



The Economic Costs of the Israeli Occupation for the Palestinian People and their Human Right to Development: Legal Dimensions





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Note

This study was prepared by the UNCTAD secretariat, drawing on a study prepared for UNCTAD by Mr. John B. Quigley, Professor Emeritus, Moritz College of Law, The Ohio State University, United States of America. This study seeks to stimulate debate on the research subject.

References to dollars (\$) mean United States dollars.

Executive summary

United Nations General Assembly resolutions 69/20, 70/12 and 71/20 request the United Nations Conference on Trade and Development (UNCTAD) to assess and report on the economic costs of the Israeli occupation for the Palestinian people. The objective of this study is to ensure that any upcoming economic analyses and reports on the costs of occupation are fully within the bounds of international law and the parameters set by the relevant United Nations resolutions.

Israel bears legal responsibility for the costs it has entailed during its occupation of Palestinian territory. This responsibility is separate from Israel's obligation to withdraw from that territory. The legal responsibility of a belligerent occupant for the negative economic consequences of actions in violation of humanitarian law survives the occupant's departure. Israel is responsible both for economic harm it has occasioned and for unjust enrichment it has derived. It also bears an obligation under international law to further the development of the economy for the population whose territory it occupies.

Israel's obligation in this regard can be found in the humanitarian law developed to protect populations under belligerent occupation. Its obligation is also grounded in the law of human rights, which protects populations during both war and peace. In other instances of belligerent occupation that have occurred, occupying Powers that have caused harm have been recognized to bear an obligation for restitution. This has been ordered by international courts and the Security Council of the United Nations, and has been provided for in peace treaties.

The international community as a whole bears an obligation to ensure that in the case of the Occupied Palestinian Territory, the belligerent occupant is held accountable for harm caused in the course of occupation. Belligerent occupation is a situation that has been recognized by the international community as requiring collective action to ensure compliance with the norms that govern it. This collective responsibility is reflected in treaty law and in international practice.

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Acronyms

GDP	gross domestic product
ICJ	International Court of Justice
PNA	Palestinian National Authority
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization

I. Introduction: Why this study?

A. United Nations mandate

This study has been prepared by the UNCTAD secretariat in response to three General Assembly resolutions (69/20, 70/12 and 71/20), which request UNCTAD to assess and report on the economic costs of the Israeli occupation for the Palestinian people. In 2015, UNCTAD prepared a note to the General Assembly entitled “Economic costs of the Israeli occupation for the Palestinian people”.¹ In 2016, UNCTAD prepared a more detailed note, which was presented at the seventy-first session of the General Assembly.²

In these preliminary notes, UNCTAD emphasized that occupation continues to impose heavy economic costs on the Palestinian people, and highlighted the urgent need for an evaluation of these costs and understanding of their impact on the prospects for the welfare of the Palestinian people and for economic development in the Occupied Palestinian Territory.

UNCTAD also elaborated on the need to establish within the United Nations system a systematic, evidence-based, comprehensive and sustainable framework for estimating the economic costs of occupation, and to report on the results to the General Assembly, not only to fulfil the requests in the aforementioned resolutions, but also to achieve a realistic pursuit of the Sustainable Development Goals in the Occupied Palestinian Territory and for forging a just and lasting peace in the Middle East.

The preliminary work of UNCTAD considered how to implement the task on the economic costs of occupation, outlined its scope, highlighted historical precedents for similar situations and assessed the resources required for implementation. This work stressed that assessing and quantifying the historical and recurrent economic costs of occupation in a systematic, scientific and evidence-based way on a regular basis, and regularly documenting, updating and maintaining an inventory of historical and evolving costs, was a substantial, multi-year task that required significant additional resources.

It is critical to recognize that this detailed work of assessing, estimating and reporting on the economic costs of the Israeli occupation for the Palestinian people needs to be based on solid scientific and legal grounds, to clearly delineate the limits of implementation and details of the work. In this regard, the present study is intended to guide the analysis of economists and other professionals in their implementation of the above-mentioned General Assembly resolutions. The objective of the study is to

¹ *Official Records of the General Assembly*, 2015, *Seventieth session, Supplement No. 35*, A/70/35, pp. 28–32.

² United Nations, General Assembly, 2016, *Economic costs of the Israeli occupation for the Palestinian people*, A/71/174, New York, 21 July.

ensure that any upcoming economic analyses and reports on the costs of occupation are fully within the bounds of international law and the parameters set by the relevant United Nations resolutions.

B. Preliminary indicators of the magnitude of the cost of occupation

In its report to the General Assembly in 2016, UNCTAD emphasized that estimations of the cost of occupation and potential remedies should not be perceived as a substitute for ending the occupation.³ Furthermore, not all occupation-related costs can be assigned a monetary value. Losses that cannot be assigned a monetary value include, but are not limited to, loss of life, loss of normal family and community life and loss of neighbourhood, culture, shelter and homeland. Therefore, the most that any assessment of the economic costs of occupation can achieve is a partial tally of a much greater loss.

Ample evidence has accumulated to show that occupation has resulted in the destruction of Palestinian productive assets and the appropriation of land and natural resources by the occupying Power. Occupation has impoverished the Palestinian people, undermined their capacity to access and utilize their resources and denied them the right to move freely within their homelands to conduct normal economic and social transactions among themselves, and with their neighbours and trading partners throughout the world.

The Palestinian National Authority (PNA) was established in 1994. However, the Palestinian people have never had sovereign control over their economy. The severe constraints and measures imposed by occupation have stifled the Palestinian economy, prior to and since the Oslo Accords. These constraints and measures have resulted in restrictions on the movement of people, labour and goods; systematic erosion of the productive base; the confiscation of land, water and other natural resources; separation from international markets; more than a decade of blockade and economic siege in the Gaza Strip; and the costly fragmentation of the Palestinian economy into three disjointed, disintegrated regions, in the Gaza Strip and the West Bank, including East Jerusalem.

Furthermore, the Palestinian people have no access to Area C (which accounts for more than 60 per cent of West Bank area) and more than two thirds of grazing land, with over 2.5 million productive trees destroyed under occupation since 1967. It is estimated that the ongoing occupation of Area C imposes a cost on the Palestinian economy of about 35 per cent of gross domestic product (GDP) and close to \$1 billion in lost tax revenue. The Palestinian people are prohibited from maintaining or constructing water wells. However, Israel has been extracting water above the level determined in the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (known as the Oslo II Accord),

³ Ibid.

signed in 1995, confiscating 82 per cent of Palestinian groundwater for its own use. This loss of water forces Palestinians to import from Israel over 50 per cent of the water they consume (see chapter V).

By 2005, at least one third of pre-2000 Palestinian physical capital had been lost. Occupation has stifled the industrial sector and limited the private sector to small-scale operations with low capital intensity, low labour productivity and impaired competitiveness in domestic and foreign markets. In the post-Oslo Accords period, occupation has forced a technological regression and steady decline on Palestinian total factor productivity. Had the pre-Oslo Accords growth trend continued, Palestinian real GDP per capita could have been at least double its current size.

In the Gaza Strip, the cost of three Israeli military operations between 2008 and 2014 is estimated to be at least three times the GDP of Gaza. In addition, restrictions on fishing off the coast of Gaza render 85 per cent of fishery resources inaccessible to Palestinian fishers, and half of the cultivable area remains out of reach for producers (see chapter V).

On the fiscal front, partial estimations reveal that the Palestinian revenue that leaks to the treasury of Israel is in the range of 3.6 per cent of GDP, or 17 per cent of total Palestinian public revenue. If captured, the leaked revenue could expand Palestinian fiscal policy space and increase annual GDP by about 4 per cent, and generate 10,000 additional jobs per year.⁴ A comprehensive assessment of all sources of leakage would, in all likelihood, reveal a much greater leakage of Palestinian revenue and a higher magnitude of related overall economic loss.

Numerous studies have concluded that, without occupation, Palestinian national income would be at least twice that of its current level. However, as the UNCTAD report to the General Assembly in 2016 indicates, all previous studies on the economic costs of the occupation were not conducted within a single comprehensive framework that could calculate the different types of losses and the direct and indirect costs in all economic sectors, while avoiding double counting. UNCTAD concluded that the previous studies had merely scratched the surface of determining the much higher economic costs of occupation, and therefore recommended the establishment within the United Nations system of a systematic, evidence-based, comprehensive and sustainable framework for estimating and documenting the economic costs of the Israeli occupation for the Palestinian people.

⁴ UNCTAD, 2014, *Palestinian Fiscal Revenue Leakage to Israel under the Paris Protocol on Economic Relations* (United Nations publication, New York and Geneva).

C. Organization of the study

This study is organized into seven chapters. Following this introductory chapter, chapter II sets the legal boundaries by briefly establishing the obligations of Israel under international law in relation to the Occupied Palestinian Territory. Chapter III sheds light on obligations with regard to the economy in the Regulations respecting the Laws and Customs of War on Land of 18 October 1907 (Hague Regulations) and the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention). Chapter IV focuses on obligations with regard to the economy in the customary law of human rights and in international human rights treaties, including the obligation of an occupying Power to promote economic development. Chapter V provides a partial list of actions that have been undertaken by Israel in the Occupied Palestinian Territory that could be considered as costs for the Palestinian people. Chapter VI discusses the international position regarding the legal obligation of Israel as an occupying Power, and the obligation of the international community to ensure that Israel meets its obligation. Chapter VII lists three categories of international precedents for the obligation of a belligerent occupant to remedy the costs of occupation. Finally, Chapter VIII concludes the study with some recommendations.

II. International legal obligations of Israel in relation to the Occupied Palestinian Territory

The economic cost of the Israeli occupation of the Palestinian territory falls on the population of that territory. To the extent that the population is deprived of resources, deprived of the ability to gain from economic activity and deprived of the ability to promote future economic development, damage is inflicted on them, collectively and individually. This cost carries a price tag for which Israel is responsible. The costs for the Palestinian population may result from practices that impede the Palestinian economy and may also result from a failure to promote economic development.

Under international law, a regime has been established for a situation in which a foreign power assumes control of a territory by military means against the will of the government of that territory. Such a regime is termed “belligerent occupation”, meaning that the foreign power has entered into occupation in a situation of belligerency. There need not be any actual hostilities if the forces of the territory in question are unable to oppose the occupation. If there are hostilities leading to occupation, it is irrelevant whether the hostilities were such that they incurred the legal responsibility of the occupant. A State that occupies territory even while acting in lawful self-defence assumes the status of a belligerent occupant. Were a foreign power to enter into control by agreement with the sovereign power of the territory, for example by a treaty of cession of territory, its occupation would not be belligerent. That is, in the absence of consent, an occupation is deemed to be belligerent.

Such a scenario is presumed in the law to be of a temporary nature. Under international law, a foreign power may not acquire sovereignty over a territory by military means. The presumption is that the foreign power will withdraw, typically upon conclusion of a treaty of peace. While the foreign power is in control of the territory, it is regarded as holding a role comparable to that of a trustee, as referred to in the domestic law of many nations. The foreign occupant is considered to be holding the territory as a temporary replacement of the legitimate sovereign, under an obligation to carry out policies that promote the well-being of the population. It is responsible for the welfare of the population, in particular for safeguarding the capacity of the population to engage in normal economic activity.

A body of law has been developed in the international community to regulate the actions of a belligerent occupant with regard to the population of the territory it occupies. It is part of a larger body of law called *jus in bello*, the law related to actions taken in the context of war. The latter is separate from the body of law called *jus ad bellum*, the law related to the conditions for the initiation of warfare. No matter how a war is assessed under *jus ad bellum*, a resulting occupation falls under *jus in bello*. The term “humanitarian law” is also used to describe obligations in warfare, including the obligations of a belligerent occupant.

The applicability of the law on belligerent occupation to such situations is seen in resolutions adopted by the United Nations Security Council in 2003 with regard to Iraq. Upon the displacement of the Government of Iraq by outside military forces, the Security Council, in its resolution 1472,

urge[d] all parties concerned [to act] consistent with the Geneva Conventions and the Hague Regulations.⁵

This reference to the Geneva Conventions and the Hague Regulations were to the body of law that governs belligerent occupation, *jus in bello*. The Security Council made no statement regarding the initiation of hostilities, or *jus ad bellum*, and did not have to do so in order to establish that the resulting displacement of the Government of Iraq and its replacement by an administration composed of representatives of other States constituted a belligerent occupation. The Security Council, in its resolution 1483,

call[ed] upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.⁶

A violation of these legal obligations results in a secondary and consequent legal obligation to remedy the violation by restoring the prior existing situation to the extent possible. This is called restitution, and entails that to the extent that the prior existing situation cannot be fully restored, the resulting economic loss must be remedied. There are ample precedents in international practice for the legal obligations of a belligerent occupant and for a secondary and consequent legal obligation to provide a remedy. Israel also bears a legal obligation to mitigate the negative consequences of illegal acts.

In its advisory opinion on the legality of the threat or use of nuclear weapons, the International Court of Justice (ICJ) considered humanitarian law, noting that

the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.⁷

Given the status of Israel in the Occupied Palestinian Territory as that of belligerent occupant, the Security Council, as reflected in resolution 446, regards the Fourth Geneva Convention as applicable to the territories occupied since 1967.⁸ The Fourth Geneva Convention is a treaty to which Israel is a party.⁹

⁵ United Nations, Security Council, 2003, Resolution 1472 (2003), S/RES/1472, New York, 28 March.

⁶ United Nations, Security Council, 2003, Resolution 1483 (2003), S/RES/1483, New York, 22 May.

⁷ ICJ, 1996, *Legality of the threat or use of nuclear weapons, Advisory Opinion, ICJ Reports 1996*, p. 226, para. 79.

⁸ United Nations, Security Council, 1979, Resolution 446 (1979), S/RES/446, New York, 22 March.

⁹ See <https://www.fdfa.admin.ch/eda/fr/dfae/politique-exterieure/droit-international-public/traites-internationaux/depositaire/protection-des-victimes-de-la-guerre.html>

In a case involving the West Bank, for example, ICJ found the Fourth Geneva Convention to apply, stating that

that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.¹⁰

This conclusion is not disputed by the Supreme Court of Israel. It also considers the status of Israel in the Occupied Palestinian Territory to be that of a belligerent occupant. There have been a number of occasions in which the Supreme Court of Israel has needed to identify the status of Israel in the Occupied Palestinian Territory. In one judicial decision related to the territory, the Supreme Court of Israel stated that “Israel holds the area in belligerent occupation (*occupatio bellica*)”.¹¹ In petitions challenging the legality of various actions taken by authorities of Israel in the Occupied Palestinian Territory, the Supreme Court of Israel has provided assessments of the Government’s actions in the light of the status of Israel as a belligerent occupant. In addition, the Hague Regulations are accepted by the Supreme Court of Israel as reflecting the customary international law with regard to belligerent occupation.

Beyond the law regulating the activity of a belligerent occupant, Israel is also bound by the law of human rights. This body of law, found in customary rules that have developed through the practice of States worldwide, as well as in treaties, binds a belligerent occupant as it binds all States. In many situations, obligations under humanitarian law and under human rights law are identical. In order to assess the legal responsibility of Israel, obligations under both humanitarian law and human rights law must be identified. Chapter III addresses obligations under humanitarian law and chapter IV addresses obligations under human rights law.

¹⁰ ICJ, 2004, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 136, para. 101.

¹¹ Supreme Court of Israel, 2004, *Beit Sourik Village Council v. The Government of Israel*, High Court of Justice 2056/04, para. 23.

III. Economic issues under the Hague Regulations and the Fourth Geneva Convention

The two principal international instruments on belligerent occupation are the Hague Regulations and the Fourth Geneva Convention.

A. Economic issues under the Hague Regulations

A number of conventions on the law of warfare were concluded at the second International Peace Conference, held in The Hague in 1907 as a follow-up to the first International Peace Conference, called by Czar Nicholas II of Russia and Queen Wilhelmina of the Netherlands, held in The Hague in 1899. The Hague Regulations are annexed to the Convention respecting the Laws and Customs of War on Land, adopted in 1907. Israel is not a party to the Convention respecting the Laws and Customs of War on Land. However, the Hague Regulations have become generally accepted to the extent that they constitute norms of customary international law. The Supreme Court of Israel has found the Hague Regulations to be binding on Israel since early on during the occupation.¹² The Hague Regulations were adopted over a century ago, yet remain the most important international instrument on the conduct of a belligerent occupant. They have been supplemented by rules in the Fourth Geneva Convention, yet the Hague Regulations set the framework for belligerent occupation and have been called a constitution for belligerent occupation. The rules on belligerent occupation are contained in section III of the Hague Regulations, as follows:

SECTION III. MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE

Article 42. Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

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

Article 44. A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.

Article 45. It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

Article 46. Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

¹² Israel Yearbook on Human Rights, 1988, *Israel Yearbook on Human Rights*, Vol. 18 (Martinus Nijhoff Publishers, London), p. 248 (*Bahij Tamimi et al v. Minister of Defense et al*, No. 507/85).

Private property can not be confiscated.

Article 47. Pillage is formally forbidden.

Article 48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

Article 49. If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

Article 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.

Article 51. No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors.

Article 52. Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Article 53. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Article 54. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

Article 55. 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.

Article 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.¹³

With regard to section III of the Hague Regulations, one major caveat should be noted, namely that the Convention respecting the Laws and Customs of War on Land and the accompanying Hague Regulations were concluded in the French language and in no additional language. The English text is an unofficial, non-authoritative translation. The issue of authenticity has caused a significant interpretive issue with regard to article 43, which is the most important proposition in section III, as it is the basic rule on the obligations of a belligerent occupant. It posits that a belligerent occupant is not sovereign in the territory over which it assumes control, that control is temporary and that the occupant will in due course withdraw. While in occupation, an occupying Power is not to change the existing legal order; it must apply the laws that it finds in force there. While it may take action to protect its forces, it must respect the population, their customs and their way of life. It may not exploit the people or resources for its own benefit.

The issue of translation arises with regard to one key phrase in article 43, namely that the occupying Power shall take all measures to ensure “public order and safety”. This English phrase does not adequately translate the French phrase “l’ordre et la vie publics”. It is widely recognized by authorities that have interpreted article 43 that the phrase in French imposes a broader obligation on an occupying Power than may be understood from the phrase in English. One analysis of the Hague Regulations takes “la vie publics” to mean “social functions and ordinary transactions which constitute daily life”.¹⁴ The Supreme Court of Israel has also recognized that the original French text is the one that must be used, and that it provides broader protection for an occupied population than may be understood from the unofficial English translation, noting that the English translation does not accurately reflect the meaning of article 43.¹⁵

The Supreme Court of Israel has had occasion to apply article 43 in a number of cases in which Palestinian plaintiffs have challenged an action taken by authorities of Israel, and takes “l’ordre et la vie publics” to mean that Israel as a belligerent occupant must maintain “public life and order in a modern and civilized State at the end of the twentieth century”.¹⁶ In *Bahij Tamimi et al v. Minister of Defense et al*, the Supreme Court of Israel applied article 43 to overturn a military order that denied permission to a group of lawyers to form a professional association, reasoning that associations of

¹³ International Committee of the Red Cross, 2017, Treaties, States parties and commentaries, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4D47F92DF3966A7EC12563CD002D6788> (accessed 8 December 2017).

¹⁴ E Schwenk, 1945, Legislative power of the military occupant under article 43, Hague Regulations, *Yale Law Journal*, 54(2), 393–416, p. 398.

¹⁵ Israel Yearbook on Human Rights, 1993, *Israel Yearbook on Human Rights*, Vol. 23 (Martinus Nijhoff Publishers, London), pp. 19–20.

¹⁶ Israel Yearbook on Human Rights, 1988, *Israel Yearbook on Human Rights*, Vol. 18 (Martinus Nijhoff Publishers, London).

lawyers to regulate their affairs and to ensure standards of ethics in the practice of law were a feature of life in a modern society, and thus the fact that lawyers should maintain such associations were a feature of the public life of a society.

B. Economic issues under the Fourth Geneva Convention

Obligations on economic issues in the context of a belligerent occupation are also found in the Fourth Geneva Convention, the fourth in a series of treaties on the law of warfare concluded at Geneva in 1949.¹⁷ Its provisions on belligerent occupation were intended to supplement the Hague Regulations. Provisions regarding occupied territory are in sections I and III of the Fourth Geneva Convention; section I contains provisions applicable both in the territories of the parties to a conflict and in occupied territories and section III contains provisions applicable exclusively in occupied territories. The provisions in the two sections of part III that most directly affect economic activity in an occupied territory are as follows:

SECTION I. PROVISIONS COMMON TO THE TERRITORIES OF THE PARTIES TO THE CONFLICT AND TO OCCUPIED TERRITORIES

Article 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

...

Article 30. Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.

Apart from the visits of the delegates of the Protecting Powers and of the International Committee of the Red Cross, provided for by Article 143, the Detaining or Occupying Powers shall facilitate as much as possible visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.

...

¹⁷ United Nations, 1950, *Treaty Series*, vol. 75, No. 973.

Article 33. No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.

...

SECTION III. OCCUPIED TERRITORIES

Article 47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

...

Article 49. Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

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

...

Article 52. No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.

Article 53. Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.¹⁸

¹⁸ Ibid.

IV. Economic issues in human rights law

Obligations on economic and social issues fall on Israel as a belligerent occupant under the law of human rights. These obligations are found both in the customary law of human rights and in treaties that prescribe rights. Economic and social issues find significant reflection in the law of human rights. An occupant is bound to respect rights found in the law of human rights, a body of law that applies in both peace and war.

A. Customary law of human rights: Right to development and labour rights

According to Buergenthal and Murphy,

customary international law develops from the practice of States. To international lawyers ‘the practice of States’ means official governmental conduct reflected in a variety of acts, including official statements at international conferences and in diplomatic exchanges, formal instructions to diplomatic agents, national court decisions, legislative measures, or other actions taken by governments to deal with matters of international concern.¹⁹

Furthermore, a State is responsible, as a customary obligation, for

a consistent pattern of gross violations of internationally recognized human rights.²⁰

Israel is a party to treaties that specify rights that are part of customary law and that are relevant to the actions of Israel in the Occupied Palestinian Territory. Specific rights are addressed in section B.

The General Assembly included a right to development in the Universal Declaration of Human Rights, article 28 of which states that

everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.²¹

The General Assembly reiterated this statement in its Declaration on the Right to Development.²²

The Universal Declaration of Human Rights includes a number of rights that facilitate economic development. By ensuring these rights, States create a basis for economic development. These rights include a right to own property, both alone and in association with others (article 17), a right to freedom of association (article 20), a right to social security (article 22), a “right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”, and

¹⁹ T Buergenthal and SD Murphy, 2007, *Public International Law in a Nutshell*, fourth edition (West Publishing, St. Paul, United States), pp. 22–23.

²⁰ American Law Institute, 1987, *Restatement of the Law Third: The Foreign Relations Law of the United States* (St. Paul, United States), para. 702 (g).

²¹ United Nations, General Assembly, 1948, Universal Declaration of Human Rights, Resolution 217 A (III), New York, 10 December.

²² United Nations, General Assembly, 1986, Declaration on the Right to Development, A/RES/41/128, New York, 4 December.

a right to form and join trade unions (article 23), a right to rest and leisure (article 24), a “right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (article 25) and a right to an education that is “directed to the full development of the human personality” (article 26).²³

The Universal Declaration of Human Rights expresses obligations under customary international law, obligations that are therefore binding on all States, including Israel. Its prescriptions are not limited to applicability in the territory of a State, but apply equally to territory over which a State has extended its control by way of belligerent occupation.

The same is true for treaties on labour rights, a number of which have been concluded under the auspices of the International Labour Organization. Israel is a member State of the International Labour Organization and a party to a number of the treaties adopted by the Annual Labour Conference, including the following:

(a) Right to Organize and Collective Bargaining Convention, 1949 (No. 98). Elaborates on the right of association by requiring States to guarantee to workers the ability to form labour unions;

(b) Abolition of Forced Labour Convention, 1957 (No. 105). Prohibits a compulsion to perform labour;

(c) Minimum Age Convention, 1973 (No. 138). Aims at the abolition of child labour and at ensuring safe working conditions for youth;

(d) Worst Forms of Child Labour Convention, 1999 (No. 182). Requires States, among other obligations, to ensure that children are not engaged in forms of labour that endanger their health, safety or morals.

B. International Covenant on Economic, Social and Cultural Rights: Applicability

Human rights obligations are undertaken by States under specific treaties. The International Covenant on Economic, Social and Cultural Rights is one such treaty. It was drafted under the auspices of the Office of the United Nations High Commissioner for Human Rights, and the final text was adopted by the General Assembly on 16 December 1966. It was opened for accession by States and entered into legal force on 3 January 1976. Israel signed on 19 December 1966, ratified the treaty without entering any reservations on 3 April 1991 and has been a party continuously since 1991.

²³ United Nations, General Assembly, 1948, Universal Declaration of Human Rights.

Israel contends that the International Covenant on Economic, Social and Cultural Rights applies to its conduct only in its own territory, and not to its conduct in the Occupied Palestinian Territory. Its view is that the International Covenant imposes obligations that can be met only in a State's own territory. However, both the Committee on Economic, Social and Cultural Rights and ICJ have expressed concerns with regard to this view. The Committee on Economic, Social and Cultural Rights is the body formed under the International Covenant that is responsible for monitoring implementation of the International Covenant by its States parties.

ICJ had occasion to consider the applicability of the International Covenant to the Occupied Palestinian Territory in its response to the request by the General Assembly for an advisory opinion on the consequences of the construction of a wall. Since the construction impacted economic activity, ICJ had to determine whether it put Israel in violation of the International Covenant. In its advisory opinion, ICJ cited the position taken by Israel in a periodic compliance report Israel had filed in 1998 with the Committee on Economic, Social and Cultural Rights. Israel and the Committee differed on the applicability of the International Covenant to the Occupied Palestinian Territory; Israel's position was that it did not apply and the Committee contended that it did.

ICJ placed reliance on the view of the Committee, as the body that monitors implementation of the International Covenant and receives periodic reports from States parties and provides them with guidance on compliance. In these reports, States parties give a self-accounting of their compliance. Israel had declined to provide information about the prescriptions of the International Covenant with regard to actions or inactions Israel had taken with regard to the Occupied Palestinian Territory.

Unlike certain other human rights treaties, the International Covenant on Economic, Social and Cultural Rights does not contain a clause describing its territorial reach. The aim of making it applicable outside a State's own territory, however, is indicated in article 1 (3), which provides 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.²⁴

The conclusion of ICJ is that the International Covenant on Economic, Social and Cultural Rights does apply to the Occupied Palestinian Territory. The analysis of ICJ was as follows:

The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State

²⁴ United Nations, General Assembly, 1966, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, Resolution 2200A (XXI), New York, 16 December.

which ‘at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge’.

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1998, Israel provided ‘statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories’. The Committee noted that, according to Israel, ‘the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant’. The Committee expressed its concern in this regard, to which Israel replied in a further report of 19 October 2001 that it has ‘consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction’ (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is ‘based on the well-established distinction between human rights and humanitarian law under international law’. It added: ‘the Committee’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights’. In view of these observations, the Committee reiterated its concern about Israel’s position and reaffirmed ‘its view that the State party’s obligations under the Covenant apply to all territories and populations under its effective control’.

For the reasons explained in paragraph 106 above, the Court cannot accept Israel’s view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.²⁵

The final sentence refers to the fact that under the Oslo Accords, PNA has limited administrative control over certain territorial sectors. ICJ, in this sentence, made it clear that the obligations of Israel under the International Covenant applied even in these territorial sectors.

As noted by ICJ, the Committee on Economic, Social and Cultural Rights expressed concern with regard to the position of Israel that the International Convention did not apply to the Occupied Palestinian Territory. The Committee’s view is reflected in proceedings that took place in 2011, during which Israel reported on its compliance with the International Covenant. During the Committee’s dialogue with representatives of Israel, the Chair of the Committee explained as follows:

The Committee saw no reason to deviate from the position it had taken during the consideration of the State party’s two previous reports concerning the applicability of the Covenant. Paragraph 15 of the 2003 concluding observations clearly indicated that the Committee did not accept the State party’s position that the Covenant was not applicable to populations other than the Israelis in the occupied territories. It also noted the Committee’s deep concern at the State party’s insistence that, given the circumstances in the occupied territories, the law of armed conflict and humanitarian law were considered to be the only mode whereby protection might be ensured for all involved, and that that matter was considered to fall outside the Committee’s sphere of responsibility. The Committee had been encouraged that [ICJ], in its 2004 advisory opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory, had quoted the Committee’s view that the State party’s obligations under the Covenant applied to all territories and populations under its effective control. While it was necessary to put the situation in the West Bank in perspective, the plight of those living there should not be minimized. It was a fact that the construction of the wall by Israel on the Palestinian territory had resulted in the confiscation of a significant amount of land and the destruction of large areas

²⁵ ICJ, 2004, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, para. 112.

of farmland and olive groves; in addition, villages had been split in two. The wall infringed on the economic and social rights enshrined in the Covenant. Likewise, in the Gaza Strip, the fishing zone extended to only three nautical miles, in contravention of well-established rights under the United Nations Convention on the Law of the Sea which provided that coastal regions were entitled to a 12 nautical-mile territorial sea and a 200 nautical-mile exclusive economic zone. That impeded the exercise of the economic rights of thousands of inhabitants who tried to make a living from fishing, as well as their social right to work and their right to food, not to mention the effects on their families. While the Committee took note of the State party's position, it would nonetheless be useful to have a detailed explanation of the situation in the occupied territories from the delegation.²⁶

C. International Covenant on Economic, Social and Cultural Rights: Specific obligations

The International Covenant on Economic, Social and Cultural Rights contains a broad spectrum of obligations in the related areas of human activity. A number of these obligations are important in assessing the legal responsibility of Israel for its actions, and inactions, with regard to economic activity in the Occupied Palestinian Territory, as detailed in this section.

Article 1 (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.²⁷

This provision relates economic development to self-determination and requires Israel to accord to the Palestinian people the rights associated with economic development. It is an umbrella provision that includes the specific rights of the Covenant and at the same time covers any other rights that may fall within its reach. For instance, fragmenting a territory through the construction of settlements and highways is prohibited if economic development is thereby impeded. A fact-finding mission under the Human Rights Council also determined that settlements are prohibited since they have negative consequences, such as creating conditions of life that encourage the outmigration of persons possessing skills gained through higher and technical education.²⁸

Article 1 (2). All peoples may, for their own ends, freely dispose of their natural wealth and resources.²⁹

Natural wealth and resources must be under the control of the population of an occupied territory, not at the disposal of the occupying Power. This applies in particular to water and to minerals. The

²⁶ United Nations, Economic and Social Council, 2011, Summary record of the 36th meeting, E/C.12/2011/SR.36, Geneva, 17 November, para. 28.

²⁷ United Nations, General Assembly, 1966.

²⁸ United Nations, Human Rights Council, 2013, Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, A/HRC/22/63, Geneva, 7 February.

²⁹ United Nations, General Assembly, 1966.

occupying Power cannot assume authority over resources, even if it uses them to benefit the population of the occupied territory. Nor may it use such resources for its own benefit.

Article 1 (2). In no case may a people be deprived of its own means of subsistence.³⁰

This is a broad provision requiring an occupying Power to implement policies that promote economic development. Policies cannot be implemented that deprive the population of its ability to engage in normal economic pursuits. To the extent that use of land is made for purposes that fall outside the bounds of what is permitted under international law, this provision is violated. Acts such as the obstruction of the movement of goods and persons in and out of a territory violate this article, since they impede the capacity of the population to provide for itself the means of subsistence.

Article 2 (2). The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³¹

This provision applies to all the rights contained in the Covenant. Therefore, to the extent that settlers from Israel are favoured over the population of the Occupied Palestinian Territory, Israel violates this provision.

Article 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.³²

This provision also applies to all the rights contained in the Covenant. Gender equality must be assured with respect to the enjoyment of rights.

Article 4. The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.³³

Limitations on rights may be imposed only if such limitations promote the general welfare. In addition, limitations may not favour one group over another and may not favour the occupying Power over the population.

Article 6 (1). The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.³⁴

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

Measures that impede the development of the economy and/or measures that obstruct physical movement within an occupied territory violate this obligation. Furthermore, if agriculturists are restricted in access to their fields or to markets, or if broad swaths of land are sequestered as security zones, this obligation is violated. This obligation is also violated if policies in the financial realm inhibit the growth of manufactures.

The right to work is further ensured by a series of obligations specified in the Covenant. These include an obligation to provide vocational guidance and training programmes (article 6 (2)), an obligation to ensure the right to full employment, fair wages, equal remuneration for work of equal value and safe and healthy working conditions (article 7), an obligation to ensure the right to form trade unions, the right of trade unions to join international trade union federations (article 8), an obligation to ensure the right to the provision of social insurance (article 9), to ensure paid leave for working women before and after childbirth and to protect children from exploitation (article 10).

Article 11 (1). The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.³⁵

This right is violated if Israel implements policies that have the effect of obstructing the development of agriculture in the Occupied Palestinian Territory. It is also violated if Israel does not provide security for agricultural endeavours, such as the growing of olive trees, if such endeavours are threatened by violence from private parties. The right to housing is violated by the demolition of houses as a punitive measure. It is violated, in particular, by the demolition of housing built for residents by international organizations.

Article 12. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.³⁶

An occupying Power is required to ensure that health care is adequate in quantity and quality, and that it is accessible to the population. The maintenance of checkpoints or physical barriers that obstruct access to medical facilities violates this obligation. Economic policies that result in the outmigration of medical personnel also violate this obligation.

Article 13. The States Parties to the present Covenant recognize the right of everyone to education.³⁷

This obligation is violated if students experience physical obstruction in travelling from places of residence to educational institutions.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

V. Some acts and measures by Israel that impose occupation-related costs on the Palestinian people

A number of practices by Israel with regard to the Occupied Palestinian Territory impose economic costs on the Palestinian people, either by obstructing their economic activity or by impeding economic advancement and development. Many of these practices contravene the obligations of Israel under the law of belligerent occupation (humanitarian law) or under the law of human rights.

The norms of humanitarian law and of human rights law give rise to liability for a range of actions that have been undertaken by the Government of Israel during the period of occupation. The following sections provide examples, but not a complete list, of those actions for which remedy or compensation may be due. Further studies and research are needed to compile a full list of similar acts and to assess the full negative impact of each act.

A. Transfer of civilians as settlers and the construction of illegal settlements

A belligerent occupant is prohibited from transferring population into the occupied territory. This prohibition stems from article 43 of the Hague Regulations, which requires an occupant to maintain the civic life of the population. Bringing new populations into the territory violates that obligation. The prohibition is also stated in specific terms in article 49 (6) of the Fourth Geneva Convention, which states that “the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies” (see chapter III). ICJ has found Israel to be in violation of this provision with regard to its settlements in the West Bank.³⁸ In addition, the Security Council, in its resolution 446 in 1979, determined that “the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity”.³⁹

The seriousness of the prohibition is accentuated by the fact that “transfer”, as defined in the Fourth Geneva Convention, constitutes a war crime for any individual who engages in that activity.⁴⁰ As further indication of the seriousness of this act, wilful commission is characterized as a “grave breach” on the part of an individual, meaning that States parties to the Fourth Geneva Convention have an obligation to prosecute.⁴¹ The International Committee of the Red Cross, in its commentary on article 85, explains that the reason that transfer is a grave breach is “because of the possible consequences for the population

³⁸ ICJ, 2004, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 120.

³⁹ United Nations, Security Council, 1979.

⁴⁰ United Nations, 2004, *Treaty Series*, vol. 2187, No. 38544, article 8 (2) (b) (vii).

⁴¹ United Nations, 1986, *Treaty Series*, vol. 1125, No. 17512, article 85 (4) (a).

of the territory concerned from a humanitarian point of view”.⁴² The characterization of transfer as a grave breach is thus an indication that consequences may be serious.

Israel has not confined itself to permitting civilians to settle in the Occupied Palestinian Territory, but promotes the economic activities of the settlements, as detailed in a recent report of the Secretary-General as follows:

Besides allocating land for the purposes of constructing settlement housing and infrastructure, Israel supports the maintenance and development of settlements through the delivery of public services and the encouragement of economic activities, including agriculture and industry. Population growth in Israeli settlements is stimulated by housing, education and tax benefits. Similar incentives are provided for settlement industries.⁴³

The Security Council, in its resolution 2334, clearly indicated that the establishment of Israeli settlements in the Occupied Palestinian Territory has no legal validity, stating that it

reaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace.⁴⁴

A number of public figures in Israel have suggested that settlers should be considered protected persons. The term “protected persons” is defined in article 4 of the Fourth Geneva Convention, as follows:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.⁴⁵

Protected persons are those that a belligerent occupant has an obligation to protect. This definition does not include civilians who are transferred into the territory during the period of an occupation. Civilians are not to be transferred by an occupying Power to settle in the occupied territory. If settlers from Israel were deemed by Israel to be protected persons, they would be placed on the same legal standing as the population that Israel found when it entered the territory in 1967. The apparent aim of those espousing protected person status for settlers from Israel is to provide a legal basis for their presence. Such a move would further erode the economic situation of the Palestinians in the Occupied Palestinian Territory by entrenching settlers from Israel.

The transfer of civilians as settlers imposes economic costs on the Palestinian population in a variety of ways. Land is taken for the area of the settlements, thereby depriving Palestinians from using the land for productive purposes. This economic cost is borne whether the land taken is held in private ownership

⁴² International Committee of the Red Cross, 1987, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva), para. 3504.

⁴³ United Nations, Human Rights Council, 2017, Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, A/HRC/34/38, Geneva, 13 April, para. 16.

⁴⁴ United Nations, Security Council, 2016, Resolution 2334 (2016), S/RES/2334, New York, 23 December, para. 1.

⁴⁵ United Nations, 1950, *Treaty Series*, vol. 75, No. 973.

or as State land that is available for use for productive purposes by the Palestinian population. Further, substantial tracts of land have been confiscated to build roads to connect the settlements with roads in the territory of Israel. In addition, goods produced in the settlements compete with Palestinian produced goods.

Moreover, the character of the civilians transferred as settlers has imposed further economic costs on the Palestinian people. Settlers believe that it is their right to own land and reside in the Occupied Palestinian Territory, and therefore consider that Palestinians are not entitled to reside in the territory and adopt a hostile attitude towards them, to the point of attacking them physically and sabotaging their economic activity. Considerable economic loss has been caused to the Palestinian people by violence committed by settlers. This violence is attributable to the Government of Israel for two reasons. The first is that the settlers should not be present in the Occupied Palestinian Territory. The second is inaction by Israel in intervening to prevent such violence or to prosecute vigorously those who perpetrate it. Violence by settlers contributes to a climate of uncertainty that is not conducive to entrepreneurial activity. More directly, violence by settlers is often aimed at Palestinian agriculture, in particular the uprooting of olive and other trees and interference with harvesting. Israel has prevented settlers from being subject to Palestinian courts, thereby preventing prosecution.

B. Construction of a separation barrier in the West Bank

The construction by Israel of a separation barrier in the West Bank is related to the transfer of civilians, as it is on a route that protects settlements. The construction has caused major disruptions to economic activity and involved the taking of significant tracts of land. The construction has particularly affected economic activity in the “seam zone”, that is, areas on the western side of the wall within the West Bank. The evident and extensive nature of the damage has led to the initiation by the General Assembly of a programme within the United Nations Secretariat to document it, detailed in a recent UNCTAD study as follows:

In 2007, General Assembly resolution ES-10/17 established the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, with its main focus on the damage emanating from construction of the separation barrier in the West Bank, not covering any other measure taken by the occupying Power. Its mandate is to serve only as a record, in documentary form, of the damage caused to all natural and legal persons concerned as a result of construction of the separation barrier, including in and around East Jerusalem. As at February 2016, the Register of Damage had completed the records of damage claims in seven of nine affected Palestinian governorates; 52,870 claim forms and over 300,000 supporting documents had been collected in 233 Palestinian communities, with a population of 946,285. Of the total number of claims, 20,459 have been processed and reviewed by the Register of Damage Board for inclusion in the register. Damages are grouped into the following six categories: agriculture (A); commercial (B); residential (C); employment (D); access to

services (E); public resources and other (F). The vast majority of claims are categorized as agriculture losses (A).⁴⁶

The construction of the separation barrier and its legal consequences were analysed by ICJ upon the request of the General Assembly for an advisory opinion. ICJ found Israel to be in violation of both humanitarian law and human rights law, for the construction of the barrier and for the ways in which the wall inhibited economic and other activity.⁴⁷

The takeover of land by Israel for settlements, for the separation barrier and for related purposes violates the law of belligerent occupation and human rights law. An occupant may make use of land only for limited purposes. It may make use of land for stationing its military forces, but may not make use of land for other purposes. For instance, it may not take land to house civilians in settlements or to build roads for the convenience of settlers. The losses to Palestinian industry and agriculture as a result of the takeover of land constitute a cost of occupation for the inhabitants.

C. Failure to promote economic development

States are required to ensure a right to development. This obligation falls on Israel by virtue of its status as a belligerent occupant, in particular in the light of the length of its occupation. If Israel fails to ensure this right over a long period of time, the negative economic consequences are serious.

The right to development applies at all times and in all places. The Declaration on the Right to Development states the right in the broadest possible terms, as follows:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁴⁸

The applicability of the right to development to Israel in its control of Palestinian territory has been acknowledged by the United Nations Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967. Stressing the scope of the right, the Special Rapporteur stated that

the right to development has been recognized as a human right itself, which raises its status to one with universal applicability and inviolability.⁴⁹

⁴⁶ UNCTAD, 2016, Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory, TD/B/63/3, Geneva, 28 September, para. 46.

⁴⁷ ICJ, 2004, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*.

⁴⁸ United Nations, General Assembly, 1986, Declaration on the Right to Development, para. 1.

⁴⁹ United Nations, General Assembly, 2016, Situation of human rights in the Palestinian territories occupied since 1967, A/71/554, New York, 19 October, para. 38.

During the occupation of Iraq in 2003, the importance of promoting economic development was acknowledged by the occupying Powers. The Coalition Provisional Authority representing the occupying Powers established a fund with the announced intention of contributing to the economic development of the population of Iraq. A major Coalition Provisional Authority objective was

to ensure that the newly established Development Fund for Iraq and other Iraqi resources, including Iraqi petroleum and petroleum products, are dedicated to the well-being of the Iraqi people.⁵⁰

Article 43 of the Hague Regulations requires a belligerent occupant to comply with the broad range of obligations that a modern State bears with regard to both permitting the economic activity of the population and to fostering and promoting economic development.

The right to development requires States to not only refrain from impeding development, but to take affirmative steps for its facilitation. The Declaration on the Right to Development states that

Article 2 (3). States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

...

Article 3 (2). The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.⁵¹

The latter refers to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which requires States, among other obligations, to promote self-determination, and states that

all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.⁵²

This Declaration, along with the Declaration on the Right to Development, is not limited in any way. It applies to a State in belligerent occupation of a foreign territory, as it applies to all States in all situations. The General Assembly has called on Israel to withdraw from the Palestinian territory to terminate the occupation. It has said that the right of the Palestinian people to self-determination extends to a right to “their independent State of Palestine”.⁵³

⁵⁰ Coalition Provisional Authority, 2004, Regulation No. 2: Development Fund for Iraq, 18 June.

⁵¹ United Nations, General Assembly, 1986, Declaration on the Right to Development.

⁵² United Nations, General Assembly, 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625 (XXV), New York, 24 October.

⁵³ United Nations, General Assembly, 2015, Resolution 70/141, A/RES/70/141, New York, 17 December.

The General Assembly, in formulating the Declaration on the Right to Development, specifically addressed the situation of belligerent occupation as one that impeded the effectuation of the right to development. The Declaration on the Right to Development states as follows:

Article 5. States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.⁵⁴

Belligerent occupation is thus regarded by the General Assembly as restrictive of the right to development. This is particularly true for an occupation that extends over a period of decades. For this length of time, the population is deprived of the capacity to formulate its own policies for development. Moreover, a foreign army is far less capable than indigenous political institutions of identifying goals for economic development and of setting policy that will realize such goals. In this regard, the General Assembly requested the Committee on the Exercise of the Inalienable Rights of the Palestinian People,

in the light of the onset of the fiftieth year of the Israeli occupation, to focus its activities throughout 2017 on efforts and initiatives to end the Israeli occupation that began in 1967.⁵⁵

In order to comply with its obligation to promote the economic development of the Palestinian territory it occupies, Israel needs to withdraw from the territory and allow the population to devise its own approaches. Instead, however, it has solidified its entrenchment and progressively subsumed more of the territory under the control of its settlers, whose aim is their own self-betterment, to the exclusion of the economic aspirations of the Palestinian people. The maintenance of control over territory by a foreign settler population is fundamentally inconsistent with the obligation of Israel as belligerent occupant to promote the economic development of the Palestinian people.

As it continues its occupation, many United Nations studies and reports indicate that Israel has failed to promote economic development. The totality of its policies has resulted in economic constriction rather than advancement. One specific issue is the use of taxes Israel collects from the population of the Occupied Palestinian Territory. Israel must use such tax revenue for the benefit and economic well-being of the population. If Israel does not use the tax revenue it collects for such purposes or uses the money to exert political pressure, this represents yet another case of economic hardship and financial loss for the Palestinian people.

The role played by Israel in the collection of customs duties, value added tax and other taxes negatively impacts economic development. The situation has been detailed by UNCTAD as follows:

⁵⁴ United Nations, General Assembly, 1986, Declaration on the Right to Development.

⁵⁵ United Nations, General Assembly, 2016, Resolution 71/20, A/RES/71/20, New York, 30 November, para. 11.

In accordance with the Protocol on Economic Relations signed in Paris in 1994 (Paris Protocol), Israel collects value added tax on Palestinian imports from Israel, and clears Palestinian imports transiting through Israel's ports, collects customs and value added tax on these imports and transfers (clears) this tax revenue to PNA. Israel's control of clearance revenue, which accounts for about three fourths of PNA revenue, enables it to exercise undue control over Palestinian fiscal affairs. UNCTAD reports and studies have highlighted the consequences of Israel's recurrent withholding of Palestinian clearance revenue; the last such withholding occurred in the first four months of 2015 following the PNA decision to join the International Criminal Court. This clearance arrangement also results in the annual leakage of hundreds of millions [of] dollars of Palestinian fiscal revenue to Israel.

This process also involves unjustifiably high handling fees charged by Israel for collecting taxes on Palestinian imports on behalf of PNA. The administrative handling fee was set in 1995 at 3 per cent of clearance revenue, to be deducted before Israel transfers the remainder to PNA. However, while Palestinian imports recently represented 6 per cent of all imports handled by the customs and value added tax department of Israel, fees deducted by Israel financed one third of the department's budget. If the handling fees were proportional to the share of Palestinian imports in total imports handled by the department, they would drop from 3 to 0.6 per cent of total clearance revenue and would have prevented \$50 million (1.7 per cent of Palestinian revenue) worth of overpayment to Israel in 2014.⁵⁶

Withholding of revenue that is due to the Palestinian government impairs its ability to carry out development programmes and to pay the basic operating expenses of a government. The withholding and appropriation of Palestinian fiscal revenue by Israel constitute obstacles to economic development. Thus, far from promoting economic development, Israel impedes it. The withholding of revenue as a reaction to Palestinian political decisions cannot be justified. If Israel, as the occupying Power, maintains control over goods entering from abroad, it must facilitate their entry, including the fiscal aspects of that entry.

D. Military operations in the Occupied Palestinian Territory

Military action by Israel in the Occupied Palestinian Territory is inconsistent with the obligation of Israel to promote economic development. The Committee on the Exercise of the Inalienable Rights of the Palestinian People provided an assessment of the impact on the population of the Gaza Strip of military action taken by Israel in July and August 2014 as follows:

More than one year after the war on Gaza in the summer of 2014, the situation in the Gaza Strip remains very grave. Palestinian and international efforts to address the humanitarian situation and rebuild the lives, homes and livelihoods of the tens of thousands of people affected by the violence have been slow to proceed owing to the blockade and severe restrictions on the import of materials into Gaza imposed by Israel, the occupying Power, and also to unfulfilled donor pledges. As at August 2015, not a single one of the destroyed homes in Gaza had been rebuilt, and over 100,000 Palestinians are still homeless, forced to shelter in temporary housing with other families or in the ruins of their homes.⁵⁷

⁵⁶ UNCTAD, 2016, Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory, TD/B/63/3, Geneva, 28 September, paras. 16–17.

⁵⁷ *Official Records of the General Assembly*, 2015, para. 2.

The consequences of this military action on the housing situation were detailed by a commission of inquiry dispatched by the Human Rights Council as follows:

Alongside the toll on civilian lives, there was enormous destruction of civilian property in Gaza: 18,000 housing units were destroyed in whole or in part. According to the Office of the Special Coordinator for the Middle East Peace Process, an estimated 80,000 homes and properties need to be rehabilitated. These “housing units” were not only the monetary equivalents of material investments. Many of them were homes. Obviously, owning a home is directly linked to the human rights to adequate housing and property, but losing a home also impacts on the enjoyment of a wide range of other human rights, including security, sanitation and health, privacy and family life. Moreover, having a home has an emotional dimension – the place where memories are stored – and often many other items to which inhabitants’ memories relate. Having one’s home destroyed or severely damaged means being deprived of more than a physical structure; it also directly impacts on the very essence of one’s existence.

At the height of last summer’s hostilities, the number of internally displaced persons reached 500,000, which is equivalent to 28 per cent of the population. Many people were uprooted from their homes or temporary shelters multiple times. They had to cope with the stress and panic associated with feeling trapped and having no safe place to go. Many fled to temporary shelters which were severely overcrowded and lacked adequate sanitary conditions. The incidents involving UNRWA [United Nations Relief and Works Agency for Palestine Refugees in the Near East] shelters and resulting deaths and injuries further compounded the lack of safety and security.

The end of the hostilities did not necessarily mean respite: temporary and often inadequate accommodation arrangements offered little protection during the winter, resulting in the deaths of at least four children. In May 2015 – many months after the violence had ended, about 100,000 people remain displaced in the Gaza Strip, according to OCHA [United Nations Office for the Coordination of Humanitarian Affairs] estimates.⁵⁸

Displacement at this level requires years of reconstruction. The housing situation in Gaza, already in dire condition prior to the military operation in July and August 2014, was set back considerably. The primary cause of housing destruction was aerial operations by Israel.

A more global picture of the economic losses caused by military action by Israel is given in a report by UNCTAD, which assessed the economic loss caused by the military operation in Gaza between December 2008 and January 2009 as in the order of \$4 billion.⁵⁹

Several military operations by Israel in Gaza since the disengagement of Israel from Gaza in 2005 have all been assessed for the economic losses they caused. In each instance the operation involved a violation of international law, *jus ad bellum*. As a result, Israel could be found liable for the economic losses inflicted by the military operations.

⁵⁸ United Nations, Human Rights Council, 2015, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, Geneva, 24 June, paras. 576–578.

⁵⁹ UNCTAD, 2015, Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory, TD/B/62/3, Geneva, 6 July.

E. Acts affecting particular sectors of the Palestinian economy

Practices by Israel affecting numerous sectors of the Palestinian economy arguably violate the legal obligations of Israel under the law of belligerent occupation and/or the law of human rights. These obligations may be violated by policies of Israel in the Occupied Palestinian Territory that inhibit productive activity in all sectors, including industry, trade and agriculture, both through taking control of the use of land and through restrictions that impede productive activity. In particular, restrictions by Israel on the flow of goods in and out of Gaza have created economic circumstances that put Israel in a position of violation of these obligations. The following sections provide examples of practices by Israel that impose economic costs on the Palestinian population in certain economic sectors.

1. Agriculture

Israel has taken control of large swaths of land for the construction of settlements, for the construction of roads for settlers and for the construction of the separation barrier. It has also closed off tracts of land, claiming a security need, in particular in Gaza. Since the onset of occupation in 1967, Palestinians have lost access to more than 60 per cent of West Bank land and more than two thirds of grazing land. In the Gaza Strip, half of the cultivable area is inaccessible to Palestinian producers.⁶⁰

2. Fisheries

In the waters off Gaza, 85 per cent of fishery resources are inaccessible to Palestinian fishers.⁶¹ Furthermore, a fact-finding mission under the Human Rights Council that examined the 2008–2009 military operation of Israel in Gaza noted that Israel

controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone.⁶²

Fisheries constitute part of the economic wealth of a country. Under international rules on fisheries, a coastal State has exclusive rights for its nationals to harvest fish and other maritime resources within a territorial sea extending 12 nautical miles seaward from the low-water line along the coast. Additionally, a coastal State may declare a fishery zone extending another 188 nautical miles seaward. In this zone, the coastal State may exclude the nationals of other States if nationals of the coastal State have the capacity to harvest the maximum allowable catch as determined unilaterally by the coastal State. Beyond this fishery zone, nationals may venture out to the high seas and fish in distant waters.

⁶⁰ UNCTAD, 2016, Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory, TD/B/63/3, Geneva, 28 September, para. 34. For more information see UNCTAD, 2015, *The Besieged Palestinian Agricultural Sector* (United Nations publication, New York and Geneva).

⁶¹ UNCTAD, 2016, Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory, TD/B/63/3, Geneva, 28 September, para 34.

⁶² United Nations, Human Rights Council, 2009, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, Geneva, 25 September, para. 278.

However, Israel has imposed, through the use of armed forces, strict limits on the distance that fishing boats may sail off the coast of Gaza. These restrictions have varied over time, and have severely limited fishers in Gaza from accessing traditional fishing waters. At times, Israel has enforced these restrictions with the use of force, sometimes resulting in injury or death to members of the Gaza fishing workforce.

The international rules on coastal fishing are contained in the United Nations Convention on the Law of the Sea. The State of Palestine acceded to this Convention on 2 January 2015. As a result, the State of Palestine has a treaty right to use coastal waters. Israel is one of only a handful of States that are not a party to this Convention. As a result, the State of Palestine has no treaty-based rights towards Israel with regard to the use of coastal waters. However, the rules on coastal waters are part of the customary law of nations. Thus, the restrictions imposed by Israel represent a violation of the rights of the Occupied Palestinian Territory and, thereby, the rights of the population.

3. Manufacturing

The Palestinian industry has been stunted as a result of restrictions imposed by Israel. Through its control of borders, Israel is able to limit the domestic production and importation of input materials needed in Palestinian manufacturing. A recent UNCTAD study detailed that, “in the industrial sector, occupation and related uncertainty, and the restrictions on movement and access, have stifled investment and limited the Palestinian private sector to small-scale operations with low capital intensity and efficiency”.⁶³ The uncertainty to which UNCTAD refers relates to a business environment in which Palestinian economic activity can be negatively impacted by a change in the policy of Israel. Restrictions on movement and access relate to the security checkpoints operated by Israel that impede the movement of persons and goods. Such restrictions represent a violation of article 43 of the Hague Regulations.

4. Communications

Israel has restricted Palestinian telephone providers with respect to the bands they can use. As a result, Palestinian providers cannot compete with providers in Israel, leading many Palestinians to use the latter. This restrictive practice limits Palestinian economic development by placing Palestinian firms at a disadvantage. A recent study by the World Bank of the Palestinian telecommunications sector concluded that the total revenue loss for the Palestinian mobile telephone sector in 2013–2015 was in the range of \$436 million to \$1,150 million, including a value added tax fiscal loss for PNA of between \$70 million and \$184 million; a direct cost of about 3.0 per cent of the economy (GDP).⁶⁴

⁶³ UNCTAD, 2016, Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory, TD/B/63/3, Geneva, 28 September, para. 35.

⁶⁴ World Bank, 2016, Telecommunication sector note in the Palestinian territories: Missed opportunity for economic development, Working Paper No. 104263.

A State has sovereign rights to the airspace above its territory. As an occupying Power, Israel is under an obligation to respect that sovereignty. Article 43 of the Hague Regulations requires an occupying Power to maintain the civic life of an occupied territory. Control of airspace is a feature of the civic life of a territory. These restrictions therefore represent a violation of article 43.

5. Tourism

The State of Palestine contains sites important to world history, potentially making tourism a major industry. As part of its general obligations under article 43 of the Hague Regulations, Israel is required to allow tourism to flourish in a way that benefits the Palestinian economy. Israel has damaged the Palestinian capacity to take advantage of tourism by occupying areas with valuable tourism assets, such as East Jerusalem, among other areas, and by taking control of the entry of foreign visitors. Israel has discouraged foreign tourists from visiting the Occupied Palestinian Territory by denying entry to Israel if accommodations are booked there in advance.⁶⁵

Israel has used other measures of control in a way that has limited development of the tourism sector by Palestinians. A study by the World Bank has found that the Palestinian tourism industry is “hindered by a number of factors”, in particular the various restrictions imposed by the Government of Israel on movement, access and physical development.⁶⁶

Israel bears special obligations with regard to sites that are important for tourism, as a member of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and under the Convention Concerning the Protection of the World Cultural and Natural Heritage adopted by the General Conference of UNESCO on 16 November 1972.⁶⁷ Both Israel and the State of Palestine are parties to the Convention. In accordance with the Convention, Israel has an obligation to refrain from damaging world heritage sites in the Occupied Palestinian Territory, as follows:

Article 6 (3). Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention.⁶⁸

Article 1 defines cultural heritage, as follows:

For the purpose of this Convention, the following shall be considered as “cultural heritage”:
monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

⁶⁵ *Haaretz*, 2017, Israel bans tour groups from staying in West Bank, then backtracks, April 26.

⁶⁶ World Bank, 2014, *Area C and the Future of the Palestinian Economy* (Washington, D. C.), p. 32.

⁶⁷ Israel filed notice to withdraw from UNESCO towards the end of 2017. Whether it will rejoin the organization is unclear.

⁶⁸ See <http://whc.unesco.org/en/convention/>.

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.⁶⁹

Article 2 defines natural heritage, as follows:

For the purposes of this Convention, the following shall be considered as “natural heritage”:

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.⁷⁰

In 2011, the State of Palestine sought membership in UNESCO and asked the Organization to designate the Church of the Nativity in Bethlehem, a major touristic destination, as a protected cultural site. Israel, while a member of UNESCO, opposed both efforts. This action intended to prevent Palestinians from protecting sites that Israel also had an obligation to protect. However, following voting processes, UNESCO designated the Church of the Nativity as a world heritage site and admitted the State of Palestine to membership.⁷¹

F. Acts affecting natural resources

1. Mining

Pillage is prohibited by the law of belligerent occupation. Under article 47 of the Hague Regulations, “pillage is formally forbidden”, and under article 33 of the Fourth Geneva Convention, “pillage is prohibited” (see chapter III). Pillage is the taking of property by individual members of an occupying army. Furthermore, article 55 of the Hague Regulations states as follows:

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.⁷²

This article imposes obligations on the use of public property. Such assets must be administered to the benefit of the occupied population. Therefore, article 55 is violated by the extraction of resources from

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ UNESCO, 2012, Church of the Nativity and the pilgrimage route in Bethlehem, Palestine, inscribed on UNESCO World Heritage List along with sites from Israel, Palau, Indonesia and Morocco, 29 June; United Nations News Centre, 2011, UNESCO votes to admit Palestine as full member, 31 October.

⁷² International Committee of the Red Cross, 2017, Treaties, States parties and commentaries.

the ground, for example by quarrying or digging wells for water, if benefit accrues to the occupying Power. Furthermore, article 55 constrains an occupant not only with regard to action taken by governmental agents but also with regard to action taken by private parties that gain access through permission by the occupant. If private companies are given access by the Government of Israel and if they exploit resources for gain, Israel may be in violation of article 55 of the Hague Regulations.

An occupant is required, in its role as temporary replacement of the sovereign, to ensure that humanitarian law requirements are not violated by anyone. ICJ determined as such with regard to the occupation by Uganda of a sector in the Democratic Republic of the Congo in a case involving the exploitation of natural resources, stating as follows:

Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory.⁷³

In particular, with regard to natural resources, which included diamonds, the Court stated that the fact that Uganda was the occupying Power extended

Uganda's obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces.⁷⁴

The Court stated that Ugandan officials had "facilitated such activities by commercial entities" and found Uganda responsible for violating its obligation of vigilance with regard to such acts and for failing to comply with its obligations, under article 43 of the Hague Regulations, as an occupying Power with regard to all acts of looting, plundering and the exploitation of natural resources in the occupied territory.⁷⁵

The Supreme Court of Israel has had occasion to apply article 43 of the Hague Regulations to the exploitation of natural resources in the Occupied Palestinian Territory. The human rights organization Yesh Din in Israel sued to challenge quarrying activity by companies from Israel in the Occupied Palestinian Territory. The Supreme Court of Israel said that article 43 required Israel as the occupying Power to avoid the economic exploitation of resources. It referred to its own prior rulings in this regard and stated as follows:

Article 43 has been acknowledged in our rulings as a quasi-constitutional framework maxim of the belligerent occupation laws, which sets a general framework for the manner by which the military commander exercises its duties and powers in the occupied territory... The commander of the Area must exercise his powers under all circumstances exclusively for the benefit of the Area, while applying only the relevant considerations – the best interest of the protected persons,

⁷³ ICJ, 2005, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168, para. 179.

⁷⁴ Ibid, para. 248.

⁷⁵ Ibid, paras. 248 and 250.

on the one hand, and the needs of the military, on the other hand. Thus, by exercising its powers, 'the military commander is not allowed to consider the national, economic and social interests of his own state, inasmuch as such interests have no effect on his security interest in the area or the interest of the local population'.⁷⁶

In addition, citing a prior case on which it had ruled, the Supreme Court stated that

a territory held in belligerent occupation is not an open field for economic or other kinds of exploitation.⁷⁷

This statement appropriately referred to the relevant law applicable to an occupying Power, namely that an occupying Power may not enhance its own economic interests by exploiting natural resources. In the circumstances that led to the case, the military of Israel had granted mining permits to private companies from Israel, who derived profit from mining they carried out under the permits. In its judgment on the case, the Supreme Court of Israel gave an interpretation of the applicability of the laws of belligerent occupation that suggested that by virtue of the Oslo Accords of 1993, PNA had given Israel greater latitude in Area C than it would otherwise have had under the law of belligerent occupation. This interpretation has no basis in law, since the Oslo Accords did not alter the status of the West Bank as a territory under belligerent occupation. The obligations of Israel are those found in the law. Article 47 of the Fourth Geneva Convention specifically nullifies any permission that may be given by the authorities of an occupied population to violate the rules on belligerent occupation. The premise of article 47 is the concern that an occupying Power may be able to coerce local authorities.

The Supreme Court of Israel reached a result favourable to Israel in the case by finding that benefits flowed to the inhabitants of the Occupied Palestinian Territory. The Yesh Din organization had filed suit against the commander of the Israel Defense Forces on the basis of the Hague Regulations, specifically articles 43 and 55. Yesh Din argued that the quarrying activity, based on permits issued by the commander, violated property rights and was inconsistent with the obligation of Israel as the occupying Power to maintain the civic life of the population of the territory. Companies from Israel were mining in the quarries and taking profits from the sale of materials extracted from the quarries. The Supreme Court of Israel disregarded the fact that the quarries were being operated for profit by companies from Israel, and stated as follows:

Furthermore, one should bear in mind that as stated in the data that have been presented before us, the currently operating Quarries provide livelihood for a considerable extent of Palestinian residents, and as stated in the State's notification, the royalties paid to the Civil Administration by the operators of the Quarries are used to finance the operations of the military administration, which promotes various kinds of projects aimed to benefit the interests of the Area. In their Reply, the Respondents (the Quarries) also emphasized that their activities have been contributing to the economic development and to the modernization of the Area in many ways, such as training of employees, payment of royalties and supplying quarrying products necessary for construction purposes. It was stated further that a significant portion of their quarrying

⁷⁶ Supreme Court of Israel, 2011, *Yesh Din v. Commander of the Israel Defense Forces in the West Bank et al*, Judgment, No. 2164/09, p. 15.

⁷⁷ *Ibid*.

products is being marketed both to Palestinians and to Israeli settlers (at a rate that varies from one quarry to another) and that granting the remedy as requested under the petition will inflict a fatal blow not only upon them, but also upon their employees and service providers among the local population, for which the quarries serve as a source of livelihood.

Considering this state of affairs, it is therefore difficult to accept the Petitioner's decisive assertion, according to which the quarrying operations are in no way promoting the best interests of the Area, especially in light of the common economic interests of both the Israeli and Palestinian parties and the prolonged period of occupation. In that context, it shall be noted that considering the significant delay underlying the petition, in light of the many years during which the Quarries have been operating in their current format and the harm that could be inflicted should the requested remedy be granted, the Petitioner had an especially heavy burden while attempting to establish its arguments. However, it seems to us that the aforementioned array of aspects displays before us a reality that is far more complex than the one presented by the Petitioner and by its strict interpretive stance.

In light of the aforesaid, we had seen fit to dismiss the petition on its face, and even while considering it on its merits, we have found that the State's revised position in regard to the operation of the Quarries in the Area does not constitute a cause for our intervention therein. The petition is therefore dismissed, without an order for costs.⁷⁸

The decision of the Supreme Court of Israel allowed the exploitation of the resources of the Occupied Palestinian Territory for the benefit of firms from Israel, thereby representing a violation of the Hague Regulations. Length of occupation does not give licence to deviate from the requirements incumbent on a belligerent occupant. Therefore, Israel is liable for whatever gain it or its companies has derived.

2. Offshore minerals

Israel has granted leases for drilling in gas fields off the coast of Gaza, in violation of Palestinian rights to the continental shelf. As a result, Palestinians have not been able to develop the gas field known as Gaza Marine. In the area off the Mediterranean coast in the vicinity of the city of Ashkelon, Israel has unilaterally drawn a line separating the Palestinian continental shelf from that of Israel, which puts three gas fields, known as Noa, Pinnacles and Mari-B, on the Israeli side of the line.⁷⁹ However, the Convention on the Law of the Sea states that such lines must not be drawn unilaterally, but by mutual agreement between two adjacent coastal States. The same rule applies as a matter of the customary law of the sea, which governs Israeli-Palestinian maritime relations since Israel is not a party to the Convention on the Law of the Sea.

The occupying Power does not allow Palestinians to develop and use the offshore natural gas fields discovered since the 1990s on the Mediterranean coast. Two high-quality gas fields have been

⁷⁸ Ibid, p. 19.

⁷⁹ See S Power, 2015, *Annexing Energy: Exploiting and Preventing the Development of Oil and Gas in the Occupied Palestinian Territory* (Al-Haq, Ramallah), available at <http://www.alhaq.org/publications/Annexing.Energy.pdf> (accessed 27 September 2017). See also L de Leeuw, 2017, *Beneath troubled waters: Noble Energy's exploitation of natural gas in the Eastern Mediterranean Sea*, Centre for Research on Multinational Corporations, available at <https://www.somo.nl/wp-content/uploads/2017/05/Beneath-troubled-waters.pdf> (accessed 27 September 2017).

discovered; one entirely within the waters of Gaza and the other on the border with Israel, and natural gas from these fields could provide badly needed energy to the entire Occupied Palestinian Territory.⁸⁰

The actions of Israel with regard to the gas fields represent violations of articles 43 and 55 of the Hague Regulations. They prevent economic development, thereby violating the right of the occupied population to economic development. Remedy may therefore be considered due for the revenues that could have been derived to date from the gas fields.

3. Underground aquifers

Israel confiscates 82 per cent of Palestinian groundwater for use inside its borders or in its settlements, and Palestinians must import over 50 per cent of their water from Israel.⁸¹ A study by the World Bank has stated that only 35 per cent of irrigable Palestinian land is actually irrigated, costing the economy 110,000 jobs per year and 10 per cent of GDP.⁸² Agricultural activities have therefore become less viable and many farmers have been forced to abandon cultivation.

Underground waters constitute part of the natural resources of a territory. An occupying Power is therefore precluded from appropriating them for use in its own territory. Such appropriation represents a violation of article 43 of the Hague Regulations, as a disruption of the civic life of the territory under occupation. It may also be in violation of article 55, as an appropriation of public assets.

G. Acts affecting the labour market and social sectors

1. Labour

Compliance by Israel with its obligation to promote employment is complicated by the fact that many Palestinian workers are forced to resort to employment in Israel and its settlements, which themselves are violations of the obligations of Israel as an occupying Power. Other employment opportunities are in companies from Israel that have been granted questionable mining permits. Palestinians working in Israel and settlements are mainly employed in dangerous and difficult jobs, with inadequate health and safety provisions. Such workers are subjected to violence from settlers and wage discrimination, whereby Palestinian workers, even those at a higher seniority level, are paid less than the pay received by an Israeli worker performing similar work.⁸³ In addition, restrictions imposed by Israel limit employment opportunities in the domestic Palestinian economy, and

⁸⁰ UNCTAD, 2015, Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory, TD/B/62/3, Geneva, 6 July, para. 49.

⁸¹ UNCTAD, 2015, *The Besieged Palestinian Agricultural Sector* (United Nations publication, New York and Geneva).

⁸² World Bank, 2009, Assessment of restrictions on Palestinian water sector development, Report No. 47657-GZ.

⁸³ UNCTAD, 2017, Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory, TD/B/64/4, Geneva, 10 July, paras. 53–54.

full control of Area C (61 per cent of West Bank area) by Israel, other restrictions and the blockade imposed on Gaza have generated a permanent unemployment crisis in the Occupied Palestinian Territory. Lack of employment opportunities in the domestic economy forces thousands of unemployed Palestinians to seek employment in Israel and in settlements in low-skill, low-wage manual activities.⁸⁴

2. Nutrition and housing

Certain measures imposed by Israel on the Occupied Palestinian Territory suggest that Israel has not complied with its obligation to ensure adequate nutrition. Measures targeting Palestinian agriculture have hampered food production, and policies on labour and employment have limited the income available for the purchase of food. UNCTAD has detailed this deficiency as follows:

Weak economic growth and high unemployment have deepened chronic food insecurity. Recent data show that two thirds of Palestinians are affected by food insecurity, with 33 per cent food-insecure, 21 per cent marginally secure and 13 per cent vulnerable to insecurity. In 2016, 1.1 million people (21 per cent of the population) in the West Bank and 1.3 million people (73 per cent of the population) in Gaza need some form of humanitarian assistance.⁸⁵

Restrictions by Israel on economic activity have also negatively impacted the housing situation in the Occupied Palestinian Territory. The housing situation is rendered worse by demolitions of housing, which are carried out as a punitive measure or for failure to obtain permits, which are often withheld for insubstantial reasons. UNCTAD has noted that

house demolition continued in 2015 and accelerated in early 2016, with 587 Palestinian structures demolished between September 2015 and April 2016.⁸⁶

Demolition is a punitive measure used as deterrence, since persons contemplating acts that violate the law must consider that their family's house may be demolished as part of a penalty. Demolition in this situation is considered a collective punishment, expressly prohibited under the Fourth Geneva Convention, and therefore may be in direct violation of article 33, derived from article 50 of the Hague Regulations, which states that

no general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.⁸⁷

The International Committee of the Red Cross, in its commentary on the Fourth Geneva Convention, notes that article 33 prohibits penalties outside the criminal justice system that are imposed on persons who committed no criminal offense, and states that article 33

⁸⁴UNCTAD, 2016, Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory, TD/B/63/3, Geneva, 28 September, para. 6.

⁸⁵ Ibid, para. 7.

⁸⁶ Ibid, para. 8.

⁸⁷ International Committee of the Red Cross, 2017, Treaties, States parties and commentaries.

does not refer to punishments inflicted under penal law, i.e. sentences pronounced by a court after due process of law, but penalties of any kind inflicted on persons... for acts that these persons have not committed.⁸⁸

3. Medical sector

The practices of Israel in the Occupied Palestinian Territory have negatively impacted the medical sector and the quality of medical care available to the Palestinian public. The prolonged blockade of Gaza has impeded the importation of medical equipment. Checkpoints operated at many points in the Occupied Palestinian Territory have also prevented patients from gaining access to medical facilities, with numerous documented deaths as a result. Restrictions that negatively impact the Palestinian economy in general have meant that fewer Palestinian resources are available to augment the medical sector. Bombing campaigns in Gaza during several major military conflicts over the course of the occupation have damaged medical facilities in Gaza. Finally, the population of Gaza remains under a blockade, denied access to the West Bank and the rest of the world, and those in need of medical treatment are often not allowed to travel to obtain essential health care.

H. Continuation of occupation

Belligerent occupation is and should be a temporary situation. A body of law has evolved around it not because it is a desirable situation, but because it is an inherently dangerous situation for the populations involved. The law of belligerent occupation is aimed at mitigating the rigours for such populations.

The refusal of Israel to withdraw, and the insertion of its civilians as settlers and building up of an infrastructure for them, could represent unlawful acts. An occupant may not continue its occupation unduly in order to extract more favourable terms in a peace settlement.⁸⁹ Israel may not continue its occupation in order to extract a commitment that, as a condition of withdrawal, other rights must be foregone, such as the right of Palestinians displaced from the territory of Israel to be repatriated.⁹⁰

Israel has continued its occupation well beyond any reasonable period of time for concluding a military confrontation. The continuation of the occupation is an unlawful act that imposes costs on the population through all the ways that the occupation disadvantages them.

⁸⁸ International Committee of the Red Cross, 1987, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva), page 225.

⁸⁹ L Oppenheim, 1948, *International Law: A Treatise*, seventh edition (H Lauterpacht, ed., Longmans, Green and Company, London), p. 432.

⁹⁰ V Azarova, 2017, *Israel's unlawfully prolonged occupation: Consequences under an integrated legal framework*, European Council on Foreign Relations Policy Brief, p. 3.

VI. Obligations of Israel and of the international community

A. Legal obligation of Israel for remedies for committed violations

An obligation to make amends for harm caused is a basic precept of international order. Such an obligation arises from treaty obligations even if a particular treaty does not specify such an obligation. Treaties often specify only obligations to act or refrain from acting in certain ways, but do not indicate the consequences of a breach. The remedies for violation of a treaty obligation are found in a separate body of law called the law of State responsibility. This body of law has been elaborated by the International Law Commission, established by the General Assembly in 1947 under article 13 of the Charter of the United Nations. The International Law Commission has devised a comprehensive set of rules requiring States to make good any wrong they cause, whether in violation of a treaty obligation or in violation of a norm found in the customary law of nations.

A violation of legal norms found in customary or treaty law gives rise to an obligation to make amends. Although specification of an obligation to make amends is not required in a particular treaty, some treaties contain such provisions. The international norms on the conduct of a belligerent occupant, in particular, require financial compensation for harms that cannot be remedied in kind. The Convention respecting the Laws and Customs of War on Land, to which the Hague Regulations are annexed, contains a specific clause on this subject, requiring financial recompense if a belligerent occupant violates rights, stating as follows:

Article 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁹¹

These provisions are also stated in the Fourth Geneva Convention, as follows:

Article 29. The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.⁹²

Two points are made in article 29. First, the belligerent occupant is legally responsible for harm caused by any of its agents, whether military or civilian. Second, the fact that an individual is held responsible for an act in violation of the laws of war does not free the belligerent occupant of its liability. As a result, even if an individual is punished for a war crime such as the transfer of civilians into territory under belligerent occupation, the State, such as Israel, may be required to provide reparations for this

⁹¹ International Committee of the Red Cross, 2017, *Treaties, States parties and commentaries*.

⁹² United Nations, 1950, *Treaty Series*, vol. 75, No. 973.

conduct. The obligation obtains whether the violation is characterized as falling under humanitarian law or human rights law. Benvenisti refers to

the responsibility of the occupant, under the law of occupation and human rights law, to provide civil remedies to its victims, as part of its obligation to ensure public order.⁹³

The reference to public order is a reference to article 43 of the Hague Regulations. The financial liability of an occupant is broad, and extends beyond the acts of the armed forces to cover acts by private parties who operate in an occupied territory under the auspices of the occupant.

If a State violates an international obligation, a number of secondary obligations arise. These obligations were put into the form of draft articles by the International Law Commission, and the General Assembly took note of the articles and commended them to the attention of Governments.⁹⁴ One obligation is to cease the unlawful conduct and give assurances that it will not be repeated, as follows:

Article 30. Cessation and non-repetition. The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.⁹⁵

In addition, a State must effect reparation, as follows:

Article 31. Reparation.

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.⁹⁶

The ways in which a State must effect reparation are defined as follows:

Article 34. Forms of reparation. Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.⁹⁷

Restitution must be effected if possible, as follows:

Article 35. Restitution. A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.⁹⁸

⁹³ E Benvenisti, 2012, *The International Law of Occupation* (Oxford University Press, Oxford), p. 338.

⁹⁴ United Nations, 2002, Resolution 56/83, A/RES/56/83, New York, 28 January.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

To the extent that restitution cannot fully remedy a wrong, compensation is required, as follows:

Article 36. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.⁹⁹

The set of secondary obligations is illustrated in the advisory opinion of ICJ on the consequences of the construction of a wall. Having stated that the construction was unlawful, the Court identified the following consequence:

Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory. ...

Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned.¹⁰⁰

The Court further stated Israel should restore what it had appropriated, as follows:

Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.¹⁰¹

These principles apply to any harm caused by Israel as a belligerent occupant. The obligation of Israel with regard to acts in violation of the laws of belligerent occupation is, in the first instance, to cease the violation if it is ongoing. It must afterwards restore the prior existing situation. To the extent that this cannot be done, compensation must be paid. The same obligation applies for violations of human rights law.

B. Obligation of the international community

The international community has an obligation to ensure that Israel is accountable for the economic costs of occupation for the Palestinian people. This stems from the fact that the obligations of Israel as a belligerent occupant are *erga omnes*, that is, owed to the international community as a whole. This applies to obligations under both humanitarian law and human rights law. With regard to humanitarian

⁹⁹ Ibid.

¹⁰⁰ ICJ, 2004, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, paras. 151–152.

¹⁰¹ Ibid, para. 153.

law, the Fourth Geneva Convention in article 1 requires States parties to respect the obligations contained in the Convention and to ensure respect for them. The latter phrase means that States parties have a collective obligation to ensure respect for the Convention whenever a situation of belligerent occupation develops. This obligation has been recognized with regard to the occupation of Palestinian territory by Israel. ICJ states that each State party to the Fourth Geneva Convention bears an individual obligation in this regard, as follows:

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 respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.¹⁰²

The Court has stated that this obligation extends in particular to self-determination, as follows:

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.¹⁰³

In its advisory opinion on the consequences of the construction of a wall, ICJ repeated the *erga omnes* analysis it used in its advisory opinion on the legality of the threat or use of nuclear weapons. ICJ quoted this advisory opinion, in stating that the essential rules of humanitarian law are customary in character, and stated as follows:

In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.¹⁰⁴

The concept of *erga omnes* is a basic norm of international order. It means that with regard to certain essential obligations there is an interest in compliance that extends beyond the immediate parties to a situation. The obligations are so fundamental that any breach threatens the entire international community. All States therefore have standing to raise such matters. As well, no State is legally permitted to act in a fashion that facilitates a breach. International law has a concept of complicity comparable to that found in domestic penal law. That is, one who aids and abets the commission of an unlawful act is in breach, alongside the actual perpetrator. Put another way, the breach by the principal perpetrator creates a situation for other States, which must not help the perpetrator. In addition, they are legally empowered to take legal action against the perpetrator.

The *erga omnes* concept has been applied by other international institutions. Implementation of this concept is seen in legal action taken by several States against Greece at the European Commission of Human Rights, at a time when the Government in Greece was engaging in the torture of political

¹⁰² Ibid, para. 159.

¹⁰³ Ibid, para. 159.

¹⁰⁴ Ibid, para. 157.

opponents. The States successfully sued Greece, although they had no direct connection to the torture taking place in Greece. Citizens of these States had not been victimized, yet the European Commission of Human Rights accepted that these States had standing to institute legal action against Greece.¹⁰⁵

The United Nations and its Member States have an obligation to ensure compliance by Israel with its obligations as a belligerent occupant. The Security Council has a primary responsibility to ensure peace, in accordance with article 24 of the Charter of the United Nations. If the Security Council fails in this task because of lack of unanimity of the permanent members, the responsibility falls on the General Assembly.¹⁰⁶ With regard to settlements in an occupied territory, the Security Council, in its resolution 465, called upon States to refrain from providing funds to be used for settlements.¹⁰⁷ In addition, the Security Council, in its resolution 2334, called upon all States to “distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967”.¹⁰⁸ Furthermore, economic development is also an obligation *erga omnes*, meaning that all States must collaborate to ensure economic development for all. According to the Declaration on the Right to Development,

Article 3 (3). States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development.¹⁰⁹

Belligerent occupation presents a special situation for the international community. It is accepted that when a State occupies territory not its own, the risk of depredations and mistreatment of the population by the occupying Power is substantial. History shows that belligerent occupation often brings abuse of occupied populations. The events of the Second World War, particularly in Eastern Europe, led to the inclusion of article 30 in the Fourth Geneva Convention, which requires an occupying Power to allow access by outside entities that may provide succour to an occupied population and may be in a position to uncover abuses committed by the occupying Power. Article 30 highlights the importance of a role being played by the international community to deal with a situation of belligerent occupation. As noted, the Fourth Geneva Convention specifically requires all States parties to ensure that the Convention is respected whenever a situation of belligerent occupation arises, as follows:

Article 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.¹¹⁰

One of the ways in which the international community can play a role is to ensure remedies for harm caused by an occupying Power. With the occupation by Israel now in its second half-century, the

¹⁰⁵Council of Europe, European Commission of Human Rights, 1970, *The Greek Case: Application No. 3321/67 – Denmark v. Greece; Application No. 3322/67 – Norway v. Greece; Application No. 3323/67 – Sweden v. Greece; Application No. 3344/67 – Netherlands v. Greece*, Report of the Subcommission.

¹⁰⁶ United Nations, 1950, Resolution 377 (V), New York, 3 November.

¹⁰⁷ United Nations, Security Council, 1980, Resolution 465, S/RES/465, New York, 1 March, para. 7.

¹⁰⁸ United Nations, Security Council, 2016, para. 5.

¹⁰⁹ United Nations, General Assembly, 1986, Declaration on the Right to Development.

¹¹⁰ United Nations, 1950, *Treaty Series*, vol. 75, No. 973.

international community increasingly understands that it cannot allow Israel to continue with a de facto annexation. As stated in a recent policy brief on the approach of the European Union to the continuation of the occupation,

third States are under a responsibility in international law to act cohesively and vigorously to ensure the non-recognition of the unlawful situation and deny it effectiveness.¹¹¹

European States have acted collectively in their trade policy to emphasize that the Occupied Palestinian Territory is not under the sovereignty of Israel. The fact that an occupation is unlawful “triggers the legal obligations of third States in international law to cooperate to bring the occupation to an end”.¹¹² The obligation to bring an end to the occupation by Israel in order to, among other reasons, avoid further economic costs for the population, rests with the United Nations. The Security Council was created to maintain the peace of the world, and is mandated, under article 39 of the Charter of the United Nations, to deal with threats to peace. The occupation, as it is unlawful, constitutes a threat to peace.

¹¹¹ V Azarova, 2017, Israel’s unlawfully prolonged occupation: Consequences under an integrated legal framework, European Council on Foreign Relations Policy Brief, p. 11.

¹¹² Ibid, pg. 4.

VII. International precedents for the obligations of a belligerent occupant

Belligerent occupants who cause damage during an occupation have been required to compensate for harm that cannot be remedied in kind. Compensation has been ordered to be paid to individual parties whose rights are violated and to States. It is well established in the law that a belligerent occupant that causes harm is liable to pay compensation. This obligation has been enforced in three ways. First, international courts have awarded compensation in such situations. Second, peace treaties concluded to end a war that included belligerent occupation of a territory have required belligerent occupants to compensate for harm caused during the occupation. Third, the Security Council, which has powers with regard to war and peace, has provided for compensation to be paid by a belligerent occupant for harm caused.

A. Remedies ordered by international courts

In one instance, the European Court of Human Rights ordered the payment of monetary compensation to a property owner. In northern Cyprus, a Greek property owner sued Turkey, claiming she had been denied access to property she owned in the sector of Cyprus that the Court found to be under belligerent occupation by Turkey. The Court found Turkey to have violated the claimant's rights, and awarded the sum of 300,000 Cypriot pounds to be paid by Turkey for "denial of access" to the property, based on the fact that the property in question was a business property, and the claimant had not been able to use it for productive purposes.¹¹³

In another instance, ICJ found financial reparation owing for the taking of natural resources by a belligerent occupant. In *Democratic Republic of the Congo v. Uganda*, ICJ found Uganda to have been in occupation of a sector of the Democratic Republic of the Congo, and required Uganda to make reparation for violations of the law of belligerent occupation, accepting evidence from the Democratic Republic of the Congo that Uganda had taken natural resources. With regard to looting, plunder and the exploitation of natural resources, the Court stated that such acts had resulted in injury to the Democratic Republic of the Congo and to persons on its territory, and that Uganda had an obligation to make reparation accordingly.¹¹⁴

¹¹³ European Court of Human Rights, 1998, *Loizidou v. Turkey*, *Judgment, Report of Judgments and Decisions 1998*, paras. 34 and 36.

¹¹⁴ ICJ, 2005, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment, ICJ Reports 2005*, para. 259.

B. Remedies ordered by peace treaties

Belligerent occupants have been required to make financial compensation in treaties following a war. The terms of armistice concluded with Germany after the First World War included a series of financial conditions, one of which was “reparation for damage done”.¹¹⁵ In territories that Germany had occupied during the war, Germany had engaged in policies that damaged the local economies, including through the recruitment of forced labour, the internment of civilians and the requisition of foodstuffs. Under the Treaty of Versailles, Germany was required to make “compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency”, and compensation to cover damage with regard to property “carried off, seized, injured or destroyed”.¹¹⁶ In addition, during the Second World War, the Allies denounced the “systematic spoliation of occupied or controlled territory”.¹¹⁷ Peace treaties concluded at the end of the war required compensation for the economic costs of occupation, in line with the Inter-Allied Declaration. For example, the Treaty of Peace with Hungary stated as follows:

Article 24. Hungary accepts the principles of the United Nations Declaration of January 5, 1943, and shall return, in the shortest possible time, property removed from the territory of any of the United Nations.¹¹⁸

The Treaty of Peace with Romania stated as follows:

Article 22. Losses caused to the Soviet Union by military operations and by the occupation by Roumania of Soviet territory shall be made good by Roumania to the Soviet Union. ...

Article 23. Roumania accepts the principles of the United Nations Declaration of January 5, 1943, and shall return property removed from the territory of any of the United Nations.¹¹⁹

The Treaty of Peace with Italy stated as follows:

Article 75 (1). Italy accepts the principles of the United Nations Declaration of January 5, 1943, and shall return, in the shortest possible time, property removed from the territory of any of the United Nations.¹²⁰

Furthermore, the Treaty of Peace with Japan stated as follows:

Article 14 (a) (1). Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question.¹²¹

¹¹⁵ Terms of Armistice with Germany, 11 November 1918, article 19.

¹¹⁶ Treaty of Peace with Germany (Treaty of Versailles), 28 June 1919, article 232 and annex 1, para. 9.

¹¹⁷ Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, London, 5 January 1943.

¹¹⁸ United Nations, 1947, *Treaty Series*, vol. 41, No. 644.

¹¹⁹ United Nations, 1947, *Treaty Series*, vol. 42, No. 645.

¹²⁰ United Nations, 1947, *Treaty Series*, vol. 49, No. 747.

¹²¹ United Nations, 1951, *Treaty Series*, vol. 136, No. 1832.

C. Remedies ordered by the Security Council

The Security Council imposed financial obligations on Iraq for harm caused by Iraq during its occupation of Kuwait in 1990–1991. Significantly, the Security Council specified that compensation in such a situation was required by law. Shortly after the occupation commenced, the Security Council reminded “Iraq that under international law it is liable for any loss, damage or injury arising in regard to Kuwait” both to “nationals and corporations” and invited States “to collect relevant information regarding their claims, and those of their nationals and corporations, for restitution or financial compensation by Iraq”.¹²² Following the end of the belligerent occupation of Kuwait, the Security Council reiterated the financial liability of Iraq, stating that Iraq was “liable under international law for any direct loss, damage – including environmental damage and the depletion of natural resources”, and created a commission to adjudicate claims made against Iraq.¹²³ The United Nations Compensation Commission proceeded to entertain claims, and compensation was provided for all manner of loss, including depletion of or damage to natural resources.¹²⁴

¹²² United Nations, Security Council, 1990, Resolution 674, S/RES/674, New York, 29 October, paras. 8–9.

¹²³ United Nations, Security Council, 1991, Resolution 687, S/RES/687, New York, 3 April, paras. 16 and 18.

¹²⁴ TJ Feighery, CS Gibson and TM Rajah, 2015, *War Reparations and the [United Nations] Compensation Commission: Designing Compensation after Conflict* (Oxford University Press, Oxford).

VIII. Conclusions and recommendations

Israel bears a legal obligation to remedy the economic costs of its occupation of the Palestinian territory. The international community also has a responsibility to ensure that Israel satisfies that obligation. The obligations of Israel are well grounded in international law and precedents. In comparable situations of belligerent occupation, States have been held financially liable. The principle of liability to remedy and compensate for harm is well established in law. While Israel also bears an obligation to terminate its occupation, that obligation is without prejudice to its obligation to compensate for harm caused to any party. This includes harm to individuals, harm to business, trade or agricultural undertakings and harm to governmental entities. Liability extends to the failure of Israel to promote economic development. As stated by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967,

The Declaration on the Right to Development establishes a rights-based approach to economic growth and social progress. Human rights are to be embedded in all aspects of economic and social development as a necessary precondition to the achievement of real and sustainable progress, expanded capacities and enlarged freedoms for the entire population.¹²⁵

Economic development is a policy goal, a desideratum for all peoples. Beyond that, however, it has come to be recognized as a legal requirement. Economic development is a right, which in turn imposes an obligation on States to promote it. A rights-based approach is of particular import for a State and people under occupation. In normal situations, a State can act to facilitate the development of its population, and the population can participate in setting policy. In a situation of belligerent occupation, neither the State that holds sovereignty nor its population is in a position to undertake this task. It becomes especially important for the international community as a whole to promote development and, if the belligerent occupant fails in its economic obligations, the international community must ensure that the belligerent occupant provides compensation and remedy. Such compensation can materially assist the population of an occupied territory in overcoming the years of non-development and de-development imposed upon it by the belligerent occupant.

With regard to the Occupied Palestinian Territory, this means an obligation for Israel, in the first instance, to avoid action that impedes development. The significant violations by Israel of property rights and other rights have impeded development. In the second instance, the right to economic development means that Israel must take affirmative steps to foster development. Israel has failed to do this. The right to development, being a right *erga omnes*, implies that the failure of Israel in both instances brings into focus an obligation for the international community as a whole to ensure that Israel complies with its obligations. For the harm already caused by Israel – both harm caused by actions

¹²⁵ United Nations, General Assembly, 2016, A/71/554, para. 40.

impeding economic development, and harm caused by a failure to take affirmative steps – Israel may owe economic compensation. It is incumbent on the international community to ensure that remedy is in place.

