



EVERYONE'S BUSINESS

Third Party Responsibility
and the Enforcement of International Law in the oPt

Diakonia International Humanitarian Law Resource Centre
October 2016

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Published by:

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Cover picture: Palestinians attempt to cross into East Jerusalem for the holy month of Ramadan prayer banned by the Israeli army near the Qalandia Checkpoint between the West Bank city of Ramallah and Jerusalem.
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I. Introduction

A. Overview

International humanitarian law, also referred to as the law of war, comprises conventional, customary and peremptory rules that apply not only to belligerents involved in international or non-international armed conflicts, but also to third parties.¹

Article 1(h) of the *Vienna Convention on the Law of Treaties* (Vienna Convention) defines a third State as “a State not a party to the treaty” as opposed to a contracting party/State, which, by ratifying the treaty, has consented to be bound by the obligations therein.² Article 34 sets out the general principle of *pacta tertiis*, which provides that “a treaty does not create either obligations or rights for a third State without its consent”.³ However, “[a]n *obligation* arises for a third State from a provision of a treaty if [...] the third State expressly accepts that obligation in writing” (emphasis added)⁴ and “[a] *right* arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto.” (emphasis added).⁵ Unless the treaty provides otherwise, and so long as the third State has not indicated to the contrary, its consent to benefit from such a right is presumed. The Vienna Convention subsequently clarifies that the above mentioned provisions do not preclude rules that are included in a treaty from binding third States as customary rules of international law.⁶

In the context of armed conflict, the term third party refers broadly to: (1) State actors not directly involved in a conflict but party to major IHL treaties, (2) State actors not party to major IHL treaties but bound by customary and peremptory norms of IHL, (3) international organizations, (4) non-State actors maintaining (economic) ties with one of the belligerents, an occupying power or occupied territory.

Fundamental IHL principles, as highlighted in ICJ jurisprudence,⁷ have attained the status of customary law and many of the most important ones have assumed the status of “*jus cogens*” norms.⁸ This means that these principles rank at the highest level within the hierarchy of international norms and therefore apply, directly or indirectly, to all States. The same reasoning applies to key principles of human rights law, which applies concurrently in the context of armed conflict or occupation.⁹

Customary rules of international law and *jus cogens* norms apply universally. They create rights and obligations “*erga omnes*” that, by their very nature, “are the concern of all States.” Moreover, “[i]n view of the importance of the rights involved, all States can be held to have a *legal* interest in their protection.”¹⁰ Every State not only has an interest in the protection of such rights but, in the case of *jus cogens* norms, States additionally have duties regarding their promotion, respect and implementation. More specifically, in the case of violations of *erga omnes* obligations, third States have a right to demand the cessation of the wrongful act or reparation for the benefit of the victims, whereas in cases of breaches of *jus cogens* norms,

¹ The terms ‘third states’ and ‘third parties’ will be used interchangeably in this brief.

² Article 2(1)(b): “‘Ratification’, ‘acceptance’, ‘approval’ and ‘accession’ mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty’, The Vienna Convention on the Law of Treaties (1969).

³ “Third State”, Encyclopaedic Dictionary of International Law, J. P. Parry and J.C. Barker, p. 504.

⁴ Article 35, Vienna Convention.

⁵ Article 36, Vienna Convention.

⁶ Article 38, Vienna Convention.

⁷ The Contribution of the International Court of Justice to International Humanitarian Law, Vincent Chetail, IRRIC June 2003, Vol. 85 n°850.

⁸ Article 53 of the Vienna Convention on the Law of Treaties (1969) defines peremptory norms of general international law as norms accepted and recognized by the international community of States as a whole, from which no derogation is permitted.

⁹ Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, 2004 ICJ Reports, p. 136, para. 106.

¹⁰ ICJ, *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, op. cit. (note 41), p. 32, para 33.

in addition to the *erga omnes* claims, third States also are duty-bound to cooperate to bring to an end such serious breaches through lawful means, as well as to refrain from recognizing the unlawful situation or rendering assistance to the offending State.¹¹

The customary obligation “to respect” and “to ensure respect” for IHL originally prescribed by common Article 1 of the four Geneva Conventions (Conventions) encompasses broad duties such as the obligation for all States to abide by the rules of the Conventions, as well as the duty to take all necessary measures to safeguard compliance with the Conventions by the parties to the conflict. By engaging in direct relations with a State that is breaching its international law obligations, a third State can be held accountable through secondary responsibility mechanisms. The International Law Commission (ILC), in its *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*,¹² has identified three major instances where a State may be held directly responsible for the acts of another: rendering aid or assistance,¹³ effective control over the perpetrator¹⁴ and exercising coercion.¹⁵

In addition, collective responsibility of international organizations is a new lens through which international law addresses the issue of ancillary responsibility. The codification effort initiated by the International Law Commission (ILC) through the *Draft Articles on the Responsibility of International Organizations* (DARIO)¹⁶ presents useful guidelines for assessing the secondary responsibility of international organizations. This innovative framework, although not supported by a long history of State practice, is applicable to breaches of international law in the context of armed-conflict or occupation.¹⁷

In the context of the prolonged occupation of the Palestinian territory, mobilization of third parties plays a crucial role towards ensuring compliance with the rule of law by the primary parties to the conflict.

After providing a brief contextual background, this legal brief first will examine the scope of third party/State responsibility, presenting the legal sources for the relevant principle and its implications with respect to negative and positive obligations for third parties not directly involved in an armed conflict or a situation of belligerent occupation. The analysis will then focus on existing implementation/enforcement mechanisms for ensuring effective third State responsibility and will provide conclusions and recommendations in that regard.

B. Background/Context

Israel, as the Occupying Power, has failed, and continues to fail, to meet its obligations under customary and treaty-based IHL/IHRL in the occupied Palestinian territory (oPt). These include the transfer of Israel's population into the oPt, establishment of large scale residential, agricultural and industrial settlements, forcible transfer of protected persons, destruction and confiscation of private property, measures aimed at the *de jure* and *de facto* annexation of

¹¹ According to Antonio Cassese, the International Law Commission (ILC) in its Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), “contemplated a three-tiered class of obligations under international law: (1) obligations contractual in nature, ie synallagmatic obligations; (2) obligations erga omnes; (3) obligations imposed by a peremptory norm. This structure is pyramidal in that the range of lawful reactions by third States to serious breaches of such obligations expands with the passage from one tier to the other: violations of synallagmatic obligations do not entail any third State action; breaches of obligations erga omnes trigger the claims mentioned above; breaches of obligations stemming from peremptory norms bring about those claims plus the three obligations to cooperate or to abstain from doing something, referred to above”, see The Character of the Violated Obligation, Antonio Cassese, in *The Law of International Responsibility*, J. Crawford, A. Pellet, S. Olleson, Oxford University Press, 2010, p. 416, this will be further developed in section III on “Ancillary and secondary responsibility under the ILC Draft Articles”, p. 9.

¹² International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <http://www.refworld.org/docid/3ddb8f804.html>

¹³ ARSIWA, Article 16

¹⁴ ARSIWA, Article 17

¹⁵ ARSIWA, Article 18

¹⁶ International Law Commission, Draft Articles on Responsibility of International Organizations, June 2011, Supplement No. 10 (A/66/10), chp.V.E.1, available at: http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/9_11_2011.pdf&lang=EF

¹⁷ State Responsibility, Part IV, Chapter X, Ancillary and Secondary Responsibility, Cambridge Studies in International and Comparative Law, James Crawford p. 406.

Palestinian land. All of the forgoing actions that constitute serious IHL breaches and violate the most fundamental principles of international law have been condemned by the international community repeatedly.¹⁸ The illegal character of Israel's administration of the oPt has been reaffirmed by the recent UN independent commission of inquiry on the 2014 Gaza conflict, which urged Israel "to lift, immediately and unconditionally, the blockade on Gaza; to cease all settlement-related activity (...); and to implement the advisory opinion rendered on 9 July 2004 by the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory".¹⁹

Despite condemnation by both State and non-State actors of Israel's unlawful and discriminatory practices in the oPt, very few actors of the international community have translated their expressed stance into tangible positive action. To the contrary, States and non-State actors have continued to maintain close political, security, diplomatic and economic ties with Israel, arguably in contradiction with their own obligations not to aid, facilitate or recognize the legality of IHL violations perpetrated by the Occupying Power.

II. Third State responsibility under IHL

A. Common Article 1 and the obligation to *respect* and *ensure respect* for the Geneva Conventions²⁰

International humanitarian law, contrary to other branches of international law, expressly specifies in its main treaties positive obligations for third States whether or not they are parties to an armed conflict. As common Article 1 to the four Geneva Conventions clearly states, the obligation to respect fundamental principles of IHL applies beyond the parties directly involved in an armed conflict, including situations of belligerent occupation: "the High Contracting Parties undertake to respect and *to ensure respect* for the present Convention in all circumstances." [emphasis added].²⁰

This introductory provision underlines the specific nature of IHL conventional instruments. "It is not an engagement concluded on the basis of reciprocity.... It is rather a series of *unilateral engagements* solemnly contracted before the world" (emphasis added).²¹ Thus, the object and purpose of the Conventions is so lofty, so universally recognized as an imperative call for civilization that each High Contracting Party (virtually the whole international community) has a direct interest in other States' compliance with fundamental IHL norms, as they apply *erga omnes*.²²

As the ICJ held in its *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion on the Wall), "it follows from that provision [common Article 1] that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with."²³ Therefore, "all the States parties to the Geneva Convention (...) are under an obligation (...) to ensure compliance by Israel with international humanitarian law as embodied in that Convention."²⁴

¹⁸ See, for instance, UN Security Council Resolutions 242 (1967), 338 (1973), 446 (1979) and 476 (1980), Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, 2004 ICJ Reports, p. 136.

¹⁹ Report of the United Nations (UN) Commission of Inquiry into the 2014 Gaza Conflict, VII Conclusions and Recommendations, Summary version, §86(d).

²⁰ The exact same wording is reproduced by Article 1(1) of Additional Protocol I (1977).

²¹ Commentary Art. 1. Chapter I: General provisions, 1st Geneva Convention, 1952.

²² Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, 2004 ICJ Reports, p. 136, para. 157.

²³ *Ibid.*, para. 158. Common Article 1 seems to be more stringent than *erga omnes* obligations in general in the sense that pursuant to it, not only states have the right to intervene in case of violations of IHL norms, recognized as *erga omnes* norms and as such applicable against the world, but they have an obligation to do so.

²⁴ *Ibid.*, para. 159.

Common Article 1 to the four Geneva Conventions thus creates a “two-sided” obligation for High Contracting Parties. On the one hand, each State is obliged to ensure compliance with the Conventions within its own jurisdiction. On the other hand, and irrespective of any direct engagement with an armed conflict, each State must do everything reasonably in its power to “ensure that [IHL] rules are respected by all”.²⁵ Despite the difficulty of apprehending the wide range of practical implications raised by this provision, particularly in terms of the specific nature of steps that third States should take, Article 1 is generally interpreted today as creating a *positive* obligation on third parties to an armed-conflict.²⁶ “It is generally understood that the positive responsibility under common Article 1 (...) is to be construed as an ‘obligation of means’ on States to take all appropriate measures possible in an attempt to end violations of international humanitarian law.”²⁷

Contrary to obligations of result, where a State is expected to attain a specific outcome, obligations of means – also known as obligations of due diligence – imply that States only are obliged to follow a certain conduct, taking all measures they could reasonably be expected to take to obtain a specific outcome, regardless of whether, through such measures, they actually manage to reach the sought outcome.²⁸ This does not imply, however, that the obligation to ensure respect lacks normative strength. Among other things, this is because, for example, where States manifestly fail to do everything within their power to safeguard respect for IHL by others, they may incur international responsibility.²⁹

The interpretation that common Article 1 involves obligations beyond those of the parties to the conflict was expressly acknowledged by the Teheran Conference on Human Rights in 1968³⁰ and subsequently reaffirmed, in relation to the Israeli/Palestinian conflict, by UN Security Council resolution 681 (1990). That resolution expressly called on States parties to the Fourth Geneva Convention to ensure respect by Israel for its obligations, in accordance with Common Article 1.³¹ Numerous UN General Assembly resolutions have expressed similar calls.³²

Measures that can be taken by third States to ensure respect for IHL

In late March 2016, the ICRC released an updated commentary on the First Geneva Convention³³ that endeavors to reflect the current interpretation of that convention’s provisions in line with new developments in law and practice that have occurred since the publication of the prior version of the commentaries six decades ago. The ICRC’s authoritative revised commentary and its interpretation of IHL sheds significant light and provides crucial guidance on High Contracting Parties’ obligations derived from common Article 1 and thus is central to the subject matter of this legal brief. Most importantly, the new commentary outlines, for the first time, a wide range of concrete measures that third States can adopt toward the end of ensuring respect for IHL by other States.

²⁵ Common Article 1 of the Geneva Conventions revisited: Protecting collective interests, Laurence Boisson de Chazournes, Luigi Condorelli, IRRIC March 2000, vol. 82, no. 837, pp. 67–87.

²⁶ Positive obligations require action from the State to be fulfilled as opposed to negative obligations where the State merely must abstain from pursuing certain conduct that would violate international law. In this context, States have a negative obligation to refrain from breaching the Geneva Conventions as well as a positive obligation to take action to prevent other States from breaching the Convention or to bring those breaches to an end.

²⁷ ICRC, *Improving Compliance with IHL*, 2004, p. 2.

²⁸ In general, one could describe an obligation of due diligence as an obligation for the State to take all measures it could reasonably be expected to take in order to prevent acts contrary to international law.

²⁹ Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations, K. Dörmann and J. Serralvo, IRRIC (2014), Vol. 96, p. 724.

³⁰ International Conference on Human Rights, Teheran, 1968, Res. XXIII, Human Rights in Armed Conflict, Preamble.

³¹ UN Security Council, Res. 681, 20 December 1990, para. 5.

³² UN General Assembly, Res. 32/91 A (ibid., § 22), Res. 37/123 A (ibid., § 23), Res. 38/180 A (ibid., § 24) and Res. 43/21 (ibid., § 25).

³³ The work on the other Conventions and the Additional Protocols is still underway. The ICRC released its first commentaries on the Geneva Conventions in 1952.

First of all, the text underlines that the duty to ensure respect by others encompasses not only negative but also positive obligations. High Contracting Parties should not only refrain from encouraging, aiding or assisting in violations of the Convention (negative obligations) but they also have a positive obligation to prevent and bring such violations to an end.³⁴

Under the law of State responsibility, States are responsible for knowingly aiding and assisting another State in the commission of internationally wrongful acts if “the relevant State organ *intended*, by aid or assistance given, to facilitate the occurrence of the wrongful conduct” (emphasis added).³⁵ What the new Article 1 commentary notes, interestingly, is that for the purpose of common Article 1, the subjective element of ‘intent’ is not required as “common Article 1 does not tolerate that a State would knowingly contribute to violations of the Conventions by a Party to a conflict, whatever its intentions may be”.³⁶ It thus follows, according to the new commentary, that “the obligation to ensure respect for the Conventions is an autonomous primary obligation that imposes more stringent conditions than those required for the secondary rules on State responsibility for aiding and assisting”.³⁷

As for the positive obligation derived from common Article 1, the new commentary explains that, according to the specific circumstances of the violation, a State has the liberty to choose among a wide range of different measures to ensure respect for IHL, depending on “the gravity of the breach, the means reasonably available to the State, and the degree of influence it exercises over those responsible for the breach”.³⁸

The commentary additionally makes clear that common Article 1 “does not provide a ground to deviate from applicable rules of international law” meaning that it does not authorize States to take measures that would conflict with applicable rules of international law such as, for example, the prohibition on the use of force.³⁹ The commentary subsequently provides a list of measures to be taken individually by States, by a group of States or within the framework of international organizations.⁴⁰ Starting with “soft” measures such as “addressing questions of compliance within the context of a diplomatic dialogue; exerting diplomatic pressure by means of confidential protests or public denunciations”,⁴¹ the commentary continues by making available to States stronger means such as applying measures of retorsion,⁴² like the “halting of ongoing negotiations or refusing to ratify agreements already signed, the non-renewal of trade privileges, and the reduction or suspension of voluntary public aid”,⁴³ as well as “adopting lawful countermeasures such as arms embargoes, trade and financial restrictions, flight bans and the reduction or suspension of aid and cooperation agreements; or conditioning, limiting or refusing arms transfers.”⁴⁴ With respect to this last measure, a recent example was a resolution passed by the parliament of the Netherlands calling on the government to stop selling arms to Saudi Arabia, which the parliament described as “guilty of violating international humanitarian law in Yemen”.⁴⁵ This action by the Dutch parliament follows an historic vote in the EU parliament in February 2016 that demanded a complete arms embargo on Saudi Arabia.⁴⁶

³⁴ ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, 2016, Article 1: Respect for the Convention, para. 37.

³⁵ ARSIWA, Article 16.

³⁶ Commentary of 2016, para. 42.

³⁷ *Ibid.*, para. 43.

³⁸ *Ibid.*, para. 48.

³⁹ Article 2(4) of the UN Charter.

⁴⁰ The commentary underlines that there is no primacy of collective actions over individual actions.

⁴¹ Commentary of 2016, para. 64.

⁴² The International Law Commission (ILC) in its commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts defines ‘retorsion’ as “unfriendly conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act”, ARSIWA Commentary, Part III, Chapter II, para. 3.

⁴³ *Ibid.*, para. 64.

⁴⁴ *Idem.*

⁴⁵ The resolution was tabled by the Labour Party, see: “Dutch MPs call for arms embargo on Saudi Arabia over Yemen war”, *Middle East Eye*, 15 March 2016, available at: <http://www.middleeasteye.net/news/dutch-parliament-calls-arms-embargo-saudi-arabia-over-yemen-war-1861032989>.

⁴⁶ At the end of February 2016, The EU parliament passed a resolution where 359 MEPs supported a bill demanding a complete arms embargo on Saudi Arabia, with 212 voting against, see: European Parliament resolution of 25 February 2016 on the humanitarian situation in Yemen (2016/2515(RSP)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0066+0+DOC+XML+V0//EN&language=EN>.

Other possible positive steps to be taken by third States rely on multilateral mechanisms such as

Referring the issue to competent international organizations, e.g., the UN Security Council or General Assembly or the ICJ; resorting to penal measures to repress violations of humanitarian law; and supporting national and international efforts to bring suspected perpetrators of serious violations of international humanitarian law to justice.⁴⁷

Presumably, this broad call could include domestic, ad hoc or prosecutions before the International Criminal Court (ICC).

In the present oPt context, many of the diplomatic measures available have been exhausted, both by individual States and collectively, evidently without bringing about improved compliance with the Conventions by Israel. However, as enumerated in the new common Article 1 commentary, many further measures remain at third States' disposal. This is also illustrated by consistent State practice on a number of occasions in other contexts, such as the case of Darfur, where continued violations of human rights and IHL led the US to adopt economic sanctions against Sudan⁴⁸ or the case of Libya in 2011 where, in condemning widespread indiscriminate attacks against the civilian population by the Libyan government, the EU put in place a package of sanctions against Libya, including an arms embargo and travel ban.⁴⁹

The new common Article 1 commentary also stresses the prominent role that falls upon the UN in ensuring compliance with the Conventions, a role that, subsequently, has been clearly outlined in Article 89 of Additional Protocol I.⁵⁰ In particular, the commentary lists examples of engagement of the UN that range from condemnation of specific violations and deployment of fact-finding missions to adoption of sanctions under Chapter VII of the UN Charter and the deployment of peace operations with a mandate to protect civilians.

Historically, some of the positive measures listed above have been characterized by States and some legal commentators as political in nature rather than as lawful steps to be taken to fulfill third States' positive obligation under common Article 1 to "ensure respect" for IHL by others. However, as the updated Article 1 commentary strongly suggests, and as the IHLRC also previously has argued,

the legal obligation to respect and ensure respect for IHL should transcend a false dichotomy between politics and international law. In this regard, the ratification of international law instruments should be regarded as a political and legal act intended to ensure political decision and policy-making based on international law.⁵¹

B. The High Contracting Parties' duty to investigate and prosecute grave breaches of the Geneva Conventions

The Geneva Conventions not only impose on the High Contracting Parties the duty to respect and ensure respect for IHL but also require third States to secure accountability for the commission of grave breaches of the Conventions. More specifically, article 146 of Geneva

⁴⁷ Commentary of 2016, para. 64.

⁴⁸ Department of the Treasury, Office of Foreign Assets Control (OFAC), Sudan Sanction Program, 5 November 2013, available at: <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/sudan.pdf>, p. 3, cited in Common Article 1 to the Geneva Conventions and the obligations to prevent IHL violations, K. Dörmann and J. Serralvo, IRRC (2014), Vol. 96, p.721.

⁴⁹ "EU Agrees Libya Arms Embargo, Travel Ban", Reuters, 28 February 2011, cited in Common Article 1 to the Geneva Conventions and the obligations to prevent IHL violations, K. Dörmann and J. Serralvo, IRRC (2014), Vol. 96, p.721.

⁵⁰ Article 89, Additional Protocol I, 1977: In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

⁵¹ Diakonia IHLRC, "Removing Peace by Force: A Legal Analysis of Recent Israeli Policies of Forcible Transfer in the occupied Palestinian territory from the Perspective of International Humanitarian Law, Criminal Accountability and Third State Responsibility (December 2015), p.14.

Convention IV provides that the High Contracting Parties “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches”⁵² of the Convention. Furthermore, each party “shall be under the obligation to search for persons alleged to have committed, or have ordered to be committed, such grave breaches and shall bring such persons, *regardless* of their nationality before its own court” (emphasis added).⁵³ As the recent commentary on this article indicates, the underlying idea is that each State party, whether or not involved in an armed conflict, shall rely upon universal jurisdiction⁵⁴ to abide by its obligation to investigate and prosecute alleged perpetrators of war crimes regardless of their nationality.⁵⁵ The principle of universal jurisdiction is more broadly applied to include the prosecution of other serious international crimes such as crimes against humanity and genocide that are linked to grave violations of international human rights law.⁵⁶

III. Ancillary and secondary responsibility under the ILC *Draft Articles*

In May 2001, the International Law Commission (ILC) adopted the *Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)*.⁵⁷ This set of 59 provisions and associated commentary is “considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility.”⁵⁸ Part One, Chapter IV, develops rules of State responsibility in connection with the acts of another State. Article 16 refers to responsibility of a State for providing aid or assistance in the commission of an internationally wrongful act by another State, what most national legal systems qualify as complicity. Part II, Chapter III, concerns the responsibility of third States in case of breaches of peremptory norms of international law (*jus cogens*). These provisions are particularly helpful to understand the extent of third States’ responsibilities in the oPt context.

While it is sometimes argued that IHL is a “self-contained system”, it is important to note that “mechanisms for the implementation of IHL, too, are embedded in those of general international law on State responsibility and can be better understood within that framework.”⁵⁹

⁵² According to Article 147 to the Geneva Convention IV, Grave breaches of the Convention “shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

⁵³ Article 146(1), (2) of Geneva Convention IV.

⁵⁴ Universal jurisdiction is defined as : “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction”, The Princeton Principles on Universal Jurisdiction, Princeton University, 2001, Principle 1.

⁵⁵ ICRC, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016, Article 49: Penal Sanctions, para. 2863.

⁵⁶ See for instance Articles 6 and 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

⁵⁷ The Draft Articles are a “soft law” instrument having no binding power for States. Nonetheless, they are considered by international courts and tribunals to be an accurate codification of customary international law on State responsibility and to perform a constructing role in articulating the development of international law on the subject matter. All States and entities of the international community are bound by customary international law regardless of whether they have codified these laws domestically or through treaties. The customary nature of the Draft Articles was reaffirmed, among others, by the International Court of Justice in its Bosnian Genocide case. See, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Rep. 2007 p. 43, para. 209.

⁵⁸ State Responsibility, Chapter I: Historical Development, James Crawford, Cambridge Studies in International and Comparative Law, p. 43.

⁵⁹ State Responsibility for violations of international humanitarian law, Marco Sassoli, IRRC June 2002 Vol. 84 No 846, p. 421

A. Third State's responsibility for serious breaches of peremptory norms of international law (Article 41)

ARSIWA Part II, Chapter III, outlines a regime of third party responsibility that only applies in instances of serious breaches of peremptory norms (*jus cogens*) obligations under international law.

Peremptory norms of international law (jus cogens)

Article 53 of the Vienna Convention on the Law of Treaties (1969) defines peremptory norms of general international law (*jus cogens*) as norms accepted and recognized by the international community of States as a whole, from which no derogation is permitted. *Jus cogens* norms "arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values."⁶⁰ While the bounds and scope of peremptory norms remains somewhat controversial, the existence of these higher binding rules of international law is undisputed today. The existence of *jus cogens* norms has been recognized by international practice and the jurisprudence of national and international tribunals. *Jus cogens* norms create obligations *erga omnes* and are applicable to all States.⁶¹

Moreover, the international community has unanimously recognized a number of fundamental rights and prohibitions as *jus cogens* norms. In its commentary to the *Draft Articles*, the ILC offered a non-exhaustive list of these well-established peremptory norms, including: the prohibition against aggression and the illegal use of force including the acquisition of territory by force, slavery and slave trade, racial discrimination, apartheid,⁶² genocide,⁶³ torture,⁶⁴ and the right to self-determination.⁶⁵

Additionally, the ILC has recognized that "some of [the rules of humanitarian law] are, in the opinion of the Commission, rules which impose obligations of *jus cogens*".⁶⁶ This interpretation appears to have been reiterated by the ICJ's 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, where the Court held that "fundamental rules [of IHL] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute *intransgressible principles of international customary law*".⁶⁷ Many respected legal scholars saw in this opinion an implicit recognition by the ICJ of the peremptory character of fundamental principles of IHL.⁶⁸ Reinforcing this interpretation, the International Criminal Tribunal for the Former Yugoslavia (ICTY) subsequently specifically referred to grave breaches of the Geneva Conventions as constituting violations of *jus cogens* norms, stating that "most norms of international humanitarian law, in particular those

⁶⁰ Draft Articles on State Responsibility (2001), Article 40, Note (3)

⁶¹ See The Character of the Violated Obligation, Antonio Cassese, in *The Law of International Responsibility*, J. Crawford, A. Pellet, S. Olleson, Oxford University Press, 2010, pp. 416-417.

⁶² General agreement as to the peremptory character of such obligations was reached at the Vienna Conference on the law of treaties in 1969, see Commentary of the Draft Articles on State Responsibility, Article 40, p. 112.

⁶³ This is supported by a number of decisions by national and international tribunals. See, for example, ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, pp. 439-440; *Counter-Claims*, p. 243; and the District Court of Jerusalem in the *Attorney-General of the Government of Israel v. Adolf Eichmann case*, ILR, vol. 36, p. 5 (1961).

⁶⁴ This is supported by a number of decisions by national and international tribunals: Cf. the United States Court of Appeals, Ninth Circuit, in *Siderman de Blake and Others v. The Republic of Argentina and Others*, ILR, vol. 103, p. 455, at p. 471 (1992); the United Kingdom Court of Appeal in *Al Adsani v. Government of Kuwait and Others*, ILR, vol. 107, p. 536, at pp. 540-541 (1996); and the United Kingdom House of Lords in *Pinochet*, pp. 841 and 881. Cf. the United States Court of Appeals, Second Circuit, in *Filartiga v. Pena-Irala*, ILR, vol. 77, p. 169, at pp. 177-179 (1980).

⁶⁵ See, *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, at p. 102, para. 29; see also A. Cassese, *International Law* (2nd ed.) (OUP, Oxford, 2005), p. 65; and M. N. Shaw, *International Law* (6th ed.) (CUP, Cambridge, 2008), p. 808.

⁶⁶ See, Report of the International Law Commission on the work of its thirty-second session, 35 UN GAOR Supp. (No. 10) at 98, UN Doc. A/35/10 (1980).

⁶⁷ *Legality of the Threat or Use of Nuclear Weapons*, op. cit. (note 6), para. 79.

⁶⁸ For an elaborate analysis of the different interpretations of the wording "intransgressible principles of international customary law", see, *The contribution of the International Court of Justice to international humanitarian law*, Vincent Chetail, p. 251.

prohibiting war crimes are also peremptory norms of international law or *jus cogens*".⁶⁹ Under these authoritative interpretations, key IHL principles arising from the Hague regulations, the Geneva Conventions and associated Protocols constitute peremptory norms. These include principles governing the conduct of hostilities, protection of persons in the power of an adverse party, as well as implementation mechanisms of IHL.

Article 40(2) of the *Draft Articles* defines serious breaches of international law as "gross or systematic failure by the responsible State" to fulfill an obligation arising under a peremptory norm of international law. Several long-term practices of the Israeli government in the oPt qualify as breaches of peremptory norms of international law. In the aggregate, continuous impairment of Palestinians' right to self-determination, acquisition of territory by force, grave breaches of the Fourth Geneva Convention (e.g., forcible transfer of protected persons and extensive destruction of property) as well as implementation of racially discriminatory policies, constitute violations of peremptory norms of IHL and IHRL. Several duties flow from such a pattern of repeated disregard for international law standards, not only for the primary perpetrator but also for third States as developed by Article 41.

The duty to cooperate to bring to an end the wrongful situation

ARSIWA Article 41 imposes three major duties on third party observers of serious breaches of peremptory norms of international law: (1) a duty to cooperate to bring to an end the wrongful situation, (2) a duty to refrain from recognizing the wrongful situation and (3) a duty to refrain from rendering aid or assistance in maintaining the wrongful situation.

As for the first duty, third States "*shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40*" (emphasis added).⁷⁰ The commentary to article 41 specifies that States, whether or not they are individually affected by the serious breach, are under a "positive duty to cooperate" to bring about the cessation of such breaches. Cooperation can take multiple forms depending on the circumstances of a given situation. It can be organized in the framework of a competent international organization such as the United Nations, for example, but article 41(1) also encompasses non-institutionalized cooperation.⁷¹ The only requirement imposed by Article 41 is that cooperation be brought through "lawful means" appropriate to the circumstances at stake. The ICJ in its *Advisory Opinion on the Wall*, supported this reasoning in stating that

[G]iven the character and the importance of the rights and obligations involved [...], it is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination *is brought to an end*. (emphasis added)⁷²

Article 41(1) significantly calls for a "joint and coordinated effort by all States"⁷³ to counteract effects of serious breaches of obligations arising under peremptory norms of international law. A relevant example of such a "joint coordinated effort" is the EU's recent adoption of a stringent sanctions regime against Russia in the aftermath of its unlawful annexation of

⁶⁹ ICTY, *Prosecutor v. Kupreskic et al.*, (Judgment, Trial Chamber) ICTY-95-16-T (14 January 2000), para. 520. Some authoritative scholars have also supported this conclusion. See, A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law,' (1998) 9 *European Journal of International Law*, 6; T. Meron, 'The Geneva Convention as Customary Law,' (1987) 81 *American Journal of International Law*, 350; E. Schwelb, 'Some Aspects of International Jus Cogens as Formulated by the International Law Commission,' (1967) 61 *American Journal of International Law*, 957.

⁷⁰ ARSIWA, Article 41(1).

⁷¹ Commentary to ARSIWA, Article 41, note (2), p. 114

⁷² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *Advisory Opinion*, ICJ, 9 July 2004, para. 161.

⁷³ ARSIWA, Article 41(1).

Crimea in 2014.⁷⁴ Those restrictive measures were taken as an act of non-recognition of, and as an effort to bring to an end, Russia's annexation of Crimea in violation of the peremptory principle of international law prohibiting acquisition of territory by force.⁷⁵ This sanctions regime includes diplomatic measures such as the decision by EU member States not to hold multilateral or bilateral meetings with Russia, the suspension of the G8 meetings formula and its replacement by the G7 process, excluding Russia;⁷⁶ asset freezing and travel restriction imposition for certain individuals deemed responsible for actions that undermine or threaten the territorial integrity, sovereignty and independence of Ukraine;⁷⁷ substantial restrictions on economic relations with Crimea and Sevastopol, including an import ban on goods from Crimea and Sevastopol, as well as restrictions on trade and investment related to certain economic sectors and infrastructure projects.⁷⁸ It is noteworthy that no such measures or joint efforts have been undertaken by the EU toward the end of bringing an end to Israel's illegal annexation of East Jerusalem and surrounding oPt territory in 1967.⁷⁹

The duty of non-recognition

Article 41(2) provides that all serious breaches of peremptory norms give rise to an obligation of non-recognition by third parties. The obligation of non-recognition represents a significant safeguard for the preservation of the international legal order:

As a minimum, the rationale of the obligation of non-recognition is to prevent (...) the validation of an unlawful situation by seeking to ensure that a *fait accompli* resulting from serious illegalities do not consolidate and crystallize over time into situations recognized by the international legal order.⁸⁰

The duty of non-recognition acquires specific relevance in the case of acquisition of territory by force and practices of annexation. In this regard, Israel has *de jure* annexed East Jerusalem and has progressively implemented a policy of *de facto* annexation of other occupied West Bank areas through the construction of the Wall, extensive settlement and related infrastructure construction, imposition of Israeli legal jurisdiction, demolitions of Palestinian homes and other infrastructure and displacement of Palestinian communities in Area C.⁸¹

Acquisition of territory by force constitutes a grave breach of the peremptory prohibition against the threat or use of force against the territorial integrity or political independence of any State inscribed in Article 2(4) of the UN Charter.⁸² The Security Council and the General Assembly both have elaborated on the content of the duty of non-recognition binding on third parties with respect to internationally wrongful acts, especially those involving forcible

⁷⁴ Council of the European Union, Council Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, 17 March 2014; and Council Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, 17 March 2014. To have a comprehensive overview of the restrictive measures adopted by the EU, see: <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/>.

⁷⁵ The unlawful annexation of Crimea constitutes an act of aggression in violation of Ukraine's sovereignty and territorial integrity. This conduct is a blatant breach of article 2(4) of the UN Charter prohibiting the acquisition of territory by force (*ius cogens* norm) as well as IHL, see in particular article 47 of GCIV.

⁷⁶ The EU-Russia summit was cancelled and EU member states decided not to hold regular bilateral summits. Bilateral talks with Russia on visa matters as well as on the New Agreement between the EU and Russia were suspended. Instead of the G8 summit in Sochi, a G7 meeting was held in Brussels on 4-5 June 2014. Since then, meetings have continued within the G7 process. EU countries also supported the suspension of negotiations over Russia's joining the OECD and the International Energy Agency, see <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/>.

⁷⁷ 146 people and 37 entities are subject to an asset freeze and a travel ban. On 10 March 2016, the Council prolonged these measures until 15 September 2016, see <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/>.

⁷⁸ In addition, a full ban on investment has been in place since December 2014, along with a prohibition to supply tourism services in Crimea. The EU also imposed economic sanctions targeting exchanges with Russia in specific economic sectors, see <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/>.

⁷⁹ The annexation of East Jerusalem will be analyzed in more detail in the following paragraph.

⁸⁰ The obligation of non-recognition of an unlawful situation, Martin Dawidowicz, in *The Law of International Responsibility*, J. Crawford, A. Pellet, S. Olleson, Oxford University Press, 2010, p. 678.

⁸¹ See, e.g., Yesh Din, *From Occupation to Annexation: the silent adoption of the Levy report on retroactive authorization of illegal construction in the West Bank*, 2 February 2016, available at: <http://www.yesh-din.org/en/from-occupation-to-annexation-the-silent-adoption-of-the-levy-report-on-retroactive-authorization-of-illegal-construction-in-the-west-bank/>

⁸² *Ibid.*, para. 87.

territorial acquisition in conjunction with other serious crimes, including genocide and apartheid.⁸³

With regard to the oPt, it is important to mention General Assembly resolutions adopted in the aftermath of the 1967 war that characterized Israeli measures placing the entire city of Jerusalem under a common civil administration as “invalid” and called on Israel to rescind all measures already taken and to refrain from taking any additional action that would result in altering the status of Jerusalem.⁸⁴ Subsequently, the Security Council applied the principle of non-recognition in resolutions 476 and 478, declaring Israel’s claims over East Jerusalem “null and void”, urging States not to recognize the annexation and calling on States to withdraw their diplomatic missions from the city.⁸⁵

With regard to the rest of the West Bank, in 2004, the ICJ expressed concern with regard to the construction of the separation wall and its perennial nature. The Court held that “the construction of the wall and its associated régime create a ‘fait accompli’ on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.”⁸⁶

In its *Advisory Opinion on the Legal consequences for third States of the continued presence of South Africa in Namibia* after the lawful revocation of its mandate, the ICJ defined the content of the duty of non-recognition for the first time. The Court held that States should refrain from “any dealings with the Government of South Africa, inconsistent with the declaration of illegality and invalidity [of the UN Security Council] because they may imply a recognition that South Africa’s presence in Namibia is legal”.⁸⁷

In compliance with their duty of non-recognition, the ICJ enjoined third States:

- 1) To abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa would purport to act on behalf of or concerning Namibia,
- 2) To abstain from invoking or applying treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia,
- 3) To abstain from sending diplomatic or special missions to South Africa and to Namibia,
- 4) To abstain from entering into economic and other forms of relationship or dealing with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.

In its *Advisory Opinion on the Wall*, the ICJ recognized the illegality of the separation wall and declared that all States were “under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem”.⁸⁹ Unfortunately, this time the Court did not elaborate further on

⁸³ In the case of Southern Rhodesia there is GA resolution 2022(XX), 5 November 1965 and SC resolutions 216, 12 November 1965, 217, 20 November 1965, 253, 29 May 1968, 277, 18 March 1970; in the case of South West Africa (Namibia) we have GA resolution 2145(XXI), 26 October 1966, and SC resolutions 264, 20 March 1969, 269, 12 August 1969, 276, 30 January 1970, 283, 29 July 1970.

⁸⁴ See, GA resolutions 2253, 4 July 1967 and 2254, 14 July 1967.

⁸⁵ SC resolutions 476, 30 June 1980 and 478, 20 August 1980.

⁸⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ reports, 2004 p.136, 184 (para 121). More recently, the UN Independent Fact-Finding Mission on Israeli Settlements in the Occupied Palestinian Territory (oPt), including East Jerusalem, which criticized Israel’s ‘creeping annexation’ of the West Bank, called on the Occupying Power to cease all settlement activity without preconditions, “in compliance with article 49 of the Fourth Geneva Convention”, see Human Rights Council, ‘Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem’ (2013) A/HRC/22/63, para. 101.

⁸⁷ 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 Reports 1971, p. 55 §121.

⁸⁸ *Ibid.*, pp. 55–56 (§122 – 124).

⁸⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ reports, 2004, 200 (para. 159).

the specific measures that third States should take to abide by the duty of non-recognition, leaving this important issue to the political organs of the UN, namely the General Assembly and the Security Council.⁹⁰

The EU has taken several measures indicating its apparent non-recognition of the unlawful situation created by the exercise of sovereignty by Israel over the oPt and its related settlement enterprise. Recalling the conclusions of the December 2012 European Foreign Affairs Council stating that “all agreements between the State of Israel and the European Union must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967, namely the Golan Heights, the West Bank including East Jerusalem, and the Gaza Strip”,⁹¹ the EU in 2013 adopted guidelines on the eligibility of Israeli entities and, in 2015, settlement product labeling guidelines.⁹² These documents constitute important steps toward the implementation of EU non-recognition of Israel’s sovereignty over the West Bank, East Jerusalem and the Syrian Golan Heights and reaffirm the EU position that the territory of Israel does not extend beyond the Green Line, including that products made in Israeli settlements are not entitled to benefit from the EU-Israel Association Agreement.⁹³

Nevertheless, the EU approach toward fulfilling its duty of non-recognition with regard to the oPt has lacked consistency. In particular, EU Member States have not agreed on a common position on the definition of a slated *differentiation policy* between the State of Israel and Israeli settlements in bilateral agreements and relationship and have refused to apply differentiation policy in other key and linked economic sectors such as banking and finance.⁹⁴ Moreover, practical implementation of an overall differentiation policy in light of the porous and fungible trade, boundary and financial sector realities between Israel and the oPt do not appear to have been fully understood, analyzed or addressed sufficiently by the EU and many European State policy makers to date.

A recent French Ministry of Foreign Affairs statement, published in the aftermath of Israel’s decision to resume Wall construction in the Cremisan Valley in April 2016, provides one unilateral, albeit indirect, example of non-recognition of an unlawful situation created by a wrongful act, stating that:

This wall is a new obstacle to economic and social development in the town of Bethlehem. According to the opinion issued by the International Court of Justice on July 9, 2004, building the wall in the Occupied Palestinian Territories is illegal under international law. We consequently ask Israel to reverse this decision.⁹⁵

It bears noting that the commentary to article 41(2) of ARSIWA, stresses that the article not only “refers to the formal recognition of these situations, but also prohibits acts which would *imply* such recognition” (emphasis added).⁹⁶ Thus, even though no State has formally recognized Israel’s *de facto* claims over the oPt (or its *de jure* annexation of East Jerusalem), as well as other measures blatantly undermining the Palestinian’s right to self-determination, some conduct by third States could be construed to implicitly recognize such unlawful situations.⁹⁷

⁹⁰ The obligation of non-recognition of an unlawful situation, Martin Dawidowicz, in *The Law of International Responsibility*, J. Crawford, A. Pellet, S. Olleson, Oxford University Press, 2010, p. 685.

⁹¹ See, Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards, 19 July 2013. The European Commission has previously affirmed in several Notices that the territory of Israel does not extend beyond the Green Line and that, as a consequence, products made in Israeli settlements are not entitled to benefit from the EU-Israel Association Agreement.

⁹² European Commission, Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967, 11 November 2015, available at: https://eeas.europa.eu/delegations/israel/documents/news/20151111_interpretative_notice_indication_of_origin_of_goods_en.pdf

⁹³ *Ibid.*

⁹⁴ See, European Council on Foreign Relations (ECFR), *EU Differentiation and Israeli Settlements*, H. Lovatt and M. Toaldo, 22 July 2015, available at: http://www.ecfr.eu/publications/summary/eu_differentiation_and_israeli_settlements3076

⁹⁵ Ministry of Foreign Affairs, France: *Israel/Palestinian Territories – Resumption of security wall construction in Cremisan Valley*, 8 April 2016, available at: <http://www.diplomatie.gouv.fr/en/country-files/israel-palestinian-territories/israel/events/article/israel-palestinian-territories-resumption-of-security-wall-construction-in>

⁹⁶ Commentary to ARSIWA, Article 41, note (5), p. 114.

⁹⁷ The obligation of non-recognition of an unlawful situation, Martin Dawidowicz, in *The Law of International Responsibility*, J. Crawford, A. Pellet, S. Olleson, Oxford University Press, 2010, p. 682.

Trading in settlement goods, for instance, and allowing settlements products to enter a third State internal markets arguably may be considered as a form of implied recognition of the unlawful situation created by the establishment of Israeli settlements in occupied territory, thus violating peremptory norms of international law.⁹⁸

The duty to refrain from rendering aid or assistance in maintaining a wrongful situation.

The third obligation derived from ARSIWA article 41(2) prohibits States from rendering aid or assistance in maintaining a situation created by a serious breach of peremptory norms of international law. As the commentary to this article affirms, the prohibition spans beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act described under article 16. Article 16 governs instances of what is often described as “complicity” in third State national legal systems and provides that a State that aids or assists another State in the commission of an internationally wrongful act is internationally responsible for doing so if:

- (a) that State does so with *knowledge* of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful *if committed by that State*. (emphasis added)⁹⁹

Article 16 imposes three requirements limiting the scope of State responsibility for aid or assistance: (1) knowledge, (2) subjective intent and actual contribution to the wrongful act, (3) several liability.¹⁰⁰ The commentary to article 16 makes clear that a State can be held responsible for aid or assistance for the internationally wrongful act of another only if it has *actual* and *specific* knowledge of the circumstances in which its aid or assistance is intended to be used.¹⁰¹

The prohibition of aid and assistance under article 41(2), deals with conduct “after the event” that assists the responsible State in maintaining the unlawful situation derived by a breach¹⁰² of obligations *erga omnes*.¹⁰³ As far as the elements of “aid or assistance” are concerned, article 41(2) must be read in conjunction with article 16, meaning that for a third State to be considered responsible, it must have knowledge of the circumstances of the internationally wrongful act and that act would be internationally wrongful if committed by the third State itself. To provide a practical example of instances of “aid and assistance” in maintaining an unlawful situation derived from a breach of peremptory norms, Crawford suggests that “[e]conomic and commercial dealings between Israel and a third State [...] might be considered to amount to aid or assistance in the commission of an internationally wrongful act, contrary to Article 16 and 41(2) of the ILC Draft Articles”.¹⁰⁴

B. Invocation of responsibility by a State other than an injured State (Article 48)

ARSIWA part III, Chapter III deals with implementation, also known as *mise-en-oeuvre*, of the international responsibility of a State. As the commentary notes, although under international law State responsibility arises independently of its invocation by another State, it is still necessary to specify what third States faced with a breach of an international obligation are required to do to ensure that the responsible State abides by its obligations of cessation and

⁹⁸ Al Haq, Feasting on the Occupation : Illegality of Settlement Produce and the Responsibility of EU Member States under International Law, Position Paper, 2013, pp. 28–30.

⁹⁹ ARSIWA, Article 16.

¹⁰⁰ ARSIWA, Article 16, Commentary, note (1)

¹⁰¹ State Responsibility, Part IV, Chapter X, Ancillary and Secondary Responsibility, Cambridge Studies in International and Comparative Law, James Crawford p. 406.

ARSIWA, Article 16, Commentary, note (5)

¹⁰² Obligation of Non-Assistance to the Responsible State, Nina HB Jørgensen, in The Law of International Responsibility, J. Crawford, A. Pellet, S. Olleson, Oxford University Press, 2010, p. 692.

¹⁰³ Commentary to ARSIWA, Article 41, note (11), p. 115.

¹⁰⁴ J. Crawford, “Opinion: Third Party Obligations with respect to Israeli Settlements in the occupied Palestinian Territory” (July 2012), p. 86, in Al Haq, Feasting on the Occupation : Illegality of Settlement Produce and the Responsibility of EU Member States under International Law, Position Paper, 2013, p. 29.

reparation of the internationally wrongful act.¹⁰⁵ Article 48, dealing with the invocation of responsibility by a State, other than an injured State, and acting in the collective interest is especially relevant in this regard. This provision is based on the idea that in case of breaches of obligations protecting the collective interests of a group of States or of the international community as a whole, every State is entitled to invoke responsibility of the offending State even if not personally injured by the violation.

Article 48 does not explicitly mention obligations *erga omnes* but its paragraph 1(b) describes that “the obligation breached is owed to the international community as a whole”¹⁰⁶ thus expressly stating the very definition of obligations *erga omnes*. Paragraph 2 of Article 48 adds that in case of breaches of obligations owed to the international community as a whole, every State may claim from the responsible State: (1) cessation of the wrongful act and assurances and guarantees of non-repetition; (2) reparation in the interest of the injured State or the beneficiaries of the obligation breached.¹⁰⁷ As per Article 54 of the same instrument, third States are also entitled to take “lawful measures” such as sanctions, embargos or other actions to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries impacted by the obligation breached.¹⁰⁸

¹⁰⁵ Commentary to ARSIWA, Part Three, Chapter II, p. 116.

¹⁰⁶ ARSIWA, Article 48(1)(b).

¹⁰⁷ *Ibid.*, Article 48(2)(a), (b)

¹⁰⁸ ARSIWA, Article 54.

IV. Conclusions and Recommendations

Israel's administration of the oPt has been documented to violate IHL and IHRL standards for decades. A long list of violations has been enumerated and condemned by international institutions over decades: violations of the occupied territory's integrity and fragmentation of what remains; occupying power policies and actions that specifically contradict its clear obligations toward the protected Palestinian population, including the transfer of the occupying power's population into the oPt; widespread and systematic policies of forcible displacement of Palestinian individuals and communities; restrictions on movement and access, including basic services and resources that amount to collective punishment, and, most prominently; the imposition of a siege and naval blockade against the Gaza Strip and its nearly two million residents.

This conduct directly breaches, among others, the prohibition of acquisition of territory by force and infringes upon the Palestinian right to self-determination, constituting serious violations of peremptory norms of international law and creating a legal interest in each and every member of the international community to bring those violations to an end, as well as an obligation not to recognize the wrongful situation and refrain from rendering aid or assistance in maintaining that wrongful situation.

As this legal brief argues, recourse to clear positive actions by third States, in particular as relates to violations of jus cogens norms, is a sound and legally based course of action based on Article 1 common to the four Geneva Conventions and ARSIWA. Moreover, it has been expressly called for by the most authoritative bodies of the international community to restore respect, by all parties, for these most fundamental principles of international law. In October 2015, extremely concerned with the increasing disrespect for the laws of war and humanity around the world, UN Secretary-General Ban Ki-moon and the head of ICRC, Peter Maurer, issued an unprecedented joint warning requesting urgent action from States to address human suffering and insecurity:

International humanitarian law establishes limits in war. Wars without limits are wars without end. And wars without end mean endless suffering.

... We work for the protection of civilians from the impact of weapons and for the humane treatment of detainees. We assist communities by providing water, food, shelter and health care. And we do so, protected by law and principles. When humanitarian law and principles are disregarded, when humanitarian needs are trumped by political agendas, when access to the wounded and sick is denied, and when security concerns lead to a suspension of operations, people are abandoned, the notion of protection loses its meaning, and humanity is flouted.

We ask that States reaffirm our shared humanity through concrete action and uphold their responsibility to respect and ensure respect for international humanitarian law.¹⁰⁹

Concrete and concerted action by third States thus is urgently required to ensure compliance with international legal obligations and to ensure genuine protection of the Palestinian population under a prolonged military occupation that has entered its fiftieth year. In a broader perspective, continued failure by third parties to ensure strict compliance with peremptory norms of international law risks fatally undermining the legitimacy and credibility of the international law system, a prospect holding enormous and untold negative ramifications for the world's most vulnerable people.

¹⁰⁹ ICRC, Peter Maurer appeals to States: "Respect the laws of war", 31 October 2015, available at: <https://www.icrc.org/en/document/peter-maurer-respect-laws-of-war>.

Diakonia's IHL Resource centre seeks to increase awareness of IHL among:

- The international community present in the oPt – international NGOs, international agencies such as United Nations and European Union bodies, international media and diplomatic missions as well as decision makers visiting the area;
- Israeli and Palestinian civil society, media, lawyers and the general public in Israel and Palestine;
- EU and UN bodies based in Brussels and Geneva;
- International corporate actors active in the oPt.

Where possible, the disseminated IHL information and work with partner organisations also includes a gender perspective.

How we work

The IHL Resource Centre consists of four interlinked components:

- Legal research and briefings to civil society and the international community;
- Education and information, including through the creation of an IHL Helpdesk and work with local partners;
- Monitoring of and reporting on IHL violations;
- Advocacy from Diakonia's Head Office in Stockholm.



What is Diakonia?

Diakonia is a Swedish development organisation working together with local partners for a sustainable change for the most vulnerable people in the world. We support more than 400 partners in nearly 30 countries and believe in a rights-based approach that aims to empower discriminated individuals or groups to demand what is rightfully theirs. Throughout the world we work toward five main goals: human rights, democratisation, social and economic justice, gender equality and sustainable peace.

Diakonia International Humanitarian Law Resource Centre

The goal of Diakonia International Humanitarian Law Resource Centre is to increase the respect for and further implementation of international law, specifically international humanitarian law (IHL), in the Israeli–Palestinian conflict. We believe that addressing violations of IHL and international human rights law tackle the root causes of the humanitarian and protection crisis in the oPt, in a sustainable manner. Our Centre makes IHL expertise available by providing:

- Briefings to groups and organisations on IHL and its applicability to Israel and the oPt;
- Tailored in-depth trainings on specific issues and policies relating to IHL;
- Legal analyses and ongoing research on current IHL topics; and
- Legal advice, consultation and legal review of documents for other actors in the oPt, to support policy formulation and strengthen advocacy with an IHL perspective.

Do you or your organisation want to learn more about IHL and its applicability to the oPt? Visit our website 'An Easy Guide to International Humanitarian Law in the occupied Palestinian territory' at: www.diakonia.se/en/IHL/ – or contact us to set up a general or specialised legal briefing by our legal advisors.

Contact us at: ihl@diakonia.se