³

12. The ICJ unambiguously referred to Israel's acts as *serious breaches* by applying the special rules of international law on state responsibility reserved for *serious breaches of peremptory norms*. Under international law in general, States have limited responsibility in connection with the wrongful act of another State. States are obliged not to become complicit by providing aid or assistance to another State in the commission of a wrongful act (ILC Article 16), and a State may have specific treaty obligations to respond to the wrongful act of another State. Other than that, no legal responsibility arises for a State in connection with the wrongful act of another State, **unless the situation is one of *serious breaches*, in particular *serious breaches of obligations under a peremptory norm*.**⁵⁴ In the special situation that arises from a *serious breach of a peremptory norm*, the responsibility of other States is not limited to their treaty obligations, but all States have additional legal obligations, codified in ILC Article 41: **(1) States shall cooperate to bring to an end through lawful means any such serious breach; and, (2) No State shall recognise as lawful a situation created by such a serious breach, nor render aid or assistance in maintaining that situation.**

The ICJ applied ILC Article 41 in its Advisory Opinion of 2004, when it explained that,

“Given the character and the importance of the rights and obligations involved [...], [i]t is also for all States, while respecting the United Nations Charter and international

⁵¹ See, ILC Article 26, comment 1, explaining that this gives expression to the 1969 Vienna Convention on Treaties, Article 53, which provides that a treaty that conflicts with a peremptory norm of general international law is void; and to Article 64 providing that an earlier treaty conflicting with a new peremptory norm becomes void and terminates. ILC Article 26 also gives expression to the basic principle of "*ex injuria non oritur ius*" (no right can be derived from injustice or from the commission of an unlawful act).

⁵² ICJ 2004 at para. 135 - 136.

⁵³ The ICJ makes explicit reference to Israel's violation of Article 53 of the Fourth Geneva Convention; Article 12(1) of the ICCPR; and Israel's failure to meet the conditions set out in Article 4 of the ICESCR, i.e., restrictions of economic, social and cultural rights must be "solely for the purpose of promoting the general welfare in a democratic society." See, ICJ 2004 at para.136, 137 and 142.

⁵⁴ See, ILC Articles, Part One, Chapter IV, comment 9.

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.”⁵⁵

and recommended 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 relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

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 regime, taking due account of the present Advisory Opinion.”⁵⁶

13. To date, no international court has examined or ruled on the responsibility of States, Israel and others, in connection with the unlawful Israeli **settlement enterprise in its entirety and as manifest today**. This grand enterprise can be defined, under the approach of the ILC Articles, as the entire range and series of Israeli legislative, executive and judiciary acts and omissions committed since 1967 by government, parliament, courts, the military, central and local authorities and other public and private entities and persons, which are attributable to the State of Israel as explained in paragraphs 3 – 6, and have contributed to and resulted in:

(i) **extensive unlawful expropriation of private and public Palestinian property** affecting approximately one third of the entire public and private Palestinian land in the occupied West Bank, including East Jerusalem, as well as its water and other natural resources;⁵⁷ and in the **annexation, de jure or de facto, and permanent integration of large areas of the occupied West Bank** (approximately 50 per cent) into the State of Israel. The latter has been achieved mainly through the allocation of Palestinian land confiscated or slated for confiscation to the regional and local councils/municipalities of the approximately 200 Israeli settlements and associated infrastructure, including the Wall, roads, other transport infrastructure and industrial zones;⁵⁸

⁵⁵ ICJ 2004 at para. 159. *See also*, para. 138 and 161.

⁵⁶ *Ibid*; decision at para. 163.

⁵⁷ B'tselem, *By Hook and By Crook*, 2011, p. 24, 30. In East Jerusalem, approximately one third of the land has been confiscated. In the rest of the West Bank, most of the confiscated land (26.7 per cent) has been expropriated through spurious declarations of “state land.” *See also*: Amnesty International, *Troubled Waters – Palestinians Denied Fair Access to Water*, 2009.

⁵⁸ *Ibid*, p. 21, 28. Land allocated directly to the settlements amounts to approximately 43per cent of the West Bank. Land slated for confiscation is so-called “survey land” comprising 12 per cent of the West Bank. On maps of Israeli authorities, it is already marked as land over which the Custodian “claims ownership,” which is the first stage in declaring property to be “state land.” For a current map of the West Bank illustrating the scope of annexation/integration of territory into Israel, *see*:

http://www.btselem.org/download/20110612_btselem_map_of_wb_eng.pdf. For a map showing the municipal area of each settlement, including the portion of private Palestinian land in it, *see*: <http://peacenow.org/map.php>.

(ii) large-scale forced population transfer, including: the **transfer of more than 500,000 Jewish settlers into the OPT**, mainly by means of a regulatory regime, including economic incentives and public and private services, that sustains and encourages growth of the settlements; and the **forcible transfer of the Palestinian population within and outside the OPT**.⁵⁹ This has been accomplished mainly by means of the Wall and a system of property and residency laws and permits, which severely restrict Palestinian freedom of movement, give rise to forced evictions and widespread destruction of Palestinian homes and commercial property, isolate occupied East Jerusalem, and confine the population in the so-called Areas A and B which comprise approximately 40 per cent of the West Bank. No comprehensive and authoritative information is available about the total number of Palestinians forcibly displaced since 1967. In the Jordan Valley, for example, Israeli policies have decimated the number of Palestinian inhabitants from 320,000 in 1967 to 65,000 today.⁶⁰ Another large group of victims are the approximately one million Palestinian refugees originating from the OPT ("1967 refugees"), whose legal status in the OPT has been revoked and whose right to return has been denied by Israel, in order to create demographic change and enable expropriation and annexation of Palestinian land;

(iii) unlawful infringement of the entire set of human rights of the occupied Palestinian population by the above policies, which have forced Palestinians to resort to livelihoods of subsistence, and by policies and practices undermining Palestinians' right to life, liberty and security.⁶¹ The latter include measures of "security and public order" applied in a sweeping, deliberate and arbitrary manner -- often in the form of collective punishment -- against Palestinian communities, groups and individuals, in particular those opposing the above Israeli policies and practices. Thus, for example, since 1967, almost 40 per cent of the male Palestinian population in the OPT has experienced detention, including arbitrary "administrative detention" without charge or trial, by Israeli authorities.⁶² No comprehensive and authoritative record exists of the Palestinian casualties inflicted by Israeli violence, including torture and extra-judicial executions in the OPT since 1967. It is estimated that between 2000 and 2007 alone, 3,800 Palestinians, most of them civilians, were killed and approximately 27,000 injured during Israeli military operations, border incidents, search and arrest operations and undercover operations;⁶³ and,

See also, OCHA-OPT, "Fact Sheet: The Humanitarian Impact of Israeli Settlement Policies", January 2012, at: http://www.ochaopt.org/documents/ocha_opt_settlements_FactSheet_January_2012_english.pdf

⁵⁹ Regarding the circumstances and scope of the ongoing forcible transfer of Palestinians, *see*: Diakonia, IHL Program, at: http://www.diakonia.se/IHL_english; ICAHD, *The Judaization of Palestine: 2011 Displacement Trends* (2012); and, Badil, *Survey of Palestinian Refugees and Internally Displaced Persons 2009 – 2010* (2010).

⁶⁰ ICAHD, *The Judaization of Palestine* (*supra*, note 59).

⁶¹ Approximately 40 per cent of the affected Palestinian population in the OPT are refugees since 1948, who originate from locations inside Israel. Although their forced exile in the OPT is not directly related to Israel's settlement enterprise in the OPT and pre-dates it, they are victims of a similar Israeli policy of forced population transfer implemented since 1948 in order to expropriate Palestinian land and change the demographic composition of the territory of the State of Israel.

⁶² *See*, Addameer, "Background on Israeli Detention", at: <http://www.addameer.org/etemplate.php?id=290>. *See also*, DCI-Palestine Section: www.dci-palestine.org

⁶³ Based on OCHA-OPT, "Special Focus: Israeli-Palestinian Fatalities Since 2000 - Key Trends", August 2007. *See also*, MDD reports of al Haq, in particular, *MDD Report July – December 2011*; and, <http://www.alhaq.org/advocacy/topics/right-to-life-and-body-integrity>

(iv) establishment of a discriminatory legislative and regulatory regime in the OPT that privileges Israel's settlers, while depriving the occupied Palestinian population of the rights enshrined in the Fourth Geneva Convention and relevant human rights treaties, and enabling the implementation of the above policies by Israel, the Occupying Power. Israel's systematic racial discrimination and policies of segregation and apartheid have been noted with concern by local and international human rights organisations, UN Special Rapporteurs on the Situation of Human Rights in the OPT, and the UN Committee on the Elimination of Racial Discrimination (CERD).⁶⁴ Their findings refer to racial discrimination in all spheres of civil, political, social, economic and cultural rights. This discrimination, in the course of more than four decades, has been institutionalised in two separate and parallel legal regimes in the OPT: one based on Israeli civil law for the privileged settlers, the other a military regime applied to the occupied Palestinian population.

14. In the absence of an authoritative legal opinion on State responsibility in connection with Israel's entire settlement enterprise as currently manifest, a tentative projection of the main findings can be undertaken based on the ICJ Advisory Opinion of 2004. The ICJ's analysis as applied to the entire settlement enterprise, rather than only to the construction of the Wall and its associated regime, confirms the Israeli breaches already identified in connection with the Wall (see paragraph 10); **it also reveals Israeli breaches of a much larger scope and highlights their serious character.** It shows, for example, that by imposing the dramatic changes of the status and demographic composition of the OPT and the related infringement on the human rights of the occupied Palestinian population described in paragraph 13, Israel is committing not only the breaches already identified in the 2004 ICJ Advisory Opinion. The ICJ's analysis as applied to the entire settlement enterprise reveals additional Israeli breaches of *peremptory norms* of customary international law, in particular the **prohibitions on colonialism, racial discrimination and apartheid**, and it exposes the **gross and systematic** manner in which Israel has violated these norms in order to affect the dramatic changes of the status and demographic composition of the OPT.⁶⁵

Serious breaches of peremptory norms are defined as the gross or systematic failure by the responsible State to fulfil its obligations under these norms (ILC Article 40).⁶⁶ Israel's failure

⁶⁴ For relevant reports of the Special Rapporteurs on the Situation of Human Rights in the OPT since 1967, see, in particular, SR John Dugard, A/HRC/4/17 (29 Jan 2007); SR Richard Falk, A/HRC/16/72 (10 January 2011). For CERD Concluding Observations on Israel, see, CERD/C/ISR/CO/13 (14 June 2007) and CERD/C/ISR/CO/14-16 (9 March 2012). See also, Human Rights Watch, *Separate and Unequal. Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories*; B'Tselem, [Checkpoints, Physical Obstructions, and Forbidden Roads](#); and, Al-Haq's *interactive map on Israel's discriminatory water policies*, at:

<http://alhaq.mits.ps/index.php/interactive-map/interactive-map-water>

⁶⁵ For a ground-breaking legal analysis of Israeli violations under these peremptory norms, as well as the collective (*erga omnes*) character of these breaches, see, *Occupation, Colonialism, Apartheid?*, South African Human Sciences Research Council, May 2009.

⁶⁶ ILC Article 40, comment 8: to be regarded as "systematic," a violation has to be carried out in an organised and deliberate way. The term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. Factors that may establish the seriousness of a violation would include the intent to violate the norm, the scope and number of individual violations, and the gravity of their consequences for the victims. Examples of such serious breaches are provided in ILC Article 41, comments 7 and 8. These include, among others, the Portuguese colonial rule,

to respect its obligations under *peremptory norms* is gross and systematic. The illegal settlement enterprise has been pursued as a matter of declared State policy, with the aim and intent to change the status and demographic composition of the OPT. For this purpose, the Israeli State, including governments and the official organs and empowered entities mentioned earlier, has since the beginning of the occupation in 1967 planned, approved, legislated, financed and executed the appropriation and annexation *de jure* and *de facto* of Palestinian land; the construction of Israeli settlement infrastructure; the transfer of Israeli settlers into the OPT; and the forcible transfer, restriction of development and growth of the Palestinian population.⁶⁷ The gross and flagrant nature of these breaches is evident in their grave consequences for the Palestinian victims and in the fact that Israel has ignored repeated condemnation and calls by the international community, including numerous resolutions of the UN Security Council,⁶⁸ to rescind its unlawful measures. *Serious breaches of peremptory norms* under specific circumstances can amount to international crimes, and they are likely to be *composite* breaches (ILC Article 15). Some of most serious wrongful acts in international law, such as systematic racial discrimination and apartheid, are *composite breaches*. These are defined as a series of acts, where not only each single act may be wrongful, but which are wrongful in aggregate. They are *continuing* breaches, with responsibility extending from the first of the act or omissions in the series.⁶⁹

15. Israel does not have valid defences precluding the wrongfulness of its settlement enterprise, for the reasons explained in the ICJ Advisory Opinion of 2004 (see paragraph 11), and because **nothing can justify the discriminatory nature of Israel's settlement enterprise, even if it were established that the obligations of the occupant under humanitarian law change with the passage of time.⁷⁰ **Israel's construction of permanent infrastructure in the OPT, the extension of Israeli law to the OPT, and the extraction of natural resources and exploitation of the economy of the OPT in a manner that discriminates****

denial of self-determination in Rhodesia, Namibia and East Timor, apartheid in South Africa, the Iraqi invasion of Kuwait, and the situation created by the former Republic of Yugoslavia through population transfer in Bosnia and Kosovo.

⁶⁷ See, Section I, in particular paragraphs 3-5, above.

⁶⁸ ICJ 2004 at para. 75, 120, 134 – 135. UNSC Resolution 446 (1979), for example, calls upon Israel, "to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories." The ICJ Advisory Opinion of 2004 cites UNSCR 237 (1967), 242 (1967), 267 (1969), 271 (1969), 298 (1971), 338 (1973), 446 (1979), 452 (1979), 465 (1980), 476 (1980), 478 (1980), 681 (1990), 799 (1992), 904 (1994), 1073 (1996), 1397 (2002), 1515 (2003).

⁶⁹ See, ILC Article 15, comments 1 and 2; and, ILC Article 14 explaining the meaning and responsibility resulting from a *continuing* breach. See also, Cherif Bassiouni, "International Crimes: "Jus Cogens" and Obligations Erga Omnes", in *Law and Contemporary Problems*, Vol. 59, No. 4.

⁷⁰ The question if and how prolonged occupation changes the nature of the obligations of the Occupying Power under humanitarian law is a matter of legal debate and controversy. Some scholars and the Israeli High Court have argued that increased Israeli economic engagement in and development of the OPT conforms with Israel's IHL obligations and is necessary in order to provide for the needs of the occupied Palestinian population, while others have rejected this argument. In any case, the legal debate about the impact of the prolonged occupation on Israel's IHL obligations in the OPT is different from and of limited relevance to the analysis of state responsibility in connection with the settlement enterprise, which is clearly discriminatory and illegal under international law. See, A.J.I.L., Agora: ICJ Advisory Opinion; and, S. Akram and M. Lynk, *The Wall and the Law* (*supra*, note 7). See also, Susan Akram and Michael Lynk, "Arab-Israeli Conflict" in *Max Planck Encyclopedia of Public International Law* (2012).

against the occupied Palestinian population and benefits Israel's own population and economy inside Israeli territory and in the OPT cannot be justified under international law. Israel's responsibility is, therefore, engaged, and, as in the case of the Wall, the *serious breaches of peremptory norms* and obligations *erga omnes* resulting from Israel's settlement enterprise in the OPT trigger the heightened responsibility of all States under customary international law (see paragraph 12).

16. In conclusion, Israel, with its settlement enterprise in the OPT as defined in paragraph 13, is in breach of its obligations under the Fourth Geneva Convention and human rights treaties. Forcible population transfer, torture and the unlawful destruction or confiscation of property during an armed conflict constitute war crimes, which give rise to individual responsibility.⁷¹ **Under customary international law, the State of Israel is responsible for acts and omissions, which, separately and in aggregate, violate, in a gross and systematic manner, the prohibitions on racial discrimination, apartheid, the acquisition of territory by force and colonial domination.** All of these constitute *serious breaches of peremptory norms* that are essential for safeguarding **Palestinians as human beings and their right to self-determination as a people**, and they are violations of obligations *erga omnes*, which are of concern to the international community as a whole (see also paragraph 9). This, as well as the *composite character* of Israel's *serious breaches*, is recognised by independent experts who have characterised Israel's regime of occupation, including the settlements in the OPT, as "a regime of prolonged occupation with features of colonialism and apartheid" and recommended for States and the United Nations to request a second ICJ advisory opinion about the legal consequences of such unlawful regime.⁷²

III. The legal consequences for Israel, the responsible State

17. Under international law on state responsibility as applied by the 2004 ICJ Advisory Opinion, the following legal consequences arise for the State of Israel from its illegal settlement enterprise in the OPT:

- a) to **perform the obligations breached** (ILC Article 29);
- b) to **cease all settlement activity in the OPT**, and to offer appropriate **assurances and guarantees of non-repetition** (ILC Article 30). This includes the obligations to dismantle the settlements, the Wall and related infrastructure in the OPT, ensure the

⁷¹ See, al Haq, "Q&A on Corporate Accountability for International Law Violations", at: <http://www.alhaq.org/images/stories/PDF/qa-corporate-accountability.pdf>. See also, Badil, *Applying International Criminal Law to Israel's Treatment of the Palestinian People*, Working Paper 12 (2011); International Commission of Jurists, *Corporate Complicity and Legal Accountability*, 2008, Vol. I, II.; Yasmine Gado, *Principles and Mechanisms to Hold Business Accountable for Human Rights Abuses: Potential Avenues to Challenge Corporate Involvement in Israel's Oppression of the Palestinian People*, Badil, 2009; and, Liesbeth Zegveld and Jeff Handmaker, "Universal Jurisdiction: State of Affairs and Ways Ahead", ISS Working Paper no. 532, International Institute of Social Sciences, The Hague, January 2012. Note: The Rome Statute of the ICC also defines some of these war crimes, including apartheid, as well as "persecution", as crimes against humanity. Further analysis is required to determine the meaning and implications of these in the context of Israel and the Palestinian people.

⁷² See, former Special Rapporteur on the OPT John Dugard, A/HRC/4/17; and, Special Rapporteur on the OPT Richard Falk, A/HRC/16/72 (*supra*, note 64). See also, findings of the *Russell Tribunal on Palestine*, Third Session, South Africa, November 2011 (on the RTOP website).

departure of the settlers from this area, and to repeal or render ineffective all related legislative and regulatory acts;

- c) to make **full reparation for all damage** caused by the illegal settlement enterprise, whether moral or material, through **restitution, compensation** and **satisfaction** (ILC Articles 31 – 39). This includes the obligations to: return the land and other immovable property seized from any natural or legal person for the settlement enterprise in the OPT; facilitate the return of all persons displaced in this context, and, undertake legislative reform as required for this purpose. Where restitution is impossible, Israel has an obligation to compensate the victims for the damage suffered. Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of its settlement enterprise in the OPT.⁷³

18. Israel may not take recourse to its domestic law in order to justify its failure to comply with these obligations (ILC Article 32). **Restitution**, *i.e.*, to re-establish the situation that existed before the wrongful act was committed, is the **primary form of reparation** required under international law from Israel, the responsible State, to the extent that this: (i) is not materially impossible, and (ii) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation (ILC Article 35). Determination of what is materially possible or proportional may require third party arbitration. In any case, **restitution by Israel is of particular importance, because its breaches are of a continuing and serious character and violate peremptory norms and obligations erga omnes under customary international law.** It is recognised, for example, that in the case of unlawful annexation, restitution (or cessation) includes the withdrawal of the occupying State's forces, the annulment of any decree of annexation, and ancillary measures, such as the return of persons or property seized in the course of the invasion.⁷⁴

IV. The Legal Consequences for Other States

19. This section discusses the responsibility of other States in connection with Israel's *serious breaches of peremptory norms* under customary international law. It focuses on the **content of the legal obligations arising for other States** from Israel's breaches committed through its settlement enterprise in the OPT, and on the **mechanisms available for States to perform their obligations.**

20. Customary international law on state responsibility is complementary to and does not replace the specific obligations of States arising from treaties. With regard to treaty obligations, the ICJ has already confirmed that States parties to the Fourth Geneva

⁷³ The ICJ Advisory Opinion affirms Israel's obligations of cessation and full reparation. *See*, ICJ 2004, para. 151 – 153 and 163. In response, the UN General Assembly established a UN Register of Damages (UNRoD), which registers material damage caused to Palestinians by the Wall but does not have the mandate or mechanisms required for processing claims, or for ensuring that Israel provides restitution and compensation to the Palestinian victims. (See also paragraph 27.)

⁷⁴ ILC Article 35, comment 6.

Convention are responsible to ensure Israel's respect of the provisions of the Convention (see paragraph 12). States also have obligations under other treaties they have ratified, such as the International Convention against Torture, the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Rome Statute of the International Criminal Court (ICC). State signatories to any of the above treaties, for example, have the obligation to ensure that persons responsible for serious breaches amounting to international crimes are brought to justice.⁷⁵

21. As explained in paragraph 12, the ICJ Advisory Opinion of 2004 confirmed that *serious breaches of peremptory norms* and obligations *erga omnes*, such as those committed by Israel with its settlement enterprise in the OPT, give rise to legal consequences for all States beyond what is required by the relevant treaties. Because Israel breaches norms and obligations which are universally binding and of concern to the international community as a whole, **all States have the additional legal obligations laid out in ILC Article 41**, i.e., (1) to cooperate to bring to an end Israel's serious breaches, and (2) not to recognise as lawful the illegal situation created by Israel, nor render aid or assistance in maintaining that situation. **This means that every State has not only a duty to abstain, but also a positive duty to act as required in order to perform these obligations.**⁷⁶

22. As for the obligations arising for all States under ILC Article 41, paragraph 2, **the obligation not to recognise as lawful** the illegal situation created by Israel refers both to formal recognition and also prohibits acts which would **imply** such recognition.⁷⁷ **The obligation not to render aid or assistance in maintaining that situation is, again, a special obligation which arises because of the *continuing and composite* character of Israel's *serious breaches***, as explained in paragraph 15. Under normal circumstances, aid or assistance is wrongful only if a State: (i) aids or assists another State in the actual commission of a wrongful act, (ii) does so with the knowledge of the wrongful act, and (iii), that act would also be unlawful if committed by the aiding/assisting State (ILC Article 16). In the special circumstances of *serious breaches of peremptory norms*, such as those committed by Israel, the obligation not to render aid or assistance is broader. Due the *composite* character of these breaches explained in paragraph 14, this obligation extends beyond aid and assistance in the commission of the serious breach itself to the **maintenance of the situation** created by the breach. Moreover, States cannot invoke defences against the wrongfulness of aid or assistance by arguing that they were not aware of the situation. **Proof of knowledge of the circumstances of the internationally wrongful act is not required**, "as it is hardly

⁷⁵ See, for example, Badil: *Applying International Criminal Law*, p. 59 – 61 (*supra*, note 71).

⁷⁶ Although some legal scholars and States contest that cooperation constitutes a positive obligation for all and each State to act, this obligation was affirmed by the majority of the judges in the 2004 ICJ Advisory opinion (see paragraph 12 above). Others have argued that even if there is an obligation to cooperate, it is practically meaningless, because the law does not specify what States should do; participation in the Quartet, or in discussions at the UN, could be enough to meet this obligation. The ILC Articles, however, clearly qualify that appropriate forms of cooperation are to "counteract the effect of Israel's serious breaches." See, Article 41, comment 1 and 2. The element of positive action in the obligation to not render aid or assistance is affirmed in ILC Article 41, para. 12.

⁷⁷ ILC Article 41, comment 5.

conceivable that a State would not have notice of the commission of a serious breach by another State.”⁷⁸

Implicit in the above is the **obligation of all States to ensure that its organs, as well as public and private entities and persons whose activities are attributable to the State under international law, do not violate these obligations.** This may include, for example, persons authorised or instructed to conduct official relations with the State of Israel or Israeli public or private entities. It also includes State-funded or otherwise-supported aid agencies and business enterprises operating in Israel or in the OPT and performing certain official functions.⁷⁹

23. The obligation of all States to cooperate to bring to an end Israel's serious breaches (ILC Article 41, paragraph 1) applies to States whether or not they are individually affected, and it means that States are under a positive obligation to undertake **a joint and coordinated effort to counteract the effect of these breaches.**⁸⁰ Customary international law on state responsibility as codified in the ILC Articles does not prescribe in detail in what form States must cooperate in order to perform this obligation. Cooperation may be in the framework of competent international organizations working together, such as the United Nations, and it may take the form of non-institutionalized cooperation. As for measures, States could, for example, request a second ICJ advisory opinion on the legal consequences of Israel's settlement enterprise, or act to persuade the Security Council to take enforcement action under Chapter VII of the UN Charter, for example under “The Responsibility to Protect” Resolution.⁸¹ Finally, States can take “countermeasures,” i.e., various forms of sanctions, which can be implemented within and outside the UN system (see below).

24. Implementation of state responsibility begins with a formal notice of claim which may, for example, be presented to the responsible State, or through the commencement of proceedings before an international court or tribunal (ILC Article 43). Usually, the right to present a claim and to adopt lawful measures against the wrongful act of a State is reserved to the *injured* State (ILC Article 42). However, in situations of a *serious breach of a peremptory norm*, all States are presumed injured or affected and, therefore, entitled to claim cessation of the breach, as well as reparation for the injured State and/or the victims (Article 48).⁸² **All States are, thus, entitled to claim from Israel cessation of its illegal settlement enterprise,**

⁷⁸ ILC Article 41, comment 11.

⁷⁹ See, ILC Articles, Part One, Chapter II, for conduct attributable to the State. This is affirmed, *inter alia*, in the UN *Guidelines on Business and Human Rights*, Section I, “The State Duty to Protect Human Rights.” See, www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf

⁸⁰ ILC Article 41, comment 2 and 3.

⁸¹ States can also take measures under the special law regulating diplomatic relations, or the special rules of international organisations, such as UN rules. The Responsibility to Protect (R2P) is a UN resolution recognising that the international community has to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Under R2P, the UN can intervene with diplomatic, humanitarian and other peaceful means, and also through enforcement, including armed intervention, under Chapter VII, preferably in cooperation with regional organisations. See, 2005 World Summit Outcome Document, UNSC Resolution 1674 (2006), and the report of the UN Secretary General, *Implementing the Responsibility to Protect* (2009).

⁸² Claims for reparation by a State other than the injured State must be made on behalf of the injured State or the victims. See, ILC Article 48, 2(b) and comment 12.

and reparation for the Palestine Liberation Organization (PLO) and the Palestinian victims.

When a State responsible for a *serious breach of a peremptory norm* does not comply with the obligation of cessation and reparation, all other States may adopt "**countermeasures**", *i.e.*, sanctions or reprisals (ILC Article 54).⁸³ Countermeasures are defined as **measures of a State that would be unlawful unless taken in response to an internationally wrongful act in order to procure cessation and reparation from the responsible State** (ILC Article 49). Countermeasures must comply with the rules for threat or use of force as embodied in the UN Charter and respect fundamental human rights, humanitarian obligations and peremptory norms (ILC Article 50), and they must be proportional (ILC Article 51). When States, other than *injured* States, take countermeasures, they often do so in the framework of international organisations, such as under the authority of Chapter VII of the UN Charter. However, a State, or a group of States, may also take individual countermeasures. **In light of Israel's persistent and flagrant non-compliance with the relevant UN Security Council resolutions and the law expounded in the ICJ Advisory Opinion of 2004, all States are, thus, in the terms of ILC Article 54, entitled to take countermeasures in order to bring about cessation of its breaches and reparation.**⁸⁴ In light of existing State practice, it would be lawful, for example, for States to adopt domestic legislation prohibiting import of Israeli goods, or export to Israel; suspend, with immediate effect, cooperation agreements with Israel; impose other forms of embargoes on trade and cooperation; freeze funds and assets of the Israeli State, entities and persons responsible for the serious breaches; bar Israeli banks from international financial transfers (SWIFT); and suspend agreements on landing rights of airplanes or impose flight bans. Moreover, States have also suspended agreements because of "a fundamental change of circumstances," rather than the right to take countermeasures. States could suspend bilateral treaties with Israel also on this basis; EU members could explore ways to replicate the measures adopted in 1991, when European Community members suspended and later denounced the 1983 Cooperation Agreement with Yugoslavia.⁸⁵

25. Failure by other States to perform their legal obligations as codified in

ILC Article 41, *i.e.*, violation of treaty obligations, failure to cooperate to end the *serious breaches* committed by the responsible State or the provision of unlawful aid or assistance to the former, gives rise to various forms of complicity.⁸⁶ **Other States become themselves responsible for wrongful conduct (ILC Article 1) and incur the additional legal**

⁸³ Countermeasures have been taken by injured States and otherwise affected States (ILC Article 48). Whereas the entitlement of injured States to take countermeasures is well established in international law, the legal entitlement of other States to do so is subject to the progressive development of the law. *See*, ILC Article 54, comment 1, 6 and 7.

⁸⁴ In light of the language in para.159 of the ICJ Advisory Opinion, whether there is an obligation upon States to take such countermeasures is controversial but they are certainly entitled to take such measures in order to end Israel's serious breaches, in particular those caused by the Wall and settlements. In para.159, the Court explains that, "it is ... for all States 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."

⁸⁵ The examples in this paragraph are based on the illustrative examples of State practice provided in ILC Article 54, comment 3 and 4.

⁸⁶ *See*, for example, Aust, Helmut Philipp, *Complicity and the Law of State Responsibility*, 2011.

obligations of cessation and reparation (ILC Articles 28 – 31). Under customary international law, this usually results in limited legal responsibility.⁸⁷ However, assistance given by one State to another after the latter has committed an internationally wrongful act may, in some circumstances, amount to the **adoption** of that act, and result in **full** legal responsibility of the assisting State for the breach pursuant to ILC Article 11.⁸⁸

V. Concluding Observations on State Practice in Response to Israel's Illegal Settlement Enterprise

26. In practice, many States have invested in the peace process and in aid to the Palestinian people. However, cooperation of States for these purposes has been guided by the terms of the Oslo Accords, which protect Israeli interests and sideline international law. Consequently, **States have not performed their legal obligations vis-a-vis the situation of serious breaches of peremptory norms of customary international law** that has been created by Israel with its settlement enterprise in the OPT (see paragraph 16).⁸⁹

27. With regard to the legal obligations as codified in ILC Article 41, States have failed to effectively uphold both their obligations under the Fourth Geneva Convention and other relevant treaties (see paragraph 20) and those arising under customary international law in two main respects:

First, **many States are complicit through the provision of unlawful recognition, and aid or assistance** in both the actual commission of Israel's serious breaches and in the maintenance of the unlawful situation thereby created, and **all States have failed to ensure that no form of such recognition, aid or assistance is provided by the organs, entities and individuals whose activities are attributable to the State**. States thereby violate the obligations described in paragraph 22.

Especially grave examples of unlawful aid and assistance in the **commission** of Israel's breaches are military aid or cooperation with Israel's oppression of Palestinians in the OPT.⁹⁰ Other examples are official aid or other forms of support for the construction and

⁸⁷ The responsibility of other States is not to be confused with the responsibility of the acting State. Other States are only responsible to the extent that their own conduct has caused or contributed to the breach committed by the acting State. *See*, for example: ILC Article 16, comments 1 and 10.

⁸⁸ ILC Articles, Part One, Chapter IV, comment 9.

⁸⁹ For a critical analysis of international development aid in the OPT based on a similar assessment, *see*, Anne Le More, *International Assistance to the Palestinians after Oslo: Political Guilt, Wasted Money*, Routledge, 2008.

⁹⁰ For legal analysis and examples of current agreements and projects of military cooperation with Israel, *see*, "Comprehensive Military Embargo of Israel", BNC Working Paper, 9 July 2011, at: http://www.bdsmovement.net/2011/military-embargo-working-paper-7517#.Ty_YscVQiSo

As for U.S. military aid, Israel will have received up to USD 3.1 billion annually in the period of 2009 – 2018. Until 2008, Israel had received a mix of military and civilian aid amounting to USD 3 – 4.3 billion. This does not include loan guarantees and special aid packages and other forms of non-financial military assistance, and approximately USD 2 billion annually in donations, as direct payments and via purchase of Israel Bonds, from private U.S. entities and person. *See*, US Campaign to End the Israeli Occupation, Policy Paper "US Military Aid to Israel" (2012), at: <http://aidtoisrael.org/section.php?id=400>. *See also*, John Mersheimer and Stephen Walt, *The Israel Lobby and U.S. Foreign Policy*, New York: Farrar, Straus, Gioroux, 2007; p. 24 -31.

development of Israel's Wall, checkpoints, terminals, prisons and detention centres,⁹¹ and for so-called joint Israeli-Palestinian industrial zones in the OPT, which benefit Israeli business, undermine Palestinian development and exploit Palestinian labour.⁹² Assistance in the commission of Israel's breaches is also provided where direct, often tax-exempt, support of the illegal settlements by (Jewish and Christian) Zionist organisations is permitted by the State in which they are registered. A grave act of complicity, which may amount to outright endorsement and **adoption** of Israel's serious breaches (paragraph 25), is the international protection provided to Israel by the U.S., mainly through diplomatic pressure on other States, in the full knowledge of the circumstances, thereby systematically obstructing efforts of all States to cooperate within and outside the United Nations and to counteract Israel's serious breaches.

Furthermore, the legal obligation not to provide aid or assistance in **maintaining** the unlawful situation is violated where States, directly or based on bilateral or multilateral agreements with the State of Israel, cooperate with or support the settlement activities of Israeli state-organs or public and private entities, such as those mentioned in Section I, or where due diligence is excluded. Examples include numerous cases of cooperation in trade and research, including by the EU⁹³, as well as the large amount of un-earmarked U.S. financial aid provided to Israel for civilian purposes at least until 2008.⁹⁴ Aid or assistance is also provided where donor governments and state-funded aid agencies construct Palestinian infrastructure, in particular roads, which indirectly contributes to the maintenance of Israel's regime of segregation and apartheid in the OPT and/or the expansion and entrenchment of Israel's settlements in the OPT,⁹⁵ or procure materials or goods for humanitarian and development aid from Israeli suppliers implicated in the settlement enterprise. Finally, this legal obligation is also violated when States finance or otherwise support activities or projects of (transnational) business companies which contribute to Israel's unlawful settlement enterprise in the OPT.⁹⁶

All such aid or assistance also amounts to **recognition** of the illegal situation created by Israel in the OPT. **Particularly grave violations of the obligation not to recognise** this unlawful situation include, for example, the 2004 letter of assurances of U.S. President Bush to Israeli Prime Minister Sharon, which endorsed Israel's unlawful acquisition of occupied territory and

⁹¹ See, for example, CNI, "More on US Aid for Checkpoint Crossings", Electronic Intifada, 11 February 2005.

⁹² See, for example, Sam Bahour, "Economic Prison Zones", Maan News Agency, 20 November 2010; and, Bisan, "Palestinian Development Between Sovereignty and Dependency: the Industrial Zones Model" (Workshop Report), at: <http://en.bisan.org/content/palestinian-development-between-sovereignty-and-dependency-industrial-zones-model>.

⁹³ For relevant findings on the EU Trade Association Agreement with Israel, see, for example, *Russell Tribunal on Palestine*, Barcelona Session, March 2010, p.16-17 (on the RToP website). The Tribunal further noted that the silence of the European Union and its member states on Israel's international law violations can be interpreted as tacit approval or acceptance (p. 21).

⁹⁴ Direct U.S. aid for civilian purposes was discontinued in 2009. See, US Campaign to End the Israeli Occupation, Policy Paper (*supra*, note 90).

⁹⁵ See, for example, Nadia Hijab and Jesse Rosenfeld, "Palestinian Roads: Cementing Statehood, or Israeli Annexation?" *The Nation*, 30 April 2010.

⁹⁶ (Transnational) companies which implement such projects and activities in the OPT include, among others, G4S, HP, Motorola, Veolia, Alstom, Caterpillar, Volvo and Hyundai. See, www.whoprofits.org, and the websites of Al Haq, the Civic Coalition for Defending Palestinian Rights in Jerusalem (CCDPRJ), and Diakonia. See also, www.electronicintifada.net; and www.business-humanrights.org

has since contributed to increasing international recognition of Israel's illegal "settlement blocks."⁹⁷ Another grave example is the decision of the OECD in 2010 to accept Israel, with its settlements in the OPT but without the occupied Palestinian population, as a member in that organisation.⁹⁸ Recognition is also provided when States or State-funded aid agencies abide by Israel's illegal permit regime in the OPT, or when State representatives conduct relations with Israeli organs or entities endorsing the illegal settlement enterprise. Recognition is, moreover, implied when States and State-funded agencies fail to hold Israel accountable for its serious breaches in public statements or UN resolutions, or tolerate destruction or damage of aid-infrastructure or aid-equipment by the Israeli army without military necessity, or by private settlers.

Second, **all States have failed to perform the obligation to cooperate and act as required for ending Israel's serious breaches** (see paragraph 23). Many States, in particular the U.S. and members of the EU, have undermined effective cooperation in the United Nations, for example by opposing or vetoing relevant UN resolutions, under the pretext that this is required for "preserving the peace process."⁹⁹ The UN General Assembly and its member States have not acted upon the recommendations of the 2004 ICJ Advisory Opinion. States, acting individually or collectively, **have not presented a formal claim to Israel for cessation of the serious breaches and reparation for the Palestinian victims in the terms of ILC Article 48** (see paragraph 24). To the contrary, State sponsors of the peace process have withheld support from the PLO when it presented such claims in the negotiations with Israel. Governments of many States have also employed political pressure that has obstructed efforts by civil society to prosecute alleged Israeli war criminals and to affirm the obligations of States in international or domestic courts.¹⁰⁰

28. Moreover, **no State, or group of States, has adopted appropriate countermeasures**

⁹⁷ Letter of 14 April 2004 from President Bush to Prime Minister Sharon as published on the Knesset's website: http://www.knesset.gov.il/process/docs/DisengageSharon_letters_eng.htm. See also, Al-Haq, *Exploring the Illegality of 'Land Swap' Agreements under Occupation*, 2011, at: <http://www.alhaq.org/publications/publications-index/item/exploring-the-illegality-of-land-swap-agreements-under-occupation>

⁹⁸ See, for example: <http://electronicintifada.net/content/palestinian-civil-society-slams-oecd-over-israels-accession/1054>

⁹⁹ Despite the unprecedented expansion of Israeli settlements since the 1990s, the UN Security Council has not adopted new resolutions of the kind it had adopted previously (see paragraph 10, note 41, and note 66). The UN Security Council has, moreover, not taken action against Israel's illegal Wall; a UN Security Council draft resolution (S/2003/980 of 14 October 2003), for example, was vetoed. (Source: UNISPAL)

¹⁰⁰ For a review of cases brought, see, Badil, *al-Majdal Magazine*, "Litigating Palestine" (Spring-Summer 2009). Cases include the case of Al-Haq submitted to the High Court of England and Wales. In this case, Al-Haq argued that the UK had certain legal obligations under customary international law arising from Israel's violations of various peremptory norms, including the right to self-determination and the prohibition against acquisition of territory by force, and that the UK had failed to meet its obligations. Al-Haq argued that the Court had the competence to review the government's failure and to order the government to, *inter alia*, suspend all UK government financial or ministerial assistance to UK companies exporting military technology or goods to Israel, request that the EU suspend the EU-Israel Association Agreement, and call a conference of the signatory State to the Fourth Geneva Convention to address Israel's grave breaches of the Convention. Both, the High Court and the Court of Appeal rejected the claims and ruled that the matter was non-justiciable (The High Court of Justice, Divisional Court, Case no: C0/1739/2009, decision of 27 July 2009; at appeal: The Court of Appeal of England and Wales, decision of 25 February 2010. See also, al Haq press release, 8 March 2010.

(sanctions) in the terms of customary international law on state responsibility as codified in ILC Articles 54 (see paragraph 24). Some States, members of the Arab League, maintain an official policy of non-cooperation (anti-normalisation, boycott) with Israel, but do not implement it. Others, for example Turkey and some States of Central and South America, have implemented certain limited or short-termed diplomatic measures or forms of sanctions in response to especially brutal and unlawful incidents. Israel's military operation against the occupied Gaza Strip in the winter of 2008/9 and its military attack against the Turkish civil society-led humanitarian flotilla to the Gaza Strip in the spring of 2010 resulted in a short-lived suspension of Turkish flights to Israel and a flight ban on Israeli military planes in Turkish airspace. The EU has for a long time been trying, without much success, to exclude goods from the illegal Israeli settlements in the OPT from the benefits of its Trade Association Agreement with Israel by imposing customs duties on them.¹⁰¹ However, such limited measures **do not meet the standards of effective countermeasures** against Israel's illegal settlement enterprise because they do not address the *serious breaches of peremptory norms* described in section II, and cannot procure cessation and reparation from Israel. In light of the deteriorating situation in the OPT, additional measures have been recommended by the Heads of EU Missions since 2010;¹⁰² these have yet to be approved by the European Commission.

29. In conclusion, all other States fail to perform their legal obligations or are complicit in Israel's *serious breaches*. These States are themselves responsible for internationally wrongful conduct. They **incur the additional obligations to cease all unlawful recognition, aid or assistance in the commission and maintenance of Israel's unlawful settlement enterprise, and to make reparation** (see paragraph 25). However, in a situation where many powerful States do not cease their wrongful conduct, other States lack the power and mechanisms to procure performance of this obligation from such States. Consequently, no State is held accountable for conducting "business as usual" with Israel by ignoring treaty obligations, failing to cooperate and take effective measures to end its *serious breaches*, or by providing unlawful recognition, aid or assistance. The resulting international climate of lawlessness and complicity is the environment that provides Israel with impunity and in which Israel's settlement enterprise thrives.

¹⁰¹ Main difficulties include the determination of the place of origin of Israeli goods, and the policy of the State of Israel to counteract the effect of this EU measure by granting subsidies to Israeli companies for settlement goods which incur customs duties upon entry into the EU. See, S. Peretz, "Lying on the Fence", *Globes*, 27-28 February 2006; Euro-Mediterranean Human Rights Network, *Third Annual Review on Human Rights in EU-Israel Relations: Accommodating to the 'special' case of Israel 2005-2006*, June 2007. See also, Bill Van Esveld, "An Unsettling Situation; What the EU should tell Israel, and itself, about settlements, trade and the destruction of EU aid", Human Rights Watch, 11 May 2012, at: <http://www.hrw.org/news/2012/05/11/unsettling-situation>

¹⁰² See, EU Heads of Mission Report on East Jerusalem 2011 (not officially published). Recommendations to reinforce EU policy include for the Commission to propose appropriate EU legislation to prevent/discourage financial transactions with Israeli entities involved in settlement activity; to compile voluntary guidelines for EU tour operators to prevent cooperation with Israeli settlement business in East Jerusalem; and to share information on violent settlers in order to assess whether to grant entry into EU Member States.

Annex

A quick guide through the ILC Articles on State Responsibility

Note: the ILC Articles lay out the general rules of international law concerned with the responsibility of States for internationally wrongful conduct. They leave aside and do **not prejudice**, issues of the responsibility arising from the special rules of international organisations, or of other non-state entities or persons, including individual responsibility for international crimes.

The rules codified in the ILC Articles cover the whole field of state responsibility; they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the **whole spectrum of the international obligations of States**, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole.¹⁰³

This quick guide serves as an introduction to the law for those unfamiliar with it, and as a tool facilitating reference to the ILC Articles. Rules and comments of special importance to the topic of this memorandum are **highlighted**.

Draft Articles on Responsibility of States for Internationally Wrongful Acts

adopted by the International Law Commission at its 53rd session, in 2001,
and submitted to the General Assembly (A/56/10)

http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

- Part One **THE INTERNATIONALLY WRONGFUL ACT OF A STATE**
defining the general conditions necessary for State responsibility to arise.
- Chapter I **General Principles** (Articles 1 - 3):
every internationally wrongful act of a State entails the international responsibility of that State (Article 1). A State is responsible for internationally wrongful conduct, if (i) the particular conduct is *attributable* to the State under international law; and, (ii) constitutes a *breach* of an international obligation of that State (Article 2) under treaty or customary law, and a State's *internal law is irrelevant* for the characterisation of an act as internationally wrongful (Article 3). Existence of loss or damage¹⁰⁴ or the intention to cause harm,¹⁰⁵ are *not* necessary elements of State responsibility.
- Chapter II **Attribution of Conduct to a State** (Articles 4 -11):
conduct of all official organs that make up the State under its internal law is attributable to the State; conduct of public and private entities, persons, and insurgent movements is also attributable to the State if the conditions laid out these Articles are met.
- Chapter III **Breach of an International Obligation** (Articles 12 – 15): provides the rules under which conduct by a State amounts to a breach of an international obligation. **Article 15 deals with breaches consisting of a *composite* act; it explains that serious breaches of peremptory norms are likely to be *composite* breaches.** (See Part Two, Chapter III).
- Chapter IV **Responsibility of a State in Connection with the Act of Another State** (Articles 16 – 19): provides that *treaty obligations* may give rise to responsibility in connection

¹⁰³ ILC Articles, General Commentary 4 (d) and 5. *See also*, ILC Articles 57 and 58.

¹⁰⁴ ILC Article 2, comment 9.

¹⁰⁵ ILC Article 2, comment 10.

with the wrongful act of another State. A State also becomes responsible for the wrongful conduct of another State, if it provides *aid or assistance in commission* of the wrongful act (Article 16) or exercises *direction or control*, or *coercion*. Other than that, *no legal responsibility* arises for a State in connection with the wrongful act of another State – unless the situation is one of serious breaches, in particular *serious breaches of obligations under peremptory norms of general international law*.¹⁰⁶ (Note: Article 16 is not to be confused with Article 41/ii.)

Chapter V

Circumstances Precluding Wrongfulness (Articles 20 – 27):

a breach of an international obligation of a State may not be wrongful if it is carried out with the *consent* of the other State concerned; in *self-defense*, as a “*countermeasure*” (see Articles 49 - 54); or in situations of *force majeure*, *distress*, or *necessity*. A State has *no valid defenses* against the wrongfulness of an act in response to situations caused partially or entirely by its own conduct, and the use of force must in all cases be proportional and in conformity with the UN Charter. A State may not take recourse to measures which are absolutely prohibited under its treaty obligations, and nothing precludes the wrongfulness of conduct which violates a peremptory norm (Article 26).

Part Two

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

defines the legal consequences for the *responsible* State of its internationally wrongful act

Chapter I

General principles, including general rules concerning *cessation* and *reparation* (Articles 28 – 33): a State responsible for internationally wrongful conduct has a legal obligation to: (i) perform the breached; (ii) cease the wrongful conduct and offer appropriate assurances and guarantees of non-repetition; and (iii) make full reparation for any damage caused, whether moral or material, through restitution, compensation and satisfaction. A State's internal law may not be used as justification for failure to comply with these obligations (Article 32).

Chapter II

Reparation for Injury (Articles 34 – 39): focuses on the forms of reparation (restitution, compensation, satisfaction) and the relations between them. *Restitution*, i.e., to re-establish the situation which existed before the wrongful act was committed, is the *primary form of reparation* required from the responsible State, to the extent that (i) it is not materially impossible, and (ii) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation (Article 35). *Restitution*, is of particular importance where the obligation breached is of a *continuing character*, and even more, so where it arises under a *peremptory norm* of general international law, for example in the case of unlawful annexation of a State.¹⁰⁷

Chapter III

Serious Breaches under Peremptory Norms of General International Law (Articles 40, 41): deals with the special situation which arises in case of such breaches. Article 40 provides that a *breach is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation* and explains the meaning of these terms. Article 41 explains the legal consequences for States other than the responsible State: *all* States have a legal obligation to (i) *cooperate to bring to an end through lawful means any such serious breach*, and (ii) *not to recognise as lawful a situation created by the breach, nor render aid or assistance in maintaining that situation*.

¹⁰⁶ ILC Articles, Part One, Chapter IV, comment 9.

¹⁰⁷ ILC Article 35, comment 6

Because of the diversity of circumstances which could possibly be involved, the provision does *not prescribe in detail what form this cooperation should take*. What is called for is a joint and coordinated effort by all States to counteract the effects of these breaches, and it is made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach.¹⁰⁸ *Recognition* not only refers to formal recognition, but also prohibits acts which would *imply* such recognition.¹⁰⁹ The *prohibition on aid or assistance* in this context goes *beyond* the provisions of Article 16. It deals with conduct “after the fact” which assists the responsible State in maintaining a situation “opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law”. ***It 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.*** Moreover, the concept of aid or assistance in Article 16 presupposes that the State has “knowledge of the circumstances of the internationally wrongful act”. There is *no need* to mention such a requirement in Article 41/ii, as it is *hardly conceivable that a State would not have notice of the commission of a serious breach by another State.*¹¹⁰

Part Three THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE: identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done.

Chapter I **Invocation of the Responsibility of a State** (Articles 42 – 48):

“Injured” and other States entitled to invoke the responsibility of a State are defined in Articles 42, 46, and 48. If more than one State is injured by the same wrongful act, each State may invoke responsibility separately (Article 46). ***Any State*** other than the injured State is entitled to invoke the responsibility of another State, if (i) *the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (ii) the obligation breached is owed to the international community as a whole* (Article 48). Also provided are the rules of: *notice/claim* for States that wish to invoke the responsibility of another State (Article 43); *admissibility* of claims (Article 44); *loss of the right to invoke* claims (Article 45); and for cases where the responsibility of more than one State may be invoked to the *same* internationally wrongful act (Article 47). ***Any State*** entitled to invoke responsibility may claim and take lawful measures to procure from the responsible State: (i) *cessation* of the internationally wrongful act, and *assurances and guarantees of non-repetition*; and (ii) *reparation* for itself (Article 43; reserved for injured States) *or in the interest of the injured State or the beneficiaries of the obligation breached* (Article 48).

Chapter II **Countermeasures** (Articles 49 – 54): deals with the conditions for and limitations on the taking of countermeasures mainly by an injured State, but also for States acting under Article 48. *Countermeasures* (reprisals, sanctions) are defined as measures of a State that ***would be unlawful, if they were not taken in response to an internationally wrongful act in order to procure cessation and reparation,***¹¹¹ *i.e.*, they are to distinguished from material breaches of a treaty. Countermeasures must respect the provisions of the UN Charter regarding the threat/use of force,

¹⁰⁸ ILC Article 41, comment 2 and 3.

¹⁰⁹ ILC Article 41, comment 5.

¹¹⁰ ILC Article 41, comment 11.

¹¹¹ ILC Articles, Part Three, Chapter II, comment 1, 4 and 8.

fundamental human rights, humanitarian obligations and peremptory norms (Article 50), and they must be proportional (Article 51). Any injured State is entitled to undertake countermeasures against a State responsible for wrongful conduct which *has not complied* with the obligation of cessation and reparation (Article 49). **All States** acting under Article 48 may take countermeasures **in the terms of Article 54**, in order to procure cessation and reparation of a *serious breach of a peremptory norm*. Although States often do so in the framework of international organisations, such as under the authority of Chapter VII of the UN Charter, a State may also take individual countermeasures, or as a group of States. Some examples of such countermeasures are provided in Article 54.

Part Four

GENERAL PROVISIONS

contains a number of general provisions applicable to the articles as a whole, specifying either their scope or certain matters not dealt with (Articles 55 – 59). The provisions make clear that where a matter dealt with in the Articles is governed by a special rule (*lex specialis*, e.g. treaties) *the latter prevail* (Article 55), and that the Articles are not exhaustive (Article 56). Article 57 *excludes from the scope of the Articles questions concerning the responsibility of international organisations and of States for the acts of international organisations. It is also made clear that the Articles are without prejudice to any question of the individual responsibility (Article 58), or to the provisions of the UN Charter (Article 59).*