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**UNITED NATIONS ROUND TABLE ON LEGAL
ASPECTS OF THE QUESTION OF PALESTINE
CONVENED BY THE COMMITTEE ON THE EXERCISE
OF THE INALIENABLE RIGHTS OF
THE PALESTINIAN PEOPLE**

United Nations Office at Geneva, 24 and 25 April 2014

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I. Introduction

Objectives of the round table

The United Nations round table on legal aspects of the question of Palestine was organized under the auspices of the Committee on the Exercise of the Inalienable Rights of the Palestinian People and was held at the United Nations Office at Geneva on 24 and 25 April 2014.

The General Assembly in its resolutions 68/12 of 26 November 2013, requested the Committee, *inter alia*, to “continue to exert all efforts to promote the realization of the inalienable rights of the Palestinian people, including their right to self-determination”. In keeping with that resolution the Committee convened the round table in Geneva, in an effort to provide international legal experts with an opportunity to discuss the legal status of Palestinian political prisoners and detainees in international law, as well as the admission of Palestine to the United Nations as a non-member observer State and the general legal implications stemming from this status.

Organization of the international meeting

Invited to the round table were all members and observers of the Committee, renowned legal experts and a number of civil society organizations accredited to the Committee. The opening session was open to all Member States. The round table was attended by representatives of 36 Governments, 2 intergovernmental organizations, 2 United Nations bodies and agencies, 10 civil society organizations and 17 legal experts. The Committee delegation was comprised of Abdou Salam Diallo, Permanent Representative of Senegal to the United Nations and Chairman of the Committee, Zahir Tanin, Permanent Representative of Afghanistan to the United Nations and Vice-Chairman of the Committee, Rodolfo Reyes Rodriguez, Permanent Representative of Cuba to the United Nations and Vice-Chairman of the Committee, Christopher Grima, Permanent Representative of Malta to the United Nations and Rapporteur of the Committee and Riyad Mansour, Permanent Observer of the State of Palestine to the United Nations.

At the opening session held on the morning of 24 April statements were made by Michael Møller, Acting Director-General of the United Nations Office at Geneva, on behalf of the Secretary-General; Abdou Salam Diallo, Committee Chairman; Anders Kompass, Director of Field Operations and Technical Cooperation Division, Office of the United Nations High Commissioner for Human Rights, and Issa Qaraqe, Palestinian Minister for Prisoners' Affairs.

Following the opening session, the four plenary sessions of the round table were conducted in closed meetings. Session I entitled “The legal status of Palestinian political prisoners and detainees in international law” took place on 24 April and provided an insight into the status of prisoners of war in international law and its application to Palestinian prisoners and detainees; United Nations procedures and mechanisms to address the issue of political prisoners, including the General Assembly, the Human Rights Council and the treaty bodies; and the issue of political prisoners in international courts and other mechanisms.

Session II entitled “Available legal mechanisms to ensure compliance with international law and third party responsibility” , which also took place on 24 April, provided experts and participants with an opportunity to discuss the responsibilities of the occupying Power under international humanitarian and human rights law; the need to ensure compliance with international humanitarian and human rights laws — actions by States parties to the Third and Fourth Geneva Conventions; and the importance of engaging the International Court of Justice.

Session III, which took place on 25 April and was entitled “General legal implications stemming from the status of non-member observer State”, conducted a legal analysis of General Assembly resolution [67/19](#); looked at the rights and obligations of non-member observer States; international conventions and treaties; and membership in United Nations specialized agencies and other global organizations. Session IV, which took place on 25 April and was entitled “The State of Palestine and international courts”, looked into the issue of placing complaints before the relevant international courts, including conditions, procedures and practices, as well as drawbacks and challenges. The closing session of the meeting took place on Friday, 25 April.

Presentations were made by 17 renowned legal experts. Each plenary session included a discussion period open to all participants. At the conclusion of the round table, all presenters were given an opportunity to submit a full length version and/or a summary of their presentation. The present report contains only the versions of those presenters who submitted their presentations and explicitly approved their publication.

II. Opening session

Secretary-General of the United Nations
(Message delivered by the
Acting Director-General of the United Nations Office at Geneva)

It is an honour to be here to represent the Secretary-General of the United Nations.

We are here today to build on numerous previous events that highlighted the significance of the provisions of international law in efforts to achieve a comprehensive, just and lasting solution of the question of Palestine.

The last such meeting was held here in April 2012 on “The question of Palestinian political prisoners in Israeli prisons and detention facilities: legal and political implications”.

Two years later, after the historic General Assembly vote, we now welcome the State of Palestine as an Observer State. Thus, this round table will discuss two key issues; the legal status of Palestinian political prisoners and detainees in international law and also consider the issue of Palestine’s admission to the United Nations as an Observer State and the general legal implications.

We are privileged once again to host such a gathering of renowned experts, Committee members and observers, at this round table and it is now my honour to deliver the message from the Secretary-General.

Message from the Secretary-General

I am pleased to send greetings to all the participants in this round table on the question of Palestine. I thank the Committee on the Exercise of the Inalienable Rights of the Palestinian People for organizing this discussion.

The round of peace negotiations being led by the United States offers an opening to advance the two-State solution to the Israeli-Palestinian conflict. Most importantly, the Israeli and Palestinian leadership have committed themselves to nine months of focused talks on all core permanent status issues.

However, given the complexity of the issues, nine months have proved to be insufficient to complete the task. I urge the parties to continue the talks on a substantive basis beyond 29 April. The costs of walking away from the negotiating table would be exponentially higher than the pain of the compromises required to resolve the conflict. No lasting peace can be achieved away from the negotiating table, and the current situation is not sustainable for both parties, the region and the international community.

The establishment of an independent State of Palestine based on the borders of 1967, alongside a secure State of Israel, is long overdue. The suffering of millions of Palestinians under occupation has lasted far too long. I remain deeply troubled by Israel’s continuing settlement activity in the West Bank and East Jerusalem, which is illegal under international law. Settlement activity is deepening the Palestinian people’s mistrust in the seriousness of the Israeli side about achieving peace; it also risks rendering a two-State solution impossible. The peace efforts are also being hindered by violence and incitement from all sides. I am concerned over the rising tension with respect to the Temple Mount/Haram Al-Sharif in Jerusalem, and call on all parties to show utmost restraint as well as full respect for the sanctity of holy sites of all faiths.

The deteriorating condition of Gaza’s civilian population remains a source of alarm, as the seven-year-old closure continues to cause serious humanitarian consequences. More than 80 per cent of all families in Gaza are dependent on aid, yet Gaza remains subject to severe restrictions on imports, exports and the movement of people by land, air and sea.

I call for a complete opening of crossings into Gaza, including Rafah, to allow legitimate trade and movements of people. At the same time, Israel’s legitimate security concerns must be addressed by continuing to thwart militant attacks and preventing the smuggling of weapons.

I also reiterate my condemnation of indiscriminate rocket attacks from Gaza, which contravene international law. Israelis have a right to live free of cross-border violence.

I welcome the desire of the organizers of this conference to highlight some of the legal aspects of the Palestinian question. I have repeatedly expressed concern for the more than 4,000 Palestinian prisoners held by Israel, and have also called for ending the practice of prolonged administrative detention. I have also called on Israel to abide by its legal obligations as expressed in the advisory opinion of the International Court of Justice on the wall and the settlements.

I will continue to do my utmost to support the realization of a two-State solution.

I am pleased to continue to be assisted in this endeavour by Mr. Roberterry, the United Nations Special Coordinator for the Middle East Peace Process. We urge the international community to support both sides in continuing their negotiations with the aim of reaching a final peace settlement.

I wish you success in your deliberations.

Abdou Salam Diallo
Chairman of the Committee on the Exercise of
the Inalienable Rights of the Palestinian People

On behalf of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, I welcome you all to this first round table on the legal aspects of the question of Palestine. I would like to convey our sincere appreciation and gratitude to the Government of Switzerland and to the United Nations Office here in Geneva for the warm welcome to the Committee and participants in this round table.

Last November, the United Nations General Assembly, in its resolution 68/12, proclaimed 2014 as the International Year of Solidarity with the Palestinian People and requested our Committee to organize activities in cooperation with Governments, United Nations organizations and civil society organizations. The

objective of the Year is to raise international awareness of the main issues of the question of Palestine, and to promote peace between Palestine and Israel. This also requires raising awareness about the obstacles to the ongoing peace process, particularly settlements, Jerusalem, the blockade of the Gaza strip and the humanitarian situation in the Occupied Palestinian Territory.

Our Committee is grateful for the continued diplomatic engagement by the international community, in particular the persistent efforts of US Secretary of State Kerry. At the same time, we call on all parties to act responsibly to create an appropriate climate for productive negotiations, which will resolve all final status issues and bring about an end to the Israeli occupation, a total Israeli military withdrawal from the Palestinian Territory occupied in 1967, including East Jerusalem, and the realization of the inalienable rights of the Palestinian people, including the right to self-determination.

However, despite the international community's calls on Israel to stop settlement activity, the expansion of settlements continues at an alarming rate in the occupied West Bank, including East Jerusalem, accompanied by the demolition of Palestinian homes and expropriation of Palestinian land. Settlement construction in 2013 more than doubled compared to 2012. These actions are a clear violation of articles 49 and 53 of the Fourth Geneva Convention. On March 29, Israel failed to meet its commitment to release the fourth group of 26 Palestinian prisoners, part of the agreement with the US and Palestinians that led to the resumption of talks. The decision not to release this fourth batch of prisoners has further complicated the continuation of the political dialogue.

Given these harsh realities, it is a rather fortuitous coincidence that we find ourselves in Geneva today. The General Assembly demonstrated its solidarity with the Palestinian people by adopting its historic resolution 67/19 on 29 November 2012, recognizing Palestine as a United Nations non-member observer State. This recognition enabled President Abbas to sign 15 letters of accession to international conventions and treaties on April 1, including a letter to the Swiss authorities in their capacity as depositories of the four Geneva Conventions of 12 August, 1949, and the first Additional Protocol. The Geneva Conventions define the basic, wartime rights of prisoners, both civilian and military, establish protections for the wounded and establish protections for the civilians in and around a war zone. Moreover, the Geneva Conventions also define the rights and protections afforded to non-combatants. The State of Palestine formally acceded to these Conventions effective 2 April, 2014, a day that will be remembered by future generations as momentous.

During the next two days, together with our Palestinian colleagues and the incredible panel of legal experts who accepted our invitation, we will be learning a great deal about the application of the Geneva Conventions to prisoners held by the occupying Power and applicable international mechanisms. We will also hold discussions about the broader legal implications of Palestine's accession to international conventions and treaties. This is critical since if the current round of negotiations fail, the Palestinians will have other legal options open to them. I encourage all of you to participate actively to enable our Palestinian colleagues start to exercise the full depth and breadth of their inalienable rights.

I look forward to two days of fruitful discussion. Thank you very much.

Anders Kompass

Director, Field Operations and Technical Cooperation Division,
Office of the United Nations High Commissioner for Human Rights, and
Representative of the High Commissioner

I am delighted to represent the Office of the High Commissioner for Human Rights at this round table on the legal aspects of the question of Palestine. I would like to take the opportunity to extend our thanks to the Committee on the Exercise of the Inalienable Rights of the Palestinian People for convening this event.

There have been significant developments in recent times regarding the situation in the Occupied Palestinian Territory. By General Assembly resolution 67/19, Palestine was granted non-member observer State status in the United Nations in November 2012. This formal recognition of Palestinian statehood by the General Assembly is a significant step towards Palestinians' realization of the right to self-determination. The High Commissioner, as well as her predecessors and many of the United Nations human rights mechanisms, have consistently called for the right to self-determination of Palestinians to be respected, protected and fulfilled. Self-determination is a fundamental human right, one to which Israelis and Palestinians are equally entitled.

Many key human rights concerns related to the occupation of Palestine were highlighted in reports of the High Commissioner and the Secretary-General to the recent twenty-fifth session of the Human Rights Council. These need to be addressed urgently, regardless of the outcome of the current round of peace talks. In the West Bank including East Jerusalem, concerns include the excessive use of force against Palestinians by Israeli security forces, violations of rights of Palestinians deprived of their liberty, the ongoing construction of Israeli settlements and settlement-related activities such as the demolition of Palestinian homes, forcible transfer of Bedouin communities and settler violence.

The situation in the Gaza Strip has been of equal concern to OHCHR. Israel's blockade of Gaza, which constitutes a form of collective punishment prohibited under international law, coupled with the recent destruction of most of the tunnel network with Egypt has resulted in a significant deterioration of economic and social rights in Gaza. In addition, the renewed hostilities between Palestinian armed groups and Israeli armed forces in the Gaza Strip in recent months are troubling.

An overarching concern, which affects the entire spectrum of Palestinians' economic, social, cultural, civil and political rights, has been a lack of accountability on both the Israeli and Palestinian sides. As recalled by the High Commissioner at the latest session of the Human Rights Council, there is an urgent need to carry out prompt, thorough, effective, independent and impartial investigations into allegations of unlawful killing or injury and torture and ill-treatment and to prosecute individuals responsible for violations and provide victims with an effective remedy.

Ten years after the unequivocal advisory opinion of the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory, it is past time that the human rights of Palestinians and Israelis alike be respected and international obligations be observed – this is imperative for any lasting peace. In the context of the current talks, the parties need to do everything possible to respect human rights.

I am pleased that two days of this round table will be used to discuss many important questions. My colleague will be making a presentation in session I, focusing on how United Nations procedures and mechanisms have addressed the human rights concerns related to Palestinian detainees and prisoners. The session on Palestine's status as a State promises to be a very interesting discussion. The recognition by the General Assembly of Palestine as a non-member observer State has opened the door for Palestine to accede to international instruments. Much has been said about the recent decision by Palestine to request accession to a number of international treaties, including eight human rights instruments. However, it is a positive development that Palestine has acted to formally commit itself to the international human rights principles and standards contained in those instruments.

I would like to thank again the Committee on the Exercise of the Inalienable Rights of the Palestinian People for this initiative and look forward to two days of fruitful discussions.

Thank you.

Issa Qaraqe
Minister for Prisoners' Affairs
State of Palestine

On behalf of my colleagues in the official delegation, the representatives of Palestinian institutions and human rights associations and myself, I wish to thank the Chair and members of the Committee on the Exercise of the Inalienable Rights of the Palestinian People for organizing this meeting at a time when the occupied State of Palestine has become a high contracting party to the four Geneva Conventions and a party to 15 international instruments.

Some 5,000 Palestinian men and women continue to languish in the jails of the Israeli occupation. They are held in 22 prisons, camps and detention centres inside the State of Israel. 476 of them have received single or multiple life sentences. There are 19 female prisoners and 200 minors aged under 18. There are 185 administrative detainees, 11 elected members of the Legislative Council and a number of political leaders. 30 prisoners have spent more than 20 years in prison. The one who has been incarcerated longest is Karim Yunus, who has been jailed for 32 years.

Since the outset of the occupation, in 1967, some 850,000 Palestinian citizens from all sectors of Palestinian society have been jailed by the Israeli occupation authorities. They include children, women, old people and youth; people who were ill or disabled; parliamentarians and academics; political, union and professional leaders; students, authors, artists, teachers and others.

Detentions are a daily occurrence, part of the routine of the occupation authorities. A total of 3,874 detentions took place in 2013, an average of 232 per month or 11 per day. 75 per cent of those cases involved children under 18.

The United Nations has proclaimed this year as the International Year of Solidarity with the Palestinian People. This meeting therefore takes on a special importance. It is vital to settle the legal debate regarding the status of Palestinian prisoners under international law and formulate a legal and political strategy on the topic of detainees in Israeli occupation prisons. Doing so would help to determine steps and priorities to extend legal protection to the prisoners under international humanitarian law, and to address the grave violations imposed on them by the Israeli occupation authorities.

I believe that the meeting can build on the following set of legal bases and arguments.

I. On 29 November 2012, Palestine gained the status of observer State in the United Nations and thereby became a legal person under international law, which regulates relations between States. That situation belies the Israeli claim that Palestine is a disputed territory. It reaffirms the position of all previous United Nations resolutions, namely that the Palestinian territory, including Jerusalem, has been occupied since 1967. The territory of the Palestinian State is under Israeli occupation. It must be liberated and its people must be enabled to exercise its right to self-determination.

II. On 1 April 2014, Palestine signed and acceded to the following 15 international instruments: the four Geneva Conventions of 1949 and the first protocol additional thereto relating to the protection of victims of international armed conflict; the Hague Convention with respect to the Laws and Customs of War on Land and its annex: regulations respecting the laws and customs of war on land; the International Convention on the Suppression and Punishment of the Crime of Apartheid; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the United Nations Convention against Corruption; the Vienna Convention on the Law of Treaties; the Vienna Convention on Diplomatic Relations; and the Vienna Convention on Consular Relations.

The fact that Palestine has signed those instruments will give effect to the relevant international laws as a frame of reference and obligate Israel, the occupying Power, to respect the provisions and principles of those instruments in its interactions with prisoners.

III. The Charter and resolutions of the United Nations affirm the inalienable right of the Palestinian people to self-determination. All States Members of the United Nations must protect and respect the right to self-determination of other States. The subjection of peoples to foreign colonization, control and exploitation contravenes the Charter, violates basic human rights and impedes international peace and cooperation. It is also inconsistent with the resolutions of the United Nations General Assembly, which affirm that peoples have a legitimate right to resist any acts of force that prevent them from realizing their right to self-determination. Such resolutions support national liberation movements in their struggle for independence and freedom from foreign tyranny and hegemony.

Those three lines of argument undermine Israel's refusal to apply the Geneva Conventions to the Occupied Palestinian Territory on the pretext that it does not belong to any sovereign State, that no State has claimed sovereignty over it, and that the four Conventions apply only to the occupation of the territory of a high contracting party. That claim has allowed Israel to treat Palestinian prisoners and detainees as criminals and terrorists, and to impose its domestic laws and military orders. It became invalid, however, when the Swiss Government declared on 11 April 2014 that the State of Palestine had, without reservation, become a high contracting party to the 1949 Geneva Conventions and the first protocol additional thereto.

Israel also errs when it claims that it does not recognize the Palestinian territories as occupied, but rather as administered or disputed. General international law recognizes national liberation movements as legal persons in accordance with the resolutions of the General Assembly and the protocols additional to the Geneva Conventions. In 1967, the United Nations recognized the Palestine Liberation Organization (PLO), in its capacity as a national liberation movement representing all of the Palestinian people, as an observer member in the United Nations. Israel recognized PLO as the sole legitimate representative of the Palestinian people in the Declaration of Principles (Oslo I Accord) in 1993.

Turning to the practical situation of prisoners in Israeli jails, the Government of Israel, the Power occupying the Palestinian territories, has committed grave violations, war crimes and crimes against humanity in its treatment of prisoners. It has contravened international humanitarian law, common article 3 of the 1947 Geneva Conventions, the first protocol additional to the Geneva Conventions and the resolutions of the United Nations. The most prominent of those grave violations are as follows:

I. Palestinian prisoners have been held in prisons in the occupying State, in contravention of articles 49, 66 and 76 of the Fourth Geneva Convention, which prohibit the transfer of prisoners from an occupied area to the occupying State.

II. During interrogation, torture and degrading treatment have been used in order to extract information from prisoners, in violation of common article 3 of the Geneva Conventions, article 147 of the Fourth Geneva Convention and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 4 of which deems all acts of torture to be war crimes.

Since 1967, 73 Palestinian prisoners have been martyred owing to the use of torture. The most recent was Arafat Jaradat, who died on 23 February 2013.

Israel has acted as a State above the law by inflicting savage forms of torture on the prisoners, including children, from the very beginning of their detention. In Israeli legislation and courts, torture is given legal cover under the pretext of counter-terrorism, and interrogators have legal immunity: no interrogator or superior has been held accountable or prosecuted for crimes against prisoners committed during interrogation.

The Israeli Supreme Court, which is the highest judicial authority in Israel, refuses to conduct any criminal investigation into complaints or torture and abuse submitted by prisoners and human rights institutions.

In comments published in the newspaper *Ha'aretz* on 8 December 2012, an officer in an interrogations unit stated that the use of torture, abuse and degrading treatment of prisoners was systematic rather than sporadic, and that it was not rejected or disapproved in his unit.

III. Imprisonment of minors: 8,000 persons Palestinian children under 18 have been detained since 2000. Children continue to be imprisoned and denied any protection or rights. Israel has failed to comply with the 1990 Convention on the Rights of the Child, which defines a child as any human being below the age of 18 years. Instead, it has defined children as anyone below the age of 12. 700 children are detained every year, the youngest of them only eight years old. They are tried in military courts alongside adults and in juvenile courts.

During their detention and interrogation, 95 per cent of children are subjected to humiliating and degrading forms of interrogation and abuse. Confessions are extracted by force, under pressure and through threats. Children are held in harsh and challenging conditions. Some have been sexually abused, held in solitary confinement or denied lawyers' visits.

On 26 June 2012, the United Kingdom Foreign Office released a report written by a delegation of British lawyers who had investigated the treatment of child prisoners. The report stated that certain aspects of child detention amounted to torture, including solitary confinement, denial of family visits, sleep deprivation, sexual harassment and the practice of making children sign confessions in a language they cannot read. It also stated that Israel treated every Palestinian child as a potential terrorist.

IV. Medical neglect: reports by human rights organizations reveal a policy of medical neglect. Necessary treatment is denied to prisoners who are sick, thereby increasing the prevalence of incurable diseases. More than 1,400 prisoners suffer from a disease, including 25 prisoners with cancer. Others have tumours, are disabled or paralysed or have gunshot injuries.

Medical policy in prisons is characterized by delays in treatment, refusal to transfer sick prisoners to hospital, misdiagnoses, medical errors, refusals to transfer patients by ambulance, a lack of specialist doctors, substandard and inappropriate detention facilities, and control methods, such as the use of tear gas, that cause disease. Of particular concern was the disclosure by the Israeli Minister of Science in 1997 that Israeli pharmaceutical companies had conducted 1,000 medical experiments on Palestinian prisoners, something that explains the high rates of disease among prisoners. Since 1967, 53 prisoners have died in occupation prisons as a result of medical neglect, including, most recently, Hasan al-Turabi and Maysirah Abu Hamdiyah.

V. Administrative detention: Israel continues to subject prisoners to arbitrary administrative detention without trial or charge. Such arrests can be extended indefinitely, and prisoners or their counsel are given no opportunity to raise a defence. Israel relies on the so-called secret file prepared by the Israeli security services.

On 24 April 2014, 180 prisoners began an open-ended hunger strike in protest against their administrative detention.

Since 2000, a total of 23,000 orders for administrative detention have been issued. All segments of Palestinian society have been targeted, including elected members of the Palestinian Legislative Council.

In line with Israeli policy, administrative arrest has become a routine rather than an emergency or anomalous measure. Under the Fourth Geneva Convention, administrative detention constitutes a particularly harsh measure. The Israeli occupation authorities use it as an easy and convenient alternative to filing criminal prosecutions, particularly if they have no evidence to support their accusations. The use of secret evidence is the norm rather than the exception, and the judiciary's reliance on such evidence indicates the high level of trust it places in the Israeli security services.

VI. Unfair trials: the procedures for the arrest and treatment of Palestinians in the Occupied Palestinian Territory are subject to a series of military orders issued by Israeli commanders. Palestinian prisoners are tried by Israeli military courts inside military bases, presided over by military judges.

Israel rejects the applicability in court proceedings of the Geneva Convention relative to the Protection of Civilian Persons in Time of War. Tens of thousands of Palestinians have been tried in military courts since those courts were established in 1967. Israeli courts are notoriously unfair and convict most Palestinians brought before them. In 8,854 cases tried before military courts in 2006, only 26 defendants were acquitted.

Israeli occupation courts are noted for their discrimination. The maximum sentences for Israelis before civilian courts are more lenient than those for Palestinians before military courts.

Civilian judges presiding over the trials of Israeli defendants allow them to raise their own defence, whereas that right is denied to Palestinians. As the Israeli journalist Kobi Nev has stated, the Army, the police the settlers, the border guards, the security services and the courts are all manifestations and different disguises for a single arm, the long arm of the State of Israel, which seeks to deprive Palestinians of their land, dignity and rights.

I have mentioned only a few examples of how Israel refuses to abide by international law in its treatment of prisoners. There are numerous grave violations, including deportations, solitary confinements, denials of family visits, apartheid, premeditated killings and extrajudicial executions of prisoners, the use of prisoners as human shields, withholding of prisoners' corpses and abductions from areas under the authority of the Palestinian National Authority. Under the Geneva Conventions, Member States are obliged to prosecute persons accused of such serious violations or extradite them to States that are prepared to do so.

Today, at this meeting, we must strive to address the main obstacles to the application of international law in the Occupied Palestinian Territory. We must determine how international tribunals and investigative committees can prevail on Israel to abide by the principles of international law and investigate those responsible for abuse against detainees. We hope to draw on your expertise and on the expertise and experience of other States and peoples.

Today, we must endeavour to formulate a strategic legal vision to establish mechanisms for the protection of Palestinian detainees now that, in a significant development, the State of Palestine has acceded to a number of international instruments. While disregarding political considerations and the dictates of the military occupation forces, we must endeavour to settle the debate regarding the legal status of Palestinian prisoners under the provisions and principles of international law.

That vision must, in my view, be based on the applicability of the Geneva Conventions. The consensus among international legal scholars is that those Conventions apply to the Occupied Palestinian Territory and to prisoners in occupation prisons. The Third Geneva Convention applies to the overwhelming majority of Palestine Liberation Organization combatants and to Palestinian national security personnel, including members of the Palestinian National Security Forces, following the 1982 declaration by the Palestine Liberation Organization, in its capacity as a national liberation movement, that it accepted and would respect and comply with the conditions set forth in the first protocol additional to the Geneva Conventions.

We must therefore consider by what legal means Israel, the occupation authority, can be prevailed upon to respect apply the Conventions. The legal means that we should consider include the following:

1. A protecting power arrangement should be put in place. Such arrangements can play an important role in upholding international human rights law. The protecting power is responsible for protecting the interests of victims, monitoring the extent to which the parties to a conflict comply with their international obligations, and providing assistance and protection to civilians under military occupation.
2. Urging the high contracting parties to the Geneva Convention to call upon Israel to apply the Fourth Geneva Convention in the Occupied Palestinian Territory, including with regard to Palestinian detainees.
3. Considering whether cases of war crimes as defined in the Conventions that have been or are being perpetrated by Israelis against prisoners, can be brought before the courts of States Parties to the Geneva Conventions.
4. Considering the establishment by the United Nations General Assembly of a special court, under Article 12 of the Charter of the United Nations, to consider Israeli crimes and inhumane treatment of prisoners.
5. Considering whether the General Assembly could request the International Court of Justice to issue an advisory opinion to establish the legal status of Palestinian detainees and the responsibilities of third parties.
6. Considering the formation of an international fact-finding commission composed of 15 States parties to the Geneva Conventions, in accordance with article 90 of Additional Protocol I, to investigate the situation and conditions of detainees in occupation prisons.
7. Considering the importance of Palestine's potential accession to the Rome Statute of the International Criminal Court with a view to prosecuting Israeli officials for crimes against prisoners.

Lastly I should like to thank you once more. I wish this meeting every success towards realizing justice, freedom and peace for our Palestinian people and our detainees in the prisons of the occupation.

III. Session I

The legal status of Palestinian political prisoners and detainees in international law

Sharon Weill
Lecturer and Academic Coordinator, Legal Section,
Centre for Education and Research in Humanitarian Action,
University of Geneva and the Graduate Institute, Geneva

The illegality of Israeli military courts

Under Article 66 of Geneva Convention IV, the Israeli military courts should be properly constituted and non-political.

Article 66 of Geneva Convention IV grants the military commander of an occupying Power the authority to establish military courts for the purpose of prosecuting offences, enacted on the basis of Article 64(2) of Geneva Convention IV. The military courts shall be "properly constituted, non-political" and located in the occupied territories. Art. 66 of Geneva Convention IV states: "In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country". The Israeli military courts in the West Bank and the Gaza Strip are the only example of military courts that claim to derive their authority from Article 66 of Geneva Convention IV. The Israeli military courts were established immediately upon the assumption of governmental authority in the Occupied Palestinian Territory by Israel. On 7 June 1967, the Israeli army issued Proclamation No 3, to which was annexed the Security Provisions Order (West Bank region) 1967, and which authorized the military commander to establish military courts, stipulated their rules of procedure, and enumerated the offences punishable by the courts. The numerous amendments have twice been incorporated into consolidated versions. First in 1970, in the Security Provisions Order (Judea and Samaria) No 378, 1970, and again in 2009, in the Security Provisions Order [Consolidated Version] (Order No 1651) - 2009. During 2001-2004 the military courts operated under the terms of the 1970 consolidated version of this order (hereinafter: Security Provision Order No. 378). On the same day, the military commander also ordered the establishment of military courts. Order regarding Establishment of Military courts (West Bank Area) (No 3) 1967, 7 June 1967, Compilation of Proclamations, Orders and Appointments No 1, p. 25.

The first five Israeli military courts were established in 1967 in Hebron, Nablus, Jenin, Jericho and Ramallah. Since then the number of courts has been reduced or enlarged according to security and political considerations. The Israeli military courts have issued hundreds of thousands of decisions involving criminal procedures. Today, only two courts of first instance and one court of appeals function in the West Bank. These courts are responsible for administering justice in matters under their jurisdiction for the entire Occupied Palestinian Territory. Whether they alone could handle this task is highly questionable. As a defense attorney explained, "[the military courts] have many cases, perhaps more than the Magistrate Court in Jerusalem. But they have fewer judges, fewer prosecutors, fewer courtrooms – and so they don't have time. And all of that is to the detriment of whom? Of the defendants and their attorneys". Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories*(2007), p. 93. Available at <http://www.yesh-din.org/site/images/BackyardProceedingsEng.pdf>. See also Sharon Weill, "The judicial arm of the occupation: the Israeli military courts in the occupied territories", Volume 89, June 2007, at footnote 4.

1. Properly constituted?

Courts "properly constituted" under Geneva Convention IV must comply with the standards required by the rule of law. Raz identified eight fundamental elements of the rule of law, common to all legal systems: (1) all law should be prospective, open, and clear; (2) the law should be relatively stable; (3) the making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules; (4) the independence of the judiciary must be guaranteed; (5) the principles of natural justice must be observed; (6) the courts should have review powers over the implementation of the other principles; (7) the courts should be easily

accessible; and (8) the discretion of the crime-prevention bodies should not be allowed to pervert the law. J. Raz, 'The Rule of Law and Its Virtue' (1977) 93 The Law Quarterly Review 2. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the U.S. Supreme Court held that a "regularly constituted court" of Common Article 3 is identical to the term "properly constituted courts" of Article 66, and that it "must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I)." 548 U.S. at 633. Similarly, the ICRC commentary emphasizing that "the idea of a regular trial is so important" indicates that military courts will "be set up in accordance with the recognized principles governing the administration of justice." Pictet, *Commentary*, p. 340. Indeed, the severity of the accusation does not lower the standard for determining whether a court is properly constituted.

Article 66 of Geneva Conventions IV requires the creation of non-political courts. Indeed, any legal procedure has to be decided by a competent, independent and impartial tribunal established by law. This requirement is prescribed by numerous human rights documents and treaties. See for example, the International Covenant of Civil and Political Rights, December 16, 1966 [hereinafter: the ICCPR], Article 14(1); the European Convention for Human Rights and Fundamental Freedoms, November 5, 1950 [hereinafter: the European Convention], Article 6(1); The American Convention on Human Rights, November 22, 1969 [hereinafter American Convention], Article 7(4); Articles 8(1) and 27(2); and African Charter on Human and Peoples' Rights, June 27, 1981 [hereinafter African Convention], Articles 7(1) and 26. and has been recognized as a founding principle in domestic systems bound by the rule of law.

The Basic Principles on the Judiciary, adopted by General Assembly resolution, established the conditions and procedures necessary to guarantee the independence of judges. Basic Principles on the Independence of the Judiciary, General Assembly resolution 40/32, November 29, 1985 and resolution 40/146, December 13, 1985 [hereinafter: Basic Principles on the Independence of the Judiciary]. These include establishing the qualifications necessary to be a judge, determining the terms of judicial appointment, Basic Principles on the Independence of the Judiciary, Principle 10. establishing efficient, fair and independent judicial disciplinary proceedings, *Id.*, Principles 17-20. and providing adequate salaries *Id.*, Principle 11. and proper training *Id.*, Principle 10. to enable the judiciary to properly perform its functions. *Id.*, Principle 7.

The judiciary in the Israeli military courts do not meet the international law standard for impartiality and independence.

(a) **The appointment procedure for the Israeli military court judges**

According to Article 3(b) of the Security Provision Order No. 378, Israeli military court judges are appointed by the army commander "on the recommendation of the Chief Military Attorney." Accordingly, judges operating in Israeli military courts in the Occupied Palestinian Territory are dependent on the prosecution and executive authorities because they are appointed following the recommendation of the head of the prosecution unit. Moreover, from 1967-2004, the judges of the Israeli military courts belonged to the Military Advocate General's Corps, the same military unit as the military prosecutors who appeared before them, and the unit which influences the content of military legislation.

Moreover, the Israeli military court judges are members of the Israeli armed forces. They are therefore subject to military discipline, are evaluated for promotions, and are subordinate to the executive power. Due to the foregoing, a strong argument can be made that the Israeli military courts in the Occupied Palestinian Territory do not comply with the structural requirement of the independence of the judiciary.

This improper constitution of the court was not corrected until April 2004, when the Military Courts Unit was established and subordinated to the Courts-Martial Unit (instead of the Military Advocate General's Corps). In addition, in 2004, the authority to recommend the appointment of judges to the military commander was transferred from the Military Advocate General to the Committee for the Appointment of Military Judges.

American Professor Lisa Hajjar observed that "law enforcement in the occupied territories is not disinterested; it is provided primarily by soldiers, most of whom, by all accounts, are deeply hostile to and suspicious of Palestinians". L. Hajjar, *Courting Conflict - The Military Court System in the West Bank and Gaza* (2005), at p. 112. The fact that all military judges must be officers of the same occupying army, and therefore by definition in a control position vis-à-vis the population of those that they judge, raises a serious doubt about their ability to be impartial.

(b) **The lack of legal training of the Israeli military court judges**

It goes without saying that judges must possess the necessary competence and legal skills in order to fulfil their judicial duties in an independent and professional manner. This is especially true in complex criminal cases.

Between 1967 and 2004, the Israeli military courts in the Occupied Palestinian Territory prosecuted hundreds of thousands of Palestinian civilians, some of them for the most serious offences in the criminal code. Yet, not all judges were required to have a legal background. Many judges were regular army officers, usually quite young, who lacked any legal education. According to Article 4 (a) of Security Provision Order No. 378: "A military court of three will be composed of three judges who are IDF officers, of which at least one will be a jurist judge." According to Article 3(b)(1) of the Security Provision Order No. 378 a jurist judge is an army officer who is "in possession of legal training and at the rank of captain or higher". As a result, most of the serious cases that were prosecuted in the Israeli military courts were decided by benches of three judges, only one of whom had any legal training. This improper constitution of the courts, in force since 1967, was not corrected until October 2004 by Amendment No. 89 to the Security Provision Order, which prescribed that all judges must have legal education. 17 Military Order No. 1550, Security Provision Order (West Bank) (Amendment 1550) (No. 89) – 2004, 12 October 2004.

(c) **Centralization of power under the Israeli Military Commander**

Until 2009, the Israeli military courts operated in accordance with the terms of Security Provision Order No. 378 (1970), which was issued by the Israeli army. In 2009 it was replaced by Security Provisions Order [Consolidated Version] (Judea and Samaria) (No. 1651) (2009). The same military order also established the criminal code, rule of procedures and due process applicable in the Occupied Palestinian Territory, as well as the regulations for the appointment of judges. Since 1967, Security Provisions Order No. 378 has been amended more than a hundred times by the Israeli military executive authorities, the very same authorities in charge of the prosecution of these offences and the appointment of the judges.

Human rights law, which was developed after the drafting of the Geneva Conventions, prohibits the trial of civilians by military courts exactly because they generally do not comply with the requirement of an independent and impartial judiciary. Articles 14 (1) of ICCPR requires that "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". For example the United Nations Human Rights Committee notes that "the existence...of military or special courts which try civilians... present serious problems as far as the equitable, independent and impartial administration of justice is concerned" UN Human Rights Committee, General Comment No. 13 on Art. 14 of the ICCPR, (12 April 1984), UN Doc.HRI/GEN/1/Rev.1.; and the United Nations Special Rapporteur on the independence of judges at lawyers concluded that "international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice." UN document E/CN.4/1998/39/Add.1, paragraph 78. See also: "The existence of independent and impartial courts and the observance of the norms of due process are basic requirements for the proper administration of justice established under international human rights law.... The reality is that, on the whole, as far as ensuring that justice is dispensed independently and impartially is concerned, military courts do not adhere to general principles and international standards and their procedures are in breach of due process" - Federico Andreu-Guzmán, *Military Jurisdiction*, International Commission of Jurists (2001), p. 10.

In this context, the ICRC customary law study states that in order to be independent, a court must be able to perform its functions independently of any other branch of the Government, especially the executive. In order to be impartial, the judges composing the court must not harbour preconceptions about the matter before them, nor act in a way that promotes the interests of one side. Regional human rights bodies have found that the trial of civilians by military courts constitutes a violation of the right to be tried by an independent and impartial tribunal. JM Henckaerts and L. Doswald-Beck, *Customary International Humanitarian law, Volume I: Rules*, Cambridge University Press (2005), (hereinafter: ICRC Customary IHL study), p. 356.

Indeed, the drafting of the Fourth Geneva Convention in 1949 was based on the rationale that occupation is a temporary situation. The Geneva Convention was not designed to regulate, and cannot be construed to authorize, a situation in which for a period in excess of 40 years, Palestinian civilians, including children, would come under the criminal jurisdiction of an alien army's judicial order, which functions as the executive, the legislative and the judicial authority. In addition, human rights law prohibits the trial of civilians by a military court, because of such court's lack of structural independence and impartiality.

2. The Israeli military courts do not provide equal treatment to Palestinians and Israelis living in the Occupied Palestinian Territory, in violation of international law

Equality is a fundamental requirement of the rule of law. The law must be equally applicable to all the subjects under a given jurisdiction, and all subjects should be equal before the law. Article 14(1) of the International Covenant on Civil and Political Rights provides that "All persons shall be equal before the courts and tribunals" and has been interpreted as meaning that all persons must have the right of equal access to a court without any discrimination. This means that establishing separate courts for different groups of people based on their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is a contravention of Article 14(1).

Jurisdiction *ratione personae*: segregation between Jewish and Palestinian defendants

Israeli Security Provisions Order (No. 378) establishes the territorial jurisdiction of the military courts over crimes committed in the Occupied Palestinian Territory regardless of the nationality of the offender, whether he is Israeli, Palestinian or a foreigner. *See* Article 7 (a) of the Security Provision Order N. 378. However, the jurisdiction has been constantly expanded or restricted according to the nationality of the perpetrator, in order to guarantee, on the one hand, jurisdiction over the civilian Palestinian population, and, on the other, to exclude the Jewish Israeli population from being subject to it. In order to avoid a situation in which Israelis residing in the Occupied Territories would fall under the jurisdiction of Israeli military law and tribunals, the Israeli Parliament enacted the Emergency Regulations (West Bank and Gaza – Criminal Jurisdiction and Legal Assistance) Law in 1967, which states in Article 2 (a):

Israeli courts have jurisdiction to try according to Israeli law any person who is present in Israel and who committed an act in the Region, and any Israeli who committed an act in the Palestinian Authority, if those acts would have constituted an offence had they occurred in the territory under the jurisdiction of Israeli courts.

At the same time, to prevent the extension of regular Israeli criminal law to Palestinians, section 2 (c) provides that "this Regulation does not apply to residents of the Region or the Palestinian Authority, who are not Israelis."

As a result of this legislation, a system of concurrent jurisdiction was created; both Israeli civil and military courts have jurisdiction over offences committed in the Occupied Palestinian Territory by Israelis. However, although two very different legal structures are competent to exercise their authority over crimes committed by Israelis in the Occupied Palestinian Territory, there is no law regulating which system has priority in adjudicating. Thus, a selective policy emerged. In the 1960s and 1970s, the parallel jurisdiction of the Israeli courts did not deprive military courts of their authority to adjudicate cases involving Israeli Jews defendants. H CJ *Levy v. General in Chief*, 21 PD 2 (1967); H CJ 507/72 *Arnon v. Attorney General* 27(1) PD 233, 238; English summary: 9 IYHR (1979) p. 334. However, this practice soon came to an end. Since the violent events committed by Jewish settlers during the evacuation of Yamit settlement in Sinai in 1979, Jewish Israelis are no longer tried before the Israeli military courts as a matter of policy. This policy of unequal treatment of Palestinians and Jewish Israeli nationals were introduced for two main reasons. Legally, it ensures that the Israeli Jewish defendant will enjoy the extensive procedural rights guaranteed by Israeli law which, as discussed below, do not apply in the Israeli military courts.

The legal lacuna, i.e., the non-determination of the rules of priority to regulate the concurrency of jurisdictions, facilitates the practice of a segregation policy. Accordingly, if two persons - one Israeli Jewish and the other Palestinian - commit the same crime in the same place in the Occupied Palestinian Territory, they will nonetheless be adjudicated by distinct and unequal systems of criminal law. In other words, the applicable systems of criminal legislation, procedural rights, rules regarding the severity of punishment, and the structural independence of judges will depend solely on the nationality of the perpetrator.

3. The military applicable penal code: illegal expansion of jurisdiction *ratione materiae*

The Hague Regulations require the occupying Power to respect the local laws "unless absolutely prevented." Article 64 (2) of Geneva Convention IV specifies three circumstances in which the occupying Power may also exercise legislative authority. The occupying Power is authorized to promulgate new legislation for the application of the Convention to maintain order and to ensure the occupying Power's safety. Art. 64(2) of the Geneva Convention IV (1949) provides that: "The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them". However, this legislative authority may be exercised only when it is essential to achieving order and safety. Significantly, the ICRC commentary indicates that the legislative capacity of the occupying Power may not serve as a means of oppressing the local population. Pictet, *Commentary*, p. 337.

Since the occupation began in 1967, Israel has issued more than 2,600 orders, including 1,700 orders that involve criminal laws. The military courts, in total expansion of their authorized jurisdiction have been prosecuting Palestinians for a variety of crimes. Indictments filed against Palestinians in the military courts are divided into five categories: hostile terrorist activity; disturbances of the peace; regular criminal offences (such as robbery, drugs offences); illegal presence in Israel; and car/traffic cases. According to official data, the number of indictments filed was 7,804 in 2003; and 10,121 in 2004 (Military Advocate General's Corps Headquarters, annual report on activity for 2003, p. 216, 249; annual report on activity for 2004, p. 126).

4. The right to be free from torture

The right to be free from torture is among the rare legal principles holding the status of *jus cogens*: peremptory norms binding upon all nations without exception. The prohibition on torture under any circumstances is codified in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as the International Covenant on Civil and Political Rights, which emphasizes the duty to treat suspects and detainees humanely and with dignity. ICCPR, Articles 7 and 4.2, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984 [hereinafter: CAT], Article 2(2) set the absolute character of the prohibition. International humanitarian law similarly establishes an absolute prohibition on torture in situations of armed conflict. Common Article 3 to all four 1949 Geneva Conventions anchors the prohibition of torture and cruel treatment and of mutilation. This Article applies explicitly to people being held in detention. The Geneva Convention IV lays down the absolute prohibition on torture and other inhumane treatment of

protected persons. Article 27 of 1949 Geneva Convention IV anchors the right of protected persons to have humane treatment, and to be protected from any act or threat of violence. Article 31 of the Convention prohibits any physical or moral coercion with the intention of obtaining information. In addition, Article 32 lays down a broad prohibition of torture and all brutal measures. Moreover, a violation of the absolute prohibition entails not only State responsibility but also individual criminal responsibility. Torture is defined as a war crime under Articles 8(2)(a)(ii) and 8(2)(b)(xxi) of the ICC Statute, as well as Art. 147 of 1949 Geneva Convention III and Art. 129 of 1949 Geneva Convention III. Art. 4 of CAT imposes on state the obligation to ensure that acts of torture are offences under their criminal law, while international human rights law and international humanitarian law impose a duty upon states to investigate allegations of torture and, where torture is identified, to prosecute those responsible. IHL imposes an obligation upon states to investigate and prosecute grave breaches of the Geneva Conventions, including torture and ill-treatment. See Art. 129 of 1949 Geneva Convention III, Art. 146 of 1949 Geneva Convention IV, and Rule 158 of ICRC Customary IHL Study.

Torture and inhumane treatment by Israeli interrogation authorities

In 1987, the use by Israeli General Secret Service agents of “a moderate measure of physical pressure” in a wide range of circumstances, was officially institutionalized, based on the “necessity” defence clause in the Israeli penal code. The clause stipulated that a person will be exempt from criminal liability for an act required in an immediate manner in order to save his or someone else’s life, liberty, or property, when no alternative course of action is available. The state-appointed Landau Committee interpreted this clause as conferring general, ex ante permission to use “moderate physical pressure” in interrogations and its recommendations were adopted in their entirety by the Israeli Government at the time. The Landau Commission also found that for many years GSS staff had systematically lied to the courts and sought to change this situation. The commission’s report noted ‘the feeling on the part of the interrogators that their actions not only enjoyed the backing of their superiors but were also known to elements outside the service who gave their tacit consent. It was claimed that these elements include the prosecution system – both civilian and the military, the courts, and the political echelon.’ *The Landau Commission Report*, pp. 28–29. This legal construction remained intact for more than a decade, and resulted, according to the Israeli NGO B’tselem, in the use of physical methods that constituted torture against 850 persons a year. 32 B’tselem, ‘Routine Torture: Interrogation Methods of the General Security Service’, February 1998, pp. 5, 16 <http://www.btselem.org/publications/summaries/199802_routine_torture>.

In 1999, the Israeli High Court of Justice rendered its landmark ruling on torture. HCJ (5100/94), *Public Committee Against Torture in Israel v Government of Israel*, 1999 [hereinafter: *Torture case* (1999)]. In that ruling, Justice Aharon Barak recognized the absolute prohibition of torture and inhuman treatment under international law, stating that “They have no exceptions and no balances.” *Ibid.*, paragraph 27. The HCJ further rejected the State’s position that the penal code’s necessity defence provides an ex ante authorization of the use of otherwise illegal methods, explicitly noting that “the government or the heads of the General Security Service do not have the authority to establish guidelines, rules, and permissions concerning the use of physical force during interrogation of persons suspected of terrorist activities.” *Torture case* (1999), paragraph 23, 35. Nonetheless, the Israeli High Court of Justice permitted an important deferral to the discretion of the Executive, which would permit (albeit to a lesser extent) torture and ill treatment practices to persist. The HCJ ruled that the Attorney General “can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from ‘necessity.’” *Ibid.*, paragraph 38. Thus, on the one hand, the Israeli High Court of Justice affirmed that the “necessity defence” could not serve as a legal authorization to use torture, *Ibid.*, paragraph 37: ‘The principle of “necessity” cannot serve as a basis of authority.’ while on the other hand, it allowed the Attorney General, who stands at the head of the State prosecutorial system and serves as the State’s legal adviser, to define the circumstances in which interrogators should not be prosecuted, when they claimed to have used a prohibited method of torture due to “necessity”.

Therefore, since the Israeli High Court of Justice ruling in 1999, hundreds of allegations of torture in detailed affidavits have been submitted. According to the Israeli Ministry of Justice, between 2001 and 2004, 388 torture complaints were submitted against GSS interrogators. In year 2001 – 65 complaints were submitted, in 2002 – 81 complaints, in 2003 – 127 complaints and in 2004 – 115 complaints. See the Letter of Attorney Boaz Oren, head of the International Agreements Unit, Ministry of Justice, 26 June 2006 addressed to the Israeli NGO B’tselem in response to B’tselem’s request for information on torture complaints (on file with the author). Yet, not one of the hundreds of complaints of torture has led to a single criminal investigation. An analysis of correspondence between complainants and the Attorney General’s office shows that the grounds given for shelving complaints of torture and ill-treatment fall into one of two main categories: justification under the necessity defence or denial. See Sharon Weill and Irit Ballas, “The Investigation Mechanism of Torture Claims in Israel: An Analysis of the 2012 GSS Investigation Decision and the Türkel Report”, in Stuart Melsen (ed) *The War Report*, Oxford University Press, Forthcoming December 2013.

Among the many allegations of torture and abuse, sleep deprivation and prolonged interrogations are commonplace, as are such acts as being bound to a chair in painful positions, beatings, slapping, kicking, threats, verbal abuse and degradation. Special methods include bending the body into painful positions, manacled from behind for long periods of time, intentional tightening of handcuffs, exposure to extreme heat and cold, permanent exposure to artificial light, and detention in sub-standard conditions contrary to the basic standards set down by the United Nations. Various forms of psychological torture, such as threats and exploitation of family members, are also commonly used. See Irit Ballas, ‘Family Matters, Public Committee Against Torture, 2012; Maya Rosenfeld, ‘When the exception becomes the rule’, Public Committee Against Torture, 2012; Elkhatib Samakh, ‘Shackling as a form of torture and ill treatment’, Public Committee Against Torture, 2009. Allegations include denying the right to contact attorneys and family members, often for extended periods of time. These allegations have not gone unnoticed by the international bodies. For example, in its concluding observations of May 2009, the Committee Against Torture expressed its concern about the use of illegal methods of interrogation: “The Committee is concerned that there are numerous, ongoing and consistent allegations of the use of methods by Israeli security officials that were prohibited by the September 1999 ruling of the Israeli Supreme Court.” Committee Against Torture, ‘Concluding Observations: Israel’, UN doc. CAT/C/ISR/CO/4, 14 May 2009, paragraph 19.

Conclusion

The Israeli military courts violated international law in multiple ways. Structurally, they failed to provide independent and impartial judges and they treated defendants differently – and unequally – based on their nationality. Procedurally, the Israeli military courts failed to extend basic due process protections to Palestinian defendants. By contrast, Israeli defendants charged with identical offences enjoyed (and continue to enjoy) more robust due process protections in the Israeli civilian courts. Finally, torture, which is prohibited under all circumstances under international law, is sanctioned by the Israeli High Court of Justice, allegations of torture during the relevant time period were common and no independent and effective investigations have ever been made.

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I am pleased to be here today and join this session on behalf of the Office of the United Nations High Commissioner for Human Rights. The situation of the thousands of Palestinians detained and imprisoned by Israel remains of the utmost concern to the High Commissioner. I will talk today about the United Nations procedures and mechanisms which exist and are used to address the issue of detainees and prisoners.

At the outset I would like to note that while the issue of Israeli-held prisoners sometimes referred to, by some, as “political prisoners” has been made part and

parcel of the peace process, it is important to stress that OHCHR is not engaged in this matter in a political sense. In the words of the High Commissioner in February 2011 when she visited Israel and Palestine: “International human rights law and international humanitarian law are not negotiable”. At that time, the High Commissioner expressed her general concern that “the politics of conflict, peace and security are constantly leading to the downgrading or setting aside, of the importance of binding international human rights and humanitarian law”. In such circumstances, it is critical that United Nations procedures and mechanisms maintain a clear focus on what international law says in regard to the rights of Palestinian detainees and prisoners, on the one hand, and the duties of the occupying Power, on the other.

Since 1967, it is estimated that between 700,000 and 800,000 Palestinians have been detained by Israel. This is a staggering number. It is estimated that at the beginning of 2014, over 5,000 Palestinians, including more than 180 children and around 170 administrative detainees, were held in Israeli custody. Statistics from B’Tselem, Addameer and DCI information consulted. Reports relating to the use of administrative detention, torture and ill-treatment, including of children, medical neglect, refusal of family visits, transfer to prisons and detention facilities within Israel, hunger strikes and deaths in detention, are a continuing cause for serious concern.

I will try to provide a brief overview of United Nations mechanisms relevant to these issues.

Every year at the General Assembly and at the Human Rights Council the Secretary-General, the High Commissioner, the Special Committee to Investigate Israeli Practices and the Special Rapporteur submit formal and publicly available reports which deal with the human rights situation in Palestine, including concerns relating to Palestinian prisoners and detainees. These reports are an authoritative source about the human rights situation and as such play a key role in defining policy in a variety of contexts.

Just to provide a snapshot, the recent periodic report of the High Commissioner as presented to the Human Rights Council in March this year included issues of concern related to administrative detention and allegations of torture and ill-treatment of detainees, including ill-treatment of children by Israel. The High Commissioner also reported concerns of arbitrary detention and ill-treatment of detainees by the Palestinian Authority, and concerns of arbitrary detention, torture and ill-treatment by the de facto authorities in Gaza. 2 A/HRC/25/40

Similarly, the Secretary-General in his last report on “Israeli practices affecting the human rights of the Palestinian people...” to the sixty-eighth General Assembly session, included a reference to the denial of family visits to Palestinian prisoners from Gaza. The Secretary-General also reported on allegations of torture and degrading treatment of Palestinian prisoners in Palestinian detention. A/68/502

The Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, which was established by the General Assembly in 1968 Res. 2443 is composed of representatives from three Member States. Its mandate has from the beginning included a very clear emphasis on prisoners and since its first mission to the region in 1970, the Committee has regularly heard witnesses relating to allegations of human rights violations. In its very first report of 1970, A/8089 the Special Committee included several recommendations relating to detention and for example stated that the General Assembly should request Israel to “prevent torture and ill-treatment of Palestinian detainees ...”. In its most recent report to the General Assembly in 2013, several decades after its first report, the Special Committee was still making recommendations relating to detention of Palestinians and, for example, urged the Government of Israel “to conduct thorough and transparent investigations of all allegations of mistreatment of children in detention”. A/68/379

Turning now to consider resolutions, the ability of the international community through the General Assembly to address the issue of Palestinian prisoners and detainees is significant. At its sixty-eighth session last year, the General Assembly passed a resolution A/RES/68/83 “Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem” on Israeli Practices containing three paragraphs exclusively expressing concern on the situation of Palestinian prisoners. It is a notable reflection of the consensus of the Member States of the United Nations on issues relating to the detention and treatment of Palestinian prisoners that the resolution was adopted by 165 votes in favour, 8 against and 8 abstentions.

A similar message can be drawn from the resolutions passed at the twenty-fifth session of the Human Rights Council in March, where four resolutions on Palestine were passed by a vote of 46 in favour to 1 against. This included a resolution L38 “The Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem” in which the Council expresses “deep concern” over the “thousands of Palestinians, including children, women and elected members of the Palestinian Legislative Council” who continue to be held in “Israeli prisons or detention centres under harsh conditions”, and demands that Israel “fully respect and abide by its international law obligations towards all Palestinian prisoners and detainees in its custody”.

Mechanisms such as human rights treaty bodies and special procedures also play an important role and are able to explore the concerns from a thematic point of view.

Israel is a party to several human rights treaties. International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, The Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the Convention on the Rights of the Child, the International Convention on the Rights of Persons with Disabilities. The respective associated human rights treaty bodies, which monitor implementation, require Israel, just like any other State, to engage on relevant issues by submitting State reports and responding to questions by the relevant body. In recent years, Israel has received recommendations from a number of treaty bodies relevant to detention of Palestinians. I would like to share with you just a few examples of the conclusions and recommendations made by treaty bodies.

In 2012, the Committee on the Elimination of Racial Discrimination CERD/C/ISR/CO/14-16 recommended that Israel “ensure equal access to justice for all persons residing in territories under the State party’s effective control” and urged it “to end its current practice of administrative detention, which is discriminatory and constitutes arbitrary detention under international human rights law”.

The Committee against Torture in 2009, CAT/C/ISR/CO/4 raised its concern about “the numerous, ongoing and consistent allegations of torture and ill-treatment before, during and after interrogation” and reiterated that, “no exceptional circumstances, including security or war or threat to security of the State, justify torture”. Israel’s State party report to the next cycle has been due since May 2013.

In 2013, the Committee on the Rights of the Child strongly urged Israel “to guarantee that juvenile justice standards apply to all children without discrimination...and to dismantle the institutionalized system of detention and use of torture and ill-treatment of Palestinian children at all stages of the judicial procedure”. The Committee also urged Israel “to comply with the recommendations it made in 2002 and 2010 and which have been constantly reiterated by all human rights mechanisms, the United Nations Secretary-General and the High Commissioner for Human Rights. CRC/C/ISR/CO/2-4

The recent universal periodic review of Israel by Member States at the Human Rights Council also deserves mention. Interestingly, in an unofficial annex responding to the recommendations, Israel noted its support for the recommendation of Norway to “Take measures to provide for the protection and safety of the Palestinian civilian population and adhere to international standards on juvenile detention” and the recommendation of Denmark to “Ensure that administrative detention is carried out in accordance with international human rights standards”. A/HRC/25/15, 126.112 and 126.124 While there were many recommendations

that Israel did not support, it is positive that it here chose to acknowledge Palestinian prisoners' rights under international law.

With respect to special procedures, independent mandate holders are able to raise particular cases, within their mandates, with a concerned State through urgent appeals or letters of allegation, and to make public reports. The Special Rapporteur on the situation of human rights in the Palestinian territories has in a number of reports included recommendations on Palestinians prisoners and detainees, including children, in Israeli detention. The Working Group on Arbitrary Detention has also consistently expressed its concerns about the plight of Palestinian detainees, in particular the extensive use of administrative detention by Israel, and several cases of Palestinians in detention have been included in recent Opinions adopted by the Working Group. No. 58/2012 (Ahmad Qatamish); No. 20/2012 (Hana Yahya Shalabi); No. 3/2012 (Khader Adnan Musa); No. 9/2010 (Wa'ad al-Hidmy) and No. 5/2010 (Hamdi Al Ta'mari and Mohamad Baran)

I would like to share a few concluding thoughts. Over the years, there have been a few limited successes. Today, there aren't any Palestinian children held in administrative detention and the number of detainees in administrative detention has steadily dropped over the past 10 years. It also appears that Israel has taken some steps at least to address the recommendations made in UNICEF's February 2013 report on "Children in Israeli military detention", which had found ill-treatment of Palestinian children in the Israeli military detention system to be "widespread, systematic and institutionalized". However, it is clear that what is required is more concrete action, based on the numerous General Assembly and Human Rights Council resolutions and the recommendations of the Secretary-General, the High Commissioner, the various treaty bodies, the independent mandate holders and the Member States. That action may come through added encouragement of, and engagement with, Israel to comply with international law, either from the international community, including civil society, or perhaps even more effectively, from within Israel itself. The system of United Nations procedures and mechanisms is crucial to remind the international community that it must continue to insist on the human rights of Palestinian prisoners and detainees.

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We highlighted this morning the relevance of the Fourth Geneva Convention and its applicability to the Occupied Palestinian Territory, also the applicability of international human rights law. There is no doubt about the responsibilities of the occupying Power under these laws. However, the two main questions remain (a) how can we force Israel to respect its obligations to end the prolonged occupation and all its illegal practices, and (b) how can we seek justice and peace?

Before deciding which tools can be used to seek justice, we should diagnose what are the grave breaches and the war crimes that the Israeli occupation committed since 1967 in relation to the case of the Palestinian prisoners and detainees, i.e., torture, arbitrary detention, killings, extensive use of force, unfair trials, ill- and degrading treatment in the process of detention, interrogation and the condemnations.

All these practices are systematic and largely used against all layers of the Palestinian population: adults, minors, men, women, political activists, community leaders, etc.

I will focus on the military courts system and link it to the option of the international courts.

There are three main problems when discussing the issue of military courts in the Occupied Palestinian Territory context:

1. The jurisdiction of the military courts.
2. The military courts' procedures and fair trial standards.
3. The recent changes of the military courts system and amendments to military orders.

1. The military courts actually have geographic jurisdiction that is not limited to the occupied territories as required under international humanitarian law. The military governor extended the jurisdiction to include any country and the military orders can apply to anyone, not just Palestinians, if the person is suspected to be involved in any act that could be considered as a threat to the security of the Occupied Palestinian Territory or the State of Israel.

The second problem related to the military courts' jurisdiction is the wide scope of the activities that are defined as crimes under military orders. It includes traffic, housing, land issues and not only serious security matters, according to the conditions of articles 64 and 66 of the Fourth Geneva Convention. All political activities are illegal since all Palestinian political parties are considered illegal under military orders, all student movements, etc.

2. The review of the procedures under the military courts system shows the discrepancies in terms of fair trial according to International standards. All documents are in Hebrew as well as the sessions, the interpretation is not professional, and the procedures between military orders and Israeli criminal law are discriminating. There is no time to present all the differences but we can state that military courts are not applying fair trial standards.

3. Thanks to local and International pressure in the last few years on military courts, some changes happened. For instance, the new amendment on the age level of who is considered a child was increased from 16 to 18. Now there is a special court for juveniles. The period of the first detention before being brought to the courts was shortened from 8 days to 4 days. All those changes won't make a huge difference for the detainees, but nevertheless now the military courts take into consideration the age at the time of the commission of the act and not at the time of the decision.

I do not think, even after Palestine's new status at the United Nations, that Palestinian prisoners have more options vis-à-vis the international courts system. The Rome Statute to access the International Criminal Court has not been ratified, and Palestine has yet to request full United Nations membership.

We could use the universal jurisdiction procedures according to the Fourth Geneva Convention, and actually human rights NGOs were considering this channel. For example, the Palestinian Centre for Human Rights brought a case of torture to the Spanish courts. Unfortunately, Spain changed its laws, as well as Belgium and the United Kingdom. We believe that political pressure was the main reason for these changes.

We also have the option of bringing the case of the prisoners to the International Court of Justice (ICJ) in a fashion similar to the Wall case. I think it would be better to take to the ICJ the whole question of "prolonged occupation" as suggested by the Special Rapporteurs Mr. John Dugard and Mr. Richard Falk.

Another option would be to set up a special tribunal for the Israeli-Palestinian conflict, like the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. This would be very hard to achieve since a decision of the Security Council is needed. The United States would veto the decision.

At the end, third States have a responsibility to open their legal systems for Palestinian victims to have access to justice.

As well, the Palestinian Authority could start changing the Palestinian legal system, especially after signing the Fourth Geneva Convention, the Convention against Torture and all other Human Rights treaties, so that we could practice universal jurisdiction and prosecute Israeli war criminals in front of Palestinian courts.

IV. Session II

Available legal mechanisms to ensure compliance with international law and third party responsibility

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Responsibility of the occupying Power under international humanitarian and human rights law

1. The status of being an occupying Power is conferred by international humanitarian law. The capacities of an occupying Power are regulated by the Regulations annexed to 1907 Hague Convention IV respecting the Laws and Customs of War on Land (the Hague Regulations) and 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War. In the context of the Israel–Palestine situation, Palestine acceded to Hague Convention IV on 2 April 2014, which will enter into force for Palestine on 1 June 2014.. Ministry of Foreign Affairs of the Kingdom of the Netherlands, Notification, Conventions 1907 No.1/2014 (17 April 2014).

Israel is not a party to this treaty, but the Hague Regulations have long been held to have customary status and thus binding on all States whether or not they are parties to Hague Convention IV.. The customary nature of the Hague Regulations was declared by the International Criminal Tribunal at Nuremberg in the *Trial of German major war criminals*, Cmd. 6964 (1946) 65. The customary status of the Regulations has since been affirmed by various other courts, see, eg, *In re Krupp* (US Military Tribunal at Nuremberg), 15 Annual Digest 620, 622; *R v Finta* (Canadian High Court of Justice), 82 ILR 425, 439; *Affo v IDF Commander in the West Bank* (Israel High Court), 83 ILR 122, 163; *Polyukhovich v Commonwealth of Australia* (Australian High Court), 91 ILR 1, 123. This position has been reaffirmed by Israel's Supreme Court on numerous occasions. See, for instance, *Oyyub v Minister of Defence* 2 Palestine Yearbook of International Law 134 (1985) 140–142, and *Beit Sourik Village Council v Government of Israel and Commander of IDF Forces in the West Bank* (HCJ 2056/04: 30 June 2004), 43 International Legal Materials 1099 (2004), 1107, para.23. Israel ratified the Fourth Geneva Convention on 6 July 1951. Palestine deposited a letter of accession to all four Geneva Conventions and the associated 1977 Additional Protocol I on 2 April 2014: by a letter addressed to all parties of the Geneva Conventions dated 10 April 2014, the Swiss Federal Council, in its capacity as the depository of the Geneva Conventions and Protocols, announced that Palestine had become a party to the four Conventions and Additional Protocol I as of 2 April 2014. See the link to notifications by the depository to States parties made in 2014 at: www.eda.admin.ch/eda/fr/home/topics/intla/intrea/chdep/warvic/depnot.html.

2. Article 42 of the Hague Regulations sets out the conditions for the start of an occupation. It provides:

42. Territory is considered occupied when it is actually placed under the authority of the hostile army.
The occupation extends only to the territory where such authority has been established and can be exercised.

In the hostages case (*United States of America v Wilhelm List and others*) the US Military Tribunal in Nuremberg ruled that “an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant’s control is maintained and that of the civil government eliminated, the area will be said to be occupied”.. VIII Law Reports of Trials of War Criminals 34 (1949), 55-56.

3. Article 43 of the Hague Regulations delineates the extent of the occupant’s authority over occupied territory:

43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

This opening clause of this Article, “[t]he authority of the legitimate power having *in fact* passed into the hands of the occupant”, contains the fundamental premise of belligerent occupation; namely, that sovereignty over occupied territory does not transfer to an occupant, but as occupation prevents the legitimate sovereign from exercising its authority, the occupant acquires a temporary right of administration.

4. Article 43 also places limitations on the extent of that temporary right of administration, as it places the occupant under duties which must be balanced. The occupant’s duty to “restore and ensure...public order and civil life” has to be weighed against the duty to respect “unless absolutely prevented, the laws in force in the country”. The latter recognize that the occupant possesses legislative power over the territory. The parameters of this power are flexible and open to interpretation, as it really is more a guideline than a clear rule. It is nevertheless clear that an occupant does not have a general legislative competence and that changes in the law of the territory will be contrary to international law unless they are required for the legitimate needs of the occupation. In short, the duty under Article 43 of the Hague Regulations to respect existing laws “unless absolutely prevented” has never been interpreted literally, as some flexibility must be accorded to the occupant in the exercise of its administrative functions. This phrase has been interpreted to import a criterion of necessity as a justification for an exercise of the occupant’s legislative competence.

5. A recurring theme in commentaries on the law of belligerent occupation is that both the Hague Regulations and Fourth Geneva Convention envisaged that an occupation would only be of short duration. The authors of these instruments did not conceive that an occupation could last for decades and Israel’s occupation of the occupied Palestinian territories is now well into its fourth decade. Professor Adam Roberts of Oxford has identified a number of long-term occupations, but he cautions against treating them as a special category. To do so might suggest that the law of occupation ceases to apply with its full vigour through the passage of time and thus reward the occupant for prolonging the occupation rather than encourage its termination.

6. It must be emphasized that in the law of armed conflict, or international humanitarian law, the concept of a “prolonged occupation” is absent from the governing international instruments, namely, the 1907 Hague Regulations and the 1949 Fourth Geneva Convention, and the notion has been little discussed in commentaries. There are few meaningful guidelines to determine what may constitute a legitimate deviation from the “normal” rules of occupation during a prolonged occupation. Commentators, however, recognize that circumstances may require that changes be made in the law of an occupied territory during a prolonged occupation in the interests of its population, although, as Professor Dinstein of Tel Aviv University observes, this makes it “imperative to guard the inhabitants from the bear’s hug of the occupant”.

7. At the 1974–1977 Diplomatic Conference which drafted the Additional Protocols to the Geneva Conventions, the majority of participating States

emphasized that, in order to maintain the unity of international law, international humanitarian law could not be isolated and self-contained but had to take into account the rules of general international law. In this connection, emphasis was placed on the need to adapt international humanitarian law to conform with the principles expounded by the International Court of Justice in paragraph 53 of the Namibia Advisory Opinion. See Sandoz *et al* (Eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC: Geneva: 1987) 51-52, namely, that “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation”. *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970) advisory opinion*, ICJ Rep, 1971, 16 at 31, para.53. One of the implications of this approach is the increasing insistence that international human rights law is relevant in time of armed conflict.

8. This was a trend which was already apparent before the 1974–1977 Diplomatic Conference. As early as the late 1960s, United Nations bodies had affirmed that some substantive human rights remained relevant during an international armed conflict. For contemporary commentary see, for instance, Draper GIAD, *The relationship between the human rights regime and the law of armed conflicts*, 1 Israel Yearbook on Human Rights 191 (1971), and von Glahn G, *The protection of human rights in time of armed conflicts*, *ibid*, 208. Thus, for instance, in resolution 237 (1967) on the situation in the Middle East, the Security Council noted that “essential and inalienable human rights should be respected even during the vicissitudes of war” and in operative paragraph 1 of resolution 2675 (XXV) of 9 December 1970, Basic principles for the protection of civilian populations in armed conflicts, the General Assembly affirmed:

Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

9. By the mid-1990s, although it was generally accepted that both human rights instruments and international humanitarian law were relevant in the regulation of non-international armed conflict, the idea that both could also be applicable during an international armed conflict was only emerging towards doctrinal consolidation. See, for instance, Burgos HS, *The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tensions, or public emergency, with special reference to war crimes and political crimes*, in Kalshoven F and Sandoz Y (Eds), *Implementation of international humanitarian law* (Nijhoff: Dordrecht: 1989) 1; Cerna CM, *Human rights in armed conflict: implementation of international humanitarian norms by regional intergovernmental human rights bodies*, in Kalshoven and Sandoz, *op cit*, 31; Dinstein Y, *Human rights in armed conflict: international humanitarian law*, in Meron T (Ed), *Human rights in international law: legal and policy issues* (Clarendon Press: Oxford: 1984) Vol. II, 345; Doswald-Beck L and Vite S, *International humanitarian law and human rights law*, 293 International Review of the Red Cross 94 (1993); Eide A, *The laws of war and human rights—divergences and convergences*, in Swinarski C (Ed), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet* (ICRC: The Hague: 1984) 675; Hampson F, *Human rights and humanitarian law in internal conflicts*, in Meyer A (Ed), *Armed conflict and the new law* (BIICL: London: 1989) 55; Kooijmans PH, *In the shadowland between civil war and civil strife: some reflections on the standard-setting process*, in Delissen A and Tanja G (Eds), *Humanitarian law of armed conflict: challenges ahead. Essays in honour of Frits Kalshoven* (Nijhoff: Dordrecht: 1991) 225; Meron T, *Human rights in internal strife: their international protection* (Grotius: Cambridge: 1987); Robertson AH, *Humanitarian law and human rights*, in Swinarski, *op cit*, 793; and Schindler D, *Human rights and humanitarian law: interrelationship of the laws*, 31 American University Law Review 935 (1982).

10. The first authoritative ruling on the nature of the relationship between international humanitarian and human rights law in an international armed conflict was enunciated by the International Court of Justice in the Legality of the Threat or Use of Nuclear Weapons Advisory Opinion in 1996. It had to consider whether or not the International Covenant on Civil and Political Rights was applicable during an international armed conflict. The Court ruled:

The protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. *Legality of the threat or use of nuclear weapons* advisory opinion, ICJ Rep, 1996(1), 226 at 240, para.25. The earlier ruling by the European Court of Human Rights which addressed aspects of the applicability of human rights norms in an international armed conflict, delivered in *Loizidou v Turkey, preliminary objections judgment* (23 March 1995), Series A, No.310 at 23-24, paras.62-64, is more restricted than that of the International Court in the *Nuclear weapons* advisory opinion. In *Loizidou*, the European Court addressed only the extra-territorial applicability of the European Convention on Human Rights where a State party exercises effective control over foreign territory. It ruled (24, para.62):

Bearing in mind the object and purpose of the Convention, the responsibilities of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set forth in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

11. In the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, the Court reaffirmed this ruling, and effectively did so again in the Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*) case, although it omitted the reference to *lex specialis*, which some have taken to mean that the Court has abandoned this approach. Prud'homme N, *Lex specialis: oversimplifying a more complex and multifaceted relationship?*, 40 Israel Law Review 355 (2007) 385. One would have wished that, having dealt with the issue three times, the Court might have been a tad more candid and maybe just a bit more specific. It has not provided a transparent account of the relationship between the law of armed conflict and human rights law in armed conflict. In fact, in the Legal Consequences of the Construction of a Wall Advisory Opinion, the Court gave the very useful explanation that:

As regards the relationship between international humanitarian law and human rights law, there are three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. *Legal consequences of the construction of a wall in occupied Palestinian territory*, ICJ Rep, 2004, 136, at 178, para.106.

12. The nature of the relationship between the law of armed conflict and international human rights law is complex and its contours contested in academic literature. Many broad, or overbroad, claims have been made as to the extent that human rights law applies during an armed conflict. The debate tends to focus on human rights treaties, without taking into account that some core rights, such as the right to life, are defined differently in different conventions, or that these contain different provisions which determine their applicability. Customary international law tends to be generally ignored in this debate. My view is that there are no general axiological principles that can determine this relationship and that the extent to which human rights apply during an armed conflict essentially depends on context and circumstances. See Scobbie I, *Principle of pragmatics? The relationship between human rights law and the law of armed conflict*, 14 Journal of Conflict and Security Law 449 (2010). Nevertheless, these rulings by the International Court of Justice have legally entrenched the idea that there is some normative relationship between these two branches of law.

13. From the abstract to the specific and thus to the Israel–Palestine situation. On occasion, the Government of Israel has challenged the status of the Palestinian territories as occupied, referring to them instead as “administered” or “disputed” territories. For example, Gold, speaking as the Israeli representative in the General Assembly, employed the term “disputed territories” to refer to the occupied Palestinian territories in the debate regarding the draft of General

Assembly resolution 52/250 (13 July 1998) which dealt with the participation of Palestine in the work of the United Nations, see UN Doc.A/52/PV.89 (7 July 1998) 3. or, in the case of the West Bank, as “Judea and Samaria”. For example, after the Legal Consequences of a Wall Advisory Opinion, a former legal adviser to the Israeli Foreign Ministry stated:

Since Israel seized the West Bank from the Kingdom of Jordan in the 1967 Six-Day War, this territory has essentially been disputed land with the claimants being Israel, Jordan and the Palestinians. Its ultimate status and boundaries will require negotiation between the parties, according to Security Council resolutions 242 and 338.. Sabel R, *The ICJ opinion on the separation barrier: designating the entire West Bank as “Palestinian territory”* (Jerusalem Center for Public Affairs: October 2005), available at: www.icpa.org/ICPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=254&PID=0&IID=893

This ignores the administrative separation of Jordan from the territory of Mandate Palestine in 1922 and its consequent irrelevance to the question of Palestinian self-determination.

14. In the wake of the 1967 war, the “missing reversioner” argument gained currency in Israeli legal and political circles.. See Blum YZ, *The missing reversioner: reflections on the status of Judea and Samaria*, 3 Israel Law Review 279 (1968) ; and Shamgar M, *The observance of international law in the administered territories*, 1 Israel Yearbook on Human Rights 262 (1971) 263-266. See also Gerson A, *Israel, the West Bank and international law* (Cass: London: 1978) 76-82; and Gorenberg G, *The accidental empire: Israel and the birth of the settlements, 1967-1977*, (Times Books: New York: 2006) 101. In essence, this contends that Israel does not have the status of belligerent occupant in the territories seized from Jordan and Egypt during the Six-Day War because neither was the displaced legitimate sovereign over these territories in terms of article 43 of the Hague Regulations. It was claimed that as Jordan and Egypt had invaded the territory of Mandate Palestine in order to eradicate Israel, they had used force unlawfully in contravention of Article 2.4 of the Charter of the United Nations. Because they had unlawfully acquired control over the territories, Blum claims that Jordan, and by extension Egypt, were entitled at most to claim the status as belligerent occupants.. Blum, *Missing reversioner*, 288 and 292-293, and also his *The juridical status of Jerusalem* (Hebrew University: Jerusalem: 1974) 15 and 18-21: see also Gerson, *Israel, the West Bank and international law*, 78-79 (although Gerson thinks that Jordan may have been more than a belligerent occupant in the West Bank, inventing the category of trustee-occupant in the process); and Shamgar, *Administered territories*, 265-266. The missing reversioner argument maintains, therefore, that neither Jordan nor Egypt possessed sovereignty over the territories they occupied.. Blum, *Missing reversioner*, 293; Gerson, *Israel, the West Bank and international law*, 78; and Shamgar, *Administered territories*, 265-266. Accordingly, as the purpose of the law of belligerent occupation is to recognize the occupant’s rights of governance while safeguarding the revisionary rights of the ousted sovereign, where the latter does not exist, only those rules intended to safeguard the humanitarian rights of the population apply.. Blum, *Missing reversioner*, 293-294.

15. Denial that Israel is the belligerent occupant of Palestine is still current within some Israeli circles. For instance, in February 2012, the Israeli Government appointed a commission, headed by former Supreme Court Justice Levy, to “examine the status of building in Judea and Samaria” - in other words, to examine the legality of settlements, whether authorized by the Israeli Government or not, in the West Bank. On 9 July 2012, the Commission’s report was released, and its conclusions stated:

Our basic conclusion is that from the point of view of international law, the classical laws of “occupation” as set out in the relevant international conventions cannot be considered applicable to the unique and sui generis historic and legal circumstances of Israel’s presence in Judea and Samaria [i.e., the West Bank] spanning over decades.

In addition, the provisions of the 1949 Fourth Geneva Convention, regarding transfer of populations, cannot be considered to be applicable and were never intended to apply to the type of settlement activity carried out by Israel in Judea and Samaria.

Therefore, according to international law, Israelis have the legal right to settle in Judea and Samaria and establishment of settlements cannot, in and of itself, be considered to be illegal.. An English translation of the Levy Commission’s conclusions and recommendations is available at: <http://unispal.un.org/UNISPAL.NSF/0/D9D07DCF58E781C585257A3A005956A6>.

16. Israel has also claimed that because the West Bank, East Jerusalem and Gaza were not part of the territory of a High Contracting Party to the Fourth Geneva Convention, the Convention is inapplicable. The situation did not fall within the terms of Article 2 of the Convention, which provides, in part:

The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

17. The missing reversioner argument was rejected by the International Court in the Legal Consequences of the Construction of a Wall Advisory Opinion. It ruled that the Fourth Geneva Convention applies to any armed conflict between High Contracting Parties and that it was irrelevant whether territory occupied during that conflict was under the sovereignty of one or other of the combatants. This interpretation was based on textual exegesis, the drafting history of Geneva Convention IV, the practice of parties to the Convention, the views of the International Committee of the Red Cross, General Assembly and Security Council, and also that of the Israel Supreme Court.. *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 173-177, paras.90-101. This was a unanimous finding by the Court, as the sole dissenting judge, Judge Buergenthal, expressly concurred in this ruling.. *Legal consequences of the construction of a wall* advisory opinion, declaration of Judge Buergenthal, ICJ Rep, 2004, 240, para.2.

18. This conclusion had also been foreshadowed in a 14 September 1967 memorandum of the then legal adviser to the Israeli Foreign Ministry, Theodor Meron, which noted that the international community had rejected Israel’s claim that the territories were not occupied:

We must nevertheless be aware that the international community has not accepted our argument that the [West] Bank is not “normal” occupied territory and that certain countries (such as Britain in its speeches at the United Nations) have expressly stated that our status in the [West] Bank is that of an occupying State. In truth, even certain actions by Israel are inconsistent with the claim that the [West] Bank is not occupied territory. 14 September 1967 Meron memorandum entitled *Settlement in the administered territories*, original in Hebrew, Israel State Archives, 153.8/7921/3A, legal opinion numbered as document 289-291, with unnumbered cover notes. An English translation of this memorandum may also be found at: www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf: quotation at 3.

19. While the ruling of the International Court must be seen as definitive on this point, we might also want to consider if Palestine’s accession to the Fourth Geneva Convention earlier this month finally put an end to any doubt on this point. Occupation is a continuing situation; Palestine is now a High Contracting Party to the Fourth Convention; and Israel is in control of Palestinian territory.

20. Indeed, the Legal Consequences of the Construction of a Wall Advisory Opinion is authoritative on the points it considers and thus should be the starting point for considering Israel's obligations as occupant in relation to the law of armed conflict and international human rights law. While it is formally correct to say that advisory opinions are not binding, this concerns only a technical issue. There are no parties to advisory proceedings before the International Court. Consequently, the opinion cannot generate *res judicata* because there are no parties who are bound by, and thus under the obligation to implement, the Court's findings. That should not detract from the fact that the Court's findings are an authoritative statement of the law, because the Court's opinion constitutes the legal advice it has given to the organ which has requested that the opinion be delivered.

21. It must be underlined that although Judge Buergenthal cast negative votes against the substantive findings in the operative clause of the opinion, because he thought that the Court did not have before it adequate factual information to decide these questions properly, he agreed with the rest of the Court on the key substantive findings, namely: that international humanitarian law, including the Fourth Geneva Convention and international human rights law are applicable in the Occupied Palestinian Territory; that the Palestinian people have a right of self-determination which must be fully protected; and that Israeli settlements in the Occupied Palestinian Territory are unlawful as they breach Geneva Convention IV, article 49.6. The importance of this cannot be overemphasized. On the fundamental points of principle that structure the legal framework of the relationship between Israel and Palestine, the Court was unanimous.

22. The responsibilities of Israel as occupying Power under the law of armed conflict depend on the legal classification of the situation obtaining between Israel and Palestine. The applicability of the Fourth Geneva Convention and the relevant provisions of the Hague Regulations pertaining to occupation, is predicated on the existence of an international armed conflict. In the past, Israel has sought to deny that the situation should be so classified. For instance, in its First Statement to the Sharm el-Sheikh Fact-finding Committee (the Mitchell Commission), the Government of Israel stated that since the start of the second intifada:

Israel is engaged in an armed conflict short of war. This is not a civilian disturbance or a demonstration or a riot. It is characterised by live-fire attacks on a significant scale, both quantitatively and geographically - around 2,700 such attacks over the entire area of the West Bank and the Gaza Strip. The attacks are carried out by a well-armed and organized militia, under the command of the Palestinian political establishment, operating from areas outside Israeli control. *Sharm el-Sheikh Fact-finding Committee, First Statement of the Government of Israel* (28 December 2000), para.282, available at: http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/12/Sharm%20el-Sheikh%20Fact-Finding%20Committee%20-%20First%20Sta-open.

23. The notion of an "armed conflict short of war" was devised by the Israel Defense Forces (IDF) Military Advocate General's Corps to categorize the violence experienced during the second intifada. It was presumably intended not to correspond to either an international or a non-international armed conflict, and thus is a purported novel classification which introduces ambiguity regarding the applicable law. In 2003, Finkelstein, then IDF Military Advocate General, explained that this notion was adopted because:

The scale and intensity of the events justifies the classification as an armed conflict. On the other hand, war is classically defined as being a conflict between the military organizations of two or more States, a condition not met in our scenario.. Finkelstein M, *Legal perspective in the fight against terror—the Israeli experience*, 1 IDF Law Review 341 (2003) 343-344; note omitted.

As "war" is a term which has been consciously dropped from the lexicon of international law, to be replaced by the factual test of whether an armed conflict exists.. See Pictet JS (Ed), *Commentary to Geneva Convention I for the amelioration of the condition of the wounded and sick in armed forces in the field* (ICRC: Geneva: 1952), *Commentary to common Article 2*, 27 at 32—"One may argue almost endlessly about the legal definition of 'war'". It is odd to see this discredited term function as the basis for the attempted introduction of a new legal category which, moreover, has not been consistently employed by the Israeli Government.. See, eg, the arguments presented by the Israeli government on the nature of the conflict in the *Targeted killings* case, summarized in paras.10–11 of President Emeritus Barak's opinion—*Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v (i) the Government of Israel, (ii) the Prime Minister of Israel, (iii) the Minister of Defence, (iv) the Israel Defense Forces, (iv) the Chief of the General Staff of the Israel Defense Forces, (v) Shurat HaDin—Israel Law Center and twenty four others*, decided 13 December 2006: an official English translation of this judgment is available at <http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf>. It also ignores the test set out in the *Tadic* jurisdiction decision in 1995 that:

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.. *Prosecutor v Tadic*, Decision on the defence motion for interlocutory appeal on jurisdiction, ICTY, Case No. IT-94-I-AR72 (2 October 1995), para.70, <<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>>.

24. One may question if this attempt to reconceptualize the nature of the conflict was necessary. As the Palestinian territories were undoubtedly under Israeli occupation at this time, Israel would have been justified in treating the situation as an international armed conflict. Indeed, this has been the position consistently adopted by Israel's Supreme Court. For example, in the *Targeted killings* case the premise of President Emeritus Barak's opinion was that "between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip...a continuous situation of armed conflict has existed since the first intifada".. *Targeted killings case*, opinion of President Emeritus Barak, para.16. He ruled that although the normative system regulating this armed conflict was complex, the situation amounted to an international armed conflict:

The fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict...for years the starting point of the Supreme Court - and also of the State's counsel before the Supreme Court - is that the armed conflict is of an international character. In this judgment we continue to rule on the basis of that view.. Ibid, para.21.

This ruling was expressly reaffirmed by Chief Justice Beinisch in the case brought by Physicians for Human Rights during Operation Cast Lead. *Physicians for Human Rights and others v Prime Minister and others, and joined case*, HCJ 201/09, 248/09, ILDC 1213 (IL 2009), opinion of Chief Justice Beinisch, para.14.

25. This classification is in accordance with that adopted by the International Court in the Legal Consequences of the Construction of a Wall Advisory Opinion. Although the Court did not expressly rule that the situation amounted to an international armed conflict, it did rule, unanimously, that it was governed by the provisions of the Fourth Geneva Convention.. See *Legal consequences of the construction of a wall advisory opinion*, ICJ Rep, 2004, 136 at 173–177, paras.90–101; and the concurring ruling of Judge Buergenthal in his Declaration at 240, para.2. The Court also ruled that the provisions of section III of the Hague Regulations were applicable in occupied Palestinian territory.. See *Legal consequences of the construction of a wall advisory opinion*, 185, para.124.

26. Consequently, Israel is under the obligation to apply the provisions of the Fourth Geneva Convention in occupied Palestine, as well as any relevant customary international law applicable in an international armed conflict, such as the rules set out in section III of the Hague Regulations. Under article 1 of the Fourth Geneva Convention, Israel has the responsibility to "respect and ensure respect" for the Convention "under all circumstances". The International Committee of the Red Cross has identified a parallel customary rule which is applicable in both international and non-international armed conflicts. In its study on customary international humanitarian law, rule 139 provides:

Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. See Henckaerts J-M and Doswald-Beck *Customary international humanitarian law. Volume I: Rules* (Cambridge UP: Cambridge: 2005) 495–498; for commentary see Turns D *Implementation and compliance*, in Wilmschurst E and Breau S, *Perspectives on the ICRC Study on customary international humanitarian law* (Cambridge UP: Cambridge: 2007) 354 at 357–360.

Rule 140 of the study expressly states that this obligation does not depend on reciprocity. See Henckaerts and Doswald-Beck, *Customary international humanitarian law Vol.I*, 498–499; and Turns, *Implementation and compliance*, 360–361. Accordingly, Israel has the responsibility to ensure that the orders and instructions issued to its armed forces are in accordance with the law of armed conflict, and also to ensure that its armed forces respect the law.

27. This latter obligation requires that Israel take remedial measures should acts which are not in accordance with the law of armed conflict occur. Article 146 of the Fourth Geneva Convention requires High Contracting Parties to enact legislation to provide effective criminal sanctions for individuals who commit, or order to be committed, any grave breaches of the Convention and to search for such individuals and either try them before their own courts, regardless of the nationality of the individual, or hand them over for trial to another High Contracting Party which has made out a prima facie case for trial. Article 147 identifies grave breaches as including: wilful killing; torture or inhuman treatment; wilfully causing great suffering or serious injury to body or health; unlawful deportation or transfer or unlawful confinement of a person protected by the Convention (essentially the civilian population of the occupied territory who are not nationals of the occupying Power, or nationals of a neutral or co-belligerent State). The ICRC database on national implementation of international humanitarian law contains no Israeli legislation which implements the obligation contained in article 146 in express terms. See http://www.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByCategorySelected.xsp?xp_countrySelected=IL. but section 16 of Israel's Penal Law (1977, as amended in 1994) provides:

(a) The penal laws of Israel shall apply in respect of external offences for the committing of which the State of Israel has undertaken, in multilateral international treaties open to accession, to penalize; this will also apply even where the person committing the offence is not an Israeli citizen or resident, and irrespective of the place of committing of the offence.

(b) The qualifications specified in Section 14 (b) (2) and (3), and (c), shall also apply in respect of the applicability of the penal laws of Israel under this Section.

Section 14 of the law provides:

(b). (2) A qualification for penal liability under the laws of that State [i.e., another State] does not apply; (3) The person has not yet been acquitted of that offence in that State or, having been convicted, he has not served the sentence imposed on him in respect of that offence. (c) No penalty more grave than what could have been imposed under the laws of the State where the offence was committed shall be imposed in respect of the offence. Reproduced Henckaerts and Doswald-Beck, *Customary international humanitarian law. Volume II: Practice, part 2* (Cambridge UP: Cambridge: 2005), 3903, section 203.

28. Customary international law contains a parallel rule regarding the duty to prosecute war crimes, which is wider in scope than Article 146. Rule 158 of the ICRC Study provides:

States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. See Henckaerts and Doswald-Beck, *Customary international humanitarian law Vol.I*, 607–611; and, for commentary, Garraway C, *War crimes*, in Wilmschurst and Breau, *Perspectives*, 377 at 391–393.

29. An additional responsibility incumbent upon Israel as occupant, which essentially derives from the general international law rather than the law of armed conflict as such, is that it is responsible for any violations of international humanitarian law. Rule 149 of the ICRC study formulates this duty thus:

A State is responsible for violations of international humanitarian law attributable to it, including:

- (a) Violations committed by its organs, including its armed forces;
- (b) Violations committed by persons or entities it empowered to exercise elements of governmental authority;
- (c) Violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and
- (d) Violations committed by private persons or groups which it acknowledges and adopts as its own conduct. See Henckaerts and Doswald-Beck, *Customary international humanitarian law Vol.I*, 530–536; and Turns, *Implementation and compliance*, 372–373.

30. It has long been established in general international law that the corollary of a breach of an international obligation is the consequent obligation to make reparation. See, eg *Chorzow factory case: jurisdiction judgment*, PCIJ, Ser.A, No.9 (1927) 4 at 21; 2001 International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, Article 31—“1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”; and Stern B, *The obligation to make reparation*, in Crawford J, Pellet A, and Olleson S (Eds), *The law of international responsibility* (Oxford UP: Oxford: 2010) 563. Rule 150 of the ICRC study reaffirms this obligation in the specific context of the law of armed conflict. It provides:

A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused. Henckaerts and Doswald-Beck, *Customary international humanitarian law Vol.I*, 537–550.

31. In 2005, Israel adopted the Civil Wrongs (Liability of the State) (amendment No. 7) Law, 5765 – 2005, which provided that Israel would not be liable in tort for damages caused in a zone of conflict for an act carried out by security forces. In *Adalah and Others v. Government of Israel* (HCJ 8276/05), the Supreme Court of Israel decided unanimously that this aspect of the law was unconstitutional and accordingly invalid. Decided 12 December 2006: available on the ICRC national implementation database.

32. In sum, in broad terms, Israel's responsibilities as occupant under the law of armed conflict lie in ensuring that its armed forces respect the law of armed conflict pertaining to occupied territory, in particular the terms of the Fourth Geneva Convention and of section III of the Hague Regulations. Should grave breaches of the Fourth Geneva Convention or war crimes be committed in occupied territory, then Israel is under a duty to investigate and prosecute those responsible. It will also be responsible to compensate or make good any damage caused.

33. Responsibilities under the law of armed conflict are fairly clear. Israel's responsibilities under international human rights are less easy to discern due to the doctrinal differences which exist regarding the relationship during an armed conflict between international humanitarian and human rights law. As noted above, the guidance given by the International Court of Justice on the nature of this relationship is sparse, but some points may be safely made.

34. By its very nature, during an occupation, the occupying Power exercises governmental authority. This is apparent from the terms of article 43 of the Hague Regulations - "the authority of the legitimate power having in fact passed into the hands of the occupant". The function of the occupant is governmental given its duty to restore and ensure public order and safety. The occupant is the administrator of the territory.

35. Although not germane to the Israel-Palestine conflict, the importance of administration was clear in *Loisidou v Turkey*. In this case, the European Court first addressed the extraterritorial applicability of the European Convention on Human Rights where a State party exercises effective control over foreign territory. It ruled:

Bearing in mind the object and purpose of the Convention, the responsibilities of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set forth in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.. *Loisidou v Turkey*, preliminary objections judgment (23 March 1995), Series A, No.310 at 23-24, paras.62-64.

36. In the Legal Consequences of the Construction of a Wall Advisory Opinion, the International Court alluded to a similar concern when considering if Israel had a duty to apply the International Covenant on Civil and Political rights in occupied Palestine:

The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.. *Legal consequences of the construction of a wall advisory opinion*, ICJ Rep, 2004, 179, para.109.

This aspect of an occupation, that the occupant exercises governmental authority, is crucial to determining an occupant's responsibilities under international human rights law.

37. Israel maintains that it is not bound to apply human rights law, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, in occupied Palestine because the law of armed conflict is the discipline which offers protection to individuals in an armed conflict and that human rights treaties are intended to offer protection to citizens from the actions of their own Government in time of peace.. See *Legal consequences of the construction of a wall advisory opinion*, 177, para.102.

38. This position was unanimously rejected by the International Court in the Legal Consequences of the Construction of a Wall Advisory Opinion.. See *Legal consequences of the construction of a wall advisory opinion*, 177-180, paras.102-111 (International Covenant on Civil and Political Rights); 180-181, paras.103-112 (International Covenant on Economic, Social and Cultural Rights), and 181, para.113 (Convention on the Rights of the Child); and also Declaration of Judge Buerenthal, 240, para.2. In doing so it relied on the *travaux préparatoires* of the ICCPR - "the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory" - and the consistent practice of the Human Rights Committee, including in relation to the extra-territorial exercise of jurisdiction by States other than Israel.. *Legal consequences of the construction of a wall advisory opinion*, 179, para.109. It also noted that the Human Rights Committee had expressly rejected Israel's claim that its obligations under the ICCPR did not apply extraterritorially to the West Bank and Gaza in 2003, ruling:

The provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.. *Legal consequences of the construction of a wall advisory opinion*, 180, para.110.

The unanimous view of the International Court regarding Israel's responsibilities to apply international human rights law in occupied Palestine must be taken as determinative. It should also be noted that some human rights norms are common to both the law of armed conflict and international human rights law, such as the prohibition on torture.

39. Further, a move away from the International Court's affirmation of the *lex specialis* principle in constructing the relationship between the law of armed conflict and international human rights law is evident in the practice of some international bodies. For instance, in general comment 31, Nature of the general legal obligation imposed on States parties to the Covenant, the Human Rights Committee did not rely on the *lex specialis* principle to determine the respective application of human rights and the law of armed conflict in armed conflicts but indicated that the issue depended on convergence or parallel application. It stated:

As implied in General Comment 29, the Covenant [on Civil and Political Rights] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.. Adopted 26 May 2004, UN Doc.CCPR/C/21/Rev.1/Add.13: General Comment 29, adopted 31 August 2001, dealt with states of emergency, UN Doc.CCPR/C/21/Rev.1/Add.11.

This approach is a trend evident in recent doctrine.. For instance, see Kretzmer D, *Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?*, 16 European Journal of International Law 171 (2004); Prud'homme N, *Lex specialis: oversimplifying a more complex and multifaceted relationship?*, 40 Israel Law Review 355 (2007) 385; and Schabas WA, *Lex specialis? Belt and suspenders? The parallel operation of human rights law and the law of armed conflict, and the conundrum of jus ad bellum*, *ibid*, 592.

and reflects a renewed interest in doctrines of systemic interpretation derived from article 31.3.c of the 1969 Vienna Convention on the Law of Treaties.

40. Having said that, it remains true that the relationship between the law of armed conflict and international human rights law is not completely mapped out. One consideration which is especially apt in the context of a prolonged occupation is the extent to which, in a calm occupation which is not characterized by widespread violent resistance, human rights law should come to the fore and be the principal framework for the regulation of the occupant's exercise of its powers. It seems axiomatic that if the situation calls for the exercise of what are essentially policing operations, rather than the suppression of violent dissent, that the operative paradigm should be that of law enforcement, rather than armed conflict. One of the principal consequences of such a paradigm shift would be restraints on the use of lethal force by the occupant's forces.

41. In the Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979, the commentary to article 1 notes that "law enforcement officials" include military authorities and State security forces where these exercise police powers. Article 2 provides that in the performance of their duties, law enforcement officials "shall respect and protect human dignity and maintain and uphold the human rights of all persons", while article 3 provides "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty". The commentary to article 3 notes that the use of force by law enforcement officials should be exceptional and should not extend beyond that which is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders. The commentary continues:

The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.

42. This approach was reaffirmed in the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Principle 9 provides:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

These Principles also define “law enforcement officials” to include members of the armed forces or State security services where these exercise police powers.

43. While the Code of Conduct for Law Enforcement Officials and 1990 Basic Principles are not texts which bind States formally, they do constitute a consensus on the proper powers of the police. In a calm occupation, where the role of the occupying forces is more akin to that of ensuring law and order, or of “maintaining public order and safety” to employ the terms of article 43 of the Hague Regulations, it is reasonable to argue that the use of force, and particularly of lethal force, by the occupying forces should be constrained within the limits indicated by these documents.

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In its Advisory Opinion concerning the Construction of a Wall in the Occupied Palestinian Territory, the ICJ clearly formulated the basic principles which have to guide the action by third States to ensure and promote compliance by Israel with the basic legal rules governing the situation of occupation (Reply D to the question put by the General Assembly):

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the Charter of the United Nations and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

According to the Court, the basis for these obligations of all States, i.e., States which are not parties to the Palestinian conflict, is twofold:

1. The majority of the relevant norms create obligations *erga omnes*.
2. Art. 1 common to the Geneva Conventions enjoins all States to respect and to ensure respect for the Conventions.

As practically all States are parties to the Geneva Conventions, the scope of application of the two principles is practically equal. Respecting the specific task assigned to this contribution by the organizers of this colloquium, I will concentrate on the second principle. In its opinion, the Court does not elaborate on the question what measures States could take in order to fulfil this obligation. It only says that they must respect the Charter of the United Nations and international law. This excludes at least the use of force. But positively speaking, what kind of measures are to be envisaged? On an abstract level, the measures to be envisaged are those which have the potential of inducing Israel (and where necessary the Palestinian Authority) to comply with the applicable rule. This paper tries to develop a kind of catalogue of such measures. The list is to a certain extent inspired by the European Union Guidelines on promoting compliance with international humanitarian law (IHL), OJEU 2005/C 327/04.

The holding of the Court, although it addresses the regime of occupation in the Occupied Palestinian Territory, is not limited to this particular question. It applies to other alleged violations of the Middle East conflict (e.g., the treatment of detainees); it also applies to other armed conflicts where international humanitarian law violations are alleged, for instance the situation in Syria. In the discussions of the various items of the catalogue to be explained, examples will sometimes be given. It must be stressed, however, that this paper is not meant to provide a thorough discussion of international humanitarian law violations alleged to have been committed in Palestine.

This is the catalogue of possible measures:

- Political dialogue
- Internalization of norms
- Public statements
- Non-public démarches
- Unilateral restriction, countermeasures
- Conditionality of trade and assistance
- Individual responsibility, fight against impunity
- Evocation of State responsibility
- International dispute settlements
- International cooperation.

Political dialogue: in the reality of the international system, both development and application of international law are determined by a political discourse between relevant actors, and only to a limited extent on high handed enforcement. This is the basis of the functioning of the United Nations system. A responsible use of this discourse is necessary. The duty to ensure the respect of the Conventions implies a duty to use the potential of such discourse. Especially those States which, for historic or political reasons, have the chance of being listened to by parties to a conflict are called upon to use this opportunity, be it bilaterally or in appropriate fora. The discourse will not always take the form of a dialogue. Some other forms are described below. Internalization of norms: It is important for the respect of international law that the persons (in particular State officials) know the law and have a positive attitude towards the law. This is what is called, in sociological terms, the internalization of norms. States parties to the Conventions have a number of opportunities to promote the internalization of norms by the agents of other States, including the parties to a conflict. Training courses offered by friendly States or in conjunction with military aid are relevant examples. This is a particularly useful part of the discourse just described.

Public statements: political dialogue, i.e., a discourse between parties listening and talking to each other, is not always possible. The conflict in and around Palestine

frequently is an example of this phenomenon. In such situation, violations of international humanitarian law must trigger public statements by third States. It is a violation of the said duty to ensure respect to remain silent in front of significant breaches of the Conventions. This is an obligation which is honoured in practice by many States, perhaps not by enough States.

Non-public démarches: a verbal reaction to violations must not necessarily be public. There are situations where non-public démarches may be more effective. Public démarches may stiffen the reaction by the addressee, which non-public démarches will not or rarely do. But due to a certain lack of transparency which is necessarily involved in this instrument to ensure compliance, its effectiveness is somewhat speculative.

Unilateral restrictions, countermeasures: deprivation of certain advantages is a classical reaction to violations of the law, in modern terminology "countermeasures". Such measures include restraints on financial transactions performed by the target State or by persons acting for the target State, travel restrictions for such persons, import or export restrictions. Such restrictions do not pose legal questions where the target State or person has no legal claim to the advantage it/he or she is deprived of (retorsion in traditional terminology). Where there is a legal entitlement to that advantage, the countermeasure constitutes the violation of an international obligation unless rendered lawful by the relevant rules of the law of State responsibility. Accordingly, countermeasures may only be taken by the injured State under the conditions set out in arts. 49 et seq. of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARS). Common article 1 of the GC [Geneva Conventions] does not exempt third States wishing to react to violations of the GC from this limitation. This is also implied in the holding of the ICJ, quoted above, that measures taken by States pursuant to article 1 common to the GC must respect international law. Thus, countermeasures involving the non-performance of an obligation binding the State taking the measure are lawful only in the case of *erga omnes* obligations in the sense of article 48, para. 1, ARS being violated. They are limited to measures defined in article 48, para. 2. Generally speaking, the GC contain *erga omnes* obligations.

Thus, this type of countermeasure taken by third States is, as a matter of principle, lawful. Conditionality of trade and assistance: a related form of measures reacting to, or trying to prevent, international humanitarian law violations is the conditionality of trade or assistance. A particular item may not be traded if it can be anticipated that it will/might be used for international humanitarian law violations. A certain aid is only granted if it is associated with measures taken to ensure respect of international humanitarian law. This is of particular relevance for arms exports or military aid, but not limited to it.

As to arms exports, an important new treaty prescribing this type of conditionality is the Arms Trade Treaty of 2 April 2013. Its article 6, para. 3, reads:

A State shall not authorize any transfer of conventional arms ..., if it has knowledge at the time of authorization that the arms ... would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

A similar principle is formulated by the EU in the Council Common Position 2008/944/CSFP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. The common position establishes eight criteria for export controls, among them "Criterion six: Behaviour of the buyer country with regard to the international community, as regards in particular its ... respect for international law.

Member States shall take into account; inter alia, the record of the buyer country with regard to:

(b) its compliance with ... international humanitarian law.

As regards non-military import or export, an important case in point is trade to and from Israeli settlements in the Occupied Palestinian Territory. The United Nations and the overwhelming majority of the international community consider these settlements to be serious violations of GC IV. Thus, if a State allows the export of building equipment for use in the construction of settlements, this may constitute an unlawful aid or assistance in the commission of an internationally wrongful act (art. 16 ARS), but also (as the case may be: at least) a violation of the duty to ensure respect of GC IV.

Allowing the import of items produced in the settlements (mainly agricultural products) means to allow the settlements to reap the profit of an unlawful activity. This is also a form of aid and assistance which is unlawful pursuant to article 16 ARS. For that very reason, it is also a violation of common article 1 GC. However, trade restrictions fall under the prohibition of quantitative restrictions pursuant to article XI GATT. They are thus lawful under the GATT if they are covered by the so-called security exception of article XXI GATT. That provision allows GATT contracting parties to fulfil their "obligations under the Charter of the United Nations for the maintenance of international peace and security". It is submitted that the same applies for other norms of *jus cogens*. The GATT cannot be understood as preventing the States parties to it to comply with their obligations of a peremptory character. This lies in the very definition of *jus cogens*.

Individual responsibility, fight against impunity

Many violations of the law of occupation and armed conflict which are occurring in the Occupied Palestinian Territory (which to discuss is beyond the scope of this paper) constitute grave breaches of the GC and war crimes. According to arts. 129 GC III and 146 GC IV, each party to the respective Convention is obliged to bring persons having committed such grave breaches before its own courts, regardless of their nationality. There is, thus, a duty to prosecute persons alleged to have committed grave breaches of the GC and to apply, for that purpose, the principle of universal jurisdiction. The same rule applies for war crimes under customary international law. The application of this rule may, however, encounter obstacles derived from the rules granting immunity to certain State organs or officials. The ICJ, in the Arrest warrant case *Congo v. Belgium*, has held that the Minister of Foreign Affairs of a country enjoys complete immunity even for war crimes and crimes against humanity while he or she is in office and after he or she left office if these crimes constituted official acts. It is debatable how far this recognition of immunity goes in the case of other State officials. The reasoning of the Court is very much geared towards the necessity to ensure an unhindered diplomatic intercourse, the Foreign Minister being the head of the diplomatic service of a country. Thus, the rule of immunity may not apply to other State officials and not to members of the military.

Evocation of State responsibility: State responsibility may be invoked, as a matter of principle, by the injured State. It may be invoked by a State which is not injured only in the case of the violation of an *erga omnes* obligation and only as regards particular consequences of the wrongful act. In the case of a violation of the law of armed conflict, the injured State is as a rule the party to the conflict to the detriment of which that violation is committed. This means that the claim of third States is limited to the consequences of the unlawful act which are enumerated in article 48, para. 2, ARS: cessation of the illegal acts, assurances and guarantees of non-repetition and reparation in favour of the injured State and/or the beneficiaries of the obligation breached. Accordingly, all States have the right to demand compensation for victims of violations which occurred in the Occupied Palestinian Territory, for instance persons whose houses have unlawfully been destroyed or who have been unlawfully evicted from their land. By virtue of common article 1 GC, there is an obligation to exercise this right.

In addition, there have been cases where third States were directly the victims of violations of the law of occupation. The most important example are destructions of houses or installations which foreign donors have given to the Palestinian population. If, and to the extent that these demolitions are not justified under the law of occupation, the donor countries or organizations (e.g., the EU) are injured in the sense of the law of State responsibility, they are entitled to claim damages. International dispute settlement, institutions: the examples of possible measures to be taken by third States suffice to show that there is a potential for controversy between third States and the occupying Power. What institutions can be used to solve these controversies? The usual procedure used in international

practice, namely negotiations, is of course the first option. There are other voluntary procedures which may be used.

Israel has not recognized the obligatory jurisdiction of the ICJ under the so-called optional clause of article 36 ICJ Statute. Its ad hoc acceptance of the ICJ in a concrete case is highly improbable. If there can be a judicial settlement of a dispute between Israel and a third State, resort to arbitration would probably be a solution, if any, because this can be tailor-made for the interests which parties to the litigation would like to protect and preserve. Fact-finding or inquiry is an established element of international dispute settlement. As Israel is not a party to AP I [Additional Protocol to the Geneva Conventions], the obligatory competence of the International Humanitarian Fact-finding Commission established pursuant to article 90 AP I does not apply. But its jurisdiction can be recognized ad hoc by any party to a conflict and its rules provide for sufficient flexibility to design a procedure fitting the interests of all parties. Inquiry is also a dispute settlement procedure provided for by the GC (arts. 132 GC III, 149 GC IV). But the inquiry commission has to be established in each particular case, which is the disadvantage of this procedure in comparison with article 90 AP I, where there is a commission already in existence.

International cooperation: Various procedures have been shown which have the potential to induce parties to a conflict, in particular an occupying Power or a detaining power, to comply with international humanitarian law. These procedures or tools are options for each specific "third" State. But they will be more effective if they are not just used by one State alone, but by many States together. This is the case for international cooperation in devising or using the tools described.

Conclusion

It has been shown that some of these tools to ensure compliance with international humanitarian law are formal procedures, others are informal. What matters is the appropriate mix of their use. Their effectiveness deserves to be made the object of further research. Their use, although - as has been shown - to a large extent obligatory, still depends on political will.

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The International Court of Justice Advisory Opinion, available legal mechanisms to ensure compliance with international law and third party responsibility

It is now a decade since the ICJ handed down its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory on 9 July 2004. It is important to recall that it was endorsed by 14 judges with only one dissenting vote, Judge Buergenthal, who nevertheless agreed with the bulk of the opinion. Sadly it has rarely been invoked either by Palestine or by the international community in general and Israel continues to refuse to accept its decisions. As Special Rapporteur, Richard Falk, concluded in his final report: "There is increasing reason to believe that despite the authority of international law and the expressed will of States Members of the United Nations, the situation is essentially frozen, if not regressing." Yet the legacy of the Court's Advisory Opinion lives on. It's *acquis* continues to serve as a guiding framework for further action to end Israel's prolonged occupation and systematic violations of human rights and humanitarian law, for the Advisory Opinion went well beyond the question of the construction of a wall in the Occupied Palestinian Territory to touch on essential issues of the Palestinian question.

This is the first time in the history of Palestine that a judicial body has set down a comprehensive legal framework, for previous attempts to request an advisory opinion, the first as early as 1947 by the Special Committee on Palestine, had been unsuccessful. While it is true that the Advisory Opinion has no technical force, it is declaratory of the existing fundamental rules that the Court has underlined and which bind both Israel and other States of the international community. Not only can these not be ignored, but the opinion also provides an authoritative platform upon which to act. Moreover, it was formally accepted and endorsed by the organ which requested it.

I. The legacy of the Advisory Opinion

Let me briefly touch on the legacy of the Wall opinion and its importance for subsequent advisory opinions and then go on to look at United Nations and third-party responsibility.

1. The Court rejected claims made by Israel, the United States and the European Union that to give an advisory opinion on this question would be politicizing the Court and thus be inappropriate. The Court reiterated that every political issue has its legal aspects and that what the Court was being asked to do was to exercise its essentially judicial task in assessing the legality of the conduct of Israel under international law (para.41). Moreover, as the principal judicial organ of the United Nations, it has constantly reiterated that it is bound to participate in the activities of the UN, to promote its purposes and to give effect to the decisions of its organs.
2. In response to objections that, should it exercise its competence, it would be interfering in a bilateral dispute the Court demonstrated that the solution for the Palestine-Israel conflict did not solely lie in bilateral negotiations between the parties, nor I should add, in the so-called Quartet on the basis of a US-devised road map, but that the question of Palestine is the continuing and special responsibility of the United Nations "until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (quoting General Assembly resolution 57/107 of 3 December 2002) and should be dealt with in the framework of the United Nations "road map" which has been set in place as early as 1948. In other words the question was of direct concern to the international community as a whole. This special and continuing responsibility of the United Nations flowed from the international status of Palestine, including East Jerusalem, as a former Mandate, self-determination unit the objective of which was statehood, and occupied territory, all three situations regulated by international law.
3. The Court reaffirmed the wide competence of the General Assembly in peace maintenance as well as the legality of the "Uniting for peace" resolution, which Israel did not challenge. The Court went further in accepting also the so-called rolling nature of the tenth Emergency Special Session reconvened in October 2003 for the 11th time since 1997. It also bolstered the competence of the GA in requesting an advisory opinion. The Court noted that a request for an advisory opinion which is based on Article 96 (1) is not in itself a "recommendation" by the General Assembly "with regard to [a] dispute or situation", i.e., not covered by Article 12. At any rate the Court pointed to the abundant practice of the United Nations which demonstrates that the General Assembly and the Security Council may deal in parallel with the same matter, despite the apparent restrictions of Articles 11 (2) and 12 of the Charter of the United Nations. The ICJ has stressed also that the GA has the unique vantage point of being able to address matters of peace and security also from a broader humanitarian, social and economic perspective. To the objection that General Assembly resolutions have no binding force, the Court had once stated (Namibia Advisory Opinion, pp.49-50) "(I)t would not be correct to assume that because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design".
4. To turn to two of the substantive issues of relevance to follow-up requests for advisory opinions - human rights and illegal settlements:

In the Wall case the Court went further than its pronouncement in the Nuclear weapons Advisory Opinion; it confirmed that human rights instruments continued to apply in armed conflict situations to the extent of their non-derogability, and that they are in certain situations complementary with international humanitarian law,

i.e., that they do not always defer to the *lex specialis* of international humanitarian law (this was reiterated subsequently in the *Democratic Republic of the Congo v. Uganda* case and by human rights bodies). It underlined the unity and indivisibility of human rights treaties, including not only the Covenant on Civil and Political Rights, but also the Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination to which Israel was a party. It underlined as well as their extraterritorial reach, particularly in occupied territories (reiterated in the *Georgia v. Russia* case). In the subsequent *Democratic Republic of the Congo v. Uganda* case the Court defined occupation as the substitution of one authority by another, although the establishment of a structured military administration of the territory occupied was not a necessary requirement. Gaza thus remains occupied, despite the implementation by Israel of its “disengagement” plan in 2005, due to the control of borders, airspace and coastal waters, and periodic military incursions.

In a very important passage (and unanimously), the Court concluded on the grounds of Security Council resolutions that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) violated article 49, para. 6, of the Fourth Geneva Convention. Special Rapporteur Richard Falk points out in his latest report that Israel issued tenders for the construction of 5,302 housing units in the West Bank, including East Jerusalem, during the period from March 2009 to January 2013, but that since March 2013 when the Netanyahu Government took office, 3,472 new units in settlements, and plans for 8,943 new settlement units have been planned. The timing of announcements regarding settlement expansion has also been provocative, with the two most recent announcements coinciding with the first and second round of Palestinian prisoner releases by Israel in the context of the renewed peace negotiations that began in August 2013.

The Court reaffirmed the countless Security Council resolutions which have been adopted over the years: (1) the Council’s determinations of the illegality under international law and United Nations resolutions of Israel’s prolonged occupation of Palestinian territories since 1967, including Jerusalem, considered to be contrary to Article 2 (4) of the Charter of the United Nations and the well-established principle of the inadmissibility of the acquisition of territory by force; (2) Its declarations of the nullity or invalidity of all legislative and administrative measures taken by Israel which purported to alter the character and status of the Occupied Palestinian Territory, such as its 1980 Basic Law establishing Jerusalem as the “complete and united” capital of Israel, are null and void; (3) Its call for the withdrawal of Israeli armed forces from the Occupied Palestinian Territory; (4) its call for the applicability of the Third and Fourth Geneva Conventions, and the Hague Regulations of 1907, including the law on occupation; (5) Its condemnation of other violations of the *jus in bello* – such as settlements, demolition of houses, collective punishment, detention, targeted assassinations, etc. (See, e.g., Security Council resolutions 452 (1979) and 465 (1980); 298 (1971), 446 (1979), 476 (1980) and 478 (1980) and 1322 (2000)).

II. United Nations and third-party responsibility

I will speak here of responsibility both in the general sense and in the legal sense, i.e., as the legal consequence of a wrongful act.

A. United Nations responsibility

(1) Follow-up to the Wall opinion

In the Wall case, the Court underlined the responsibility of the United Nations and especially the General Assembly and the Security Council, to “consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion.” The Goldstone report has also called on the United Nations organs to take action to ensure compliance by Israel of its international obligations following on its military operations in Gaza. This flows from the particular responsibility of the United Nations as a whole, including the Security Council, for Palestine which means a responsibility shared also by the Secretary-General, to ensure that further action be taken. But the United Nations has had a disappointing record of enforcing the ICJ’s opinion even though the GA has the competence to recommend, and thus to authorize, enforcement action in the exercise of its responsibility for Palestine and has imposed a series of measures in similar situations.

The follow-up of the Assembly to the ICJ’s demands was a watered down series of resolutions (on 20 July 2004, the General Assembly adopted a resolution (ES-10/15) (150-6, with 10 abstentions) which only “acknowledges” the Advisory Opinion and adopts certain measures as a follow-up to the resolution. The General Assembly however did not consider the means of ensuring compliance. Concretely, two measures bear underlining: a register of damages and a call to Switzerland as the depositary of the Geneva Conventions. In the Wall case, the Court, having demonstrated that Israel had engaged its responsibility through breaches of a number of fundamental obligations, declared that in the event of the impossibility of restitution, Israel was under an obligation to give compensation to natural or legal persons having suffered material damage as a result of the wall’s construction in the Occupied Palestinian Territory. The GA therefore requested the Secretary-General to establish a register of damage (ES-10/17 of January 2007). The register however was only established two and a half years after the Advisory Opinion. It is a far cry from a compensation commission or a claims resolution facility. UNRoD merely receives, processes and reviews claims – it is simply an electronic database at the United Nations in Vienna. Though by September 2013, more than 38,500 claims were made, only 8,994 have been reviewed by the Board of UNRoD for its inclusion in the register. Nor did the General Assembly respond to the Goldstone report’s recommendation that it establish an escrow fund to be used to pay adequate compensation to Palestinians who have suffered loss and damage as a result of Israel’s unlawful acts in Gaza.

The General Assembly specially called on Switzerland as the depositary of the Geneva Conventions to work towards the resumption of a conference of High Contracting Parties. Unfortunately, Switzerland has acknowledged the failure of its diplomatic efforts presenting in July 2005 an inconclusive report to the President of the General Assembly.

(2) Enforcement mechanisms at the disposal of the United Nations

The United Nations has failed, however, to utilize all the multilateral mechanisms at its disposal to induce compliance which have been used in similar cases and situations. The General Assembly has recommended economic sanctions and divestment policies, notably, in the cases of South Africa and Portuguese territories, but more importantly in 1982 it had called for financial and diplomatic sanctions against Israel in a resolution relating to the Golan Heights. The Security Council has to date imposed around 19 sanctions regimes spanning four continents under Article 41 of the Charter – which have covered a huge span of measures targeting States, non-State entities and individuals but of course scores of vetoes by the United States have over the last decades prevented robust action against Israel, even when in blatant situations of violations (e.g., resolutions dealing with the settlements or calling for a ceasefire in Gaza). The General Assembly could call the SC to account by asking for special reports under Article 15 (1) and 24 (3).

The General Assembly established the first peacekeeping force in the history of the United Nations, following on the Suez crisis. The Council has established peacekeeping operations with extended mandates, currently 16 deployed on four continents. The Council, in a number of situations, has authorized the use of force for a number of purposes including a no-fly zone in Libya. The General Assembly has established fact-finding missions, as it once did for the massacres in Jenin to complement those established by the Human Rights Council. The Security Council has referred situations to the ICC in the cases of Darfur and Libya.

The General Assembly rejected the credentials in 1974 of the South African delegation on the grounds of the Government’s apartheid policies suspending its participation in the work of the Assembly. The Security Council also suspended the former Yugoslavia from the work of the General Assembly and the Economic and Social Council (res. 777 (1992)). The General Assembly established a mixed internal/international tribunal in Cambodia to judge the crimes committed by the Pol Pot regime, admittedly on the basis of an agreement with that country. Prof. Falk points out that nothing, except its impractical nature,

prevents the General Assembly from establishing an international criminal tribunal as a subsidiary organ under Article 22 of the Charter.

Two advisory opinions of the ICJ were asked by the Economic and Social Council in relation to violations of the immunity of its experts on mission – Mr. Mazilu (1982) and Mr. Coomaraswamy (1999) – on the basis of the United Nations Convention on Privileges and Immunities. The United Nations failed to react to similar infringements on the immunity of Prof. Richard Falk, Special Rapporteur for Palestine, when on his mission in Israel. Article 103, as well as the peremptory nature of the right to self-determination, would ensure that any settlement which is not in conformity with the right to self-determination would be invalid under international law. General Assembly resolution. 34/70 states that “there can be no partial agreement or separate treaty which purports to determine the future of the Palestinian territories occupied by Israel since 1967 in violation of their right to self-determination”, while in resolution 35/169 B the General Assembly declares the partial invalidation of all such instruments. The Security Council has similarly called for non-recognition and invalidity (e.g., Iraq’s annexation of Kuwait).

The list of enforcement measures goes on. The United Nations has condemned ethnic cleansing in certain situations, but although the Court had declared that the wall could generate another exodus, thus risking further alterations to the demographic composition of the Occupied Palestinian Territory, in addition to policies of deportation and expulsion, no mention was made in relation to Palestine. The Council’s reactions to grave breaches of humanitarian law committed against Palestinians have also lacked robust enforcement. In terms of fact-finding, the Council has been unwilling to insist upon a mission under chapter VII authority, shielding itself behind the United Nations Secretary-General. It refused to discuss the Goldstone report. While the Security Council has promoted the return of refugees and displaced persons based on a right of return which it affirmed, for example, in its resolutions 361 (1974) concerning Cyprus, and 820 (1993) concerning Bosnia-Herzegovina it has never endorsed resolution 194 and this in fact has even been declared a non-negotiable issue in Israel-Palestine peace negotiations.

Finally, while the Council has called for compensation on a number of occasions, and in Iraq established the United Nations Compensation Commission under which Iraq has had to pay huge sums to individuals, States and companies for damages, including environmental damage, for its invasion and occupation of Kuwait, the Council has never sought such reparations following on the military onslaught against Gaza (except for damages for United Nations schools and centres which Israel has acknowledged).

The virtual immunity which Israel enjoys from measures that are routinely applied by the Security Council due to the countless vetoes of one permanent member has had a very damaging impact on attempts to persuade the Israeli Government to engage in a genuine peace process based on United Nations international standards.

(3) *Accountability of the United Nations*

Yet accountability of international organizations for their acts and omissions has become an important part of the process of introducing the rule of law into international relations, resulting in the International Law Commission’s adoption of its Articles on Responsibility of International Organizations adopted by the General Assembly in 2011.

Recently some courts and tribunals have drawn attention to the accountability of the Security Council for some of its acts, particularly in the field of sanctions and individual responsibility. They have also affirmed that the Security Council could not derogate from peremptory norms, such as self-determination and fundamental norms of human rights and international humanitarian law. A veto by a permanent member that obstructs action directed to the protection of vital community values and interests could in this context be seen as an abuse of rights. The Security Council has at the very least a moral obligation, and not mere discretion, to act in such circumstances. That inaction must entail the accountability of both the Security Council and the States which compose it, in particular its permanent members. In connection with omissions, Special Rapporteur Gaja addressed this question in his third report on the responsibility of international organizations, with reference to Rwanda, stating that “failure to act [on the part of the United Nations] would have represented a breach of an international obligation. Difficulties relating to the decision-making process could not exonerate the United Nations”.

The Articles on Responsibility of International Organizations have also considered the relationship between State and international organization responsibility. A State may therefore incur international responsibility for an internationally wrongful act in connection with the conduct of an international organization and conversely, the responsibility of the international organization in certain circumstances for the wrongful conduct of its members. There could also be dual or even multiple attribution of conduct or joint or several responsibility in the same set of circumstances. This is important for it lets neither off the hook and ensures at least some remedies for victims (see *Mothers of Srebrenica v. State of the Netherlands and the United Nations* in the courts of The Netherlands).

Although in practical fact these rules on responsibility are not easy to apply they nevertheless give us some guidelines and confirm that international organizations should also be held to account.

B. Third-party responsibility

(1) *Obligations of third States*

International and United Nations concern for Palestine flows from the important *erga omnes* obligations and peremptory norms (*jus cogens*) involved which means that all States have not only a right but also a duty to respond to their violations. The ICJ in the Wall and other cases has underlined the *erga omnes* nature of the right to self-determination and in the *Belgium v. Senegal* case, the Court identified the 1984 United Nations Convention against Torture to be one that embodied obligations *erga omnes partes* in which “[a]ll the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention”.

In its advisory opinion the Court has endorsed the character and importance of the obligations breached and the consequences of their violation.

Non-recognition. The court declared that all States were under an obligation “not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction”, with implicit reference to article 41 of the ILC State Responsibility Articles relating to reactions to a serious breach of a peremptory norms because it involves “a gross or systematic failure by the responsible State to fulfil the obligation”.

A duty of non-recognition on the part of States results also from Security Council resolutions relating to the nullity of all Israeli acts purporting to change the status of the Occupied Palestinian Territory. As stated by the Court in the Namibia Opinion, “It would be an untenable interpretation to maintain that, once such a declaration (of illegality) had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it”.

Non-recognition, at the very least, means the exclusion of any act or settlement implying recognition of an illegal situation. This includes abstention from treaty, diplomatic, economic and other forms of relationship or dealings with Israel on behalf of or concerning Palestine where, for example, the illegal settlements are concerned. In the case of Yugoslavia, the Security Council had extended this doctrine of invalidity and non-recognition to include even private acts of individuals,

such as all land and property transactions made under duress in Bosnia (res. 820 (1993)).

The Court has also called on States not to render aid or assistance to Israel in connection with its breaches in order to bar the legality of a situation maintained in violation of international law.

The duty to cooperate. According to article 41 of the Articles on State Responsibility, serious breaches of peremptory norms entail also the duty to cooperate with other States to ensure cessation of the serious breach. This is a positive duty; it is found in individual legal instruments and can also be organized in the framework of the United Nations. The duty to cooperate in this context may be linked to the emerging duty or responsibility to protect.

Due diligence. In the Genocide Convention case (*Bosnia vs. Serbia*), the Court also sketched out a duty to prevent which involves a positive duty to employ all means reasonably available to a State once it learns of the existence of a serious risk that a serious breach will be committed, if it can be shown that the State had the capacity “to influence” effectively the action of a State or persons likely to commit such acts; for example, if it is geographically close or has political and other links with the perpetrator. This duty to prevent certain prohibited acts from occurring is referred to in State Responsibility Article 14 (3) and found in separate instruments, e.g., Genocide Convention, 1948 Convention against Torture. States members of the G-8, the Quartet and permanent members of the Security Council or of the EU are all in such positions of “influence”.

(2) *Other measures which States can and should adopt*

Sanctions. States are entitled to take unilaterally lawful non-forcible countermeasures against Israel. States therefore should, e.g., suspend participation in agreements contrary to peremptory norms of international law.

Invocation. Any State has the right to invoke violations of norms owed to the international community as a whole under article 48 (1b) of the Articles on State Responsibility, which means calling for cessation of the internationally wrongful act, assurances and guarantees of non-repetition and insisting on reparations. States have the right to invoke the violations of international law through resort to dispute settlement bodies.

Unfortunately, the bringing of a claim before the ICJ requires a jurisdictional link which may be found in the compromissory clauses of certain multilateral treaties, but Israel has made reservations to such clauses or is not a party to the relevant instruments, except for the Genocide Convention.

The obligation to “respect and to ensure”. The Court also called on the High Contracting Parties to the Geneva Conventions to ensure respect by Israel for international humanitarian law under common article 1 of the Geneva Conventions, “in all circumstances”, i.e., unconditionally. Other panellists have pointed out that such steps could include the convening of meetings of the High Contracting Parties, enforcement of the system of repression of grave breaches, diplomatic action or public denunciation and exercise of universal jurisdiction to prosecute or extradite individuals committing grave breaches. Switzerland as the depositary of the Geneva Conventions has a particular obligation as recalled in the General Assembly resolution.

(3) *Responsibility for not carrying out third-party obligations*

The consequences for other States may be to incur responsibility under international law through complicity or through failure to react to the breaches. Such breaches are justiciable, and the responsibility of the States concerned could in certain circumstances be invoked before domestic and international courts.

Complicity. Although the term of complicity is not used in the law of international responsibility, the Court did refer to it in the 2007 *Bosnia-Herzegovina v. Serbia* case. Article 16 of the State Responsibility Articles is on the responsibility of States following on their aid and assistance in the commission of internationally wrongful acts, providing they do so with knowledge of the circumstances of the internationally wrongful act and the act would be internationally wrongful if committed by them. This includes such assistance as supporting military activities in breach of international law obligations; or the issuance of export licences for arms-related products despite knowing the purpose for which these arms were destined. Specific obligations not to provide material aid to a State that uses the aid to commit human rights violations, may be found in resolutions of the Security Council and General Assembly: for example, the Security Council's resolutions prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa.

In this regard, the European Union directive laying down guidelines which establish that all agreements between Israel and the European Union relating to all areas of cooperation between the EU and Israel, including economics, science, culture, sports and academia must now unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967 is a step in the right direction. Likewise, the ruling of the Court of Justice of the European Union in the *Brita* case stating that products originating in the West Bank do not fall within the territorial scope of the EU's association agreement with Israel and, as such, do not qualify for preferential treatment under that agreement is also positive (*Brita GmbH v Hauptzollamt Hamburg-Hafen*, Judgment of 25 February 2010).

The relationship between State and individual responsibility for human rights violations

Under the law of State responsibility, the activities of a private company where these contravene international law could in certain circumstances be attributed to the State if, inter alia, it endorses such activities, or if it concerns a State-run enterprise or the company is entrusted with public functions.

At the very least, States have a duty to make their corporations aware of the legal dangers inherent in supplying materials or services, directly or indirectly, in contravention of their obligations under international law. Companies have to be warned of the risks and associated costs in terms of reputation, as well as the potential legal consequences of doing business in the settlements, an example of judicial control of EU-concluded agreements' conformity with international law.

(4) *Exercise of universal jurisdiction*

But there is a trend to consider that private corporations themselves are directly responsible for crimes under international law, for example, where they conclude with the Israeli Government for the exploitation of say the natural resources of Gaza, or for the supply of bulldozers to illegally raze the homes of Palestinians, or for building a tram connecting the settlements in Jerusalem. The Special Rapporteur on Palestine in his final report focused attention on companies involved in business and financial activities, and the possibility of corporate complicity in international crimes, related to Israeli settlements in the West Bank, including East Jerusalem. He points to emergent human rights obligations of companies in conformity with international law and the Guiding Principles on Business and Human Rights.

Under universal jurisdiction domestic courts can exercise their jurisdiction in prosecuting a perpetrator irrespective of where the crime was committed. It also means that all States have the duty to prosecute or extradite. This is the topic of another panel, so I will simply point out that cases against private companies in domestic courts have been brought, e.g., *Corrie v. Caterpillar*, a federal lawsuit brought against Caterpillar Inc. charging it with aiding and abetting war crimes and other serious human rights violations on the grounds that the company provided bulldozers to the Israeli Defense Forces (IDF) knowing they would be used unlawfully to demolish homes and endanger civilians in the Occupied Palestinian Territory.

States now have not only a right to exercise universal jurisdiction over the perpetrators of international crimes, but also obligations imposed under certain treaties and the statutes of international tribunals. In the past, however, States have been very cautious to assume jurisdiction over crimes which bear no connection to the State of the forum, and States which have been avant-garde in doing so, like Belgium and Spain, have been subjected to great pressure to change their legislation.

However, resort to domestic law instances on the basis of universal jurisdiction comes up against the hurdle of the adequacy of a sufficient domestic legal basis, the limitations placed by States on this exercise and the question of immunities under international law. (see ICJ arrest warrant (*DRC v. Belgium*) and the case of jurisdictional immunities (*Germany v. Italy*) and the case of *Al-Adsani* before the European Court of Human Rights). In all these cases, the ICJ and the ECtHR considered that there was no conflict between rules of *jus cogens* and the rules on State immunity -- the one substantive, the other procedural -- and upheld the immunity of the State.

Conclusion

Richard Falk has proposed in his final report that “the General Assembly request the International Court of Justice to issue an advisory opinion on the legal status of the prolonged occupation of Palestine, as aggravated by prohibited transfers of large numbers of persons from the occupying Power and the imposition of a dual and discriminatory administrative and legal system in the West Bank, including East Jerusalem, and further assess allegations that the prolonged occupation possesses legally unacceptable characteristics of ‘colonialism’, ‘apartheid’ and ‘ethnic cleansing’”;

While Prof. Falk’s suggestion for an advisory opinion could be reworded, it does show that a more holistic approach than that of asking the Court for an opinion on narrower issues, such as prisoners, is required. While the Advisory Opinion lives on and is highly relevant to the situation today, many aspects of that situation have changed. Any advisory opinion should call on the Court to view the consequences (not the statehood which is by now an *acquis*) of the General Assembly’s recognition of Palestine as a non-member observer State in Assembly resolution 67/19 of 29 November 2012 and its admission to specialized agencies. While the General Assembly resolution is not constitutive of the State of Palestine and is merely declaratory, the now confirmed status of Palestine as a State, member of a specialized agency and party to numerous treaties, must have an incidence on the way one approaches these long-term existing issues such as prolonged occupation - now of a State and not a territory - settlements, as well as newer issues, such as treaty obligations, etc.

V. Session III

General legal implications stemming from the status of non-member observer State

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The Palestinian statehood bid and its discontents: legal analysis of General Assembly resolution 67/19 and the rights and obligations of non-Member State observers

I. Introduction: the statehood bid and resolution 67/19

The determination and activation of State status is one of the most fraught issues in international law. However, it is of less relevance to Palestine’s statehood bid than some observers might assume. The existence of a State in international law is a purely factual and political matter left to the decision of each individual State and international organization. Neither recognition by a certain number of States (the “numbers game”), nor United Nations membership, nor any other normative act can amount to an objective determination of “statehood status”. Since State status is essentially tautological, questions concerning Palestine’s statehood are mostly irrelevant to the understanding of the purpose and effects of the statehood initiatives.

Factually, there is an abundant practice on Palestine’s treatment as a “State”: it has been explicitly recognized by close to 140 States and implicitly recognized by scores of other States, international organizations and non-State actors. Even before the late 1980s, when the PLO attempted to accede to international conventions (e.g., the WHO constitution and the Geneva Conventions), Palestine was already recognized and treated as a State by the majority of States. Extensive evidence of the treatment of Palestine as a state exists from before the 1980’s, going back as far as the time of the British Mandate in Palestine. See generally, John Quigley, *The Statehood of Palestine International Law in the Middle East Conflict* (Cambridge, 2010). The PLO, representing the State of Palestine, has enjoyed full diplomatic privileges in many States and extensive observer rights in the United Nations. Thus, formally, Palestine is not claiming the right to statehood, but rather pursuing the actual exercise of the rights that flow from its existing status as a State. The distinction between the capacity to possess and the capacity to exercise rights is exemplified in the ‘prisoner analogy’ – incarceration does not deprive an individual of his or her rights, only of the ability to exercise them. Although Palestine enjoys sovereignty and independence, it is prevented from exercising the rights that flow from sovereignty and independence by Israel’s military occupation of its territory. See, ICJ, *US v France*, 1952.

Palestine’s statehood bid was activated in September 2011 on the basis of the so-called (by the NSU) the “State-to-State file”, with the objective of achieving three goals: (1) create “facts on the ground” regarding the inalienable Palestinian collective and individual rights, e.g., national sovereignty over cultural heritage sites; (2) obtain financial and technical support to build the necessary capacity for Palestine; (3) provide additional leverage to permanent status negotiations with Israel, conducted by the PLO. A given example of the third purpose is if Palestine is a party to the Chicago Convention, then negotiations with Israel will not be about who controls Palestine’s airspace, but how it is regulated like any other state. Gabriel Fahel (NSU Legal Adviser), ‘The essence of the S+S approach’, *The Palestine Papers*, Al-Jazeera Transparency: <http://www.ajtransparency.com/ar/projects/thepalestinepapers/20121911227796594.html>.

Following Palestine’s admission to UNESCO, in October 2011, it was believed that some states that are depositaries of treaties (e.g., Switzerland) could require more than United Nations specialized agency membership to accept an accession instrument from Palestine. In April 2012, the International Criminal Court (ICC) Prosecutor claimed that Palestine’s unsettled State status was an obstacle to its ability to trigger the Court’s jurisdiction. The bid for General Assembly resolution 67/19 came a year after President Mahmoud Abbas submitted an application for full membership to United Nations Secretary-General Ban Ki-Moon, which was then blocked at the level of the Security Council’s admissions committee on 9 November 2011. Eight out of 15 states on the committee voted in favour of holding a vote on the application. However, since Bosnia did not support the vote, it lost. Upgrading Palestine’s status at the General Assembly was the next best thing in terms of strengthening its status as a State in international law, dispelling any remaining doubts as to its status, and keeping up the momentum for full United Nations membership. Since most states had treated Palestine as a state by this point, and prominent international legal experts have advised that there is no legal impediment to Palestine joining international organizations and acceding to

conventions, remaining doubts were notably driven largely by political interests and alliances. See, Gabriel Fahel (NSU Legal Adviser), ‘The essence of the S+S approach’, *The Palestine Papers*, Al-Jazeera Transparency: <http://www.ajtransparency.com/ar/projects/thepalestinepapers/20121911227796594.html>.

This paper considers the legal value and implications of resolution 67/19, as well as its potential legal and political discontents. It then examines the practice related to non-Member State observer entities: their rights and obligations in terms of their participation in the organization of the United Nations and the effects of such status on Palestine's status and rights in the international legal order more generally. The paper concludes by highlighting some remaining concerns raised by the Palestinian statehood bid regarding the potential effects of the internal structures of Palestinian representation on rights and obligations claimed by the Palestinian people in international law.

II. Legal analysis of resolution 67/19

A General Assembly resolution is first and foremost an agreement between the Member States of the United Nations, who have voting rights in the Assembly. In the normative hierarchy of international law, General Assembly resolutions are considered soft law; meaning that they are neither obligatory nor binding norms *stricto sensu*. Philippe Sands, Pierre Klein, Bowett's Law of International Institutions (Sweet & Maxwell, 2001) 29. The activities of international organizations do not feature in the list of formal sources in Article 38 of the ICJ Statute, but they are "well-placed to contribute to its development." James Crawford, Brownlie's Principles of Public International Law (Oxford, 8th edition, 2012) 192. Nevertheless, since the General Assembly has the responsibility for "encouraging the progressive development of international law and its codification", Charter of the United Nations, Article 13. its resolutions perform an important role in formulating a consensus among States on the legal character of certain acts and situations, setting a standard of international legitimacy and legality.

(i) General Assembly resolutions as international and national norm-makers

A General Assembly resolution also amounts to a strong recommendation to international organizations and States to formulate an internal position on the relevant issue and adjust the conduct of their internal and international affairs accordingly. In the case of Palestine, in other words, a State's vote in the General Assembly can lead to the formulation of public policy commitments by the State authorities with regard to the non-recognition of Israel's unlawful exercise of sovereign rights in the occupied Palestinian territory. These positions and commitments, in turn, can become relevant to the manner in which these States implement their own national law – given the established State practice of ensuring that domestic legislation is implemented in conformity with public policy commitments. Public policy also determines the manner in which States and international actors, particularly the EU, conduct their relations with third States, in view of their internal legal necessity to maintain consistency between their policies and activities, as a general principle of EU law. Treaty on the EU, Article 2.

As for international organizations, the General Assembly's power to coordinate and promote the legal and policy agendas of United Nations specialized agencies and other bodies "gives it a continuing role at the heart of the law-making process." Alan Boyle, Christine Chinkin, The Making of International Law (Oxford, 2007) 117. Certain resolutions of the Assembly may have a "quasi-legislative" role. Philippe Sands, Pierre Klein, Bowett' Law of International Institutions (Sweet & Maxwell, 2001) 29. See, for an example of a resolution of a norm-making character, GA Resolution 217 A (III) Universal Declaration of Human Rights (1949). According to Article 14 of the Charter of the United Nations, the General Assembly can "recommend measures for the peaceful adjustment of any situation regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations." The ICJ affirmed, in the Wall Opinion, that the restrictive powers of the GA should be interpreted in light of the evolving practice to permit both the Assembly and the Security Council to deal in parallel with the same matter. ICJ Reports 2004, 136, 148-149. See also, Malcolm Shaw, International Law (Cambridge, 6th edition, 2008) 1222. The right of the Assembly to deal with matters concerning international peace and security is enshrined in Resolution 377 (V), 'Uniting for Peace'. The General Assembly could, in theory, require that the Human Rights Council or the Secretary-General be seized of a matter and it is far from inconceivable that it would call on the Security Council to deliberate it. The point is that the General Assembly has enough power to enable it to bring some consistency to the policy and law-making of an otherwise diverse body of organizations. Alan Boyle, Christine Chinkin, The Making of International Law (Oxford, 2007) 118.

(ii) Legal implications of resolution 67/19

As is the case with assessing State practice, in order to appreciate the value and significance of a General Assembly resolution, the specific decision and "the extent to which legal matters were considered [by the General Assembly] must be examined before legal weight is ascribed." James Crawford, Brownlie's Principles of Public International Law (Oxford, 8th edition, 2012) 194-195. The immediate purpose of resolution 67/19 is to grant Palestinian representatives the seat of a non-Member State observer in the General Assembly. As such, there is little doubt about its intention to bestow a particular status, with certain rights and obligations as discussed below, on the Palestinian representatives in their capacity as participants in the international organization of the United Nations. However, the operative scope and obiter statements made by the resolution extend to other legal and political matters.

Palestine's status as a State in international law

The real legal value of resolution 67/19 is in its answer to the broader looming legal question concerning Palestine's status as a State in international law. As Cerone remarked, "the issue of the day was statehood, not enhanced procedural rights in the political organs of the United Nations." John Cerone, 'Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State', ASIL Insight, Vol 16, No 37 (7 December 2012). While a General Assembly resolution is neither dispositive nor decisive towards the determination of statehood, since the United Nations does not issue statehood "passports", its normative affirmation of Palestine's status as a State improves Palestine's chances of joining United Nations agencies and acceding to international conventions. Indeed, the resolution urges "all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom" (para. 6).

Moreover, as the ultimate authority for the admission of States to the United Nations, the General Assembly's position urging the Security Council to favourably consider Palestine's application for full membership is significant (para. 3). As John Quigley has pointed out, while the ICJ held that the role of the Security Council in the admission process to the organization is crucial and cannot be sidestepped, the question of whether a recommendation had to be positive was neither asked, nor deliberated. Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 3 March 1950, ICJ Reports 1950. Indeed, the March 2013 report of the Secretary-General on the implementation of resolution 67/19 confirmed Palestine's conformity with the "all States" formula. Also known as the 'Vienna' formula enshrined in Article 15, Vienna Convention on the Law of Treaties 1969, allowing the State of Palestine to participate in diplomatic conferences and treaties, open to States other than the Members of the United Nations.

The General Assembly resolution and the Secretary-General's report also respond to the ICC Prosecutor's April 2012 request for further guidance from a United Nations body on "the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute" ICC The Situation of Palestine Update from 3 April 2012, para. 6: <http://www.icc-cpi.int/NR/rdonlyres/C6162BBFFEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>. Armed with both UNESCO membership and non-Member State status, in addition to an extensive body of practice treating it as a State, Palestine has no doubt resolved virtually all (genuine, legally sound) doubt about its status as a sovereign State. Yet, some questions remain unresolved: when does Palestine's statehood begin? Even if Palestine is now a State, was it a State at the time that it lodged its ICC declaration in January 2009, which requested the ICC's jurisdiction retroactive to July 2002? More importantly, does it need to have been a State at the time of the alleged international crime, in cases of violations that are not continuous?

Cerone remarks that “[t]he challenge for the ICC” in answering these questions “will be to demonstrate that its decision is not a political choice” but that it is the result of “a thorough, well-reasoned legal analysis in support of its course of action.” John Cerone, ‘Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State’, ASIL Insight, Vol 16, No 37 (7 December 2012).

Self-determination, occupation and final status negotiations

Resolution 67/19 commences with a curious omission, or rather practical contradiction, with regard to the principal scope and components of the Palestinian people’s right to self-determination. Despite recalling the right of return of Palestinian refugees and General Assembly resolution 194 (III) in its preamble and recalling other “core issues, namely, the Palestine refugees, Jerusalem, settlements, borders, security and water,” the resolution “reaffirms the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967.” Thus, it focuses on one component of the right to self-determination, which entails the end of occupation and the fulfilment of “the vision of two States,” Resolution 67/19, para. 1. for a certain group of the Palestinian people – namely, those with a link to the territory on the Palestinian side of the pre-1967 borders.

The collective right of return of Palestine refugees is not part of this equation. Still, a generous interpretation may be that by affirming the “determination to contribute to the achievement of the inalienable rights of the Palestinian people”, paragraph 4 prioritizes the achievement of actual independence by the State of Palestine, before the issue of the return of Palestine refugees to the current internationally recognized territory of the State of Israel, which as a collective right is also an issue of self-determination for the majority of Palestinians in the Diaspora. Another contentious final status issue mentioned in the resolution is that of borders. International law and practice has not prevented recognized States from having provisional borders.

The Palestinian Negotiations Support Unit’s legal advisers have previously argued, in response to such concerns, that “the risk of a State with provisional borders can be addressed vis-à-vis the need to have building blocks in place before re-declaring statehood.” See, Gabriel Fahel (NSU Legal Adviser), ‘The essence of the S+S approach’, The Palestine Papers, Al-Jazeera Transparency <http://www.ajtransparency.com/ar/projects/thepalestinepapers/20121911227796594.html>. There are ways to accede to international treaties while protecting the rights of Palestinians with links to the territory of Israel as well as limiting Israel’s ability to further its territorial claims. By calling for the establishment of a Palestinian State “on the basis of the pre-1967 borders”, however, the resolution implies the existence of a possibility for “land swaps” to take place in the context of negotiations.

The reaction to the vote by United States Representative Susan Rice is indicative of the political backdrop to this critical aspect of the resolution: “We will continue to oppose firmly any and all unilateral actions in international bodies or treaties that circumvent or prejudice the very outcomes that can only be negotiated, including Palestinian statehood.” Susan E. Rice, Explanation of Vote by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, Following UN General Assembly Vote on Palestinian Observer State Status Resolution U.S. Permanent Representative to the United Nations, U.S. Mission to the United Nations, New York, November 29, 2012: <http://usun.state.gov/briefing/statements/201226.htm>. Rice added that, “the current resolution should not and cannot be read as establishing terms of reference. In many respects, the resolution prejudices the very issues it says are to be resolved through negotiation, particularly with respect to territory.” Ibid.

Although it is fully within the mandate of the Assembly to recall the obligations incumbent on Member States under the Charter of the United Nations, including Israel, the resolution does not refer to the prohibition in international law on the acquisition of territory through the use of force, which precludes Palestine from lawfully ceding territory to Israel (even in exchange for other territory) in time of belligerent occupation. International law protects the inviolable rights of protected persons and the ousted sovereign by providing that neither such rights, nor the status of the territory in international law can be altered, even through an agreement. The purpose of the prohibition is to protect the vulnerable population and sovereign from being coerced, even if only circumstantially, to cede land or waive other rights only in order to bring about the end of the conflict. Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge, 2009) 50-52.

Dissecting Palestinian representative structures

Perhaps one of the resolution’s most important legal assertions is found in paragraph 2, which states that the non-Member State status accorded to Palestine is “without prejudice to the acquired rights, privileges and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people.”

While clearly intending to assuage concerns, current at the time, that Palestinian statehood could bring about the dissolution of the PLO (as a result of its substitution at the United Nations), this provision also affirms the important distinction between existing Palestinian representative structures, in light of their respective representational capacities, international legal personalities and constituencies.

The Palestinian people, within the pre-1967 borders and beyond, are represented by three distinct bodies: the State of Palestine, a State actor that represents the Palestinian people with a territorial link to the territory within the 1967 borders; the PLO, a transnational organization that represents all the Palestinian people, including refugees in the Diaspora, as well as those with a territorial link to the current internationally recognized territory of the State of Israel; and, finally, though absent from the resolution, the Palestinian Authority, an administrative body set up by an agreement concluded in time of belligerent occupation between Israel and the PLO for the administration of parts of the occupied territory, which currently represents, with a limited mandate and authority, Palestinians who are permitted by Israel to reside in the West Bank, excluding East Jerusalem. See, for a discussion of the role of the PLO in particular, Amin M. Husain, ‘Who Is the Legitimate Representative of the Palestinian People?’, *Chinese Journal of International Law* (2003).

In the absence of a fully fledged and functioning state apparatus, the PLO should continue to conduct the State’s relations on the international plane, and as such to further rights claims on behalf of the rest of its constituency, namely, Palestinian refugees in the Diaspora with a territorial link to Israel. Such conflation, beyond fuelling internal political dissatisfaction, could lead to critical misgivings about the ability of either the PLO or the State of Palestine to fulfil its respective roles and protect against the encroachment on rights. The absence of a clear distinction between the PLO, the State and the PA could not only result in limiting the capacity for rights claims, but also lead to misgivings about the determination of responsibility for violations of international law.

III. Rights and obligations of non-Member State observers

Until November 29, 2012, Palestine had the status of an observer “entity.” It now has the status of an observer “non-Member State”. In the words of the United Nations Protocol Office, “Non-member States having received a standing invitation to participate as observers in the sessions and the work of the General Assembly and maintaining permanent observer missions at Headquarters.” The privilege of Permanent Observer, though not officially recognized in the Charter of the United Nations, Moreover, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975) which sets forth certain rules on the status of observers, has so far failed to attract the number of ratifications necessary for entering into force. Thilo Rensmann, ‘International Organizations or Institutions, Observer Status’, *Max Planck Encyclopedia of Public International Law* (June 2007). has become an enduring custom, granted to

States that have some (often temporary) limitation on becoming full members of the Organization. The various categories of observer status described in the “Blue Book” of the UN Protocol and Liaison Service include: non-Member States maintaining permanent observer missions at UN Headquarters (e.g., the Holy See/Vatican City); Entities maintaining permanent observer missions at UN Headquarters (e.g., Palestine);

Intergovernmental Organizations maintaining permanent offices at UN Headquarters (e.g., regional intergovernmental organizations); and Other Entities maintaining permanent offices at UN Headquarters (e.g., the Sovereign Military Order of Malta and the International Committee of the Red Cross). Even within each category, different observers may have different rights of participation. Nongovernmental organizations are eligible for a more limited status, known as “consultative status,” which is regulated by Resolution 1996/31 of the UN’s Economic and Social Council. See E.S.C. Res. 1996/31, U.N. Doc. E/RES/1996/31 (July 25, 1996): <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>. John Cerone, ‘Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State’, ASIL Insight, Vol 16, No 37 (7 December 2012).

To be granted this privilege, the applicant must have fulfilled the requirements stipulated by the United Nations Office of Legal Affairs, including full membership in one or more specialized agencies of the United Nations and recognition as a State by Member States of the United Nations. See “The Question of Observer Status in the United Nations: The Case of Non-Member States,” United Nations Public Information Office, February 4, 2000. When the Holy See applied for this status in 1964, it had already become a full member of at least two UN special agencies and enjoyed diplomatic relations with at least 14 member states of the UN.

Observer States have various rights of participation in United Nations deliberations and debates, but may not vote. The right of an observer in any international organization may encompass one or more of the following: (a) access to the forum in which the sessions of the respective organ are held, (b) access to the documents issued by the respective organ, (c) the right to have documents distributed, (d) the right to make statements, (e) the right to reply, (f) the right to submit proposals and (g) the right to raise points of order.

Since 1988, when the PLO was recognized as the sole representative of the Palestinian people and granted observer entity status in the Assembly, Palestinian representatives were conferred many of these rights in practice, including the rights to participate in debates, submit statements, access documents and many United Nations fora.

Palestine was also invited to submit a statement to the ICJ in the Wall Opinion proceedings by virtue of its observer entity status in the General Assembly. Palestine’s diplomatic mission and United Nations representative have also benefited from the functional minimum of immunities and privileges, including immunity from legal process with respect to words spoken or written and all acts performed in their official capacity as observers before the respective organ of the organization and the inviolability of all official papers, documents, and the premises of the Mission.

Over a dozen other States have had the status of “non-Member State observer” before becoming full Member States, although the Holy See is the only other current State with this status. On July 1, 2004, the General Assembly unanimously adopted Resolution A/58/314, acknowledging the Holy See’s privilege as an Observer State of the UN, it is accorded “the rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspices of the Assembly or other organs of the United Nations, as well as in United Nations conferences as set out in the annex to the present resolution...” By contrast to resolution 67/19, the General Assembly resolution granting the Holy See’s “non-Member State observer status” enumerated its rights and obligations in a detailed annex, including some of the following: right to participate in debates; right to list speakers; right to make interventions; right of reply; right to circulate communications related to the debate; right to raise points of order; right to co-sponsor draft resolutions and decisions, which would be put to a vote upon request from a Member State. U.N. General Assembly Resolution A/58/314, Participation of the Holy See in the Work of the UN, 16 July 2004, Annex I.

IV. Concluding remarks: internal “housekeeping” matters

The benefits of Palestine’s efforts to activate its international legal personality as a State actor are both external, in terms of their ability to bring about compliance with international law by other states, and internal, in terms of their ability to set a standard for Palestine’s conduct domestically and internationally.

Palestine’s participation in the international system will contribute to the establishment of a body of normative fact with a cumulative effect that will make it more difficult for third States and international actors to evade their *erga omnes* obligations arising out of Israel’s serious breaches of peremptory norms – including the duty of non-recognition, non-aid or assistance. By requiring State and international actors, both in the context of international organizations and their domestic orders (i.e., through parliamentary debates and the triggering of national regulatory processes) to take positions with regard to Israel’s internationally unlawful acts, including violations of the sovereign rights of the State of Palestine, Palestinian representatives and civil society can trigger enforcement measures against Israeli authorities.

The example of the EU’s measures in the context of its relations with Israel – for instance, territorial restrictions on funding under the “Horizon 2020” programme – is a case in point for the ability of Palestinian representatives and civil society actors to potentiate the normative power of actors like the EU and its member States, who are obligated on the basis of EU public policy commitments (by the Foreign Affairs Council) and internal legal obligations (in the Treaty on the EU) to respect international law and thereby ensure non-recognition of Israel’s unlawful acts. The same goes for other third States, particularly those engaged in relations with Israel either through their State authorities or their private entities, like businesses.

In turn, if Israel is required to adjust its practices in conformity with international law in order to enable its relations with third States and international actors, it may gradually accommodate and become socialized to these international norms. This process of international law enforcement is especially critical in a time when other – namely, criminal – international law enforcement mechanisms remain unavailable.

Additionally, Palestine’s status as a State requires that it participate in international affairs in good faith and ensure conformity with its international law obligations domestically, by setting a human rights and international law standard to be upheld and demanded. In this regard, the recent General Assembly resolution and other measures taken by Palestine, which have unquestionably bolstered the international debate on the “question of Palestine”, have also sounded alarm bells about the political and legal character of the Palestinian representative structures, both domestically and internationally, calling for critical internal housekeeping measures:

1. The need to distinguish, structurally and functionally, between the legal personality and representational capacities of the State of Palestine, the PA and the PLO, respectively. Crucially, the distinct mandate and limited authority of the PA should not be conflated with a representational capacity or legal personality of a Government of a State. The PA’s institutions and officials should be clearly distinguished, as well as physically detached, from those of the State in order to ensure that the latter are not subject to pressure and coercion from Israel as a result of the process and practice following the Oslo Accords.

Some conflation has occurred thus far: both the 2009 ICC Declaration and the April 2014 accession instruments were delivered by PA ministries, and in January 2013, a number of presidential decrees were issued changing the name of the PA to the ‘State of Palestine’. On the face of it, the PA is being transformed into the

Government of the State (this was reflected in the August 2013 OHCHR report on the Occupied Palestinian Territory, where the designation “Government of the State of Palestine” replaced “the PA”), which either assumes the PA’s dissolution or its entrustment with the role of functioning on behalf of the State. Making the PA wear two hats is particularly dangerous as it would mean that decisions of the PA that are dictated or (directly or indirectly) coerced by Israel could be perceived as those of the Government of the State – and vice versa, the State’s autonomous actions may be tainted and jeopardized by the PA’s limited authority and legal capacity (e.g., as per Oslo, the PA cannot exercise criminal jurisdiction over Israelis nor conduct international relations). If States and international institutions consider the PA as the Government of the State, it could hinder attempts to join international institutions and further international claims over territory and matters for which the PA has only limited formal authority.

2. The need to define the status and relationship of the State of Palestine with Hamas’ local government in the Gaza Strip, which should be treated as part of the institutional structures of the State. Crucially, Palestinian representatives should ensure that the most favourable legal (and political) construct and narrative is put forward and operationalized (to the extent possible before internal reconciliation) – one that ensures the integrity of the two territories and provides the utmost protection for Palestinians residing in or originating from the Gaza Strip. The administration of part of a State’s territory by a local oppositional government is not unknown to international practice. This would also mean that the hostilities between Israel and the Gaza Strip, at least with the official armed forces of Hamas, should be classified as an international armed conflict. The ICRC currently considered the conflict as international, primarily due to the context of belligerent occupation. ICRC, Annual Activities Report for 2012, June 2013 <http://www.icrc.org/eng/assets/files/annual-report/icrc-annualreport-2012.pdf> (accessed 6 July 2013). Human Rights Watch, however, continues to treat it as a non-international armed conflict. Human Rights Watch, ‘Q & A on Hostilities between Israel and Hamas’, 21 November 2012 <http://www.hrw.org/news/2012/11/20/q-hostilities-between-israel-and-hamas>.

3. The need to fully define and transparently publicize information about the internal ratification process for international instruments (most probably as a monist legal system) and the measures – legislative, administrative and executive – that the Palestinian institutions intend to undertake to ensure respect for international law. To demonstrate good faith in bringing about respect for international law, efforts should be made to bring the PLC back into operation so that laws (such as the newly drafted cultural heritage protection laws, which have been put on the shelf) can be enacted and enforced in accordance with Palestine’s international law obligations.

While the ability of Palestinian authorities to enforce such laws will remain limited, both geographically and functionally, by the Israeli occupation, the resulting protection gaps and Israeli restrictions should be carefully documented and exposed to further pressure by international actors (e.g., United Nations human rights bodies). Ultimately, as an occupying Power with effective control over the whole Palestinian territory and with decisive competence in most aspects of daily life, Israel remains responsible for ensuring respect for human rights until an effective end of the occupation.

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(summary, as submitted)

Palestine’s new obligations: treaties and conventions

Professor Lynk spoke about the new international legal obligations assumed by Palestine in April 2014. The 15 international treaties and conventions that Palestine applied to join on 2 April included diplomatic, governance, international humanitarian and criminal law and human rights instruments. Joining these treaties and conventions would have five particular consequences: (i) it would enhance Palestine’s acquisition of an international legal State personality; (ii) it would solidify Palestine’s attempt to hold the occupying Power to account under international law; (iii) it imposes legal obligations on Palestine itself to report on, and account for, for its State behaviour towards its population to the international community; (iv) it offers more tools for Palestinian civil society to build a culture of democracy and accountability for governance; and (v) it potentially permits the occupying Power to use these instruments as a counter-measure to attack Palestine for any purported violations of human rights and international humanitarian legal standards. Professor Lynk made particular mention of the prohibitions in the Fourth Geneva Convention against settler implantation by the occupying Power and the identification of this prohibition as a “grave crime” under the 1977 First Additional Protocol, which would complement any legal steps that might be taken in international judicial forums under the Rome Statute of 1998.

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Membership in the United Nations specialized agencies

The granting of observer State status to Palestine by the General Assembly in its resolution 67/19 of 29 November 2012 has had legal implications in many areas of international relations but thus far we have not seen any impact in the area of membership in the United Nations specialized agencies and other global organizations. You may recall that prior to that decision, UNESCO had admitted Palestine as a full member in October 2011. The current situation of “no movement” in the area of admission to specialized agencies is presumably because the State of Palestine (henceforth “Palestine” in this presentation) has decided thus far not to submit formal applications for admission to membership in these organizations. I will address various questions in the short time available.

Does acquiring the status of a non-member State observer have any automatic impact on applying for membership to such organizations?

But from the outset let us be clear what organizations we are talking about. The “specialized agencies” is a precise term used in the Charter - Articles 57 to 59, 63 and 64. In general, such organizations are established by intergovernmental agreement and are active roughly in the areas within the ambit of the Economic and Social Council. Relationship agreements are concluded between each such agency and the Council subject to approval of the General Assembly. There are – at last count – 15 such specialized agencies ranging from one pre-dating the Charter (the ILO) to the Bretton Woods institutions to FAO, UNESCO ICAO, etc. Several are based here in Geneva: ILO, ITU, WHO, WIPO, WMO and WTO. Other “related organizations” are those which have a relationship with the United Nations but not specifically with the Economic and Social Council. They include the IAEA, which reports to both the Assembly and the Security Council, and CTBTO and OPCW, both of which report to the Assembly. Henceforth, when I refer to “specialized agencies”, that term also includes the “related organizations.”

In some cases, being a member of the United Nations may entitle the applicant to simply accede to the constituent instrument of the organization concerned and thus become a member, but there is a procedure involved for a State that is not a United Nations member. However, in three cases - IFAD, UNIDO and WIPO - being a member of a specialized agency entitles an applicant to simply deposit the requisite treaty action in order to become a member; there is no procedure or voting by any intergovernmental body. Thus, Palestine should consider becoming a member of those organizations very carefully.

Returning to the question of the impact of the Assembly's decision on any applications for membership in the agencies, in resolution 396 (V) of 14 December 1950 the General Assembly dealt with the situation "whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes a subject of controversy in the United Nations". The Assembly recommended that "the attitude adopted by the General Assembly...concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies". Over the years, this language has been interpreted more broadly to include basically any representational decisions taken by the General Assembly, arguably including Assembly decisions, whether a given entity was a State or not. Of course, the United Nations attitude is not binding on a specialized agency, but the Assembly having considered Palestine to be a State should go a long way to disposing of any argument from a secretariat that a Palestinian application is not receivable as such because it is not a State. Of course, that would not guarantee admission or other factors coming to bear for and against admission.

What kind of admission procedures are employed by the agencies?

There are a wide variety of admission procedures, some of which would be friendlier to a Palestinian application for admission than others. On one end of the spectrum is membership in the IBRD/World Bank: it is required that the applicant first be a member of the IMF. On that score, because of the so-called "weighted voting" applied in the IMF, it is necessary to obtain 85 per cent of the total voting power in order to adjust IMF quotas, which is necessary for the admission of a new member. As the United States currently has a voting percentage of 16.75 per cent, it has a virtual veto on any changes to the IMF quotas and thus on the admission of any new IMF members.

On the other end of the spectrum, there are agencies that only require a simple majority of those present and voting in the "general conference" of all members in order to admit a new member. This is the case with WHO and WIPO.

In between there is a variety of requirements for admission. Often, an executive body or council of the organization must recommend admission of the applicant before the general conference can take up the matter, similar to the United Nations, which requires a Security Council recommendation before the Assembly can consider the application, though of course in the agencies there is no "veto". Such agencies with such a "filter" requirement include IAEA, IFAD, IMO and UNIDO. Other differences involve the required majority for admission. Besides the simple majority required in WHO and WIPO without any "filter", the IAEA and IMO employ a simple majority following a recommendation from their board or council. Many require a two thirds majority of those present and voting in the general conference, such as FAO, UNWTO and UPU. Further precision is needed in the case of ITU and WMO that require two thirds of the membership to approve, as opposed to members present and voting. ILO because of its unique tripartite structure requires approval by "two thirds of the delegates attending the session, including two thirds of the Government delegates present and voting". The most onerous voting requirement in an agency governed by the one member/one vote principle is ICAO, which requires a four-fifths majority vote of its Assembly.

Some requirements are related to the field of activity of the agency. For example, WMO requires an applicant to have its own meteorological service and the WTO requires an applicant to have full autonomy in the conduct of its trade policies.

From the purely procedural point of view, the agencies with no filters and a simple "majority of those present and voting" requirement are WHO and WIPO. For those agencies with a governing body filter, IAEA and IFAD employ a simple "majority of those present and voting" requirement.

What is the major obstacle to admission to a specialized agency?

The major obstacle to the admission of Palestine to a United Nations specialized agency is a political one: United States domestic legislation cutting off contributions to agencies which admit Palestine as a full Member State. Domestic legislation in 1990 provided that no funds shall be available to the United Nations or any specialized agency thereof which accords the PLO the same standing as Member States. 1994 legislation provides that the United States shall not make any voluntary or assessed contribution to any affiliated organization of the United Nations which grants full membership as a State to any organization or group that does not have the internationally recognized attributes of statehood. While one might disagree with the assessment concerning whether Palestine possesses the internationally recognized attributes of statehood, it is clear in its statement of 31 October 2011 concerning the admission of Palestine to UNESCO, that the United States Government would consider admission of Palestine as a full member State in a specialized agency as triggering those legislative provisions, as was the case with UNESCO, and would mean a cut-off of United States funds to such an agency.

According to that statement, "Today's vote by the member States of UNESCO to admit Palestine as a member is regrettable, premature and undermines our shared goal of a comprehensive, just and lasting peace in the Middle East". The statement recalled the U.S. position that establishment of an independent and sovereign Palestinian State can only be realized through direct negotiations between the Israelis and Palestinians. It also said that "Palestinian membership as a State in UNESCO triggers longstanding legislative restrictions which will compel the United States to refrain from making contributions to UNESCO." In statement made last October, the United States Permanent Representative in the Security Council stated, "We urge restraint on the part of all sides, and call upon all parties to avoid actions that undermine final status negotiations."

While the Obama administration might propose to the Congress the faculty to waive or exempt that legislation under certain circumstances, until that is done the law remains on the books and is very clear. In addition, it serves no particularly useful purpose to get into the question of the legality of the United States withholding its assessed contributions, which in most cases would be a violation of the constitution or other resolutions of the organization, as was the case when the United States withheld its assessed contributions to the United Nations.

Besides the policy reasons, which presumably the United States would again raise with regard to any new application of Palestine for membership in a United Nations specialized agency, the monetary effect of admission on an agency's budget would no doubt be a factor as well. One should look at the budgets of the various agencies to determine to what extent they are dependent on United States contributions - both assessed and voluntary - to determine how much resistance there would be among the membership to any application for membership that would entail a cut-off of United States contributions. This could affect the ability to obtain the required majority for admission, or could provoke a "no action" motion, which is what I seem to recall occurred in 1989 in WHO when Palestine submitted an application for admission. This would not be a factor, of course, with regard to agencies to which the United States does not belong, such as UNIDO and UNWTO, if my sources are correct. And with regard to UNIDO, as mentioned before, Palestine has an automatic right to become a member by virtue of having already been admitted as a member of UNESCO.

Thus, from the legal or procedural point of view, the easiest organization to join would probably be UNIDO, where Palestine has an automatic right to become a member by virtue of UNESCO membership and the United States is not a member, so it is not dependent on United States financing. Beyond that, IFAD and WIPO could be joined automatically by virtue of UNESCO membership but the issue of reliance on United States financial or other support is a factor. Finally, UNWTO is a possibility, as the United States is not a member, so presumably there is no dependence on United States funds or influence, but this would have to be examined. The most important thing, of course, is a policy determination by the Government of Palestine as to which agencies should be joined for the benefit of the people of Palestine; what agencies would provide needed assistance and benefit to the population? Palestine would have to determine if it was "worth it" to join a given agency knowing that its funds might be drastically reduced and goodwill might be lost among members of the agency who would see programmes benefiting their own people reduced or eliminated.

The other risk in applying for membership in specialized agencies to which the United States belongs would be to enhance Palestine's status, but to do so just short of full membership to avoid triggering the United States legislation. It is not known how many of these agencies have "observer State" status similar to the General Assembly (Palestine currently has a "special observer" status at UNWTO), but there might be a move to grant Palestine a status similar to what it achieved in the Assembly; simply follow by example Assembly resolution 67/19 in what status and rights to provide Palestine. That could politically be quite easy, as States would have already conferred that status and rights in the Assembly, so it would simply be a follow-through to provide consistency and uniformity within the United Nations system of organizations. Some such as the United States would no doubt continue to object that such a status would be premature and jeopardize negotiations regarding final status. But Palestine should consider that possibility very carefully, as it might be seen by some as "backsliding", since it already has full membership in UNESCO. On the other hand, it could be argued that as long as it would be clearly granted State observer status as the "State of Palestine", it could be seen as an "upgrading" and a further acceptance of its status as a State by a number of additional international organizations. These are policy matters for Palestine to consider, far beyond the legal questions that I was requested to address.

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Complaints before relevant international courts: drawbacks and challenges

Let's start by stating the obvious: not once has a competent court – acting in accordance with international legal standards – seriously investigated and prosecuted those responsible for the crimes of the occupation, which include war crimes and crimes against humanity, apartheid, persecution and torture. As a matter of fact, for decades the Palestine issue did not reach the docket of international courts and tribunals.

For a long time, it appeared that there was no court capable of providing a forum for such situation; the institutions themselves did not exist or they were not available to Palestine. This is no longer the case. In recent years, we have witnessed some serious attempts to resort to international courts in order to enforce international law and put an end to the Israeli unlawful regime in Palestine. Over the past 10 years, both the International Court of Justice and the International Criminal Court have been confronted with aspects of the Israeli-Palestinian conflict. Other attempts have been done before third States' courts pursuant to the UJ principle. This increased recourse to international law to defend the Palestinian human rights has been maliciously labelled by some commentators as "lawfare".

The "lawfare" label is inappropriate and absurd. It is nothing more than the desperate attempt to undermine the availability of new legal mechanisms and institutions whereby international law can be applied to current conflicts, including Israel and Palestine. W. Schabas, Foreword, *Is there a Court for Gaza?*, 2012As Prof. Schabas emphasized, after "decades where international law was a largely theoretical proposition, something invoked by academics and activists, and in debates within political bodies of the United Nations, there is now a realistic prospect that the great conflicts of our time can actually be brought to court." Ibid.

To understand how "dangerous" is perceived by Israel and its allies the possible recourse to international law mechanisms by Palestine, it serves to mention the huge pressure that was put on the PA at the time of the United Nations bid, when western States like Italy or the United Kingdom conditioned their support for the resolution at the General Assembly to the fact that Palestine would "refrain from applying for membership of the International Criminal Court or the International Court of Justice, which could both be used to pursue war crimes charges or other legal claims against Israel". See K.J. Heller, 'Britain to support Palestine's UNGA resolution?', *Opinio Juris*, 26 November 2012.

In my view, this is the counterproof, the confirmation of the validity of the legal strategy that we are pursuing. It is self-evident that the political process has reached to an end. It is essential that Israel's crimes be heard by a competent court and the responsible individuals, especially those at the higher levels, are held to account. A visit to Palestine would convince even the more sceptical ones of the urgent need to take action and pass from the rhetoric to the facts.

As far as Gaza is concerned, Israel claims that the continuous, absolute closure, which is strangling Gaza, is a reaction to Hamas' takeover of the Strip in 2007. In reality, Israel's imposed closure, far from being a new and direct consequence of Hamas ruling, is a long-standing policy, which became more stringent with the outbreak of the second intifada in 2000 and then absolute in 2007. See PCHR Report 'The illegal closure of the Gaza Strip: Collective punishment of the civilian population', 10 December 2010.

Authoritative international bodies, including the ICRC, condemned in the strongest terms such unlawful closure, which amounts to collective punishment of the civilian population, and over the years called Israel to immediately lift it. Among many, see ICRC, 'Gaza closure: not another year!', 14 June 2010. Similar calls came from individual States, the EU and United Nations agencies, including the Security Council. See UN SC Resolution 1860 (2009), following Operation Cast Lead. In fact, the situation in the West Bank attests that the collective punishment of the Gaza Strip merely form part of Israel's overall occupation policy. Regardless of who is in the Government in Ramallah, illegal settlement expansion continues; construction of the separation wall advances; hundreds of checkpoints restrict freedom of movement; by-pass roads link settlements to major cities in Israel leading to a de facto "bantustanization" of the West Bank; the annexation and judaization of East Jerusalem is almost completed.

Incursions, killings, arbitrary arrests, house demolitions and use of excessive force are common features of life in the West Bank. See R. Sourani, in C. Meloni, G. Tognoni (eds), *'Is there a Court for Gaza?'*, 2012, p. 18. This reality has been extensively documented. It has been the subject of a ground-breaking Advisory Opinion of the International Court of Justice in 2004; it has been addressed by the United Nations Security Council; it has been the subject of numerous reports by various United Nations agencies and bodies, including the Human Rights Council, and the reports of several special rapporteurs. The evidence is overwhelming.

Documentation is certainly of paramount importance, but by no means sufficient. In this respect, international law relevance and the whole United Nations system impact appear to be mostly symbolic. Take the aftermath of Operation Cast Lead: as Richard Falk put it, the Goldstone report "broke the sound barrier". In the view of the Special Rapporteur the high visibility of the FFM report highlighted both the strengths and weaknesses of international law and the United Nations system. The fact that the United Nations established such a high-profile mission to investigate and document the allegations of war crimes committed by Israel (and, subsequent to a request of Goldstone himself, by the Palestinian side), marked a novelty in the politics of the United Nations towards Israel.

Certainly, the importance of the UNFFM report lies in particular in its recommendations, which emphasized the need for accountability measures, including criminal justice mechanisms; recommendations which, however, remained ineffective so far, due to the political pressure of some States to block and minimize the report's impact within the United Nations and in other fora, such as the ICC. Indeed, Israel's violations of peremptory (*jus cogens*) norms of international law are crimes and entail the individual criminal responsibility of the perpetrators directly under international law.

The natural forum to adjudicate such crimes, given that the domestic legal systems are unable and/or unwilling to offer effective judicial remedy, appears to be the ICC. This was also the forum suggested by the Goldstone report in 2009 and more recently by the 2013 report of the United Nations independent inquiry into the human rights consequences of Israel's settlement policies and practices. In particular, the latter report suggests that the ICC could investigate and prosecute the "transfer of Israeli citizens into the OPT, prohibited under international law and international criminal law", which constitutes a war crime under article 8, ICC Statute. M. Kearney, 'Transfer of settlers as a war crime', 2013

As is well known, serious attempts have been done in this direction over the past four years. I will try to briefly outline the drawbacks and challenges related to a possible intervention of the ICC. The first challenge is to solve the difficulties in establishing the jurisdiction of the Court. The ICC may exercise jurisdiction over the crimes committed on the territory or by the nationals of its State parties, and neither Israel nor Palestine has ratified the Rome Statute. However, pursuant to article 12 (3) of the Rome Statute, any State may make a declaration accepting the exercise of jurisdiction by the Court, regardless of whether it has ratified the Statute; such declaration was lodged in January 2009 by the Minister of Justice of Palestine, thereby accepting the jurisdiction of the Court since July 2002. With a much-criticized decision, after three years of preliminary examination, in April 2012 the then ICC Prosecutor decided not to open an investigation into the situation in Palestine. C. Meloni, 'Palestine and the ICC: some notes on why it is not a closed chapter', *Opinio Juris*, 25 September 2012

Two years later, the obstacle (already questionable at that time), regarding the uncertain status of Palestine as a State, has been removed, and this condition for the

ICC to open the investigation in the situation Palestine is now fulfilled. The first condition - that the alleged crimes must fall within the subject matter jurisdiction of the Court - never actually posed a problem either with respect to the crimes committed in Gaza, or in the West Bank, which amount to war crimes and possible crimes against humanity.

The issue of debate regards now the temporal jurisdiction of the Court: despite the arguments to the contrary raised by some scholars, the ICC jurisprudence demonstrates that it is unquestionable that a State may accept the jurisdiction retroactively pursuant to article 12 (3) of the Rome Statute (as the Côte d'Ivoire case shows). It has been argued that the State of Palestine could not employ article 12 (3) to give jurisdiction over its territory for a period in the past when it may not have been a State. A. Zimmermann, 'Palestine and the ICC: Quo vadis?', Journal of International Criminal Justice, 2013, 303-329. As a matter of fact, there is no fitting precedent to provide a clear-cut answer to this issue. However, it can be noted that Palestine was not created as a State by the 29 November 2012 GA resolution. J. Quigley, 'The Palestine Declaration to the International Criminal Court: The Statehood issue', in 'C. Meloni, G. Tognoni (eds), 'Is there a Court for Gaza?', 2012, 429-439.

The then Prosecutor created a loophole by referring to external bodies, such as the United Nations, in order to assess whether Palestine is a State (and now, since when). On the contrary, Prof. Alain Pellet's functional interpretation of State, i.e., for the sole purpose of the ICC jurisdiction, would have been much preferable and could still be of assistance to solve the loophole in this regard. The Court should also take into consideration that the consequence of such a claim, that the ICC cannot have jurisdiction over the facts committed in Palestine before November 2012, would defy the very object and purpose of the Rome Statute and place outside the reach of the ICC a region of the world and its people, who have been stripped of their fundamental rights - including self-determination - due to the illegal occupation to which they have been subjected by a foreign power.

Another challenge is represented by the discretionality enjoyed by the ICC Prosecutor. Such a discretionary power is articulated on two levels: (a) whether to initiate or not the investigation; and (b) what crimes or cases to select. It shall be remembered that the Prosecutor always enjoys discretionality as to the decision whether to investigate and eventually in which direction to do so even in the presence of a referral by a State or the United Nations Security Council, as well as by a declaration under article 12 (3). In this regard, and given the political pressure, the biggest challenge is not convincing the Prosecutor that she may exercise jurisdiction, but rather convincing her that she should. Ibid.

In this sense, I believe that a referral from one or more ICC States parties would be desirable, also because it would allow the Prosecutor to skip the authorization of the Pre-Trial Chamber (otherwise required when acting *proprio motu*). The selection of cases by the Prosecutor is a highly sensitive issue, as it carries the inherent risk of generating a disputable narrative of the conflict. Clearly, the investigation should be impartial and probably would address the two sides of the conflict: but what crimes should be addressed?

In my view, it is important to focus not just on the conduct of hostilities, for instance, not only on operation Cast Lead in Gaza. See the Op'd by Ian Brownlie and others, published in The Sunday Times in January 2009, with regard to Operation Cast Lead, which criticized Israel also for waging the war in the first place. A focus solely on the battlefield, whereby both sides could be presented as bearing responsibility for international humanitarian law violations, would be misleading, as it would not tackle the root cause of the conflict. W. Schabas, 'Foreword', cit. This is why it is critical to include also other crimes. I am thinking in particular of the crimes of apartheid, persecution, torture (as crimes against humanity) and, of course, the settlements (as a war crime).

Some of these are ongoing crimes and thus would not incur in the same issues and doubts regarding a possible retroactive jurisdiction of the ICC (as the Prosecutor is now alleging that cases dating before 2012 would not fall under the jurisdiction of the Court). Just a conclusive note: Palestine's recent ratification of 16 international treaties, among which are the most important HR and international humanitarian law treaties, is a major advancement in many aspects.

On the one hand, the State of Palestine will have now to conform itself to the obligations contracted with the ratification of these treaties; on the other hand, individual petitions on behalf of the victims can now be brought before these bodies, which can offer effective judicial remedy.

Notably, Palestine has not yet ratified the Statute of the International Criminal Court: this is not a surprise, given the political pressure exerted on the PA by Israel, the United States and other western allies. It is, however, disappointing that criminal justice and the rights of the victims are used as a bargaining chip. Given the situation, it would be desirable that the ICC Prosecutor proceeded on the basis of the 2009 Article 12 declaration without requesting a new signal from Palestine: to equate the achievement of the status of Observer State at the United Nations General Assembly to the fulfilment of self-determination of the Palestinian people would be tantamount to sweeping the main issue under the rug, as far as the State of Palestine is occupied, as without doubt it still is.

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Palestine, United Nations non-Member observer status and ICC jurisdiction

On 22 January 2009, the Palestinian Minister of Justice, on behalf of the Palestinian National Authority (PNA), lodged [a declaration](#) recognizing the jurisdiction of the International Criminal Court (ICC) "for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002." On 3 April 2012, the ICC Office of the Prosecutor concluded that the preconditions to the exercise of jurisdiction were not met, arguing that Palestine had only been granted "observer", not "non-Member State", status by the General Assembly. The Prosecutor considered that the declaration "was not validly lodged" ([report on preliminary examinations activities 2013](#), para. 236). However, the Prosecutor also said that "allegations of crimes committed in Palestine" could be considered "in the future" if the "competent organs of United Nations ... resolve the legal issue relevant to an assessment of article 12 ...". On 29 November 2012 the United Nations General Assembly – by 138 votes to 9, with 41 abstentions – decided "to accord to Palestine non-member observer State status" ([General Assembly resolution 67/19 of 4 December 2012](#), para. 2).

With this decision, the legal issue raised in the Prosecutor's decision has been resolved. Palestine has been "upgraded" from a mere "observer" to a "non-Member State". The formal declaration of statehood, which some previously considered a missing precondition to Palestine's status as a State (Ronen, JICJ 8(2010), 26; Shany, JICJ 8 (2010), 337), has been produced by the General Assembly. And this notwithstanding the possible lack of complete fulfilment of the [Montevideo criteria](#) (in particular the effective government criterion; cf. Shaw, JICJ 9 (2011), 307 ff.). The view that Palestine is now a State is not only the prevailing view among scholars (Zimmermann, JICJ 11(2013), 303; Ronen, JICJ 12 (2014) 8; contra still Kontorovich, JICJ 11 (2013), 979), but above all has been confirmed by treaty practice since the General Assembly resolution, i.e., the accession of Palestine to at least [15 international treaties](#) (accepted by the respective depositaries). This means that Palestine, represented by its Government, can now not only trigger ICC jurisdiction by way of a declaration under article 12 (3) of the [ICC Statute](#) but also directly accede to the [ICC Statute](#) (albeit without retroactive effect, cf. articles 11 (2), 126 (2)). While there is no longer a need to overcome the lack of statehood by way of a functional interpretation of article 12 (3) (Shany, JICJ 8 (2010), 329; Pellet, JICJ 8(2010), 981), the new article 12 (3) power suffers from several limitations. Those limitations will be the focus of this post (leaving aside the subsequent "ordinary" obstacles, especially gravity,

admissibility and interests of justice, to turn an ICC situation into a formal investigation of a case). Here are the four problems with article 12 (3) that I see.

First, article 12 (3) is premised on a delegation-based theory of jurisdiction (Shany, JICJ 8(2010), 331-2), i.e., the “State” within the meaning of the provision delegates a part of its jurisdiction to the ICC. Of course, this presupposes that the State possesses the jurisdiction it wants to delegate in the first place. Here, Annex II of the 1995 Israeli-Palestinian Interim Agreement ([Oslo I](#)) comes into play. According to its article I, the Palestinian criminal jurisdiction is limited to “offences committed by Palestinians and/or non-Israelis in the Territory”. “Territory” refers to the West Bank and the Gaza Strip, in principle including East Jerusalem. Indeed, this is the Palestinian territory internationally recognized as a “single territorial unit” (art. IV [declaration of principles 1993](#) [Oslo I]; article XI (1) Oslo II). Of course, on the one hand, Palestinian jurisdiction does not extend to Area C in the West Bank (including Israeli settlements and military installations). On the other hand, while Israel does not, in principle, claim sovereignty over the West Bank and Gaza, it does so with regard to East Jerusalem. Thus, on the basis of Oslo, Palestinian criminal jurisdiction is severely limited both *ratione personae* and *ratione loci*.

To get around these limitations, one may argue that Oslo, having been agreed between Israel and the PLO, as the representative of the Palestinian people (General Assembly resolution 67/19, para. 2), can neither bind the PNA, which only came into existence with Oslo, nor, a fortiori, the Government of the now formally recognized State of Palestine. This indeed has been argued (Ronen, JICJ 12 (2014), 23), but it seems overly formalistic to distinguish, for the purpose of the representation of the Palestinian people and the underlying right to self-determination, between the PLO, the PNA and the Government of Palestine (tripartite approach). Be that as it may, it seems more plausible to question the jurisdictional limitations produced by Oslo II from the perspective of the ICC and the underlying criminal accountability claims. Can the ICC’s jurisdiction really be limited by bilateral accords? Does this not stretch the delegation theory of article 12 (3) too far? Can this theory really limit the Court’s jurisdiction once the door to this jurisdiction, so to speak, has been opened by the, in principle, jurisdictional sovereign, the bearer of the jurisdictional claim, i.e., the State of Palestine?

I would submit that Oslo II cannot limit the ICC’s jurisdiction, even on the basis of the delegation theory, for essentially three reasons. First, Oslo II did not, indeed could not, take from Palestine the (prescriptive) jurisdiction over its territory, but only limited the exercise of this jurisdiction. In other words, pursuant to Oslo II, the PNA must not exercise jurisdiction over Israelis, but may delegate this jurisdiction to an international court. Otherwise, Oslo II would operate as a bar to the international prosecution of possible international crimes by Israeli soldiers in the West Bank, a result hardly compatible with the ICC’s mission and the underlying duty to prosecute international core crimes. Secondly, Oslo was only meant to provide rules for a transitional period not exceeding five years. Because this period has expired and, in addition, the legal situation has radically changed (with the recognition of Palestinian statehood), Oslo can no longer operate as a restriction of Palestinian rights. In any case, should one consider that the triggering of ICC jurisdiction would violate pre-existing third party rights (*in casu* those of Israel under Oslo), the only limitation arising from the ICC Statute is the one of article 98 referring to cooperation with the ICC, in particular the surrender of suspects.

Secondly, the PNA would have to file a new declaration, since the 2009 Declaration must be considered void in light of the Prosecutor’s decision and the non-retroactive effect of General Assembly resolution 67/19. In other words, the General Assembly resolution changed the status of Palestine *only ex nunc* with a view to future Palestinian declarations (Zimmermann, JICJ 11(2013), 308-9). Here, another problem with Oslo arises, since article IX (5) of the Interim Agreement severely limits the PNA’s power to conduct foreign relations. However, it is not clear from this provision whether it also prohibits the triggering of international criminal jurisdiction. It is fair to assume that at the time of drafting nobody thought that such a possibility would ever arise. In any case, here again one could argue – with more reason than above – that the Government of Palestine cannot be bound by this provision, not having been a party to Oslo. Indeed, if this Government can accede to international treaties, as indeed it does, it is, a fortiori, entitled to lodge an article 12 (3) declaration.

Third, the question arises whether such a (new) declaration can have a retroactive effect. The 2009 Declaration sought retroactive jurisdiction reaching back to 1 July 2002, the date of entry into force of the ICC Statute. I would submit that such a retroactive effect is possible. This possibility follows from the delegation theory underlying articles 12 (3) and 11 (2). Article 12 (3) implies that it is the sovereign right of the State delegating its territorial jurisdiction to do so within the temporal parameters of the ICC Statute, i.e., going back, in principle, to the Statute’s entry into force. Article 11 (2) prohibits a retroactive effect of jurisdiction, but not with regard to (“unless”) the State “has made a declaration under article 12, paragraph 3”. Zimmermann’s argument that article 12 (3) is a different, indeed, ad hoc, form of triggering jurisdiction does not prove otherwise, since the very fact that article 12 (3) is such an exceptional channel to jurisdiction implies that the non-retroactivity rule of article 11 does not apply.

Further, the possibility of a retroactive effect is also confirmed by the ICC’s practice so far, accepting several article 12 (3) declarations granting retroactive jurisdiction. For example, the [Declaration of Ivory Coast](#) of 18 April 2003 referred to events since 19 September 2002, and the recent [Declaration of Ukraine](#) of 17 April referred to events from 21 November 2013 to 22 February 2014. Of course, in the case of Palestine, such a declaration cannot go further back than the actual recognition of statehood on 29 November 2012, since the authority to lodge it is premised on the existence of a State of Palestine.

Fourth, if such a declaration can only give jurisdiction with regard to events occurring after 29 November 2012 it will, *ratione temporis*, have to focus on crimes committed since that date. However, there may be an exception to this temporal limitation with regard to the possible criminalization of the transfer of settlers into the occupied territories. Such a transfer – as one of the occupying Power’s “own civilian populations” – clearly amounts to a war crime in international armed conflict (article 8 (2) (b) (viii), ICC Statute). Indeed, the systematic establishment of settlements creates *faits accomplis* on the ground, the very facts to be prevented by the primary international humanitarian law norms (articles 49 (6) GC IV and 84 (5) (a) AP I). Arguably, the settlement policy is the primary obstacle to the creation of a Palestinian State as a single, homogeneous territorial unit; thus, it touches upon the very essence of the primary international humanitarian law prohibition. Against this background, the still-existing dispute on the customary character of this provision (Cassese et al., *International Law*, 3rd ed. 2013, 80-1), apart from putting a heavy burden on the ICC (having to inquire whether article 8 (2) (b) (viii) is in line with customary international law), can hardly be an obstacle to adjudication here.

A more difficult question is raised by the character of the crime as a continuous or permanent crime. Could that imply that transfers anticipating the coming into existence of the State of Palestine would fall within the ICC’s jurisdiction? What is the decisive point in time to sever the jurisdictional link with regard to continuous crimes? There are quite a few theoretical answers to this question. One could focus on the commencement of the transfer and thus exclude all transfers which commenced before 29 November 2012. This is similar to the solution chosen by the States parties for the crime of enforced disappearance. They required – by footnote 24 to the elements of crime to article 7 (1) (i) – that the attack (as the context element of crimes against humanity) must have commenced after the entry into force of the Statute. Of course, the problem of the enforced disappearance approach is that it focuses on the context, not an individual element of the crime, and therefore is too restrictive. The other side of the coin is the question of what has to be “continuous”? In other words, what has to reach into the present or even the future? Is it the actual act (as proposed by article 14 (2) of the ILC Articles on State Responsibility), i.e., the transfer as such, or do its mere effects or consequences suffice? For reasons of space, this cannot be further explored here. In any case, these temporal considerations do not affect the Court’s jurisdiction over the ongoing settlement policy and practice.

VII. Chairman’s summary

The United Nations round table on legal aspects of the question of Palestine, organized by the Committee on the Exercise of the Inalienable Rights of the Palestinian People, addressed the legal status of Palestinian political prisoners and detainees as well as applicable provisions of international law and its enforcement mechanisms. It also examined the legal implications stemming from the status of non-Member observer State accorded to Palestine by the General Assembly in its resolution 67/19 of 29 November 2012. Members and observers of the Committee, intergovernmental organizations (including various United Nations bodies) and civil society organizations, together with a panel of renowned legal experts, shared their expertise over the course of two days through an interactive format.

In the opening session, the Secretary-General of the United Nations, in his message, urged the Israeli and Palestinian parties to continue peace negotiations on a substantive basis beyond the 29 April deadline. He also stated that the establishment of an independent State of Palestine based on 1967 borders, alongside a secure State of Israel, was long overdue and that the suffering of millions of Palestinians under occupation had lasted far too long. He further stated that he remained deeply troubled by Israel’s continuing settlement activity and called on all parties to show utmost restraint as well as full respect vis-à-vis the holy sites.

The Chairman of the Committee underscored the objectives of the International Year of Solidarity with the Palestinian People and echoed the Secretary-General's concerns, inviting both parties to continue the negotiations in good faith. He also welcomed the round table which, he said, was essential for Palestine to be presented with alternative legal options if the current round of negotiations failed. The representative of the High Commissioner for Human Rights said that General Assembly resolution 67/19 was a significant step towards the realization of the right to self-determination. He also highlighted key human rights violations and said there was an urgent need for investigations into allegations of unlawful killings and torture of prisoners, for the prosecution of individuals responsible, and for the provision of effective remedies to victims. He referred to Palestine's accession to international treaties, including to eight human rights instruments, as a positive development reflecting Palestine's formal commitment to international human rights principles. The Palestinian Minister for Prisoners Affairs and representative of the State of Palestine called for a greater implementation of international law to protect Palestinian prisoners and detainees in Israeli jails and detention centres. He shared recent official figures and extensive information regarding the plight of Palestinian prisoners and detainees and the abuses they are enduring and stressed the importance of the round table in assisting the State of Palestine with the development of a legal strategy and remedies to address this critical issue. The Minister pointed to numerous violations of the Geneva Conventions by Israel including the transfer of detainees, the use of systematic torture, the arrest of Palestinian children and the use of administrative detention by Israel, the occupying Power, as well as obstruction of access to proper medical care and family visits. Finally, he made several recommendations concerning the establishment of a special court in accordance with the Charter of the United Nations, the request for an advisory opinion of the International Court of Justice and the accession of the State of Palestine to the Rome Statute of the International Criminal Court.

The round table then reviewed the legal status of Palestinian prisoners and detainees in international law as well as the measures to improve their situation. The possible applicability of "prisoner of war" status to future Palestinian prisoners was discussed, including the conditions to be recognized as a "combatant" as set forth in the Third Geneva Convention. The conditions were described as offering limited opportunities, taking into account the Palestinian context. It was also noted that the recognition of the "combatant" status would mean that Palestinian prisoners could be held in detention until "the end of hostilities" without trial, raising the question of the definition of the cessation of hostilities.

The question of the prosecution of hundreds of thousands of civilians before Israeli military courts was also addressed. The authority of such courts in the Occupied Palestinian Territory was questioned in light of the Fourth Geneva Convention, deemed by some legal experts as inapplicable to protracted situations of occupation, which went far beyond the scope and duration envisioned by the Convention. The main shortcomings of these courts included their lack of independence and impartiality, as well as their incapacity of providing a due process. The improper use of military courts for the prosecution of child prisoners and detainees was also raised. It was claimed that Israel's military courts were of a political nature, as they were, structurally, prevented from providing a fair trial, in contradiction to the Fourth Geneva Convention and in violation of common article 3.

It was said that United Nations procedures and mechanisms should bear a clear focus on international humanitarian law regarding the rights of Palestinian detainees and the duties of the occupying Power. The submission of human rights reports to the General Assembly and Human Rights Council constituted an important and authoritative body on this issue. Furthermore, it was noted that General Assembly and Human Rights Council resolutions were key instruments to reflect the high degree of consensus of the United Nations on human rights issues in the Occupied Palestinian Territory. Human rights treaty bodies, special procedures, as well as universal periodic reviews by Member States at the Human Rights Council, also played an important role to expose Israel's violations and make recommendations to address these violations.

Palestinian experts recalled recent comments made by special rapporteurs on the situation of human rights in the Palestinian territories occupied since 1967 concerning the legality of prolonged occupation. The latter was directly connected to the Palestinian prisoners' issues and therefore should nurture national strategies and support the efforts of the Ministry of Prisoners Affairs to internationalize the problem. They called for more accountability with regard to Israeli Military Courts, suggesting that the State of Palestine should accede to the Rome Statute, set up a special court or tribunal to address earlier crimes and apply the principle of universal jurisdiction.

Further discussing the Palestinian prisoners' issue, several participants insisted on the fact that the diptych "end the occupation/self-determination" was the cornerstone of the problem. They also called for an advisory opinion of the International Court of Justice, though some experts expressed the view that such an approach was cumbersome and required the expenditure of large amounts of political capital in the effort to secure the support of Member States in the General Assembly for an advisory opinion. They also questioned the relevance as well as the political advantage of submitting a question whose answer could be too obvious from a legal perspective.

The round table also reviewed the available legal mechanisms aimed at ensuring compliance with international law and addressed third party responsibility. After examining the conditions governing the beginning of an occupation and the extent of the occupant's authority over an occupied territory, it was highlighted that The Hague and Geneva Conventions envisaged that an occupation would only be of short duration. The concept of "prolonged occupation" was absent from governing international instruments.

Therefore, to maintain the unity of international law, it was noted that international humanitarian law was not precluding the application of human rights law in time of armed conflict. The International Court of Justice provided limited guidance on this relationship but it corroborated the idea that a State, when acting beyond its jurisdiction, should apply human rights standards, as reflected in the pronouncement of the Court in the advisory opinion of 9 July 2004. In addition, the recent accession of the State of Palestine to the Fourth Geneva Convention put an end to Israel's attempts to continue to elude its obligations as occupying Power.

In broad terms, Israel's responsibilities as occupant under international humanitarian law lay in ensuring that its armed forces respected the Fourth Geneva Convention and section III of the Hague Regulations relative to "military authority over the territory of the hostile State". Israel is under a duty to investigate and prosecute those responsible for grave breaches of the Fourth Geneva Convention or war crimes committed in the Occupied Palestinian Territory. Israel is also responsible for compensating for any damage caused.

Concerning the actions by States parties to the Geneva Conventions to ensure and promote compliance by Israel, in addition to common article 1, their guiding principles were clearly formulated by the advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. In its opinion, the Court declared that all States must respect the Charter of the United Nations and international law. However, the Court did not elaborate on the measures States should take to ensure this respect.

Building on the European Union guidelines regarding non-support for Israeli settlements, potential measures recommended by the experts for promoting compliance with international humanitarian law included: political dialogue, the internalization of norms, public statements, non-public démarches, unilateral restriction, countermeasures, the conditionality of trade and assistance, individual responsibility and the fight against impunity, the evocation of State responsibility, international dispute settlements and international cooperation. Some of these tools were more formal than others; hence the importance to strive for an appropriate mix of their use, although many still depended on the political will of Governments.

The legacy of the advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory continued to offer a guiding framework. It reaffirmed the wide competence of the General Assembly in peace maintenance and bolstered its competence in requesting an advisory opinion. It confirmed that human rights treaties continued to apply in armed conflict situations and that they were in certain situations complementary with international humanitarian law. It also concluded on the basis of Security Council resolutions that "Israeli settlements in the Occupied

Palestinian Territory (including East Jerusalem) violated article 49, paragraph 6, of the Fourth Geneva Convention.”

Moreover, it was pointed out that the Court underlined the continuing and special responsibility of the United Nations to enforce the provisions of its advisory opinion and its resolutions aimed at the achievement of a just, lasting and peaceful solution to the question of Palestine in all its aspects. However, according to some experts, the United Nations did not fully uphold this responsibility, as reflected in some resolutions that did not fully hold Israel to account for its violations, including the late establishment of the United Nations Register of Damage. The United Nations also failed to promote actions on the Palestinian issue in the context of multilateral mechanisms that had been used in similar cases and situations: economic sanctions and divestment policies (South Africa, Portuguese territories), financial and diplomatic sanctions (Israel concerning the Golan Heights), establishment of a mixed internal/international tribunal (Cambodia), etc. The experts lamented that the United States also prevented robust action by the Security Council through the repeated use of its veto power, preventing attempts to persuade the Israeli Government to engage in a genuine peace process based on United Nations resolutions and international legal rules and standards.

On third party responsibility, it was stressed that the Court declared in its advisory opinion that all States were under an obligation “not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction.” Such duty of non-recognition on the part of States was also found in Security Council resolutions concerning measures by Israel, the occupying Power, to alter the status, demographic composition and character of the Occupied Palestinian Territory, including East Jerusalem. Third party responsibility could also be established through complicity, failure to react to international law breaches or through the activities of a private company. On the latter, the current trend was to consider that private corporations were directly responsible for crimes under international law, as recently expressed by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.

Taking the above into consideration, experts advised that any new advisory opinion should bear a more holistic approach to view the consequences (not the Statehood which was by now an *acquis*) of General Assembly resolution 67/19 and of Israel’s 47 years of military occupation of Palestine.

While reviewing the general legal implications stemming from the status of non-Member observer State, the round table participants agreed that General Assembly resolution 67/19 did not bestow statehood on Palestine, rather it bestowed on Palestine the status of “non-Member observer State”, based on an extensive body of facts reflected in the resolution regarding Palestine’s practice in international relations over the decades, including in terms of recognition by more than 130 countries and in the context of the United Nations and other international and regional organizations, thus reflecting an already-existing State status.

The State of Palestine’s submission of instruments of accession to 20 treaties and conventions on 1 April 2014 was widely discussed. Depending on their category, human rights, diplomatic, governance, humanitarian law and international criminal law, it was underscored that such treaties and conventions also entailed rights and obligations for the State of Palestine to meet international standards. Concerning the particular case of the four Geneva Conventions, their accession reconfirmed the international character of the Israeli-Palestinian conflict and offered clear options to challenge the occupation and its corollary, the settlements.

Several participants referred to State dispute settlement clauses in multilateral treaties, specifying that Israel made reservations in all of them except the Convention on the Prevention and Punishment of the Crime of Genocide. Despite this fact, it was mentioned that it could be challenged, arguing that such exceptions were contrary to the essence of the treaties. It was particularly relevant for the case of international human rights treaties, though States were rather reluctant to lodge complaints against other States.

Regarding possible membership of the State of Palestine in more United Nations specialized agencies and other global organizations, it was demonstrated that the problem was essentially of a political nature (financial pressures exerted by the United States) requiring a political decision. Diverse application procedures were presented (some friendlier than others) with different types of majority. For example, it was suggested that the State of Palestine should consider joining UNIDO as it was neither receiving funds from the United States nor requiring a vote. The State of Palestine should also consider joining UNWTO as the United States was not a member; however a vote would be required.

During the last session of the round table, it was specified that General Assembly resolution 67/19 did not change the relationship of the State of Palestine with the International Court of Justice with respect to advisory opinions. However, it opened the possibility to join the Court upon a recommendation by the Security Council to the General Assembly, but the risk of a veto from the United States was likely. A declaration to accept compulsory jurisdiction as per article 36, paragraph 2, of the Statute of the Court was described as posing limited perspectives, but could still be regarded as an option.

Concerning the accession to the Rome Statute of the International Criminal Court, some experts argued that the State of Palestine should lodge a new declaration to accept the exercise of the jurisdiction by the Court as per its article 12, paragraph 3. This presented the sole option for retroactivity. Nevertheless, a new declaration could be seen as recognition that the State of Palestine had only existed since resolution 67/19, thus endorsing the 2012 decision of the office of the Prosecutor of the International Criminal Court, which did not act on the 2009 Palestinian request on the premise it was emanating from an “entity” and not a “non-Member State” of the General Assembly and that the Prosecutor could not proceed unless this were to be clarified by the General Assembly. This led some experts to consider that the 2009 declaration was still valid and should be reconfirmed, along with a formal accession of the Rome Statute.

Accession as such was not presenting legal obstacles, but in this case the Court would exercise its jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute. Furthermore, some experts warned that the limitation of criminal jurisdiction embedded in the Oslo Accords could impact the jurisdiction of the International Criminal Court if the State of Palestine acceded to the Statute. They also insisted on the importance of properly analysing the cases of continuous crimes such as settlement activities and population transfers.

The Palestinian Minister of Prisoners’ Affairs, in his concluding remarks as the representative of the State of Palestine, stressed the great benefit of the round table. He reiterated the commitment of the State of Palestine to negotiations, peace and justice and concluded with a quote from Marwan Barghouti: “The last day of the age of occupation is the first day of peace in the region.”

Closing the Seminar, the Chairman of the Committee noted that the acceleration of the search for peace needed to go hand in hand with greater accountability, political will and respect for international law and human rights principles. He reiterated the support of the Committee for these objectives and stated that it would invest greater efforts to advance the rule of law.

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