<u>Illegality of Israel's presence in the Palestinian Gaza Strip and West Bank, including East Jerusalem, in the light of the 2024 *Occupied Palestinian Territory* Advisory Opinion of the International Court of Justice, and consequences for third States and the European Union</u>

Legal Opinion

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1 December 2024

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<u>Executive Summary</u>

Introduction

This opinion explains what the legal consequences are for 'third States'—all States other than, in this context, Israel and Palestine—including European Union (EU) states, and the EU itself, of Israel's violations of international law in maintaining its presence in the Palestinian West Bank, including East Jerusalem, and Gaza Strip, hereinafter the Occupied Palestinian Territory (OPT), in the light of the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* Advisory Opinion of the International Court of Justice (ICJ) of 19 July 2024 (*OPT* Advisory Opinion), and the subsequent resolution of the UN General Assembly of 13 September 2024, affirming this Advisory Opinion and implementing its findings.

Illegality of Israel's presence in the OPT

Israel's <u>presence</u> in the OPT is, <u>in and of itself</u>, illegal as a violation of the international law of self-determination and the international law on the use of force, the latter violation constituting aggression, and including a violation of the prohibition of the purported acquisition of territory, a.k.a. 'annexation', through the use of force. This is 'existential' illegality—the very existence of Israel's presence is illegal. Such illegality is distinct from 'conduct-based' illegality, which is also occurring—the way Israel <u>conducts</u> itself through its presence in the OPT is also illegal (for example, maintaining and expanding settlements, perpetrating racial discrimination generally, and apartheid in particular, and subjecting the Palestinian people to further abuses, now, in Gaza, of an extremity amounting to genocide, war crimes and crimes against humanity).

Consequence of illegality: invalidity

The illegal nature of Israel's presence in the OPT necessarily means that, a general matter, everything that Israel has done and is doing there—including, in the case of certain parts of the West Bank, decisions involving the full-spectrum of territorial administration matters, from the question of land ownership to issues of cultural heritage—on whatever basis, is legally invalid. The invalidity of Israel's acts through its presence in the OPT is qualified insofar as this is necessary to uphold the human rights of the individuals in the territory.

Primary consequence of illegality for Israel: requirement of immediate withdrawal

Various legal consequences for Israel follow from the illegality of its presence in the OPT. The focus of the present opinion is the primary consequence: the illegality must end, which in this case means Israel must end its presence. The ICJ held that the Israeli presence in the OPT must be brought to an end "as rapidly as possible". The General Assembly stipulated that it should be brought to an end "without delay", and "no later than 12 months" from 13 September 2024.

The inextricable link between the Israeli presence in the OPT and the Israeli state generally

The Israeli presence in the OPT is linked to the Israeli state, including its military, and the Israeli economy and society, including cultural, sporting and educational life, in a complex and multifaced manner so as to be factually and legally inextricable. In consequence, when it comes to the behaviour of third States, and the EU, and all other actors, in their relations with the Israeli state, including the Israeli military, the Israeli economy, and other Israeli actors, including Israeli companies, and universities, it is impossible, because of the way things operate, to meaningfully disaggregate relations that are, one way or another, connected to the Israeli presence in the OPT, and relations that are entirely free of such a connection. When it comes, then, to the obligations that third States and the EU must comply with in these relations as a consequence of the illegal nature of the presence, such obligations have to address the relations *as a general matter*.

Legal duties of third States and the EU

Third States and the EU have three legal duties to suppress Israel's violations of international law in maintaining its presence in the OPT. These are:

(1) A positive duty to bring Israel's illegal presence in the OPT to an end, through both individual and joint, co-operative, means, and a related obligation to co-operate with the UN to put into effect any modalities promulgated by the General Assembly and the Security Council to ensure the end of Israel's presence in the OPT and the full realization of the Palestinian right to self-determination.

No particular form of action, whether individually or in co-operation with other third States and international organizations, is prescribed by international law, given the multiplicity of possibilities that exist. One option is to adopt sanctions against Israelis, including government officials, involved in the conduct of the unlawful presence. This may extend to freezing bank accounts and assets abroad, and travel restrictions.

(2) A negative duty not to recognize as lawful the existence and continuation of Israel's illegal presence in the OPT.

Fundamentally, third States and the EU are required not to recognize the validity of Israel's presence in the OPT as a general matter, in and of itself, since to do so would imply that this presence is lawful, breaching the obligation not to recognize it as such. In consequence, third States and the EU must not recognize as valid anything Israel has done through its exercise of authority in the OPT, subject to the aforementioned exception concerning recognizing the validity of acts necessary to safeguard individual human rights. This requires a profound shift of emphasis, from an assumption that Israel's exercise of authority in the

OPT is valid, and focusing only on whether or not, in exercising this authority, Israel violates international humanitarian law. The assumption on which this approach rests is contrary to the legal position on invalidity, and adopting the approach is therefore a breach of the obligation of non-recognition of this invalidity (or put differently, a breach of the obligation not to treat the presence as valid). This obligation therefore requires third States and the EU to shift their emphasis, from non-recognition of the legality of illegal conduct only, to also non-recognition of the legality of the presence itself.

The general obligation not to recognize the Israeli presence as legally valid also includes not recognizing as valid Israel's justificatory claims, whether expressly or impliedly, for its presence in the OPT, of whatever kind. Such claims would include self-defence, and the enjoyment of sovereignty.

Underlying the requirement not to recognize any sovereignty claims by Israel is a requirement that third States and the EU must to hold to the general position that the OPT is not the sovereign territory of Israel. They must not, therefore, recognize any claims to sovereignty by Israel over any parts of the OPT—effectively changing the pre-1967 borders between Israel and the OPT in an expansionist direction in favour of Israel—unless such claims are agreed to, on a valid international legal basis, by the Palestinian people. They must also not recognize the validity of any action which implies or furthers such claims, for example efforts to change the demographic composition of the OPT. They also have, in effect, a positive obligation to ensure that, in their dealings with Israel, in any instance necessary to comply with this obligation of non-recognition, they distinguish between, on the one hand, the territory of Israel, and, on the other hand, the OPT. Examples of the practical implications of these obligations are:

- No diplomatic or consular relations generally with Israel which imply the legality of Israel's presence (in general, and on the basis of the enjoyment of sovereignty in particular) in the OPT.
- No recognition of Israel's illegal presence in OPT in the establishment and maintenance of diplomatic missions to Israel in particular.
- No treaty relations generally that imply an Israeli right (including but not limited to a right based on the enjoyment of sovereignty) to act with respect to all or part of the OPT.
- No invoking or applying existing treaties or treaty provisions, if any, with Israel where it purports to act on behalf of or concerning the OPT.
- No dealings, including economic or trade dealings, that entrench the Israeli presence in the OPT.

  On this subject, the *OPT* Advisory Opinion and the General Assembly implementing resolution stipulated an obligation to abstain

> …from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory....

Given how the economic dimensions of the Israeli presence in the OPT are inextricably linked to the Israeli economy generally, *all* economic and trade dealings with Israel 'concern', one way or another, all or parts of the OPT, and *all* such dealings 'may' entrench the presence. Third States and the EU must, therefore, adopt a *complete* reciprocal trade (including arms), finance, investment, scientific, technological, audiovisual, cultural (including tourism), educational and sporting embargo against Israel, including but not limited to an embargo of products from settlements.

- Take positive steps to prevent trade or investment relations that assist in the maintenance of the illegal Israeli presence in the OPT.
- No recognition of any economic exploitation by Israel of the resources in the OPT.
- Take positive steps to ensure nationals, and other non-state actors, including companies and other legal entities under their jurisdiction, do not recognize the situation created by the illegal presence

  This requires the following activities to be prohibited:

  1. All travel to Israel, including for the purposes of business, tourism, cultural and sporting activities, education and other academic activities including research, university exchanges, conference attendance, employment, residence, service in the armed forces.
  2. All trade (including in arms), investment and any other forms of financing, technology transfer, and provision of charitable support, with the Israeli state and Israeli entities, including universities.
  3. All other forms of collaboration with the Israeli state and Israeli entities, such as science and technology collaboration, sports games, cultural events, university exchanges and partnerships.

(3) A negative duty not to aid or assist in the maintenance of Israel's illegal presence in the OPT

This obligation is distinct from the more generally-applicable, narrowly-relevant rule from the international law of State responsibility, covering any and all violations of international law by Israel, that a third State is legally responsible if it aids or assists Israel in the commission of one or more of these unlawful acts, *and such aid or assistance is given with a view to facilitating the illegality*. The issue here (a special obligation arising as a consequence of particular nature of the obligations being breached) is, more simply, an obligation not to provide aid or assistance that will enable the illegal Israeli

presence to be maintained. Whether or not the intent behind this provision is to support illegality is irrelevant.

States are prohibited from providing any and all aid or assistance to Israel in maintaining its presence in the OPT. The focus is on the existence of the presence itself, not only how it is being conducted. Given the impossibility of meaningfully distinguishing between such aid/assistance that would end up supporting, one way or another, the Israeli presence in the OPT as distinct from Israel's other activities, including within Israel, there cannot be any aid/assistance to Israel *at* all. A complete embargo on all forms of aid/assistance to Israel as a general matter is therefore required.

On the issue of military aid and assistance in particular, given the way the conduct of the presence in the OPT is inextricably linked to the operation of the Israeli military system as a general matter, there can be no aid or assistance to Israel's military *at all*. Moreover, given that it is the military *presence* in the OPT, in and of itself, that is unlawful, the ban has to cover *all* elements of aid that supports the Israeli military, not just aid covering matters such as arms that can be and are being used to perpetrate violations of international humanitarian law.

When it comes to trade, investment, and scientific, technological, cultural, educational and sporting relations, it is necessary, as with the obligation of non-recognition, to implement a complete trade (including arms), finance, investment, scientific, technological, audiovisual, cultural (including tourism), educational and sporting embargo, operating reciprocally, on Israel as a general matter (so including, but not limited to, settlements) in order to ensure that trade, investment and scientific, technological, cultural, educational and sporting relations do not end up assisting in the maintenance of the illegal Israeli presence in the OPT.

Third States must exercise their national legal jurisdiction to regulate their own nationals, and all other non-state actors, including companies and other entities, in their territorial jurisdiction, to prevent them from providing any aid or assistance to the Israeli presence in the OPT. This requires the same ban as outlined above in the context of the obligation of non-recognition.

Legal rights of third States and the EU to invoke the illegality of Israel's presence in the OPT

Given that the norms violated by the existence of Israel's presence in the OPT—the right of self-determination and the prohibition of aggression—have *erga omnes* status, all States, and the EU, have a legal right to invoke the illegal nature of this presence, and call upon Israel to bring it to an end immediately. They also have the legal right to invoke any breaches by other third States of the aforementioned suppression duties (2) and (3) (the obligations not to recognize or aid or assist Israel's illegal presence), and likewise call for these breaches to end immediately. These rights are vested in all States individually, and can be exercised individually and collectively, including, in the case of EU States, through the EU.

Significance for the EU-Israel Association Agreement

The EU-Israel Association Agreement was adopted in 2000. At that time, the predominant focus within the EU was only on illegality in the OPT in terms of how Israel conducted the occupation, rather than also the occupation being itself illegal. When the focus shifts to existential illegality, as is now demanded by the *OPT* Advisory Opinion and the implementing resolution of the General Assembly, more fundamental and wide-ranging illegality is at issue. Moreover, as indicated, there is a complex, inextricable relationship between all facets of the Israeli state, economy, and society with the presence at this more general, wide-ranging level, which makes it impossible to meaningfully disaggregate, so as to identify areas where co-operation is possible without recognizing, or aiding and assisting, in the illegal presence. Hence, duties (2) and (3) mean that there cannot be co-operation as a general matter. Indeed, as indicated, they require the adoption of a complete, reciprocal, trade (including arms), finance, investment, scientific, technological, audiovisual, cultural (including tourism), educational and sporting embargo against Israel.

The EU-Israel Association agreement is, therefore, fundamentally incompatible with this new (to many EU States and the EU itself), authoritatively-established understanding of the true nature of the illegal character of the Israeli presence in the OPT. In particular, most of its provisions are now incompatible with legal duties (2) and (3): viz. those that cover free trade, scientific and technological co-operation, economic co-operation, cooperation on audiovisual and cultural matters, information and communication, and social matters.

The EU-Israel Association agreement must, therefore, be terminated, in order to bring the actions of EU States, and the EU itself, in line with their obligations in international law as set out herein.

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1. Introduction

2. This opinion explains what the legal consequences are for 'third States'—all States other than, in this context, Israel and Palestine—including European Union (EU) states, and the EU itself, of Israel's violations of international law in maintaining its presence in the Palestinian West Bank, including East Jerusalem, and Gaza Strip, in the light of the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* Advisory Opinion of the International Court of Justice (ICJ) of 19 July 2024 (*OPT* Advisory Opinion),[1] and the subsequent Resolution of the UN General Assembly of 13 September 2024, affirming this Advisory Opinion and implementing its findings.[2]

3. I acted as Senior Counsel and Legal Advisor to the League of Arab States in the aforementioned Advisory Opinion proceedings.[3] The ideas in the submissions I made in that capacity were based on my academic work.[4] The present opinion is partly based on these ideas. I was commissioned to write it by the Palestinian human rights NGO Al Haq Europe. It has been prepared in my capacity as a university academic expert, and in my own name, only, not also in the name of any other party, including Al Haq Europe, University College London, or the League of Arab States. The opinion has been provided for informational purposes only, to assist any interested parties who wish to understand better the legal implications of the Advisory Opinion. It should not be relied upon, and no responsibility is accepted for any such reliance.

4. As far as the EU is concerned, the present opinion focuses only on the rules of general international law applicable universally, to all States. Given that the rules apply to EU States, these States must comply with them not only in their bilateral relations with Israel, but also in any joint action that they take under the EU umbrella with Israel. Likewise, insofar as the EU itself acts as a distinct legal person, it must comply with these general rules in its relations with Israel, in order to ensure that any action it takes stays within the limits of the competence it has been given by its member States, and also to ensure that it does not place those States in a position where they are required to act themselves, or are part of an organization itself that is acting, in a manner that is unlawful as far as their own obligations are concerned. The EU is, therefore, 'bound' to comply with these obligations on this indirect basis. Much of what is covered in the present opinion is therefore drawn from the general framework applicable to States only, and is invoked in the context of the

[1] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, International Court of Justice, 19 July 2024 (hereinafter OPT Advisory Opinion).

[2] GA Res. A/ES-10/L.31/Rev.1, 13 September 2024 (hereinafter GA Res. A/ES-10/L.31)

[3] See Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for Advisory Opinion), International Court of Justice, Written Submission by the League of Arab States, 20 July 2023; Written comments on the written statements made by States and organizations by the League of Arab States, 25 October 2023; Oral Statement by Dr Ralph Wilde, Senior Counsel and Advocate, League of Arab States, 26 February 2024 (video here; verbatim record here (from page 25); see also here).

[4] Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (OUP, 2008); 'Using the master's tools to dismantle the master's house: international law and Palestinian liberation' *Palestine Yearbook of International Law* (2021); 'The international law of self-determination and the use of force requires an immediate end to the occupation of the Palestinian West Bank and Gaza', Policy Brief (2022); 'Is the Israeli occupation of the Palestinian West Bank (including East Jerusalem) and Gaza 'legal' or 'illegal' in international law?', Legal Opinion (2022); 'Tears of the Olive Trees: Mandatory Palestine, the UK, and accountability for colonialism in international law', *Journal of the History of International Law* (2022); (with Shawan Jabarin) *British Reparations Owed to the Palestinian People*, Position Paper, Al Haq (2023); 'Israel's War in Gaza is Not a Valid Act of Self-defence in International Law,' *Opinio Juris* blog (2023).

position of the EU, in addition to States, on the foregoing basis (i.e. being binding indirectly). In addition to this, some relevant obligations that apply to States are understood to also apply directly to the EU, as an international organization, in its own right. Consequently, the EU must also comply with them on this alternative, direct basis, in addition to the indirect basis derivative of member States' obligations. For the purposes of the present opinion, it is unnecessary to clarify the full scope of the relevant rules of international law applicable to the EU in its own right, since in any case these will constitute a sub-set of the rules also applicable to member States, *mutatis mutandis,* and are therefore effectively addressed within the broader coverage of the State rules—rules which are, as indicated, in any case indirectly to be followed by the EU. Nonetheless, reference will be made to one basis on which one particular rule is binding on the EU in its own right. The rule in question is the obligation not to recognize the validity and legality of the Israeli presence in the OPT. This is derived from the nature and character of the violations perpetrated by Israel in maintaining this presence, and was affirmed to be directly applicable to international organizations by the ICJ in the *OPT* Advisory Opinion.

5. The *OPT* Advisory Opinion follows two decades after the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion of the ICJ of 2004 (hereinafter *Wall* Advisory Opinion).[5] As some of the determinations in that earlier Advisory Opinion, notably concerning the obligations of third States, are built upon in the *OPT* Advisory Opinion, these are referenced where relevant. Likewise, other situations that are analogous, in certain respects, to that of Israel in the OPT, will also be invoked where useful. This includes, notably, the situation of South Africa's presence in what was originally called South West Africa, later renamed Namibia, which was illegal in international law on one of the two bases on which, as will be explained herein, Israel's presence in the OPT is illegal—as a violation of self-determination. Because of this, some of the determinations made about the legal consequences of this presence for third States, by both the UN General Assembly and Security Council, and the ICJ in the *Namibia* Advisory Opinion, are transferrable, *mutatis mutandis*, to the subject of the Israeli presence in the OPT, as is reflected in the references made to some of these determinations by the ICJ in the *OPT* Advisory Opinion.[6] The present opinion will follow the Court's approach in this regard, on the same basis, drawing on some of the same, and some additional, determinations, where relevant.

2. Law: applicable law, two aspects to the 'legality' question, and mistaken, limited approach to this question, rejected as inadequate by the International Court of Justice

2.a. Applicable law

6. This opinion focuses on some (not all) of the core areas of international law that have a special fundamental status. They are norms of *jus cogens*, peremptory norms, meaning

[5] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion, I.C.J. Reports 2004 (hereinafter *Wall* Advisory Opinion).

[6] The Advisory Opinion is *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (19*70), Advisory Opinion, 21 June 1971 (1971) ICJ Rep., p. 16 (hereinafter *Namibia* Advisory Opinion).

they cannot be limited by other areas of international law, and, as will be addressed further below, serious violations of which giving rise to special obligations on the part of third States and international organizations, including the EU. These norms also operate *erga omnes*, meaning that all states have a legitimate interest in seeing them complied with, something that will also be addressed further below. These legal rules are:

(1) The right of self-determination (which exists in customary international law and common article 1 of the two global human rights Covenants, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), thereby forming part of international human rights law (IHRL)).

(2) The prohibition on the (extraterritorial) use of force other than in self-defence (or authorized by the UN Security Council), which, if violated, constitutes aggression.

(3) The prohibition of genocide.

(4) The prohibition of crimes against humanity.

(5) The core/basic protections of the laws of war, a.k.a. international humanitarian law (IHL), including occupation law, which, when violated, constitute 'war crimes'.

(6) The prohibition on apartheid.

(7) The prohibition on racial discrimination in general (beyond what is covered by the prohibition on apartheid).

(8) The prohibition on torture and inhuman and degrading treatment in IHRL (a prohibition of this is also part of legal area (5)).

7. When it comes to the legal issues implicated in the question of the legality of Israel's presence in the OPT, and the legality of how Israel conducts this presence, all these areas of law operate at a state level, in terms of Israel's obligations, the rights of the State of Palestine and the Palestinian people as a self-determination unit, the rights of Palestinian individuals, and, in a secondary way, the rights and obligations of third States. Also, beyond the scope of the present opinion, breaches of (2)-(8) give rise to individual criminal responsibility ((6) and (7), at the International Criminal Court in the aggravated form of taking place in the context of a systematic attack against a civilian population, thereby falling within (4)).

2.b. Two aspects to the question of legality/illegality relating to Israel's presence in the OPT

8. The question of legality/illegality relating to Israel's presence in the OPT has two elements.

(1) The first element is whether the *existence* of the presence in the OPT, in and of itself, has a legal basis. If it does not, then it is *existentially illegal*. As affirmed by the ICJ in the *OPT* Advisory Opinion, this question falls to be determined according to the law of self-determination (in its external manifestation) and, because the presence constitutes a use of force, the law on the use of force – legal areas (1) and (2) above.

(2) The second element is whether the way Israel *conducts* its presence in the OPT is in conformity to international law. Various areas of international law regulate the exercise of authority by a State over people in such contexts – these include legal areas (1) (self-determination in its internal manifestation), (3)-(8) above, and other international legal norms that do not have the special status of these areas of law, viz. international environmental law, and those areas of IHL, including occupation law, and IHRL, beyond the sub-sets of these legal regimes that have this special status.

9. As will be explained further, the present opinion is limited to the first element.

2.c. The current approach to the legality question by some States, notably western States, including members of the EU and the EU itself, and international human rights NGOs

10. A common approach to the legality question can be identified in the policies of some States, notably western States, including members of the EU, and the EU itself. According to this approach, although, on the basis of legal area (1), the Palestinian people have a right of external self-determination, i.e. a right to determine their international status (e.g. being a state), and be self-governing on the basis of this status, and that implementing this right requires the end of Israel's presence in the Palestinian territory, the realization of this—when it happens, and on what basis—depends, legally, on a peace agreement being reached between the Israelis and the Palestinians. The point here is not that Israel is only likely to end its presence if this is something it consents to in a peace agreement. Rather, it is that international law does not *require* the presence to end unless and until there is such an agreement. Implied in this approach is that, in international law, external self-determination means a right to become self-governing only if and when there is a peace settlement agreed to by the State preventing the realization of this right. And, relatedly, that if this peace settlement is adopted, the provisions of this agreement should be the only international legal consideration when it comes to the question of what the territorial scope of the self-governing unit should be.

11. Thus, the position of third States, including EU states, and the EU, concerned about the Israeli-Palestinian situation, is that this concern should focus only on efforts to enable negotiations that can bring about a peace agreement. In the meantime, the Israeli presence in the OPT can remain, without this—the presence itself (as opposed to how it is conducted)—involving any violation of international law.

12. The only remaining issue here is that, given that under this approach, the status of the OPT is to be determined by a peace agreement, Israel cannot unilaterally annex any part of this territory—assert a claim to sovereignty, i.e. a claim that this territory is now part of the sovereign territory of Israel. Thus all western States other than, possibly, the USA, including all EU States, do not recognize Israel's claim to sovereignty over East Jerusalem (which is part of the West Bank component of the OPT) and claim to seek to act in a way that is consistent with this position, action which is invoked to explain why they, unlike the USA, have located their embassies to Israel outside Jerusalem (actually reflecting a position that the status of Jerusalem as a general matter—i.e. both West and East—is to be determined by a peace agreement). (The position of the USA has a degree of ambiguity to

it, notably when it comes to whether the location of its embassy in Jerusalem is necessarily a recognition of Israeli sovereignty over Jerusalem generally rather than West Jerusalem only. A full treatment of this is beyond the scope of the present opinion).

13. This position on East Jerusalem is limited to a rejection of any claim that Israel's presence there is pursuant to, and reflective of, the enjoyment of sovereignty. It is not a rejection that, more generally, Israel has no legal right to exercise this presence at all. Nor is it, more specifically, a position that, given that the ostensible basis on which Israel operates its presence in East Jerusalem has no legal basis, and is, indeed, illegal (an attempt to annex territory through the use of force—a matter to be addressed further below), this *presence* is therefore, in and of itself, illegal.

14. Likewise, insofar as the official position of Israel has shifted in recent years towards an assertion of sovereignty extending beyond East Jerusalem to the rest of the West Bank (to be addressed further below), the position of western States (in this case including the USA at the time of writing), including EU States, and the EU itself, is that Israel is not sovereign there and that any such claim is therefore invalid, and that the territory is not sovereign Israeli territory. As with East Jerusalem, this position is limited to a rejection of the particular basis on which Israel operates its presence in the rest of the West Bank. It is not also a rejection of Israel's operation of this presence itself, including such a rejection via the illegality of the purported-annexationist basis on which the presence may operate.

15. With the election of President Trump to a second term, there is a possibility that the USA may recognize Israel's claim to sovereignty over all or part of the rest of the West Bank, beyond East Jerusalem, and also, even, all or part of the Gaza Strip. If other western States, including EU States, and the EU itself, maintain the foregoing position, their response to this will be limited to a disagreement with and, possibly, opposition to, the USA recognition.

16. Other than the foregoing partial treatment of the illegality of the basis on which Israel claims to exercise authority in East Jerusalem (possibly not followed by the USA when it comes to East Jerusalem) (which may, in the future, be expressly invoked as applicable to other parts of the OPT if recognition by the USA of any Israeli purported annexation of these other parts is forthcoming) on the part of western States other than the USA, the current approach, in this case of all western States, including the USA, is that nothing (further, for all these states other than the USA) is required on their part when it comes to the first element of the legal question—the legality of Israel's presence in the OPT, in and of itself—beyond a general effort to try to promote negotiations for a peace settlement.

17. For these States, the main, day-to-day significance of international law is the second element of the legal question: whether or not Israel's treatment of the Palestinian people, and the conduct of its presence more generally, in the OPT is lawful according to the regulatory framework. This, then, becomes the exclusive focus of attention when it comes to the question of compliance with international law. In consequence, the position of third States, including EU States, and the EU itself, is only to address, essentially, how ostensibly 'humane' Israel's treatment of the Palestinian people in the OPT is (for example criticising house demolitions, or lack of humanitarian access) and/or whether Israel is, in other respects, breaching the regulatory framework (for example, criticising the expansion of settlements). Typically, this is itself selective when it comes to the full range of matters

where illegality is, actually, evident (e.g., not covering apartheid, and, when it comes to settlements, calling only for new settlements not to be created (and existing settlements not to be expanded) and not also for existing settlements to be dismantled).

18. A related approach can also be identified on the part of some such States, the EU, and also some international human rights NGOs, when these actors address the question of legality through what they understand to be a 'human rights' framework, including, what they claim, is the framework of IHRL. According to this approach, the only matters to be addressed are the second element in the legality question: is the way Israel treats the Palestinian people compliant with human rights standards (including, for some international human rights NGOs, the prohibition of apartheid—in this respect going beyond the partial focus of most western States). The first element of the legality question—whether Israel should be exercising authority over the Palestinian people in the first place—is, according to this approach, not a human rights question. As far as international law is concerned, this approach is furthered through an approach to IHRL that views self-determination as somehow not part of this area of law, or, even if it is (a position that is hard to deny given that self-determination is provided for in common Article 1 of the two global human rights Covenants), the right is somehow not justiciable (cannot be interpreted and applied by a court), or its significance to the question of whether or not the Israeli presence in the OPT is somehow contested/unclear, and/or the right only covers 'internal' self-determination, i.e. how the Palestinian people are treated within the framework of the Israeli operation of its presence in the OPT. Thus to focus on the legality of this presence in terms of IHRL is, like a focus on such legality in terms of IHL (including occupation law)—a focus on the two areas of law together in this context is now the common 'humanitarian' approach—is to be concerned with the legality of how Israel treats the Palestinian people in the OPT only.

2.d. The challenge to this approach, and how it was rejected

19. I argued, in an academic publication, a related policy brief, and a legal opinion, that the foregoing approach is incorrect: the Israeli *presence* in the OPT is illegal in the law of self-determination, in its external manifestation (including as this law is enshrined in common Article 1 of the two global human rights covenants), and the law on the use of force, in the sense that it has no legally-valid basis to operate and must, therefore, be terminated immediately.[7] In consequence, I argued that the focus by third States, including EU States, and the EU itself, and international human rights NGOs, on the question of the legality of Israel's presence in the OPT has to move beyond only addressing legality of *conduct*, to also focus on legality of *existence*, with implications for their own behaviour. (These implications are set out in detail in the following sections.)

20. When I put this position to officials of western States, and the EU, for example at a meeting I had in Ramallah in 2022 with Sven Kühn von Burgsdorff, the then EU representative to the Palestinian territories, who was noted for the extent to which he was willing to vocally

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[7] Ralph Wilde, 'Using the master's tools to dismantle the master's house: international law and Palestinian liberation' *Palestine Yearbook of International Law* (2021); 'The international law of self-determination and the use of force requires an immediate end to the occupation of the Palestinian West Bank and Gaza', Policy Brief (2022); 'Is the Israeli occupation of the Palestinian West Bank (including East Jerusalem) and Gaza 'legal' or 'illegal' in international law?', Legal Opinion (2022).

raise certain issues of illegality of *conduct*, I was told that ‘a court has not determined this’ (such States and the EU have had no problem addressing the question of the legality of Russia’s invasion and occupation, including its purported annexation of parts, of Ukraine in terms of not only its conduct, but also the very operation and existence of Russia’s force-enabled presence in Ukrainian territory in and of itself, without this fundamental matter having been determined by a court).

21. When I put this position to officials of international human rights NGOs, I was told that they were reluctant to address it not because it was incorrect, but because of other policy considerations that required them to avoid it (e.g. pressures from donors, and fears that addressing a particular situation of self-determination would open a Pandora’s box that would require them to address other such situations elsewhere).

2.e. The World Court, and then the General Assembly, intervenes and cannot be ignored

22. The context in which the merits of the position I was advancing has changed radically. A court, and not just any court, the World Court—the Principal Judicial Organ of the United Nations—considered it in the *OPT* Advisory Opinion of 19 July 2024.[8] The Court held that Israel’s presence in the OPT was, in and of itself, illegal, and must therefore be brought to an end “as rapidly as possible”, and that this had important implications for third States in terms of their own behaviour.[9] The United Nations General Assembly subsequently endorsed this finding of existential illegality, in a resolution adopted on 13 September 2024, calling upon Israel to end its presence in the OPT “without delay”, and “no later than 12 months” from the adoption of its resolution.[10]

23. This finding of existential illegality, and its consequences for third States, which will be set out in more detail in the following two sections, is, and was based on, my position. (My position was adopted by the twenty-two States of the League of Arab States as their own, who asked me to put it to the Court for its adoption, which I did, as indicated serving as their Senior Counsel and Advocate in the case.[11] My position, either in its original formulation, or as it was set out in the written statement of the League of Arab States, was also adopted by many of the other parties in the case and advanced in their written and oral statements).

24. The *OPT* Advisory Opinion is non-binding in the sense that, as a decision of a court, it is not a ‘judgment’ that, by virtue of that status itself, parties to a case must comply with. Likewise, General Assembly resolutions making pronouncements on particular situations, including legal pronouncements, as here, are not legally binding. However, the law that the Court applied in the *OPT* Advisory Opinion, and the General Assembly affirmed in its

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[8] *OPT* Advisory Opinion, *supra.*

[9] *OPT* Advisory Opinion, *supra*; on existential illegality: paras. 261-2 and operative paragraph (3) at page 78; on ending the presence: para. 267 and operative paragraph (4), at page. 78.

[10] GA Res. A/ES-10/L.31, *supra*; on existential illegality: paras. 1 and 2; on ending the presence: para. 2.

[11] See Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for Advisory Opinion), International Court of Justice, Written Submission by the League of Arab States, 20 July 2023; Written comments on the written statements made by States and organizations by the League of Arab States, 25 October 2023; Oral Statement by Dr Ralph Wilde, Senior Counsel and Advocate, League of Arab States, 26 February 2024 (video here; verbatim record here (from page 25); see also here).

resolution, *is* binding. Thus the *OPT* Advisory Opinion is, essentially, an authoritative determination of what this binding law means. And it has been issued by, as indicated, the highest court in the world, comprising judges who are the some of the pre-eminent jurists of international law globally. The finding on existential illegality had been advanced by many of the parties in the case (as indicated, deploying arguments originating in my ideas), with only a very small minority of parties offering contrary arguments. It was adopted by the Court in the Advisory Opinion by eleven votes to four.[12] This was then backed up by the General Assembly, in a resolution passed with 124 votes in favour, 14 votes against, 43 abstentions and 12 members not voting.[13]

25. The determination on the existential illegality of Israel's presence in the OPT has been subject to near-universal acceptance by international law experts, whether through positive affirmation, or absence of criticism or objection. The few objections made, by a small number of US jurists, have been done on the basis of accusing the President of the Court, H.E. Judge Nawaf Salam, of bias in favour of the Palestinian people, and suggesting that this bias somehow led to a substantive finding that was legally incorrect. Such accusations do not offer any evidence for the bias (which they allege exists simply because of President Salam's Arab identity—he is Lebanese), nor do they explain what was incorrect in the substantive findings (instead, the *OPT* Advisory Opinion is simply dismissed, out of hand, *in toto*). Likewise, the accusations do not explain, in the light of how ICJ decisions are drafted, and the freedom judges have to agree or disagree with each other, including the President, how President Salam was able to obtain overwhelming support amongst his colleagues for a decision which, actually, they did not agree with and viewed to be legally incorrect. Nor do they explain how it was possible for this support to be forthcoming from these judges not only in their affirmation of the decision itself, but also repeated in the form of multiple express remarks in their separate individual and written statements. None of this makes any sense, and so cannot be taken as anything other than a crude, cheap and desperate attempt to undermine credibility of the substantive finding, via a racist slur and a wilful misrepresentation of how judicial decisions at that Court are made, recklessly undermining the Court and the international rule of law as a general matter into the bargain.

2.f. Grasping the nettle: what third States, including EU States, and international human rights NGOs, must now do

26. The consequence of the *OPT* Advisory Opinion, and the subsequent General Assembly resolution, adopting the position that the existence of the Israeli presence in the OPT is illegal, and must therefore be brought to an end "as rapidly as possible" (ICJ)[14] and "without delay", and "no later than 12 months" from 13 September 2024 (GA),[15] and determining various consequences of this for third States, as outlined further below, is twofold.

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[12] *OPT* Advisory Opinion, *supra,* operative paragraphs (3) and (4), page 78.
[13] https://digitallibrary.un.org/record/4061432?ln=en
[14] *OPT* Advisory Opinion, *supra*; on existential illegality: paras. 261-2 and operative paragraph (3) at page 78; on ending the presence: para. 267 and operative paragraph (4), at page. 78.
[15] GA Res. A/ES-10/L.31, *supra*; on existential illegality: paras. 1 and 2; on ending the presence: para. 2.

(1) In the first place, the correctness of the position on existential legality (from which the determination of the consequences for third States flows) is now beyond doubt. It is not just the view of one academic scholar any more.

(2) In the second place, the fact that the position on existential illegality and consequences for third States has been adopted by two of the Principal Organs of the United Nations—the plenary 'political' (State-comprising) organ, and the judicial organ—essentially, the world assembly of States, and the world court, ascribes to it a pre-eminent importance. In consequence, all States, and international human rights NGOs, must adopt the prioritization of the approach that this treatment of it reflects and requires: They must themselves expressly acknowledge this illegality and its legal consequences.

27. Overall, third States, including EU States, and the EU itself, and international human rights NGOs, cannot continue to behave as if they do not need to give account to the illegality of the very existence of Israel's presence in the OPT itself, and, in consequence, ignore the question of whether this has legal consequences for third States and the EU. If they wish to be faithful to their claim that what they do is based on international law, and, in the case of third States and the EU, they respect the existence of, and seek to comply with, their own legal obligations, they have to take in the full legal picture. The practice of cherry-picking issues of conduct-related illegality—e.g., settlements, house demolitions, preventing aid delivery—and focusing on these matters exclusively when it comes to the position they take on the legality of Israel's behaviour, and what implications this has for their own behaviour, has to end.

28. Thus, a more fundamental matter—the question of whether or not Israel should even exercise authority in the OPT in the first place—must be addressed. This is exceptionally challenging, because of its wide-ranging nature, and, as will be explained below, the implications it has when the consequences for third States and the EU are to be determined. However, the challenging nature of the legal position is an inevitable consequence of the challenging nature of the situation it relates to, which, it must be said, has been allowed to continue, for more than half a century, by all States, including those States, and the EU, who had within their power the ability to address it. Third States, the EU, and international human rights organizations may wish, for policy reasons, to avoid addressing these challenging aspects of the situation, but international law does not itself follow that approach. Indeed, when it comes to third States, and the EU, as will be explained below, international law actually requires them—via obligations they must comply with—to face up to it.

2.g. Selectivity of forthcoming coverage

29. Given the significance of what is at stake with this broader legal focus on the existential illegality of Israel's presence in the OPT, and the fact that the broader focus has hitherto been ignored by most western States, including EU States, and the EU itself, what follows is itself exclusively limited to explaining what the broader focus involves. As indicated, the Israeli presence in the OPT is also illegal in the way it is *conducted*. And the ICJ *OPT* Advisory Opinion, and associated General Assembly resolution, also addressed this

illegality. The following exclusive focus on existential legality and its consequences for third states is without prejudice to the question of illegality of conduct, and the consequence of that for third states.

3. Existential illegality

3.a. General position

30. As held by the Court in the *OPT* Advisory Opinion, the Israeli presence in the Palestinian territory is, in and of itself, illegal—i.e., its very existence is illegal—on two legal bases. Because of this illegality, it should be brought to an end "as rapidly as possible". [16] As indicated, the General Assembly articulated this as "without delay", and "no later than 12 months" from the adoption of its resolution in September 2024.[17]

3.b. Existential illegality 1: The law of self-determination

31. The first legal basis for the existential illegality of the Israeli presence in the OPT is the law of self-determination. The presence is, of its nature, a fundamental impediment to the ability of the Palestinian to exercise this right, and is, therefore, as the Court held, a violation of it.[18]

3.c. Existential illegality 2: the law on the use of force

32. The second legal basis for the existential illegality of the Israeli presence in the OPT is the law on the use of force—the *jus ad bellum*. This is the law that regulates whether and when states can use force outside their borders. As the Court affirmed, the Israeli presence in the OPT, as a military occupation, is a use of force.[19] It has been conducted there as a consequence of the 1967 war between Israel and Egypt, Jordan and Syria, during which Israel captured the Gaza Strip from Egypt and the West Bank from Jordan. The occupation was and is a continuation of the use of force that enabled its initial capture.

33. As the Court also affirmed, as a use of force, the legality of the existence of the presence in the OPT falls to be determined by the law on the use of force—the *jus ad bellum*.[20] The Court focused in particular on Israel using its control over the OPT to attempt to annex the territory—to seek to acquire sovereignty over it. The purported acquisition of territory through the use of force, when that territory is not *terra nullius* but the territory of another sovereign entity—in this case, the Palestinian people as a self-determination unit, and the State of Palestine (note, the former would be sufficient here)—is illegal in the law on the use of force (as well as being a violation of the right of self-determination). The Court held that Israel's presence in the entire OPT violated this rule in the law on the use of force,

[16] *OPT* Advisory Opinion, *supra*, para. 267 and operative paragraph (4), at page. 78.
[17] GA Res. A/ES-10/L.31, *supra*, para. 2.
[18] *OPT* Advisory Opinion, *supra,* paras. 230-243, 255-7.
[19] *OPT* Advisory Opinion, *supra,* para. 109 and 253.
[20] Id.

and, therefore, its presence in the OPT was existentially illegal on this basis, in addition to the other, violation-of-self-determination basis.[21]

34. However, this is not the only basis on which the existential legality of the Israeli presence must be addressed when it comes to the law on the use force. To say that the presence is an illegal use of force because of how Israel has sought to obtain an unlawful benefit from the use of force—to annex the territory—does not, by itself, rule out the possibility that there might be an alternative, lawful basis on which Israel could maintain the presence in the law of the use of force.

35. There are only two potential alternative bases that need to be addressed.[22]

36. The first potential basis for the presence to be compatible with the law on the use of force is an idea that there is *sui generis* right to maintain some elements of the presence in the OPT on the basis of the Oslo Accords. This would have had the effect of modifying the position arrived at by applying the *jus ad bellum* rules, providing a legal right where one would otherwise not exist. As I argued for the League of Arab States in the case, and also for the League before the International Criminal Court, this proposition has no credibility.[23] The ICJ dismissed the relevance of the Oslo Accords after brief consideration, in the process effectively ruling out the possibility that the Accords could form the basis for the presence to be lawfully maintained.[24]

37. The second potential basis for the Israeli presence to be compatible with the law on the use of force is on the basis of the legal right of self-defence within that law. Again, for the League of Arab States I explained to the Court how there was no legal basis to maintain the presence as a form of self-defence (summarized below).[25] On this issue, the Court made no comment in the *OPT* Advisory Opinion (although in the earlier *Wall* Advisory Opinion, the Court seemed to suggest that the right of self-defence in international law was not applicable to occupied territory).[26]

38. However, by disposing entirely of the question of existential legality in *jus ad bellum* terms on the basis of the illegality of Israel's attempt at annexation, having characterized the presence as a use of force whose legality therefore fell to be determined by the law on the use of force, the Court necessarily had to have already dismissed the validity of any alternative justification for this use of force. Had it not done so, it could not have concluded that Israel had no right to maintain its presence, and that the presence needed, therefore, to be brought to an end as rapidly as possible. The fact that the Court did not expressly reject

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[21] Id., paras. 157-179 and operative paragraph

[22] But see the discussion in the extract from the oral statement of the League of Arab States in the Advisory Opinion case, below.

[23] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for Advisory Opinion), International Court of Justice, Written comments on the written statements made by States and organizations by the League of Arab States, 25 October 2023, Section 3c; League of Arab States - Written Observations Pursuant to Rule 103, International Criminal Court, amicus curiae brief in the Situation in the State of Palestine, 6 August 2024, ICC Document ICC-01/18-282.

[24] *OPT* Advisory Opinion, *supra,* paras. 102, 140, 263.

[25] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for Advisory Opinion), International Court of Justice, Written Submission by the League of Arab States, 20 July 2023, sections 5, 11, 12; Written comments on the written statements made by States and organizations by the League of Arab States, 25 October 2023, section 7; Oral Statement by Dr Ralph Wilde, Senior Counsel and Advocate, League of Arab States, 26 February 2024 (video here; verbatim record here (from page 25); see also here).

[26] *Wall* Advisory Opinion, *supra,* para. 139.

the validity of any *jus ad bellum* justification such as self-defence does not alter the fact that, by characterizing the occupation as a use of force, and determining that, as such, it was existentially illegal and therefore needed to be brought to an end as rapidly as possible, this rejection was implied. Equally, although the Court's determination of illegality in the *jus ad bellum* was specific to the issue of purported annexation, its overall finding of existential illegality, applied to a presence it had expressly characterized as a use of force, means, of necessity, that the occupation is a use of force that lacks a valid legal justification, and, as such, is, as a general matter, illegal in the *jus ad bellum*.

39. There is a question as to the relevance of the Court's finding to the particular issue of the legality of Israel's military presence, through which it has used extreme force, constituting genocide, in the Gaza Strip since 7 October 2023. The *OPT* Advisory Opinion was requested by the UN General Assembly on 30 December 2022. The Court stipulated a deadline for the written statements of participants of 25 July 2023. This was all, then, before 7 October 2023. The deadline for the written responses to the written submissions was 25 October 2023, when Israel's use of extreme force in Gaza had begun. That extreme use of force then continued throughout the period of the oral hearing, 19-26 February 2024, and in the period between then, and when the *OPT* Advisory Opinion was issued, 19 July 2024, during which the Opinion was drafted. Some of the written responses and oral statements made by the participants in the case, including the written response and the oral statement I made on behalf of the League of Arab States, expressly referenced the question of the legality of Israel's use of force in Gaza after 7 October 2023, and the relationship between this and the legality of Israel's use of force there, and in the West Bank, since 1967 (outlined below).

40. The question put by the General Assembly used "policies and practices" as a catch-all term for the behaviour of Israel in (what the Court determined was limited to) the OPT, the legality of which it asked the Court to determine. The Court stated in the *OPT* Advisory Opinion that it

> …notes that the request for an advisory opinion was adopted by the General Assembly on 30 December 2022 and asked the Court to address Israel's "ongoing" or "continuing" policies and practices…Thus, the Court is of the view that the policies and practices contemplated by the request of the General Assembly do not include conduct by Israel in the Gaza Strip in response to the attack carried out against it by Hamas and other armed groups on 7 October 2023.[27]

It might be thought, from this statement,[28] that the Court's determination that Israel's presence in the OPT is illegal only runs up to 30 December 2022, and is without prejudice to whether or not circumstances after that date might lead to a different conclusion, notably when it comes to the legality of the presence in the Gaza Strip in particular. However, the Court followed its determination as to the illegality of Israel's presence with a consequent requirement that this presence needed to be brought to an end "as rapidly as possible".[29] The Court could not have made this statement unless, at the time when the *OPT* Advisory Opinion was issued, 19 July 2024, there was no lawful basis in the *jus ad bellum* for Israel

[27] *OPT* Advisory Opinion, *supra,* para. 81.
[28] See also *OPT* Advisory Opinion, *supra,* para. 284.
[29] *OPT* Advisory Opinion, *supra*, para. 267 and operative paragraph (4), at page. 78.

to maintain its presence in the OPT, including in the Gaza Strip. The implicit rejection of a general *jus ad bellum* justification for Israel to maintain its presence in the OPT (including the Gaza Strip) certainly applies, then, not only up to 30 December 2022 (preceded by a potentially 57-year period—to be addressed below), but also on 19 July 2024. Equally, for the General Assembly, in its resolution affirming and implementing the *OPT* Advisory Opinion, to call, on 13 September 2024, for Israel to end its "unlawful presence" in the OPT "without delay", and "no later than 12 months" from the adoption of the resolution, is the expression of a clear view that, on the basis of the determination made by the *OPT* Advisory Opinion, the presence is unlawful at that moment, hence the presence being characterized as such, and hence the requirement that the presence must end without delay.[30] The General Assembly follows this by stipulating that that it:

> *Demands* that Israel comply without delay with all its legal obligations under international law, including as stipulated by the International Court of Justice, by, inter alia:
>
> (a) Withdrawing all its military forces from the Occupied Palestinian Territory, including its airspace and maritime space.[31]

41. Although the Court did not provide an express explanation for its implicit finding that Israel's presence in the OPT is a use of force with no valid justification in the *jus ad bellum* as a general matter, I can offer the following rationale for such a finding. This rationale includes the period of Israel's use of force in Gaza after 7 October 2023, and thus fills in the potential temporal gap arising out of the uncertainty over what is covered by the *OPT* Advisory Opinion. This is my academic view, which was adopted by the 22 States members of the League of Arab States and certain other participants in the Advisory proceedings.[32] The League of Arab States coverage was contained in the written statement, the written response to the written statements of the other participants, and the oral statement (with the coverage of the situation in the Gaza Strip after 7 October 2023 in particular contained in the written response and the oral statement).[33] The oral statement set things out thus (paragraph numbers are different in the verbatim record, and footnotes are omitted):

> (1) Israel captured the Gaza Strip and West Bank from, respectively, Egypt and Jordan, in the war it launched against them and Syria. It claimed to be acting in self-defence, anticipating a non-immediately imminent attack. The war was over after six days. Peace treaties between Israel and Egypt and Jordan were subsequently adopted.
>
> (2) Despite this, Israel maintained control of the territory—continuing the use of force enabling its capture.

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[30] GA Res. A/ES-10/L.31, *supra*, para. 2.

[31] GA Res. A/ES-10/L.31, *supra*, para. 3.

[32] The academic view is set out in Ralph Wilde, 'Using the master's tools to dismantle the master's house: international law and Palestinian liberation' *Palestine Yearbook of International Law* (2021), Section III; Ralph Wilde, 'Israel's War in Gaza is Not a Valid Act of Self-defence in International Law,' *Opinio Juris* blog (2023).

[33] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for Advisory Opinion), International Court of Justice, Written Submission by the League of Arab States, 20 July 2023, Section 12; Written comments on the written statements made by States and organizations by the League of Arab States, 25 October 2023, Section 7; Oral Statement by Dr Ralph Wilde, Senior Counsel and Advocate, League of Arab States, 26 February 2024 (video here; verbatim record here (from page 25); see also here).

(3) Israel's 1967 war was illegal in the *jus ad bellum*—even assuming, *arguendo*, its claim of a feared attack, states cannot lawfully use force in non-immediately imminent anticipatory self-defence.

(4) Alternatively, assuming—again *arguendo*—that the war was lawful, the justification ended after six days. However, the *jus ad bellum* requirements continued to apply to the occupation as itself a continuing use of force. In 1967, with self-determination well established in international law, States could not lawfully use force to retain control over a self-determination unit captured in war, unless the legal test justifying the initial use of force also justified, on the same basis, the use of force in retaining control. Moreover, this justification would need to continue, not only in the immediate aftermath, but for more than half a century. Manifestly, this legal test has not been met.

(5) Israel's exercise of control over the Gaza Strip and West Bank through the use of force has been illegal in the *jus ad bellum* since the capture of the territory itself, or, at least, very soon afterwards.

(6) The occupation is, therefore…existentially illegal in the law on the use of force—an aggression—…as a general matter, beyond illegality specific to purported annexation…

(7) What, then, of Israel's current military action in Gaza? This is not a war that began in October 2023. It is a drastic scaling-up of the force exercised there, and in the West Bank, on a continual basis, since 1967. A justification for a new phase in an ongoing illegal use of force cannot be constructed solely out of the consequences of violent resistance to that illegal use of force. Otherwise, an illegal use of force would be rendered lawful because those subject to it violently resisted—circular logic, with a perverse outcome.

(8) More generally, Israel cannot lawfully use force to control the Palestinian territory for security purposes pending an agreement providing security guarantees. States can only lawfully use force outside their borders in extremely narrow circumstances. Beyond that, they must address security threats non-forcibly.

[…]

(9) A final potential basis sometimes invoked to justify continuing the occupation should be addressed. Occupation and human rights law…oblige Israel to address security threats in occupied territory. However, they only regulate the conduct of an occupation when it exists. They don't also provide a legal basis for that existence itself. Existential legality is determined by the law of self-determination and the *jus ad bellum* only. There is no "back door" legal basis for Israel to maintain the occupation through the imperatives of occupation and human rights law.[34]

42. The foregoing account characterizes the illegal use of force as an 'aggression.' The Court did not use this term aggression. However, the *jus ad bellum* violations it determined to be

[34] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for Advisory Opinion), International Court of Justice, Oral Statement by Dr Ralph Wilde, Senior Counsel and Advocate, League of Arab States, 26 February 2024 (video here; verbatim record here (from page 25); see also here).

taking place, both expressly—a purported annexation through the use of force—and impliedly—use of force in the form of an occupation without valid legal justification—are universally regarded to be paradigmatic examples of *jus ad bellum* violations constituting aggression, as President Salam stated in his separate Declaration to the *OPT* Advisory Opinion in the context of the annexation-related violation, and the link between this and the individual crime of aggression in the Rome Statute of the ICC.[35] In effect, then, Israel's use of force, enabling it to control the Palestinian Gaza Strip and West Bank, including East Jerusalem, since 1967, has been implicitly characterized as an aggression by the International Court of Justice.

3.d. Violations are 'serious'

43. As indicated above, the right of self-determination and the prohibition of aggression in international law are both norms that have fundamental *jus cogens* status. Israel's violations of these norms in this instance fall into a special 'serious' category, which has special consequences for third States and international organizations, including the EU, addressed below. A serious breach of a *jus cogens* norm of international law is defined in Article 41, paragraph 2, of the United Nations International Law Commission (ILC)'s Articles on State Responsibility as being "a gross or systematic failure by the responsible State to fulfil the obligation" concerned.[36] The commentary to the ILC Articles on State Responsibility notes:

> To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations, and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.[37]

44. Violations of the right of self-determination, and the prohibition of aggression, are of their nature 'systematic', necessarily involving an intentional violation on a large scale. Their violation by Israel is, thus, by definition 'serious', as the ICJ affirmed as far as the violations of self-determination are concerned.[38] The significance of this for the position of third States and the EU is addressed below.

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[35] *OPT* Advisory Opinion, *supra*, Declaration by President Salam, para. 13.
[36] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, U.N. Doc. A/56/10, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, (hereinafter 'ARSIWA'), Art. 41(2). See also International Law Commission, Draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries, adopted at its seventy-third session, A/77/10, 2022, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf (hereinafter 'ILC *jus cogens* Draft Conclusions & Commentaries'), Conclusion 19, para. 3, and ARSIWA, Part Two, Ch. III, Art. 41 Commentary; ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19 Commentary.
[37] ARSIWA, *supra,* Part Two, Ch. III, Art. 40 Commentary, para. 8.
[38] *OPT* Advisory Opinion, *supra,* para. 280.

4. Meaning and significance of existential illegality

4.a. Illegal exercise of authority as a general matter—not just the exercise of authority that violates IHL and IHRL

45. A fundamental consequence of the existential illegality of the Israeli presence in the OPT is that, necessarily, everything Israel does there lacks a valid international legal basis, and is an illegal exercise of authority, not just those things which violate the law regulating the conduct of the occupation. The fact that the substantive norms of the regulatory framework entitle and indeed require Israel to do certain things does not alter the more fundamental position that Israel lacks any legal authority to do anything, and whatever it therefore does is illegal, even if it is compliant with and pursuant to the rules of the conduct-regulatory framework. Thus, the United Nations Human Rights Committee observed in para. 70 of its 2019 General Comment 36 on the right to life in the ICCPR (to which Israel is a party) that a State engaging in a use of force that constitutes aggression—i.e., one that is existentially illegal in this way according to the *jus ad bellum*, as in the present case—violates *ipso facto* the obligation in the Covenant not to engage in the arbitrary deprivation of life.[39] In other words, in an illegal use of force, every violation of the right to life is, necessarily, 'arbitrary' (i.e. lacking in legally valid justification) and therefore illegal as a violation of the Covenant.

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

46. How can international law simultaneously say that the very existence of the Israeli presence in the OPT is illegal, and that Israel is required and entitled to do certain things during it? How can, for example, Israel be understood to be entitled to use necessary and proportionate force to promote public order in the OPT (according to IHL and potentially also IHRL) if its very presence there, including when it comes to public order functions, is an illegal use of force (according to the *jus ad bellum*)—and in consequence, following the logic of the UN Human Rights Committee, a particular public order action, involving lethal force that is necessary and proportionate, and otherwise also IHL compliant, is illegal in IHRL?

47. The law does this because it operates at two different levels, dealing with matters of relatively different significance, both of which have to be taken into account to arrive at the complete legal picture. The pragmatic objective of having IHL—to rein in the excesses of war regardless of whether it is understood to have a just cause—necessarily means its rules apply equally to a State engaged in a use of force that is lawful in *jus ad bellum* terms, and one that is unlawful in such terms. (IHRL is, similarly, applicable extraterritorially regardless of the legality of the activity at issue.) But this does nothing to alter the more fundamental matter being dealt with by the law on the use of force. Instead, a sub-set of the violence that is illegal as a matter of the *jus ad bellum* is then rendered unlawful a second time for that State, in the *jus in bello*, in order for there to be rules in operation that would also render the same type of violence, if perpetrated by a State acting otherwise lawfully under the *jus ad bellum*, illegal. Put more crudely, to ensure that neither State acts

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

in a manner considered to be 'inhumane', both States have to be subject to rules against 'inhumanity', even if, separately, the recourse to force by one such State is also to be treated as unjust on a more fundamental level, thereby prohibiting 'inhumane' and (supposedly) 'non-inhumane' acts alike by that State. This also has the benefit of enabling a more detailed set of requirements to be stipulated, with dedicated mechanisms of enforcement, operating universally between belligerents, for the sub-set of force that is to be impermissible on all sides.

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

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

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

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

4.d. Different actors and different obligations

51. It might be said that the foregoing legal position creates potential confusion and contradiction, with soldiers acting on the basis of IHL only (or IHL plus IHRL minus self-determination only), thus not following the complete set of standards that need to be taken into account to ensure lawful behaviour. However, as a general matter, individual soldiers are not the direct subjects of the areas of international law applicable here, whether the *jus ad bellum* or the *jus in bello*; it is the State of Israel. A sub-set of these obligations are then made directly applicable to them on the basis of individual criminal responsibility. This is, with one exception, limited to certain standards concerned with the conduct of the occupation only. And it is those standards only that are typically the basis on which soldiers are trained and which they are expected to follow in theatre. The exception to the foregoing occupation-conduct-specificity of international criminal responsibility is the crime of aggression, which does indeed deal with the existential illegality of the presence. However, this is limited only to individuals in senior positions who are in a position to determine its existence—in the words of the Rome Statute for the ICC, "in a position effectively to exercise control over or to direct the political or military action of a State".[40]

52. The effect of these differences is to disaggregate the legal framework in a manner that corresponds to the different determinative roles that actors play. Those in a position to determine the continued existence of the presence, whether in civilian or military positions, are potentially subject to an international criminal sanction—the crime of aggression—for their role in this continued existence. The State of Israel is also itself legally responsible here, as a matter of the *jus ad bellum* and the law of self-determination (setting aside the question of whether States can commit crimes), and, linking the individual and State responsibilities, it is for the leaders of that State to ensure it complies with that responsibility. If they do not do this, and the presence continues, then it is these individuals, and the State of Israel, who are legally responsible for the fact that the soldiers in the West Bank have no right to be there, and, within this, no right to exercise any form of authority—whether or not IHL-compliant—in the first place. These individual soldiers, by contrast, are not internationally-legally-responsible in this way, their responsibilities in international law being limited narrowly to areas of international criminal law concerned with IHL compliance, as reflected in the specificity of their training, and the limitations of their capacities within the chain of authority. Any deprivations of life by these soldiers pursuant to the occupation which does not involve a breach of IHL will still be an unlawful violation of the right to life in IHRL. But that violation will be one committed by the State in whose

[40] Rome Statute of the International Criminal Court, 1998, Art. 8*bis,* para 1.

name they acted (and, in terms of the crime of aggression, individual leaders). The State's obligation to ensure its agents do not act in this way so as to lead to violations of its obligations in IHRL would require the State to end the occupation. Thus, the constructive effect of the prohibition of the arbitrary deprivation of life in IHRL is to require the State subject to such an obligation not to engage in the illegal use of force. Equally, leaders seeking not to commit the crime of aggression must use their power to direct State policy in this way.

5. Consequence of existential illegality for the presence itself: invalidity and requirement that Israel terminate it

5.a. Introduction

53. The fundamental consequence of Israel's presence in the OPT being, in and of itself, illegal, for the presence itself, is twofold. In the first place, everything Israel does as part of this presence is invalid (subject to an exception to ensure the protection of individual rights). In the second place, Israel must terminate the presence immediately.

5.b. Invalidity

5.b.i. All unlawful acts are invalid

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

5.b.ii. Everything Israel does in the OPT is invalid because the presence is existentially illegal

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

56. The interplay between the existential illegality of the presence generally and what the applicable regulatory legal framework—chiefly, occupation law—permits and requires, needs to be addressed here. As indicated above, it is important to put things in their correct order, and not jump to what occupation law might permit and even require Israel to do as if somehow there is not a more fundamental matter concerning whether it should be engaged in the occupation in the first place which needs to be addressed first. Moreover, when attention turns to occupation law, it is necessary to interpret the meaning of this law in the context the broader, more fundamental legal position. So, for example, the occupation law rules requiring an occupier to maintain the status quo in occupied territory unless absolutely prevented have to be interpreted in the light of what is potentially at stake

if the status quo is altered—the right of self-determination of the Palestinian people—the existence of this right in international law, and the *jus cogens* nature of the right.

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

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

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

5.b.iii. Affirmations of invalidity by the UN General Assembly and Security Council, including as endorsed by the ICJ in the *OPT* Advisory Opinion

58. The invalidity of that which Israel has done which is illegal has been confirmed as such by the UN General Assembly and the Security Council. On settlements, for example, the General Assembly deemed Israel's establishment of settlements in the OPT to have "no legal validity".[41] The Security Council "determined that the policies and practices of Israel in establishing settlements in the Palestinian and Arab territories occupied since 1967 have

[41] GA Res. 2334, 23 December 2016, para. 1.

no legal validity".[42] On the broader annexationist, settler-colonial enterprise, as the ICJ indicated by quoting the following passage in the *OPT* Advisory Opinion, the Security Council found that measures taken by Israel to "change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, have no legal validity".[43]

5.b.iv. Individual rights, the 'Namibia exception', and settlers

59. Whereas everything done by Israel under the occupation has been and is invalid as a general matter, IHRL requires that certain consequences of this be treated as legally valid for individuals, if to do otherwise would violate their rights in IHRL. This requirement has its origin in the approach taken in a dictum by the ICJ in the 1971 *Namibia* Advisory Opinion, in the context of one of the key consequences of validity and invalidity—the position that should be taken by third States in terms of recognition, to be addressed below. In a paragraph cited in the *OPT* Advisory Opinion, the Court observed that:

> …the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[44]

60. This matter is complicated because of the presence of Israeli settlers in the OPT, whose rights in IHRL need to be correctly appraised. It is sometimes mistakenly suggested that the application of IHRL to Israel in the West Bank including East Jerusalem somehow enables such settlers to claim, on the basis of IHRL, things (e.g. land and real property) which they would otherwise have no right to and which in some cases have been purportedly acquired on the basis of administrative and judicial decisions by Israel made on a discriminatory basis and pursuant to overall authority that is illegal.

61. This is mistaken in multiple respects. The operative legal regime applicable to the Israeli presence is arrived at by taking into account IHRL together with the rules of IHL, including occupation law, which contains important normative distinctions between the Palestinian population, on the one hand, and Israeli settlers, on the other. Moreover, in any case, individuals do not have the human right to benefit from unlawful discrimination—quite the reverse, the breach of IHRL involved in that discrimination requires individuals benefiting from that breach to be deprived of the benefit. More generally, it is a basic legal principle inherent in the concept of law itself that if something is illegally taken from its owner, valid title cannot be passed on to a third party. Furthermore, most of IHRL, and certainly when it comes to freedom from interference in enjoyment of land and property, freedom of movement and freedom of residence, is concerned with context-specific balancing, of both conflicting rights and also between rights and legitimate restrictions on

[42] SC Res. 446, 22 March 1979, para. 1. See also SC Res. 452 (1979), 20 July 1979, preamble.
[43] SC Res. 465, 1 March 1980, preamble, quoted in the *OPT* Advisory Opinion, *supra,* para. 276.
[44] *Namibia* Advisory Opinion, *supra,* p. 56, para. 125.

such rights. Necessarily, contextualism means that sometimes very different substantive legal positions are arrived at in relation to superficially similar situations, in relation to different groups of people, because of the context and how this context cuts differently as between the different groups.

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

63. Applying the foregoing, the invalidity of Israel's acts through its presence in the OPT is qualified insofar as this is necessary to uphold the rights of the individuals in the territory. What then these rights mean will differ, *inter alia* depending on whether or not the individuals are Palestinian, or unlawful Israeli settlers. Some qualifications will apply in the same way between members of the two groups, for example when it comes to the examples given by the Court in the extract above—the registration of births, marriages and deaths. Others will have a very different substantive meaning as between members of the two groups as a consequence of the different legal position the groups are in and/or because, in the case of Israeli settlers, of the unlawfully discriminatory foundation for the establishment of the right. So, for example, when it comes to a legal process operated by the Israeli presence in the OPT that purports to vests title in land, the starting point for this will be invalidity. This will then be qualified in the case of any purported vesting of title in Palestinian owners, in order to ensure the protection of their valid rights. Conversely, a purported land confiscation from a Palestinian person conducted unlawfully and/or in a discriminatory fashion, paving the way for the purported vesting of title over the land in an Israeli settler, would remain invalid (both the purported confiscation, and the purported vesting of title) since there is no valid legal right enjoyed by an individual (in this case the Israeli settler) in existence that would require the *Namibia* exception to be applied.

5.c. Requirement to terminate the presence immediately

5.c.i. General duty

64. Various legal consequences for Israel follow from the illegality of Israel's presence in the OPT.[45] For present purposes the focus will be on the primary consequence of *cessation* only: the illegality must end, which in this case means Israel must end its presence so to end this act and so end the legal violations.[46] This duty is vital. Not only is it a necessary step on the path to eliminating the consequences of Israel's wrongful conduct. Also, it safeguards the continuing validity and effectiveness of the rules that have been violated. In this way, in the words of the Commentary to the ILC Articles on State Responsibility, it "protects both the interests of the injured State or States and the international community as a whole in the preservation of, and reliance on, the rule of law".[47]

65. As the ICJ indicated in the *Wall* Advisory Opinion, the duty of cessation "is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation".[48]

5.c.ii. Immediacy—general principle and application in other equivalent situations

66. The ICJ has repeatedly affirmed that the duty of cessation constitutes an obligation to take immediate steps to put an end to the continuing wrongful act. In the 1980 *United States Diplomatic and Consular Staff in Tehran* case, the ICJ held that Iran had violated, and was continuing to violate, several obligations owed to the USA under international law,[49] and ordered Iran to "*immediately* terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran" (emphasis added).[50] In the 2009 *Navigational and Related Rights* case, the ICJ explained:

> [I]t should be recalled that when the Court has found that the conduct of a State is of a wrongful nature, and in the event that this conduct persists on the date of the judgment, the State concerned is obliged to cease it *immediately* [emphasis added].[51]

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[45] See generally, *OPT Advisory Opinion,* paras. 267-272; Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for Advisory Opinion), International Court of Justice, Written Submission by the League of Arab States, 20 July 2023, Section 19.

[46] See ARSIWA, *supra,* Art. 30(a).

[47] ARSIWA, *supra,* Part Two, Ch. I, Art. 30 Commentary, para. 5.

[48] *Wall* Advisory Opinion, *supra,* p. 197, para. 150. See also, *Haya de la Torre Case,* Judgment of June 13th, 1951, I.C.J. Reports 1951, p. 71 at p. 82 ("This decision entails a legal consequence, namely that of putting an end to an illegal situation"); *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment of 3 February, 12, I.C.J. Reports 2012, p. 99 at p. 153, para. 137 (referring specifically to ARSIWA Article 30(*a*)); see also *Rainbow Warrior (New Zealand v. France)*, Arbitration Award, 30 April 1990, para. 114; *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi*, Arbitration Award, 4 March 1991, para. 61 (noting that the obligation to put to an end a wrongful act that constitutes a violation of customary international law is "not in doubt").

[49] United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980, p. 3 at pp. 41-42, para. 90.

[50] Ibid., p. 44, para. 95.

[51] Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 213 at p. 267, para. 148.

67. The immediate nature of the cessation requirement is further illustrated when the requirement has been affirmed in the context of the following situations which cover illegality of the particular type under present evaluation: first, illegality as a matter of the use of force and, second, illegality as a matter of self-determination.

68. On illegality in the use of force, in the *Military and Paramilitary Activities in and against Nicaragua* case, in the context of a finding that the USA violated international law through its use of force and military and paramilitary activities within Nicaragua, the ICJ held that the USA is "under a duty *immediately* to cease and to refrain from all such acts as may constitute breaches" of its legal obligations (emphasis added).[52]

69. On illegality in the law of self-determination, in the *Namibia* Advisory Opinion, the ICJ held that "South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it" and "the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia *immediately* and thus put an end to its occupation of the Territory" (emphasis added).[53] In the 2019 *Chagos* Advisory Opinion, the ICJ, having determined that the UK's exercise of control over the Chagos Archipelago was a violation of the law of self-determination, held that "the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago *as rapidly as possible*..." (emphasis added).[54] Following the Court's decision, the General Assembly adopted Resolution 73/295, demanding that, in accordance with the Court's Advisory Opinion, the United Kingdom "withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution, thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible".[55]

5.c.iii. Application to the Israeli presence in the OPT: immediate requirement of termination

70. Based on the foregoing general principles of State responsibility, Israel must immediately end all the violations of international law involved in it maintaining its presence in the OPT.

71. Fundamentally, this means Israel is under obligation to withdraw its presence and administration entirely from the occupied Palestinian territory immediately. The right of self-determination being violated by the existence of the occupation is to be realized immediately, since the right itself is an immediate, automatic entitlement to freedom, without preconditions. This realization cannot therefore be made subject to any qualifications, in terms of its temporal character, on any basis. There is, then, no valid legal basis on which Israel can avoid a requirement to terminate the occupation immediately.

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[52] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, International Court of Justice, I.C.J. Reports, 1986, p. 149, para. 292, sub-para. 12.

[53] *Namibia* Advisory Opinion, *supra*, p. 54, para. 118 and p. 58, para. 133.

[54] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, International Court of Justice, Advisory Opinion, I.C.J. Reports 2019 (hereinafter *Chagos* Advisory Opinion) p. 139, para. 178.

[55] GA Res. 73/295, 24 May 2019, para. 3.

72. This position was affirmed by the ICJ and the General Assembly. The Court stipulated that the Israeli presence in the OPT must be brought to an end "as rapidly as possible".[56] The General Assembly stipulated that it should be brought to an end "without delay", and "no later than 12 months" from 13 September 2024.[57]

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

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

75. Within the foregoing is an obligation to cease any activity concerned with altering the legal status of any part of the OPT, including East Jerusalem. As far back as 1967 itself, the General Assembly called upon Israel to "rescind all measures already taken and to desist forthwith from taking action which would alter the status of Jerusalem".[58]

76. The legal requirement to immediately terminate the occupation had been reflected in and reinforced by determinations by the United Nations General Assembly and Security Council prior to the General Assembly's aforementioned articulation of this principle in 2024 following the *OPT* Advisory Opinion.

77. The General Assembly called for the end of the occupation on numerous occasions ranging widely across the lifespan of the occupation. In Resolution 2628 of 1970, it stated that it:

> 1. *Reaffirms* that the acquisition of territories by force is inadmissible and that, consequently, territories thus occupied must be restored;
>
> 2. *Reaffirms* that the establishment of a just and lasting peace in the Middle East should include the application of both the following principles:
>
> (a) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;
>
> (b) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and its right to live in peace within secure and recognized boundaries free from threats or acts of force.[59]

In Resolution 3414 of 1975, the Assembly likewise stated that it:

> 1. *Reaffirms* that the acquisition of territory by force is inadmissible and therefore all territories thus occupied must be returned;

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[56] *OPT* Advisory Opinion, *supra*; on existential illegality: paras. 261-2 and operative paragraph (3) at page 78; on ending the presence: para. 267 and operative paragraph (4), at page. 78.
[57] GA Res. A/ES-10/L.31, *supra*, para. 2.
[58] GA Res. 2253, 4 July 1967, para. 2.
[59] GA Res. 2628, 4 November 1970, paras. 1-2

> 2. *Condemns* Israel's continued occupation of Arab territories in violation of the Charter of the United Nations, the principles of international law and repeated United Nations resolutions.[60]

The call for Israel to withdraw from the OPT was reiterated in numerous other General Assembly resolutions, including Resolutions 32/20 (1977), 33/29 (1978), 34/70 (1979), 35/207 (1980), 36/226A (1981), 38/180A (1983), 45/83A (1990), ES-10/18 (2009), and 77/247 (2022).[61]

78. The Security Council has, on several occasions, called for the withdrawal of Israeli forces from the OPT.[62] In Resolution 242 of 1967, the Council stated that it:

> 1. *Affirms* that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:
>
> (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
>
> (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.[63]

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[60] GA Res. 3414, 5 December 1975, paras. 1-2.

[61] GA Res. 32/20, 25 November 1977, preamble, para. 2 (calling for Israeli "withdrawal from all Arab territories occupied since 5 June 1967"); GA Res. 33/29, 7 December 1978, paras. 2-3 (calling for "Israeli withdrawal from all the occupied Palestinian and other Arab territories"); GA Res. 34/70, 6 December 1979, paras. 2, 4 (calling for "Israeli withdrawal from all the occupied Arab and Palestinian territories, including Jerusalem); GA Res. 35/207, 16 December 1980, para. 1 (calling for "immediate, unconditional, and total withdrawal of Israel from all these occupied territories") and para. 4 (calling for "complete and unconditional withdrawal from all the Palestinian and other Arab territories since June 1967); GA Res. 36/226A, 17 December 1981, preamble ("*reiterating* that… Israel must withdraw unconditionally from all occupied Palestinian and other Arab territories, including Jerusalem), para. 1 ("demands immediate unconditional and total withdrawal of Israel from all these occupied territories"), and para. 4 (calling for "complete and unconditional withdrawal of Israel from the Palestinian and other Arab territories occupied since 1967, including Jerusalem"); GA Res. 38/180A, 19 December 1983, para. 11 (calling for "total and unconditional withdrawal by Israel from all the Palestinian and other Arab territories occupied since 1967, including Jerusalem"); GA Res. 45/83A, 13 December 1990, preamble ("Israel must withdraw unconditionally from the Palestinian territory occupied since 1967, including Jerusalem, and the other occupied Arab territories"), para. 1 (reaffirming the necessity of "immediate, unconditional, and total withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and the other occupied Arab territories"), para. 3 (calling to ensure "the complete and unconditional withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and the other occupied Arab territories"), and para. 5 (demanding "immediate, unconditional, and total withdrawal of Israel from all the territories occupied since 1967); GA Res. ES-10/18, 16 January 2009, para. 1 (demanding "full withdrawal of Israeli forces from the Gaza strip"); GA Res. 77/247, 30 December 2023, para. 6 (affirming the right of the Palestinian people to achieve "without delay an end to the Israeli occupation that began in 1967").

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

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

6. Consequence of existential illegality for third States and the EU (1): Legal duties to suppress Israel's violations of international law in maintaining its presence in the OPT

6.a. Introduction

6.a.i. Three duties

79. Third States and the EU have three legal duties to suppress Israel's violations of international law in maintaining its presence in the OPT. These are:

    (1) A positive duty to bring Israel's illegal presence in the OPT to an end, through both individual and joint, co-operative, means, and a related obligation to co-operate with the UN to put into effect any modalities promulgated by the General Assembly and the Security Council to ensure the end of Israel's presence in the OPT and the full realization of the Palestinian right to self-determination.

    (2) A negative duty not to recognize as lawful the existence and continuation of Israel's illegal presence in the OPT.

    (3) A negative duty not to aid or assist in the maintenance of Israel's illegal presence in the OPT.

80. These three duties are elaborated in the main sub-sections below. Before that, it is necessary to explain where the duties come from; the difference in relative precision between them; the significance to them of the inextricably complex relationship between Israel's presence in the OPT and the Israeli state, economy, and society generally; and the basis on which third States are obliged to regulate the behaviour of their own nationals and other non-state actors in their jurisdiction when it comes to the impact of this behaviour on Israel's illegal presence in the OPT.

6.a.ii. Basis for the duties

81. The duties are a consequence of the nature of the particular obligations being violated—the right of self-determination and the prohibition of aggression—and the serious nature of the violations. The following explanation is provided for information purposes only; it does not need to be consulted otherwise.

82. The duties arise on multiple specific grounds:

    (A) The first specific grounds covers an aspect of duty (1)—the obligation to take joint and separate action to end Israel's violation of self-determination in particular in maintaining its presence in the OPT. According to the UN General Assembly Resolution containing the Declaration on Friendly Relations and Co-operation of 1970.

    > Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the principles in the Charter…
    >
    > […]

> In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, *such peoples are entitled* to seek and *to receive support* [emphasis added].[64]

In the *Wall* and *OPT* Advisory Opinions, the ICJ extracted the first part of the quotation above[65] and went on to stipulate that (with the different focus of each Advisory Opinion reflected in the words in square brackets):

> It is…for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the [construction of the wall/the illegal presence of Israel in the Occupied Palestinian Territory] to the exercise by the Palestinian people of its right to self-determination is brought to an end.[66]

In the General Assembly resolution implementing the ICJ *OPT* Advisory Opinion, the Assembly:

> *Calls upon* all States to comply with their obligations under international law, inter alia, as reflected in the advisory opinion, including their obligation:
>
> (a) To promote, through joint and separate action, the realization of the right of the Palestinian people to self-determination, the respect of which is an obligation *erga omnes*… and, while respecting the Charter of the United Nations and international law, to ensure that any impediment resulting from the illegal presence of Israel in the Occupied Palestinian Territory to the exercise by the Palestinian people of its right to self-determination is brought to an end.[67]

(B) The second specific grounds for the suppression duties covers another particular aspect of duty (1) – the obligation to co-operate (i.e. only joint action, not also individual action—effectively, a sub-set of the coverage of grounds (A)) to bring Israel's violations of both self-determination and the prohibition of aggression (so wider than coverage in grounds (A)) in maintaining its presence in the OPT to an end, and also, again in relation to violations of both areas of law, duties (2) and (3). Here, the duties are consequence of the fact that, as indicated above, both sets of rules violated—the right of self-determination, and the prohibition of aggression—have *jus cogens* status, and the violations of these rules is 'serious'. As matter of the international law of State responsibility as articulated in the ILC Articles on State Responsibility and its draft conclusions on *jus cogens* obligations, 'serious breaches' of *jus cogens* obligations, in the words of the Commentary on the State Responsibility Articles, "attract additional consequences, not only for the responsible State but [also] for all other States".[68] These

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[64] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970 ('Friendly Relations and Co-operation Declaration').
[65] *Wall* Advisory Opinion, *supra*, para. 156; *OPT* Advisory Opinion, *supra,* paras. 274-5
[66] *Wall* Advisory Opinion, *supra,* para. 159; *OPT* Advisory Opinion, *supra,* para. 279.
[67] GA Res. A/ES-10/L.31/Rev.1, para. 4(a).
[68] ARSIWA, *supra,* Part Two, Ch. III Commentary, para. 7. On this area of State responsibility, see ARSIWA, *supra,* Arts. 40-41; ILC *jus cogens* Draft Conclusions & Commentaries, *supra,* Conclusion 19. See also ARSIWA, *supra,* Part Two, Ch. III Commentary.

additional consequences are the foregoing particular aspect of duty (1), [69] and duties (2)[70] and (3)[71]. This is reflected in the following stipulation by the UN Human Rights Council in resolution 49/28 of 11 April 2022 (preamble, para 7):

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

(C) The third specific grounds is a yet <u>further particular aspect of duty (1) in the context of the violation of self-determination particular,</u> which covers a further link between co-operative and individual action, complementing the foregoing obligations to engage in co-operative action in grounds (A) and (B): the <u>obligation to put into effect any modalities promulgated by the General Assembly and the Security Council to ensure the end of Israel's presence in the OPT and the full realization of the Palestinian right to self-determination.</u> This has its origins in the second part of the partially extracted first sentence from the Friendly Relations and Co-operation Resolution of the General Assembly above. The full sentence reads (emphasis added):

> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, *and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . .*[72]

Both the *Wall* and the *OPT* Advisory Opinions quoted this extract with the second part of the sentence.[73] The *Wall* Advisory Opinion did not follow this up with any further stipulation but, perhaps reflecting the failure of Israel and third States to implement their obligations as stipulated in that Opinion, in the *OPT* Advisory Opinion, the Court stipulated that:

[69] ARSIWA, *supra,* Art. 41(1); Quotation from ARSIWA, *supra,* Part Two, Ch. III, Art. 41 Commentary, para. 3. See also ILC *jus cogens* Draft Conclusions & Commentaries, *supra,* Conclusion 19, para. 1; On this duty existing in customary international law, see ILC *jus cogens* Draft Conclusions & Commentaries, *supra,* Conclusion 19, Commentary, para. 2. In the *Chagos* Advisory Opinion, the Court stipulated "all Member States must co-operate with the United Nations to complete the decolonization of Mauritius". *Chagos* Advisory Opinion, *supra,* para. 182.

[70] ARSIWA, *supra,* Art. 41(2). See also ILC *jus cogens* Draft Conclusions & Commentaries, *supra,* Conclusion 19, para. 2. See also ARSIWA, *supra,* Part Two, Ch. III, Art. 41 Commentary, *passim*. On the status of this obligation in customary international law, see ARSIWA, *supra,* Part Two, Ch. III, Art. 41 Commentary, paras 6 and 12 and sources cited therein and ILC *jus cogens* Draft Conclusions & Commentaries, *supra,* Conclusion 13, para. 13 and sources cited therein. The obligation of non-recognition arising out of serious violations of *jus cogens* norms is reflected in the dictum of the International Criminal Court in *The Prosecutor v. Bosco Ntaganda* that "as a general principle of law, there is a duty not to recognize situations created by certain serious breaches of international law". *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1707, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, of January 2017, Trial Chamber VI, International Criminal Court, para. 53.

[71] ARSIWA, *supra,* Art. 41(2). See also ILC *jus cogens* Draft Conclusions & Commentaries, *supra,* Conclusion 19, para. 2; ARSIWA, *supra,* Part Two, Ch. III, Art. 41 Commentary. On the status of this obligation in customary international law, see ARSIWA, *supra,* Part Two, Ch. III, Art. 41 Commentary, para. 12, and ILC *jus cogens* Draft Conclusions & Commentaries, *supra,* Conclusion 13, para. 13 and sources cited therein.

[72] Friendly Relations and Co-operation Declaration, *supra.*

[73] *Wall* Advisory Opinion, *supra,* para. 157; *OPT* Advisory Opinion, *supra,* para. 275.

> …while it is for the General Assembly and the Security Council to pronounce on the modalities required to ensure an end to Israel's illegal presence in the Occupied Palestinian Territory and the full realization of the right of the Palestinian people to self-determination, all States must co-operate with the United Nations to put those modalities into effect.[74]

(D) The fourth specific grounds is for duties (2) and (3), which the ICJ affirmed arise in the context of the violation of the right of self-determination (in the *Wall* Advisory Opinion), and affirmed arise in the context of this violation and the violation of the prohibition of annexation through the use of force (in the *OPT* Advisory Opinion), seemingly because these two areas of law operate *erga omnes.*[75] As far as duty (3) (no aid or assistance) arising in the context of self-determination is concerned, it is notable that the General Assembly stated in the Friendly Relations and Co-operation Declaration that:

> Every State has the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence.[76]

Likewise, in the General Assembly resolution implementing the ICJ *OPT* Advisory Opinion, the Assembly:

> *Calls upon* all States to comply with their obligations under international law, inter alia, as reflected in the advisory opinion, including their obligation:
>
> […] To… [in the context of] the right of the Palestinian people to self-determination, the respect of which is an obligation *erga omnes*… refrain from any action which deprives the Palestinian people of this right.[77]

(E) The fifth specific grounds is for duty (2), which the ICJ determined in the *OPT Advisory Opinion* to apply to international organizations, so for present purposes including the EU, in their own right, because the violations at issue are 'serious' and operate *erga omnes*.[78]

(F) Finally, in the *OPT* Advisory Opinion, the ICJ quoted various General Assembly and Security Council resolutions affirming aspects of what is covered in duties (2) and (3) arising out of illegality in using force to purportedly acquire territory in particular.[79]

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[74] *OPT* Advisory Opinion, *supra,* para. 275. This echoes the Court's stipulation in the *Chagos* Advisory Opinion:

> while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect

Chagos Advisory Opinion, *supra,* para 180.

[75] *Wall* Advisory Opinion, *supra,* paras. 155 (*erga omnes* status of self-determination), 159 (obligations (2) and (3)); *OPT* Advisory Opinion, paras. 274 (*erga omnes* status of self-determination and prohibition of annexation through the use of force), 279 (obligations (2) and (3)).

[76] Friendly Relations and Co-operation Declaration, *supra.*

[77] GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 4(a).

[78] *OPT* Advisory Opinion, *supra*, para. 280.

[79] *OPT* Advisory Opinion, *supra*, paras. 276-8.

6.a.iii. Difference in relative precision between the three duties

83. As will be further indicated below, suppression duty (1), the positive obligation to bring to an end, through lawful means, Israel's violations of international law in maintaining its presence in the OPT, is, relative to suppression duties (2) and (3), imprecise and uncertain When it comes to unilateral action, a range of different actions may be possible. When it comes to the duty to cooperate with others (other third States, international organizations), the substantive modalities it may involve, and whether any such modalities are even forthcoming, will depend on the outcome of that co-operative endeavour; likewise, the duty to implement modalities stipulated by the General Assembly and Security Council will depend on whether these modalities are forthcoming and what form they take. Suppression duties (2) and (3), the negative obligations not to recognize, and not to aid or assist, Israel's violations of international law in maintaining its presence in the OPT are, by contrast, relatively precise and definite. This is the case because, *inter alia*, they concern matters that are entirely within each State's control in the sense that, although the obligations are relative to Israel's behaviour, they can be discharged entirely without necessarily having any control over Israel (e.g. adopting a general arms embargo against Israel would be sufficient to discharge the obligation not to provide weapons to Israel that will be used to maintain its illegal presence in the OPT, a matter addressed further below).

6.a.iv. Significance and consequence of the complex, inextricable relationship between territorial Israel and the Israeli presence in the OPT

84. As partly reflected in the ICJ's conclusion in the *OPT* Advisory Opinion that Israel has purported to annex the OPT, i.e. it treats the entirety of this territory as under the overall, seemingly indefinite dominion of the Israeli state, the Israeli presence in the OPT is linked to the Israeli state, including its military, and the Israeli economy and society, including cultural, sporting and educational life, in a complex and multifaced manner so as to be factually and legally inextricable.

85. The presence is conducted by the Israeli armed forces as part of their general operations. Israeli settlers living in the OPT, roughly constituting approximately 7.5% of the Israeli citizenry, often work in Israel, including for private Israeli companies, the Israeli state, and Israeli universities, their commute between the settlement home and the Israeli workplace being facilitated by the settler-only roads and checkpoints linking the two and, in the case of East Jerusalem, the light rail connecting East and West Jerusalem, with a stop at the train station at the latter, where the train connects to the airport, and major Israeli towns and cities including Tel Aviv and Haifa. The housing of these citizens outside Israel, on land and using natural resources that have not had to be paid for, and where the usual, costly requirements of environmental protection are typically disregarded (e.g. raw sewage from settlements being discharged in nearby Palestinian villages), constitutes, effectively, an economic benefit with effects in Israel, to the general economy, the Israeli state, and the employers of settlers. Housing pressure and so housing costs in Israel are reduced; wage pressures in Israel are reduced insofar as cheaper housing enables employees to be paid less. The considerable economic activities performed in settlements (which in some cases are farms, factories, chemical and public utility plants, quarries etc.) are typically

conducted by Israeli companies as part of, and linked to, the overall activities of such companies taking place within Israel. The operation of public utilities plants in the OPT that serve Israel, such as sewage treatment plants, without having to follow the same environmental safeguards that would be necessary in Israel, reduces general utility bills in Israel.

86. As for universities, Ariel University is located in the West Bank; the (main) Mount Scopus campus of Hebrew University is partly located beyond the green line in occupied East Jerusalem. These universities, and the other Israeli universities located exclusively in Israel, are (also, in the case of Ariel and Hebrew Universities) linked to the presence in the OPT in the sense that they train members of the Israeli armed forces (people who are, for the reason indicated above, invariably going to use this training in their work as part of maintaining the presence in the OPT), are engaged in various other activities to support the presence, and sometimes also adopt official positions affirming the legitimacy and the legality of all or part of the presence, whether in a general way or also more specifically by affirming the unlawful claim to sovereignty (e.g. Hebrew University's official position that East Jerusalem is part of sovereign Israeli territory).[80]

87. As for culture and tourism, the Old City of Al Quds (Jerusalem), one of the most important visitor attractions in the world because of its significance to the three main Abrahamic religions, is located in the OPT, in East Jerusalem. Tourists must accept and work through the Israeli exercise of authority there, performed on the unlawful basis that it forms part of the sovereign territory of Israel. They often stay in Israeli-owned and operated hotels located on stolen land in East Jerusalem. These hotel chains also operate in and house the same tourists in other tourist spots in Israel, such as Tel Aviv, and Israeli tour operators typically run tours that combine attractions in both Israel and the Old City of Al Quds. Many museums in Israel contain artefacts taken from sites in the OPT, including the Old City. In the foregoing and other key respects, the tourist and hospitality industry operates seamlessly across Israel and the Old City part of the OPT, with tourists to Israel inevitably participating in this overall structure even if they restrict themselves to territorial Israel (which few do, given that this would exclude the Old City of Al Quds).

88. The consequence of the foregoing is that when it comes to the behaviour of third States, and the EU, and all other actors, in their relations with the Israeli state, including the Israeli military, the Israeli economy, and other Israeli actors, including Israeli companies, including tour companies, and universities, it is impossible, because of the way things operate, to meaningfully disaggregate relations that are, one way or another, connected to the Israeli presence in the OPT, and relations that are entirely free of such a connection.

89. This problem is illustrated in the following observations made by Yussef Al Tamimi in connection with duty (3) (the obligation not to aid or assist) (hyperlinks in the original):

> Separating legal trade relations with Israeli businesses from links to the illegal occupation is difficult, and sometimes impossible. Arms, drones and surveillance equipment developed by Israeli arms manufacturers are employed throughout Gaza, occupied Palestinian territories and East Jerusalem and sold as battle-tested to European countries. Such economic activity clearly assists in the maintenance of the

[80] See further Maya Wind, *Towers of Ivory and Steel: How Israeli Universities Deny Palestinian Freedom* (Verso, 2024).

illegal situation and is thus prohibited under the ICJ Opinion. This problem has proven persistent in economic relations with Israel, other such examples including cooperations with Israel's national water company, which expropriates water from Palestinian springs in the West Bank, the country's largest supermarket chain, which operates in illegal settlements, and an irrigation firm. There is a difficulty in separating trade and investment relations with businesses operating in Israel and those having ties to occupied Palestinian territories because Israel treats settlements as an integral part of its territory in accordance with its domestic law. With so many businesses tied up in internationally prohibited activities, it is indeed the question if untangling those enterprises from the illegal side of their activities is possible. Recent official documents obtained by a Dutch rights group through a freedom of information act request show Dutch Foreign Ministry officials expressing doubts that any trade with Israeli businesses can be entirely 'settlement-free': "Almost every Israeli business has a connection to settlements somewhere."[81]

90. Insofar, then, as third States and the EU bear obligations applicable to these relations as a consequence of the illegal nature of the presence, such obligations have to address the relations *as a general matter*. This general requirement is therefore adopted in how the three duties are explained in the following sub-sections.

6.a.v. Obligations borne by States to ensure non-state actors do not recognize, or aid or assist, in the maintenance of Israel's illegal presence in the OPT

91. A final, general matter needs to be reviewed that applies to both duties (2) and (3) – the duties of non-recognition, and no aid or assistance (explained in full below). These duties apply to States, and by association, the EU, in terms of their own relations with Israel. They also oblige States to take positive steps to ensure that their nationals, and other non-state actors within their jurisdiction, including companies and other entities, are also subject to, and abide by, equivalent duties. In its implementing resolution to the *OPT* Advisory Opinion, the General Assembly called upon all States to

> …take steps to ensure that their nationals, and companies and entities under their jurisdiction, do not act in any way that would entail recognition or provide aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory.[82]

92. The obligation both arises as a consequence of, and is discharged through, the entitlement that third States have in international law to exercise jurisdiction over, in the first place, their nationals, and, in the second place, all non-state actors generally (including all individuals, nationals and non-nationals alike, corporations, other legal entities etc.) within their territorial jurisdiction. States exercise such jurisdiction, for example criminal jurisdiction, *inter alia* to regulate the behaviour of nationals and other non-state actors in their territorial jurisdiction to ensure conformity to certain standards. Such regulatory regimes imply a general public policy position taken by the State on the matters subject to

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[81] Yussef Al Tamimi, *Implications of the ICJ Advisory Opinion for the EU-Israel Association Agreement*, EJIL-Talk blog, 30 July 2024.

[82] GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 5(a).

the regulation, in terms of what matters should be regulated, if at all, and how. If a State does not take action to restrict the behaviour of its nationals and other non-state actors in its territorial jurisdiction when it comes to a particular subject, this implies a public policy position that the behaviour in question is not problematic.

93. If, then, the State did not restrict the actions of its nationals and other non-state actors in its territorial jurisdiction which involve recognizing, as lawful, the Israeli presence in the OPT, and/or aiding or assisting this presence, the lack of restrictive regulation would imply that such recognition and/or aid and assistance by these other actors would not be problematic. Adopting, implicitly, such a position would breach the States' own obligations not to recognize or aid or assist (covered below). In other words, the duty borne by States to regulate nationals and other non-state actors through their national legal systems arises because of what is implied by the scope of national legal regulation of nationals and other non-state actors, and the significance of this for the legal duties concerned with non-recognition and the non-provision of aid and assistance.

94. The significance of this duty to regulate will be elaborated in the coverage of duties (2) and (3) below.

6.b. Duty (1): Positive obligation to bring Israel's illegal presence in the OPT to an end, through both individual and joint, co-operative, means, and a related obligation to co-operate with the UN to put into effect any modalities promulgated by the General Assembly and the Security Council to ensure the end of Israel's presence in the OPT and the full realization of the Palestinian right to self-determination.

95. Third States (and, for present purposes, also the EU) bear a positive obligation to bring the violations to an end, through both individual and joint, co-operative, means, and a related obligation to co-operate with the UN to put into effect any modalities promulgated by the General Assembly and the Security Council to ensure the end of Israel's presence in the OPT and the full realization of the Palestinian right to self-determination.

96. No particular form of action, whether individually or in co-operation with other third States and international organizations, is prescribed by international law, given the multiplicity of possibilities that exist.

97. Co-operative possibilities include both institutionalized cooperation (for instance, for EU member States, through the EU, and for all States, through the United Nations) and non-institutionalized cooperation.[83] Action would cover all matters that implicate bringing the illegality to an end, involving not only the behaviour of Israel, but also the behaviour of any other third States which recognize as lawful, and/or aid or assist Israel in conducting, its unlawful presence, thereby breaching duties (2) and (3) borne by these third States, as outlined below in the current section.

98. The obligation to give effect to stipulations of the UN General Assembly and the Security Council implicates the many resolutions which have on numerous occasions called for

[83] ARSIWA, *supra,* Part Two, Ch. III, Art. 41 Commentary, para. 2. and ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19 Commentary, para. 10.

Israel's violations of international law to end. Some of these resolutions have expressly called upon third States to support the Palestinian people,[84] and (set out in detail below under duty (3)) to withhold military and economic aid to Israel. Regardless of whether or not there are express stipulations addressed to UN member States of this kind, these States and the EU can use the determinations concerning Israel's breaches as a part guide when deciding what they must focus on in discharging their present obligation to bring those breaches to an end.

99. Under duties (2) and (3), the recognition of the illegal presence, and the provision of aid and assistance that facilities the illegal presence, are prohibited. Discharging these duties in the ways set out below, which, as will be explained, include implementing a general, reciprocal, trade (including arms), finance, investment, scientific, technological, cultural (including tourism), educational and sporting embargo against Israel, and ensuring nationals and other non-state actors within the State's territorial jurisdiction do not themselves act in a way that recognizes or aids or assists the illegal presence, can also be viewed as one means of discharging the present duty, viz. seeking to bring the illegal situation to an end by ending any recognition of and aid or assistance to it.

100. In addition to the aforementioned obligations to take action with respect to nationals and other non-state actors within the State's territorial jurisdiction (to be explained further below), third States can also discharge their obligation to bring the violations to an end by adopting sanctions against Israelis, including government officials, involved in the conduct of the unlawful presence. This may extend to freezing bank accounts and assets abroad, and restrictions on travel. In its resolution implementing the *OPT* Advisory Opinion, the General Assembly called up on States to…

> …implement sanctions, including travel bans and asset freezes, against natural and legal persons engaged in the maintenance of Israel's unlawful presence in the Occupied Palestinian Territory, including in relation to settler violence…[85]

101. As indicated above, one consequence of the illegal character of Israel's presence in the OPT is that everything it does there, subject to the *Namibia* exception, is invalid. Moreover, as will be explained in the following sub-section, third States and the EU bear a negative obligation not to recognize as legal the Israeli presence in the OPT. One way that they can discharge their positive obligation to bring this illegal situation to an end would be to positively affirm both the foregoing position concerning invalidity, and what is implicit in the negative obligation of non-recognition, that the presence is illegal. In the context of South Africa's illegal presence in Namibia, the UN Security Council and the ICJ stipulated that States are obliged to recognize—i.e. positively adopt the position—that the presence is illegal and invalid. In Resolution 283 of 1970, the Security Council called upon States maintaining diplomatic or consular relations with South Africa to:

[84] GA Res. 3236, 5 November 1974, para. 6 ("*The General Assembly … Appeals* to all States and international organizations to extend their support to the Palestinian people in in its struggle to restore its rights, in accordance with the Charter").
[85] GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 5(c).

> issue a formal declaration to the Government of South Africa to the effect that they do not recognize any authority of South Africa with regard to Namibia and that they consider South Africa's continued presence in Namibia illegal….[86]

In Resolution 301 also of 1970, the United Nations Security Council stated that

> States Members of the United Nations are under obligation to recognize the illegality and invalidity of South Africa's presence in Namibia.[87]

In the *Namibia* Advisory Opinion the ICJ held that that the consequence of the illegal nature of the presence was an obligation on the part of all States "to recognize the illegality of South Africa's continued presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia."[88]

102. The final section of this opinion addresses the *rights* that third States and the EU have to invoke the violations of international law committed by Israel in maintaining its presence in the OPT, and any violations by third States of their negative obligations, set out immediately below, not to recognize or aid or assist Israel's violations, in both cases as a consequence of the obligations being violated having *erga omnes* status. One way that third States and the EU could discharge their obligation to bring these violations to an end would be to act individually and collectively pursuant to these rights (for example bringing cases about these violations against Israel and any relevant third States to international courts and tribunals, and/or participating in existing such cases). Further information about possibilities that exist here are addressed in that final section.

6.c. Duty (2): Negative obligation of non-recognition of Israel's illegal presence in the OPT

<u>6.c.i. General obligation not to recognize, expressly or impliedly, the Israeli presence in the OPT as lawful</u>

103. In the words of the *OPT* Advisory Opinion, and affirmed by the General Assembly, third States (and, for present purposes, also the EU) bear a negative obligation "not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory."[89] According to the ICJ in the *OPT* Advisory Opinion, and affirmed by the General Assembly, international organizations, so for present purposes including the EU (notably, the General Assembly expressly included "regional organizations" in its affirmation of the principle), are also subject to this obligation in their own right.[90] The

[86] SC Res. 283 (1970), para. 2.
[87] SC Resolution 301 (1970), para. 6(1).
[88] *Namibia* Advisory Opinion, *supra,* para. 119.
[89] *OPT* Advisory Opinion, *supra,* para. 279 (see also id., para. 285, operative paragraph (7), adopted by 12 votes to 3), and GA Res. A/ES-10/L.31/Rev.1, para. 4.b. In the context of South Africa in Namibia, the Security Council called upon all States

> …to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of…such presence and administration [of South Africa in Namibia]

SC Resolution 301 (1971), para 6.
[90] *OPT* Advisory Opinion, *supra*, para. 280 (see also id., para. 285, operative paragraph (8), adopted by 12 votes to 3); GA Res. A/ES-10/L.31/Rev.1, *supra*, para. 6.

ICJ held this to be the case because the breaches of international law at issue are serious, and operate *erga omnes*.[91] According to the commentary to the ILC Articles on State Responsibility,

> The obligation [of non-recognition] applies to "situations" created by these breaches…It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.[92]

6.c.ii. Obligation not to recognize that the existence of the Israeli presence in the OPT is valid, and not to recognize the validity of anything Israel does through this presence, subject to the *Namibia* exception

104. Fundamentally, third States and the EU are required not to recognize the validity of Israel's presence in the OPT as a general matter, in and of itself, since to do so would imply that this presence is lawful, breaching the obligation not to recognize it as such. In other words, they must not do anything that expressly or impliedly accepts that Israel has a right to operate the presence. In consequence, third States and the EU must not recognize as valid anything Israel has done through its exercise of authority in the OPT, subject to the *Namibia* exception concerning recognizing the validity of acts necessary to safeguard individual rights, explained above. As indicated in the foregoing example of the international reaction to the killing of Shirin Abu Akleh, this requires a profound shift of emphasis, from an assumption that Israel's exercise of authority in the OPT is valid, and focusing only on whether or not, in exercising this authority, Israel violates IHL and IHRL (minus self-determination). The assumption on which this approach rests is contrary to the legal position on invalidity, and adopting the approach is therefore a breach of the obligation of non-recognition of this invalidity (or put differently, a breach of the obligation not to treat the presence as valid). This obligation therefore requires third States and the EU to shift their emphasis, from non-recognition of the legality of illegal conduct only, to also non-recognition of the legality of the presence itself.

6.c.iii. Obligation not to recognize as valid any justificatory claims Israel makes to maintain its presence in the OPT

105. The general obligation not to recognize the Israeli presence as valid also includes not recognizing as valid Israel's justificatory claims, whether expressly or impliedly, for its presence in the OPT, of whatever kind. To do otherwise would be to implicitly endorse illegality or to mistakenly treat as lawful something which is illegal. Such claims would include the following:

(1) Self-defence. Any recognition that Israel has a right to maintain its presence in the OPT as a form of self-defence is tantamount to recognizing that Israel has a valid basis to do this according to the international law on the use of force, when, as indicated above, as the ICJ affirmed, it does not. In other words, it is recognition of an aggression and violation of self-determination or, put differently, it is a denial that

[91] *OPT* Advisory Opinion, *supra*, para. 280 (see also id., para. 285, operative paragraph (8), adopted by 12 votes to 3).
[92] ARSIWA, *supra,* Part Two, Ch. III, Art. 41 Commentary, para. 5.

something is an aggression and a violation of self-determination. This amounts to a fundamental repudiation of two of the core areas of international law, as a general matter, and as they apply in the present situation.

(2) Annexation. Likewise, any recognition that Israel has a right to maintain its presence over any or all of the OPT on any basis that is linked to a sovereignty claim—that Israel is sovereign, or has a right to be sovereign, or can be present in order to pave the way for a situation where it will be sovereign—would be tantamount to accepting as lawful something that the ICJ had determined to be illegal: the attempted annexation of territory through the use of force.

6.c.iv. Obligation not to recognize any claims to sovereignty by Israel over all or part of the OPT (and the validity of any related actions e.g. attempts at demographic changes) and, in consequence, to distinguish between Israeli territory and the OPT in any dealings with Israel

106. Underlying the requirement not to recognize any annexationist claims by Israel is that third States and the EU are required to hold to the general position that the OPT is not the sovereign territory of Israel. They must not, therefore, recognize any claims to sovereignty by Israel over any parts of the OPT—effectively changing the pre-1967 borders between Israel and the OPT in an expansionist direction in favour of Israel—unless such claims are agreed to, on a valid international legal basis, by the Palestinian people. They must also not recognize the validity of any action which implies or furthers such claims, for example efforts to change the demographic composition of the OPT (efforts that are also separately unlawful on additional bases, e.g. being contrary to the prohibitions of the forced displacement of the Palestinian people, and the implanting of settlements, in occupation law). They also have, in effect, a positive obligation to ensure that, in their dealings with Israel, in any instance necessary to comply with this obligation of non-recognition, they distinguish between, on the one hand, the territory of Israel, and, on the other hand, the OPT.

107. With these requirements in mind, the ICJ in the *OPT* Advisory Opinion cited the following stipulations by the Security Council and the General Assembly:

> …the Security Council in resolution 2334 (2016) reaffirmed that "it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations", and called upon "all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967"
>
> § Similarly, the General Assembly has called upon all States
>
> "*(a)* Not to recognize any changes to the pre-1967 borders, including with regard to Jerusalem, other than those agreed by the parties through negotiations…;
>
> *(b)* To distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967;

[…]

In its resolution 77/126, the General Assembly also called upon

> "all States, consistent with their obligations under international law and the relevant resolutions, not to recognize….the situation created by measures that are illegal under international law, including those aimed at advancing annexation in the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967";

…while in resolution 32/161 (1977), the General Assembly called upon

> "all States, international organizations, specialized agencies, investment corporations and all other institutions not to recognize… any measures undertaken by Israel to…to effect any changes in the demographic composition or geographic character or institutional structure of…[the occupied Palestinian] territories"[93]

The Court then followed the aforementioned extracts by stating that it

> …is of the view that Member States are under an obligation not to recognize any changes in the physical character or demographic composition, institutional structure or status of the territory occupied by Israel on 5 June 1967, including East Jerusalem, except as agreed by the parties through negotiations and to distinguish in their dealings with Israel between the territory of the State of Israel and the Palestinian territory occupied since 1967…[94]

This was affirmed by the General Assembly, which called upon States

> "to comply with their obligations under international law, inter alia, as reflected in the advisory opinion, including their obligation:
>
> […]
>
> (d) Not to recognize any changes in the physical character or demographic composition, institutional structure or status of the territory occupied by Israel on 5 June 1967, including East Jerusalem, except as agreed by the parties through negotiations, as affirmed by the Security Council in its resolution 2334 (2016), and the obligation in this regard, in relation to, inter alia, their diplomatic, political, legal, military, economic,

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[93] Id., paras. 277-8.

[94] Id., para. 278. In the context of South Africa's illegal presence in Namibia, the UN Security Council, in resolution, 276 of 1970, called upon all States

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

…the Council's determination that

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

SC Resolution 276 (1970), paras. 5 and 2.

> commercial and financial dealings with Israel, to distinguish between Israel and the Palestinian territory occupied since 1967.[95]

The General Assembly also called upon

> international organizations, including the United Nations, and regional organizations … to distinguish, in their relevant dealings, between Israel and the Occupied Palestinian Territory, and not to recognize…any measures undertaken by Israel to exploit the natural resources of the Occupied Palestinian Territory or to effect any changes in the demographic composition or geographic character or institutional structure of the Territory.[96]

108. Examples of the practical implications of the foregoing obligations are as follows:

(1) <u>No diplomatic or consular relations generally with Israel which imply the legality of Israel's presence (in general, and on the basis of the enjoyment of sovereignty in particular) in the OPT</u>

In Resolution 283 of 1970, the Security Council called upon States maintaining diplomatic or consular relations with South Africa to:

> …terminate existing diplomatic and consular representation as far as they extend to Namibia.[97]

In the *Namibia* Advisory Opinion, the ICJ held that

> Member States… are under obligation to… abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia…They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.[98]

(2) <u>No recognition of Israel's illegal presence in OPT in the establishment and maintenance of diplomatic missions to Israel in particular</u>

In Resolution 478 (1980), the Security Council called upon

> …Those States that have established diplomatic missions [to Israel] at Jerusalem to withdraw such missions from the Holy City…[99]

The *OPT* Advisory Opinion and the General Assembly implementing resolution stipulated an obligation to abstain…

> …in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the Occupied Palestinian Territory…[100]

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[95] GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 4(d).

[96] GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 6 (the ICJ had articulated the obligation to "distinguish in their dealings with Israel between the territory of Israel and the Occupied Palestinian Territory" in relation to the UN in particular – see *OPT* Advisory Opinion, *supra*, para. 280).

[97] SC Res. 283 (1970), para. 2.

[98] *Namibia* Advisory Opinion, *supra,* para. 123.

[99] SC Res 478, 20 August 1980, para. 5(b).

[100] *OPT* Advisory Opinion, *supra*, para. 278; GA Res. A/ES-10/L.31/Rev.1, *supra*, para. 4(d)(iii).

The General Assembly continued this stipulation with:

> …including by refraining from the establishment of diplomatic missions [to Israel] in Jerusalem, pursuant to Security Council resolution 478 (1980) of 20 August 1980.

In the context of South Africa's illegal presence in Namibia, in Resolution 283 of 1970, the Security Council called upon States maintaining diplomatic or consular relations with South Africa to:

> …terminate existing diplomatic and consular representation [to South Africa] as far as they extend to Namibia, and to withdraw any diplomatic or consular mission or representative [to South Africa] residing in the Territory.[101]

In the *Namibia* Advisory Opinion, the ICJ held that

> Member States…are under obligation to…abstain from sending consular agents [representing their State to South Africa] to Namibia, and to withdraw any such agents already there.[102]

(3) <u>No treaty relations generally that imply an Israeli right (including but not limited to a right based on the enjoyment of sovereignty) to act with respect to all or part of the OPT</u>

The *OPT* Advisory Opinion cited the following stipulation by the General Assembly:

> § …the General Assembly has called upon all States
>
> "*(a)* …[to ensure] that agreements with Israel do not imply recognition of Israeli sovereignty over the territories occupied by Israel in 1967
>
> […] (resolution 74/11 (2019)).

The Court, following this citation, and the General Assembly, stipulated an obligation to abstain

> … from treaty relations with Israel in all cases in which it purports to act on behalf of the Occupied Palestinian Territory or a part thereof on matters concerning the Occupied Palestinian Territory or a part of its territory.[103]

(4) <u>No invoking or applying existing treaties or treaty provisions, if any, with Israel where it purports to act on behalf of or concerning the OPT, subject to the *Namibia* exception</u>

[101] SC Res. 283 (1970), para. 2.
[102] *Namibia* Advisory Opinion, *supra,* para. 123.
[103] *OPT* Advisory Opinion, para. 278; GA Res. A/ES-10/L.31/Rev.1, para. 4(d)(i). The Court cited para. 122 of the *Namibia* Advisory Opinion, *supra,* where it made an equivalent stipulation.

In the *Namibia* Advisory Opinion, the Court stipulated, in a paragraph cited by the ICJ in the *OPT* Advisory Opinion, that:

> With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.[104]

(5) <u>No dealings, including economic or trade dealings, that entrench the Israeli presence in the OPT</u>

In the *Namibia* Advisory Opinion, the ICJ affirmed an

> …obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.[105]

The *OPT* Advisory Opinion and the General Assembly implementing resolution stipulated an obligation to abstain…

> from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory....[106]

To which the General Assembly added "…including with regard to the settlements and their associated regime".[107] Given what has been said above about how the economic dimensions of the Israeli presence in the OPT are inextricably linked to the Israeli economy generally, *all* economic and trade dealings with Israel 'concern', one way or another, all or parts of the OPT, and *all* such dealings 'may' entrench the presence. Third States and the EU must, therefore, adopt a *complete* reciprocal trade (including arms), finance, investment, scientific, technological, audiovisual, cultural (including tourism), educational and sporting embargo against Israel, including but not limited to an embargo of products from settlements.[108]

(6) <u>Take positive steps to prevent trade or investment relations that assist in the maintenance of the illegal Israeli presence in the OPT</u>

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[104] *Namibia* Advisory Opinion, *supra,* para. 122, the paragraph being cited in the *OPT* Advisory Opinion, *supra,* para. 278.
[105] *Namibia* Advisory Opinion, *supra*, para. 124.
[106] *OPT* Advisory Opinion, *supra,* para. 278; GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 4(d)(ii).
[107] GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 4(d)(ii).
[108] In its resolution implementing the *OPT* Advisory Opinion, the General Assembly called up on States to "take steps towards ceasing the importation of any products originating in the Israeli settlements…" GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 5(b). In the context of the more general stipulation concerning economic and trade dealings generally, "including" settlements, this stipulation concerning products from settlements should be understood as a reference to what is necessary but not by itself sufficient to discharge third States' (and by association the EU's) obligations concerning trade.

The *OPT* Advisory Opinion and the General Assembly implementing resolution stipulated an obligation to take

> …steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory.[109]

To which the General Assembly added "…including with regard to the settlements and their associated regime".[110] This obligation concerning assistance (to be addressed further under duty (3) below) is articulated in the context of the duty of non-recognition because assistance in maintaining the illegal situation implies recognition that the situation is lawful.

(7) No recognition of any economic exploitation by Israel of the resources in the OPT

In the *OPT* Advisory Opinion the ICJ cited the following stipulation by the UN General Assembly in resolution 32/161 (1977), where it called upon

> all States, international organizations, specialized agencies, investment corporations and all other institutions not to recognize…any measures undertaken by Israel to exploit the resources of the occupied territories…[111]

(8) Take positive steps to ensure nationals, and non-state actors, including companies and other legal entities under their jurisdiction, do not recognize the situation created by the illegal presence

As quoted earlier, in its implementing resolution to the *OPT* Advisory Opinion, the General Assembly called upon all States to

> …take steps to ensure that their nationals, and companies and entities under their jurisdiction… do not act in any way that would entail recognition [of] the situation created by Israel's illegal presence in the Occupied Palestinian Territory.[112]

Just as third States and the EU must not recognize as lawful the Israeli presence in the OPT, so too it is necessary that all non-state actors—individuals, companies and other entities—likewise do not do so. As explained above, third States are obliged to take positive steps to ensure this.

Third States must exercise their national legal jurisdiction to regulate their own nationals, and all other non-state actors, including companies and other entities, in their territorial jurisdiction, to prevent them from taking any action that recognizes as lawful the Israeli presence in the OPT. Just as the inextricable nature of the linkages between Israel and the OPT require a general, reciprocal, trade (including arms), finance, investment, scientific, technological, audiovisual, cultural (including tourism), educational and sporting embargo on the part of third States and the EU, so too it is necessary that third States take such regulatory action that prevents engagement with Israel *as a general matter*, including, but not limited to,

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[109] *OPT* Advisory Opinion, *supra,* para. 278; GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 4(d)(iv).
[110] GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 4(d)(iv)
[111] *OPT* Advisory Opinion, paras. 277-8.
[112] GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 5(a).

engagement with Israeli settlers and settlements in the OPT. This requires the following activities to be prohibited:

1. All travel to Israel, including for the purposes of business, tourism, cultural and sporting activities, education and other academic activities including research, university exchanges, conference attendance, employment, residence, service in the armed forces.
2. All trade (including in arms), investment and any other forms of financing, technology transfer, and provision of charitable support, with the Israeli state and Israeli entities, including universities.
3. All other forms of collaboration with the Israeli state and Israeli entities, such as science and technology collaboration, sports games, cultural events, university exchanges and partnerships.

6.d. Duty (3): Negative obligation not to render aid or assistance to the maintenance of Israel's illegal presence in the OPT

6.d.i. Meaning

109. As stated in the *OPT* Advisory Opinion, and affirmed by the General Assembly in its implementing resolution, third States (and, for present purposes, the EU) bear a negative obligation "not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory."[113] The General Assembly articulated a more specific obligation vested in international organizations, including regional organizations, in their own right, calling upon them

> …not to recognize, or cooperate with or assist in any manner in, any measures undertaken by Israel to exploit the natural resources of the Occupied Palestinian Territory or to effect any changes in the demographic composition or geographic character or institutional structure of the Territory.[114]

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[113] *OPT* Advisory Opinion, *supra,* para. 279 (see also id., para. 285, operative paragraph (7), adopted by 12 votes to 3); GA Res. A/ES-10/L.31/Rev.1, para. 4(c). Cf. the following stipulation by the General Assembly in resolution 77/126, cited by the ICJ in the *OPT* Advisory Opinion, *id,* para. 277, calling upon

> …all States, consistent with their obligations under international law and the relevant resolutions…not to render aid or assistance in maintaining, the situation created by measures that are illegal under international law, including those aimed at advancing annexation in the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967

GA Res. 77/126, 15 December 2022, para. 17. In the context of South Africa's illegal presence in Namibia, the Security Council called upon all States

> …to refrain from any acts and in particular any dealings with the Government of South Africa…lending support or assistance to, such presence and administration [of South Africa in Namibia].

SC Res. 301 (1971), para 6. Similarly, The ICJ found in the *Namibia* Advisory Opinion that member States of the United Nations are "under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia". *Namibia* Advisory Opinion, *supra,* para. 119.

[114] GA Res. A/ES-10/L.31/Rev.1, *supra*, para. 6.

110. The obligation not to aid or assist in the maintenance of Israel's illegal presence in the OPT is distinct from the more generally-applicable, narrowly-relevant rule from the international law of State responsibility, covering any and all violations of international law by Israel, that a third State is legally responsible if it aids or assists Israel in the commission of one or more of these unlawful acts, *when such aid or assistance is given with a view to facilitating the illegality*. In these circumstances, the third State would have, in the words of the Commentary to the ILC State Responsibility Articles, "derived responsibility" for the unlawful act or acts by Israel—liability on the basis of a type of complicity.[115] Whether or not this responsibility would arise in relation to aid or assistance given by a third State (and by association the EU) to Israel in relation to the illegality of its presence in the OPT would depend on the facts of each particular form of aid or assistance, given the need to identify the intent of aiding illegality as a component of the legal test. This area of responsibility is, therefore, beyond the scope of the present opinion. The duty under current evaluation is not a consequence of the general rules of state responsibility but is, rather, a specific obligation linked, as indicated above, to the special nature of the particular legal rules that have been violated by Israel in maintaining its presence in the OPT.[116] Although it arises in these more specific circumstances, it is more general than the rule of state responsibility, since it is not concerned with aid or assistance given *with the intent of supporting illegality.* The issue is, more simply, an obligation not to provide aid or assistance that will enable the illegal Israeli presence to be maintained. Whether or not the intent for this provision is to support illegality is irrelevant.

111. States are prohibited from providing any and all aid or assistance to Israel in maintaining its presence in the OPT. The focus is on the presence itself, not only how it is being conducted. Moreover, given the impossibility of meaningfully distinguishing between such aid/assistance that would end up supporting, one way or another, the Israeli presence in the OPT as distinct from Israel's other activities, including within Israel, as explained earlier, this means that there cannot be any aid/assistance to Israel *at all*. A *complete* embargo on all forms of aid/assistance to Israel as a general matter is therefore required.

6.d.ii. Military aid and assistance

112. On the issue of military aid and assistance in particular, in its resolution implementing the *OPT* Advisory Opinion, the General Assembly called up on States to…

> …take steps towards ceasing the…provision or transfer of arms, munitions and related equipment to Israel, the occupying Power, in all cases where there are reasonable grounds to suspect that they may be used in the Occupied Palestinian Territory…[117]

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[115] See ARSIWA, *supra,* Art. 16, and ARSIWA Commentary, *supra,* Commentary to Art. 16 (from page 65), quotation taken from the latter, para. (2) (p.66) (the word "complicity" is used id, para. (11) (p. 67)).

[116] The Commentary on the relevant article on State responsibility states:

> Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts. Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule

ARSIWA Commentary, *supra,* Commentary to Art. 16, para. (2) (p. 66) (footnote omitted).

[117] GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 5(b).

Given what has been said above about the way the conduct of the presence in the OPT is inextricably linked to the operation of the Israeli military system as a general matter, there will be such reasonable grounds in the case of *any and all* military transfers to Israel. Thus there can be no aid or assistance to Israel's military *at all*. States who wish to support the Israeli military outside of its military-enabled presence in the OPT cannot do this lawfully until Israel ceases that presence (quite apart from whether further legal considerations might also bar support for non-OPT-related activities, a matter that is beyond the scope of the present opinion).

Moreover, and to the same effect, given that it is the military *presence* in the OPT, in and of itself, that is unlawful, not only the behaviour of this military presence there which violates IHL in particular (whether generally, or the sub-set of core protections of IHL that operate *jus cogens* and *erga omnes* (see above)), the ban has to cover *all* elements of aid that supports the Israeli military, not just aid covering matters such as arms that can be and are being used to perpetrate violations of IHL. This is not a situation, then, where the focus is only on restricting any armaments that might be used by Israel to breach IHL (whether generally or the core protections of that area of law). Rather, it is a focus on any military-related support that supports the *general operation* of the Israeli military forces in their conduct of the presence in the OPT.

The requirement to end any such military assistance to Israel for this more general reason has long been affirmed by the General Assembly, before the aforementioned stipulation in its resolution affirming the *OPT* Advisory Opinion. In Resolution 3414 of 1975, the UN General Assembly requested

> …all States to desist from supplying Israel with any military or economic aid as long as it continues to occupy Arab territories and deny the inalienable national rights of the Palestinian people.[118]

In Resolution 36/27 of 1981, the General Assembly reiterated "…its call to all States to cease forthwith any provision to Israel of arms and related material of all types which enable it to commit acts of aggression against other States".[119] In Resolution 36/226A also of 1981, the Assembly called on all States "to put an end to the flow to Israel of any military, economic, and financial resources that would encourage it to pursue its aggressive policies against the Arab countries and the Palestinian people".[120] The Assembly also considered that

> …the agreements on strategic co-operation between the United States of America and Israel signed on 30 November 1981…encourage Israel to pursue its aggressive and expansionist policies and practices in the Palestinian and other Arab territories occupied since 1967, including Jerusalem, would have adverse effects on efforts for the establishment of a comprehensive, just and lasting peace in the Middle East and would threaten the security of the region.[121]

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[118] GA Res. 3414 (1975) para. 3.
[119] GA Res. 36/27 (1981), para. 3.
[120] GA Res. 36/226A (1981), para. 13.
[121] Id. Para. 12.

In Resolution 38/180A of 1983, the General Assembly deplored "any political, economic, financial, military and technological support to Israel that encourages Israel to commit acts of aggression and to consolidate and perpetuate its occupation and annexation of occupied Arab territories", and called "once more" upon all Member States to "refrain from supplying Israel with any weapons and related equipment and to suspend any military assistance that Israel receives from them."[122]

The General Assembly further declared, in Part E of the same Resolution, "the international responsibility of any party or parties that supply Israel with arms or economic aid that augments its war potential", and condemned "all steps which may result in augmenting the capability of Israel and contributing to its policy of aggression against countries in the region".[123] In particular, it demanded that all States, and particularly the United States of America, "refrain from taking any step that would support Israel's war capabilities and consequently its aggressive acts", and called upon States to "review… any agreement, whether military, economic or otherwise, concluded with Israel".[124]

6.d.iii. Trade, investment, and scientific, technological, cultural, educational and sporting relations

113. When it comes to trade, investment, and scientific, technological, cultural, educational and sporting relations, it will be recalled that the *OPT* Advisory Opinion and the General Assembly implementing resolution stipulated an obligation to take

> …steps to prevent trade or investment relations that *assist in the maintenance* of the illegal situation created by Israel in the Occupied Palestinian Territory [emphasis added].[125]

To which the General Assembly added "…including with regard to the settlements and their associated regime".[126] Given how, as indicated above, the Israeli presence in the OPT is inextricably linked to Israel and its economy, just as trade, investment, and cultural, educational and sporting relations with Israel as a general matter will, as mentioned, end up, one way or another, recognizing the Israeli presence in the OPT, likewise such trade, investment and cultural, educational and sporting relations will also end up, one way or another, aiding and assisting this presence. Thus, it is (again) necessary to implement a complete trade (including arms), finance, investment, scientific, technological, audiovisual, cultural (including tourism), educational and sporting embargo, operating reciprocally, on Israel as a general matter (so including, but not limited to, settlements) in order to ensure that trade, investment and scientific, technological, cultural, educational and sporting relations do not end up assisting in the maintenance of the illegal Israeli presence in the OPT.

In Resolution 38/180A of 1983, the General Assembly deplored "any political, economic, financial, military and technological support to Israel that encourages Israel to commit acts

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[122] GA Res. 38/180A (1983), para. 9.
[123] Id., part E, paras. 1 and 2.
[124] Id., part E, paras 3 and 4.
[125] *OPT* Advisory Opinion, *supra,* para. 278; GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 4(d)(iv).
[126] GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 4(d)(iv)

of aggression and to consolidate and perpetuate its occupation and annexation of occupied Arab territories", and called "once more" upon all Member States:

> (c) To suspend economic, financial and technological assistance to and co-operation with Israel;
>
> (d) To sever diplomatic trade and cultural relations with Israel.[127]

6.d.iv. Take positive steps to ensure nationals, and other non-state actors, such as companies and other legal entities, under their jurisdiction, do not aid or assist the illegal presence

114. A quoted above, in its implementing resolution to the *OPT* Advisory Opinion, the General Assembly called upon all States to

> …take steps to ensure that their nationals, and companies and entities under their jurisdiction… do not act in any way that would…provide aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory.[128]

115. Just as third States and the EU must not aid or assist the Israeli presence in the OPT, so too it is necessary that all non-state actors—individuals, companies and other entities—likewise do not do so. As explained above, third States are obliged to take positive steps to ensure this, on a common basis that also applies to the earlier requirement to ensure that these actors do not recognize the Israeli presence in the OPT.

116. As with the issue of recognition, third States must exercise their national legal jurisdiction to regulate their own nationals, and all other non-state actors, including companies and other entities, in their territorial jurisdiction, to prevent them from providing any aid or assistance to the Israeli presence in the OPT. Just as the inextricable nature of the linkages between Israel and the OPT require a general, reciprocal, trade (including arms), finance, investment, scientific, technological, audiovisual, cultural (including tourism), educational and sporting embargo on Israel on the part of third States and the EU, so too it is necessary that third States and the EU take such regulatory action that prevents engagement with Israel *as a general matter*, including, but not limited to, engagement with Israeli settlers and settlements in the OPT. This therefore duplicates the foregoing requirement that applies as a consequence of the duty of non-recognition, viz. a prohibition on the following activities:

    1. All travel to Israel, including for the purposes of business, tourism, cultural and sporting activities, education and other academic activities including research, university exchanges, conference attendance, employment, residence, service in the armed forces.
    2. All trade, investment and any other forms of financing, technology transfer, and provision of charitable support, with the Israeli state and Israeli entities, including universities.

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[127] GA Res. 38/180A (1983), para. 13.
[128] GA Res. A/ES-10/L.31/Rev.1, *supra,* para. 5(a).

3. All other forms of collaboration with the Israeli state and Israeli entities, such as science and technology collaboration, sports games, cultural events, university exchanges and partnerships.

7. Consequence of existential illegality for third States and the EU (2): Legal right to invoke the illegality of Israel's presence in the OPT, and/or the illegality of other third States in breaching their obligations not to recognize, or aid or assist, this presence

7.a. Introduction

117. The foregoing positive obligation borne by third States and the EU to take steps to bring the existence of Israel's presence in the OPT to an end (duty (1)) is based in part on the way that the presence violates the right of self-determination, and this right operates *erga omnes*—against all—meaning that all States, and the EU, have a legitimate interest, and so a legal interest in international law, in seeing it complied with. The more general significance of this *erga omnes* concept is that all States, and the EU, have a legal *right* to invoke violations of norms that have this status. Given that the norms violated by the existence of Israel's presence in the OPT—the right of self-determination and the prohibition of aggression—have this status, all States, and the EU, have a legal right to invoke the illegal nature of this presence, and call upon Israel to bring it to an end immediately. They also have the legal right to invoke any breaches by other third States of the relatively specific suppression duties, viz., duties (2) and (3), not to recognize or aid or assist Israel's illegal presence, and likewise call for these breaches to end immediately. These rights are vested in all States individually, and can be exercised individually and collectively, including, in the case of EU States, through the EU. As indicated above, the exercise of these rights as they relate to Israel's illegality can be one means through which third States discharge their legal duty to take steps to bring the illegal presence of Israel in the OPT to an end.

7.b. Two types of *erga omnes* obligations

7.b.i. Two types

118. Obligations can operate *erga omnes* in two senses. In the first place, obligations can be binding on a particular group of States, and were established for the protection of a collective interest between those States in particular, and so operate *erga omnes partes*—between the members of that group.[129] In the second place, obligations can exist generally (i.e. are applicable to all States) and are owed to the international community as a whole, and so operate *erga omnes* in this sense.[130]

[129] ARSIWA, *supra,* Part Three, Ch. I, Art. 48 Commentary, para. 6.
[130] ARSIWA, *supra,* Art. 48(b); ARSIWA, Part Three, Ch. I, Art. 48 Commentary, para. 8.

7.b.ii. (1) *Erga omnes partes*

119. Obligations *erga omnes partes* apply to a particular group of States and exist for the purpose of protecting a collective interest.[131] Usually, such obligations exist in a treaty, although they can also exist in customary international law.[132] Such obligations "are owed by any State party to all the other States"[133] such that when any given State breaches them, all other States *within* the group can invoke the breach even if they were not directly injured or they do not have some other special interest in it (e.g. it concerned harm to their nationals).[134]

120. Whether a treaty contains *erga omnes partes* obligations depends on its text. Interpreting the Treaty of Versailles in the *S.S. Wimbledon* case, the League of Nations Permanent Court of International Court of Justice identified a common legal interest in "the intention of the authors … to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind".[135] In the *Belgium v. Senegal* case, the ICJ identified the *erga omnes partes* nature of obligations under the Convention Against Torture in the treaty's preambular call "to make more effective the struggle against torture…throughout the world".[136] Consequently, "the obligations in question are owed by any State party to all the other States Parties to the Convention"[137] and States have "a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, the authors do not enjoy impunity".[138]

121. This type of obligation exists in Genocide Convention. In the *Reservations to the Convention Against Genocide* Advisory Opinion, the ICJ emphasised that States had a common interest in each other's compliance with the Convention, because its "object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality".[139] In the preliminary objections phase of the current *Gambia v. Myanmar* case also before the ICJ, the Court affirmed the "right of all other Contracting Parties to assert the common interest in compliance with the obligations *erga omnes partes* under the Convention".[140] The Court invoked this dictum, and proceeded on the basis of it, in the Provisional Measures Order of 26 January 2024 in the current *South Africa v Israel* case concerning the Genocide Convention.[141]

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[131] ARSIWA, *supra,* Art. 48.
[132] ARSIWA, *supra,* Part Three, Ch. I, Art. 48 Commentary, para. 6.
[133] *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (hereinafter *Belgium v Senegal*), p. 422 at p. 439, para. 68.
[134] *Belgium v. Senegal*, *supra,* p. 450, para. 69; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar), Preliminary Objections, I.C.J. Reports 2022 (hereinafter '*Gambia v. Myanmar* Preliminary Objections'), p. 36, para. 109.
[135] *Case of the S.S. "Wimbledon"*, Judgment of 17 August 1923, P.C.I.J., Series A, No. 1, 1923 (hereinafter '*S.S. "Wimbledon"*'), p. 23.
[136] *Belgium v. Senegal* Judgment (2012), *supra*, para. 68.
[137] Ibid.
[138] Ibid.
[139] *Reservations to the Genocide Convention*, International Court of Justice, Advisory Opinion (1951) p. 12.
[140] *Gambia v. Myanmar* Preliminary Objections, *supra,* para. 113.
[141] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), International Court of Justice, 26 January 2024, Request for the Indication of Provisional Measures, Order, obtainable here (hereinafter '*South Africa v Israel* 26 January Order'), para 33.

122. The obligations to respect the right to self-determination, and observe the prohibition of aggression, exist in treaties to which Israel and other States are parties. The prohibition of aggression is, in effect, provided for in the substantive *jus ad bellum* rules of the UN Charter. As indicated earlier, the right of self-determination is provided for in common Article 1 of the two global human rights Covenants of 1966, the ICCPR and the ICESCR. Israel is a party to these treaties. All third States, including EU States, are parties to the UN Charter. Most third States, including all EU States, are parties to one or other or both of the human rights Covenants. The UN Charter and the human rights Covenants are regarded as paradigmatic examples of agreements adopted on the basis of promoting the common interests of the parties.

7.b.iii. (2) *Erga omnes* obligations owed to the international community as a whole

123. The second way in which obligations can operate *erga omnes* is in the sense that they are understood to be owed to the international community as a whole and, therefore, as the ICJ held in the *Barcelona Traction* case, "by their very nature … are the concern of all States" and "[a]ll States can be held to have a legal interest in their protection...".[142] The right of self-determination and the prohibition of aggression that are violated by Israel's presence in the OPT also operate *erga omnes* in this sense.

7.b.iv. *Erga omnes* character of third State suppression duties

124. If violations of the *erga omnes* obligations by any given State—in this case, Israel—is understood to be of interest to all, it follows that violations of the suppression duties borne by third States in relation to the violations of the *erga omnes* obligations will themselves also be of interest to all States, and so also operate *erga omnes*. Thus if a third State violates the aforementioned suppression duties in relation to Israel's violations arising out of its presence in the OPT, this will itself be a violation of an obligation that operates *erga omnes*. Given the aforementioned differences in certainty and precision as between suppression duty (1), on the one hand, and suppression duties (2) and (3), on the other hand, the significance of the duties operating *erga omnes* is chiefly as far as the latter two, the duties not to recognize, or aid or assist, is concerned (this would be different for duty (1) if the focus on the law being breached by Israel was broadened out, for example to encompass violations of IHL and the Genocide Convention—that would be beyond the scope of the present opinion).

7.c. What third States and the EU can do

7.c.i. Characterize the Israeli presence in the OPT, and any breaches by other third States of the foregoing obligations relating to this presence, as illegal

125. The general right that third States and the EU have is to *invoke* Israel's breach of the legal right of self-determination and prohibition of aggression that its presence in the OPT gives

[142] Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33).

rise to.[143] (Notably, the ILC Draft Conclusions on *jus cogens* norms (the Commentary of which observing that norms with *jus cogens* status also have *erga omnes* status) holds that "any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*)"[144].) They also have the right to invoke any breach by any other third State of suppression duties (2) and (3) relating to Israel's breaches, as outlined above. This right to invoke means a legal right to publicly characterize the existence of Israel's presence in the OPT as illegal, and to publicly criticise the existence of the presence on the basis that it is illegal. Likewise, it means a legal right to publicly characterize any breaches by other third States of suppression duties (2) and (3) relating to the illegality of Israel's presence in the OPT as illegal, and to publicly criticise these States for the relevant actions (e.g. providing arms) on the basis that they are illegal.

7.c.ii. Call upon Israel and third States—cessation, assurance of non-repetition, reparation

126. Third States and the EU are legally entitled to call on Israel to perform the three breach-consequence-related obligations that exist in international law, the first of which having been addressed above: cessation, assurances of non-repetition, and reparation. They are, thus, for example, entitled to call upon Israel to immediately terminate its presence in the OPT. Likewise they are entitled to call upon any third States who are breaching suppression duties (2) and (3) to perform these three breach-consequence-related obligations as they relate to the breaches they are committing.

7.c.iii. Take measures to induce cessation and reparation

127. Third States and the EU are also entitled to take lawful measures against Israel, and any third States breaching suppression duties (2) and (3), to induce the aforementioned cessation and reparation.[145]

128. In addition, countermeasures—acts that are ordinarily wrongful, but where wrongfulness is precluded by the fact that they are taken in response to another State's wrongful act—against Israel, and any third States breaching suppression duties (2) and (3), may also be legally permissible on the same grounds. The Commentary to the ILC Articles on State Responsibility noted in 2001 that State practice on countermeasures by non-injured States "is limited and embryonic," mentioning the use of trade embargoes, asset freezes, travel bans, boycotts, and other unilateral and multilateral sanctions.[146] The conclusion then was that

> the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States

[143] ARSIWA, *supra,* Art. 48(b).
[144] ILC *jus cogens* Draft Conclusions & Commentaries, *supra,* Conclusion 17, para. 2.
[145] ARSIWA, *supra,* Art. 54.
[146] ARSIWA, *supra,* Part Three, Ch. II, Art. 54 Commentary paras. 3 and 4 (quotation from para 3).

> referred to in article 48 [concerning *erga omnes* obligations] to take countermeasures in the collective interest.[147]

Notably, the Commentary did not hold that such countermeasures would be unlawful—the position was left open. In the over-two-decade-period since the Commentary was completed, a right to take such measures may have crystallized.[148]

7.c.iv. Bring and/or participate in a legal claim

129. Third States have potential standing to bring a claim before a court, tribunal or other international law enforcement body against Israel concerning its breaches of international law in maintaining its presence in the OPT, and against any third State breaching suppression duties (2) and (3) in relation to these breaches of international law by Israel. As will be explained, the EU could also participate in some of these cases.

130. Examples of standing established on the basis of obligations operating *erga omnes partes* (or potentially so, to be determined definitively at a later stage of an ongoing case) are the League of Nations Permanent Court of International Justice in the aforementioned *S.S. Wimbledon* case, allowing Italy and Japan to bring a claim against Germany for refusing to grant access to the Kiel Canal, despite not being individually injured;[149] the ICJ permitting Gambia to bring a claim against Myanmar under the Genocide Convention despite being uninjured by Myanmar's actions;[150] and the current cases, also before the ICJ, brought by South Africa against Israel also under the Genocide Convention, and by Nicaragua against Germany for violations of various areas of international law arising out of its action and inaction in relation to Israel's violations of international law in Gaza, where, in the former, the Court accepted at the provisional measures stage, on the basis of the lower *prima facie* standard applicable at that stage, that South Africa had standing to bring the case on *erga omnes partes* grounds, and in the latter, the Court, at the same stage, did not address the question of *prima facie* standing, having decided that provisional measures were not required, but rejected Germany's request to strike the case from the list on the grounds of a manifest lack of jurisdiction, finding that there was no such manifest lack.[151]

131. The possibility of such a claim in relation to the existential illegality of Israel's presence in the OPT, and any breaches by third States of suppression duties (2) and (3) relating to this illegality, would depend *inter alia* on whether a court or tribunal would have jurisdiction to hear it.

132. As far as a claim against Israel, outside of the highly unlikely scenario whereby Israel would agree to such jurisdiction on the basis of *forum prorogatum*, the main possibility is in the context of a claim concerning Israel's violations of international law in the way it treats the Palestinian people in its conduct of its presence in the OPT. Two sets of rules

[147] ARSIWA, *supra,* Part Three, Ch. II, Art. 54 Commentary paras 6.
[148] Martin Dawidowicz, 'Third-Party Countermeasures: A Progressive Development of International Law?', (2016) 29 QIL 3.
[149] S.S. "Wimbledon" supra, pp. 20-23
[150] *Gambia v. Myanmar* Preliminary Objections, *supra*, p. 37, para. 113,
[151] In the case of the *South Africa v Israel* case, in *South Africa v Israel* 26 January Order, *supra,* paras 33-4. In the case of the case of the *Nicaragua v Germany* case, in the Order of 30 April 2024.

regulating this conduct are capable of being adjudicated internationally without Israel needing to consent to this jurisdiction.

133. The first option for a claim against Israel is a claim concerning violations of the Genocide Convention before the ICJ, as is currently underway with the *South Africa v Israel* case concerning the situation in Gaza since October 2023 in particular. Under Article IX of the Convention:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III [concerning conspiracy, incitement, attempt and complicity], shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

134. Any of the 153 parties to the Convention are able to bring such a case, without Israel needing to consent to the Court's jurisdiction.[152] Israel has not made any reservations in connection with being a party to the Convention.[153] As South Africa has already brought a case against Israel concerning Gaza in particular, other States can potentially participate in this, as some have already. There are two potential options here.

(1) The first option is pursuant to Article 62 of the ICJ statute, which stipulates that:

> 1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> 2. It shall be for the Court to decide upon this request.[154]

At the time of writing requests of this kind were made by Nicaragua and Palestine.[155]

(2) In the second place, under Article 63 of the ICJ statue, any of the parties to the Genocide Convention have a right to intervene in the proceedings on the basis that the case involves the "construction"—i.e. a determination of the general meaning—of the Convention to which they are parties.[156] If they intervene on this basis, then the "construction given by the judgment" will be binding on them.[157] At the time of writing, declarations of intervention had been made by (in the order in which they were made) Colombia, Libya, Mexico, Palestine, Spain, Türkiye, Chile, Maldives, and Bolivia,[158] and it had has been reported that Bangladesh, Belgium and Ireland had separately, announced their intention to intervene in the case.[159]

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[152] For the parties to the Convention, see See United Nations Treaty Collection, Status of Treaties, Genocide Convention, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en

[153] Id.

[154] ICJ Statute (Annex of the UN Charter), https://www.icj-cij.org/statute) (hereinafter 'ICJ Statute'), Art. 62.

[155] See https://www.icj-cij.org/case/192

[156] ICJ Statute, *supra,* Art. 63.

[157] Id.

[158] See https://www.icj-cij.org/case/192

[159] https://mofa.gov.bd/site/press_release/2bd6b2da-c04d-48b7-a7c8-b32cf13a97fc; https://www.middleeastmonitor.com/20240311-belgium-to-intervene-in-south-africas-genocide-case-against-israel-at-top-un-court/; https://www.gov.ie/en/press-release/4e9a7-statement-by-the-tanaiste-on-the-south-africa-vs-israel-case-at-the-international-court-of-justice/.

135. International organizations, including the EU, could also participate in this or any other cases brought under the Genocide Convention, as the EU has already done in the *Ukraine v Russia* case also before the ICJ, also concerning the Genocide Convention.[160] Such participation is possible on the basis of Article 34, paragraph 2, of the ICJ Statute, and Article 69, paragraph 2, of the ICJ Rules of Court. Article 34 of the Statute stipulates that (emphasis added):

> 1. Only states may be parties in cases before the Court.
>
> 2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and *shall receive such information presented by such organizations on their own initiative.*

The latter, italicised clause of the sentence in paragraph 2 means that irrespective of whether the Court has made a request for an international organization to provide information, any such organization can provide information, and the Court is bound to receive it. Article 69, paragraph 2, of the Rules of Court states:

> [w]hen a public international organization sees fit to furnish, on its own initiative, information relevant to a case before the Court, it shall do so in the form of a Memorial to be filed in the Registry before the closure of the written proceedings.

136. The second option for a claim against Israel is a (non-legally-binding) communication (effectively, a complaint) alleging a violation of the International Convention on the Elimination of Racial Discrimination (ICERD) in terms of the prohibition of apartheid and racial discrimination more generally to the Committee on the Elimination of Racial Discrimination (not a court but a body that makes what are in effect quasi-judicial determinations).[161] Article 11(1) of the ICERD reads,

> If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee.[162]

This mechanism does not require Israel's prior consent for the Committee to be seized, and no reservation has been made to Articles 11 by any Party to the Convention.[163] Indeed, in a decision in a 'communication' (as such complaints are termed) brought by the State of Palestine against Israel, the CERD has, in tandem with the jurisprudence and interpretations of the American and European Courts of Human Rights, and the UN Human Rights Committee, emphasised that human rights obligations are "non-synallagmatic".[164] They impose collective obligations, rather than a "web of inter-State exchanges of mutual obligations".[165] Consequently, "any State party may trigger the collective enforcement

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[160] On that intervention, see https://www.icj-cij.org/sites/default/files/case-related/182/182-20220818-PRE-01-00-EN.pdf.

[161] On Israel being a party to the Convention, see United Nations Treaty Collection, Status of Treaties, ICERD, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.

[162] International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 U.N.T.S. 195 (hereinafter 'ICERD'), Art. 11(1).

[163] See CERD, Inter-State communication submitted by the State of Palestine against Israel: decision on jurisdiction, U.N. Doc. CERD/C/100/5, 6 June 2021, para. 56 and UN Treaty Collection, Status of Treaties, ICERD, Declarations and Reservations, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.

[164] Ibid, para. 50.

[165] Ibid, para. 48.

machinery created by the respective treaty, independently from the existence of correlative obligations between the concerned parties".[166] Such an approach advances the "object and purpose" of human rights treaties,[167] rooted as they are "in superior common values shared by the international community as a whole".[168] Therefore, under the ICERD, any of the 182 State Parties to the ICERD[169] may bring a communication (complaint) against Israel for its violations of the ICERD, in addition to the communication brought by Palestine, which concluded with a report by the ad-hoc conciliation commission on 22 August 2024.[170]

137. Bringing their own ICJ case under the Genocide Convention, and/or participating in the *South Africa v Israel* ICJ case concerning that treaty, or bringing a communication under the ICERD, could provide third States and, in the case of the ICJ possibilities, also the EU, an opportunity to invoke the illegality of Israel's presence in the OPT. Neither ICJ cases, nor ICERD communications, would be concerned with this matter directly, because of the limited focus on, respectively, the Genocide Convention and ICERD. However, the legal issues that fall to be determined as a matter of these two instruments are linked to the broader legal matter of the illegality of the presence as a matter of the *jus ad bellum* and/or the law of self-determination.

138. In the case of the Genocide Convention, for example, one legal issue to be determined in the *South Africa v Israel* case is the question of whether Israel's military action in Gaza meets the 'intent' requirement for genocide, in the light of Israel's claim that the intent of its action in Gaza is self-defence. That claim presupposes what, as has been explained herein, the ICJ effectively rejected in the *OPT* Advisory Opinion: that Israel's presence in the OPT has a valid basis in the *jus ad bellum*. Whereas Article 63 interventions would be limited to the general matter of the meaning of the Genocide Convention, rather than its application to the facts of the case, such interventions could address the general issue of the meaning of the intent requirement, in the context where self-defence is being invoked, but where there is no valid international legal right to exercise self-defence in existence.

139. In the case of the ICERD, the limited nature of the aforementioned report by the ad hoc conciliation commission in the communication brought by Palestine (a matter that is beyond the scope of the present opinion)[171] means that there are still many important issues that could be addressed in a new communication brought against Israel, by one or more third State. This would provide the State or States a further opportunity to invoke the illegal nature of the Israeli presence in the OPT. One example of the legal issues that could be raised in such a communication is the question of the significance for the prohibitions of racial discrimination and apartheid of the authority at issue having no valid legal basis to be in existence in the first place.

140. Finally, as far as a claim against a third State for a breach of suppression obligations (2) and (3) is concerned, there is an exceptionally wide and varied range of possibilities here,

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[166] Ibid, para. 50.
[167] Ibid, para. 51 (cf. Vienna Convention on the Law of Treaties, 23 May 1969, entry into force 27 January 1980, Art. 31).
[168] Ibid, para. 51.
[169] See UN Treaty Collection, Status of Treaties, ICERD, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.
[170] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=187
[171] See e.g. https://www.ejiltalk.org/a-missed-opportunity-the-decision-in-palestine-v-israel/#:~:text=Palestine%20v%20Israel%20specifically%20litigated,3%20CERD'.

depending on which State is under evaluation and the particular mechanisms that can exercise jurisdiction over it. They could involve claims directly concerning these obligations, and/or claims concerned with related obligations that, as with the foregoing examples concerning Israel, could require these obligations to be addressed. The aforementioned case brought by Nicaragua against Germany to the ICJ is an illustration of the type of claim that could be brought here. One legal matter that will need to be resolved in that and other claims of this type is whether or not they require the consent of Israel, on the grounds that the legal issues which fall to be resolved necessitate determinations as to the legality of Israel's behaviour (the principle from the 1954 *Monetary Gold* judgment of the ICJ).[172]

8. Significance for the EU-Israel Association Agreement

141. The "Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part," commonly known as the EU-Israel Association Agreement (EU-Israel AA), was adopted in 2000.[173] At that time, the predominant focus within the EU was, as indicated above, on illegality in the OPT in terms of how Israel conducted the occupation, rather than the occupation being itself illegal. When the focus shifts to existential illegality, as is now demanded by the *OPT* Advisory Opinion and the implementing resolution of the General Assembly, more fundamental and wide-ranging illegality is at issue. Moreover, as outlined above, there is a complex, inextricable relationship between all facets of the Israeli state, economy, and society with the presence at this more general, wide-ranging level, which makes it impossible to meaningfully disaggregate so as to identify areas where co-operation is possible without recognizing, or aiding and assisting, in the illegal presence. Hence, duties (2) and (3) mean that there cannot be co-operation as a general matter. Indeed, they require the adoption of a complete, reciprocal, trade (including arms), finance, investment, scientific, technological, audiovisual, cultural (including tourism), educational and sporting embargo.

142. The EU-Israel AA is, therefore, fundamentally incompatible with this new, authoritatively-established understanding of the true nature of the illegal character of the Israeli presence in the OPT. In particular, most of its provisions are now incompatible with legal duties (2) and (3): viz. those that cover free trade, scientific and technological co-operation, economic co-operation, cooperation on audiovisual and cultural matters, information and communication, and social matters.

143. The preamble to the EU-Israel AA affirms

> …the importance which the Parties attach to the principle of economic freedom and to the principles of the United Nations Charter, particularly the observance of human rights and democracy, which form the very basis of the Association.[174]

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[172] See https://www.icj-cij.org/sites/default/files/case-related/19/019-19540615-JUD-01-00-EN.pdf

[173] "Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part", 21 June 2000, *Official Journal of the European Communities*, L 147/3 (hereinafter 'EU-Israel AA').

[174] EU-Israel AA, *supra*, preamble.

Article 2 of the EU-Israel AA states that:

> Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.[175]

The first of the purposes and principles listed in the UN Charter is:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.[176]

The main substantive obligations borne by States parties to the UN Charter are, as mentioned earlier, the rules on the use of force, the *jus ad bellum*. The second of the purposes and principles of the UN Charter is:

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people.[177]

The obligation to respect self-determination is, as indicated earlier, enshrined in customary international law and common article 1 of the global human rights Covenants.

144. It is exactly these particular rules of international law—the *jus ad bellum,* and the right of self-determination—that are being violated by Israel's presence in the OPT, and it is precisely because of the special treatment that these rules are given in international law that third States, and the EU, bear the special suppression-related duties in relation to them. The EU-Israel AA, in both the preamble and Article 2, invokes the very concepts—"the principles of the United Nations Charter" and "the observance of human rights" (the preamble) and "respect for human rights" (Article 2)—that implicate these rules, but then, paradoxically, goes on to set out provisions which are contrary to them. The "principles of the United Nations Charter, particularly the observance of human rights" are not simply matters which are *important* to the Parties; the *jus ad bellum* and the obligation to respect the right of self-determination constitute binding international legal rules. Moreover, these obligations cannot somehow be balanced against, and so potentially compromised in relation to, "the principle of economic freedom". They constitute non-derogable rules of international law, whereas a decision made between international legal persons to commit to economic freedom in their mutual relations is not something, in general, they are bound to do, let alone bound to do on the basis of an obligation that is non-derogable. Likewise, "relations between the Parties, as well as all the provisions of the Agreement itself" should indeed be "based on respect for human rights", but not because such respect is simply a 'guide' to "internal and international policy". Rather, this is necessary because of binding international legal obligations, including, notably, the non-derogable legal obligation to respect the right of self-determination.

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[175] Id, Art. 2.
[176] UN Charter, Art. 1 para. 1.
[177] UN Charter, Art. 1 para. 2.

145. The EU-Israel AA must therefore be terminated, in order to bring the actions of EU States, and the EU itself, in line with their obligations in international law as set out in Section 6 above.