

# **RESPONSIBILITY OF THIRD STATES AND INTERNATIONAL ORGANISATIONS EMANATING FROM THE FINDINGS OF THE ICJ'S ADVISORY OPINION OF 19 JULY 2024**

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## Introduction

On 19 July 2024, the International Court of Justice (ICJ), the principal judicial organ of the United Nations (UN), issued its Advisory Opinion on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem.<sup>1</sup>

In the operative paragraph of the Opinion, the Court found, in relevant part, that:

- Israel's continued presence in the occupied Palestinian territory (oPt) is unlawful;
- Israel is under an obligation to bring its unlawful presence in the oPt to an end as rapidly as possible;
- Israel is under an obligation to immediately cease all new settlement activity and to evacuate all settlers from the oPt;
- Israel has the obligation to make reparation for the damage caused to all natural or legal persons concerned in the oPt;
- All States are under an obligation not to recognise as legal the situation arising from the unlawful presence of Israel in the oPt and not to render aid or assistance in maintaining the situation created by Israel's continued presence in the oPt;
- International organisations, including the UN, are under an obligation not to recognise as legal the situation arising from Israel's unlawful presence in the oPt; and
- The UN, and especially the General Assembly, which requested the opinion, and the Security Council, should consider the precise modalities and further action required to bring Israel's unlawful presence in the oPt to an end as rapidly as possible.<sup>2</sup>

This note focuses on the legal consequences for third States and international organisations emanating from the Court's findings in the Advisory Opinion.

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<sup>1</sup> Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Advisory Opinion) [2024] <<https://icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>> accessed 22 October 2024. For a detailed summary of the Advisory Opinion, see 'Summary of the ICJ's Advisory Opinion of 19 July 2024 on the Legal Consequences Arising from Israel's Policies and Practices in the oPt' (*Diakonia IHL Centre*, 29 July 2024) <<https://www.diakonia.se/ihl/news/summary-icj-advisory-opinion-19-july-2024/>> accessed 22 October 2024.

<sup>2</sup> Advisory Opinion *ibid* [285].

## Legal status of the Advisory Opinion

Strictly speaking, advisory opinions rendered by the ICJ are not legally binding in themselves. They are not judgments in contentious cases in which States are formally party to the proceedings and bound by the Court's findings;<sup>3</sup> rather, they constitute a form of legal advice given by the Court to the UN organ that requested it (the General Assembly in this case).<sup>4</sup>

Nevertheless, advisory opinions constitute an authoritative determination and clarification of international law which carries considerable weight given the ICJ's status as the 'principal judicial organ of the United Nations'.<sup>5</sup> Furthermore, the legal sources that the Court relies upon in support of its findings – in this case, the treaties that Israel is party to, customary international law, and general principles of international law – are legally binding and give rise to corresponding legal obligations for Israel and for third States.

## Legal basis for third party responsibility

The basic principle of the law of State responsibility is that in case a State violates its obligations under international law, legal consequences follow for the State that is the author of the breach.<sup>6</sup> These consequences are:

- A continued duty of performance of the obligation in question;<sup>7</sup>
- An obligation to cease the wrongful conduct and, where appropriate, offer assurances and guarantees of non-repetition;<sup>8</sup> and
- An obligation to make full reparation for injury.<sup>9</sup>

Under certain circumstances, however, legal consequences also follow for third States – i.e., States other than the author of the violations.

The Court noted in this regard that some of the norms breached by Israel in the context of its unlawful presence in the oPt and related unlawful policies and practices give rise to obligations

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<sup>3</sup> For a list of contentious cases see 'Contentious Cases' (ICJ) <<https://icj-cij.org/index.php/contentious-cases>> accessed 22 October 2024.

<sup>4</sup> See 'The ICJ Advisory Opinion on the Legal Consequences of Israel's Occupation of Palestinian Territory' (*Diakonia IHL Centre*, 29 November 2022) 1 <<https://www.diakonia.se/ihl/news/qa-icj-advisory-opinion-iopt/>> accessed 22 October 2024.

<sup>5</sup> 'The Court' (ICJ) <<https://www.icj-cij.org/court>> accessed 22 October 2024.

<sup>6</sup> International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) Yearbook Intl L Com Vol II Pt 2 (ARSIWA) arts 1, 28.

<sup>7</sup> *ibid* art 29.

<sup>8</sup> *ibid* art 30.

<sup>9</sup> *ibid* art 31. Reparation may take the form of restitution, monetary compensation, or satisfaction. *ibid* arts 34-37.

erga omnes.<sup>10</sup> These include the right of the Palestinian people to self-determination, the prohibition of the acquisition of territory by force, and ‘certain of [Israel’s] obligations under international humanitarian law and international human rights law’.<sup>11</sup> Accordingly, ‘all States can be held to have a legal interest’ in these norms being upheld.<sup>12</sup>

While the Court referred to the erga omnes character of these norms, it would arguably have been more appropriate for it to point to their status as peremptory norms of general international law, or jus cogens.<sup>13</sup> That is because under the law of State responsibility, legal consequences follow for third States in case of serious breaches of peremptory norms.<sup>14</sup> These legal consequences are precisely those that the Court set out in the Advisory Opinion: non-recognition, non-assistance, and cooperation by lawful means to bring the violations to an end.<sup>15</sup>

While all peremptory norms of international law give rise to obligations erga omnes, the reverse is not necessarily true.<sup>16</sup> However, this note proceeds on the assumption that the norms cited by the Court as having been violated by Israel are both peremptory norms of general international law and give rise to obligations erga omnes. The sections that follow examine the far-reaching obligations for third parties identified by the Court and seek to further concretise them.

### **The duty of non-recognition**

The Court noted that ‘in view of the character and importance of the rights and obligations involved’, third States have a general duty ‘not to recognize as legal the situation arising from’ Israel’s unlawful presence in the oPt.<sup>17</sup>

At a general level, this means that States are not allowed to recognise Israel’s unlawful presence in the oPt as lawful nor any purported exercise of sovereignty by Israel over the oPt.<sup>18</sup> The

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<sup>10</sup> Advisory Opinion (n 1) [274]. The Latin phrase erga omnes means ‘towards all’. In international law, erga omnes obligations are obligations that States have towards the international community as a whole. See *The Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 [33].

<sup>11</sup> Advisory Opinion *ibid*.

<sup>12</sup> *ibid* (citation omitted).

<sup>13</sup> For a non-exhaustive list of norms that the ILC considers to be peremptory in character, see ILC, ‘Report of the International Law Commission on its Seventy-Third Session 18 April–3 June and 4 July–5 August 2022’ (Advance Version of 12 August 2022) UN Doc A/77/10 Conclusion 23.

<sup>14</sup> ARSIWA (n 6) art 40(1). Breaches are considered serious if they ‘[involve] a gross or systematic failure by the responsible State to fulfil the obligation’. *ibid* art 40(2).

<sup>15</sup> *ibid* arts 41(1) and (2).

<sup>16</sup> ILC, ‘Report of the International Law Commission’ (n 13) Conclusion 17.

<sup>17</sup> Advisory Opinion (n 1) [279].

<sup>18</sup> ARSIWA (n 6) Commentary to art 41(2) 114: ‘The obligation applies to “situations” created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition’.

obligation also requires, at a minimum, that States align their public positioning with the findings of the Advisory Opinion. Furthermore, as the Court held in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Namibia Advisory Opinion), '[t]hey should also make it clear to the [Israeli] authorities that the maintenance of diplomatic or consular relations with [Israel] does not imply any recognition of its authority with regard to [the oPt]'.<sup>19</sup> It is worth noting that '[c]ollective non-recognition would seem to be a prerequisite for any concerted community response against' violations of peremptory norms 'and marks the minimum necessary response by States' to such conduct.<sup>20</sup>

An exception to the duty of non-recognition, first recognised in the Namibia Advisory Opinion, is that it 'should not result in depriving the people [in the oPt] of any advantages derived from international co-operation'.<sup>21</sup> Concretely, and in line with the practical examples listed by the Court, States should, for example, continue to accept personal documents issued by the Israeli authorities for the benefit of Palestinians from the oPt (while acknowledging the overall discriminatory practices, e.g., in relation to the Palestinian population registry).<sup>22</sup>

The Court also referred to the duty of non-recognition in connection with the second ground for the illegality of Israel's continued presence in the oPt, the prohibition of the acquisition of territory by force. It held that:

States are under an obligation not to recognize any changes in the physical character or demographic composition, institutional structure or status of the territory occupied by Israel on 5 June 1967, including East Jerusalem, except as agreed by the parties through negotiations and to distinguish in their dealings with Israel between the territory of the State of Israel and the Palestinian territory occupied since 1967.<sup>23</sup>

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<sup>19</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 (Namibia Advisory Opinion) [123].

<sup>20</sup> ARSIWA (n 6) Commentary to art 41(2) 115.

<sup>21</sup> Namibia Advisory Opinion (n 19) [125].

<sup>22</sup> *ibid.* The full passage reads as follows: 'In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory'. On discriminatory practices relating to the population registry see eg 'A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution' (*Human Rights Watch*, April 2021) <[https://www.hrw.org/sites/default/files/media\\_2021/04/israel\\_palestine0421\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/media_2021/04/israel_palestine0421_web_0.pdf)> accessed 22 October 2024.

<sup>23</sup> Advisory Opinion (n 1) [278].

In the Court's view, the duty to distinguish entails at least the following four corollary obligations:

- An 'obligation to abstain from treaty relations with Israel in all cases in which it purports to act on behalf of the [oPt] or a part thereof on matters concerning the [oPt] or a part of its territory';
- An obligation 'to abstain from entering into economic or trade dealings with Israel concerning the [oPt] or parts thereof which may entrench its unlawful presence in the territory';
- An obligation 'to abstain, in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the [oPt]'; and
- An obligation 'to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the [oPt]'.<sup>24</sup>

In support of these obligations, which may overlap,<sup>25</sup> the Court surveyed resolutions adopted by the General Assembly and Security Council as well as the Namibia Advisory Opinion.<sup>26</sup> The articulation of these obligations can be viewed as an attempt by the Court to concretise the duty of non-recognition that is incumbent upon all States regarding situations that result from serious breaches of peremptory norms.<sup>27</sup>

***The duty to abstain from treaty relations where Israel purports to act on behalf of the oPt***

The duty to abstain from treaty relations where Israel purports to act on behalf of the oPt has consequences for bilateral and multilateral treaties between Israel and third States, such as double taxation agreements (DTAs), bilateral investment treaties (BITs), and free trade agreements (FTAs), amongst others. Such treaties normally include a provision on geographical scope of applicability. If the scope specified includes 'the territory of the State of Israel as well as territories under its jurisdiction, administration or control', or 'the sovereign territory of Israel pursuant to its domestic laws' as opposed to international law (since Israeli domestic law treats East Jerusalem as Israel's sovereign territory<sup>28</sup>), or other language to this effect, the provision in question would violate the duty of distinction.

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<sup>24</sup> *ibid.*

<sup>25</sup> The precise delimitation between the duty not to recognise changes in the character and status of the oPt and the duty not to recognise the illegal situation resulting from Israel's unlawful presence in the oPt is particularly unclear.

<sup>26</sup> Advisory Opinion (n 1) [276]-[278].

<sup>27</sup> ARSIWA (n 6) art 41(2).

<sup>28</sup> Furthermore, some provisions of Israeli domestic law are applied to settlers in the West Bank (excluding East Jerusalem) *ratione personae*. Eg 'The Occupation of the West Bank and the Crime of Apartheid: Legal Opinion' (Yesh Din, June 2020) <<https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/Apartheid+2020/Apartheid+ENG.pdf>> accessed 22 October 2024.

States must accordingly refrain from entering into such agreements and, in case of existing agreements, abstain from invoking or applying those treaties or provisions of treaties concluded by Israel on behalf of or concerning the oPt.<sup>29</sup> Multilateral humanitarian treaties whose suspension or non-application would have a detrimental impact on the population in the oPt are exempt from this obligation.<sup>30</sup>

It is worth taking note in this regard of a recent ruling by the Court of Justice of the European Union (CJEU) confirming its earlier decision that trade agreements concluded between the European Union (EU) and Morocco purporting to act on behalf of Western Sahara without the population's proper consent violate their right to self-determination and are to be annulled.<sup>31</sup>

***The duty to abstain from entering into economic or trade dealings with Israel concerning the oPt or parts thereof which may entrench its unlawful presence in the territory***

The wording 'economic or trade dealings' in the next obligation identified by the Court can be interpreted as referring to the movement of goods, services, and capital between States.<sup>32</sup> States themselves are sometimes directly party to such dealings (including, for instance, as majority stakeholders in companies) and indirectly by regulating the commercial activities of private actors.<sup>33</sup> Accordingly, the obligation also carries implications for FTAs, BITs, and similar agreements.

While the Court did not spell out what 'entrenchment' means in the context of this obligation, it is worth recalling the Court's earlier finding that:

Israel's policies and practices, including the maintenance and expansion of settlements, the construction of associated infrastructure, including the wall, the exploitation of natural resources, the proclamation of Jerusalem as Israel's capital,

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<sup>29</sup> 'With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation'. Namibia Advisory Opinion (n 19) [122].

<sup>30</sup> *ibid.* The Court went on to specify: 'With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect'.

<sup>31</sup> Joined Cases C-779/21 P and C-799/21 P *European Commission v Front Populaire Pour la Libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario), Council of the European Union and Council of the European Union v Front Populaire Pour la Libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)* [2024] ECLI:EU:C:2024:835. Eg Jed Odermatt, 'Whose Consent? On the Joined Cases C-779/21 P, Commission v Front Polisario and C-799/21 P, Council v Front Polisario' (*Verfassungsblog*, 5 October 2024) <<https://verfassungsblog.de/commission-v-front-polisario/>> accessed 22 October 2024.

<sup>32</sup> The reference to the free movement of goods, services, and capital is taken by analogy to the four freedoms that underpin the EU single market: the free movement of goods, services, capital, and people.

<sup>33</sup> It is possible to interpret this obligation as only applicable to direct dealings between States themselves; however, this is not the approach taken in this analysis given that States usually regulate the economic conduct of third parties.

the comprehensive application of Israeli domestic law in East Jerusalem and its extensive application in the West Bank, **entrench** Israel's control of the Occupied Palestinian Territory.<sup>34</sup>

Accordingly, since these policies and practices entrench Israel's unlawful presence, States must, at the very least, not enter into any related economic or trade dealings.<sup>35</sup>

There are two measures that some States have already taken in an effort to distinguish: labelling requirements for goods produced in Israeli settlements and rules that exempt these goods from preferential trade treatment.<sup>36</sup> While these measures go in the right direction, they do not suffice to comply with the duty of distinction, as explained below.

The CJEU has held, for example, that goods produced in Israeli settlements in the West Bank (or the Syrian Golan Heights) must be labelled as such; they cannot be labelled as originating from Israel or from the West Bank or Golan Heights because this would be misleading as to their true origin.<sup>37</sup> Norway has adopted a similar labelling requirement,<sup>38</sup> and the US administration is reportedly considering such a policy as well.<sup>39</sup>

Furthermore, goods produced in settlement localities are not eligible for preferential treatment (qua a reduction or elimination of tariffs pursuant to rules of origin) under the EU-Israel Association Agreement, which regulates trade between Israel and EU member States.<sup>40</sup> Since 2023, a specific code (Y864) must be added to goods imported from Israel to certify that they

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<sup>34</sup> Advisory Opinion (n 1) [173] (emphasis added).

<sup>35</sup> Yusef Al Tamimi, 'Implications of the ICJ Advisory Opinion for the EU-Israel Association Agreement' (*EJIL:Talk!*, 30 July 2024) <<https://www.ejiltalk.org/implications-of-the-icj-advisory-opinion-for-the-eu-israel-association-agreement/>> accessed 22 October 2024.

<sup>36</sup> For a more comprehensive overview see 'Differentiation Tracker' (*European Council on Foreign Relations (ECFR)*) <<https://ecfr.eu/special/differentiation-tracker/>> accessed 22 October 2024.

<sup>37</sup> Case C-363/18 *Organisation Juive Européenne, Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* [2020] OJ C10/13. The Court treated this as a matter of consumer protection, consumers in its view having a right to know the exact provenance of goods available for purchase, including the extent to which production involved violations of international humanitarian law (IHL).

<sup>38</sup> 'Norway Mandates Labelling of Products from Israeli Settlements' *Middle East Eye* (London, 12 June 2022) <<https://www.middleeasteye.net/news/israel-palestine-norway-label-products-settlements-west-bank>> accessed 22 October 2024.

<sup>39</sup> Felicia Schwartz, 'US Plans to Label Goods from Jewish Settlements in Occupied West Bank' *Financial Times* (Washington DC, 5 April 2024) <<https://www.ft.com/content/f0df1d24-2824-41a1-bc7a-56285ab3720d>> accessed 22 October 2024.

<sup>40</sup> See Notice to Importers 2005/C 20/02 Imports from Israel into the Community [2005] OJ C20/2 and Notice to Importers 2012/C 232/03 Imports from Israel into the EU [2012] OJ C232/5 as well as earlier versions; 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 (signed on 20 November 1995, entered into force 1 June 2000) [2000] OJ L147/3.

were not produced in any of these localities for them to receive preferential treatment.<sup>41</sup> The UK-Israel Trade and Partnership Agreement also exempts goods produced in the settlements from preferential treatment,<sup>42</sup> as does Norway pursuant to the European Free Trade Agreement (EFTA).<sup>43</sup>

While such measures are to be welcomed, they fall short of the duty of distinction as articulated by the Security Council and reaffirmed by the ICJ in the Advisory Opinion.<sup>44</sup> That is because they remove preferential treatment for settlement goods (thus potentially somewhat reducing their lucrateness due to the imposition of tariffs) but leave the purchasing choice to the consumer. Furthermore, the potential loss of profitability is mitigated by the fact that the Israeli government reimburses producers for the accruing tariff burden – for example for exports to the EU.<sup>45</sup> What these measures do not achieve is banning access to the sales market altogether, thus allowing settlement products to remain financially profitable – and to further entrench the occupation.<sup>46</sup> In essence, what the measures implemented to date do is impermissibly shift the burden from Israel (the actor committing breaches of peremptory norms) and third States (the actors for whom legal consequences follow in case of such breaches) to the consumer.<sup>47</sup>

The obligation to abstain from entering into economic or trade dealings that may entrench Israel's unlawful presence in the oPt requires a ban on trade with settlements – and, more broadly, on economic activity with Israeli actors in the oPt.<sup>48</sup> Going forward, and in light of the Advisory Opinion, an effective mechanism should be set in place to ascertain that goods labelled

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<sup>41</sup> 'New Code Y864 for Goods Imported into the EU with Preferential Origin from Israel as from 16 May 2023' (*European Commission*, 25 May 2023) <<https://trade.ec.europa.eu/access-to-markets/en/news/new-code-y864-goods-imported-eu-preferential-origin-israel-16-may-2023>> accessed 22 October 2024.

<sup>42</sup> 'Notice to Importers: Imports from Israel into the United Kingdom' (*Department for Business and Trade*, 4 January 2021) <<https://www.gov.uk/government/publications/notice-to-importers-treatment-of-goods-from-israeli-settlements/notice-to-importers-imports-from-israel-into-the-united-kingdom>> accessed 22 October 2024.

<sup>43</sup> Eg 'The Ministry is Advising Against Trade and Business Cooperation with the Illegal Israeli Settlements' (*Ministry of Foreign Affairs*, 8 March 2024) <<https://www.regjeringen.no/en/dokumenter/the-ministry-is-advising-against-trade-and-business-cooperation-with-the-illegal-israeli-settlements/id3028681/>> accessed 22 October 2024.

<sup>44</sup> In 2016, the Security Council '[called] upon all States ... to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967'. UNSC Res 2334 (23 December 2016) UN Doc S/RES/2334 (2016) para 5. Advisory Opinion (n 1) [278]. See Al Tamimi (n 35).

<sup>45</sup> Eg Tovah Lazaroff, 'Settlers to Be Reimbursed for EU Tariffs' *The Jerusalem Post* (Jerusalem, 30 June 2009) <<https://www.jpost.com/israel/settlers-to-be-reimbursed-for-eu-tariffs>> accessed 22 October 2024.

<sup>46</sup> Al Tamimi (n 35). 'We call for the UK and Irish governments to ban settlement produce. Settlements are illegal under international law and Christian Aid believes that it is the role of governments to protect the consumer from purchasing goods from an illegal source. Moreover, this trade perpetuates the settlements by making them economically profitable'. 'Breaking Down the Barriers: Working for Peace in a Holy Land' (*Christian Aid*, March 2012) <<https://www.christianaid.org.uk/sites/default/files/2022-07/iopt-breaking-down-barriers-information-report-mar2012.pdf>> accessed 22 October 2024.

<sup>47</sup> This is not acceptable, especially not for actors that claim to act for the benefit and protection of consumers, such as the EU.

<sup>48</sup> Al Tamimi (n 35).

as originating from Israel were indeed produced there and not in a settlement.<sup>49</sup> This could, for instance, involve reversing the burden of proof such that producers, viz., exporters should have to substantiate and certify the precise place of origin of the goods in question.

Turning from the movement of goods to the movement of services and capital, and by analogy to a settlement trade ban, States should prohibit investments in companies registered in settlements as well as land and real estate located there.<sup>50</sup> A similar prohibition should be applied to the provision of services in settlements.<sup>51</sup> Issuing general guidance documents warning about an abstract risk of violations of international law in connection with the settlements – as some States have done to date – is welcome, but not sufficient.<sup>52</sup>

To give a concrete example of measures taken in other contexts, it is worth noting that in June 2014, in response to Russia’s illegal annexation of Crimea, the EU prohibited the import of goods from Crimea and Sevastopol.<sup>53</sup> The investment in real estate or entities in Crimea, the export of products relating to certain industries such as transport, telecommunications, energy, and oil and gas, as well as the provision of services connected to tourism were subsequently banned as well, among others.<sup>54</sup> This is in line with the position advocated here that the duty of non-recognition

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<sup>49</sup> *ibid.*

<sup>50</sup> Usually, investment relations between States are governed by BITs and other agreements that contain investment clauses. For a list of BITs that Israel is party to as well as agreements with an investment provision and related instruments see ‘Israel’ (*UN Trade and Development (UNCTAD)*) <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/102/israel>> accessed 22 October 2024.

<sup>51</sup> Al Tamimi (n 35).

<sup>52</sup> Eg ‘Advice on Investment in Israeli Settlements in Occupied Palestinian Territory’ (*Department of Foreign Affairs*, last updated 19 March 2024) <<https://www.gov.ie/en/publication/6d1e9-advice-on-investment-in-israeli-settlements-in-occupied-palestinian-territory/>> accessed 22 October 2024; ‘Government is Advising Against Trade and Business Activity with Israeli Settlements’ (*Ministry of Foreign Affairs*, 14 March 2024) <<https://www.regjeringen.no/en/aktuelt/government-is-advising-against-trade-and-business-activity-with-israeli-settlements/id3028680/>> accessed 22 October 2024; Hugh Lovatt, ‘EU Member State Business Advisories on Israeli Settlements’ (*ECFR*, 2 November 2016) <[https://ecfr.eu/article/eu\\_member\\_state\\_business\\_advisories\\_on\\_israel\\_settlements/](https://ecfr.eu/article/eu_member_state_business_advisories_on_israel_settlements/)> accessed 22 October 2024.

<sup>53</sup> Council Regulation (EU) 692/2014 of 23 June 2014 Concerning Restrictions on the Import into the Union of Goods Originating in Crimea or Sevastopol, in Response to the Illegal Annexation of Crimea and Sevastopol [2014] OJ L183/9.

Article 2 provides as follows:

‘It shall be prohibited:

- (a) to import into the European Union goods originating in Crimea or Sevastopol;
- (b) to provide, directly or indirectly, financing or financial assistance as well as insurance and reinsurance related to the import of the goods referred to in point (a)’.

<sup>54</sup> Council Regulation (EU) 1351/2014 of 18 December 2014 Amending Regulation (EU) 692/2014 Concerning Restrictive Measures in Response to the Illegal Annexation of Crimea and Sevastopol [2014] OJ L365/46 arts 2(a)-(e). See ‘Sanctions with Respect to Russia and Ukraine’ (*Government Offices of Sweden*)

and distinction requires restrictions on the free movement of goods, services, and capital from and to the unlawfully annexed territory – the oPt in this case (unless the dealings are with Palestinian companies).<sup>55</sup> This is further substantiated by the fact that in its September 2024 resolution on the Advisory Opinion, the General Assembly called upon States ‘[t]o take steps towards ceasing the importation of any products originating in the Israeli settlements’.<sup>56</sup> As noted, States should also set up a procedure to verify that only goods stemming from Israel are labelled as such, with the requisite burden of proof being on the producer and exporter, not the importing State.<sup>57</sup>

Additional litigation, for example before the CJEU, challenging national or EU legislation and policy which render it difficult for States to comply with the duty of non-recognition set out in the Advisory Opinion may be a necessary step to implement third States’ obligations in this regard.

***The duty for States to abstain from any recognition of Israel’s unlawful presence in the oPt in the establishment and maintenance of diplomatic missions in Israel***

The duty on States to abstain from any recognition of Israel’s unlawful presence in the oPt in the establishment and maintenance of diplomatic missions in Israel is perhaps the most straightforward obligation. Generally, States must distinguish between their delegations to Israel and those to the oPt (usually the Palestinian Authority (PA)).

States should not move their diplomatic representations in Israel to Jerusalem because doing so would recognise Israel’s annexation and application of its own domestic law to the eastern part of the city and the creation, in 1967, of extended municipal boundaries of ‘Greater Jerusalem’ incorporating former West Bank villages.<sup>58</sup> Those States that have previously done so – the

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<<https://www.government.se/government-policy/foreign-and-security-policy/international-sanctions/geographical-sanctions/russia-and-ukraine---sanctions/>> accessed 22 October 2024.

<sup>55</sup> Al Tamimi (n 35). This is in line with the exception to the duty of non-recognition articulated by the Court in the Namibia Advisory Opinion: ‘In general, the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory’. Namibia Advisory Opinion (n 19) [125].

<sup>56</sup> UNGA Res ES-10/24 (18 September 2024) UN Doc A/RES/ES-10/24 para 5(b).

<sup>57</sup> Al Tamimi (n 35).

<sup>58</sup> UNSC Res 478 (20 August 1980), adopted in response to the Israeli Knesset’s adoption of the Basic Law: Jerusalem, Capital of Israel in July 1980. Eg ‘Greater Jerusalem Map (Updated 2011)’ +972 Magazine (Tel Aviv, 17 March 2011) <<https://www.972mag.com/east-jerusalem-map/>> accessed 22 October 2024.

United States, Kosovo, Papua New Guinea, Honduras, and Guatemala – should relocate their missions to Tel Aviv or elsewhere to Israeli territory.<sup>59</sup>

States should similarly refrain from moving any of their diplomatic representations in Israel to the West Bank, including to settlements.<sup>60</sup> Furthermore, their consular agents should not provide consular services to Israelis in the oPt.<sup>61</sup>

***The duty to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the oPt***

The final obligation that the Court specified in relation to the duty of distinction is for States to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the oPt. This seems to be an obligation of conduct or means, not result ('take steps'), and a call for regulating the conduct of third parties, including companies registered within the State ('to prevent'). Arguably, 'assisting in the maintenance of the illegal situation' is broader and more indirect than economic or trade relations with Israel concerning the oPt that may 'entrench its unlawful presence'.<sup>62</sup>

This obligation has implications for relations with Israeli businesses and State-owned enterprises – almost all of which operate in settlements – and for purchases of arms and military equipment from Israeli companies to the extent that these are tested and used in the oPt as well.<sup>63</sup>

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<sup>59</sup> Eg Lazar Berman, 'Citing "God of Israel," Papua New Guinea Becomes 5th Nation to Open Jerusalem Embassy' *Times of Israel* (Jerusalem, 5 September 2023) <<https://www.timesofisrael.com/citing-god-of-israel-papua-new-guinea-opens-jerusalem-embassy>> accessed 22 October 2024.

<sup>60</sup> 'Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there'. *Namibia Advisory Opinion* (n 19) [123].

<sup>61</sup> There is also a question as to whether the provision of consular services to Israeli citizens residing in settlements in the West Bank, including East Jerusalem, may be prohibited altogether, including in Israeli territory, according to the duty of distinction. It has been argued, for example, that 'a State must not ... issue travel documents to settlers living in unlawful settlements'. 'Position Paper of the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel: Legal Analysis and Recommendations on Implementation of the International Court of Justice, Advisory Opinion, Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem' (*Office of the United Nations High Commissioner for Human Rights (OHCHR)*, October 2024) (COI position paper) para 24 <[https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiopt/2024-10-18-COI-position-paper\\_co-israel.pdf](https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiopt/2024-10-18-COI-position-paper_co-israel.pdf)> accessed 22 October 2024.

<sup>62</sup> Again, it is presumed here that the Court meant to indicate two separate obligations, though they may overlap to an extent, and their precise delimitation is not entirely clear. The reference to taking steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the oPt also echoes the language of ARSIWA (n 6) art 41(2) and the duty of non-assistance, which is covered in a separate section.

<sup>63</sup> Al Tamimi (n 35). For a detailed exposition about weapons technology used in the oPt and exported to other countries see Antony Loewenstein, *The Palestine Laboratory: How Israel Exports the Technology of Occupation Around the World* (Verso 2023).

For example, the Israeli State is the majority owner of two major defence companies, Rafael Advanced Defense Systems (Rafael) and Israel Aerospace Industries (IAI).<sup>64</sup> Prohibiting business dealings with these entities is required pursuant to this obligation as such dealings would assist in maintaining the illegal situation.<sup>65</sup> This applies not just to conduct by third parties but also to States themselves purchasing directly from these companies, for example the Heron drone produced by IAI that is reportedly also used in Gaza.<sup>66</sup>

Furthermore, the prohibition extends to joint ventures and subsidiaries of these companies located in third States.<sup>67</sup> By definition, a joint venture involves risk- and profit-sharing between two legal entities.<sup>68</sup> Subsidiaries in turn are partly or fully owned by a parent company.<sup>69</sup>

To give a concrete example, Rafael runs a joint venture with German weapons manufacturers Rheinmetall and Diehl Defence called Eurospike, which is based in Germany.<sup>70</sup> The website describes the joint venture as follows:

Eurospike is responsible for the marketing of the missiles of the SPIKE family in Europe. The missile is produced at several sites in Germany. ... Additionally due to the success of SPIKE sales throughout Europe, most members of the NATO alliance are SPIKE users which ensures interoperability and also has advantages when needing to stock during exercises.<sup>71</sup>

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<sup>64</sup> Oded Yaron, 'Arms Embargo: Will Israeli-Owned Companies Be Barred from Selling to Israel?' *Haaretz* (Tel Aviv, 9 October 2024) <<https://www.haaretz.com/israel-news/security-aviation/2024-10-09/ty-article/.premium/arms-embargo-will-israeli-owned-foreign-companies-be-barred-from-selling-to-israel/00000192-678d-de48-a192-77ade56c0000>> accessed 22 October 2024.

<sup>65</sup> Relations with these companies could arguably also be construed as 'entrenching' the occupation in violation of the second obligation. Again, the precise delimitation between these two obligations is not entirely clear, and there may be a degree of overlap.

<sup>66</sup> Joshua Posaner, 'You Need Our Air Defenses, Israeli Arms Maker Tells Europe' *Politico* (Berlin, 6 June 2024) <<https://www.politico.eu/article/boaz-levy-israel-aerospace-industries-ballistic-missile-air-defenses-arms-israel-europe/>> accessed 22 October 2024; 'IAI Unmanned Aerial Dominance: Heron Family's Crucial Impact on the Iron Swords War' (IAI) <<https://www.iai.co.il/news-media/iai-action/IAI-Unmanned-Aerial-Dominance>> accessed 22 October 2024.

<sup>67</sup> Yaron (n 64).

<sup>68</sup> A joint venture can be defined as 'a combination of two or more parties that seek the development of a single enterprise or project for profit, sharing the risks associated with its development'. 'Joint Venture' (*Legal Information Institute*, last updated July 2021) <[https://www.law.cornell.edu/wex/joint\\_venture](https://www.law.cornell.edu/wex/joint_venture)> accessed 22 October 2024.

<sup>69</sup> 'Subsidiary' (*Legal Information Institute*, last updated June 2024) <<https://www.law.cornell.edu/wex/subsidiary>> accessed 22 October 2024.

<sup>70</sup> 'About Us' <<https://eurospike.com/>> accessed 22 October 2024. Rheinmetall relied on slave labour during the Second World War, including from concentration camp inmates, prisoners of war, and civilians deported from occupied territories. As a majority State-owned company and one of the main arms manufacturers in Nazi Germany, Rheinmetall also played a role in German rearmament and enabled the continuation of the war. Dr Christian Leitzbach, 'Zwangsarbeit im NS-Staat' (*Rheinmetall*) <<https://www.rheinmetall.com/de/unternehmen/historie/zwangsarbeit-im-ns-staat>> accessed 22 October 2024.

<sup>71</sup> 'About Us' *ibid.*

The Spike missile has reportedly been used in Gaza, for example.<sup>72</sup> A joint venture with a State-owned Israeli defence company that manufactures weapons also used in the oPt directly benefits Israel's capacity to maintain the illegal situation in the oPt, if not entrench the occupation.<sup>73</sup>

The export of arms and provision of military assistance to Israel is addressed in the section on non-assistance below.

Similarly, States must interdict doing business with companies that operate in the oPt in the fields of infrastructure and construction as well as the exploitation of natural resources, which are central elements of Israel's control in the oPt.<sup>74</sup> A relevant source in this context is the UN database on business enterprises operating in the settlements and the 'listed activities' identified as giving rise to particularly severe concerns about violations of international law:<sup>75</sup>

- (a) The supply of equipment and materials facilitating the construction and the expansion of settlements and the wall, and associated infrastructures;
- (b) The supply of surveillance and identification equipment for settlements, the wall and checkpoints directly linked with settlements;
- (c) The supply of equipment for the demolition of housing and property, the destruction of agricultural farms, greenhouses, olive groves and crops;
- (d) The supply of security services, equipment and materials to enterprises operating in settlements;
- (e) The provision of services and utilities supporting the maintenance and existence of settlements, including transport;

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<sup>72</sup> Eg Chris McGreal, 'Israeli Weapons Packed with Shrapnel Causing Devastating Injuries to Children in Gaza, Doctors Say' *The Guardian* (London, 11 July 2024) <<https://www.theguardian.com/world/article/2024/jul/11/israeli-weapons-shrapnel-children-gaza-injured>> accessed 22 October 2024. It has also been surmised that Spike missiles were used in the attack on a convoy from World Central Kitchen in April in which seven aid workers were killed. Shayan Sardarizadeh, Benedict Garman, and Thomas Spencer, 'Gaza Aid Convoy Strike: What We Know' *BBC News* (London, 5 April 2024) <<https://www.bbc.com/news/world-middle-east-68714128>> accessed 22 October 2024.

<sup>73</sup> By way of another example, the Netherlands recently expressed interest in procuring missile launchers from Rafael that can be used in conjunction with the Spike missile. Rudy Ruitenberg, 'Netherlands Picks Israel's Rafael to Supply Upgraded Anti-Tank Systems' *DefenseNews* (Paris, 4 September 2024) <<https://www.defensenews.com/global/europe/2024/09/04/netherlands-picks-israels-rafael-to-supply-upgraded-anti-tank-systems/>> accessed 22 October 2024.

<sup>74</sup> Advisory Opinion (n 1) [173].

<sup>75</sup> For the most up-to-date list of companies see 'OHCHR Update of Database of All Business Enterprises Involved in the Activities Detailed in Paragraph 96 of the 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' (*OHCHR*, 30 June 2023) <<https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session31/database-hrc3136/23-06-30-Update-israeli-settlement-opt-database-hrc3136.pdf>> accessed 22 October 2024.

- (f) Banking and financial operations helping to develop, expand or maintain settlements and their activities, including loans for housing and the development of businesses;
- (g) The use of natural resources, in particular water and land, for business purposes;
- (h) Pollution, and the dumping of waste in or its transfer to Palestinian villages;
- (i) Use of benefits and reinvestments of enterprises owned totally or partially by settlers for developing, expanding and maintaining the settlements;
- (j) Captivity of the Palestinian financial and economic markets, as well as practices that disadvantage Palestinian enterprises, including through restrictions on movement, administrative and legal constraints.<sup>76</sup>

For all other companies registered in Israel, States have at a minimum a duty 'to ensure that their nationals, and companies and entities under their jurisdiction, as well as their authorities, do not act in any way that would entail recognition or provide aid or assistance in maintaining the situation created by Israel's illegal presence in the [oPt]'.<sup>77</sup> This requires 'making clear-cut rules about the origin of Israeli products and services, and prohibit economic relations where "settlement-free" origin is not guaranteed or transparency cannot be achieved'.<sup>78</sup> This is crucial also for purposes of enforcing a settlement trade ban in light of the complete intermingling in Israel of goods and services from Israeli territory and from the settlements.

Companies also have independent obligations in this regard: they must conduct due diligence to ensure that their operations and business dealings do not violate applicable rules of international law and human rights standards.<sup>79</sup>

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<sup>76</sup> OHCHR, 'Database of All Business Enterprises Involved in the Activities Detailed in Paragraph 96 of the 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' (1 February 2018) UN Doc A/HRC/37/39 para 3.

<sup>77</sup> UNGA Res ES-10/24 (n 56) para 5(a). While General Assembly resolutions are, strictly speaking, not in themselves legally binding, in this case the resolution can be viewed as an articulation of the duties of non-recognition and non-assistance reflective of customary international law as enshrined in the ARSIWA (and also as set out by the Court in the Advisory Opinion).

<sup>78</sup> Al Tamimi (n 35).

<sup>79</sup> Eg 'OHCHR and Business and Human Rights' (OHCHR) <<https://www.ohchr.org/en/business-and-human-rights>> accessed 22 October 2024. For a discussion of the legal basis of companies' human rights obligations see eg Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013).

## The duty of non-assistance

The Court further held that third States have ‘an obligation not to render aid or assistance in maintaining the situation created by Israel’s illegal presence in the [oPt]’.<sup>80</sup> This obligation can be considered ‘a logical extension of the duty of non-recognition’<sup>81</sup> and is broader in scope than the obligation to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation. The duty of non-assistance has been understood to require, among other things, a halt to military aid and arms transfers to the extent that they are used for purposes of maintaining the illegal situation.<sup>82</sup>

For example, in respect of Portugal’s continued rule over colonial territories in violation of the right to self-determination, the Security Council adopted a resolution in 1965 calling upon all States:

[T]o refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the people of the Territories under its administration; and to take all the necessary measures to prevent the sale and supply of arms and military equipment to the Portuguese Government for this purpose, including the sale and shipment of equipment and materials for the manufacture and maintenance of arms and ammunition to be used in the Territories under Portuguese administration.<sup>83</sup>

The Security Council also used similar language with regards to apartheid South Africa:

[A]ll States shall cease forthwith any provision to South Africa of arms and related *matériel* of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment, and spare parts for the aforementioned, and shall cease as well the provision of all types of equipment and supplies and grants of licensing arrangements for the manufacture or maintenance of the aforementioned.<sup>84</sup>

The resolution further required States to review existing agreements with South Africa relating to the provision of arms and military equipment ‘with a view to terminating them’.<sup>85</sup>

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<sup>80</sup> Advisory Opinion (n 1) [279].

<sup>81</sup> ARSIWA (n 6) Commentary to art 41(2) 115.

<sup>82</sup> The examples that follow are listed in the ARSIWA (n 6) Commentary to art 41(2) 115.

<sup>83</sup> UNSC Res 218 (1965) (23 November 1965) UN Doc S/RES/218(1965) para 6. This was under the corporatist dictatorship of António de Oliveira Salazar.

<sup>84</sup> UNSC Res 418 (1977) (4 November 1977) UN Doc S/RES/418(1977) para 2. This resolution was adopted under Chapter VII of the UN Charter, the Council having determined on the basis of ‘the policies and acts of the South African Government ... that the acquisition by South Africa of arms and related *matériel* constitutes a threat to the maintenance of international peace and security’. *ibid* para 1.

<sup>85</sup> *ibid* para 3.

Similarly, in its resolution on the Advisory Opinion, the General Assembly specifically called upon States '[t]o take steps towards ceasing ... the provision or transfer of arms, munitions and related equipment to Israel, the occupying Power, in all cases where there are reasonable grounds to suspect that they may be used in the [oPt]'.<sup>86</sup>

Some States have already partially suspended weapons exports to Israel, though mostly over concerns regarding the conduct of the war in Gaza.<sup>87</sup> They should also suspend such transfers to the extent that arms and military equipment may be used to maintain the situation created by Israel's illegal presence in the oPt and explicitly refer to their obligations pursuant to the Advisory Opinion in this regard. This requires that States put in place a mechanism for monitoring the destination and use of exports; assurances on the part of the Israeli authorities that cannot be independently verified do not suffice.

Furthermore, other forms of assistance, such as economic assistance, are prohibited as well pursuant to this obligation to the extent that they may be used by Israel to maintain the unlawful situation.<sup>88</sup>

### **The duty of cooperation by lawful means**

The Court also found that '[i]t is for all States, while respecting the Charter of the United Nations and international law, to ensure that any impediment resulting from the illegal presence of Israel in the Occupied Palestinian Territory to the exercise of the Palestinian people of its right to self-determination is brought to an end'.<sup>89</sup> This is an articulation of the general duty to cooperate by lawful means to bring serious violations of jus cogens – in this case of the right to self-determination – to an end.<sup>90</sup>

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<sup>86</sup> UNGA Res ES-10/24 (n 56) para 5(b).

<sup>87</sup> Eg Oliver Holmes, 'Which Countries Have Banned or Restricted Arms Sales to Israel?' *The Guardian* (London, 3 September 2024) <<https://www.theguardian.com/world/article/2024/sep/03/which-countries-banned-or-restricted-arms-sales-to-israel-gaza-war>> accessed 22 October 2024. For an overview of recent weapons exports to Israel see eg David Gritten, 'Gaza War: Where Does Israel Get Its Weapons?' *BBC News* (London, 3 September 2024) <<https://www.bbc.com/news/world-middle-east-68737412>> accessed 22 October 2024.

<sup>88</sup> This emanates, for example, from the wording of UNSC Res 218 (n 83) para 6: States should 'refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the people of the Territories under its administration'.

<sup>89</sup> Advisory Opinion (n 1) [279]. This language is very similar to what the Court found in its earlier Advisory Opinion on the legality of the wall/separation barrier in the oPt: '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 [in the oPt], to the exercise by the Palestinian people of its right to self-determination is brought to an end'. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [159].

<sup>90</sup> ARSIWA (n 6) art 41(1). It has been argued that this duty has yet to reach the status of customary international law: 'It may be open to question whether general international law at present prescribes a positive duty of

While international law does not prescribe the exact measures that States should take in this regard, it is accepted that cooperation should preferably be within the framework of the UN or another institution, but it can also take place on a bilateral or regional level.<sup>91</sup>

Several potential measures have been suggested in relation to the duty to cooperate:

- States could pass resolutions in international fora ‘condemning breaches of peremptory norms, calling for the cessation of such breaches and/or establishing accountability mechanisms’.<sup>92</sup> Two concrete examples in this regard that were articulated by the General Assembly are the establishment of an international register of damage for the oPt to facilitate Israel’s obligation to make full reparation for damage caused throughout the occupation (either by means of restitution or financial compensation) as well as the establishment of a follow-up mechanism in response to the Court’s finding that Israel’s conduct in the oPt violates Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which prohibits racial segregation and apartheid.<sup>93</sup>
- Furthermore, States could adopt measures of retorsion, which are unfriendly but lawful acts, such as cutting diplomatic ties or suspending voluntary assistance.<sup>94</sup> Some States have done this in connection with concerns about violations of international law committed during the war in Gaza.<sup>95</sup>
- States could also adopt countermeasures, which are acts that violate a State’s international obligations (qua ‘non-performance for the time being’ of the obligation in question, for example pursuant to a treaty).<sup>96</sup> These acts are exceptionally permissible because they are adopted pursuant to a prior violation of international law for purposes of bringing the conduct of the author of the breach in line with its international

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cooperation, and paragraph 1 in that respect may reflect the progressive development of international law’. *ibid* Commentary to art 41(1) 114.

<sup>91</sup> *ibid* Commentary to art 41(1) 114.

<sup>92</sup> Advisory Committee on Public International Law, ‘Legal Consequences of a Serious Breach of a Peremptory Norm: The International Rights and Duties of States in Relation to a Breach of the Prohibition of Aggression, Advisory Report 41’ (17 November 2022) 8  
<<https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2022/11/17/legal-consequences-of-a-serious-breach-of-a-peremptory-norm>>.

<sup>93</sup> UNGA Res ES-10/24 (n 56) paras 10, 14.

<sup>94</sup> Advisory Committee on Public International Law (n 92) 12; ARSIWA (n 6) Commentary to Chapter II 128.

<sup>95</sup> Eg Ivana Saric and Rahul Mukherjee, ‘Which Countries Have Withdrawn Diplomats Over Israel’s Actions in Gaza’ *Axios* (Arlington, 16 November 2023) <<https://www.axios.com/2023/11/16/israel-gaza-war-countries-against-cease-fire-diplomats>> accessed 22 October 2024; Stefano Pozzebón, Michael Rios, and Ruba Alhenawi, ‘Colombia to Break Diplomatic Ties with Israel Over Actions in Gaza’ *CNN* (Atlanta, 1 May 2024) <<https://edition.cnn.com/2024/05/01/world/colombia-breaks-diplomatic-ties-israel-intl-latam/index.html>> accessed 22 October 2024.

<sup>96</sup> ARSIWA (n 6) art 49(2).

obligations.<sup>97</sup> Countermeasures are essentially a ‘self-help’ measure in the absence of a centralised enforcement mechanism for international law.<sup>98</sup> They require certain procedural steps, such as notifying the State that is the author of the breach, and they must be ‘commensurate with the injury suffered’.<sup>99</sup> Examples of countermeasures would be imposing a trade embargo, suspending a treaty in violation of its provisions – such as an FTA or a BIT – and freezing assets belonging to the State.<sup>100</sup> It is increasingly, though not universally, accepted that third States which are not directly injured by a specific breach but are acting pursuant to erga omnes or erga omnes partes obligations – such as those the Court identified Israel to have violated – are entitled to adopt countermeasures.<sup>101</sup>

- There is also a question whether the duty to cooperate could encompass the imposition of what has been called ‘targeted’ or ‘Magnitsky-style’ sanctions, which are not directed against the State as such but rather against individuals (most commonly, high-ranking officials).<sup>102</sup> From the perspective of the law of State responsibility, this makes sense because the conduct of organs of the State – including heads of State and government and State officials – is considered attributable to the State.<sup>103</sup> It is worth noting in this regard that the General Assembly called upon States ‘[t]o implement sanctions, including travel bans and asset freezes, against natural and legal persons engaged in the maintenance of Israel’s unlawful presence in the [oPt], including in relation to settler violence’.<sup>104</sup> A consideration militating in favour of States taking such action is the fact that the UN Security Council, which has enforcement powers under Chapter VII of the UN

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<sup>97</sup> Advisory Committee on Public International Law (n 92) 12-13.

<sup>98</sup> Eg Dr Talita Dias, ‘Countermeasures in International Law and Their Role in Cyberspace’ (*Chatham House*, 23 May 2024) <<https://www.chathamhouse.org/2024/05/countermeasures-international-law-and-their-role-cyberspace/02-conditions-taking>> accessed 22 October 2024.

<sup>99</sup> ARSIWA (n 6) arts 51, 52(1).

<sup>100</sup> Advisory Committee on Public International Law (n 92) 12; Miles Jackson and Federica Paddeu, ‘Proxy Countermeasures in International Law’ (*EJIL:Talk!*, 5 July 2024) <<https://www.ejiltalk.org/proxy-countermeasures-in-international-law/>> accessed 22 October 2024; ARSIWA (n 6) Commentary to art 53 138.

<sup>101</sup> ARSIWA (n 6) arts 48(1) and 54. For an overview of relevant State practice see ARSIWA (n 6) Commentary to art 54 137-139. For a discussion see Miles Jackson and Federica Paddeu, ‘The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?’ (2024) 118 AJIL 231.

<sup>102</sup> Eg Tomas Hamilton, Natalie Lucas, Alex Prezanti et al, ‘Targeted Sanctions as a Pathway to Accountability: An Active Role for Civil Society?’ (2024) 22 J Intl Crim Justice 345. While States have adopted such measures in practice, it is unclear if that was simply a policy choice rather than action taken pursuant to art 41(1) ARSIWA and the duty to cooperate by lawful means.

<sup>103</sup> ARSIWA (n 6) art 4.

<sup>104</sup> UNGA Res ES-10/24 (n 56) para 5(c).

Charter, including with regards to the imposition of sanctions, is very unlikely to adopt such measures given political deadlock.<sup>105</sup>

In respect of the second ground of illegality – the denial of the right to self-determination – the Court included another specific articulation of the duty to cooperate by lawful means.<sup>106</sup> It first noted that it falls within the responsibility of the UN, and especially the General Assembly and the Security Council, to determine the follow-up action required to bring Israel’s unlawful presence to an end and to achieve the realisation of the Palestinian people’s right to self-determination.<sup>107</sup> Citing the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration), the Court then observed that third States ‘must co-operate with the United Nations to put those modalities into effect’.<sup>108</sup>

This language is very similar to the Advisory Opinion the Court rendered in 2019 on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Chagos Advisory Opinion), where the Court had found that ‘while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect’.<sup>109</sup>

At a minimum, the duty to cooperate with the UN to put into effect the requisite modalities for ending Israel’s unlawful presence requires that States vote in favour of (and not veto) resolutions that speak to follow-up measures and faithfully carry out the decisions of UN bodies, especially the Security Council and the General Assembly.<sup>110</sup>

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<sup>105</sup> Over the decades, the Security Council moved from the imposition of wide-ranging economic and sectoral sanctions to targeted sanctions regimes. Eg Joanna Weschler, ‘The Evolution of Security Council Innovations in Sanctions’ (2010) 65 Intl J 31.

<sup>106</sup> ARSIWA (n 6) art 41(1).

<sup>107</sup> Advisory Opinion (n 1) [275].

<sup>108</sup> *ibid*, citing UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV).

<sup>109</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 [180]. The Court’s language also echoes the following passage from the Namibia Advisory Opinion: ‘As to the general consequences resulting from the illegal presence of South Africa in Namibia, all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust [of the Mandate system established pursuant to the Covenant of the League of Nations] was instituted’. Namibia Advisory Opinion (n 19) [127].

<sup>110</sup> For example, all States should arguably have voted in favour of the resolution adopted by the General Assembly in September. See UNGA Res ES-10/24 (n 56).

## The duty to ensure respect for IHL

The Court finally noted that States parties to the – universally ratified – Fourth Geneva Convention (GC IV) have an obligation to ensure respect for IHL.<sup>111</sup> It is well-accepted that this duty has both a negative and a positive dimension – not to aid, assist, or encourage violations of IHL by parties to an armed conflict, and taking all feasible measures to prevent such violations and to bring them to an end.<sup>112</sup>

The negative obligation has implications especially when it comes to the transfer of arms and military equipment, which further reinforces the obligation to impose a ban on such exports – not just to the extent that they may assist in maintaining the occupation, but also in case of credible risk that they may be used in violation of IHL.<sup>113</sup> Accordingly, in essence, States have a dual duty of due diligence when it comes to weapons exports to Israel and need to establish a credible independent monitoring mechanism in this regard; again, unilateral assurances do not suffice.

In respect of the positive obligation, two possible steps that States can take are diplomatic protest against violations and collective measures, such as ‘holding international conferences on specific situations, investigating possible violations, creating *ad hoc* criminal tribunals and courts, [and] ... imposing international sanctions’.<sup>114</sup> Furthermore, States should cooperate with the ongoing investigation of the International Criminal Court (ICC) into the Situation in Palestine and ensure that impartial humanitarian organisations present in the oPt can operate effectively.<sup>115</sup>

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<sup>111</sup> Advisory Opinion (n 1) [279]. See GCs art 1 and Study on Customary IHL by the International Committee of the Red Cross (ICRC) ‘Customary IHL Database’ (*ICRC*, first published in 2005) (CIHL) r 144.

<sup>112</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I) Commentary of 2016 to art 1 paras 158-173. It is worth noting that ‘[t]he obligation to ensure respect for the Conventions is an autonomous primary obligation that imposes more stringent conditions than those required for the secondary rules on State responsibility for aiding or assisting’. *ibid* para 160. See Cordula Droege and David Tuck, ‘Fighting Together and International Humanitarian Law: Ensuring Respect for the Law and Assessing Responsibility for Violations (2/2)’ (*ICRC Humanitarian Law & Policy Blog*, 17 October 2017) <<https://blogs.icrc.org/law-and-policy/2017/10/17/fighting-together-international-humanitarian-law-ensuring-respect-law-assessing-responsibility-violations-2-2/>> accessed 22 October 2024.

<sup>113</sup> Droege and Tuck *ibid*.

<sup>114</sup> Commentary to CIHL r 144.

<sup>115</sup> ‘State of Palestine’ (ICC) <<https://www.icc-cpi.int/palestine>> accessed 22 October 2024. For a list of publications by the IHL Centre on the ICC investigation see ‘The ICC Investigation into the Situation in the State of Palestine’ (*Diakonia IHL Centre*) <<https://www.diakonia.se/ihl/jerusalem/proceedings-before-international-courts-relating-to-israel-and-the-opt/the-icc-investigation-into-the-situation-in-the-state-of-palestine/>> accessed 22 October 2024.

It is worth noting that the General Assembly also called upon all States party to the Geneva Conventions to hold an international conference on how to enforce the protections enshrined in GC IV in the oPt.<sup>116</sup>

### Legal consequences for the UN and international organisations

Turning to the legal consequences for the UN and international organisations, it should be noted that States remain bound by their tripartite obligations of non-recognition, non-assistance, and duty to cooperate also when acting as members of an international organisation.

Furthermore, the Court briefly noted that the duty not to recognise the illegal situation resulting from Israel's unlawful presence in the oPt, including the obligation to distinguish in dealings with Israel between the territory of Israel and the oPt, is also incumbent upon the UN itself as an entity with separate international legal personality.<sup>117</sup>

For example, UN resolutions, maps, and other official documents should clearly demarcate the territory of Israel and the oPt.<sup>118</sup> Furthermore, UN agencies in their operations must not assist Israel in carrying out its unlawful policies and practices or further entrench its control over the oPt.<sup>119</sup> The principle first articulated in the Namibia Advisory Opinion applies *mutatis mutandis*, so that activities carried out for the benefit of the rights and welfare of the Palestinian population are exempt.<sup>120</sup> Similar to the obligations of third States, non-recognition also requires that the UN actively recognises and aligns its public positioning in line with the Court's findings in the Advisory Opinion, including as to the unlawfulness of Israel's policies and practices implemented in the oPt and its overall presence there.

The Court noted that the duty of non-recognition also applies to international organisations more generally – so, arguably those that are not formally part of the UN system, such as the ICC and the World Trade Organization (WTO).<sup>121</sup> It is not entirely clear whether this also covers

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<sup>116</sup> UNGA Res ES-10/24 (n 56) para 12. The General Assembly specifically called upon Switzerland, 'in its capacity as the depositary of the Geneva Conventions, to convene the Conference within six months of the adoption of the present resolution'.

<sup>117</sup> Advisory Opinion (n 1) [280].

<sup>118</sup> UNGA Res ES-10/24 (n 56) para 7.

<sup>119</sup> Advisory Opinion (n 1) [280]. The Court specified that 'the General Assembly has already called, in some of its resolutions, on international organizations and specialized agencies not "to recognize, or co-operate with or assist in any manner in, any measures undertaken by Israel to exploit the resources of the occupied territories or to effect any changes in the demographic composition or geographic character or institutional structure of those territories" (resolution 32/161 (1977))'.

<sup>120</sup> Namibia Advisory Opinion (n 19) [125].

<sup>121</sup> Advisory Opinion (n 1) [280]. The Court said that '[t]he duty of non-recognition specified above **also applies to international organizations, including the United Nations**, in view of the serious breaches of obligations *erga omnes* under international law (emphasis added)'.

international non-governmental organisations (INGOs).<sup>122</sup> INGOs, and especially those that cooperate closely with the UN, are nonetheless recommended to voluntarily align their operations with the findings of the Court, including on non-recognition.

The Court also reiterated that it is for the General Assembly and the Security Council to determine what further measures are required to bring Israel's unlawful presence in the oPt to an end.<sup>123</sup> It is worth noting that the Security Council has enforcement powers pursuant to Chapter VII of the UN Charter in case of a threat to the peace, breach of the peace, or act of aggression, which range from imposing economic sanctions to authorising the use of armed force.<sup>124</sup> States that sit on the Security Council, and especially its five permanent members endowed with veto powers, have a heightened obligation and special responsibility commensurate with their level of authority not to obstruct any follow-up action to implement the findings of the Court. It has also been argued that they would be prohibited from using their veto powers altogether in case of breaches of peremptory norms of general international law – in this context the right to self-determination and the prohibition of the acquisition of territory by force.<sup>125</sup>

In any case, in the likely event that the Security Council is deadlocked, the General Assembly should consider taking action pursuant to the 'Uniting for peace' principle.<sup>126</sup> This principle emanates from the eponymous General Assembly resolution 377 (V), adopted in November 1950 in light of Soviet vetoes during the Korean War, which provides that:

... if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the

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<sup>122</sup> For a discussion of the legal status of INGOs pursuant to international law see eg Kerstin Martens, 'Examining the (Non-)Status of NGOs in International Law' 10 *Indiana J Global Legal Studies* 1.

<sup>123</sup> Advisory Opinion (n 1) [281].

<sup>124</sup> Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) XV UNCTAD 335, amendments in 557 UNTS 143, 638 UNTS 308, and 892 UNTS 119 Chapter VII.

<sup>125</sup> 'The Commission is of the view that, when peremptory norms of international law are violated, the Permanent Members of the Security Council should not be allowed to exercise their veto as this is contrary to the obligation to uphold peremptory norms of international law'. COI position paper (n 61) para 38.

<sup>126</sup> 'UN General Assembly: Adopt "Uniting for Peace" Resolution to Implement Multilateral Sanctions against Israel' (*DAWN MENA*, 20 September 2024) <<https://dawnmena.org/un-general-assembly-adopt-uniting-for-peace-resolution-to-implement-multilateral-sanctions-against-israel/>> accessed 22 October 2024. For an overview of Security Council resolutions concerning Israel and the oPt over the decades see eg Dahlia Scheindlin, 'Fact or Fiction: Is Israel Unfairly Singled Out for Global Condemnation?' *Haaretz* (Tel Aviv, 26 June 2024) <<https://www.haaretz.com/israel-news/2024-06-26/ty-article/.premium/fact-or-fiction-is-israel-unfairly-singled-out-for-global-condemnation/00000190-5053-d37f-a392-7afbfbaf0000>> accessed 22 October 2024; Shakeeb Asrar and Mohammed Hussein, 'How the US Has Used its Veto Power at the UN in Support of Israel' *Aljazeera* (Doha, 26 October 2023) <<https://www.aljazeera.com/news/2023/10/26/how-the-us-has-used-its-veto-power-at-the-un-in-support-of-israel>> accessed 22 October 2024.

matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.<sup>127</sup>

The General Assembly has previously adopted resolutions based on the ‘Uniting for peace’ principle on several occasions, including with regards to Israel’s occupation of Palestinian territory, and recently with regards to Russia’s invasion of Ukraine.<sup>128</sup> Given the reference to ‘recommendations’, resolutions adopted by the General Assembly in this context are still, strictly speaking, non-binding, but it can be argued that all States have an obligation to comply with such resolutions in light of their duty to cooperate to bring serious breaches of peremptory norms to an end.<sup>129</sup>

## Conclusion

### Third States have an obligation:

- Not to recognise as legal the situation arising from the unlawful presence of Israel in the oPt;
- Not to recognise any changes in the physical character or demographic composition, institutional structure, or status of the oPt;
- To distinguish in their dealings with Israel between the territory of Israel and the oPt, including by means of:
  - Abstaining from treaty relations with Israel in all cases in which it purports to act on behalf of the oPt or a part thereof on matters concerning the oPt or a part of its territory;
  - Abstaining from entering into economic or trade dealings with Israel concerning the oPt or parts thereof which may entrench its unlawful presence in the oPt;
  - Abstaining, in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the oPt; and

<sup>127</sup> UNGA Res 377 (V) ‘Uniting for Peace’ (3 November 1950) UN Doc A/RES/377(V) para 1.

<sup>128</sup> ‘UN General Assembly Resolutions Tables’ (UN) <<https://research.un.org/en/docs/ga/quick/emergency>> accessed 22 October 2024; ‘Security Council Deadlocks and Uniting for Peace: An Abridged History’ (Security Council Report, October 2013) <[https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security\\_Council\\_Deadlocks\\_and\\_Uniting\\_for\\_Peace.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security_Council_Deadlocks_and_Uniting_for_Peace.pdf)> accessed 22 October 2024; DAWN MENA (n 126).

<sup>129</sup> Christian Tomuschat, ‘Uniting for Peace’ (UN, 2008) 1 <[https://legal.un.org/avl/pdf/ha/ufp/ufp\\_e.pdf](https://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf)> accessed 22 October 2024.

- Taking steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the oPt;
- Not to render aid or assistance in maintaining the situation created by Israel's unlawful presence in the oPt;
- While respecting the UN Charter and international law, to ensure that any impediment resulting from the illegal presence of Israel in the oPt to the exercise of the Palestinian people of its right to self-determination is brought to an end;
- To cooperate with the UN to put the modalities into effect to end Israel's unlawful presence in the oPt and fully realise the Palestinian people's right to self-determination; and
- To ensure Israel's compliance with the provisions of IHL enshrined in GC IV.

**Policy recommendations for States to comply with these obligations:**

- Regarding the duties of non-recognition and distinction, States should:
  - Fully align their public positioning with the Court's findings in the Advisory Opinion, including on the illegality of Israel's continued presence in the oPt and of its policies and practices implemented in the oPt;
  - Revisit existing agreements with Israel as to their scope of application and refrain from entering into new agreements that include the oPt in their scope of application;
  - Ban the importation of goods produced in settlements, the exportation of goods to settlements, as well as the provision of services to and investment in settlements in the oPt;
  - Ban dealings with Israeli companies that engage in activities listed as high-risk pursuant to the UN database on enterprises operating in the settlements, for example in the fields of defence, infrastructure, construction, and exploitation of natural resources;
  - Given that most Israeli companies operate also in the settlements, establish explicit guidelines as to which business relations with these companies assist in maintaining the illegal situation and set up an effective monitoring mechanism;
  - Refrain from moving their diplomatic missions in Israel to West Jerusalem or to the West Bank, including East Jerusalem, and refrain from offering consular services to Israelis in the oPt; and

- Refrain from taking any actions that would undermine the rights and protections of the Palestinian population in the oPt in line with the exception articulated in the Namibia Advisory Opinion.
- Regarding the duty of non-assistance, States should:
  - Suspend the transfer of arms and military equipment as well as other forms of assistance to Israel to the extent that they may be used to maintain the occupation.
- Regarding the duty to cooperate by lawful means, States should:
  - Vote in favour of resolutions that concern follow-up action to implement the findings of the Court and faithfully carry out the decisions of UN bodies, especially the Security Council and the General Assembly;
  - Condemn violations of international law in public fora and set up international mechanisms, including a register of damage for the oPt and a follow-up mechanism to investigate the violation of Article 3 CERD;
  - Consider taking measures of retorsion and countermeasures and imposing 'Magnitsky-style' targeted sanctions; and
  - Consider invoking Israel's international responsibility for violations of the erga omnes obligations identified by the Court, namely the Palestinian people's right to self-determination, the prohibition of the acquisition of territory by force, and certain of Israel's obligations under IHL and international human rights law (IHRL).
- Regarding the duty to ensure respect for IHL, States should:
  - Suspend the transfer of arms and other military equipment to Israel in case of a credible risk that they may be used to commit violations of IHL;
  - Cooperate with the ICC's ongoing investigation into the Situation in the State of Palestine;
  - Take steps to ensure that impartial humanitarian organisations present in the oPt can operate effectively; and
  - Convene the High Contracting Parties to the Geneva Conventions to discuss how to enforce the provisions of GC IV in the oPt.

**The UN and international organisations have an obligation, as applicable:**

- Not to recognise as legal the situation arising from the unlawful presence of Israel in the oPt and to distinguish in their dealings with Israel between the territory of Israel and the oPt; and

- To determine what further measures are required to bring Israel's unlawful presence in the oPt to an end.

**Policy recommendations for international organisations and the UN to comply with these obligations:**

- Regarding the duties of non-recognition and distinction, international organisations and the UN should, as applicable:
  - Fully align their public positioning with the Court's findings in the Advisory Opinion, including on the illegality of Israel's continued presence in the oPt and of its policies and practices implemented in the oPt; and
  - Distinguish between the territory of Israel and the oPt, including in official documents, maps, and other records, except when acting for the benefit, protection, and rights of the Palestinian population in the oPt in line with the exception articulated in the Namibia Advisory Opinion.
- Regarding the duty to determine further measures to bring Israel's unlawful presence to an end, international organisations and the UN should, as applicable:
  - Assist in the establishment of an international register of damage for the oPt and of a follow-up mechanism for the violation of Article 3 CERD; and
  - When determining the follow-up measures required to bring Israel's unlawful presence in the oPt to an end and to realise the Palestinian people's right to self-determination, consider reliance on the Security Council's enforcement powers under Chapter VII of the UN Charter and, in case of impasse, action by the General Assembly pursuant to the 'Uniting for peace' principle.