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Rights and obligations of the EU and its Member States to ensure compliance with IHL and IHRL in relation to the situation of the oPt

Legal Expert Opinion

by

Michael Bothe
Professor emeritus of Public Law
J.W. Goethe University Frankfurt/Main

with the cooperation of

Jennifer Drehwald
Research assistant

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Executive Summary

The EU is a prominent actor in efforts in international politics, and has become actively involved in promoting the respect for human rights and the rule of law and to settle international controversies in this spirit. Despite the highly political character of many conflicts, law has always played an important role in this respect. The Expert Opinion discusses the legal framework of measures the EU and/or its Member States, acting individually or jointly, could take in order to promote compliance with international law, in particular international humanitarian law and human rights, by non-member States. The basic question is whether the EU has in this field the same or similar rights and obligations as do States. A crucial example of this general issue is the Middle East conflict in which the EU has also been involved in various ways. Therefore, the Opinion in its second part considers which steps the EU is entitled or even obliged to take in order to induce Israel to comply with its obligations as an occupying power in the occupied Palestinian territory (oPt).

The starting point of the analysis are three categories of international legal norms:

- Art. 1 common to the Geneva Conventions provides for a right and a duty of the contracting parties to ensure compliance with the Conventions. Does a corresponding rule of customary international law also oblige and entitle the EU to do the same?
- A number of rules which are relevant for the conflict (the prohibition of the use of force, the right to self-determination, core rules of human rights law and of international humanitarian law) constitute peremptory norms. Does the EU have the same or similar duties of cooperation for the purpose of bringing to an end violations of these norms?
- Most relevant rules of human rights law and international humanitarian law create *erga omnes* obligations. Does the EU have rights identical or equivalent to the rights States have in relation to ensuring compliance with *erga omnes* obligations?

The legal analysis shows that the answer to these three questions is affirmative.

The starting point for this answer is the international legal personality of the EU (Art. 47 TEU) which is recognized by the international community at large. According to the rules developed by the International Court of Justice and the International Law Commission, an international organization is the addressee of those rules of customary international law which relate to the functions of the organization as determined by its constituent treaty. The Treaty of the European Union (TEU) grants the EU a competence in all fields of foreign policy (Art. 24 para. 1 TEU) and this task is contained in the guiding principles for external action (Art. 21 para. 1 TEU). This includes the promotion of democracy, human rights and the respect for fundamental principles of international law. The EU is thus empowered, by its constituent treaty, to promote compliance with international humanitarian law and human rights. It follows that the rules of customary international law applying to States in this regard also bind and entitle the EU. The EU as an organization is entitled to take the measures which States can take to ensure compliance with international humanitarian law and human rights law.

As a consequence, the EU is entitled and obligated, by a customary humanitarian law rule corresponding to common Art. 1 of the Geneva Conventions, to take measures to induce third States, parties to a conflict, to respect international humanitarian law.

It is also obligated to cooperate to bring to an end any serious breach of a peremptory norm of international law. Furthermore, it is entitled to invoke the responsibility of States to respect *erga omnes* obligations, such as those flowing from customary human rights law.

These obligations existing under international law are strengthened, as a matter of EU law, by the provisions of the TEU on the goals and principles of external action.

Many measures taken by Israel in relation to the oPt are alleged to constitute violations of different rules belonging to the three types of rules just mentioned: international humanitarian law (in particular the law of belligerent occupation), peremptory norms of international law (core rules of human rights law, prohibition of the use of force, right to self-determination) and rules applying *erga omnes* (many human rights and rules of customary humanitarian law).

The EU is thus entitled or obligated to take a variety of measures to induce Israel to comply with its international legal obligations relating to the oPt. They include political initiatives, *inter alia* within the framework of the European Neighbourhood Policy or the Association Agreement between the EU and Israel, using compliance by Israel as a precondition for advantages to be granted in these frameworks, political support for the two state solution and objection to Israeli measures on the ground which impede that solution, resistance against Israel's settlements policy including respective trade measures, support for the use of criminal law by member States and for measures taken by the ICC to punish those violations of international humanitarian law which constitute war crimes.

The Member States must support the EU in taking such measures. In certain situations, the EU must also assist Member States in taking such measures.

Table of contents

<u>Introduction</u>	5
<u>Part A</u>	
<u>The possible role of the EU concerning compliance by non-member States with international humanitarian law and human rights law</u>	7
1. Relevant powers, obligations and procedures under EU law	7
2. The position of the EU under general international law	8
3. A possible role for the EU in promoting compliance with international humanitarian law and human rights law	11
a. The rule formulated in Art. 1 common to the Geneva Conventions.....	11
b. The duty to cooperate in order to bring to an end violations of peremptory norms of international law	12
c. The right to demand respect for <i>erga omnes</i> obligations.....	12
<u>Part B</u>	
<u>The rights and duties of the EU and its members in relation to alleged violations of international humanitarian law and human rights law by Israel</u>	14
1. Alleged violations.....	14
2. Measures to be taken by the EU and/or its Member States	16
<u>Part C</u>	
<u>Obligations of assistance and support between the EU and its Member States</u>	21
<u>Conclusion</u>	23

Introduction

The EU has become an important actor in world politics. Its role in various peace or arms control processes (Syria, Iran) bears witness to this role. This experience draws international attention to the role the EU could play in the complex and so far intractable situation of armed conflict between Israel and the Palestinian side, in particular the situation of the Palestinian population in the occupied Palestinian territory (oPt). As the prospects of a political solution of the conflict are gloomy, the protection of the population of the occupied territory provided by international law, in particular the law of belligerent occupation and human rights law, is all the more crucial. Despite the highly political character of the Middle East conflict, law has always played an essential role in the way that conflict was handled by various actors.¹ The International Court of Justice has contributed to the debate by two advisory opinions.² The Security Council has formulated its position concerning the conflict in legal terms.³ The discussion concerning Palestine's statehood is pursued in legal terms.⁴

It is the purpose of the present Expert Opinion to clarify the legal framework of a possible role the EU could play in improving compliance with these areas of international law. As recent U.S. actions have curtailed the possibilities of the U.S. to serve as a peacemaker in the Middle East,⁵ the potential of other actors, in particular the EU, to take the lead in a peace process in this area becomes all the more crucial.⁶ That role of the EU is particularly important as its relations with Israel are far better than those of the UN which Israel considers fundamentally biased.⁷

At the center of the analysis, there are three relevant types of rules of international law (Part A):

- Art. 1 common to the Geneva Conventions provides for a right and a duty of the contracting parties to ensure compliance with the Conventions. Does a corresponding rule of customary international law also oblige and entitle the EU to do the same?
- Core rules of human rights law as well as some fundamental rules of international humanitarian law constitute *ius cogens*.

¹ Jan Busse/Stephan Stetter, 'Israels Skepsis gegenüber den UN', 66 *Vereinte Nationen* 99-104 (2018), at p. 104.

² *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11.04.1949, ICJ Reports 1949, 174; *Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion, 9. 7. 2004.

³ See *inter alia* SC resolutions 242 (1967), 338 (1973), 452 (1979), 465 (1980), 1397 (2002); latest example SC resolution 2334, 23.12.2016.

⁴ See for example the debate about the qualification of Palestine as „observer State“, Muriel Asseburg, 'Palästinas verbauter Weg zur Eigenstaatlichkeit', 66 *Vereinte Nationen* 105-110 (2018), at p. 106 *et seq.*

⁵ U.S. President Donald Trump, *Presidential Proclamation Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem*, 6 December 2017, available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-recognizing-jerusalem-capital-state-israel-relocating-united-states-embassy-israel-jerusalem/>

⁶ Hugh Lovatt, 'Moving beyond the MEPP: How a New European Neighbourhood Policy can Save the Two State Solution', Heinrich Böll-Stiftung 2016, available at <https://eu.boell.org/en/2016/11/28/moving-beyond-mepp-how-can-new-european-neighbourhood-policy-save-two-state-solution.pdf>

⁷ Busse/Stetter, *loc.cit.* note 1, at p. 104.

Is the EU obligated to cooperate to bring to an end the violation of such norms in the same way States are?

- Most relevant rules of human rights law and international humanitarian law create *erga omnes* obligations.

Does the EU have rights identical or equivalent to the rights States have in relation to ensuring compliance with *erga omnes* obligations?

The legal consequences of these three types of rules are different. Art. 1 common to the Geneva Conventions not only gives a right, but imposes a duty to ensure compliance with international humanitarian law. The violation of peremptory norms of international law imposes a duty on other States, namely a duty to cooperate. There is only a right, but not a duty, to invoke *erga omnes* obligations.

In relation to the EU, the answer to these three questions has two different aspects which are, however, linked to each other, namely:

- Does general international law allow the EU to exercise these rights or to assume such duties?
- Does EU law empower or even oblige the EU and its Member States to exercise these rights or to assume such duties regarding IHL and IHRL?

The general answer given to these questions in Part A will be applied to the situation of the oPt (Part B).

A multi-level approach is necessary to answer the questions considered in the present Opinion as it relates to both the role of the Union and to that of its Member States. Therefore, the relevant obligations of the EU vis-à-vis its Member States and those of the Member States towards the Union will be discussed (Part C).

An important starting point of the legal and practical analysis will be “guidelines” adopted by the EU Council in relation to compliance with human rights law and the law of armed conflict,⁸ in particular the Guidelines on promoting compliance with international humanitarian law of 2005, updated 2009.⁹ The latter Guidelines contain *inter alia* a catalogue of measures which may be envisaged and which therefore have to be discussed from a legal point of view.

⁸ See the publication Council of the European Union, *Guidelines. Human Rights and International Humanitarian Law*, 2009.

⁹ Council of the European Union, *Updated European Union guidelines on promoting compliance with international humanitarian law (IHL)*, O.J. C 303/12, 15.12.2009, 2009/C 303/06. For an analysis see Pål Wrange, ‘The EU Guidelines on Promoting Compliance with International Humanitarian Law’, 78 *Nordic Journal of International Law* 541-552 (2009); Andrea Breslin, ‘Ensuring Respect: The European Union’s Guidelines on Promoting compliance with International Humanitarian Law’, 43 *Israel Law Review* 382-413 (2010), on the Guidelines’ potential as a means to improve compliance with IHL at pp. 408 *et seq.*; Christiane Höhn, ‘International Humanitarian Law in the European Union’s Common Foreign and Security Policy, in Particular the EU Code of Conduct of Arms Exports’, in Thomas Giegerich/Ursula E. Heinz (eds.), *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference*, Duncker & Humblot: Berlin 2009, 167-182, at p. 168 *et seq.*

Part A

The possible role of the EU concerning compliance by non-member States with international humanitarian law and human rights law

1. Relevant powers, obligations and procedures under EU law

As will be shown in Part A.2, the answer to the question of the applicability of customary international law to the EU depends to a certain extent on the powers and obligations of the EU under its own law, in particular its constituent treaties (TEU and Treaty on the Functioning of the European Union, TFEU). The analysis of that question has therefore to start with the EU level.

As the efforts to create a European “constitution” had failed because of two negative referenda held in 2005, the Member States agreed to alter the constituent treaties of the EU in fundamental areas without formulating the ambition to create a constitution.¹⁰ The Treaty of Lisbon, which entered into force in December 2009, was the result of the ensuing negotiations. The treaty not only strengthened the role of the European Charter of Fundamental Rights, but also changed main parts of the EU’s institutional structure and drew a clearer line between the competences of the Union and the Member States.¹¹

After a long development of the political cooperation as a dimension of European integration, the Lisbon Treaty grants to the EU the competence to become active in all areas of foreign policy (Art. 24 para. 1 TEU). The activity of the EU in the field of foreign policy is to be “guided” by certain principles formulated in Art. 21 TEU: among them to “consolidate and support democracy, the rule of law, human rights and the principles of international law”. This principle includes action to promote the compliance with human rights and international humanitarian law.¹² This is expressly stated in the Guidelines on promoting compliance with international humanitarian law mentioned above. In addition, the TEU determines the procedures (i.e. the respective competences of EU organs) and types of measures which may be taken in the field of external action and in particular with respect to the common foreign and security policy (CFSP).¹³

The Lisbon Treaty (Art. 47 TEU) also clarifies¹⁴ that the Union “shall have legal personality”, which is an important instrument for foreign policy action. The EU is thus an international

¹⁰ On the failure of the Constitutional Treaty and the following process see Paul Craig, *The Lisbon Treaty. Law, Politics and Treaty Reform*, OUP 2010, at p. 1 *et seq.*

¹¹ On the changes after the Treaty of Lisbon see Michael Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’, 45 *Common Market Law Review* 617-703 (2008), at pp. 621 *et seq.*

¹² Breslin, *loc.cit.* note 9, at p. 392.

¹³ More details below Part B.2.

¹⁴ On the earlier controversy see Jean Paul Jacqué, *Droit institutionnel de l’Union Européenne*, 7th ed. Dalloz: Paris 2012, mn. 287; Matthias Ruffert, ‘Art. 47’, mn. 2, in Christian Calliess/Matthias Ruffert (eds.), *EUV/AEUV*, Beck/Manz: München/Wien, 5th ed. 2017.

organization and a subject of international law¹⁵ and as such the successor of the European Community.¹⁶ That provision covers all areas of EU activities.¹⁷

2. The position of the EU under general international law

For general international law, which determines the relationship between the EU and non-member States, the TEU is *res inter alios acta*, i.e. it does not create rights nor duties for non-member States. However, the fact that the parties to the TEU have endowed the Union with international legal personality carries an effect also in relation to third States. It is generally recognized that the EU is a subject of international law also in its relations with third States. Whether this presupposes a recognition of the EU by third States or whether the objective existence of the EU in international relations entails its character as a subject of international law is irrelevant in the current context.¹⁸ In practice, the EU is nowadays recognized as a subject of international law, and treated as such, by practically all States. This is, *inter alia*, proven by the fact that the EU is a party to many international treaties concluded by States.¹⁹

However, international organizations including the EU do not necessarily have the same rights and duties as States. In the perspective of international law (which has to be distinguished from the treaty making power pursuant of EU law), the treaty-making power of the EU (or of other economic integration organizations) is as a rule expressly stipulated in relevant treaties and it is doubtful whether the EU could become a party to an international treaty in the absence of such an opening clause providing for international organizations to become parties to the treaty. The debate concerning a possible ratification of the European Convention on Human Rights by the EU shows that in the case of some treaties at least, there must be some adaptation on both sides before the EU can become a party to a particular treaty.²⁰ It is therefore not possible that the EU becomes a party to the Geneva Conventions or to UN human rights treaties absent any relevant opening clause in those treaties.

The ensuing question is whether and to what extent the legal personality of the EU entails a consequence that international customary law normally applicable to States also applies to international organizations, particularly the EU.²¹ In the *Reparations for Injuries* advisory opinion, the ICJ related the answer to that question to the functions of the organization:

¹⁵ Ruffert, *loc.cit.* note 14, mn. 1 and 5; Oliver Dörr, 'Art. 47', mn. 4 and 11, in Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (eds.), *Das Recht der Europäischen Union*, looseleaf.

¹⁶ Dörr, *loc.cit.* note 15, mn. 5 and 31; Bardo Fassbender, 'Die Völkerrechtssubjektivität der Europäischen Union nach dem Entwurf des Verfassungsvertrages', 42 *Archiv des Völkerrechts* 26-43 (2004), at p. 27.

¹⁷ Dörr, *loc.cit.* note 15, mn. 26.

¹⁸ Ruffert, *loc.cit.* note 14, mn. 6; Dörr, *loc.cit.* note 15, mn. 29.

¹⁹ E.g. Convention on International Trade in Endangered Species of Wild Fauna and Flora, 03.03.1973, UNTS 993, p. 243; United Nations Framework Convention on Climate Change, 09.05.1992, UNTS 1771, p. 107; Convention on Biological Diversity, 05.06.1992, UNTS 1792, p. 79.

²⁰ European Court of Justice *Opinion 2/13*, 18.12.2014; Peter Jan Kuijper/Esa Paasivirta, 'EU International Responsibility and its Attribution', in Malcolm Evans/Panos Koutrakos (eds.), *The International Responsibility of the European Union*, Hart: Oxford/Portland 2013, 35-71, at p. 43 *et seq.*

²¹ Paolo Palchetti, 'Reactions by the European Union to Breaches of *Erga Omnes* Obligations', in Enzo Canizzaro (ed.), *the European Union as an Actor in International Relations*, The Hague *et al.*: Kluwer 2002, 219-230, at p. 224.

“Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.”²²

An international organization is the addressee of those norms of international law which relate to, and are relevant for the implementation of, the functions of the organization. This rule entails, for example, a positive answer to the question whether the UN is bound by customary human rights law and by international humanitarian law if UN forces become involved as parties in an armed conflict.²³

As to the EU, it is said that its legal personality is “functionally limited”.²⁴ In this respect, it must be emphasized that the promotion of human rights and the rule of law as well as of the general principles of international law form part of the goals of EU external action and CFSP.²⁵ From the line of argument developed above in relation to the UN, i.e. concluding from the statutory functions to applicable international customary law, it follows that international customary law concerning the means to ensure compliance with those principles applies to the EU as well.

This interpretation is confirmed by the constant practice of the EU and earlier of the EC. The Union has a lengthy track record of criticizing human rights violations of third States²⁶ and imposing sanctions against them.²⁷ The Guidelines mentioned above are part of this practice. Some authors take this interpretation for granted as the starting point for further considerations.²⁸

This conclusion is also confirmed by an analysis of the law of the international responsibility of States and of international organizations as elaborated by the International Law Commission,

²² *Reparations for Injuries Suffered in the Service of the United Nations*, *loc.cit.* note 2, at 180.

²³ Michael Bothe, ‘UN Peace Operations’, in Dieter Fleck (ed.), *The Handbook of the Law of Visiting Forces*, 2nd ed. OUP 2018, 50-74, at p. 65 *et seq.*

²⁴ Ruffert, *loc.cit.* note 15, mn. 7; Dörr, *loc.cit.* note 15, mn. 12 and 24.

²⁵ Breslin, *loc.cit.* note 9, at p. 392.

²⁶ See e.g. European Parliament Resolution 2018/2626(RSP), 15.03.2018, on the situation in Syria; European Parliament Resolution 2015/2973(RSP), 17.12.2015, on the situation in Burundi; European Parliament Resolution 2015/2582(RSP), 12.03.2015, on the situation in Venezuela; European Parliament Resolution 2014/2696(RSP), 17.04.2014, on the situation in North Korea (Democratic People’s Republic of Korea).

²⁷ E.g. Council Regulation 359/2011/EU, 12.04.2011, concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran; Council Regulation 1081/2000/EC, 22.05.2000, prohibiting the sale, supply and export to Burma/Myanmar of equipment which might be used for internal repression or terrorism, and freezing the funds of certain persons related to important governmental functions in that country; Council Regulation 204/2011/EU, 02.03.2011, concerning restrictive measures in view of the situation in Libya; Council Decision 2017/2074/CFSP, 13.11.2017, concerning restrictive measures in view of the situation in Venezuela; Council Implementing Decision 2018/168/CFSP, 02.02.2018, implementing Decision 2015/740/CFSP concerning restrictive measures in view of the situation in South Sudan. Cfr. Palchetti, *loc.cit.* note 21, at p. 219 *et seq.*; Christian J. Tams/Alessandra Asteriti, ‘*Erga Omnes, Jus Cogens, and Their Impact on the Law of Responsibility*’, in Malcolm Evans/Panos Koutrakos (eds.), *op.cit.* note 20, 163-188, at p. 173 *et seq.*

²⁸ Höhn, *loc.cit.* note 9, at p. 168 *et seq.*

namely the Articles on the responsibility of States for internationally wrongful acts (ARS)²⁹ and the Articles on the responsibility of international organizations (ARIO).³⁰ Both sets of articles have either been considered as *lex lata* customary law rules at the time of their adoption or have formed in the meantime the basis for consolidating the relevant body of customary international law.³¹ Despite the fact that it has so far not been possible to adopt them in treaty form, they can now be relied upon as formulating the current state of international law in matters of responsibility of States as well as of international organizations. Art. 40 and 41 ARS provide for a duty of States to cooperate to bring to an end violations of peremptory norms of international law. Art. 41 and 42 ARIO extend this obligation to international organizations. Art. 42 to 48 ARS provide for the possibility of an injured or a non-injured State to invoke the responsibility of a State. Art. 43 to 49 ARIO provide for the invocation of the responsibility of an international organization by an injured or non-injured State or organization. The possibility for an international organization to invoke responsibility is, however, limited according to Art. 49 para. 3 ARIO:

(if) safeguarding the interests of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.

This limitation corresponds to the general rules concerning the application of general international law to international organizations as they can be derived from the Advisory Opinion of the ICJ on *Reparations for Injuries*, namely that the organization possesses those rights under international customary law which are implied in its statutory functions.

The articles do not explicitly address the possibility of an international organization invoking the international responsibility of a State. Yet this silence of the texts does not mean that the latter possibility is excluded. It can be explained by the drafting history as the Articles on State responsibility did not take into consideration responsibility being invoked by actors other than States. In its commentary on ARIO, the ILC, in analyzing the practice relating to invoking responsibility, does not differentiate between States and organizations invoking the responsibility of States although it acknowledges the existence of some doctrinal controversy and the scarcity of relevant practice except for the EU, which has been active in invoking the responsibility of non-member States for human rights violations.³²

²⁹ Adopted by the ILC 26 July 2001 and noted by GA Res. 56/83 of 12 December 2001.

³⁰ ILC, *Draft Articles on the responsibility of international organizations with commentaries*, 2011; on the relevance of these articles see Kuijper/Paasivirta, *loc.cit.* note 20, at pp. 35 *et seq.*

³¹ James Crawford, 'State Responsibility', mn. 69, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, (hereinafter *MPEPIL*); Matthias Hartwig, 'International Organizations or Institutions, Responsibility and Liability', MN 16, in *MPEPIL*. On the difference between the ARS and the ARIO, see the General Commentary of the ILC to the ARIO, *Report of the International Law Commission on the work of its sixty-third session*, UN Doc. A/66/10, p. 47.

³² ILC, *loc.cit.* note 30, p. 90; Tams/Asteriti, *loc.cit.* note 27, at p. 172.

To conclude: the rules of customary international law relating to promoting compliance with international law apply to the EU,³³ and accordingly oblige and entitle the EU. This not only determines the external relations of the EU, customary international law is also part of the internal law of the Union.³⁴

3. A possible role for the EU in promoting compliance with international humanitarian law and human rights law

As pointed out above, there are three rules which assign to States other than the injured State (in this sense “third” States) a role in ensuring compliance with international humanitarian law and human rights law, namely Art. 1 common to the Geneva Conventions, the duty to cooperate to bring to an end violations of peremptory norms of international law and the *erga omnes* effect of human rights obligations.

a. The rule formulated in Art. 1 common to the Geneva Conventions

Art. 1 common to the Geneva Conventions enjoins all parties thereto to “ensure respect” for the Conventions. Art. 1 AP I extends this duty to the respect for the Protocol. These provisions are generally understood as not only requiring the parties to the Conventions to ensure respect by their own forces, but also as obliging parties to the Conventions to take such measures in respect of other parties. This means a negative obligation to abstain from actions supporting violations as well as a positive duty to induce parties to a conflict to abide by the Conventions and AP I.³⁵

As the EU is not, and probably cannot become, a party to these treaties, the EU cannot invoke these rules as a matter of treaty law. It can only rely on a corresponding rule of customary law. The decisive question thus is whether the rule contained in Art. 1 common to the Conventions and in Art. 1 AP I is also part of customary law. As to measures possibly taken vis-à-vis third States, the differentiated answer of the ICRC Customary Law Study³⁶ is as follows:

Rule 144. States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.

This rule distinguishes between a negative and a positive obligation. As to the positive obligation, i.e. the obligation to take positive steps to induce compliance by third States,

³³ Palchetti, *loc.cit.* note 21, at p. 172; Theodore Konstadinides, ‘When in Europe: Customary International Law and EU Competence in the Sphere of External Action’, 13 *German LJ* 1177-1201 (2012), at p. 1183 with further references.

³⁴ Alessandra Gianelli, ‘Customary International Law in the European Union’, in Enzo Cannizzaro/Paolo Palchetti/Ramses A. Wessels (eds.), *International Law as Law of the European Union*, Nijhoff 2011, 93-110: “Europeanization of customary international law”, p. 108 *et seq.*; Konstadinides, *loc.cit.* note 33, p. 1180.

³⁵ Breslin, *loc.cit.* note 9, at p. 386.

³⁶ Jean-Marie Henckaerts/Louise Doswald-Beck/ICRC, *Customary International Humanitarian Law*, CUP 2005, vol. I, Rules, p. 509.

formulated in the second sentence, the language is softer than that of Art. 1 (“ensure respect”), but that soft obligation corresponds to a reasonable interpretation of Art. 1, too.

The ensuing question is whether the EU as an international organization is bound and entitled by the corresponding rule of customary law. As already indicated, international organizations are bound by those rules of customary international law which relate to the areas of international law in which the organization may, according to its statutes, exercise functions. Promoting respect for human rights, for the rule of law in international relations and for general principles of international law is part of the principles which shall guide the foreign policy of the Union. Therefore, the EU is an addressee of the rule of customary humanitarian law formulated in Rule 144 of the Customary Law Study. Thus, the EU is not only entitled, but also obliged to “exert its influence ... to stop violations of international humanitarian law” by any party to an armed conflict. A total omission would thus be a violation of the customary law duty to “ensure respect”.

This right and duty existing pursuant to international law is complemented by a corresponding duty existing under EU law. Art. 21 para. 2 TEU imposes a duty on the Union. It “shall define and pursue common policies and actions” for promoting “the rule of law, human rights and the principles of international law”.³⁷ Although there is a considerable degree of discretion concerning the way in which EU organs fulfill this obligation, it would be a violation of the TEU if the EU remained totally inactive in the light of massive violations of international humanitarian law. The TEU not only grants certain powers to the EU organs, it also imposes obligations.

b. The duty to cooperate in order to bring to an end violations of peremptory norms of international law

Art. 41(1) ARS and Art. 42 (1) ARIO enjoin States and international organizations to cooperate “to bring to an end ... any serious breach” of a peremptory norm of international law. The exact content of this duty to cooperate is left open, it varies with the context.³⁸ The notion of “cooperate” means that the relevant actors should not act alone, but in conjunction with each other.

c. The right to demand respect for *erga omnes* obligations

As to the right to demand respect for *erga omnes* obligations, similar considerations apply. The rights which a non-injured State possesses to invoke the responsibility of another State for its unlawful acts are formulated in Art. 48 ARS. As argued above, an international organization

³⁷ Emphasis added.

³⁸ ILC, *loc.cit.* note 30, p. 83; Andrea Gattini, ‘A Return Ticket to ‘Communitarisme’. Please’, 13 *EJIL* 1181-1199 (2002) at p. 1186 *et seq.*

has the same rights, at least provided that the violation in question relates to a subject matter falling within the scope of functions of the organization. Therefore, the EU has the right to invoke the responsibility of a State for the violation of *erga omnes* norms in the fields of international humanitarian law and of human rights.³⁹

³⁹ Dörr, *loc.cit.* note 15, mn. 54 and 70; Palchetti, *loc.cit.* note 21, at p. 221 *et seq.*; Tams/Asteriti, *loc.cit.* note 27, at p. 168 *et seq.*

Part B

The rights and duties of the EU and its members in relation to alleged violations of international humanitarian law and human rights law by Israel

This Part analyzes the conclusions which have to be drawn from the reasoning developed in Part A regarding measures to be taken by the EU addressing compliance by Israel with international human rights law, international humanitarian law and other relevant rules of international law in relation to the occupied Palestinian territory.

1. Alleged violations

It is not the purpose of the present Opinion to provide a general stocktaking of the violations of international humanitarian law and human rights law allegedly committed by Israel. It is, however, necessary to give a summary overview of the relevant claims which have been put forward by various States and organizations in order to address the question of corresponding measures to be taken in this regard by the EU and its Member States. These violations have in particular been stated in the ICJ Advisory Opinion on the construction of a wall in the oPt,⁴⁰ in various resolutions of the UN General Assembly⁴¹ and the Security Council,⁴² and in various reports commissioned by the UN Human Rights Council.⁴³ The main issues are the following:

- the establishment of Israeli settlements in violation of Art. 49 of the Fourth Convention;⁴⁴
- restrictions on the freedom of movement of the population through various measures, in particular the construction of a wall, but also forced relocation, in violation of the Hague Regulations on Land Warfare, various human rights provisions, in particular Art. 12 ICCPR, and Art. 49 GC IV;⁴⁵
- house demolitions, claimed to be justified as punitive measures, as sanctions in case of the lack of building permits, including buildings funded by relief organizations, or for building the Wall, in violation of the Hague Regulations and of the prohibition of collective punishment;⁴⁶
- detention without due process of law or in unacceptable conditions;⁴⁷

⁴⁰ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *loc.cit.* note 2.

⁴¹ See most recently GA Res. 71/98; 23 December 2016: *Israeli practices affecting human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*.

⁴² Res. 2334, 23 December 2016, reaffirming resolution 242 (1967), 338 (1973), 446 (1979), 452 (1979), 465 (1980), 476 (1980), 478 (1980), 1397 (2002), 1515 (2003) and 1850 (2008).

⁴³ *Report of the Special Rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967, Makarim Wibisono*, UN Doc. A/HRC/28/78, 22 January 2015.

⁴⁴ ICJ, *loc.cit.* note 2, paras. 120, 126; Security Council Res. 2334 (2016), OP 1.

⁴⁵ ICJ, *loc.cit.* note 2, paras. 127, 134; GA Res. 71/98, PP35; on the relocation of Bedouins UN Doc. A/HRC/28/78, paras. 64-72.

⁴⁶ On punitive house demolitions see UN Doc. A/HRC/28/78, paras. 50-53; on demolition for the construction of the Wall ICJ, *loc.cit.* note 2, paras. 132 *et seq.*; on collective punishment GA Res. 71/98 PP. 24.

⁴⁷ GA Res. 71/98, PP 24.

- targeted killings not justified as lawful acts of warfare;⁴⁸
- excessive use of force;⁴⁹
- various measures which result in the change of the demographic structure of the population of the oPt, in violation of the right to self-determination and, amounting to a forbidden *de facto* annexation, of the prohibition of the use of force;⁵⁰
- cutting vital supplies to the Gaza Strip (often called “blockade”);⁵¹
- impeding relief operations in violation of art. 70 AP I and a corresponding norm of customary humanitarian law;
- violations of the principle of distinction in the conduct of hostilities during various interventions in the Gaza Strip.⁵²

International law which applies to the situation of the oPt is characterized by a parallel application of international humanitarian law, in particular Geneva Convention IV and the Hague Regulations, and human rights law. This has been emphasized, in particular, by the ICJ in the Advisory Opinion on the construction of a wall. In addition, the prohibition of the use of force and the right to self-determination are relevant.

Thus, the rules violated by Israeli practices in relation to the oPt pertain to a different degree to the three types of norms described in Part A (3.) which allow for, or even require, the involvement of non-injured States or organizations in demanding respect for them.

The relevant rules of IHL are covered by the customary law duty of all States and of relevant international organization to take measures inducing the parties to an armed conflict to respect IHL, in particular Art. 49 GC IV and Art. 46 of the Hague Regulations on Land Warfare.

Fundamental rules of IHL and of human rights law as well as the prohibition of the use of force (prohibition of *de facto* annexation) and the right to self-determination constitute *ius cogens*.⁵³ Their violation thus triggers a duty of cooperation the content of which is, however, somewhat unclear.⁵⁴

The relevant rules of IHL, relevant human rights (in particular Art. 6, 9, 12 ICCPR) as well as the prohibition of the use of force and the right to self-determination are rules which protect

⁴⁸ David Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defense’, 16 *EJIL* 171-212 (2005).

⁴⁹ See GA Res. 71/98, PP. 24.

⁵⁰ ICJ, *loc.cit.* note 2, paras. 115 *et seq.*; see also GA Res. 71/98, PP. 24.

⁵¹ See GA Res. 71/98, PP. 27.

⁵² See in particular the Goldstone Report, *Human Rights in Palestine and in other Occupied Arab Territories. Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc A/HRC/12/48, 25 September 2009; on more recent destructions UN Doc A/HRC/28/78, paras. 12-14.

⁵³ Stefan Kadelbach, ‘Jus Cogens, Obligations Erga Omnes and other Rules – the Identification of Fundamental Norms’, in Christian Tomuschat/Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes*, Nijhoff: Leiden/Boston 2006, 21-40, at p. 28 *et seq.*

⁵⁴ See above note 38.

fundamental interests of the international community and therefore create *erga omnes* obligations.⁵⁵ They allow public interest enforcement.⁵⁶

The rules developed in Part A therefore apply to these alleged violations. The EU and its Member States may or even must take measures to induce Israel to cease and to not repeat these violations. They must cooperate for this purpose.

2. Measures to be taken by the EU and/or its Member States

The measures to be taken by the EU belong to the field of external action, in particular the Common Foreign and Security Policy (CFSP).⁵⁷ This policy (Art. 24 para. 1 TEU)⁵⁸ is “defined and implemented” by the European Council (the organ composed of the Heads of State and Government) and by the Council (composed of the ministers in charge of a particular matter, in the case of the CFSP the foreign and/or defense ministers). The High Representative of the Union for Foreign Affairs and Security Policy is tasked to put the CSFP into effect. The measures described below will as a rule be adopted in the form of Council decisions, often styled “conclusions”. There is a special and complicated procedure for treaty making (Art. 218 TFEU), with particular provisions for treaties on subjects concerning the CFSP, and for measures related to trade policy (Art. 207 TFEU).

Art. 26 TEU contains a catalogue of types of measures which can be adopted within the framework of the CFSP: general guidelines, actions, positions and arrangements for the implementation of these measures. The binding force of Council decisions taken within the framework of the CFSP varies according to their content.⁵⁹ As a rule, they are not formally binding, except that, where the situation “requires operational action by the Union”, the necessary decisions “shall commit the Member States in the positions they adopt and in the conduct of their activity” (Art. 28 par. 1 and 2 TEU). In light of the limited direct binding character of CFSP decisions, the duty to cooperate⁶⁰ is all the more crucial for the effectiveness of CFSP measures.⁶¹

As indicated above, the Guidelines on Promoting Compliance with International Humanitarian Law,⁶² adopted by the Council, contain a catalogue of possible measures for that purpose. This catalogue as well as other relevant rules, such as the law of State responsibility, must now be examined as to their practical application.

⁵⁵ ICJ, *Construction of a Wall*, *loc.cit.* note 2; ICJ, *Barcelona Traction*, Judgment of 5.2.1970, *ICJ Reports* 1970, p. 2, para. 33; on the right to self-determination ICJ, *Namibia*, Advisory Opinion of 21.6.1971, *ICJ Reports* 1971, p. 15, para. 126.

⁵⁶ Tams/Asteriti, *loc.cit.* note 27, at p. 168 *et seq.*

⁵⁷ For a comprehensive analysis see Walter Frenz, ‘Die neue GASP’, 70 *Heidelberg Journal of International Law* 487-521 (2010).

⁵⁸ See above Sec. A.1.

⁵⁹ Frenz, *loc.cit.* note 57, p. 497.

⁶⁰ Below Part C.

⁶¹ See Frenz, *loc.cit.* note 57, p. 504 *et seq.*

⁶² See above note 9.

According to the Guidelines, a first step to be taken by the “responsible EU bodies, including appropriate Council Working Groups”, is an assessment of the situation as a matter of fact and law.⁶³ A lot of fact-finding has already been done in relation to alleged violations of international humanitarian law and of human rights law in the oPt. There are, for example, the findings of the ICJ in its Advisory Opinion on the construction of a wall and numerous reports, emanating from the UN and from NGOs. If additional stocktaking by the EU appears necessary as a basis of appropriate action, one means to achieve this could be the use of the International Humanitarian Fact-Finding Commission (IHFFC) established pursuant to Art. 90 AP I. Palestine has recognized the competence of the Commission under this Article.⁶⁴ It is now generally recognized that the IHFFC may undertake an investigation on the basis of a mandate given by an international organization.⁶⁵

A first group of measures contained in the Guidelines are political initiatives: political dialogue⁶⁶ and demarches or public statements.⁶⁷ This type of measure is among those envisaged by common Art. 1 GC.⁶⁸ A framework for this political exchange has been, and could further on be, the Association Agreement between the EU and Israel,⁶⁹ where the Association Council has indeed dealt with respect for human rights in the oPt,⁷⁰ together with the European Neighbourhood Policy (ENP) as far as it deals with Israel,⁷¹ where EU concerns have also been voiced. The effectiveness of this expression of concern leaves much to be desired.

The law of State responsibility provides further options to promote compliance with IHL and with *erga omnes* obligations. The use of these possibilities could be an important political initiative. In relation to demolitions which affect buildings or other facilities financed by the EU or its Member States, which happens all too often, it has to be ascertained whether they violate an obligation existing vis-à-vis the EU member donor State or the EU, in which case the EU or the Member State in question could invoke the responsibility of Israel in their capacity

⁶³ Sec. III.A.15.

⁶⁴ Palestine declared the prior acceptance of the competence of the IFFC on 26 March 2018, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=Xpages_NORMStatesParties&xp_treatySelected=470

⁶⁵ Mandated by the OSCE, the IHFFC lead an independent forensic investigation on the tragic event of an OSCE Mission vehicle being hit by a mine on 23 April 2017 in Eastern Ukraine, news on <http://www.osce.org>. The executive summary of the confidential report is published on the OSCE website <http://www.osce.org/home/338361>, stating that the laying of mines in the area constituted a violation of international humanitarian law.

⁶⁶ Breslin, *loc.cit.* note 9, at pp. 399 *et seq.*; on the EU practice also Höhn, *loc.cit.* note 9, at p. 169 *et seq.*

⁶⁷ Sec. III.B.16.(a)-(c).

⁶⁸ ICRC, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Commentary 2016*, Article 1, mn. 181. The convention relevant for the present Opinion is rather GC IV, yet its Article 1 is identical to Art. 1 GC I.

⁶⁹ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, 20.11.1995, entered into force 1.6.2000, OJ L 147/3, 21.6.2000,

⁷⁰ Council of the European Union, *Eleventh Meeting of the EU-Israel Association Council, Statement of the European Union*, 24.7.2012, Press 12938/12.

⁷¹ EU-Israel ENP Action Plan 2005, see Joint Staff Working Document, *Implementation of the European Neighbourhood Policy in Israel. Progress in 2012 and recommendations for action*, SWD(2013) 91 final, 20.3.2013, pp. 3, 14 *et seq.*; see also Lovatt, above note 6.

as injured subject. It is beyond the scope of the present Opinion to discuss the relevant legal issues in greater detail.

In the case of other violations enumerated above, the relevant step would be that the EU as a non-injured organization invokes the responsibility of Israel as provided in Art. 48 ARS, an “action” to be taken by the Council according to Art. 25(b)(i) TFEU. It could demand the cessation of the unlawful acts, assurances and guarantees of non-repetition as well as reparation for the benefit of the injured entity, i.e. Palestine represented by the Palestinian Authority.

The duty to cooperate⁷² to bring to an end violations of peremptory norms of international law relates in particular to violations of the prohibition of the use of force by *de facto* annexation and to violations of Palestine’s right to self determination, as stated by the ICJ in its advisory opinion on the construction of a wall.⁷³ In this perspective, the EU is obliged to support measures to maintain the viability of a two-state-solution.⁷⁴

The duty to promote compliance with IHL also contains a negative aspect, namely the obligation not to support violations.⁷⁵ Such unlawful support could take many forms: for instance the authorization of exports of material used to commit violations, such as cement for building the wall or for the construction of the illegal settlements.

Trade relations are important in this connection. Trade restrictions have been used by the EC/EU as a reaction to human rights violations, for instance the suspension of GSP+ preferential treatment.⁷⁶ This is a complex issue in case of an armed conflict because of their negative effect on the civilian population. However, trade restrictions as a means to deprive Israel of the benefits of the unlawful settlements policy are necessary. If the EU accorded preferential treatment under the Euro-Mediterranean association agreement with Israel to goods from the oPt (including East Jerusalem), in particular from the settlements, this would mean that the EU recognized and treated the Israeli practice as lawful. This would be a violation of the EU’s duty not to support the Israeli breaches of IHL and other rules as explained above.⁷⁷ The European Court of Justice has indeed held that EU customs authorities were entitled to refuse that preferential treatment.⁷⁸ Following the same line of argument, the European Commission maintains that if products from the settlements were labelled in a way which designated their origin as “Israel”, this would mean incorrect and therefore forbidden

⁷² See above note 38.

⁷³ ICJ, *Construction of a Wall*, *loc. cit.* note 2, para. 117 *et seq.*, 121 *et seq.*

⁷⁴ Asseburg, *loc. cit.* note 4, at p. 110.

⁷⁵ ICRC, *loc. cit.* note 68, mn. 158 *et seq.*

⁷⁶ Breslin, *loc. cit.* note 9, p. 402 *et seq.* The Generalised Scheme of Preferences, created on the initiative of UNCTAD, is an exception to the GATT rule of most favoured nation treatment which allows developed States to lower their tariffs on imports from developing countries without being obliged to do the same for all other States. GSP+ is a special incentive arrangement for Sustainable Development and Good Governance. It includes monitoring the human rights compliance of the beneficiary States, see *Report from the Commission to the European Parliament and the Council. Report on the Generalised Scheme of Preferences covering the period 2016-2017*, COM(2018) 36 final, 19.1.2018.

⁷⁷ See text accompanying note 36.

⁷⁸ European Court of Justice, case C-386/08, *Brita v. Hauptzollamt Hamburg-Hafen*, Judgment of 25.02.2010.

labelling.⁷⁹ Israel vehemently contested this interpretation. The EU position is in line with the obligation imposed upon all States by the Security Council “to distinguish, in their dealings, between the territory of the State of Israel and the territories occupied since 1967”.⁸⁰

Economic relations also raise the problem of lawful countermeasures beyond Art. 48 ARS, already mentioned. The ILC has left this question open (Art. 54 ARS, 57 ARIO). It is argued, and there is considerable practice, including EC/EU practice, that countermeasures taken for the purpose of restraining systematic and massive violations of human rights are lawful even without a Security Council mandate.⁸¹ But a nuanced approach to the question is necessary. Where countermeasures do not violate any rule of international law (e.g. severance of diplomatic relations), they are legally unobjectionable. But if they violate other rules of international law, closer consideration is required. Such consideration is beyond the scope of the present Opinion. It is to be noted, however, that the EU, in its agreements concerning trade relations with third countries, uses so-called conditionality clauses which make human rights compliance of the partners a condition for obtaining certain advantages provided for in the agreement.⁸² Along the same lines, it has to be noted that respect for human rights is a constitutive element of the Association Agreement between the EU and Israel⁸³ and it is suggested that a reevaluation of the relations which is envisaged within this framework should be made to depend on compliance by Israel with human rights relating to the oPt.⁸⁴

The Guidelines also mention individual responsibility as a means to promote compliance with IHL. The promotion of, and support for, the use of criminal law by States on the basis of universal jurisdiction and by the ICC has been an issue of practical relevance in relation to the oPt. Prosecutors in two EU member States have opened investigations against high level Israeli officials, so far without success.⁸⁵ The ICC Prosecutor has opened a pre-investigation relating to war crimes allegedly committed in Palestine.⁸⁶ Such use of international criminal law has for years been an important element of EU external action, too. This is so although the prosecution of war crimes is a task of the Member States, not of the EU. Yet in line with the said position of the EU in matters of international criminal law, the Guidelines state that the EU has a role in “encouraging” States to fulfill this duty. Various decisions of the Council and the European Parliament have declared the fight against impunity and national measures to prosecute genocide, crimes against humanity and war crimes as well as support for the ICC are important

⁷⁹ European Commission, *Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967*, C(2015) 7834 final, 11.11.2015.

⁸⁰ SC resolution 2334, 23.12.2016, OP 5.

⁸¹ Tams/Asteriti, *loc.cit.* note 27, at p. 173 *et seq.*; Palchetti, *loc.cit.* note 21, at p. 219 *et seq.*

⁸² For a comprehensive overview on this practice, see Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements*, OUP 2005.

⁸³ *Loc.cit.* note 69, PP 3 and Art. 2.

⁸⁴ Asseburg, *loc.cit.* note 4, at p. 110.

⁸⁵ Mayeul Hiéramente, ‘Die Ermittlung des ICC im Nahost-Konflikt’, 66 *Vereinte Nationen* 111-116 (2018), at p. 112.

⁸⁶ Hiéramente, *loc.cit.* note 85, at p. 113.

elements of EU external action.⁸⁷ After the ratification of the ICC Statute by Palestine⁸⁸ and the opening of a pre-investigation by the ICC Prosecutor, such support by the EU would be important. Not every violation of the law of armed conflict and of human rights law as it applies to armed conflicts is a war crime or a crime against humanity. Yet some of the violations mentioned above amount to war crimes or crimes against humanity.⁸⁹

⁸⁷ See Council Decision 2011/168/CFSP, 21.03.2011, on the International Criminal Court; Action Plan to follow-up on the decision on the International Criminal Court, 12.07.2011; Council Decision 2002/494/JHA, 13.06.2002, setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, and Council Decision 2003/225/JHA, 8.05.2003, on the investigation and prosecution of genocide, crimes against humanity and war crimes; European Parliament resolution of 17 November 2011 on EU support for the ICC: facing challenges and overcoming difficulties (2011/2109 (INI)).

⁸⁸ 2.1.2015, ICRC Data Base, *Treaties, States Parties and Commentaries*.

⁸⁹ A detailed criminal law analysis of war crimes or crimes against humanity which might have been committed by Israeli military or police personnel in relation to the oPt is beyond the scope of the present Opinion.

Part C

Obligations of assistance and support between the EU and its Member States

As shown above, the obligations to promote compliance with IHL and the right to demand compliance with human rights law addresses both the Union and the Member States. The ensuing question is how these two levels of obligation relate to each other. This relationship is governed by the principles of loyalty and cooperation between the two levels of authority. The provisions of the TEU which are particularly relevant in this context are Art. 4 para. 3 and Art. 24 para. 3 TEU:

Art. 4 para. 3:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

Art. 24 para. 3:

The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

Art. 4 para. 3 enshrines the old principle of community loyalty⁹⁰ which has been a constitutional principle of the law of the European communities since the very beginning of European integration but formulated in different ways in the various treaties in the course of European integration history.⁹¹ This principle covers all areas of EU activities, including external relations.⁹² Art. 24 para. 3 is a concretization of the relevant duties for the field of external action.⁹³ In light of the non-binding character of most decisions in the field of external action, it removes any doubt relating to the obligation to support decisions which themselves are not obligatory.⁹⁴ It is not a *lex specialis* excluding the application of the general principle.

According to Art. 4 Para. 3, the principle of sincere cooperation has a tridimensional structure.⁹⁵ It is not a one way street. It obliges the Member States to cooperate with the Union and *vice-versa* the Union to cooperate with the Member States.⁹⁶ In addition, it obligates the Member States to cooperate with each other.

⁹⁰ In the course of the debate concerning various steps of European integration, the principle has been referred to under different names: from "good faith" to "loyalty", "loyal cooperation", "fidelity" and now "principle of sincere cooperation", a term coined by the ECJ in 1983; see Gert De Baere/Timothy Roes, 'EU loyalty as good faith', 64 *International and Comparative Law Quarterly* 829-874 (2015), at p. 829.

⁹¹ Puttler/Kahl, 'Art. 4', mn. 34, in Calliess/Ruffert, *op.cit.* note 15; De Baere/Roes, *loc.cit.* note 90, at p. 830 *et seq.*; Kamiel Mortelmans, 'The Principle of Loyalty to the Community (Art. 5 EC) and the Obligations of Community Institutions', 5 *Maastricht Journal of European and Comparative Law* 67-88 (1998).

⁹² Andres Delgado Costeleiro, 'The duty to remain silent: limitless loyalty in EU external relations?', 36 *European Law Review* 524-541 (2011), at p. 524 *et seq.*

⁹³ Puttler/Kahl, *loc.cit.* note 91, mn. 39; De Baere/Roes, *loc.cit.* note 90, at p. 835.

⁹⁴ Klamert, *The Principle of Loyalty in EU Law*, OUP 2014, p. 97.

⁹⁵ Puttler/Kahl, *loc.cit.* note 91, mn. 23; De Baere/Roes, *loc.cit.* note 90, at p. 850.

⁹⁶ 'Art. 4 TEU', mn. 5, in Rudolf Geiger/Daniel-Erasmus Khan/Markus Kotzur (eds.), *European Union Treaties*, Munich: Beck/Hart 2015; De Baere/Roes, *loc.cit.* note 90, at p. 835 *et seq.*

These duties to cooperate are legal duties, not only programs.⁹⁷ They relate to tasks “which flow from the Treaties”. The problem is thus whether measures to ensure compliance with IHL and/or human rights fulfill this condition. As pointed out above, such measures fall within the powers of the Union in the field of external action. Thus, Member States are obliged to “assist” the Union taking such measures. The CJEU has developed from the principle of loyalty far reaching duties of cooperation in external relations.⁹⁸ These include

“if not a duty of abstention [from negotiating multilateral agreements for which the Commission has been authorized] on the part of the Member States, at the very least the duty of close cooperation between the Member States and the [EU] institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation”⁹⁹ as well as a duty to inform and consult the competent EU institution before instituting dispute-settlement proceedings – other than before the CJEU – against another Member State.¹⁰⁰ This conclusion is strengthened by Art. 24 para. 3: Member States must “support” the Union taking such measures.

It must then be asked whether the reverse is also true, namely that the Union must assist the Member States in taking such measures. Member States can and must take such measures independently from any Union action. Does then action by the Member States in a field where also the Union could become active “flow from the Treaties”? It is submitted that the overlap of competences between the Union and the Member States¹⁰¹ in the field of foreign policy creates a sufficient nexus between the activities and competences of both levels to trigger the Union’s duty of assistance pursuant to the principle of sincere cooperation. Art. 24 para. 3 does not address the question of support of the Union for the Member States, at least not explicitly. Thus, the question of the Union’s obligation to assist Member States taking measures to ensure compliance with IHL or IHRL is context dependent. Where Member States depend on the Union if they want to take effective action to ensure compliance with IHL and/or IHRL, this is a matter governed by the TEU and therefore assistance to the Members is called for. Sanctions to be taken by individual Member States would be such a situation. If an individual Member State is unable, or even prevented by EU law, to take such action on its own, cooperation and assistance by the EU is called for.

⁹⁷ Puttler/Kahl, *loc.cit.* note 91, mn. 42; DeBaere, Geert/Roes, Timothy, ‘EU Loyalty as Good Faith’, 64 *ICLQ* 829-874 (2015), at p. 830.

⁹⁸ Daniel Davison-Vecchione, ‘Beyond the Forms of Faith: *Pacta sunt servanda*, and Loyalty’, 16 *German LJ* 1163-1190 (2015), at pp. 1169 *et seq.*; see also Kuijper/Paasivirta, *loc.cit.* note 30, at p. 40 *et seq.*

⁹⁹ European Court of Justice, cases C-266/03 and C-433/03, *Inland Waterway*, Judgments of 02.06.2005 and 14.07.2005; see also case C-246/07, *PFOS*, Judgment of 20.04.2010 and case C-45/07, *IMO*, Judgment of 12.02.2009.

¹⁰⁰ European Court of Justice, case C-459/03, *Mox Plant*, Judgment of 30.05.2006.

¹⁰¹ Palchetti, *loc.cit.* note 21, at p. 225.

Conclusion

1. International legal arguments play an important role as policy instruments in the international discourse concerning the Middle East conflict. In that context, international law assigns important tasks and possibilities to actors which are not parties to this conflict. The EU is an important actor in this respect.
2. The EU is a subject of international law distinct from the Member States. As such, it is the addressee of the rules of customary international law relating to human rights and international humanitarian law.
3. Therefore, the EU is entitled and obligated to implement the rule of international law obligating and entitling its addressees to ensure the respect for IHL. As part of this right and obligation, it may and must do everything in its power to try to prevent Israel from continuing its IHL violations relating to the occupied Palestinian territory.
4. For the same reason, the EU is entitled to invoke the international responsibility of Israel regarding its violations of human rights law in the occupied Palestinian territory.
5. Furthermore, the EU is obliged to cooperate with other relevant actors to bring to an end Israel's violations of core norms of human rights law and international humanitarian law which are peremptory norms (*ius cogens*).
6. On the basis of the obligation of sincere cooperation (Art. 4 para. 3 TEU), the Member States are obliged to assist the EU in exercising these rights or implementing these obligations. *Vice versa*, the EU must assist its Member States if they were to take similar measures in respect of Israel's practices regarding the occupied Palestinian territory.

Frankfurt, June 2018



Prof. Dr. Michael Bothe