

10 Years after the Advisory Opinion on the Wall in Occupied Palestine: Time for Concrete Action

9 July 2014

To:

Secretary-General of the United Nations Ban Ki-moon
High Contracting Parties to the Geneva Conventions

This letter is joined by 87 legal experts and 32 legal networks and organizations concerned with the ongoing breaches of international law in the occupied Palestinian territories violating the Palestinian people's individual and collective human rights. We are pursuing mechanisms to end impunity for these breaches and violations on the occasion of the tenth anniversary of the International Court of Justice (ICJ) *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004.¹ We take note also of the main outcomes of subsequent efforts by independent legal experts, UN bodies and civil institutions² to promote good practice and operational measures aimed at ending Israeli violations and ensuring respect for international law in the pursuit of justice, peace and world order.

The Court arrived at its Advisory Opinion following essentially the same rules and procedures as in its binding judgments in other, contentious cases. Further, the Advisory Opinion's high status and legal effect derive from the fact that it is the official pronouncement of the principal judicial organ of the United Nations.

The 2004 ICJ opinion authoritatively elucidates (1) the international legal framework that applies to the Israeli occupation (2) the connection between the Wall and Israel's illegal settler-colony enterprise and (3) the responsible actors and their legal obligations. The ICJ concluded that the "construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law."³ The Court found that construction of the Wall and its associated regime violate multiple norms binding on all States under both treaties and customary law, including peremptory norms from which no derogation is permitted.⁴ The Court ruled that:

- A. Israel cannot rely on a right of self-defence, or on a state of necessity, in order to preclude the wrongfulness of the construction of the Wall⁵;
- B. Israel is under an obligation to terminate its breaches of international law, to cease the construction of the Wall, to dismantle its structures, and to repeal or render ineffective all related legislative and regulatory acts; Israel is further under an obligation to make reparation for all damage caused by the Wall⁶;
- C. All States are under an obligation not to recognize the illegal situation resulting from the construction of the Wall and not to render aid or assistance in maintaining the situation created by such construction and its associated regime⁷;

- D. All High Contracting Parties (HCPs) to the *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949* have an additional obligation to respect and ensure Israel's and other States' compliance with international humanitarian law as embodied in that Convention⁸;
- E. The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the Wall and the associated régime.⁹

The 150 states¹⁰ that voted in favour of UN General Assembly resolution ES-10/15¹¹ explicitly have acknowledged the duty of Israel and all UN Member States to “comply with their legal obligations as mentioned in the advisory opinion.”¹² Following the ICJ advisory to consider further action, the General Assembly acclaimed “*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,”¹³ and established the United Nations Register of Damage (UNRoD) caused by the construction of the wall in the occupied Palestinian territory.¹⁴

Subsequent legal analysis of Israeli violations and their consequences for Palestinian human rights have reaffirmed and complemented the *ICJ Advisory Opinion* in response to the particular question that the General Assembly put to it.¹⁵ The *ICJ Advisory Opinion* already had underlined that the Wall was a component of the wider Israeli annexation and settlement enterprise that systematically violates Palestinians' human rights. Consecutive UN Special Rapporteurs on the situation of human rights in the oPt have found that Israel's occupation regime, integrating the settler colonies and the Wall, has resulted in institutionalized discrimination, segregation and systematic and severe violation of Palestinians' human rights. They have characterized this Israeli regime as one “of prolonged occupation with features of colonialism and apartheid.”¹⁶ UN treaty bodies such as the UN Committee on the Elimination of Racial Discrimination (CERD)¹⁷ and independent legal studies¹⁸ have supported these findings. It follows that these Israeli violations trigger not only state responsibility, but also individual criminal liability under the Rome Statute of the ICC and other standards of international criminal law.¹⁹

Based on the above, UN fact-finding missions and Special Rapporteurs, as well as human rights organizations around the world, have engaged in the study of third-party responsibilities and extraterritorial human rights obligations.²⁰ They have analysed how states, parastatal and private actors provide recognition and/or otherwise assist in the commission or maintenance of these crimes, gross violations of human rights and serious violations of IHL.²¹ Taking into consideration the IHL framework, human rights conventions,²² the *Apartheid Convention*²³ and the *Rome Statute of the ICC*, such analysis has demonstrated the obligation of states to adopt practical measures in economic and business operations, in order to comply with their duties under international law and avoid, or terminate complicity with illegal situations.

Primary responsibility to promote and protect human rights, and to ensure respect for international law and human rights by nonstate actors, remains with States. However, legal development over the last years has stressed the liability of corporations, parastatal institutions and financial actors. In 2006, the International Red Cross has stressed that IHL binds not only states and armed groups but as well business enterprises.²⁴ In 2011, the UN Human Rights Council resolution A/HRC/RES/17/4 adopting the *UN Guiding Principles on Business and Human Rights* underlined that transnational corporations and other business enterprises have a responsibility to respect human rights.²⁵ The UN Special Representative for Business and Human Rights has concluded that corporations now are considered bearers of duties under international criminal law.²⁶

Some non-State actors already have been denounced for their noncompliance with their international law and human rights obligations. Among these entities are the parastatal Jewish National Fund, World Zionist Organization, and Mekorot, as well as Israeli and transnational corporations such as Elbit Systems, Sodastream, Ahava, G4S, Veolia Group, Alstom, Dexia Bank, and institutions of the Israeli banking system, among others.²⁷

Since 2004, some States and private bodies have developed good practices or policies, including divestment from, or termination of/abstention from contracts with entities involved in Israeli violations of international law. The EU Guidelines on eligibility of Israeli entities for grants, prizes and financial instruments²⁸ and the relevant Non-Aligned Movement resolutions²⁹ are notable examples of the exercise of collective extraterritorial obligations.

States, public entities, parastatal organisations and private actors—whether located in, operating partially in, providing services or products to, transacting with or trading in services or products of Israeli settler colonies, or otherwise engaged in projects executed totally or partially under Israeli control in the oPt and/or not “undertaken in accordance with the wishes of the peoples of [Non-Self-Governing] Territories, and their contribution to the development of such Territories”³⁰—are under self-executing obligations to cooperate in taking the following measures:

1. Terminate all funding, contracts or other economic and institutional relations with actors enabling, supporting or encouraging the continuation of Israeli violations of international law. To this end, investigations must consider the fungibility of financial trails, products and technology transfer.
2. Ban/terminate all trade in products partially or totally produced in the illegal settler colonies. The labelling of products as originating from the colonies, while continuing to trade, is not sufficient to meet the obligations of nonrecognition of, and noncooperation with the illegal situation. The WTO regime does not impede this corrective trade measure.³¹

Individual States and governments, in particular, should:

1. Adopt policies and prohibitive legislation, and develop, produce and widely disseminate informational guidelines, in order to ensure that companies and other entities under their jurisdiction are sufficiently apprised of the legal consequences of their role in Israeli violations, and in order that no party evade its obligations.
2. High Contracting Parties to the Geneva Conventions are further obliged to exercise domestic and universal jurisdiction, in order to pursue and prosecute or extradite actors that have been or are involved in grave breaches of IHL³²;
3. States must pursue and prosecute the authors of international crimes, codified inter alia in the *Apartheid Convention* and the *Rome Statute of the ICC*, in accordance with their international obligations;
4. States and organs of the United Nations must ensure that Israel make timely, effective and adequate reparation for all damages suffered from its conduct and that of its agents.³³

International law provides for States to comply with these obligations individually and by way of international cooperation, as well as through the organs and mechanisms of the United Nations. Among the available measures are:

- Implementing trade, military and/or diplomatic sanctions as a countermeasure³⁴;

- Creating an enabling environment for the accession of Palestine to the Rome Statute³⁵;
- Depositing a statement affirming applicability of the Fourth Geneva Convention in the oPt, including Jerusalem, the West Bank and Gaza Strip;
- Re-constituting the UN Special Committee and Center against Apartheid, charged to investigate Israeli apartheid, recommend measures to combat it, and monitor compliance of all States and private entities in light of their individual, collective, domestic and extraterritorial obligations vis-à-vis Israel's regime of prolonged occupation with its features of colonialism and apartheid, which the Wall exemplifies³⁶;
- Development of an UN Agenda for Action in consultation with the UN human rights treaty bodies, ILO compliance mechanisms, legal advisors to the Secretary-General and the depositary of the IV Geneva Convention;
- Through the General Assembly, mandating the UN Register of Damage to develop the capacity to determine reparations for losses, costs and damages to any party as a consequence of the Separation Wall's development, construction and/or maintenance.

The failure of the United Nations and individual Member States to uphold their binding obligations to uphold international law and world order in this case undermines the international system and faith in international law. Ten years after the ICJ decision, we urge the United Nations, its Member States and organs, finally to comply with their obligations and take legally permissible measures to ensure the removal of the Israeli Wall from occupied Palestinian territory and the associated regime of settler colonies, institutionalized discrimination and annexation. This requires applying the lessons of conflagrations past, combatting the related violations by any and all parties, and effecting the full reparation of victims now for the resulting costs, losses and damages in compliance with the reparations framework that the General Assembly has adopted by acclamation.

In the face these persistent grave breaches, gross violations and codified crimes, ten years of inertia is far too long.

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86. **Carlos Zamorano**, president of the Argentinian League for Human Rights, Argentina
87. **Liesbeth Zegveld**, human rights lawyer, founder, Nuhanovic Foundation, Netherlands

Organizational endorsements:

Palestine:

- **Adalah - The Legal Center for Arab Minority Rights in Israel**
- **Addameer Association for Human Rights**, Palestine
- **Addameer, Prisoner Support and Human Rights Association**, Palestine
- **Arab Organization for Human Rights**, Nazareth, Israel/Palestine
- **Al Haq**, Ramallah, Palestine
- **Al Mezan Center for Human Rights**, Gaza, Palestine
- **Al-Quds Human Rights Clinic, Al-Quds University**, Jerusalem, Palestine
- **Center for Defense of Liberties and Civil Rights "Hurriyat"**
- **Civic Coalition for Palestinian Rights in Jerusalem**
- **Defence for Children International, Palestine Section**
- **Jerusalem Legal Aid and Human Rights Center**
- **MUSAWA, The Palestinian Center for the Independence of the Judiciary and the Legal Profession**
- **Palestinian Centre for Human Rights**

International:

- **American Association of Jurists**, International
- **Argentinian League for Human Rights (Liga Argentina por los Derechos del Hombre)**
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- **European Association of Lawyers for Democracy and World Human Rights (ELDH)**
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- **Housing and Land Rights Network/Habitat International Coalition**, International
- **International Law Association**, Turkey
- **Lawyers for Palestinian Human Rights**, UK
- **Mothers and Families of the Prisoners and Disappeared**, Uruguay
- **National Association of Democratic Jurists (Associazione Nazionale Giuristi Democratici)**, Italy
- **National Lawyers Guild**, USA
- **Peace and Justice Service (Servicio Paz y Justicia) - SERPAJ Chile**
- **Peace and Justice Service (Servicio Paz y Justicia) - SERPAJ Colombia**
- **Peace and Justice Service (Servicio Paz y Justicia) - SERPAJ Uruguay**
- **Permanent Assembly for Human Rights (APDH)**, Argentina
- **PLAN - Palestine Legal Action Network**, International
- **PROGRESS Lawyers Network**, Belgium
- **Russell Tribunal**, International

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- ¹ “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,” Advisory Opinion of 9 July 2004 [heretofore: *ICJ Advisory Opinion*], at: <http://www.icj-cij.org/docket/files/131/1671.pdf>.
- ² See, for example: Ingrid Jaradat/al-Haq, “*State Responsibility in Connection with Israel’s Illegal Settlement Enterprise in the Occupied Palestinian Territory*,” (2013). http://www.alhaq.org/images/stories/PDF/2012/Legal_Memo_State_Responsibility_FINAL_16_07.pdf; Tom Moerenhout, “*The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories*,” *JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES*, Vol. 3, Issue 2, pp. 344–85; François Dubuisson, “*The International Obligations of the European Union and its Member States with regard to Economic Relations with Israeli Settlements*,” (Brussels: CNCD-11.11.11, February 2014), at: <http://www.madeinillegality.org/IMG/pdf/en-report-dubuisson-madeinillegality.pdf>; “*Feasting on the Occupation: Illegality of Settlement Produce and the Responsibility of EU Member States under International Law*,” (Ramallah: Al-Haq, 2013), at: <http://www.alhaq.org/publications/publications-index/item/feasting-on-the-occupation-illegality-of-settlement-produce-and-the-responsibility-of-eu-members-states-under-international-law>; *The Proceedings of the Russell Tribunal on Palestine*, <http://www.russelltribunalonpalestine.com/en/sessions>;
- ³ *ICJ Advisory Opinion*, op. cit., paras. 142, 147, 162, 163.
- ⁴ Such as the prohibitions against the acquisition of territory by force, population transfer and the violation of the Palestinian people’s right to self-determination; absolute prohibitions against torture, etc.
- ⁵ *ICJ Advisory Opinion*, op. cit., paras. 137, 139, 142.
- ⁶ *Ibid.*, paras. 149–54.
- ⁷ See also S/RES/465, 1 March 1980, para. 7.
- ⁸ *Ibid.*, paras. 154–59.
- ⁹ *Ibid.*, para. 160.
- ¹⁰ The only countries not voting in favour of the resolution were: against - Australia, Israel, Marshall Islands, Micronesia (Federated States of), Palau, United States of America ; Abstaining - Cameroon, Canada, El Salvador, Nauru, Papua New Guinea, Solomon Islands, Tonga, Uganda, Uruguay, Vanuatu.
- ¹¹ “Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem,” ES-10/15, 2 August 2004, at: <http://unispal.un.org/UNISPAL.NSF/0/F3B95E613518A0AC85256EEB00683444>.
- ¹² *Ibid.*, paras. 1 and 2.
- ¹³ “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” A/RES/60/147, 21 March 2006, at: <http://www.un.org/Docs/asp/ws.asp?m=A/RES/60/147>.
- ¹⁴ “Establishment of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory,” ES-10/17, 24 January 2007, at: <http://www.unrod.org/docs/Resolution%20ES-10%2017%20of%20the%20General%20Assembly%20of%2024%20January%202007%20.pdf>. The Resolution recalled that “Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the occupied Palestinian territory, including in and around East Jerusalem” and recognized “the necessity of accurately documenting the damage caused by the construction of the wall for the purpose of fulfilling the obligation to make the above-mentioned reparations, including restitution and

- compensation, in accordance with the rules and principles of international law.” The same Resolution notes that “the act of registration of damage, as such, does not entail, at this stage, an evaluation or assessment of the loss or damage caused by the construction of the wall,” which is implicitly a function of measures yet to be determined.
- ¹⁵ “What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?” See “Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory,” ES-10/14, 8 December 2003, at: <http://unispal.un.org/UNISPAL.NSF/0/F953B744269B9B7485256E1500776DCA>.
- ¹⁶ John Dugard, “Implementation of General Assembly resolution 60/251 of 15 March 2006 entitled “Human Rights Council”: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967” <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=461e52b12>; Richard Falk, “Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, submitted in accordance with Human Rights Council resolution 5/1,” <http://unispal.un.org/UNISPAL.NSF/0/69BEC99AF727EAC2852577C3004AAD8A>; Human Sciences Research Council of South Africa, *Occupation, Colonialism, Apartheid?: A re-assessment of Israel’s practices in the occupied Palestinian territories under international law* (Cape Town: HSRC, 2009), at: <http://www.hlrn.org/img/documents/HSRC%20study%20-%20Occupation,%20Colonialism,%20Apartheid%20-%20full.pdf>.
- ¹⁷ CERD, “Concluding Observations: Israel,” CERD/C/ISR/CO/13, 14 June 2007, paras. 17–19; and CERD/C/ISR/CO/14–16, 9 March 2012, paras. 11, 15, 24–27.
- ¹⁸ Human Sciences Research Council of South Africa, *Occupation, Colonialism, Apartheid?: A re-assessment of Israel’s practices in the occupied Palestinian territories under international law* (Cape Town: HSRC, 2009), at: <http://www.hlrn.org/img/documents/HSRC%20study%20-%20Occupation,%20Colonialism,%20Apartheid%20-%20full.pdf>; and Third Russell Tribunal on Palestine, Cape Town, 5–7 November 2011, at: <http://www.russelltribunalonpalestine.com/en/sessions/south-africa>.
- ¹⁹ Notably, the CERD findings repeat the concern over Israel’s failure to uphold its obligations under Article 3 of the Convention on the Elimination of All Forms of Racial Discrimination, which obliges States parties to combat the crime of apartheid.
- ²⁰ See, for instance, *Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights*, 2011, at: <http://www.etoconsortium.org/en/library/maastricht-principles/>.
- ²¹ A large majority of Israeli companies, financial and parastatal institutions are involved in the construction of the Wall and the settlement project and the maintenance of the situation created by them. Transnational companies are expanding their economic activities in the occupied Palestinian territory as part of, or for the benefit of settlements, or maintain commercial relations with Israeli companies involved in the settlements. Especially the homeland security industry (and connected sectors) maintain a symbiotic relationship with Israeli violations of international norms as they provide a testing ground for their technology. At least 1,400 corporations are active in settlements and thirteen industrial zones, as well as agricultural zones have been established on the West Bank; they benefit from public investments and preferential fiscal regimes. Jaradat/al Haq, op. cit.
- ²² The Independent Fact-finding Mission on the Israeli settlements and the Human Rights Council have explicitly affirmed the applicability of these principles to business activities in the occupied Palestinian territory. “*Human rights situation in Palestine and other occupied Arab territories 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, 7 February 2013, paras. 17, 104, at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf.
- ²³ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, General Assembly resolution 3068 (XXVIII), 30 November 1973, entry into force 18 July 1976, at: <http://legal.un.org/avl/ha/cspca/cspca.html>.
- ²⁴ ICRC (2006). Business and international humanitarian law, p. 14, at: http://www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf
- ²⁵ International guidelines and principles such as the UN *Global Compact*, the OECD *Guidelines for Multinational Enterprises* have been adopted to reflect the standard of the UN Guiding Principles.
- ²⁶ The United Nations Secretary-General’s Special Representative for Business and Human Rights John Ruggie’s reports indicate that in the course of the past few decades, the legal status of corporations in international law has shifted to some extent from the classical position, with corporations now considered bearers of duties under international criminal law. See Emeka Duruigbo, “*Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*,” 6 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS. 222 (2008), at: <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1073&context=njihr>.
- ²⁷ Other corporations well-known for their dealings with the Israeli occupation include Caterpillar Inc. (United States), Ahava (Israel), Volvo Group (Sweden), Riwal Holding Group (Netherlands), Hewlett Packard (USA), Mehadrin (Israel), Motorola (USA), Assa Abloy (Sweden), and Cemex (Mexico), etc.
- ²⁸ European Commission, “*Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards*” Notice 2013/C 205/05, OFFICIAL JOURNAL OF THE EUROPEAN UNION, Vol. 56 (19 July 2013), pp. 9–11, at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1405005659273&uri=OJ:JOC_2013_205_R_NS0005.
- ²⁹ The Non-Aligned Movement has adopted several declarations calling for “specific actions to be taken including legislative measures, collectively, regionally and individually, to prevent any products of the illegal Israeli settlements from entering their markets, consistent with obligations under international treaties, to decline entry to Israeli settlers and to impose sanctions on companies and entities

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- involved in construction of the Wall and other illegal colonization activities in the occupied Palestinian territory, including East Jerusalem.” Non-Aligned Movement, “*Declaration on Palestine*,” XIV Ministerial Conference of the Non-Aligned Movement, 19 August 2004, at: <http://www.nam.gov.za/media/040820a.htm>.
- ³⁰ Under-Secretary-General for Legal Affairs Hans Correll, The Legal Counsel, “*Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council*,” S/2002/161, 12 February 2002, paras. 21–22, at: <http://www.arso.org/Olaeng.pdf>.
- ³¹ Moerenhout, op. cit.
- ³² *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, Article 146.
- ³³ A/RES/60/147, 21 March 2006.
- ³⁴ General Assembly resolution “The situation in the Middle East,” A/37/123, 16 December 1982, para. 13.
- ³⁵ On 21 January 2009, Government of Palestine Minister of Justice `Ali al-Khashān declared under Article 12 (3) of the Rome Statute, recognizing the jurisdiction of the International Criminal Court “for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002. The ICC Registrar acknowledged receipt of the declaration in 2009/404/SA/LASS, 23 January 2009. See “*Al-Haq Position Paper on Issues Arising from the Palestinian Authority’s Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute*,” (Ramallah: Al-Haq, 14 December 2009), at: [http://www.alhaq.org/pdfs/position-paper-icc-\(14December2009\).pdf](http://www.alhaq.org/pdfs/position-paper-icc-(14December2009).pdf).
- ³⁶ Consistent also with the Russell Tribunal on Palestine, “Actions Required and Recommended,” Cape Town session, 5–7 November 2011, 7.2.6, at <http://www.russelltribunalonpalestine.com/en/sessions/south-africa/south-africa-session-%e2%80%94full-findings>.