AL-HAQ

CONFERENCE OF THE HIGH CONTRACTING PARTIES TO THE FOURTH GENEVA CONVENTION

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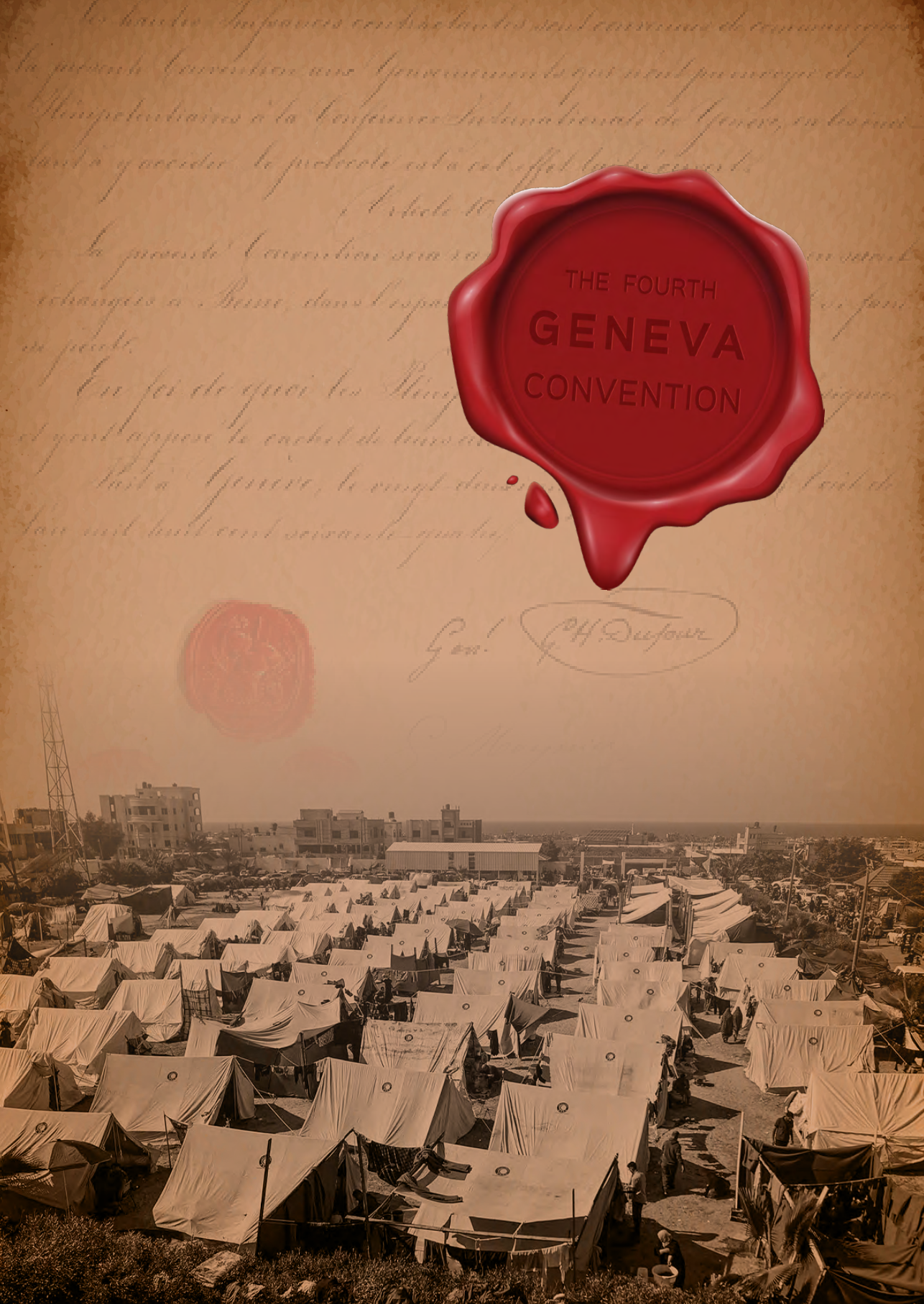
THE FOURTH
GENEVA
CONVENTION

I. Conference of the High Contracting Parties 2025

On 18 September 2024, the UN General Assembly asked Switzerland, as the depositary state, to convene a Conference of High Contracting Parties on the observance of the Fourth Geneva Convention in the occupied Palestinian territory, including East Jerusalem. In advance of the Conference, expected to be held in March 2025, and recognising that Israel's violations span the entire range of international humanitarian law's provisions and principles, Al-Haq here identifies certain of the key issues that High-Contracting Parties must consider if the Conference is to have any meaningful effect.

In light of the recent Advisory Opinion *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* the 'problem of implementation', central to the viability of international humanitarian law must today be effectively borne by the collective of High Contracting Parties (HCPs) and not left to the discretion of the occupying power.[1] By its Advisory Opinion, the ICJ confirmed that Israel's continued presence in the Occupied Palestinian Territory is illegal, that that such presence constitutes a wrongful act entailing its international responsibility, and that Israel has an obligation to bring an end to its presence in the Occupied Palestinian Territory as rapidly as possible.[2]

Throughout the *Palestine Advisory Opinion,* the Court made significant pronouncements as to the continued application of the Fourth Geneva Convention, as to the requirement that the interpretation and application of the Oslo Accords cannot detract from Israel's obligations under the pertinent rules of international law, and made specific findings of Israel's violations of the Fourth Geneva Convention and the Hague Regulations. The Court held that the obligations violated by Israel include certain obligations *erga omnes*, obligations which by their very nature are "the concern of all States", and accordingly, "all States can be held to have a legal interest" in these norms being upheld. Among the obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination and the

1 International Court of Justice, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory,* 19 July 2024 (hereafter *Palestine Advisory Opinion).*

2 *Palestine Advisory Opinion* para 267.

obligation arising from the prohibition of the use of force to acquire territory as well as certain of its obligations under international humanitarian law and international human rights law.[3]

Previous incarnations of the Conference of HCPs re the occupation have manifestly failed to adequately address the modalities of third state obligations to ensure the enforcement of the Fourth Geneva Convention, a matter which must, in light of the Advisory Opinion, and its endorsement by Resolution of the UN General Assembly, be the primary focus of the forthcoming Conference. To date the Conferences have been characterised by diplomatic negotiation occurring behind closed doors, with draft declarations prepared in advance, focusing on general affirmations of legal and humanitarian principles. Proposals that Conference outcomes should include provisions allowing for the establishment of follow-up mechanisms have never been accepted. Records of the Conference are not made public. The actual conferences have been devoid of debate, in keeping with the tendency for gatekeepers of international humanitarian law to prioritise neutrality, and to avoid 'politicisation' in favour of adopting a general consensus. Israel and its allies have been consistent opponents of any Conference.

Nonetheless, participation rose steadily from 103 states at the 1999 Conference, 115 states in 2001, and 128 states in 2014. Given significant Palestine related developments at the International Court of Justice (ICJ) and International Criminal Court (ICC) over the past two years in particular, and the increased vigour and determination from many states to bulwark the international legal framework against its undermining by great powers, it can be assumed that the present Conference will attract significant levels of engagement. The convening of the present Conference follows decades of Israeli impunity for its manifest and widespread violations of the Fourth Geneva Convention, which have escalated through a settler-colonial apartheid project to an ongoing and devasting genocide. Israel has roundly rejected, and with the complicity of its allies, ignored decades of UN Security Council and General Assembly resolutions, the 2004 Wall Advisory Opinion, and the ICJ's Orders for preliminary measures in the South Africa Genocide application.

The ICJ's *Palestine Advisory Opinion* (2024), and the relevant UN General Assembly resolution, provide adequate clarity and direction to High Contracting

3 *Palestine Advisory Opinion* para 274.

Parties as to their obligations vis-à-vis Israel and Palestine under international law, including under the Fourth Geneva Convention. As stressed by UN experts calling for compliance with the Advisory Opinion 'irresponsible inaction' threatens to jeopardise 'the entire edifice of international law and rule of law in world affairs.'[4]

The ICJ, in affirming that 'all States are under an obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory. They are also under an obligation not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory', declared that: 'In addition, all the States parties to the Fourth Geneva Convention have the obligation, while respecting the Charter of the United Nations and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.'[5] Such conclusion is in keeping with Rule 144 of customary international humanitarian law, whereby '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.'[6]

The consequences for Third States, responding to Israel's responsibility for serious breaches of its international obligations, encompass the duties of non-recognition, non-assistance, and cooperation by lawful means to bring the violations to an end. As the Advisory Opinion has established that Israel has committed Grave Breaches of the Fourth Geneva Convention, all HCPs are on notice, and unless they cease any aid and assistance to Israel in the commission of these acts, those HCPs shall be deemed to be complicit in those internationally wrongful acts.

As an international organisation, with international legal personality, the ICRC itself also has obligations addressed by the Advisory Opinion, namely the duty of non-recognition, requiring *inter alia,* that the ICRC not recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory and the obligation to distinguish in their dealings with Israel between the territory of Israel and the Occupied Palestinian Territory.[7] The HCP Conference,

4 UN experts warn international order on a knife's edge, urge States to comply with ICJ Advisory Opinion 18 September 2024: <https://srfreedex.org/un-experts-warn-international-order-on-a-knifes-edge-urge-states-to-comply-with-icj-advisory-opinion/>.

5 *Palestine Advisory Opinion* para 279.

6 Rule 144. Ensuring Respect for International Humanitarian Law Erga Omnes: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule144>.

7 *Palestine Advisory Opinion* para 280.

with its focus on the Fourth Geneva Convention, and recalling the AO's affirmation that the obligations flowing from Israel's internationally wrongful acts do not release it from its continuing duty to perform the international obligations which its conduct is in breach of, and that "Israel remains bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law", facilitates HCPs in taking a step towards meeting their obligations.[8]

The 2001 HCP Conference Declaration had called upon 'the parties to the conflict' to consider anew suggestions made at the meeting of experts of High Contracting Parties in 1998 to resolve problems of implementation of the Fourth Geneva Convention. It is incumbent upon the present conference to recognise Israel's entrenched position and intention to manage the occupation in perpetuity including through the ongoing commission of genocide.

In light of the recent Advisory Opinion, the 'problem of implementation' must today be effectively borne by the collective of HCPs and not left to the discretion of the occupying power. Previous incarnations of the Conference of HCPs re the occupation have manifestly failed to adequately address the modalities of third state obligations to ensure the enforcement of the Fourth Geneva Convention, a matter which must, in light of the Advisory Opinion, and its endorsement by Resolution of the UN General Assembly, be the primary focus of the forthcoming Conference.

It is imperative therefore that the Conference be focused on developing a concerted community position, ensuring that states are guided, and their mandate and obligations clarified, as to their rights and duties in ensuring Israel's compliance with its obligations under the Fourth Geneva Convention. The most effective approach is for the Conference, in compliance with the Advisory Opinion's findings on legal consequences for third states, and Rule 144 Ensuring Respect for International Humanitarian Law, to develop and apply the imposition of consistent, collective, and clear international sanctions against Israel. A key Conference outcome must include the establishment of a viable Follow-Up Mechanism so as to encourage and monitor enforcement of the rules of international humanitarian law, and to prepare states for further action should Israel not meet its obligation to end its unlawful presence in occupied Palestinian territory by the General Assembly deadline.

8 *Ibid,* para 272.

II. Necessity of HCP to Address the Root Causes of Settler Colonialism and Apartheid

Palestinians have consistently highlighted the ongoing nature of the Nakba ('catastrophe') since 1948, which they continue to endure collectively, in the denial of their right to return to their homes, lands, and properties, and the ongoing Israeli program of population transfer and appropriation policies and practices across colonised Palestine (on both sides of the Green Line). Palestinians have clearly articulated their desire for the realisation of their collective right to their land, self-determination, freedom, and justice free from the shackles of Israeli settler colonialism and apartheid, paying a heavy price in the face of Israel's systematic suppression, domination, and genocidal violence.

Where previous iterations of the Conference have expressed 'concern' as to ongoing perpetration of Grave Breaches of the Fourth Geneva Convention, and called for 'good faith' interpretation and application of international humanitarian law, the systematic violence of the occupation, continuously escalating, has long passed the threshold where mere words of concern can be deemed an adequate response, or where 'good faith' can be expected from Israel. The Conference must demand and police the enforcement of the Grave Breaches regime of the Geneva Conventions, including by way of an effective and viable follow-up mechanism.

Following the ICJ's Wall Advisory Opinion of 20 July 2004, the General Assembly had called upon all States parties to the Fourth Geneva Convention to ensure respect by Israel for the Convention, and invited Switzerland, in its capacity as depositary to conduct consultations and to report to the General Assembly on the matter, including with regard to the possibility of resuming the Conference of High Contracting Parties to the Fourth Geneva Convention.[9] Following consultations, Switzerland concluded that a conference of High Contracting Parties was not the course to be pursued at the moment, for among other reasons given that 'Israel is generally expected to abide by the law and the findings of the advisory opinion'.[10]

9 General Assembly resolution ES–10/15, 20 July 2004, paragraph 7.

10 Letter dated 30 June 2005 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the General Assembly A/ES-10/304,5 July 2005 <https://digitallibrary.un.org/record/553108?v=pdf>. para 23.

A consideration of the root causes of the present situation indicates that Israel has consistently determined that it need not, and will not, abide by international law. Israel's ongoing crimes against the Palestinian people that have continued for decades with no accountability will continue unabated if the characterization of the situation on the ground fails to consider Israel's laws, institutions, policies, and practices, as part of a Zionist settler-colonial, population-transfer, and apartheid regime, targeting the Palestinian people as a whole.

Through a plethora of charters, laws, policies, and practices since its inception, Israel has intentionally acted to dispossess, segregate, fragment, isolate, and oppress the indigenous Palestinian people as a whole, while denying their right to self-determination as affirmed since the adoption of the Covenant of the League of Nations. Israel and its institutions, including organs of the state, have continued to further entrench this regime of dispossession, appropriation, pillage, destruction of Palestinian property, population transfer, demographic engineering and apartheid, sustaining these human rights violations and crimes against the Palestinian people with impunity. The international community has consistently failed to take effective measures to hold Israel accountable for its grave human rights violations, war crimes, and crimes against humanity, nor has it addressed the root causes of the ongoing dispossession, displacement, domination, and persecution of the Palestinian people.

Even when we take into consideration that Israel's occupation has been determined by the International Court of Justice to be illegal per se, the IHL framework has only been applied by the Court to Palestinians in the oPt since 1967, excluding Palestinians in the 1948 territory (Palestinian citizens of Israel), as well as Palestinian refugees and exiles in the diaspora,[11] from the collective right to self-determination of the Palestinian people, and contributing to their legal, political, and geographic fragmentation as a tool of apartheid.[12] Nonetheless the Advisory Opinion has recognised that 'The sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the Occupied Palestinian Territory and continued frustration of the right of

11 *Palestine Advisory Opinion,* para 182. 'the question covers Israel's legislation and measures only to the extent that they apply in the Occupied Palestinian Territory. The Court is therefore not called upon to pronounce on whether Israel's legislation or measures outside the Occupied Palestinian Territory, including in Israel's own territory, are discriminatory.'

12 UN Economic and Social Commission for Western Asia (ESCWA), 'Israeli Practices towards the Palestinian People and the Question of Apartheid', (2017) UN Doc E/ESCWA/ECRI/2017/1, 37.

the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the Occupied Palestinian Territory unlawful.'[13]

Limiting analyses to the "conflict" narrative suggests confrontation between two parties over opposing interests, neglecting the history and the fundamental root causes that shape the identity and struggle of the Palestinian people against the Zionist settler colonial project. Such a paradigm also fails to reflect that power and responsibility are asymmetrical between the Israeli colonisers and the indigenous Palestinian people, who, before their land's conquest by force had no reason to fight, and whose resistance is inevitable.[14] Further, the "conflict" narrative bounds responsive strategies in the outcomes of settler colonialism, rather than targeting the root causes and the institutionalised structure of oppression, dispossession and transfer itself.[15]

The Advisory Opinion was clear that even though it had determined Israel's presence in the occupied Palestinian territory to be unlawful, the rules of international humanitarian law and human rights law continue to apply to the occupying Power, regardless of the illegality of its presence.[16] Underlining the dehumanisation and racism characteristic of Israel's unlawful occupation, the Court further affirmed that Israel's conduct in the occupied Palestinian territory constitutes a violation of the prohibition, at Article 3 of the Convention on the Elimination of Racial Discrimination, of racial segregation and apartheid.[17] Recalling, that the function of International Humanitarian Law is to seek to balance state security with protection of civilians and prisoners, it is notable that central to the conclusion of the Advisory Opinion that Israel's presence in the occupied Palestinian territory is unlawful and must be terminated as rapidly as possible, is the affirmation that Israel's measures 'imposing restrictions on all Palestinians solely on account of their Palestinian identity are disproportionate to any legitimate public aim and cannot be justified with reference to security.'[18] Such conclusion requires HCPs to call for the reconstitution of the UN Special Committee against Apartheid and

13 *Palestine Advisory Opinion,* para 261.

14 Awad Abdelfattah, 'A just future demands the decolonization of Palestine – and a democratic state for all', (+972 Magazine, 10 December 2019) <https://www.972mag.com/decolonization-palestine-one-state/>.

15 Omar Salamanca, 'Past is Present: Settler Colonialism in Palestine' (2012) 2 Settler Colonial Studies, 1, 4.

16 *Palestine Advisory Opinion* para 251.

17 *Palestine Advisory Opinion* para 229.

18 *Palestine Advisory Opinion* para 205.

the UN Centre against Apartheid, which played essential roles in the international mobilization against apartheid in South Africa and in challenging third state complicity in the apartheid regime.

As stressed by the UN Special Rapporteur, 'A core feature of Israeli conduct since 7 October has been the intensification of its de-civilianization of Palestinians, a protected group under the Genocide Convention. Israel has used international humanitarian law terminology to justify its systematic use of lethal violence against Palestinian civilians as a group and the extensive destruction of life-sustaining infrastructures. Israel has done this by deploying international humanitarian law concepts, such as human shields, collateral damage, safe zones, evacuations and medical protection, in such a permissive manner as to gut those concepts of their normative content, subverting their protective purpose and ultimately eroding the distinction between civilians and combatants in Israeli actions in Gaza.'[19] In describing how Israel has deployed a 'Humanitarian camouflage' so as to distort the laws of war to conceal genocidal intent, the Rapporteur has highlighted the fundamental importance to the very essence of the Geneva Conventions, for HCPs to distil Israeli rhetoric from Israeli conduct, and emphasise the demand that a meaningful defence of the international legal framework requires recognition of Zionist settler colonialism as the root cause of Israel's continuing crimes.

19 Anatomy of a genocide: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese, A/HRC/55/73, 1 July 2024, para 55: <https://www.un.org/unispal/document/anatomy-of-a-genocide-report-of-the-special-rapporteur-on-the-situation-of-human-rights-in-the-palestinian-territory-occupied-since-1967-to-human-rights-council-advance-unedited-version-a-hrc-55/>.

III. Duty to Ensure Respect for International Humanitarian Law

The Conference must reaffirm that the duty to ensure respect includes the negative duty not to aid, assist, or encourage violations of IHL by parties to an armed conflict, and a positive duty of taking all feasible measures to prevent such violations and to bring them to an end. All HCPs are under an obligation to act, individually and collectively, to bring the unlawful occupation to an end, including by building political, economic, legal, and cultural pressure on Israel to end the unlawful occupation in line with the findings of the Advisory Opinion, and to cease all new and ongoing breaches of international humanitarian law. Recalling Article 16 of the Draft Articles on State Responsibility, "a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so".[20] As such, the HCP Conference must assert that all HCPs have the obligation to enforce a two way ban on the transfer of arms and military equipment, including dual use items, to Israel, both to the extent that they may assist in maintaining the occupation, and also given the credible risk that they may be used in violation of IHL.

In particular, HCPs must ensure that technological developments are taken fully into account, such that the provision to Israel of access to resources such as cloud computing, Artificial Intelligence, and personal or public data, each of which contribute to the violation of Palestinian rights and facilitate the commission of breaches of IHL by the Israeli military, is banned. Similar restrictions must extend to research and development cooperation with Israel, joint training, security, and military exercises with Israel, all of which contribute to the maintenance of the unlawful occupation.

HCPs must ensure due diligence when it comes to weapons exports to Israel and need to establish credible independent monitoring mechanisms. In *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)* before the ICJ, Nicaragua challenged Germany's ongoing material support to Israel, and requested Court to indicate provisional measures, pending the Court's determination on the

20 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001: <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

merits of the case, with respect to Germany's "participation in the ongoing plausible genocide and serious breaches of international humanitarian law and other peremptory norms of general international law occurring in the Gaza Strip".[21] While the ICJ did not indicate provisional measures against Germany, accepting Germany's unilateral assurances on the facts, the Court refrained from 'rejecting' Nicaragua's request (as Germany had asked), but found "that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".[22] This approach suggests that the Court would be prepared to react to any change of circumstances, for example changing patterns in granting export licences, with the Court further emphasising all states of their continuing obligations under Common Article 1 of the Geneva Conventions and Article 1 of the Genocide Convention.[23]

Critically, all HCPs are obliged to undertake a thorough due diligence review of any additional aid or assistance to Israel and determine whether it is being used by Israel to support and maintain the unlawful occupation. Further, all HCPs must review all diplomatic, political, and economic interactions with Israel to ensure they do not support or provide aid or assistance to its unlawful presence in the occupied Palestinian territory, or to its violations of international humanitarian law. Goods and services emerging from both the colonisation of occupied Palestinian territory and other unlawful activities that may be detrimental to Palestinians' rights, must be banned from entering the territory and markets of HCPs, and measures taken to label and permit goods and services emerging from Palestinian individuals and entities in occupied territory. As such, HCPS are to cancel or suspend economic relationships, trade agreements and academic relations with Israel that may contribute to its unlawful presence and to breaches of IHL in the occupied Palestinian territory.

Further actions include the requirement that HCPs impose sanctions, including asset freezes, on Israeli individuals, and on entities including businesses, corporations and financial institutions, involved in the maintenance of the

21 ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany), Application Instituting Proceedings containing a Request for the Indication of Provisional Measures filed in the Registry of the Court on 1 March 2024*, para 101.

22 ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany),* 30 April 2024, Order, para 26.

23 ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany),* 30 April 2024, Order, para 24.

unlawful occupation and breaches of IHL, as well as on any foreign or domestic entities and individuals subject to their jurisdiction that supply goods and services that may aid, assist or enable the unlawful occupation and beaches of international humanitarian law. HCPs must not recognise Jerusalem as the capital of Israel, must rescind any such recognition previously made, and must not locate diplomatic representatives to Israel in Jerusalem,[24] or issue travel documents to settlers living in unlawful settlements.

In terms of 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'.[25] In particular, HCPs must fully align their public positioning with the Court's findings in the *Palestine Advisory Opinion*, including on the illegality of Israel's continued presence in the OPT and of its policies and practices implemented in occupied Palestine. The Conference must also act to establish a protective presence, which, with the consent of Palestinians can contribute to the implementation of international humanitarian law, and by ensuring safe and full access for independent experts and mechanisms charged with monitoring and investigating human rights violations and international crimes in the occupied Palestinian territory.

24 UN Security Council Resolution 478 Territories occupied by Israel.

25 ICRC, IHL Database, Rule 144, Ensuring Respect for International Humanitarian Law *Erga Omnes* Rule 144, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule144>.

IV. Humanitarian Relief

In the first instance, and against the backdrop of the December 2024 request from the UN General Assembly for an additional ICJ Advisory Opinion on the Obligations of Israel in relation to the presence and activities of the United Nations, other international organizations and third States in and in relation to the Occupied Palestinian Territory, the Conference should recall its previous declarations of support for and calls upon parties to facilitate the activities in the oPt of the ICRC, UNRWA, and of other impartial humanitarian organisations, as well as the UNHCHR and of UN Special Rapporteurs.[26] The 2001 Declaration called for Israel, as the Occupying Power 'to facilitate the relief operations and free passage of the ICRC and UNRWA, as well as any other impartial humanitarian organisation, to guarantee their protection and, where applicable, to refrain from levying taxes and imposing undue financial burdens on these organisations.'[27] The 2014 Declaration recalled 'the primary obligation of the occupying Power to ensure adequate supplies of the population of the occupied territory and that whenever it is not in a position to do so, it is under the obligation to allow and facilitate relief schemes. In that case, they further recall that all High Contracting Parties shall permit the free passage of humanitarian relief and shall guarantee its protection.'[28]

On 31 January 2025, as part of its ongoing genocidal campaign, legislation came into force in Israel enabling Israel to close off all access to UNRWA, completely crippling and shutting down humanitarian aid and supports to Gaza and across the oPt. Over the past 75 years UNRWA has assumed many functions normally performed by a national state. Because of its vital role, it is facing physical, legal, political, and rhetorical attacks from Israel — all of which put the power and position of the Agency, and that of the UN itself, as well as people's trust and faith in their processes, in serious jeopardy. The Conference must reiterate that under the Fourth Geneva Convention, Israel has the duty to ensure the adequate provision of food and medical supplies, as well as other supplies essential to the survival of the civilian population of the occupied territory and objects necessary

26 Declaration 2001, paras 7 and 10, <https://www.un.org/unispal/document/auto-insert-199888/>; Declaration 2014, para 5, <https://www.un.org/unispal/document/auto-insert-187192/>.

27 *Ibid,* para 15 <https://www.un.org/unispal/document/auto-insert-199888/>.

28 *Ibid,* para 5. <https://www.un.org/unispal/document/auto-insert-187192/>.

for religious worship. It must also allow access to humanitarian protective organizations, such as the International Committee of the Red Cross (ICRC) and UNRWA.[29]

In addition to condemning the legislation adopted by Israel in October 2024 to dismantle UNRWA, it is imperative that the Conference recognise and consistently reaffirm through words and actions that there is no replacement or alternative to UNRWA. The Conference must determine how third states are to force Israel to abide by its obligations as the occupying power, and specify the nature of the obligation upon HCPs to provide, or facilitate the provision, of the urgent and increasing requirements of the Palestinian population.

The Conference must further emphasise and endorse the three sets of provisional measures ordered by the International Court of Justice in the case of Application of the Convention on the *Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel),* including the Order of 28 March 2024 where the Court directed that Israel:

> 'Take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary'.[30]

29 Arts. 30, 55, 69-71 and 143 Fourth Geneva Convention.

30 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* 28 March 2024, Order, para 45.

V. Accountability

The Conference Declaration of 2001 reaffirmed "the obligations of the High Contracting Parties under articles 146, 147 and 148 of the Fourth Geneva Convention with regard to penal sanctions, grave breaches and responsibilities of the High Contracting Parties?"[31] and called upon Israel as the Occupying Power:

> "[T]o immediately refrain from committing grave breaches involving any of the acts mentioned in art. 147 of the Fourth Geneva Convention, such as wilful killing, torture, unlawful deportation, wilful depriving of the rights of fair and regular trial, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. The participating High Contracting Parties recall that according to art. 148 no High Contracting Party shall be allowed to absolve itself of any liability incurred by itself in respect to grave breaches. The participating High Contracting Parties also recall the responsibilities of the Occupying Power according to art. 29 of the Fourth Geneva Convention for the treatment of protected persons."[32]

The 2014 Declaration emphasised "that all serious violations of international humanitarian law must be investigated and that all those responsible should be brought to justice".[33]

In light of the established and entrenched impunity for Israeli officials before Israeli courts, it is imperative that HCPs give effect to their obligations under the Convention to investigate and prosecute any Israeli nationals suspected of perpetration of grave breaches of the Convention. UN General Assembly Resolution A/ES-10/L.31/Rev.1 of 13 September 2024 has called upon all States to comply with their obligations under international law, as reflected in the advisory opinion:

31 Conference Declaration of 2001, para 4.

32 *Ibid*, para 13.

33 *Ibid,* para 6.

> ". . . including their obligation […] (e) To ensure, as States parties to the Fourth Geneva Convention, compliance with international humanitarian law as embodied in that Convention, in particular pursuant to their obligations under articles 146, 147 and 148 regarding penal sanctions and grave breaches, while respecting the Charter of the United Nations and international law and underscoring the urgency of undertaking measures to enforce the Convention in the Occupied Palestinian Territory, including East Jerusalem".

Since November 2024 Israel's Prime Minister, Benjamin Netanyahu and former Minister of Defence, Yoav Gallant have been subject to International Criminal Court (ICC) arrest warrants, including in relation to conduct in violation of international humanitarian law. Pre-Trial Chamber I of the Court found "reasonable grounds" to believe that both Netanyahu and Gallant bear "criminal responsibility for [...] the war crime of starvation as a method of warfare; and the crimes against humanity of murder, persecution, and other inhumane acts".[34] The Chamber further decided that there are "reasonable grounds to believe that [they] each bear criminal responsibility as civilian superiors for the war crime of intentionally directing an attack against the civilian population".[35]

Certain states sought to avoid their Rome Statute obligations, ignoring the consistent jurisprudence of the Court, by recourse to claims that Netanyahu and Gallant might enjoy immunity from prosecution on account of their official status. Such argumentation undermines not only the ICC, but illustrates the irreconcilable contradictions by which the enforcement mechanism of the Fourth Geneva Conventions have been neutered by continued tolerance of the doctrine of official immunity in international law. Grave breaches under Article 147 of the Fourth Geneva Convention constitute:

> "[T]hose involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person,

34 Situation in the State of Palestine: *ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant*, 21 November 2024: <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>.

35 *Ibid.*

> compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

By its *Palestine Advisory Opinion* of 2024 the ICJ concluded that certain of "Israel's policies and practices are contrary to the prohibition of forcible transfer of the protected population under the first paragraph of Article 49 of the Fourth Geneva Convention".[36] The Court further held "that Israel's systematic failure to prevent or to punish attacks by settlers against the life or bodily integrity of Palestinians, as well as Israel's excessive use of force against Palestinians, is inconsistent with the obligations identified in paragraph 149" [i.e., the right to life of protected persons in the occupied territory as guaranteed under the rule reflected in Article 46 of the Hague Regulations, which rule is complemented by the first paragraph of Article 27 of the Fourth Geneva Convention, which provides that protected persons shall be humanely treated and protected against all threats or acts of violence.][37]

Additionally, the Court, noting that under Article 53 of the Fourth Geneva Convention, the destruction of real or personal property is "prohibited, except where such destruction is rendered absolutely necessary by military operations", concluded that "[i]n the present case, however, the Court is not convinced that the punitive demolition of property is rendered absolutely necessary by military operations, or is otherwise justified".[38] The Court continued by observing that the first paragraph of Article 33 of the Fourth Geneva Convention provides that "[n]o protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited", and noted that "punitive demolition of property amounts to punishment of other persons living in or using this property for acts that they have not committed, and it is therefore contrary to Article 33 of the Fourth Geneva Convention".[39] The Court concluded that "Israel's practice of punitive demolitions of Palestinian property, being contrary to its obligations under international humanitarian law, does not serve a legitimate public aim."[40]

36 *Palestine Advisory Opinion* para 147.

37 *Ibid* para 154.

38 *Ibid* para 211.

39 *Ibid* para 212.

40 *Ibid* para 213.

By these conclusions the Court has identified Israel's responsibility for a series of Grave Breaches of the Fourth Geneva Convention, conduct for which HCPs must ensure that the individuals responsible bear penal sanction. As clarified by the Court, "all the States parties to the Fourth Geneva Convention have the obligation, while respecting the Charter of the United Nations and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention".[41] States, including many HCPs, have been active in negotiations ongoing at the International Law Commission concerning the topic of immunity of State officials from foreign criminal jurisdiction,[42] and draft article 7 in particular.[43]

Draft Article 7 of the texts and titles of the draft articles adopted by the Drafting Committee on first reading provides as follows:

"Crimes under international law in respect of which immunity ratione materiae shall not apply

1. Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
    a. crime of genocide;
    b. crimes against humanity;
    c. war crimes;
    d. crime of apartheid;
    e. torture;
    f. enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles."[44]

41 *Ibid* para 279.

42 ILC Analytical Guide to the Work of the International Law Commission <https://legal.un.org/ilc/guide/4_2.shtml>.

43 Benjamin Meret, Some States' Position on Draft Article 7 Versus the Very Same States' Positions Concerning Atrocities in Ukraine: An Inconsistent Stand? 6 August 2024 <https://www.ejiltalk.org/some-states-position-on-draft-article-7-versus-the-very-same-states-positions-concerning-atrocities-in-ukraine-an-inconsistent-stand/>.

44 ILC, Immunity of State officials from foreign criminal jurisdiction <https://legal.un.org/ilc/reports/2022/english/chp6.pdf>.

War Crimes, for the purposes of the draft article are designated in the annex as those war crimes provided for at article 8, paragraph 2 of the Rome Statute of the International Criminal Court, which in turn reads:

> "For the purpose of this Statute, "war crimes" means:
>
> a. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (i.) Wilful killing;
>
> (ii.) Torture or inhuman treatment, including biological experiments;
>
> (iii.) Wilfully causing great suffering, or serious injury to body or health;
>
> (iv.) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
>
> (v.) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
>
> (vi.) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
>
> (vii.) Unlawful deportation or transfer or unlawful confinement;
>
> (viii.) Taking of hostages."

This ongoing process indicates, that despite a significant number of states desiring to retain the right of impunity, there are a critical mass of states of the view that the progressive development of international law requires acknowledgment that official immunity can no longer be regarded as applicable to the perpetrators of international crimes, including for perpetrators of grave breaches of the Fourth Geneva Convention.

At the United Nations General Assembly in October 2024 the ICRC stated that it has a favourable view of the efforts toward a dedicated legally binding instrument on the prevention and punishment of crimes against humanity, negotiated on the basis of the Draft Articles on the Prevention and Punishment of Crimes Against Humanity, as adopted by the International Law Commission. The ICRC further emphasised that:

> "Investigating and prosecuting serious violations promotes respect for, and trust in, IHL and is an important tool against impunity. Furthermore, accountability for violations provides civilians with justice and strengthens respect for international humanitarian law. The ICRC emphasizes the role of accountability for such violations as a deterrent in future armed conflicts, preventing further violations of international humanitarian law."[45]

The HCP conference must take a clear step to ensure that the doctrine of official immunity can no longer be understood or validly interpreted as facilitating impunity for the perpetrators of grave breaches of the Fourth Geneva Convention. Tolerance of impunity has facilitated and fostered an environment of criminality and widespread human rights abuses. A dynamic and clear declaration that impunity can no longer prevail over the legal obligations to investigate and prosecute grave breaches of the Fourth Geneva Convention is imperative. While the present Conference is specifically concerned with the situation under the unlawful Israeli occupation, the consequences of continued impunity are being felt in conflicts internationally. As stated in UNRWA's presentation to the 2014 HCP Conference:

> "This conference arises out of a specific geographical context. But the Declaration is important because key paragraphs are of universal application and there are serious challenges to the implementation of international humanitarian law in other parts of the world."[46]

High Contracting Parties must also investigate and prosecute those subject to their jurisdiction, who are involved in crimes in the occupied Palestinian territory, including dual citizens serving in Israel's military, including mercenaries or those involved in settler violence.

Notably, the violations identified by the Court are of a peremptory nature which give rise to obligations *erga omnes*, hence all HCPs, regardless of whether state

45 ICRC, Investigating and prosecuting serious violations: an important tool against impunity, 14 October 2024: <https://www.icrc.org/en/statement/79-UN-crimes-against-humanity-investigating-and-prosecuting-serious-violations-tool-against-impunity>.

46 Conference of high contracting parties to the Fourth Geneva Convention 08 January 2015, Geneva, 17 December 2014, Statement by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) <https://www.unrwa.org/newsroom/official-statements/conference-high-contracting-parties-fourth-geneva-convention>.

parties to the Rome Statute, have a duty to cooperate with the International Criminal Court's investigation in the Situation in the State of Palestine. Further, the national authorities of HCPs must conduct their own investigations and, where appropriate, advance prosecutions under domestic criminal law or universal jurisdictions for criminal conduct committed, including where perpetrated by dual citizens serving in Israel's military, including mercenaries, or those involved in settler violence in the occupied territory.

VI. Prisoners

Article 76 of the Fourth Geneva Convention clearly outlines the rights of protected persons when facing detention by an Occupying Power. Amongst these rights is the right to remain in the occupied territory during all stages of detention, including during the serving of prison sentences if convicted. The vast majority of Palestinian prisoners are currently held within Israel, with the result that their families from the OPT face extreme difficulties in visiting them. Also included in Article 76 are the Occupying Power's obligations to provide adequate medical care, and to provide special protection for women and child detainees. Furthermore, the Fourth Geneva Convention contains several provisions providing for due process and administration of justice guarantees.

Israel has been operating under a state of emergency since 1948, allowing the governments to alter their laws, particularly those pertaining to Palestinian prisoners and detainees. This ongoing state of emergency has facilitated widespread attacks against Palestinians across historic Palestine, including by the recently-introduced "Emergency Instructions". Where the Israeli legal system actively shields Israeli perpetrators of international crimes, the intrinsically racist and discriminatory nature of the Israeli High Court is based on considerations of secret evidence in denial of due process guarantees, while the discriminatory Israeli military courts which unilaterally prosecute Palestinians and subject them to arbitrary detention on secret evidence, omit hearing cases concerning illegally transferred in settlers who are instead tried under Israeli domestic courts with full due process guarantees.

Since the start of the ongoing genocide against Palestinians in Gaza, the Israeli occupying forces have increased their nightly house raids and campaign of arbitrary arrests and detention, accompanied by intensified brutality of arrests, dire prison conditions, and practices of ill-treatment and torture, including sexual violence, as a continuation of Israel's long-established policy of collective punishment used to intimidate and repress Palestinians.

Criticising Israel's routine use of administrative detention against Palestinians across the occupied Palestinian territory, the Office of the High Commissioner for Human Rights recently indicated that such conduct may comprise Grave

Breaches pf the Fourth Geneva Convention and war crimes under the Rome Statute of the International Criminal Court.[47]

The "unlawful deportation or transfer or unlawful confinement of a protected person" or "wilfully depriving a protected person of the rights of fair and regular trial" constitute grave breaches of the Fourth Geneva Convention. This gives rise to the legal obligation on all High Contracting Parties to the Convention to provide effective penal sanction for persons committing or ordering the commission of such grave breaches, and to search for and prosecute such persons. With regard to international human rights law, in the context of the genocidal assault on Gaza Al-Haq and partners have emphasised the necessity of an independent investigation into recent "deaths" of Palestinian prisoners and detainees.

> "There are serious suspicions that the majority of these deaths resulted from torture, ill-treatment, and extrajudicial executions. With Israeli prison guards continuing to assault and mistreat Palestinian detainees without adequate oversight or accountability and under the directives of the Israeli government, particularly the Minister of National Security, Itamar Ben-Gvir, the thousands of Palestinian prisoners and detainees currently held in Israeli detention face significant risks. Indeed, our organisations hold Israeli authorities responsible for the well-being of Palestinian detainees in Israeli prisons, and express grave concern for the lives of hundreds of Palestinian prisoners who may be at risk of death due to the persistent policies of torture and medical neglect by the IPS.
>
> We also reaffirm the urgent need to end the enforced disappearance of hundreds of Palestinian detainees, including dozens of women from Gaza, by promptly disclosing their names and whereabouts. We further call for an immediate cessation of Israeli policies of torture and ill-treatment during arbitrary detention. In addition, we urgently appeal to the International Committee of the Red Cross (ICRC) to enhance its role in monitoring the conditions of detention of Palestinian prisoners and detainees in Israeli prisons."[48]

47 OHCHR Thematic Report: *Detention in the context of the escalation of hostilities in Gaza* (October 2023-June 2024) 31 July 2024, para 65: <https://www.ohchr.org/sites/default/files/documents/countries/opt/20240731-Thematic-report-Detention-context-Gaza-hostilities.pdf>.

48 PCHR, Al-Mezan, Al-Haq, *Urgent Call for Independent Investigation Amidst Persistent Reports of Torture, Enforced Disappearance, and Another Palestinian "Death" in Israeli Custody* (04 January 2024) <https://www.alhaq.org/advocacy/22468.html>.

The Conference of the HCP must have full regard for the urgent need for the protection of Palestinian detainees, including from the ongoing detention, arrest, enforced disappearance, ill-treatment and torture, and sexual violence perpetrated against Palestinian residents of Gaza, and ensure full compliance with the fundamentals of the rules of IHL. The Conference must demand and ensure that Israel release all Palestinian political prisoners, and to end its widespread and systematic use of arbitrary detention, including administrative detention, and the commission of torture and other ill-treatment against Palestinian detainees and prisoners, and that Israel discloses the names, locations, and details of detention of Palestinian residents of Gaza, ensures their rights are respected, including their right to legal representation, and refrain from ill-treatment and torture against them.

The Conference must recognise that Israel's systematic arrest campaigns and torture, which are carried out as a form of collective punishment against the Palestinian population, contribute to the maintenance of Israel's settler-colonialism and apartheid; Take effective measures to ensure that Israel halts its intimidations tactics against Palestinians on both sides of the Green Line, releases all Palestinian political prisoners, and ends its widespread and systematic use of arbitrary detention, including administrative detention, and the commission of torture and other ill-treatment against Palestinian detainees, and prisoners; Ensure Israel repeals its 'Unlawful Combatants Law' enacted in 2002 and demand Israel to disclose the names, locations, and details of detention of Palestinians from Gaza, ensure their rights are respected, including their right to legal representation, and refrain from ill-treatment and torture against them;

Further, the Conference must ensure that Israeli authorities grant access to legal representation or visits by the ICRC for detained Palestinians, to assess the condition of Palestinian prisoners and detainees, after the violations they have endured and to investigate and disclose the conditions and whereabouts of the detained individuals to alleviate the distress of their families and ensure transparency.

VII. Return of the Dead

The long established rules of international humanitarian law concerning treatment of the dead are detailed and clear. The rules of *Customary International Humanitarian Law*[49] clearly establish the responsibilities that all parties to armed conflict, international or non-international, have with regards treating the dead with respect.

> Rule 112. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction.
>
> Rule 113. Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited.
>
> Rule 114. Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them.
>
> Rule 115. The dead must be disposed of in a respectful manner and their graves respected and properly maintained.
>
> Rule 116. With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves.

Israel's practices of refusing to return bodies to their families and loved ones constitutes a clear violation of international human rights and humanitarian law, while the existence of mass graves across Gaza evidences the commission of international crimes, pertaining both to the right to life, and to violations of "last rights", including last and burial rites, and the respectful handling of remains. Mass graves further serve to conceal the identity of the dead.

49 Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law: Volume I: Rules* (ICRC) Cambridge University Press, 2005.

The Advisory Opinion confirmed that "Israel is also under an obligation to provide full reparation for the damage caused by its internationally wrongful acts to all natural or legal persons concerned", noting that the essential principle is that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[50] A core component of the right to reparation also includes "[v]erification of the facts and full and public disclosure of the truth".[51] The Conference must ensure that the rules of IHL pertinent to the treatment of the dead, and the identification and return of bodies, are respected and enforced, and ensure the facilitation to Palestinian responsible authorities of all necessary resources, including the assistance of organisations including the International Commission on Missing Persons, and the ICRC.

50 *Palestine Advisory Opinion* para 269.

51 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 22 (b). UN General Assembly resolution 60/147, 15 December 2005. Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world, 12 October 2020, para 50.

VIII. Settlements/ Transfer of Civilians

The Court recalled that the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereafter '*Wall Advisory Opinion'*) had found that Israel's settlement policy was in breach of the sixth paragraph of Article 49.6 of the Fourth Geneva Convention, which provides that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies", and that Article 49:

> "prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory".[52]

Emphasising that Israel's construction of settlements "is accompanied by specially designed civilian infrastructure in the West Bank and East Jerusalem, which integrates the settlements into the territory of Israel",[53] the Court concluded that: "that the transfer by Israel of settlers to the West Bank and East Jerusalem, as well as Israel's maintenance of their presence, is contrary to the sixth paragraph of Article 49 of the Fourth Geneva Convention".[54]The Court further confirmed Israel's obligation to evacuate 'all settlers from existing settlements and the dismantling of the parts of the wall constructed by Israel that are situated in the Occupied Palestinian Territory, as well as allowing all Palestinians displaced during the occupation to return to their original place of residence.'[55]

The Court gave broader analysis to the overall settlement project, rather than a simple focus on the transfer of civilians into occupied territory. Observing that Question *(a)* posed by the General Assembly had enquired in part about the legal consequences arising from Israel's settlement policy, the Court noted "a certain degree of ambiguity in the English term 'settlement', as used in the resolution of the General Assembly and in other texts" since the term could be understood as

52 *Palestine Advisory Opinion* para 115.

53 *Ibid* 117.

54 *Palestine Advisory Opinion* para 119.

55 *Ibid* para 270.

referring to the Israeli residential communities established or supported by Israel in the Occupied Palestinian Territory, or it may also be understood as encompassing all physical and non-physical structures and processes that constitute, enable and support the establishment, expansion and maintenance of these communities.

Crucially, the Court found the latter interpretation to be the appropriate one, given that the two concepts are distinguished in French through the use of the terms "colonie" and "colonisation", respectively:

> "The French version of the resolution uses the term "colonisation", thus indicating that the Court is called upon to examine Israel's policy in relation to settlements comprehensively. The fact that question *(b)*, which forms the context for the interpretation of question *(a)*, describes settlement as a policy or practice confirms this interpretation".[56]

The Court's consideration of Israel's policy of settlement, continued by reference to the confiscation or requisitioning of land, exploitation of natural resources, extension of Israeli law, Forced displacement of the Palestinian population, and violence against Palestinians. The Court concluded that Israel's policies of land confiscation are not in conformity with Articles 46, 52 and 55 of the Hague Regulations,[57] that by severely restricting the access of the Palestinian population to water that is available in the Occupied Palestinian Territory, Israel acts inconsistently with its obligation to ensure the availability of water in sufficient quantity and quality (Article 55 of the Fourth Geneva Convention),[58] and "that Israel's policy of exploitation of natural resources in the Occupied Palestinian Territory is inconsistent with its obligation to respect the Palestinian people's right to permanent sovereignty over natural resources".[59]

Specifically, the Court held that the extension of Israel's law to the occupied West Bank and East Jerusalem was not justified under any of the grounds laid down in Article 64.2 of the Fourth Geneva Convention concluding: "that Israel has exercised its regulatory authority as an occupying Power in a manner that is inconsistent with the rule reflected in Article 43 of the Hague Regulations and

56 *Ibid* para 111.

57 *Ibid* para 122.

58 *Ibid* para 133.

59 *Ibid* para 133.

Article 64 of the Fourth Geneva Convention".[60] The Court was also of the view, that Israel's settlement policies and practices contribute to the departure of Palestinian populations from areas of the West Bank and East Jerusalem, and "are contrary to the prohibition of forcible transfer of the protected population under the first paragraph of Article 49 of the Fourth Geneva Convention".[61]

Concerning settler violence, the Court concludes that the violence by settlers against Palestinians, and Israel's failure to prevent or to punish it effectively and Israel's excessive use of force against Palestinians "contribute to the creation and maintenance of a coercive environment against Palestinians. In the present case, on the basis of the evidence before it, the Court is of the view that Israel's systematic failure to prevent or to punish attacks by settlers against the life or bodily integrity of Palestinians, as well as Israel's excessive use of force against Palestinians, is inconsistent with the obligations [under Article 46 of the Hague Regulations, complemented by the first paragraph of Article 27 of the Fourth Geneva Convention, and the rights to life and to protection against violence guaranteed by Article 6, paragraph 1, and Article 7 of the ICCPR.]"[62]

Accordingly, HCPs must legislate to prevent all of their citizens who hold dual citizenship with Israel from serving in the Israeli military or other services that contribute to the occupation and apartheid regime or, in the case of individuals or organisations that contribute to Article 49 breaches, from the purchase or rental of property anywhere in occupied Palestinian territory. In particular, HCPs must prohibit all 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. Such prohibition must be enforced through the provision of explicit guidelines and effective monitoring mechanism. HCPs must further review the parameters of the activities considered for sanctioning in the wake of the Advisory Opinions conclusions as to the illegality of the occupation and the scope of third state responsibility.

60 *Palestine Advisory Opinion* para 141.

61 *Ibid* para 147.

62 *Ibid* para 154.

IX. Self-Determination/ Oslo – Ceasefire: Primacy of the Fourth Geneva Convention

Under international humanitarian law the notion of self-determination is relevant in the classification of conflicts. At the minimum for states that have accepted Additional Protocol I, to which Palestine acceded in 2014, IHL rules of international armed conflicts apply to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination."[63] The *Palestine Advisory Opinion* has clearly established that Israel's unlawful alien occupation, encompassing Israel's violation of Article 3 ICERD, violates the Palestinian right to self-determination, thus leading to the conclusion that the IHL rules of international armed conflict must apply as between Israeli and Palestinian parties to the conflict. The Court did not however make such a finding explicit, a decision possibly understood by a reticence to make a determination as to Palestinian statehood, presumably as this issue was not directly included in the scope of the question referred by the UN General Assembly.

International law's prohibition of colonialism,[64] including of Israel's ongoing and racist settle-colonial project, taken together with the core principles of international law establishing the right of peoples to self-determination and the prohibition of the acquisition of territory by force and of population transfer, as identified in the Advisory Opinion, makes it abundantly clear that cross-border transfer and internal demographic manipulation inside the Green Line constitute colonial practices in flagrant violation of international law. These practices breach a wide range of Palestinians' individual and collective rights, including their right of return to their country and freedom of movement, residence, and the right to family life within.

63 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-1>.

64 UN General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly, Resolution 1514 (XV), 14 December 1960, UN Doc A/RES/1514 (XV).

In holding that Israel's powers and duties in the Occupied Palestinian Territory are governed by the Fourth Geneva Convention and by customary international law, the Court explained, as had been noted previously in its *Wall* Advisory Opinion: "the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties" (*I.C.J. Reports 2004 (I)*, p. 177, para. 101). Egypt, Israel and Jordan were all parties to that Convention when the 1967 armed conflict broke out. Therefore, the Fourth Geneva Convention is applicable in the Occupied Palestinian Territory.[65] While such analysis is not incorrect, it does not take into consideration the fact of Palestinian statehood, whose recognition requires the conclusion that the occupation, as per the terms also of the Rome Statute, constitutes an international armed conflict.

By a Separate Opinion, Judge Robledo was critical of the failure of the Advisory Opinion to have been explicit with regard to the statehood of Palestine. He succinctly notes how adhering to the cliched formulas, which note merely the "right [of the Palestinian people] to an independent and sovereign State" only serves to accentuate existing imbalances of power: "This kind of language contributes to making the situation of one of the parties (Palestine) even more unequal in relation to the other (Israel), and from the outset distorts the parameters of the negotiations that will have to take place between them".[66] Judge Robledo further stressed that:

> "The ambiguity inherent in the words "its right to an independent and sovereign State" is a further obstacle to the full implementation of the right of the Palestinian people to self-determination, in that it contributes indirectly to the position that the proclamation of the State of Israel on 14 May 1948 was somehow made in respect of territory belonging to no one or *terra nullius*".

Presently the approach of the Office of the Prosecutor at the International Criminal Court, followed though yet to be endorsed by the judiciary, has been to view certain Israeli conduct in occupied Palestine through the framework of the IHL rules for international armed conflict, and other Israeli conduct through the framework of the IHL rules for non-international armed conflict. Such bifurcation

65 *Palestine Advisory Opinion* para 96.

66 Separate Opinion of Judge Gómez Robledo, para 4. <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-12-en.pdf>.

has no basis in international law, with the Prosecutor's rationale for such a division, as presented by the Office's appointees in the Panel of Experts in International Law, as yet meagre and unsubstantiated.[67]

We recommend that the HCP Conference recognise the State of Palestine as a party to the Geneva Conventions and their Additional Protocols and affirm that the rules of IHL of international armed conflict, including the Fourth Geneva Convention, apply in all relations between Israel as the unlawful Occupying Power and the State of Palestine and as between Israel as the unlawful Occupying Power and Palestinians as the protected population.

67 Report of the Panel of Experts in International Law, 20 May 2024 <https://www.icc-cpi.int/about/otp/special-advisers-to-the-prosecutor/panel-of-experts-in-international-law>.

X. Trade and Other Agreements between Israel and the State of Palestine, or between Israel and any Palestinian non-state actors

The Advisory Opinion noted that the law of occupation, does not, in principle, "deprive the local population's civilian institutions in the occupied territory of the regulatory authority that they may have. Rather, it invests in the occupying Power a set of regulatory powers on an exceptional basis and on specific enumerated grounds".[68] As noted by the Court, by Article 43 of the Hague Regulations, the Occupying Power must in principle respect the law in force in the occupied territory unless absolutely prevented from doing so, a rule complemented by the second paragraph of Article 64 of the Fourth Geneva Convention, which exeptionally allows the occupying Power to

> "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the [Fourth Geneva] Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them".[69]

Quoting the Independent International Commission of Inquiry, the Court noted that Israel has expanded its sphere of legal regulation in the West Bank, and "has to a large degree substituted its military law for the local law in force in the Occupied Palestinian Territory at the beginning of the occupation in 1967",[70] and that "from the perspective of domestic law, Israel treats East Jerusalem as its own national territory, where Israeli law is applied in full and to the exclusion of any other domestic legal system":[71]

68 *Palestine Advisory Opinion* para 134.
69 *Ibid* para 134.
70 *Ibid* para 136.
71 *Ibid* para 138.

> "Since the start of the occupation, Israel has extended its legal domain in the West Bank, which has resulted in far-reaching changes to the applicable law and, in practice, two sets of applicable law: military law and Israeli domestic law, which has been extended extra-territorially to apply only to Israeli settlers. This has been done through military orders, legislation and Supreme Court decisions and includes criminal law, national health insurance law, taxation laws and laws pertaining to elections. There are also separate legal systems for enforcing traffic laws and an institutional and legislative separation in the planning and building regime."[72]

The Court was not convinced that the extension of Israel's law to the occupied West Bank and East Jerusalem was justified under any of the grounds laid down in Article 64.2 of the Fourth Geneva Convention, holding that the comprehensive application of Israeli law in East Jerusalem, as well as its application in relation to settlers throughout the West Bank, could not 'be deemed "essential" for any of the purposes enumerated' in Article 64 of the Fourth Geneva Convention.[73]

The Court at this point again give consideration to the "arrangements agreed upon between Israel and the PLO in the Oslo Accords", which it held pointed 'in the same direction', since, as the Court found, its "provisions are clearly intended to preserve some of the powers conferred on Israel under the law of occupation, rather than to increase them".[74] In concluding on this section the Opinion held: "that Israel has exercised its regulatory authority as an Occupying Power in a manner that is inconsistent with the rule reflected in Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention".[75] Following from this, the HCP Conference must ensure that all HCPs in their dealings, regulatory, fiscal, logistical, financial and otherwise, with the State of Palestine and with Palestinians as the protected population, avoid complicity in Israel's violations of Article 64. As an illustrative example, Palestinians must be afforded equitable access to financial markets, institutions, and opportunities, and the Conference must affirm that Palestinian enterprises, educational and civil organisations, charities and all other institutions, as well as individuals, must be free to engage

72 "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel", UN doc. A/77/328 (14 September 2022), para. 46.

73 *Palestine Advisory Opinion* para 139.

74 *Ibid* para 140.

75 *Ibid* para 141.

in their lawful and necessary activities without sanction or threat from the Occupying Power.

Specifically, HCPs must ensure that their business enterprises are not engaging in activities in occupied territory and are not benefiting from the unlawful occupation or breaches of international humanitarian law.

In this regard we recall that the Court has affirmed the centrality of the right to self-determination in international law is also reflected in its inclusion as common Article 1 of the ICESCR and the ICCPR, the first paragraph of which provides: "All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development." […] The Court considers that, in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law".[76] The Court clarified that the duty on third states, including HCPS, of distinguishing dealings with Israel between its own territory and the Occupied Palestinian Territory "encompasses, *inter alia*, the obligation to abstain from treaty relations with Israel in all cases in which it purports to act on behalf of the Occupied Palestinian Territory or a part thereof on matters concerning the Occupied Palestinian Territory or a part of its territory; to abstain from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory".[77] Likewise the UN General Assembly Resolution, affirmed that in accordance with the advisory opinion of the International Court of Justice:

> (h) The existence of the Palestinian people's right to self-determination, in view of its character as an inalienable right, cannot be subject to conditions on the part of the occupying Power.

In particular it is imperative therefore that HCPs recognise that in all dealings with occupied Palestine, existing regulatory frameworks, including those shaped by the Oslo Accords, including the Paris Economic Protocol, and Israeli Military Orders, must be interpreted, applied, and enforced, in such a manner that is fully compatible with, and does not detract from, Palestinian rights under international law.[78]

76 *Palestine Advisory Opinion* para 233.

77 *Ibid* para 278.

78 Nur Arafeh, Long Overdue: Alternatives to the Paris Protocol, (27 February 2018) <https://al-shabaka.org/briefs/long-overdue-alternatives-to-the-paris-protocol/>.

The duty to abstain from treaty relations where Israel purports to act on behalf of occupied Palestine has consequences for any treaties between Israel and HCPs, including double taxation agreements, bilateral investment treaties, and free trade agreements. HCPs must review all such arrangements with Israel in order to ensure distinction in their dealings between Israel and the Occupied Palestinian Territory and to exclude any dealing that would support the maintenance of the unlawful occupation and the commission of breaches of international humanitarian law, adding where necessary effective conditionalities, for example as to geographical/territorial scope, to existing agreements to ensure they are distinguishing in their dealings. Where any such agreements have the effect of detracting from Palestinian rights under international law, including the Fourth Geneva Convention, HCPs are under a duty to repeal or amend any such agreements in line with their international legal obligations. Israel has the burden of proving that it is engaging in activities solely for the benefit of the occupied population.

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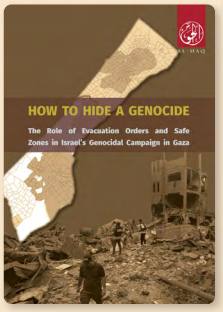

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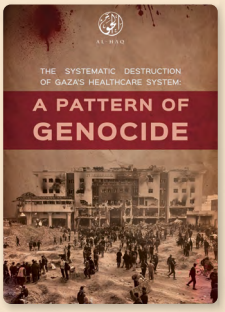

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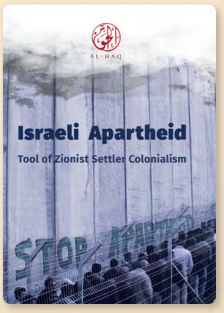

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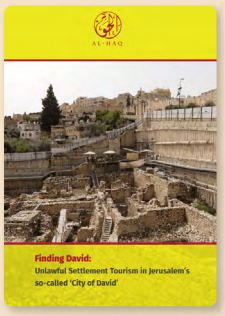

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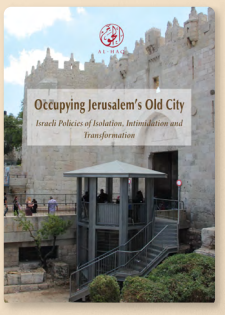

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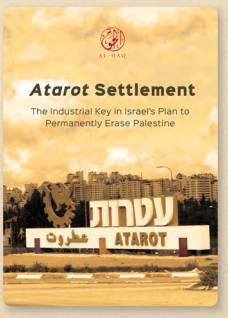

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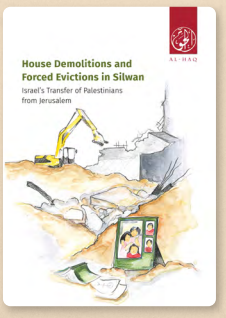

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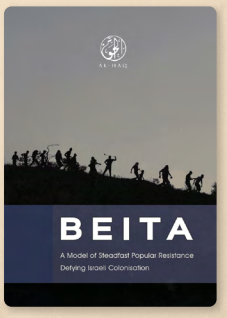

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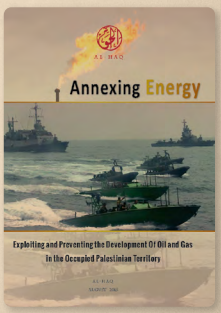

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About Al-Haq

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah in the Occupied Palestinian Territory (OPT). Established in 1979 to protect and promote human rights and the rule of law in the OPT, the organisation has special consultative status with the United Nations Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. Al-Haq conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. Al-Haq has a specialised international law library for the use of its staff and the local community.

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), ESCR-Net – The International Network for Economic, Social and Cultural Rights, the Palestinian Human Rights Organizations Council (PHROC), and the Palestinian NGO Network (PNGO). In 2018, Al-Haq was a co-recipient of the French Republic Human Rights Award, whereas in 2019, Al-Haq was the recipient of the Human Rights and Business Award. In 2020, Al-Haq received the Gwynne Skinner Human Rights Award presented by the International Corporate Accountability Roundtable (ICAR) for its outstanding work in the field of corporate accountability. Al-Haq was awarded the prestigious Bruno Kreisky Prize and the MESA Academic Freedom Award in 2022.

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