

## Opinion

### Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories

James Crawford SC\*

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#### A. Introduction

1. I am asked to advise on the legal obligations (at an international, European and UK level) facing European states (specifically the UK) regarding their support for and involvement with Israeli settlement activity in the West Bank.

2. I focus on the following issues:

- The obligations of States pursuant to the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory* and general international law; including the extent to which a third State's involvement in settlements might be considered incompatible with international law;
- The extent to which a third State's involvement in settlements might be considered incompatible with EU or UK law, including the European Convention on Human Rights, the common law and the *Terrorism Act 2000* (UK);
- Whether international law requires States to take positive action, e.g. to ban settlement produce, or prevent companies within their jurisdiction participating in the trade; and
- Whether the import of settlement produce is unlawful under UK law.

3. I set out my conclusions in Section I below.

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## B. Background<sup>1</sup>

4. Since 1967, when Israel first occupied the territories of the West Bank, East Jerusalem and Gaza following the Six Day War,<sup>2</sup> Israel has embarked on a policy of “creeping expropriation”<sup>3</sup> of territory, through the creation of settlements in the occupied territories. This activity has been regularly met with statements opposed to Israel’s conduct and with declarations of illegality emanating from the Security Council,<sup>4</sup> the General Assembly,<sup>5</sup> and (in 2004) the International Court of Justice.<sup>6</sup>

5. The first point to note is that the legal ramifications of the settlement policy in the West Bank differ markedly from those in Gaza; not least as a result of the different land laws that were in effect in these territories prior to 1967 and the contentious question of whether Israel remains an occupier of Gaza subsequent to its 2005 “withdrawal”.<sup>7</sup> This Opinion will focus on the situation arising in the West Bank where the majority of settlements are placed.

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<sup>1</sup> For general background, see James Crawford, *The Creation of States in International Law* (2<sup>nd</sup> edn., Clarendon Press: Oxford, 2006) 42-448 & works there cited. See also Emma Playfair (ed.) *International Law and the Administration of Occupied Territories* (Clarendon Press: Oxford, 1992); Victor Kattan (ed.) *The Palestine Question in International Law* (British Institute of International and Comparative Law: London, 2008); Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP: Cambridge, 2009).

<sup>2</sup> Crawford, 425.

<sup>3</sup> Crawford, 437.

<sup>4</sup> See e.g. Security Council resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 446 (1979) of 22 March 1979, 1322 (2000) of 7 October 2000, 1397 (2002) of 12 March 2002, 1402 (2002) of 30 March 2002, 1403 (2002) of 4 April 2002, 1405 (2002) of 19 April 2002, 1435 (2002) of 24 September 2002, 1515 (2003) of 19 November 2003, 1544 (2004) of 19 May 2004 and 1850 (2008) of 16 December 2008.

<sup>5</sup> See e.g. General Assembly resolutions ES-10/9 of 24 December 2001, ES-10/10 of 14 May 2002, ES-10/11 of 10 September 2003, ES-10/12 of 25 September 2003, ES-10/13 of 27 October 2003, ES-10/14 of 12 December 2003, ES-10/15 of 2 August 2004 and ES-10/16 of 4 April 2007.

<sup>6</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136.

<sup>7</sup> See for example Y Shany, ‘Faraway, so close: the legal status of Gaza after Israel’s disengagement’, 8 *Yearbook of International Humanitarian Law* (2006) 369; M. Mari, ‘The Israeli disengagement from the Gaza Strip: an end of the occupation?’ 8 *Yearbook of International Humanitarian Law* (2005) 356, 366-367. See also G. Aronson, ‘Issues arising from the implementation of Israel’s disengagement from the Gaza Strip’, 34 *Journal of Palestine Studies* (2005) 49; MS Kaliser, ‘A modern day exodus: international human rights law and international humanitarian law implications of Israel’s withdrawal from the Gaza Strip’, 17 *Indiana International and Comparative Law Review* 187 (2007); Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP: Cambridge, 2009); and Gisha–Legal Center for Freedom of Movement, ‘Disengaged occupiers: the legal status of Gaza (2007)’, available at: <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf>.

6. According to the Israeli NGO B'Tselem, between 1967 and 2010, Israel established 121 settlements in the West Bank that were recognized by the Interior Ministry. In addition, some 100 outposts (settlements built without official authorization but with support and assistance of government ministries) were constructed. Israel also funded and assisted in the establishment of a number of settler enclaves in the heart of Palestinian “neighborhoods” (the euphemistic term employed exclusively in relation to Jerusalem settlements<sup>8</sup>) in East Jerusalem.

7. There are three primary mechanisms by which land in the West Bank is appropriated for settlements.<sup>9</sup> The first method is the requisition of land for “military needs”. The second is the declaration of “state land”, which makes use of the Ottoman Land Law of 1858; while the third is the private transfer of land. There are also certain settlements which have apparently been established without the support of the State of Israel – known as “outposts”. This Opinion will not address outposts.

8. Land acquisition on the basis of military need is not necessarily unlawful under international law. Pursuant to Article 52 of the 1907 Hague Regulations,<sup>10</sup> requisitions of property are permitted to meet “the needs of the army of occupation”.<sup>11</sup> Until 1979, requisition for security needs was the primary mechanism for the taking of land for settlements,<sup>12</sup> and some, such as the *Nahal* settlements, were clearly army bases and probably lawful.<sup>13</sup> However, following the decision of the Israeli High Court of Justice in the *Elon*

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<sup>8</sup> For more on the distinctions in terminology, see Ibrahim Matar, ‘Exploitation of Land and Water Resources for Jewish Colonies in the Occupied Territories’ in Emma Playfair (ed.) *International Law and the Administration of Occupied Territories* (Clarendon Press: Oxford, 1992), 443.

<sup>9</sup> See B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, Report on ‘Land Expropriation and Settlements’ available at: <http://www.btselem.org/English/Settlements/>. See also B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, ‘By Hook and By Crook – Israeli Settlement Policy in the West Bank’ July 2010; and Ibrahim Matar, ‘Exploitation of Land and Water Resources for Jewish Colonies in the Occupied Territories’ in Emma Playfair (ed.) *International Law and the Administration of Occupied Territories* (Clarendon Press: Oxford, 1992), 443.

<sup>10</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

<sup>11</sup> The occupier is required to make contributions in kind for any requisitioned property, which as far as possible are to be paid for in cash; and if not, a receipt is to be given and the payment of the amount due made as soon as possible. It is beyond the scope of this Opinion to assess whether or not any such contributions have in fact been paid by the Israeli military commander in relation to the relevant settlements.

<sup>12</sup> B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, ‘By Hook and By Crook – Israeli Settlement Policy in the West Bank’ July 2010, 22.

<sup>13</sup> For discussion of the *Nahal* settlements see Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP: Cambridge, 2009), 243. See also B’Tselem, The Israeli Information Center for Human

*Moreh* case,<sup>14</sup> in which the Court found that a settlement not established for clear security purposes was unlawful, the Israeli government implemented a change in policy: instead of requisitioning land for military needs, it began to issue declarations of “state” land, or constructing settlements on land already nominated as public or state land during the Mandatory period.<sup>15</sup>

9. The declaration of land in the West Bank as “state land” was based on the Order Regarding Government Property (Judea and Samaria) (No. 59), 5727-1967, which authorized the person delegated by the Commander of IDF Forces in the Region to take possession of properties belonging to an “enemy state” and to manage these at his discretion.<sup>16</sup> This order, issued shortly after the occupation began, was used to seize control of land registered in the name of the Jordanian government. Turkish – and British – owned properties are also eligible for the status of registered state land.<sup>17</sup> By this method, approximately forty percent of the area of the West Bank was declared state land. According to Pliya Albeck, former head of the Civil Department in the Israeli State Attorney's Office, approximately ninety percent of the settlements are established on land declared “state land”.<sup>18</sup>

10. In relation to the private transfer of land, Dinstein makes the important point that it is only transfers that are approved or implemented by the State which are unlawful. He notes:

“...the crucial reference to ‘transfer’ in the text of Article 49 (sixth paragraph) requires some calibration where the Occupying Power gives the settlements no backing at all. The ‘one-size-fits-all’ panoramic view of settlements in the West Bank is incompatible with the Geneva limitation of the prohibition to those settlements that can be subsumed under the heading of a ‘transfer’. It is easy to understand the condemnation of settlers who come to reside in an occupied territory under the cloak of a government-coordinated (and subsidized) scheme, by dint of official organization or institutional encouragement... However, the chorus of recriminations against Israeli settlements

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Rights in the Occupied Territories, ‘By Hook and By Crook – Israeli Settlement Policy in the West Bank’ July 2010, 22-3; and the Israeli High Court of Justice decision in the *Beth El* case, HCJ 606/78.

<sup>14</sup> HCJ 390/79, Dweikat et al v Government of Israel, 34(1) PD 1, 22 October 1979, 16-17 (translation into English available in M. Shamgar (ed.) *Military Government in the Territories Administered by Israel 1967 – 1980* (Hebrew University Jerusalem, Faculty of Law, 1982) 404. See discussion in Dinstein, 242-6.

<sup>15</sup> B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, ‘By Hook and By Crook – Israeli Settlement Policy in the West Bank’ July 2010, 24.

<sup>16</sup> B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, ‘Land Grab: Israel’s Settlement Policy in the West Bank’ May 2002, 52.

<sup>17</sup> Ibid.

<sup>18</sup> Pliya Albeck, *Lands in Judea and Samaria* (in Hebrew) (lecture at Bet Hapraklit on 28 May 1985, Israel Bar Association), 5 cited in B’Tselem, ‘Land Grab’, 51.

disregards the (by no means trivial) segment of settlements in the West Bank, undertaken by Israeli nationals individually – at times, on private land owned by Jews since the days of the British Mandate...or on parcels of private land purchased for full market value from those having title to it – without any financial or other sponsorship from the Israeli Government (indeed, in not a few instances, against the official policy of the Government). When settlers act entirely on their own initiative, when they do not arrogate to themselves land belonging to others or expropriated from its rightful owners, and when they do not benefit from any overt or covert governmental inducement, neither the letter nor the spirit of Article 49 (sixth paragraph) comes into play.”<sup>19</sup>

While this is undoubtedly true *vis-à-vis* those particular settlements or outposts which can be demonstrated as having no State support (and there are a number), I do not consider that this abrogates Israel’s international responsibility for implementing a general policy of support for settlement activity in the West Bank.

11. It must be noted that the settlements “program” encompasses not merely the settlement buildings but also the construction and consolidation of the infrastructure to support those settlements, such as roads and public facilities such as schools and community centres.<sup>20</sup>

12. In conclusion, it is possible that requisitions of property for military exigencies are not unlawful; nor are legitimate private transfers of land from Palestinian to Israeli individuals with no State involvement. There is no direct consideration in the authorities concerning the status of property acquired for military need but subsequently used for civilian purposes; but applying the reasoning of the Israeli High Court in the *Elon Moreh* case,<sup>21</sup> I would suggest that once the security rationale of a settlement expires, so too does this specific justification.<sup>22</sup>

13. This Opinion applies, then, only to the (significant number of) settlements which were instigated by, funded by, or otherwise supported by, Israel, including infrastructure set aside for the purposes of such settlements.

14. Finally I assume for the purposes of this opinion that Palestine – though a legal entity with rights and obligations under international law – is not yet a State with a status as such

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<sup>19</sup> Dinstein, 241.

<sup>20</sup> See Report of the Special Rapporteur Richard Falk on the situation of human rights in the Palestinian territories occupied since 1967, Human Rights Council, UN Doc A/HRC/16/72, 10 January 2011, para 14.

<sup>21</sup> HCJ 390/79, Dweikat et al v Government of Israel, 34(1) PD 1, 22 October 1979, 16-17 (translation into English available in M. Shamgar (ed.) *Military Government in the Territories Administered by Israel 1967 – 1980* (Hebrew University Jerusalem, Faculty of Law, 1982), 404.

<sup>22</sup> See further Dinstein, 244-245.

opposable to Israel. This may however change, and if it does some of the issues discussed here could require reconsideration.<sup>23</sup>

### C. Advisory Opinion of the International Court of Justice

15. The International Court of Justice handed down its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory* on 9 July 2004. The first thing to note is that as an Advisory Opinion, the Court's statements do not have binding force.<sup>24</sup> An Advisory Opinion is not a method of resolving disputes; rather, "[t]he purpose of the advisory function is ... to offer legal advice to the organs and institutions requesting the opinion".<sup>25</sup> Nonetheless, Advisory Opinions constitute declarations of international law for States to take into account in conducting their affairs and their ratio is likely to be followed by the Court in its subsequent case law. Furthermore, the ICJ has held that its Advisory Opinions are authoritative, and by implication cannot be disregarded by the requesting organ and the States Members of the United Nations.<sup>26</sup> States are responsible for acting in accordance with international law, despite the formally non-binding nature of the Advisory Opinion.

16. Secondly, the central focus of the Advisory Opinion is the illegality of the construction of the wall. A number of the express obligations relate to the construction of the wall and its associated regime, not the settlements *per se*. In particular, the Court did not "back up its finding that the settlements are unlawful with an explicit statement of Israel's

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<sup>23</sup> See e.g., Council of Ministers Conclusions on the Middle East Peace Process, 3058th Foreign Affairs Council Meeting, 13 December 2010, reiterating its readiness when appropriate to recognize a Palestinian state (para 5); available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/118448.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118448.pdf); 3) 2004 EU-Palestine Action Plan, made in the context of the 2004 European Neighbourhood Policy, setting out the only international forum in which both Israel and Palestine participate; available at: [http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc\\_146237.pdf](http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146237.pdf).

<sup>24</sup> Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950, p. 65, 71; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion I.C.J. Reports 1999, p. 62, 77 (para 25).

<sup>25</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, p. 236 (para 15).

<sup>26</sup> See e.g., Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 177 (para 31), where the Court stated that its reasoning on the advisory character of its function and its non-binding force from the Peace Treaties Advisory Opinion "is equally valid where it is suggested that a legal question is pending not between two States, but between the United Nations and a member State."; Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988, p. 12.

obligation to dismantle them, to repeal or render ineffective [the] related legislative and regulatory acts [or] to make reparation for all damage caused by their construction.”<sup>27</sup> This is to be contrasted with the Court’s statements to this effect in relation to the wall in the *dispositif*.<sup>28</sup>

17. Turning to an analysis of the Court’s Opinion; the basic principles of the law governing occupation are found in the Fourth Geneva Convention<sup>29</sup> and the 1907 Hague Regulations<sup>30</sup> – both are considered to codify “intransgressible principles of international customary law” which “are to be observed by all States whether or not they have ratified the conventions that contain them”,<sup>31</sup> and include provisions regarding the permissible uses of property during an occupation. According to the principles of occupation set out in these documents, an occupant acquires only temporary authority, not sovereignty, over an occupied territory.<sup>32</sup> A purported annexation of occupied territory is ineffective to alter the status of the territory, and it remains subject to the law of occupation.<sup>33</sup>

18. While the Court acknowledged that Articles 43, 46 and 52 Hague Regulations applied to the Occupied Palestinian Territory,<sup>34</sup> as did Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention,<sup>35</sup> ultimately, the Court concluded that only Articles 49 and 53 of the Fourth Geneva Convention and Articles 46 and 52 of the Hague Regulations had been

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<sup>27</sup> Roger O’Keefe, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary’ (2004) 1 *Revue Belge de Droit International* 92, extracted in Victor Kattan (ed.) *The Palestine Question in International Law* (British Institute of International and Comparative Law: London, 2008) 751, 793.

<sup>28</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 201 (para 163).

<sup>29</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949 (adopted: 12 August 1949; entry into force 21 October 1950; 194 States Parties).

<sup>30</sup> Hague Regulations concerning the Laws and Customs of War on Land 1907 (adopted: 18 October 1907; entry into force: 26 January 1910).

<sup>31</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, 257 (para 79)

<sup>32</sup> Article 43, 1907 Hague Regulations.

<sup>33</sup> Christopher Greenwood, ‘The Administration of Occupied Territory in International Law’, in E Playfair, (ed.) *International Law and the Administration of Occupied Territories – Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press: Oxford, 1992), 244-245.

<sup>34</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 185 (para 124).

<sup>35</sup> *Ibid.*, 185 (para 126).

breached by Israel.<sup>36</sup> Of these customary rules of international humanitarian law, only one explicitly related to the settlements; as the Court observed:

“As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: ‘The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.’ That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of Settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited... The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”<sup>37</sup>

Article 49(6) of the Fourth Geneva Convention prohibits the deportation or transfer of parts of an occupying power’s own civilian population into the territory that it occupies. No exception or provision for derogation applies. Although the transfer of populations is also designated a war crime under Article 8(2)(b)(8) of the Rome Statute,<sup>38</sup> since Israel has not ratified the Statute, the Court did not consider its application.

19. The Court in fact relied almost exclusively on resolutions of the Security Council,<sup>39</sup> which had declared the illegality of the settlements, in support of its (undoubtedly correct) conclusion that the settlements are globally in breach of Article 49(6).<sup>40</sup>

20. In relation to the construction of the wall, the Court concluded that it had led to the destruction or requisition of properties in contravention of Articles 46 and 52 of the Hague Regulations and Article 53 of the fourth Geneva Convention; finding that although military exigencies could be taken into account in certain circumstances, these provisions were either not applicable or their requirements were not satisfied. Probably the settlements are also in breach of these Articles, but the Court did not direct its analysis to this point.

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<sup>36</sup> Ibid., 183 (para 120), 189 (para 132).

<sup>37</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 183 (para 120).

<sup>38</sup> Rome Statute of the International Criminal Court (signed 17 July 1998; entry into force 1 July 2002) 2187 U.N.T.S. 3.

<sup>39</sup> SC Res 446 (22 March 1979); SC Res 452 (20 July 1979); SC Res 465 (1 March 1980).

<sup>40</sup> For analysis of this point, see Ian Scobbie, ‘Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine’ (2005) 16 *European Journal of International Law* 941, 943-4.



21. Regarding the application of the human rights conventions, the Court found that Israel had made a permitted derogation only from Article 9 of the International Covenant on Civil and Political Rights, and that the other articles of the Covenant (particularly Articles 17(1) and 12(1)) remained applicable in the Occupied Palestinian Territory.<sup>41</sup> The Court also declared Articles 6, 7, 10, 11, 12, 13 and 14 of the International Covenant on Economic and Social Rights, and Articles 16, 24, 27 and 28 of the Convention on the Rights of the Child relevant.<sup>42</sup>

22. Having thus identified the applicable rights of the Palestinian people, and obligations owed by Israel under international humanitarian law, the Court stated at paragraphs 155-156:

“The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature ‘the concern of all States’ and, ‘In view of the importance of the rights involved, all States can be held to have a legal interest in their protection’ (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law...

As regards the first of these, the Court has already observed ... that in the *East Timor* case, it described as ‘irreproachable’ the assertion that ‘the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character’ (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV)...

‘Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle...’”

And then at paragraph 159:

“Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while

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<sup>41</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 187-189.

<sup>42</sup> Ibid.

respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.”

#### **D. Relevant Principles of International Law**

23. As a result of the Advisory Opinion, some aspects of the law are now clearer, such as the status of the West Bank as “occupied territory”, the concurrent application of human rights treaties with the provisions of international humanitarian law, and the unlawfulness of the Israeli settlements in general. Despite this, there were some serious criticisms of the Court’s opinion, not least that the Court had been “told [by the General Assembly] what answer it was expected to give to the requesting organ.”<sup>43</sup>

24. Moreover, given the focus of the Court on the regime associated with construction of the wall, rather than the Israeli occupation and/or settlements more generally, there are some notable omissions from the Court’s decision. The Court confirmed the following:

1. That the Palestinian people have a right to self-determination;
2. That all States parties to the Fourth Geneva Convention are under an obligation, while respecting the United Nations Charter and international law, to “ensure compliance by Israel with international humanitarian law”.<sup>44</sup>
3. That all States are under an obligation not to recognise the illegal situation resulting from the construction of the wall and as a corollary, not to render aid or assistance in maintaining the situation created by such construction; and

Although it is open to some debate, for the purposes of the present Opinion, it will be presumed that the Court’s statements, although directed at the situation arising from the construction of the wall, would be equally applicable to the unlawful settlement activity. The Court did not turn its attention to the following issues, which are potentially relevant to the settlements:

4. The consequences of occupation and the principle of usufruct;
5. The right to permanent sovereignty over natural resources; or
6. War crimes.

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<sup>43</sup> Michla Pomerance, ‘The Court’s Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial’ 99 *American Journal of International Law* (2006) 26, 32.

<sup>44</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 200 (para 159).

25. In the following section, I address the general scope of each of the listed principles and obligations, before turning to a discussion of the consequences for third States in section E, below. Each of the issues is addressed in turn.

***(1) Self-Determination***

26. The right of self-determination is one of the essential tenets of international law. Since the adoption of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*;<sup>45</sup> followed by the *International Covenant on Economic, Social and Cultural Rights*<sup>46</sup> and the *International Covenant on Civil and Political Rights*,<sup>47</sup> the concept of self-determination as a whole has obtained the characteristic of a fundamental human right, both individual and collective. Some authors classify it as a peremptory norm (*jus cogens*),<sup>48</sup> and the Court in its Advisory Opinion affirmed the *erga omnes* character of the right.<sup>49</sup>

27. The identically worded Articles 1 of the ICCPR and ICESCR state that:

“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

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<sup>45</sup> UNGA Res 1514 (XV) (14 December 1960).

<sup>46</sup> Adopted by General Assembly Resolution 2200 (XXI), 16 December 1966 (entry into force 3 January 1976) (“ICESCR”), 993 U.N.T.S. 3.

<sup>47</sup> Adopted by General Assembly Resolution 2200A (XXI), 16 December 1966 (entry into force 23 March 1976) (“ICCPR”), 999 U.N.T.S. 171.

<sup>48</sup> See Brownlie, 511-512; see also Antonio Cassese, *International Law* (2<sup>nd</sup> edn., OUP: Oxford, 2005), 65; Malcolm N. Shaw, *International Law* (6<sup>th</sup> edn., CUP: Cambridge, 2008), 808.

<sup>49</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 200 (para 159).

The Security Council, has also recognized the validity of the right of peoples to self-determination,<sup>50</sup> reaffirming the interpretation of the principle as laid down in General Assembly Resolution 1514 (XV).<sup>51</sup>

28. As explicitly affirmed by the Court in its Opinion,<sup>52</sup> the principle of self-determination is applicable to the people of Palestine, and that the people of Palestine have a right to determine their own future political status.<sup>53</sup> To the extent that Israel maintains (by means of settlements or otherwise) its *de facto* annexation of West Bank territory, that annexation has prevented the Palestinian people from exercising their right to self-determination pursuant to General Assembly Resolution 1514 (XV).

29. In light of the principle of self-determination, sovereignty and title in an occupied territory are not vested in the occupying power but remain with the population under occupation.<sup>54</sup> As such, Israel does not acquire a legal right to or interest in land in the West Bank purely on the basis of its status as an occupier.

30. I have been asked whether General Assembly Resolution 2625<sup>55</sup> provides support for the contention that an individual (as opposed to collective) duty exists to ensure compliance with principles of self-determination. A first point to note is that according to the Charter of the United Nations, the General Assembly is empowered to make only non-binding recommendations to States on international issues within its competence.<sup>56</sup> General Assembly Resolutions may be considered as evidence of relevant *opinio juris* – that is, as evidence of the general opinion of states that a certain norm or obligations constitutes customary international law. There can be no doubt that the international community

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<sup>50</sup> See SC Res 183 (1963) and 218 (1965).

<sup>51</sup> See SC Res 183 (1963).

<sup>52</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 199 (paras 155-6).

<sup>53</sup> For discussion, see Crawford, 123.

<sup>54</sup> Orna Ben-Naftali, Aeyal M. Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkley Journal of International Law* 551, 554.

<sup>55</sup> UN General Assembly Resolution 2625 (XXV) (24 October 1970) Declaration on Principles of International Law Friendly Relations and Co-Operation among States in Accordance With the Charter of the United Nations.

<sup>56</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Arts. 10 and 11.

considers the settlements to be unlawful. However this does not entail responsibilities or ramifications for entities other than Israel, the State in breach. Resolution 2625 suggests that:

“Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples...”<sup>57</sup>

31. This is simply a statement that the principle of self-determination has an *erga omnes* character, a matter which the Court has expressly acknowledged.<sup>58</sup> But in this regard I agree with Orakhelashvili: “the *erga omnes* nature of an obligation is not a source or determinant of the public order [character] of a norm but merely a consequence of such [character]. It is not the *erga omnes* nature of an obligation that confers an imperative character on that rule or itself determines any of the consequences of its breaches.”<sup>59</sup>

32. Furthermore, the Human Rights Committee, authoritatively interpreting Article 1 of the ICCPR in its General Comment No. 12 on the Right to Self-Determination, stated that:

“Paragraph 2 affirms a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to ‘dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence’. This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.

...Paragraph 3, in the Committee’s opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history. It stipulates that ‘The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations’. The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such

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<sup>57</sup> Ibid., 123-124.

<sup>58</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 200 (para 159).

<sup>59</sup> Alexander Orakhelashvili, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction’ (2006) 11 *Journal of Conflict & Security Law* 119, 131.

positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination. The reports should contain information on the performance of these obligations and the measures taken to that end.”<sup>60</sup>

33. As such, the UK or another third State has an obligation to implement and promote the principle of self-determination, but not the obligation to ensure Israel’s compliance with the principle. Israel is clearly acting contrary to international law in this respect and is responsible for its acts which deny the Palestinian people the right to self-determination. But the UK is not denying the people of Palestine the exercise of their right to self-determination, whatever position it may take, or fail to take, with respect to the products of the Israeli occupation.

***(2) Scope of obligation to ensure compliance by Israel with international humanitarian law***

34. In 2004 the Court expressly confirmed the applicability (and breach by Israel<sup>61</sup>) of Article 49(6) of the Fourth Geneva Convention, which provides:

‘The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.’

35. The authoritative ICRC commentary states that: “[Article 49(6)] is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons, or in order, as they claimed, to colonize those territories.”<sup>62</sup> The Court confirmed that the provision prohibits not only deportations or forced transfers, but also any measures taken by an occupying state to organize or encourage transfers of parts of its own population into the occupied territory.<sup>63</sup>

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<sup>60</sup> Human Rights Committee, ICCPR General Comment No. 12: The right to self-determination of peoples (Art. 1), 13 March 1984, paras 5-6.

<sup>61</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 183 (para 120).

<sup>62</sup> Jean S. Pictet (ed.), Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (International Committee of the Red Cross: Geneva, 1958), 283.

<sup>63</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 183 (para 120).

36. The Court's statement that all States parties to the Fourth Geneva Convention are under an obligation to ensure compliance by Israel with international humanitarian law,<sup>64</sup> to the extent that it amounts to an obligation to take positive action, is controversial. This ruling was based on the Court's conclusion that the obligations violated by Israel through the construction of the wall and its associated regime included "certain obligations *erga omnes*," including the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law – in particular, the Court recalled common Article 1 of the Fourth Geneva Convention, which requires that "[t]he High Contracting Parties undertake to respect and to ensure respect" for the Convention "in all circumstances".<sup>65</sup> The Court concluded on that basis 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."<sup>66</sup> The result would appear to be that Article 49(6) has been assimilated by the Court to an obligation *erga omnes*.

37. The Court did not, however, elaborate on what such a duty to "ensure respect" entails.<sup>67</sup> According to the International Committee of the Red Cross, State practice on common Article 1 is "not rich enough to determine the upper limits of how a State may 'ensure respect' for the Fourth Geneva Convention".<sup>68</sup>

38. Sassòli has argued that the obligation to "ensure respect" laid down in Common Article 1 could be seen as "establishing a standard of due diligence with regard to private players if the latter find themselves under the jurisdiction of a State, or even with regard to breaches of international humanitarian law by States and non-State actors abroad which could be influenced by a State."<sup>69</sup> It has also been suggested that a State's failure to take diligent

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<sup>64</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 200 (para 159).

<sup>65</sup> Ibid., 199-200 (para 158).

<sup>66</sup> Ibid.

<sup>67</sup> Cf Ardi Imseis, 'Critical Reflections on the International Humanitarian Law aspects of the ICJ *Wall* Advisory Opinion' (2005) 99 *American Journal of International Law* 102, 115.

<sup>68</sup> Marco Sassòli and Antoine A. Bouvier, *How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law* (2nd edn., International Committee of the Red Cross: Geneva, 2006), 231.

<sup>69</sup> Marco Sassòli, 'State responsibility for violations of international humanitarian law', *IRRC*, Vol. 84, No. 846 (June 2002), 401, 412.

efforts to prevent and punish private entities or individuals for breaches of humanitarian law treaties triggers a legal responsibility on its part for those breaches.<sup>70</sup>

39. While this may be a tenable interpretation of Common Article 1, due diligence standards must be limited to acts or actors within the jurisdiction and control of the State – a State cannot be responsible for acts conducted by entities outside its control and outside of its jurisdiction. The obligation in question – insofar as the operation of Common Article 1 extends – is the obligation *on the occupier* not to transfer parts of its own civilian population into the territory it occupies. There can be no obligation of due diligence on the part a third State to prevent that conduct.

40. Sassòli further notes that:

“Under Draft Article 48(1), any State other than an injured State is entitled to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole. As evidenced by common Article 1, the rules of international humanitarian law belong to such obligations *erga omnes*. ‘Any State’ may (and — under common Article 1 — must), therefore, in the event of international humanitarian law violations, claim cessation from the responsible State as well as ‘reparation (...) in the interest of the injured State or of the beneficiaries of the obligation breached’. Those beneficiaries will often be the individual war victims. The term ‘any State’ was ‘intended to avoid any implication that these States have to act together or in unison’. For common Article 1 it is thus made clear that third States do not have to act together or in coordination when they invoke the responsibility of a State violating international humanitarian law.”<sup>71</sup>

41. I do not agree with this conclusion. While Article 49(6) of the Fourth Geneva Convention is arguably an obligation *erga omnes*, owed to the community of States as a whole, and as such any State is *entitled* to invoke the responsibility of Israel for its breach, there is no *obligation* on States to do so stemming either from its status as *erga omnes* or otherwise.<sup>72</sup> Law does not compel those concerned to seek a remedy, even if they are entitled to do so.

42. Article 16 of the ILC Articles on State Responsibility makes it clear that a State only breaches international law when it directly aids or assists the commission of an

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<sup>70</sup> Timo Koivurova, ‘Due Diligence’, Max Planck Encyclopaedia of Public International Law, para 32, available at: [http://www.mpepil.com/subscriber\\_article?script=yes&id=/epil/entries/law-9780199231690-e1034&recno=1&searchType=Quick&query=due+diligence](http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1034&recno=1&searchType=Quick&query=due+diligence).

<sup>71</sup> Marco Sassòli, ‘State responsibility for violations of international humanitarian law’, IRRC, Vol. 84, No. 846 (June 2002) 401, 426-427.

<sup>72</sup> ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), UN Doc A/56/10, Article 48(1).



internationally wrongful act. By inference there is no responsibility for simple neglect. This was a primary concern of Judge Kooijmans, the only member of the Court to dissent from its finding on the legal obligations of third states. Judge Kooijmans noted that he found it difficult to “envisage what States are expected to do or not to do in actual practice”.<sup>73</sup>

43. As noted by John Dugard, the former Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, there are only limited options open to States seeking to enforce Israeli compliance with international humanitarian law. In addition to non-recognition, a State may have recourse to economic measures, exclusion from international organizations, or investigative committees.<sup>74</sup> But States are not obliged to take up any of these courses of action. As early as 1982, the General Assembly called upon States to implement economic sanctions against Israel for its unlawful settlement activity.<sup>75</sup> Resolutions ES-10/5 and ES-10/6, the latter of which states that “all illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, especially settlement activities and the practical results thereof, remain contrary to international law and cannot be recognized, irrespective of the passage of time”<sup>76</sup> are further evidence of the collective condemnation of Israel’s actions. But to date, no legal ramifications have resulted from States’ continuing engagement with Israel.

44. Attempts have been made to exclude Israel from participation in the General Assembly on the basis of its non-compliance with international law.<sup>77</sup> But the regular reports of the General Assembly Special Committee<sup>78</sup> and Human Rights Council’s Special Rapporteur<sup>79</sup> – and the resulting United Nations condemnations – have done nothing to stem

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<sup>73</sup> Separate Opinion of Judge Kooijmans, 220 (para 1).

<sup>74</sup> See John Dugard, ‘Enforcement of Human Rights in the West Bank and the Gaza Strip’ in in Emma Playfair (ed.) *International Law and the Administration of Occupied Territories* (Clarendon Press: Oxford, 1992), 461, 476.

<sup>75</sup> GA Res ES-9/1 (5 February 1982). See also GA Res 38/180A (19 December 1983).

<sup>76</sup> GA Res ES-10/6 (24 February 1999).

<sup>77</sup> John Dugard, ‘Enforcement of Human Rights in the West Bank and the Gaza Strip’ in in Emma Playfair (ed.) *International Law and the Administration of Occupied Territories* (Clarendon Press: Oxford, 1992), 461, 482.

<sup>78</sup> Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, established by GA Res 2443 (XXIII).

<sup>79</sup> See for example Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 John Dugard, ‘Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”’ UN Doc A/HRC/4/17,

the tide of settlements. Most recently it was reported that in December 2010, the pace of settlement expansion in the East Jerusalem neighbourhoods had escalated, rather than decreased.<sup>80</sup>

45. The conclusion is not that there are no consequences for third States emanating from the statements of law made by the International Court in its Advisory Opinion. States are under an obligation of non-recognition and must not aid or assist Israel in its perpetuation of the settlement program. But it is doubtful that the obligation to ensure compliance with the Fourth Geneva Convention extends so far as to require any positive action on the part of individual States. Significant collective action through the United Nations organs has been addressed to this exact issue, with little practical effect.

### *(3) Scope of the Obligation of Non-Recognition*

46. I turn now to the most significant obligation set down by the Court in its Advisory Opinion – the obligation on States 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. The maxim *ex injuria ius non oritur* provides the basis for the obligation of non-recognition; that is, a legal right cannot stem from an unlawful act. Lauterpacht noted that:

“In a society in which the enforcement of the law is in a rudimentary stage there is a natural tendency for breaches of the law to be regarded, for the sole reason of their successful assertion, as a source of legal right. Non-recognition obviates that danger to a large extent.”<sup>81</sup>

As territory cannot be acquired by the unlawful use of force nor where that purported territorial acquisition violates the right to self-determination, States are obliged to not give legal credence – recognition of authority over the territory – to the unlawful acquisition. As Warbrick explains, “[i]n international law, recognition is the acknowledgement of a set of

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29 January 2007; and Report of the Special Rapporteur Richard Falk on the situation of human rights in the Palestinian territories occupied since 1967, Human Rights Council, UN Doc A/HRC/16/72, 10 January 2011.

<sup>80</sup> Report of the Special Rapporteur Richard Falk on the situation of human rights in the Palestinian territories occupied since 1967, Human Rights Council, UN Doc A/HRC/16/72, 10 January 2011, para 16.

<sup>81</sup> Lauterpacht, *Collected Papers* (1970) 347 cited in Alexander Orakhelashvili, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction’ (2006) 11 *Journal of Conflict & Security Law* 119, 131.

facts or a condition of things which has legal consequences”.<sup>82</sup> It is, at a minimum, intended to prevent insofar as possible “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.”<sup>83</sup> This was a key concern of the Court in its Advisory Opinion.<sup>84</sup>

47. The principle of non-recognition was affirmed by the International Court in its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.<sup>85</sup> There the Court found that the continued presence of South Africa in the mandated territory of Namibia, following revocation of the mandate, was unlawful.<sup>86</sup> Accordingly, it held that States are under an obligation not to recognize that unlawful situation and must refrain from “lending any support or any form of assistance to South Africa with reference to its occupation of Namibia”.<sup>87</sup>

48. The Court set out the scope of the doctrine of non-recognition at paragraphs 122-124 of the *Namibia* Opinion. In the first place, States may not enter into treaty relations with an unlawful regime with regard to the territory in dispute. In addition, States may not invoke or apply *vis-à-vis* the unlawful regime of the territory existing treaties applicable to the territory. However, by way of exception, States may invoke certain multilateral conventions (such as those of a humanitarian character), the non-performance of which might adversely affect the inhabitants of the territory under the unlawful regime. The Court also indicated (in accordance with Security Council Resolution 283 (1970)) that States must refrain from any diplomatic or consular relations with the unlawful regime which imply recognition of the authority of the regime over the territory. Finally, the Court set out the requirement of States

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<sup>82</sup> Colin Warbrick, ‘The New British Policy on Recognition of Governments’ (1981) 30 *International and Comparative Law Quarterly* 568, 568.

<sup>83</sup> Martin Dawidowicz, ‘The Obligation of Non-Recognition of an Unlawful Situation’ in J Crawford, A Pellet & S Olleson (eds.), *The Law of International Responsibility* (OUP: Oxford, 2010), 678.

<sup>84</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 184 (para 121).

<sup>85</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p.16.

<sup>86</sup> See Crawford, 163.

<sup>87</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, 54.

to “abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.”<sup>88</sup>

49. However, the Court also introduced an element of flexibility in the doctrine of collective non-recognition, by stating that:

“In general, the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international Co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.”<sup>89</sup>

To this extent, economic and other dealings – such as commercial and investment activities<sup>90</sup> – might be permitted as long as they do not serve to “entrench” authority over the territory; can be considered as routine government administration; or serve to benefit the local (i.e. Palestinian) population.

50. There are different interpretations of the *Namibia* exception.<sup>91</sup> Some commentators indicate that States “should not regard as valid any acts and transactions...relating to public property, concessions, etc.”<sup>92</sup> Such an interpretation would include settlements constructed on state land. However, non-recognition does not necessarily mean that the non-recognising third party State regards the non-recognised authority as “without factual existence.”<sup>93</sup> The complexity of the “*Namibia* exception” was addressed in the Separate Opinions of Judges Onyeama and Petrán:

“[W]hile I agree that there is on States an obligation of non-recognition of the legality of the presence of South Africa and of its administration in Namibia, I do not agree that this obligation necessarily extends to refusing to recognize the

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<sup>88</sup> Ibid., p. 56 (para 124).

<sup>89</sup> Ibid., (para 125).

<sup>90</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, Secretary-General’s Written Statement, 128-148.

<sup>91</sup> For discussion see Yaël Ronen, ‘Status of Settlers Implanted by Illegal Territorial Regimes’ (2008) 79 *British Yearbook of International Law* 194, 233-234.

<sup>92</sup> Ronen, 233.

<sup>93</sup> Warbrick, 570.

validity of South Africa's acts on behalf of or concerning Namibia in view of the fact that the administration of South Africa over Namibia (illegal though it is) still constitutes the *de facto* government of the Territory.”<sup>94</sup>

“The very term *non-recognition* implies not positive action but abstention from acts signifying recognition. Non-recognition therefore excludes, above all else, diplomatic relations and those formal declarations and acts of courtesy through which recognition is normally expressed. Nevertheless, although the notion of non-recognition excludes official and ostentatious top-level contacts, customary usage does not seem to be the same at the administrative level, since necessities of a practical or humanitarian nature may justify certain contacts or certain forms of Co-operation...in the international law of today, non-recognition has obligatory negative effects in only a very limited sector of governmental acts of a somewhat symbolic nature. Outside this limited sphere, there cannot exist any obligations incumbent on States to react against the continued presence of South Africa in Namibia unless such obligations rest on some legal basis other than the simple duty not to recognize South Africa's right to continue to administer the Territory. Such a basis can be sought only in those resolutions of the Security Council which were referred to in the course of the proceedings.”<sup>95</sup>

Another interpretation was suggested by Judge de Castro:

“In the present case, the acts of the occupying authorities cannot be considered as those of a legitimate government, but must be likened to those of a *de facto* and usurping government. A distinction must be made between the private and the public sector. It would seem that the acts of the *de facto* authorities relating to the acts and rights of private persons should be regarded as valid (validity of entries in the civil registers and in the Land Registry, validity of marriages, validity of judgments of the civil courts, etc.). On the other hand, other States should not regard as valid any acts and transactions of the authorities in Namibia relating to public property, concessions, etc. States will thus not be able to exercise protection of their nationals with regard to any acquisitions of this kind.

In the field of international relations, the duty of Co-operation of States implies that they must refrain from all diplomatic, consular and other relations with South Africa which might indicate that they recognize the authority of the South African Government over the Territory of Namibia-and more particularly they must not have consuls, agents, etc., in Namibia, except for such as are of a nature appropriate to territories which are under *de facto* occupation (in the sense of resolution 283 (1970)).

States should regard as ineffective clauses in any treaty which recognize the authority of South Africa in the Territory of South West Africa. New treaties with South Africa may not contain such clauses. In treaties for avoidance of double taxation, no account may be taken of taxes paid in Namibia. Extradition

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<sup>94</sup> Separate Opinion of Judge Onyeama, 149.

<sup>95</sup> Separate Opinion of Judge Petré, 134-135.

treaties may not have effect with regard to Namibians, because they cannot be handed over to illegal authorities, etc.”<sup>96</sup>

51. As such, while some elements of the obligation of non-recognition are clear, such as the prohibition on diplomatic relations and conclusion of treaties, or invocation of existing treaties which recognise the unlawful regime as sovereign, beyond this, it is difficult to delineate any operative content to the obligation. In my opinion, the obligation has an inherent flexibility that will permit (or, at least, not expressly prohibit) the acceptance of acts which do not purport to secure or enhance territorial claims, but which as a result of their commercial, minor administrative or “routine” character, or which are of immediate benefit to the population, should be regarded as “untainted by the illegality of the administration”.<sup>97</sup> The “population” in this respect is the local Palestinian population, not the settlers. Examples of such “untainted” acts could include the registration of a birth or the sale of milk from a local settlement store (whether to settlers or Palestinian persons). Although these acts are conducted in the midst of a territorial regime which is unlawful, this does not serve to make every act within the territorial regime itself unlawful.

#### **(4) Occupation/Usufruct**

52. It is undeniable that Israel occupies the territory of the West Bank. While international law permits a State to administer occupied territory, and accepts that the occupant has the powers necessary to provide for the government of the territory, the status of occupier imposes significant legal restrictions:

“...the laws of occupation are not intended to provide a general framework for reconstruction and law reform. Occupation authority is restricted by specific limitations arising from the protection of the occupied territory and its people.”<sup>98</sup>

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<sup>96</sup> Separate Opinion of Judge de Castro, 218-219.

<sup>97</sup> Crawford, 167. This interpretation has found support in the UK, in particular Lord Wilberforce’s formulation in *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 536, discussed below in Section G.

<sup>98</sup> Carsten Stahn, *The Law and Practice of International Territorial Administration Versailles to Iraq and Beyond* (CUP, Cambridge, 2008), 119.

53. The basic principles of the law governing occupation are found in the Fourth Geneva Convention<sup>99</sup> and the 1907 Hague Regulations<sup>100</sup> – both are considered to be customary international law and include provisions regarding the permissible uses of property during an occupation.

54. The Hague Regulations distinguish between private and public property. Articles 53 and 55 allow certain uses of public property by occupants, but Article 46 prevents the confiscation of private property. The occupant has a limited authority to requisition goods and services to accommodate the needs of the army of occupation, but the occupant is obligated to pay for such (Article 52).

55. The 1907 Hague Regulations were recognised as binding on Israel in respect of the West Bank settlements by the Israeli High Court of Justice in the 1979 *Elon Moreh* case. The conclusions of the High Court and the Regulations constrain Israeli land acquisition and settlement in several important respects not addressed by the Court. As usefully summarised by Lustick:<sup>101</sup>

- No land, whether public or private, can be permanently confiscated. Land may only be “requisitioned” on a temporary basis.
- No settlement, whether established on private or public land, can be considered permanent.
- If requisitioned land is privately owned, title remains in the hands of the owner, and rental payments are to be made while the land is in use.
- Settlements on privately owned land in the occupied territories are legal only if their establishment and the land requisitions involved are “really necessary for the army of occupation.”

56. Article 55 of the Hague Regulations, which applies to all land designated “state land” on which settlements have been constructed, states that:

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<sup>99</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949 (adopted: 12 August 1949; entry into force 21 October 1950).

<sup>100</sup> Hague Regulations concerning the Laws and Customs of War on Land 1907 (adopted: 18 October 1907; entry into force: 26 January 1910).

<sup>101</sup> Piskoi Din, (Judgments of the Court), 1980, HCJ 390/79/vol. 34 (I), Jerusalem, p. 7, (the *Elon Moreh* case). Cited in Ian Lustick, ‘Israel and the West Bank after *Elon Moreh*: The Mechanics of De Facto Annexation’ (1981) 35(4) *Middle East Journal* 557, 562.

“The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”

57. The occupier acquires a right to manage the public properties of the occupied territory and use them to meet its needs subject to certain limitations. These limitations are derived from the temporary nature of the occupation and the lack of sovereignty of the occupying State. Israel, as the occupier, is forbidden to change the character and nature of designated “state land”, except for security needs or arguably for the benefit of the local population. At a minimum this means that possession of the land cannot be permanently alienated, nor its basic character transformed.

58. Article 43 of the 1907 Hague Regulations also requires the occupying power to respect the laws applying in the occupied territory. The essential elements of the Ottoman Land Law (discussed in Section B, above) were first adopted by British Mandate legislation, and later by Jordanian legislation, and accordingly continued to apply at the time of the Israeli occupation in 1967. Taking Article 55 together with Article 43, Israel has argued that the establishment of the settlements is a lawful act of deriving profits which contributes to maintaining the properties of the Jordanian government.<sup>102</sup>

59. However, the concept of “usufruct” emphasizes that the occupier may use but does not own the property.<sup>103</sup> The usufructuary principle forbids wasteful or negligent destruction of the capital value, whether by excessive mining or other abusive exploitation.<sup>104</sup> There is very limited case law addressing the scope of Article 55 of the 1907 Hague Regulations. In the *Flick* case before the US Military Tribunal at Nuremberg in 1947, the accused, the principal proprietor of a large group of German industrial enterprises, was charged with war crimes, *inter alia*, for offences against property in the countries and territories occupied by Germany, and ultimately found guilty on this count. The Tribunal noted of Article 55 that:

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<sup>102</sup> Albeck, *Lands in Judea and Samaria*, 8-9 as cited in B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, ‘Land Grab: Israel’s Settlement Policy in the West Bank’ May 2002.(Jerusalem: Jerusalem Institute for Israel Studies, 1985), p. 42, cited in Land Grab, 51.

<sup>103</sup> See Schrijver, 268; see also Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP: Cambridge, 2009), 214.

<sup>104</sup> Ibid.



“...wherever the occupying power acts or holds itself out as owner of the public property owned by the occupied country, Article 55 [of the 1907 Hague Regulations] is violated. The same applies if the occupying power or its agents who took possession of public buildings or factories or plants, assert ownership, remove equipment of machinery, and ship it to their own country, or make any other use of the property which is incompatible with usufruct.”<sup>105</sup>

60. It is also generally accepted that the occupier may not use the resources of the occupied territory for its own domestic purposes, but rather must use them “to the extent necessary for the current administration of the territory and to meet the essential needs of the population”.<sup>106</sup> For example, this restriction was acknowledged by the occupants of Iraq in 2003, who informed the President of the UN Security Council that they would act to ensure that Iraq’s oil is protected and used for the benefit of the Iraqi people, resulting in a binding Chapter VII resolution to enforce that principle.<sup>107</sup>

61. Notably, the occupier does not administer the occupied territory as a trustee for the population. International law seeks to strike a balance between the interests of the occupying power and the interests of the occupied population. However, an occupant may not exploit the economy of the territory in order to benefit its own economy. “In no case can it exploit the inhabitants, the resources, or other assets of the territory under its control for the benefit of its own territory or population.”<sup>108</sup> It could be argued that the settlements are *per se* in breach of this principle, given that the assets of the West Bank in the settlement areas are being utilized entirely for the benefit of Israel. Moreover, the character of occupation as a temporary measure indicates that an occupier lacks the authority to make permanent changes to the occupied territory. It seems likely that this includes the construction of infrastructure related to the settlements (such as roads or light rail systems, not to mention settlement buildings) that would outlast any change in the status of the territory.

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<sup>105</sup> United States, Military Tribunal at Nuremberg, *Flick case*, Judgment, 22 December 1947, cited in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *ICRC Customary International Humanitarian Law Volume II: Practice* (CUP: Cambridge, 2005), 1041.

<sup>106</sup> Institut de Droit International, Bruges Declaration on the Use of Force and Belligerent Occupation, 2003.

<sup>107</sup> SC Res 1483, 22 May 2003.

<sup>108</sup> Antonio Cassese, ‘Powers and Duties of an Occupant in Relation to Land and Natural Resources’ in E Playfair, (ed.) *International Law and the Administration of Occupied Territories – Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press: Oxford, 1992), 420-1.

62. This principle is relevant to the question of settlement produce. There is a view in the literature that the rules prohibiting sale of public property extend only to the land (i.e. the capital) itself and not to the yield harvested from public lands.<sup>109</sup> Indeed, the UK *Manual of the Law of Armed Conflict* suggests that “[t]he occupying power has no right of disposal or sale but may let or use public land and buildings, sell crops, cut and sell timber, and work mines.”<sup>110</sup> The Secretary-General has also noted that:

“In principle a usufructuary may use the property but without detriment to its substance. He is entitled to the fruits but not the capital. The property that is the subject of the usufruct is not to be consumed. This interpretation is expressly confirmed by the second sentence of article 55 which stipulates that the occupying State ‘must safeguard the capital of these properties’. The principle is readily applicable to crops and other renewable resources, but its application to minerals and other non-renewable resources is controversial. Extraction of minerals is in fact a depletion of capital and a detriment to the substance.”<sup>111</sup>

63. The occupant is not permitted to damage or destroy public land, including farms (e.g. it would be certainly be impermissible to destroy a farm; and arguably impermissible to strip out one crop in favour of another); but the question whether it is permissible to establish new farms where the land was not in use prior to the occupation is uncertain.<sup>112</sup> In this regard, it is at least arguable that the sale of settlement produce where no proceeds are returned to the local population (and in fact, directly compete with local produce) is contrary to the principle of usufruct and therefore Article 55 of the Hague Regulations. It must be noted, however, that the obligation to administer property in accordance with the principles of usufruct is not an obligation *erga omnes*; it is a duty owed by an occupant to the occupied.

#### (5) *Permanent Sovereignty over Natural Resources*

64. Another principle of international law not considered by the Court in its Advisory Opinion is that of permanent sovereignty over natural resources. As a corollary of the right of self-determination, the right of peoples to their natural resources has been confirmed by the Court as a clear principle of customary international law.<sup>113</sup>

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<sup>109</sup> See Dinstein, 215.

<sup>110</sup> Ministry of Defence, UK Manual of the Law of Armed Conflict (OUP: Oxford, 2004), 303 (11.86).

<sup>111</sup> Report of the Secretary-General, UN Doc A/38/265-E/1983/85, 21 June 1983, para 39.

<sup>112</sup> See analogous consideration of the establishment of new mines in Dinstein, 216.

<sup>113</sup> Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, 251 (para 244). The right has also been affirmed in the

65. In the context of the Occupied Palestinian Territories, the General Assembly has affirmed the right of the population of the occupied territory to “sovereignty...over their national wealth and resources”,<sup>114</sup> and has called upon all States not to recognise or cooperate with any measures taken by Israel to exploit the resources of the occupied territories.<sup>115</sup> The Secretary-General also submitted a number of reports on the issue,<sup>116</sup> while the General Assembly reiterated its condemnation on an almost yearly basis up until 1983,<sup>117</sup> when it issued resolution 38/144, stating:

“*The General Assembly...*

3. *Condemns* Israel for its exploitation of the national resources of occupied Palestinians...

5. *Emphasizes* the right of the Palestinian and other Arab peoples whose territories are under Israeli occupation to full and effective permanent sovereignty and control over their natural and all other resources, wealth and economic activities.”

Such statements, while they may evidence *opinio juris*, are recommendations only with no binding force. Moreover, following the Camp David agreements<sup>118</sup> and the more general move towards a focus on the political settlement of the conflict, no further resolutions or reports dealing with this issue have been issued by the General Assembly or any other UN organ. In respect of the settlements, the local aquifers, when used both to supply water to the settlement population and to support settlement agriculture, are natural resources in the

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International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

<sup>114</sup> GA Res 3005 (XXVII) (15 December 1972), para 4. For discussion, see Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP: Cambridge, 1997), 152

<sup>115</sup> For discussion, see Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP: Cambridge, 1997), 152.

<sup>116</sup> See for example, ‘Implications, under international law, of the United Nations resolutions on permanent sovereignty over natural resources, on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories’, Report of the Secretary-General, UN Doc A/38/265-E/1983/85, 21 June 1983. See further Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP: Cambridge, 1997), 154-5.

<sup>117</sup> GA Res 3175 (XXVIII) (17 December 1973); GA Res 3336 (XXIX) (17 December 1974); GA Res 3516 (XXX) (15 December 1975); GA Res 31/186 (21 December 1976); GA Res 32/161 (19 December 1977); GA Res 34/136 (14 December 1979); GA Res 35/110 (5 December 1980); GA Res 36/173 (17 December 1981); GA Res 37/135 (17 December 1982); GA Res 38/144 (19 December 1983).

<sup>118</sup> ‘A Framework of Peace in the Middle East’ 17 September 1978, (1978) 17 ILM 1463.

relevant sense. Moreover breach of the right of permanent sovereignty over natural resources may require reparation for the depletion of natural resources by the occupying State.<sup>119</sup>

(6) *War Crimes*

66. The Rome Statute of the International Criminal Court entered into force on 1 July 2002. The International Criminal Court has jurisdiction only over “natural persons” (Article 25) and only under defined circumstances.<sup>120</sup> Article 8(2)(b)(8) of the Statute provides:

“Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, ‘war crimes’ means:

...

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

...

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;”.

67. The potentially relevant crime here is the transfer of population (i.e. breach of Article 49(6) of the Fourth Geneva Convention). Rights and obligations regarding natural resources and principles of usufruct are not addressed by the Statute. In any event, Israel has not ratified the Statute. The Court did not address the question of war crimes in its Advisory Opinion.

68. The United Kingdom has enacted the International Criminal Court Act 2001 (UK), which designates war crimes, as defined in the Rome Statute, as offences under the law of

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<sup>119</sup> The right to permanent sovereignty has been said to include, in case of violation, the right to restitution and full compensation. In resolution 3201 (S-VI), para 4(f), the General Assembly includes the following principle: “The right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples.” See to the same effect article 16 of resolution 3281 (XXIX) and paragraph 33 of the Lima Declaration endorsed by the General Assembly in resolution 3362 (S-VII). See Report of the Secretary-General, UN Doc A/38/265-E/1983/85, 21 June 1983 (para 15(e)).

<sup>120</sup> Rome Statute of the International Criminal Court. Adopted 17 July 1998; entered into force 1 July 2002, 2187 U.N.T.S. 90. There are 111 States parties and 139 ratifications to the Statute of the International Criminal Court, see: <http://www.iccnw.org/?mod=romesignatures>.

England and Wales.<sup>121</sup> It is also a crime for a person to engage in conduct ancillary to a war crime, even where that ancillary act is committed outside the United Kingdom.<sup>122</sup>

69. However, for the UK courts to have jurisdiction, the act must have been committed by a UK national, a UK resident or a person subject to UK service jurisdiction.<sup>123</sup> As with the Rome Statute, the International Criminal Court Act does not apply to corporations. It is therefore possible for the Crown to pursue criminal proceedings against an individual who directly causes or aids in the transfer of population, contrary to Article 8(2)(b)(8) of the Rome Statute (should such an individual come to reside in the UK), but there are no further obligations or ramifications for States or corporations.

### (7) *Conclusions*

70. Israel has engaged in internationally unlawful conduct in pursuing its settlement agenda. In particular, Israel continues to annex territory *de facto*; to breach the Palestinian peoples' right to self-determination. By making use of the natural resources of the West Bank to further its own economic ends (but not to the benefit of the local Palestinian population) it is arguable that Israel is in breach of the Palestinian people's right to permanent sovereignty over their natural resources; and the principle of usufruct, in accordance with Article 55 of the 1907 Hague Regulations.

### **E. Consequences for Third States**

71. Statements by the United Nations Security Council and General Assembly have failed to shed any light on the extent of the obligations of third States in relation to the situation in the West Bank. The only Security Council Resolution, in any event non-binding, addressed to third States is 1850 (2008), in which the Security Council "calls on all States and international organizations to contribute to an atmosphere conducive to negotiations and to support the Palestinian government that is committed to the Quartet principles."<sup>124</sup> By contrast, the General Assembly in its Tenth Emergency Special Session, following the

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<sup>121</sup> International Criminal Court Act 2001 (UK), s. 51.

<sup>122</sup> *Ibid.*, s 52.

<sup>123</sup> *Ibid.* These terms are defined in s.67.

<sup>124</sup> SC Res 1850 (16 December 2008).

Advisory Opinion, passed a resolution calling on all States to simply “comply with their legal obligations as mentioned in the advisory opinion”.<sup>125</sup>

72. The legal consequences for third States of this unlawful conduct on the part of Israel could arise in two ways: from the obligation of non-recognition or the obligation “not to render aid or assistance”<sup>126</sup> in maintaining the unlawful situation. The Court in its Advisory Opinion also stated that third States have an obligation to see that any impediment to the exercise of the Palestinian people’s right of self-determination is brought to an end.<sup>127</sup> I would consider this a corollary of the obligation of non-recognition, rather than as a separate and distinct positive obligation.

73. The International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts codify the customary rule of international law that States are under an obligation not to recognise as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of international law,<sup>128</sup> and more generally not to render aid or assistance to another State in the commission of an unlawful act.<sup>129</sup> Article 16 provides:

#### **“Article 16**

##### **Aid or assistance in the commission of an internationally wrongful act**

A State which aids or assists another State in the commission of an internationally wrongful act by the latter 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.”

Articles 40 and 41 provide:

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<sup>125</sup> GA Res ES-10/15 (2 August 2004).

<sup>126</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, 199 (paras 155-6).

<sup>127</sup> Ibid.

<sup>128</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), UN Doc A/56/10, Articles 40 and 41.

<sup>129</sup> Ibid., Article 16.

## **“Article 40**

### **Application of this Chapter**

1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

## **Article 41**

### **Particular consequences of a serious breach of an obligation under this Chapter**

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.”

The ILC Articles lay down “secondary” or framework rules applicable to situations of State responsibility: they are relevant to the consequences of Israel’s failure to respect the Palestinian people’s right of self-determination.

74. It is important to note at the outset that Article 41(1) is heavily qualified: it is an obligation to co-operate, and nothing more. There is no requirement for individual action on the part of a given State unilaterally to bring to an end, or attempt to bring to an end, an unlawful situation. An example of such collective action, in respect of Southern Rhodesia, is the Security Council’s imposition of mandatory economic sanctions under Chapter VII of the Charter.<sup>130</sup> Other international organisations, such as the Commonwealth and the Organization of African Unity, also took collective action, for example, adopting resolutions calling for the withholding of recognition of the minority government.<sup>131</sup>

75. Articles 16 and 41(2) require a State not to render aid or assistance in the commission of an unlawful act. Article 41(2) is somewhat broader in scope, as it comes into play “after” the unlawful event, making it unlawful to “maintain” the situation created by the breach; whereas Article 16 is contemporaneous – it is unlawful to assist in the commission of an

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<sup>130</sup> SC Res 232 (16 December 1966), SC Res 2563 (29 May 1968), SC Res 277 (18 March 1970)

<sup>131</sup> Second Ordinary Session of the Assembly of Heads of States held in Accra, Ghana, from 21 to 26 October 1965, AHG/Res 25 (II) (22 October 1965), 5.

unlawful act. However, Article 41(2) applies only to breaches of peremptory norms – such as the right of self-determination – while Article 16 applies to all unlawful conduct. In the case of the Israeli occupation of the West Bank, both Articles are relevant.

76. The obligation not to assist the responsible State is “limited to acts that would assist in preserving the situation created by the breach”.<sup>132</sup> That is, it is limited to acts that would assist in preserving either (a) Israel’s *de facto* annexation of the West Bank and other occupied territories in breach of the right to self-determination, (b) Israel’s breach of Article 49(6) of Geneva Convention IV prohibiting the transfer of populations or (c) Israel’s potential breach of Article 55 of the 1907 Hague Regulations. The obligation

“does not cover international co-operation with the responsible State in other fields. In other words, it does not require the complete isolation of the responsible State. However, a State may legitimately avoid all types of international co-operation with the responsible State if it so chooses.”<sup>133</sup>

77. Furthermore, the acts of the alleged accomplice constitute aiding or assisting only if they are specifically directed toward assisting the crime. A general relation between them will not suffice. The rule for complicity is a strict one; there must be *actual* knowledge of the circumstances and willing assistance by the State concerned which contributes significantly to the commission of the wrongful act. Further, to be responsible by way of complicity, the State concerned must have intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct. Therefore, it is not sufficient that the US supplies Israel with bulldozers<sup>134</sup> which are subsequently utilised in the unlawful destruction of private property during construction of the Wall – the US must know and intend that those bulldozers are to be used in such a way.

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<sup>132</sup> Nina Jørgensen, ‘The Obligation of Non-Assistance to the Responsible State’ in J Crawford, A Pellet & S Olleson (eds.), *The Law of International Responsibility* (OUP: Oxford, 2010), 691.

<sup>133</sup> Ibid.

<sup>134</sup> Through the Foreign Military Sales program. See further [http://www.dsca.osd.mil/home/foreign\\_military\\_sales.htm](http://www.dsca.osd.mil/home/foreign_military_sales.htm); War Against Want, ‘Profiting from the Occupation: Corporate complicity in Israel’s crimes against the Palestinian people’, July 2006, 4-5.



78. The ILC was conscious that with respect to Article 16 was engaging more in progressive development than codification, unlike the situation with the general rules on attribution.<sup>135</sup>

79. Article 41(2) requires States not to recognize an unlawful situation. As discussed above, the *Namibia* case sets out the generally applicable scope of the obligation: that States are enjoined from (1) entering into treaty relations with the non-recognised regime in respect of the unlawfully acquired territory; (2) invoking or applying existing bilateral treaties concerning the unlawfully acquired territory which involved active intergovernmental co-operation; (3) sending diplomatic missions, consular agents or special missions to the non-recognised regime; and (4) entering into economic and other forms of relationship concerning the unlawfully acquired territory which might entrench the non-recognised regime's authority over the territory.<sup>136</sup> As explained by Yaël Ronen:

“The objective of the refusal to recognise as lawful a situation created through a violation of a peremptory norm...is to induce the responsible state to revert to legality. An alternative policy would constitute legitimization of the acts of the wrong-doing state. Since at issue are violations of peremptory norms that operate erga omnes, the violation cannot be waived or its consequences acquiesced in. A state which does recognize as lawful a situation created through violation of a peremptory norm is itself in violation of the obligation of non-recognition.”<sup>137</sup>

80. It is also important to note that recognition (or non-recognition) is “a largely legally unregulated discretion of State and ... a considerable degree of dealings can exist between a State and another authority without the recognition of the one by the other and without implying recognition either.”<sup>138</sup> Recognition of States or governments is a matter that falls within the competence of the executive, and a domestic court will normally not review a government's decision to recognise (or not) a foreign authority against statutory or international law standards.<sup>139</sup> In particular, it must be noted that “the recognizing State's

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<sup>135</sup> The distinction between progressive development and codification is made in Article 13 (1) (a) of the United Nations Charter itself, as well as in Article (1) of the Statute of the International Law Commission of 1949.

<sup>136</sup> Dawidowicz, 685.

<sup>137</sup> Yaël Ronen, ‘Illegal Occupation and its Consequences’ (2008) 41(1&2) *Israeli Law Review* 201, 233.

<sup>138</sup> *Ibid.*, 570.

<sup>139</sup> Colin Warbrick, ‘The New British Policy on Recognition of Governments’ (1981) 30 *International and Comparative Law Quarterly* 568, 576; John Dugard, ‘Rhodesia: Does South Africa Recognize it as an Independent State?’ (1977) 94(II) *The South African Law Journal* 127, 128.

intention on this subject is the overriding consideration and ... recognition should not be too readily inferred.”<sup>140</sup>

### *Diplomatic and Treaty Relations*

81. The UK does not formally recognise the authority of Israel over the Occupied Palestinian Territory, and maintains no diplomatic or consular relations in respect of those territories. On the contrary, the UK maintains a relationship with the Palestinian Authority and a British Consulate General in Jerusalem whose Consular district covers Jerusalem (West and East), the West Bank and Gaza.<sup>141</sup>

82. Of the treaties entered into between the UK and Israel since 1967,<sup>142</sup> none have a territorial aspect that might imply recognition on the part of the UK. The only exception is the *Agreement for Air Services Between And Beyond Their Respective Territories Between the Government of Israel and the Government of the United Kingdom of Great Britain and Northern Ireland* (24 September 1975), in which Article 1(e) defines “territory” as “the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or trusteeship of that State”. Whether or not the Convention applies to the Occupied Palestinian Territories is uncertain, but if so, in the present state of affairs, the UK is under an obligation to regard this clause as ineffective.<sup>143</sup>

83. It is also worth noting that the UK/Israel convention on double taxation,<sup>144</sup> although entered into before the occupation in 1967, applies to income tax and company tax levied in “Israel”, defined (with fine circularity) as “the territory in which the Government of Israel

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<sup>140</sup> John Dugard, ‘Rhodesia: Does South Africa Recognize it as an Independent State?’ (1977) 94(II) *The South African Law Journal* 127, 128.

<sup>141</sup> See Foreign and Commonwealth Office, <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/middle-east-north-africa/palestine-national-authority?profile=all>.

<sup>142</sup> Convention Between The Government Of Israel And The Government Of The United Kingdom Of Great Britain And Northern Ireland Providing For The Reciprocal Recognition And Enforcement Of Judgment In Civil Matters (28 October 1970); Agreement On Bilateral Cooperation In Private Sector Industrial Research And Development Between The Government Of Israel And The Government Of The United Kingdom Of Great Britain And Northern Ireland (24 May 1999); Administrative Arrangements For The Implementation Of The Convention On Social Security Between The United Kingdom Of Great Britain And Northern Ireland And Israel (9 November 1983).

<sup>143</sup> See Separate Opinion of Judge de Castro, 219.

<sup>144</sup> Convention Between the Government of the State of Israel and the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect To Taxes On Income (26 September 1962).

levies taxation”.<sup>145</sup> If the government of Israel levies taxes in any part of the West Bank (and it is presumed that they do so in respect of the settlers), the UK is under an obligation not to take account of those taxes in relation to the other provisions of the convention.<sup>146</sup>

### *Economic and Commercial Dealings*

84. Economic and commercial dealings between Israel and a third State may be considered as either a breach of the obligation of non-recognition (if such dealings do not fall within the *Namibia* exception) or they might be considered to amount to aid or assistance in the commission of an internationally wrongful act, contrary to Articles 16 and 41(2) of the ILC Draft Articles.

85. Some pertinent examples of commercial dealings could be the purchase of agricultural produce from settlements; or the provision of financial or other assistance in the construction of settlement buildings or infrastructure. It is very doubtful that payments of the basic state pension (or other applicable pensions) by the UK government to individuals known to live in settlements would breach of the obligation of non-recognition or amount to aid or assistance – pensions benefits attach to the individual and the right to claim a pension arises through the relevant payment of National Insurance – it is entirely unrelated to questions of territory and would most likely fall within the *Namibia* exception.

86. As noted above, the people of Palestine have a right to permanent sovereignty over their natural resources. These include not only gas and oil, but also water, a particularly vital resource in the West Bank.<sup>147</sup> Since the occupation, Israel has implemented legislation on the allocation and control of water resources that is “at considerable variance with the legislation, whether written or customary, that used to prevail in the Palestinian...territories.”<sup>148</sup> In particular, by means of military orders,<sup>149</sup> proprietary rights in water acquired before the occupation have been severely curtailed, and Israel has permitted the transfer of water from

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<sup>145</sup> Convention for the Avoidance of Double Taxation, Article II(1)(b).

<sup>146</sup> See Separate Opinion of Judge de Castro, 219.

<sup>147</sup> Meron Benvenisti, *The West Bank Data Project* (Washington D.C.: American Enterprise Institute for Public Policy Research, 1984), 14.

<sup>148</sup> Special Document, ‘Permanent Sovereignty over National Resources in the Occupied Palestinian and other Arab Territories’ (1985) 14(2) *Journal of Palestine Studies* (Special Issue: The Palestinians in Israel and the Occupied Territories), para 15.

<sup>149</sup> Military Order No. 92 of 1967; Military Order No. 158 of 1967; Military Order No. 291 of 1968.

one basin to another, which was expressly banned under the Jordanian Law No. 40 of 1952, in place prior to the occupation. The waters of the Jordan basin are now transferred into the Israeli national water carrier and redistributed.<sup>150</sup> The result of these legislative and administrative changes is that “the full supply of water for the very water-intensive agricultural settlements and the unimpeded flow of underground water to the Israeli-tapped aquifers is fully protected. ... these policies deny the Palestinians the possibility of developing competitive water-intensive farming techniques to put irrigable land to full use and exposes them to the vagaries of natural rainfall.”<sup>151</sup>

87. On its face, these acts would appear to be in clear breach of Article 43 of the 1907 Hague Regulations, which requires that the occupying power respect, unless absolutely prevented, the laws in force in the country before the occupation, as well as a breach of the Palestinian peoples’ right to permanent sovereignty over their natural resources. Certainly it is not the case that changes to the water allocation and management scheme were required by military or other necessity. Even including settler use, there is more water available in the West Bank than required, so it was not necessary to recast the legislative framework to provide for either the local population or the military needs of the occupant.<sup>152</sup>

88. Given that Israeli settlement agricultural practices are highly dependent on water irrigated under a system established in breach of Article 43, there is an argument to be made that the purchase of settlement agricultural produce by third States aids and assists in the ongoing commission of an internationally unlawful act – the breach of Article 43.

89. In a similar vein, according to Article 55 of the 1907 Hague Regulations, the principle of usufruct applies to all occupiers. As such, Israel may not damage or destroy public land, nor use its resources except to the extent necessary for the administration of the territory and to meet the essential needs of the local population.<sup>153</sup> In case of settlement agricultural produce by a State – where the purchaser is aware that no benefit accrues to the local

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<sup>150</sup> Special Document, ‘Permanent Sovereignty over National Resources in the Occupied Palestinian and other Arab Territories’ (1985) 14(2) *Journal of Palestine Studies* (Special Issue: The Palestinians in Israel and the Occupied Territories), para 23.

<sup>151</sup> *Ibid.*, para 37.

<sup>152</sup> *Ibid.*

<sup>153</sup> Institut de Droit International, *Bruges Declaration on the Use of Force and Belligerent Occupation*, 2003.

population and intends that this be the case – it is at least arguable that this aids and assists in an ongoing breach of Article 55.

90. Furthermore, as noted above, the character of occupation as a temporary measure (and the related obligation of non-recognition which is intended to prevent the occupation becoming permanent) indicates that an occupier lacks the power to make permanent changes to the occupied territory. Indeed, the Israeli High Court of Justice has taken this view.<sup>154</sup> It seems likely that this includes restraints on the construction of infrastructure related to the settlements (such as roads or light rail systems) that would outlast any change in the status of the territory. Insofar as a third State directly contributes to such construction, it is arguable that they are in breach of their obligation not to recognise the unlawful regime (i.e., not to contribute towards the unlawful occupation becoming a *fait accompli*).

91. Importantly, however, a State does not aid or assist unlawful conduct by merely permitting corporations within its jurisdiction to trade commercially with Israel. For the purposes of Article 16, the link between the unlawful conduct of Israel and the conduct of the third State lacks a sufficient nexus in such a case. As for the obligation of non-recognition, the question is whether or not particular conduct falls within the *Namibia* exception. The validity of changes made to land titles by the unlawful regime during the period of non-recognition depends on whether particular acts of the transfer of property, or other acts related to the administration of the settlements, fall within the *Namibia* exception. Clearly, it is arguable that the general scheme of settlement activity is aimed at entrenching the unlawful regime of occupation and the unlawful acquisition of territory to Israel. But acts of benefit to the population are “to be regarded as untainted by the illegality of the administration”.<sup>155</sup> As such, to take one example, the financing by a State of an organisation operating inside a settlement, which is in fact engaged in the provision of health services to the Palestinian population, would likely be considered an act “untainted” by the illegality of the settlement regime. Ultimately, the question of whether a particular act falls within the *Namibia* exception (and therefore whether aiding and assisting in the commission of that act is unlawful) is highly fact-dependant.

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<sup>154</sup> “Elon Moreh” case, HCJ 390/79, Dweikat et al v Government of Israel, 34(1) PD 1, 22 October 1979. Translation into English available in M. Shamgar (ed.) *Military Government in the Territories Administered by Israel 1967 – 1980* (Hebrew University Jerusalem, Faculty of Law, 1982), 404.

<sup>155</sup> Crawford, 167.

92. It must be stressed that the ILC Draft Articles apply only to States and their governmental organs. A State engaged in unlawful conduct and any State aiding that conduct may be liable to cease the act and make assurances of non-repetition;<sup>156</sup> and possibly liable for reparation in the form of compensation, restitution or satisfaction.<sup>157</sup> However, international law clearly distinguishes for the purposes of responsibility between conduct of the State or other entity itself (i.e., conduct committed by its organs or officials) and conduct committed by third persons or entity.

*Attribution of corporate conduct to the State*

93. In some circumstances the conduct of State corporations may be attributed to the State under human rights conventions, but the responsibility is always and exclusively that of the State itself. This is addressed by the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), in particular, Articles 4, 5 and 8. These provide as follows:

“Article 4

*Conduct of organs of a State*

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5

*Conduct of persons or entities exercising elements of governmental authority*

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 8

*Conduct directed or controlled by a State*

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<sup>156</sup> Articles on Responsibility of States for Internationally Wrongful Acts (2001), UN Doc A/56/10, Article 30.

<sup>157</sup> Ibid., Article 34.

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

93. The Articles concerning attribution set out some of the central rules of international responsibility. But no rule of international responsibility applies as such to the commercial conduct of a trading company, even if it is State-owned and controlled. The mere fact that a State is the sole or major shareholder in or otherwise controls a corporation does not make the conduct of the corporation State conduct.

94. ARSIWA Article 5 deals with entities which are not organs of the State but which have been “empowered by the law of that State to exercise elements of the governmental authority”. In deciding what is “governmental authority” for this purpose, important considerations include “the content of the powers,” “the way they are conferred... the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise.”<sup>158</sup> The ILC, in its Commentary to Article 5, recalls the justification for attributing certain acts by such entities to the State:

“the internal law of the State has conferred on the entity in question the exercise of certain elements of the government authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock).”<sup>159</sup>

As is clear from the ILC’s example, there must be a direct connection between the conduct in question and the governmental authority conferred.

95. There is also the situation, addressed under ARSIWA Article 8, where the State directs or controls a person or entity not otherwise related to the State. This situation typically arises in connection with informal, even covert, relations between the State and, for

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<sup>158</sup> Comment (5) to ARSIWA Art 5, reprinted in Crawford, J, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) (hereafter *Commentaries*), 101.

<sup>159</sup> Ibid.

example, external military, paramilitary, or insurgent forces.<sup>160</sup> But it can also arise in connection with State-owned or State-controlled companies. As to these, the ILC noted:

“The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5.”<sup>161</sup>

96. The structure of the corporation might make clear that it is to be considered as “exercis[ing] elements of the governmental authority”. For example, the attendance of the Prime Minister of Iran and six other cabinet ministers at meetings of the National Iranian Oil Company indicated strongly to the Iran-US Claims Tribunal that the acts of NIOC were to be attributed to the State of Iran.<sup>162</sup> However, the requisite State involvement is not merely general oversight, regulation, the setting of strategic guidelines, or the like. Control of the general sort which the shareholder exercises over the enterprise will not constitute State involvement either.<sup>163</sup>

97. However, there are also cases where the question of attribution cannot be determined solely by reference to the status or form of the entity in question. With many State-owned companies, there is a mixture of public and private activity. For example, a State-owned bank with a separate legal personality might perform some governmental functions but for the most part act in a private commercial capacity. Acts done in the latter capacity will not be attributed to the State.

98. The ILC noted in its Commentary to ARSIWA Article 8 that the application of that article to corporate entities is limited, because “*prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental

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<sup>160</sup> See e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, I.C.J. Reports 1986, p 14.

<sup>161</sup> Comment (6) to ARSIWA Art 8, *Commentaries*, 112.

<sup>162</sup> *Oil Field of Texas v Government of the Islamic Republic of Iran, National Iranian Oil Company, Oil Service Company of Iran*, Award of 7-8 Dec 1982 (Lagergren, President; Bellet, Mangård, Kashani, Holtzmann, Shafeiei, Alrich, Mosk, Sani, Members) 1 Iran-US CT Rep 347, 356.

<sup>163</sup> See Comment (6) to ARSIWA Art 8, noting that all State corporations, by definition, are “owned by and in that sense subject to the control of the State...”: *Commentaries*, 112.



authority within the meaning of article 5.”<sup>164</sup> The corporation, by definition, is formally separate from the State; as such there must be *specific* direction in relation to the conduct which constitutes the breach which is complained of, or a specific delegation of powers characterised as governmental whoever performs them (e.g. running prisons and other forms of law enforcement).

(3) *Corporate complicity*

99. When the terms of an international treaty become part of the law of a given State – whether (as in most common law jurisdictions) by being enacted by parliament or (as in many civil law jurisdictions) by virtue of constitutional approval and promulgation which give a self-executing treaty the force of law – corporations may be civilly liable for wrongful conduct contrary to the enacted terms of the treaty just as they may be liable for any other conduct recognized as unlawful by that legal system. For example aircraft hijacking is a crime in the UK pursuant to legislation which implements the Montreal Convention of 1971.<sup>165</sup> A corporation which was complicit in a hijacking would be civilly liable in the UK on the same basis as it would be for complicity in any other criminal act. Its liability would arise under UK law, not under international law.<sup>166</sup>

100. Some States do provide in their national legislation for corporate liability for war crimes. A good example is Australia’s Criminal Code 1995. Pursuant to section 268.32, the transfer of populations is designated a war crime; and pursuant to section 11.2, any person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly. Under section 12.1 of the Criminal Code, a body corporate may be found guilty of any offence in the same way as individuals, including crimes only punishable by imprisonment. Under subsection 4.B.(3) of the Crimes Act 1914 (Cth), a fine may be imposed on the body corporate in lieu of imprisonment.

101. The Criminal Code applies to a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory, even if the conduct constituting the offence

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<sup>164</sup> Art 8, Comment (6): *Commentaries*, 112.

<sup>165</sup> Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971, 974 U.N.T.S. 177.

<sup>166</sup> Under the Montreal Convention (and the implementing UK Act), only individuals can commit the crimes defined in the Convention.

occurred entirely outside of Australia.<sup>167</sup> Section 268.117 of the International Criminal Court (Consequential Amendments) Act 2002 (Cth) expressly promotes war crimes to Category D offences, that is, offences which apply universally, whether or not the conduct constituting the alleged offence occurs in Australia.<sup>168</sup> As such, it is possible for an Australian corporation to be found guilty of the war crime of complicity in the transfer of population.

102. War crimes can only be perpetrated during armed conflict, international or (in certain circumstances) internal. Such a situation currently exists in the West Bank and Gaza, due to the continued occupation by Israel: the International Court has indicated that it is willing to extend international humanitarian law to the territories of this basis.<sup>169</sup> Common Article 2 of the Geneva Conventions provides that a situation of international armed conflict includes ‘all cases of partial or total occupation of a territory’. This forms the basis for the customary international law on the subject, adopted wholesale by the Rome Statute: the Elements of Crimes provide that the elements for war crimes under the Statute ‘shall be interpreted within the established framework of the international law of armed conflict’.<sup>170</sup> Occupation continues so long as partial control is exercised over the territory in question, even if the occupation meets no armed resistance, and for as long as the partial control exists.

(4) *Alien Tort Statute (USA)*

103. There was, and possibly still is, one exception to the traditional position at the level of US federal law, under which a degree of direct responsibility for human rights violations on the part of corporate actors could be recognized through litigation brought by private claimants. The US Alien Tort Statute (“ATS”), a provision of the 1789 *Judiciary Act*, provides:

“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>171</sup>

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<sup>167</sup> *Criminal Code 1995 (Cth)*, Schedule, Division 15, section 15.1(c)(ii).

<sup>168</sup> *Criminal Code 1995 (Cth)*, Schedule, Division 15, section 15.4 (extended geographical jurisdiction—Category D).

<sup>169</sup> Dinstein, 274-5, 277.

<sup>170</sup> See further Dinstein, 31-4; Boas, Bischoff & Reid, *Elements of Crimes under International Law* (2008) 233-4. Also: *Prosecutor v Tadic* (1995) 105 ILR 419, 488.

<sup>171</sup> 28 U.S.C § 1350.

104. Modern interpretation of the ATS equated the law of nations with current customary international law;<sup>172</sup> most notably, with the principle that there “exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens”.<sup>173</sup> The ATS does not itself provide any causes of action, but rather operates as a source of jurisdiction that makes actionable in US courts certain violations of customary international law norms,<sup>174</sup> and litigants have successfully pursued corporations (both US-based and non-US based) for aiding and abetting alleged human rights abuses perpetrated by foreign governments.<sup>175</sup>

105. Claims pursuant to the Alien Tort Statute are only permitted for breaches of “specific, universal, and obligatory” norms.<sup>176</sup> Interpretation of the ATS has focused primarily on human rights abuses; courts have found that such norms include (but are not limited to) prohibitions on genocide and war crimes,<sup>177</sup> torture<sup>178</sup> and cruel, inhuman or degrading treatment,<sup>179</sup> summary execution,<sup>180</sup> disappearances,<sup>181</sup> non-consensual medical experimentation on children,<sup>182</sup> and forced labour.<sup>183</sup>

106. While it has not previously been tested, given the *erga omnes* character of the right to self-determination, recognised as a fundamental human right in the ICCPR and ICESCR, and furthermore, given the conceptual origins of the modern concept of self-determination in the Declaration of Independence, a US court could conceivably find that a corporation operating

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<sup>172</sup> *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980).

<sup>173</sup> *Ibid.*, 877-78, 884-885.

<sup>174</sup> *Sosa v. Alvarez-Machain* 542 U.S. 692, 697 (2004).

<sup>175</sup> John B. Bellinger III, ‘Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute And Other Approaches’, 42 *Vanderbilt Journal of Transnational Law* (2009) 1, 4.

<sup>176</sup> *Sosa v. Alvarez-Machain* 542 U.S. 692, 761-2 (2004) citing *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994).

<sup>177</sup> *Kadic v. Karadic* 70 F.3d 232, 240 (2d Cir. 1995).

<sup>178</sup> *Abebe-Jira v. Negewo* 72 F.3d 844, 847 (11th Cir. 1996).

<sup>179</sup> *Xuncax v. Gramajo* 886 F. Supp. 162, 179 (D. Mass. 1995).

<sup>180</sup> *Hilao v. In re Estate of Marcos* 25 F.3d 1467, 1472 (9th Cir. 1994); *Xuncax v. Gramajo* 886 F. Supp. 162, 179 (D. Mass. 1995).

<sup>181</sup> *Forti v. Suarez-Mason* 694 F. Supp. 707, 720 (N.D. Cal. 1988).

<sup>182</sup> *Abdullahi v. Pfizer, Inc.* 562 F.3d 163, 176-77 (as amended 24 March 2009).

<sup>183</sup> *Doe v. Unocal* 395 F.3d 932, 957 (2002).

in the West Bank from the jurisdiction of a third State was aiding and abetting Israel in its ongoing denial of the Palestinian people’s right to self-determination; and that such a right constitutes a “specific, universal, and obligatory” norm<sup>184</sup> of international law, actionable under the Alien Tort Statute. This analysis is subject, however, to an important caveat. On 17 September 2010, the Court of Appeals for the Second Circuit in *Kiobel v. Royal Dutch Petroleum*,<sup>185</sup> held that...

“in ATS suits alleging violations of customary international law, the scope of liability—who is liable for what—is determined by customary international law itself. Because customary international law consists of only those norms that are specific, universal, and obligatory in the relations of States *inter se*, and because no corporation has ever been subject to *any* form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernable—much less universally recognized—norm of customary international law that we may apply pursuant to the ATS.”<sup>186</sup>

In doing so the majority relied on expert opinions filed by the writer, and by Professor Christopher Greenwood (as he then was), in another case, *Presbyterian Church of Sudan & others v Talisman Energy, Inc & Republic of Sudan*.<sup>187</sup>

107. As a result, and should this decision come to be accepted by other Circuit Courts as an accurate statement of the law, corporations will no longer face liability for aiding or abetting breaches of international law pursuant to the Alien Tort Statute. However, the debate is by no means over: several other Circuit Courts (including most recently the Ninth Circuit in the case of *Sarei v. Rio Tinto*<sup>188</sup>) have indicated that corporations may be held liable under the ATS in appropriate circumstances. On the basis of the emergent Circuit split, the Supreme Court has granted *certiorari* with respect to *Kiobel v. Royal Dutch Petroleum*.<sup>189</sup> Oral

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<sup>184</sup> *Sosa v. Alvarez-Machain* 542 U.S. 692, 761-2 (2004) citing *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994).

<sup>185</sup> *Kiobel v Royal Dutch Petroleum*, 621 F.3d 111 (2<sup>nd</sup> Ct, 2011).

<sup>186</sup> *Ibid.*, 121-2.

<sup>187</sup> 244 F Supp 289 (NYDC, 19 March 2003); 582 F.3d 244, 259 (2<sup>nd</sup> Ct, 2 October 2009).

<sup>188</sup> Slip Op, Doc 02-56256; 02-56390; 09-56381 (9<sup>th</sup> Ct, 25 October 2011) 19339-41. See also *Doe v. Exxon Mobil Corp*, Slip Op, Doc 09-7125; 09-7127; 09-7134; 09-7135 (DC Ct, 9 July 2011); *Flomo v Firestone Natural Rubber Co*, Slip Op, Doc 10-3675 (7<sup>th</sup> Ct, 11 July 2011).

<sup>189</sup> 132 S.Ct 472 (2011).

submissions will take place before the Court on 28 February 2012. Pending that hearing the question with respect to corporate responsibility under ATS is entirely uncertain.

108. However, there is also a question as to what extent a corporation operating extraterritorially is subject to the jurisdiction of its home state; and to what extent States are obliged to regulate those entities in accordance with their international law obligations? Are States obliged to take steps to protect against human rights violations by private actors operating within or under their jurisdiction? As suggested by the Inter-American Court of Human Rights: “[I]n principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”<sup>190</sup>

109. But apart from the fact that the Court’s holdings have no applicability in the UK; in any event, I am sceptical of its formulation. Even to the extent that settlement activity would be unlawful in the UK under UK law (pursuant, for example, to the Human Rights Act 1998 (UK)), no State has the capacity to enforce its domestic laws against foreign-incorporated entities in respect of activities outside its territory – even if the foreign-incorporated entity is a wholly-owned subsidiary of a UK corporation.<sup>191</sup>

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<sup>190</sup> *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para 172.

<sup>191</sup> Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP: Cambridge, 2006), 142.

110. Nonetheless, simply because there is no means of enforcing international law against corporations does not serve to legitimate or validate unlawful activities. Individual property rights or other commercial interests ‘acquired’ by corporations that stem from the unlawful regime are not likely to be opposable to an independent Palestinian State, in the absence of a specific agreement to this effect.

## G. UK Law

### (1) Common law

111. The *Namibia* principle has been broadly accepted by a line of UK authority. In *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)*,<sup>192</sup> Lord Wilberforce entered a reservation that “where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned...the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question”.<sup>193</sup> In *Hesperides Hotels Ltd v Aegean Holidays Ltd*,<sup>194</sup> a case which arose out of the expropriation of property in northern Cyprus, Lord Denning MR said that he would, if necessary, unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by the United Kingdom government *de jure* or *de facto*, “at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth”.<sup>195</sup> In *Gur Corporation v Trust Bank of Africa Ltd*,<sup>196</sup> Lord Donaldson MR said that he saw great force in the reservation of Lord Wilberforce, “since it is one thing to treat a state or government as being ‘without the law’, but quite another to treat the inhabitants of its territory as ‘outlaws’ who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences”.<sup>197</sup> In

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<sup>192</sup> [1967] 1 AC 853.

<sup>193</sup> *Ibid.*, 954.

<sup>194</sup> [1978] 1 QB 205.

<sup>195</sup> *Ibid.*, 218G.

<sup>196</sup> [1987] 1 QB 599.

<sup>197</sup> *Ibid.*, 622.

*Caglar v Billingham (Inspector of Taxes)*,<sup>198</sup> the Special Commissioners formulated the principle in terms that “the courts may acknowledge the existence of an unrecognised foreign government in the context of the enforcement of laws relating to commercial obligations or matters of private law between individuals or matters of routine administration such as the registration of births, marriages or deaths”, save that the courts will not acknowledge the existence of an unrecognised State if to do so would involve them in acting inconsistently with the foreign policy or diplomatic stance of the UK.<sup>199</sup> In *Emin v Yeldag*,<sup>200</sup> a case in which recognition was accorded to a divorce granted under the purported laws of the TRNC, Sumner J said that he did not dissent from the formulation of the principle in *Caglar v Billingham* but noted that he did not have to accept the breadth of the formulation for the purposes of his decision.<sup>201</sup>

112. Most recently, in *R (on the application of Kibris Turk Hava Yollari and another) v Secretary of State for Transport*,<sup>202</sup> the Court of Appeal considered the application by Kibris Turk Hava Yollari, a Turkish airline, for a variation of its operating permit so as to allow it to carry passengers, baggage and cargo on scheduled services between the United Kingdom and northern Cyprus. While the Court decided the case on the basis of the 1944 Chicago Convention<sup>203</sup> (finding that the Republic of Cyprus retained sovereignty over the entirety of the island in accordance with the terms of Article 1 of the Convention such that no permits could be granted to the TRNC), the Court also addressed the UK position on recognition,<sup>204</sup> and in particular, the scope of the *Namibia* exception in UK law:

“Mr Haddon-Cave submitted that the Namibia exception is a flexible principle and that the present case is a paradigm case for its application, given the importance of air travel and the adverse impact on ordinary people in northern

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<sup>198</sup> [1996] STC (SDC) 150.

<sup>199</sup> *Ibid.*, para 121.

<sup>200</sup> [2002] 1 FLR 956.

<sup>201</sup> *Emin v Yeldag* [2002] 1 FLR 956, 969 (para 62).

<sup>202</sup> [2010] All ER (D) 111 (Oct).

<sup>203</sup> Convention on International Civil Aviation, Chicago, 7 December 1944, 2178 U.N.T.S. 197.

<sup>204</sup> *R (on the application of Kibris Turk Hava Yollari and another) v Secretary of State for Transport (Republic of Cyprus, interested party)* [2010] All ER (D) 111 (Oct), paras 71-74. See also judgment of Wyn Williams J in the first instance: *R (on the application of Kibris Turk Hava Yollari CTA Holidays) v Secretary of State for Transport* [2009] All ER (D) 295 (Jul), paras 68-89.

Cyprus who are deprived of the advantages of international cooperation in the field.

I cannot accept that submission. In my judgment, the issue in the present case falls well outside the ambit of the Namibia exception, however precisely the principle may be formulated for the purposes of its application in domestic law. This case is not concerned with private rights, acts of everyday occurrence, routine acts of administration, day to day activities having legal consequences, or matters of that kind. The case involves public functions in the field of international civil aviation and the lawfulness of a public law decision. The issues in the case are issues of public law, concerning the question whether it is lawful to grant a permit for international flights to and from northern Cyprus contrary to the wishes (and, as I would hold, the treaty rights) of the recognised state of which that territory forms part. The body of rules established by the authorities of the TRNC to govern civil aviation in northern Cyprus is relevant only in so far as it affects those issues of public law (as distinct, for example, from the question whether the rules are capable of giving rise to private rights of which our courts should take cognisance). This is not the kind of subject-matter at which the Namibia exception is directed.

It is almost certainly true that the opening up of international flights to northern Cyprus would be of great practical significance for persons resident in the territory, notwithstanding the evidence before the court that it is practical for visitors to the territory to use airports in the south of the island. But that does not bring the case within the exception. The mere fact that the impugned public law decision has a knock-on effect on private lives cannot be sufficient for the purpose. In my view, Mr Haddon-Cave's submissions read too much into the International Court of Justice's reference to the advantages derived from international co-operation and seek to give the exception far too wide a scope.”<sup>205</sup>

113. As such, particular acts in relation to a non-recognised entity must be addressed on a sliding scale. A mere “knock-on effect” to private lives cannot bring a generally public act within the scope of the Namibia exception, but at the same time, acts which “relat[e] to commercial obligations or matters of private law between individuals or matters of routine administration such as the registration of births, marriages or deaths”<sup>206</sup> will.

114. In practical terms, a UK court will not acknowledge the existence of an unrecognised State if to do so would involve them in acting inconsistently with the foreign policy or diplomatic stance of the UK.<sup>207</sup> UK courts will generally decline to adjudicate on such issues:

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<sup>205</sup> R (on the application of Kibris Turk Hava Yollari and another) v Secretary of State for Transport (Republic of Cyprus, interested party) [2010] All ER (D) 111 (Oct), paras 78-80.

<sup>206</sup> *Caglar v Billingham (Inspector of Taxes)* [1996] STC (SDC) 150, para 121.

<sup>207</sup> *Ibid.*, para 121.



“Constitutionally, the conduct of foreign affairs is exclusively within the sphere of the executive (*Jones, Gentle* in the Court of Appeal, *Abbasi*). While there may, exceptionally, be situations in which the court will intervene in foreign policy issues, this case is far from being one of them. The two strands considered, the nature of the underlying claim, that is condemnation of Israel, and the nature of the claim against the Government, that is a direction or declaration as to what foreign policy it should follow, operate together to demonstrate that the court should not be prepared to consider it.”<sup>208</sup>

115. Finally, I note that there is nothing inherently unlawful in the UK taking steps to restrict monetary flows between the UK and the settlements, either under UK or international law, but ultimately the answer to this question is contingent on the mechanism by which money is exchanged between the UK and the settlements. For example, the Banking Act 2009 only requires that transfers of foreign property<sup>209</sup> through UK banks be in accordance with “rights and liabilities under foreign law.”<sup>210</sup> Foreign law does not include international law, but only “the law of a country or territory outside the United Kingdom.”<sup>211</sup> There is nothing to *prevent* the UK Parliament from legislating to prohibit UK banks from directly financing the transfer of real property in the West Bank. However, it is also the case that the UK is under no international legal obligation to take any such action.

(2) *UK legislation*

116. The Proceeds of Crime Act 2002 (UK) only operates where an offender has been convicted of a relevant crime under the Criminal Justice Act 1988 in proceedings before the Crown Court or a magistrates’ court. The court has a duty to determine whether the offender has benefited from the relevant criminal conduct, and may make orders for the confiscation and recovery of any such benefit.<sup>212</sup> The relevant offences include blackmail, prostitution, drug trafficking, counterfeiting, money laundering, directing terrorism, people trafficking, arms trafficking or breaches of intellectual property.<sup>213</sup>

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<sup>208</sup> R (on the application of Al-Haq) v. Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 1910 (Admin), para 44 (Lord Justice Pill).

<sup>209</sup> Defined as “property outside the United Kingdom”: Banking Act 2009 (UK) s.39(2)(a).

<sup>210</sup> Banking Act 2009 (UK) s.39(2)(b).

<sup>211</sup> Banking Act 2009 (UK) s.39(8).

<sup>212</sup> See *Proceeds of Crime Act 2002* (c. 29) (UK) s.6; and formerly *Criminal Justice Act 1988* (UK) Pt VI. See also *Proceeds of Crime Act 1995* (c. 11) (UK).

<sup>213</sup> *Proceeds of Crime Act 2002* (c. 29) (UK) Sch. 2. Different provisions apply for crimes committed prior to 24 March 2003, but for the time being they are not considered relevant.

117. As such, questions of international law which could be pertinent to the settlement activity appear to be irrelevant. Moreover, no crime (international or domestic) has been committed by a State or corporation to the extent that it engages with Israeli settlements through trade or financial support. It might be a breach of the obligation to recognise Palestinian rights to self-determination and/or not to render aid to the de facto annexation of the occupied territories, but this is not a criminal offence.

118. In addition, it is highly unlikely that the provisions of either the Terrorist Asset-Freezing etc. Act 2010;<sup>214</sup> Anti-terrorism, Crime and Security Act 2001 or the Terrorism Act 2000 could be relevant to the settlements issue. To begin with, the relevant offences must be committed within the United Kingdom;<sup>215</sup> moreover, the definition of “terrorism” is unlikely to capture any of the settlement activity.<sup>216</sup> Although an act of serious damage to property or serious violence against a person may constitute an act of terrorism where the act is designed “intimidate the public or a section of the public” – the public referred to is undoubtedly the UK public. Palestinian persons will not be protected under UK law (unless, of course, they reside in the UK). If certain acts cannot be designated terrorist acts, any property or profits related to or deriving from that act cannot be pursued.<sup>217</sup>

119. The UK has also enacted the Geneva Conventions Act 1957, which provides that “any person, whatever his nationality, who, whether in or outside the United Kingdom, commits,

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<sup>214</sup> Terrorist Asset-Freezing etc. Act 2010 (c. 38) (UK) s.1(a) and (b): This Act only applies “a person designated by the Treasury for the purposes of this Part” or to “a natural or legal person, group or entity included in the list provided for by Article 2(3) of Council Regulation No 2580/2001 of 27 December 2001”. The defined entities include CIRA (Continuity Irish Republican Army), E.T.A (Basque Fatherland and Liberty), G.R.A.P.O (the First of October Anti-Fascist Resistance Group), Hamas-Izz al-Din al-Qassem (terrorist wing of Hamas), LVF (Loyalist Volunteer Force) and the PIJ (Palestinian Islamic Jihad). See Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344, 28 December 2001, 93–96.

<sup>215</sup> Terrorism Act 2000 (UK), s.130.

<sup>216</sup> Ibid., s. 1: (1) In this Act "terrorism" means the use or threat of action where (a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause. (2) Action falls within this subsection if it (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system. (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

<sup>217</sup> Ibid., s.14.

or aids, abets or procures the commission by any other person of, a grave breach”<sup>218</sup> of the Geneva Conventions or the Additional Protocols has committed an offence. Again, this Act does not extend to corporations. Individuals may be liable before UK criminal courts for a breach of Article 49(6), but the question of whether or not to prosecute such individuals rests with the Attorney General.<sup>219</sup>

120. Finally, the Human Rights Act 1998 (UK) gives direct effect in the UK to the rights enshrined in the European Convention on Human Rights (“ECHR”) and imposes a duty to ensure that UK legislation is interpreted and common law decisions made in a manner generally compatible with the Convention.<sup>220</sup> Where the decisions of the European Court of Human Rights (“ECtHR”) establishing the nature and extent of those human rights directly affect a UK case at first instance, they will be followed. The inapplicability of the ECHR to conduct beyond the UK is discussed Section H below. Suffice to say that the Human Rights Act cannot extend jurisdiction beyond that of the ECHR, which itself does not apply to conduct by Israel or in the West Bank.

## **H. EU Law**

121. I have also been asked to consider the application of principles of European Union law to the present issue. The European Union has been a key player in the political negotiations for a two-State solution: the European Union is a member of the Quartet<sup>221</sup> charged with overseeing negotiations between the Palestinian Authority and Israel, and in 2002 launched the ‘Road Map for Peace’ aimed at resolving the conflict. The EU is also the biggest donor of assistance to the Palestinians, providing around €500 million in aid per year.<sup>222</sup>

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<sup>218</sup> United Kingdom, *Geneva Conventions Act*, 1957, as amended in 1995, Section 1(1).

<sup>219</sup> *Ibid.*, Section 1A(3)(a) and (b).

<sup>220</sup> Human Rights Act 1998 (UK), s.1.

<sup>221</sup> Together with the UN, the US and the Russian Federation.

<sup>222</sup> Communication from the Commission to the Council and the European Parliament, ‘EU-Palestinian Cooperation Beyond Disengagement - Towards a Two-State Solution’, Brussels, Com(2005) 458 Final, 5 October 2005. Half of the figure comes from the EC budget and the remainder from bilateral EU Member State funding.

122. Following the Court's Advisory Opinion, the European Parliament issued a resolution on the EU's priorities and recommendations for the 61st session of the UN Commission on Human Rights, calling for...

“the adoption of a resolution calling for international law to be applied so that Israel's violation of its international obligations ceases, namely through the suspension of construction of the wall on lands that are on the West-Bank side of the internationally recognised ‘green line’ between Israel and the Palestinian Territories, its dismantling and the repeal of all legal or regulatory acts relating to its construction, and also so that third countries honour their obligations by refraining from supporting the building of the wall; calls on the Council and the Commission to intensify their efforts to achieve a just and lasting solution to the conflict in the Middle East through the negotiation of a firm and final peace agreement as laid out in the Roadmap for Peace, without prior conditions, based on the existence of two democratic and sovereign states — Israel and Palestine — coexisting peacefully side by side within secure and recognised frontiers; reaffirms its commitment to the creation of a viable sovereign Palestinian state in 2005”.<sup>223</sup>

123. According to the 2004 EU-Palestine Action Plan, made in the context of the European Neighbourhood Policy:

“Achieving Palestinian statehood requires full implementation of the Quartet Roadmap and an end to violence in order to reach a fair and lasting peace in the Middle East...the overall political situation in the region ... affects the scope of actions that can be feasibly undertaken. There are a number of constraints and limitations resulting from the ongoing Israeli-Palestinian conflict and the continuing occupation, including settlement activity, restrictions to movement as a result of the closure policy and the separation barrier. The limitations on the Palestinian Authority pending the creation of a Palestinian state must also be taken into account. Joint action will be required both to bring about the implementation of the Roadmap and to continue the preparations for statehood.”<sup>224</sup>

124. The EU High Representative for Foreign Affairs and Security Catherine Ashton has also stated: “The position of the EU is very clear: settlements are illegal under international law, constitute an obstacle to peace and threaten to make a two-state solution impossible”,<sup>225</sup>

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<sup>223</sup> European Parliament resolution on the EU's priorities and recommendations for the 61<sup>st</sup> session of the UN Commission on Human Rights in Geneva, *Official Journal* 304 E, 01/12/2005, P. 0375 – 0383 (para 7).

<sup>224</sup> EU/Palestine Authority Action Plan, 2004, available at: [http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc\\_146237.pdf](http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146237.pdf) .

<sup>225</sup> Statement by Catherine Ashton, High Representative for Foreign Affairs and Security, Policy of the European Union, on the Middle East peace talks, A190/10, Brussels, 27 September 2010.

and in its Conclusions on the Middle East Peace Process, the Council of the European Union reiterated that:

“The EU notes with regret that Israel has not extended the moratorium as requested by the EU, the US and the Quartet. Our views on settlements, including in East Jerusalem, are clear: they are illegal under international law and an obstacle to peace. We reiterate our views on the status of Jerusalem and repeat our call for all parties to refrain from provocative unilateral actions and violence.”<sup>226</sup>

125. In a recent session of the European Parliament, the European Commission stated that in respect of Israeli settlement produce:

“In the light of Article 207 of the Treaty on the Functioning of the European Union, and of Regulation 260/2009, measures in the field of trade policy are normally adopted at EU level. A Member State cannot adopt import measures unless specifically authorised in an act of the Union or, unless, on the basis of Regulation 260/2009 it can justify its action on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property, and in doing so it does not infringe EC law.”<sup>227</sup>

Pursuant to Article 1 of Regulation 260/2009,<sup>228</sup> products originating in third countries “shall be freely imported into the Community and shall not generally be subject to any quantitative restrictions.” However, the Commission is correct to state that there is nothing which can prohibit a Member State from adopting more restrictive import measures on public policy grounds. The obligation to comply with the requirements of international law and the obligation of non-recognition are matters of executive prerogative which fall within the grounds of a “public policy” decision. There do not appear to be any EC laws which could be breached by a Member State taking the decision to ban the import of settlement produce on public policy grounds. In fact, Member States that wish to block the import of settlement

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<sup>226</sup> Council conclusions on the Middle East Peace Process, 3058<sup>th</sup> Foreign Affairs Council Meeting, Brussels, 13 December 2010, available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/118448.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118448.pdf) (para 2).

<sup>227</sup> European Parliament, Rule 117, Question for written answer to the Commission, Marian Harkin (ALDE) E-000047/11, 7 February 2011, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-000047+0+DOC+XML+V0//EN&language=EN>.

<sup>228</sup> Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports, OJ L 84, 31 March 2009.

produce could have recourse to Article 2 of the European Communities Association Agreement with Israel,<sup>229</sup> which states that:

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

126. Victor Kattan has argued that Member States of the European Community have an obligation to “invoke the human rights clause in Article 2 of the Association Agreement as a means for bringing to an end – through lawful means – Israel’s violations of both international humanitarian and human rights law, by withdrawing the terms of preferential trade provided by the association regime.”<sup>230</sup> However, while such an option is open to Member States, and indeed could be considered a viable means of putting into effect the obligation to “ensure compliance by Israel with international humanitarian law”, there is no basis for asserting that Member States are obliged to take such a course.

127. The EC-Israel Association Agreement provides for the liberalisation of trade and free movement of goods between Israel and the EC. Customs duties on imports and exports from Israel are excluded.<sup>231</sup> The European Court of Justice has confirmed that “products originating in the West Bank do not fall within the territorial scope of [the EC-Israel] agreement and do not therefore qualify for preferential treatment under that agreement.”<sup>232</sup> The Court concluded that only the EC-PLO Association Agreement (and the related Protocols) applies to the territory of the West Bank and the Gaza Strip.<sup>233</sup> Under Article 2(2) of the EC-PLO Protocol, “products wholly obtained in the West Bank and the Gaza Strip are to be treated as products originating in the West Bank and the Gaza Strip, as are products

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<sup>229</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, 20 November 2008, *Official Journal L 147*, 21/06/2000.

<sup>230</sup> Victor Kattan, ‘The Wall, Obligations Erga Omnes and Human Rights: The Case for Withdrawing the European Community’s Terms of Preferential Trade with Israel’ 13 *Palestine Yearbook of International Law* (2004/2005) 72, 89.

<sup>231</sup> Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, 24 February 1997, *Official Journal L 187*, 16/07/1997 P. 0003 – 0135.

<sup>232</sup> Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, Court of Justice of the European Union (Fourth Chamber) Judgment, 25 February 2010, para 53.

<sup>233</sup> *Ibid.*, para 47.

obtained in the West Bank and Gaza Strip incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the West Bank and Gaza Strip.”<sup>234</sup> As such, preferential customs treatment under the EC-Israel Association Agreement should not extend to settlement produce. However, the European Court of Justice has only held that Member States *may* refuse such preferential treatment where the goods concerned originate in the West Bank – not that Member States are obliged to take extraordinary steps to ensure that they do so. In fact, it is only where insufficient information is supplied to enable the real origin of the products to be determined that the customs authorities are entitled to refuse to grant preferential treatment in respect of those products.<sup>235</sup>

128. More generally, the principle of collective non-recognition has been applied by the European Court of Human Rights in a series of cases concerning Northern Cyprus (“TRNC”). In particular, the ECHR has upheld the rights of displaced persons pursuant to Article 8 of the European Convention on Human Rights and Article 1 of the Convention’s First Protocol. Article 8 states:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 1 of the Protocol states:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

The Security Council in resolutions 541 (1983) and 550 (1984) declared the legal invalidity of the TRNC and called on States not to recognize it. Relying on these resolutions, in 1996, the European Court of Human Rights in the case of *Loizidou v. Turkey* found that Turkey was responsible for the acts of the TRNC (on the basis of its “effective control” over the territorial

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<sup>234</sup> Ibid., para 25.

<sup>235</sup> Ibid., para 65.

area of the TRNC<sup>236</sup>), that the expropriation of private property by the TRNC amounted to a denial of access to the property, and as such constituted an unlawful interference with Loizidou's right to property.<sup>237</sup> In particular, the ECHR found that Loizidou remained in ownership of property and awarded the claimant compensation for Turkey's interference with her right to full enjoyment of her property. The ECHR reasoned that it was evident from international practice that the international community did not regard the "TRNC" as the lawful authority over the territory, and that the Republic of Cyprus had remained the sole legitimate Government of Cyprus.<sup>238</sup> The decision of the ECHR in *Loizidou* has been upheld in subsequent cases – in none of the cases have the acts of the TRNC been accepted as valid.<sup>239</sup>

129. Israel is not a party to the European Convention. As such, the ECHR has no direct application to the unlawful acts of Israel. Moreover, the ECtHR's jurisdiction only extends to applications by an ECHR Contracting State or individual alleging a breach by a Contracting State of one of the Convention rights. Since Convention rights do not apply in Israel or the Occupied Palestinian Territories, the issue is moot.<sup>240</sup>

130. Although property rights or other interests acquired (by States, individuals or corporations) in support of the settlements would not be opposable to an independent Palestine, this does not imply any positive obligations for third States.

131. Finally, as a matter of *realpolitik*, the European Union has demonstrated political disinterest in upholding the right to self-determination in relation to the analogous situation in Western Sahara. The recently-extended Fisheries Partnership Agreement ("FPA") entered into between Morocco and the European Communities provides for fishing rights over the offshore territory of Morocco, including the unlawfully annexed territory of Western

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<sup>236</sup> *Loizidou v. Turkey (Preliminary Objections)*, Judgement of 23 March 1995, Series A, No. 310, para 62.

<sup>237</sup> *Loizidou v. Turkey (Merits)*, Judgment of 18 December 1996, ECHR (1996) Series A, No. 4, para 64.

<sup>238</sup> *Loizidou v. Turkey (Merits)*, para 44.

<sup>239</sup> *Case of Cyprus v. Turkey (Merits)*, Judgment of 10 May 2001, ECHR (2001) Series A, No. 4, 5, 30-31; *Case of Ilascu and Others v. Moldova and Russia*, Application no. 48787/59, Judgment of 8 July 2004, paras 458-459; *Xenides-Arestis v. Turkey (Merits and Just Satisfaction)* Application no. 46347/99, Judgment of 22 December 2005; *Xenides-Arestis v. Turkey (Just Satisfaction)* Application no. 46347/99, Judgment of 7 December 2006, paras 36-37.

<sup>240</sup> See *Bankovic v Belgium*, European Court of Human Rights (Grand Chamber), Decision as to the Admissibility of Application no. 52207/99, 12 December 2001, para 80: "The Convention was not designed to operate throughout the world, even in respect of conduct of Contracting States." 41 ILM 517 (2002), 530.



Sahara.<sup>241</sup> There is no doubt that the FPA, like its predecessor agreements, contravenes the right to self-determination of the people of Western Sahara and well as the principle of non-recognition; yet there have to date been no legal repercussions for any State party.

132. In conclusion, there do not appear to be any potential consequences under EU law or under the ECHR for States or private entities engaged in operations within the Israeli settlements, with the exception that settlement produce cannot knowingly be granted preferential customs status by Member States under the EC-Israel Association Agreement. There is no basis as a matter of law to suggest that the Agreement is designed to permit Israel to procure preferential status for goods emanating from the West Bank. The import of goods emanating from the West Bank is governed by the terms of the EC-PLO Association Agreement; the EC-Israel Association Agreement simply does not apply to the territory of the West Bank. As such, in no way can a Member State, acting reasonably to exclude settlement goods from receiving preferential treatment, be said to be aiding or assisting Israel in the promulgation of a breach of international law. There is no obligation on States to implement additional measures beyond those already provided for under the relevant Agreements.<sup>242</sup>

133. For the sake of completeness, it might also be mentioned that in extending a ban on settlement trade, the EC would not be in breach of its obligations under the General Agreement on Tariffs and Trade (GATT), now subsumed within the covered agreements of the World Trade Organization (WTO).<sup>243</sup> Although GATT Article I requires that most favoured nation treatment be extended to Israel as a WTO Member, and GATT Article XI forbids the use of quantitative restrictions such as a ban on imports, both these provisions are phrased in terms of products originating in the ‘territory’ of another WTO Member. As a matter of international law, the West Bank and Gaza cannot be considered to be Israel’s territory; thus the EC is not prevented by its GATT/WTO obligations from banning settlement trade.

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<sup>241</sup> Council Regulation EC No 764/2006 of 22 May 2006 (OJ L141 of 29 May 2006). The current Fisheries Partnership Agreement between the EU and Morocco entered into force on 28 February 2007. The most recent Protocol to this Agreement ran until 27 February 2011. Vessels from 11 EU Member States could obtain fishing licences from Morocco under the Agreement and its Protocol. On 25 February 2011 a one-year extension of the Protocol was signed by the parties but has yet to be ratified.

<sup>242</sup> Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, Court of Justice of the European Union (Fourth Chamber) Judgment, 25 February 2010, para 65.

<sup>243</sup> Marrakesh Agreement establishing the World Trade Organization (Annex 1A: GATT) (signed 15 April 1994; entry into force 1 January 1995) 1867 U.N.T.S. 154.

## I. Conclusions

134. The International Court's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory set out distinct legal obligations for third States. In particular, the Court noted the fundamental right of the Palestinian people to self-determination.<sup>244</sup> In the circumstances, Israel is obliged to administer the territory of the West Bank in accordance with the principles of usufruct.

135. To the extent that a third State's involvement in Israel's settlement activity can be characterized as recognition, aid or assistance, it would be incompatible with international law; a State would be liable for its own conduct in accordance with the ILC Articles on State Responsibility. Such a determination would depend on the particular facts, including the source of the settlement land, as well as to considerations of causation. However, it is doubtful whether States have any positive obligations to ensure Israel's compliance with international humanitarian law. The ILC Articles require only collective action.

136. UK law has followed international law in this respect. It is not unlawful for the UK government to purchase settlement goods or otherwise engage with the settlements under UK law – provided that such engagement falls within the *Namibia* exception. Moreover, a private sector entity or person does not bear any international legal responsibility for aiding or assisting the unlawful settlement program, nor for ensuring that the people of Palestine can exercise their right to self-determination, nor for ensuring that Israel complies with its obligations under international law.

137. Given previous State practice, it is highly unlikely that any legal consequences will eventuate should an individual State continue to engage with the Israeli occupation regime and the settlements. The fact remains that where the political will does not exist to implement it, international law can be rendered ineffective. The law does not thereby change, however, and given a change in the political landscape, it retains the potential to become influential; and there is certainly some moral hazard in a State neglecting its obligation to promote the Palestinian right to self-determination.

138. Nonetheless, the following arguments could be influential:

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<sup>244</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004, p. 136, 199 (paras 155-156).

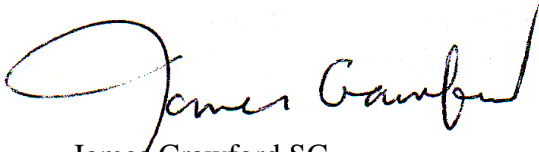
- The purchase of settlement agricultural produce, or the construction of infrastructure within the settlements, could amount to aiding and assisting the ongoing breach of Articles 43 and 55 of the 1907 Hague Regulations, and the general breach of the Palestinians’ rights to self-determination and sovereignty over their natural resources. This could engage the assisting State’s responsibility under Articles 16 and 41(2) of the ILC Articles on State Responsibility;
- Although the European Convention does not apply here, the ECHR’s ruling in *Loizidou v. Turkey* highlights the unlawfulness of any purported transfer of property, where that transfer is in breach of fundamental principles of human rights.
- Property rights acquired by States, individuals or corporations in support of the settlements would not be opposable to an independent Palestine as a matter of general international law;
- Considerations of public policy together with Article 2 of the EC-Israel Association Agreement could be used by States to withdraw the terms of preferential trade provided to Israel by the Agreement or to ban settlement trade. A full ban, however, could only be based on EC Regulation 260/2009 and considerations of public policy, which remain within the purview of the individual EC Member States: thus the decision to extend such a ban would need to be made by each Member individually.
- A corporation engaged in breaches of human rights in the West Bank could leave itself open to litigation in the US pursuant to the Alien Tort Statute, although as a result of the decision in *Kiobel v. Royal Dutch Petroleum* this is for the time being unlikely to succeed. The Supreme Court’s grant of *certiorari* with respect to this decision, however, indicates that the debate is not yet over and it is possible that the Second Circuit’s conclusions in that case may be reversed.

139. Unfortunately, the present reality of the political situation in Palestine is such that it is unlikely that any adverse legal ramifications will result from States or private entities continuing to engage with the unlawful settlements. As noted by the Court in its *Namibia* judgment: “the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end.”<sup>245</sup>

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<sup>245</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, 52 (para 111).

Regrettably, the political will does not seem to exist at present to enforce principles of international law in respect of the settlements.

A handwritten signature in black ink, reading "James Crawford". The signature is fluid and cursive, with a large initial 'J'.

James Crawford SC

Matrix Chambers, London

24 January 2012