Legal Consequences for Third States of Israel's breaches of international law in the Palestinian Gaza Strip

Legal Opinion for the Arab Organisation for Human Rights in the UK

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Executive Summary

(The present opinion is limited to the Palestinian Gaza Strip, although much of what it covers is equally applicable to Israel's use of force through the occupation of the Palestinian West Bank.)

Israel's current use of force in the Palestinian Gaza Strip is part of a long-standing illegal use of force by that state in the territory which began in 1967. It is a violation of the use of force, an aggression, and the right of self-determination of the Palestinian people. In addition, the use of force in its current manifestation, supplementing the force-enabled siege with aerial bombardment and a land invasion, also involves breaches of the laws of war, a.k.a. international humanitarian law (IHL), including serious violations which constitute war crimes, and breaches of the prohibition of apartheid in particular and racial discrimination more generally. Some of these breaches are also a continuation, in more extreme form, of what happened prior to the current bombing and land incursion campaign. Also, a credible case is now being made by states, UN experts and human rights NGOs that crimes against humanity and genocide are being committed.

Israel is obliged to cease its illegal behaviour immediately: a ceasefire and withdrawal from, and complete termination of the force-enabled siege of, the Palestinian Gaza Strip. Because fundamental international legal rules are being breached, third states (all other states apart from Israel and Palestine) have special legal obligations. They must not recognize as lawful, or provide any aid or assistance to, Israel's use of force in, including its occupation of, the Palestinian Gaza Strip. This means not affirming that Israel has a right to use this force, and ceasing support, including military support, to Israel for this purpose. They must also take positive steps to bring the illegal situation to an end, including calling for Israel to take the aforementioned actions.

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1. Introduction

1. I have been asked to provide an opinion explaining what the legal consequences are for 'third states'—all states other than, in this context, Israel and Palestine—of Israel's violations of international law in its current use of force in the Palestinian Gaza Strip. It is limited to the violations by Israel, without prejudice to the violations being perpetrated in this context by other actors, such as members of Hamas and Islamic Jihad. This opinion is a summary of the legal framework. As it is being written as events are unfolding, matters are being addressed only with reference to facts that are in the public domain, without the benefit of specialist intelligence or the results of an independent fact-finding investigation. Necessarily, then, it covers what it is possible to say within these considerable limitations.

2. This opinion has been prepared in my private, individual capacity, and in my own name, only. It has not been written in any other capacity nor can and should the ideas herein be attributed to any other entity than myself.

2. What law is being violated

3. This opinion is limited to some (not all) of the core areas of international law that have a special fundamental status. They are norms of *jus cogens*, peremptory norms, meaning they cannot be limited by other areas of international law, and, as will be addressed further below, serious violations of them give rise to special obligations on the part of third states. These norms also operate *erga omnes*, meaning that all states have a legitimate interest in seeing them complied with, something that will also be addressed further below. These legal rules are:

   (1) The right of self-determination.

   (2) The prohibition on the use of force other than in self-defence (or authorized by the UN Security Council), which if violated constitutes aggression.

   (3) The prohibition of genocide.

   (4) The prohibition of crimes against humanity.

   (5) The core/basic protections of the laws of war, a.k.a. international humanitarian law, which when violated constitute 'war crimes'.

   (6) The prohibition on apartheid.

   (7) The prohibition on racial discrimination in general (beyond what is covered by the prohibition on apartheid).

4. All these areas of law operate at a state level, in terms of Israel's obligations, the rights of the State of Palestine, and, in a secondary way, the rights and obligations of third states. Also, breaches of (2)-(7) give rise to individual criminal responsibility ((6) and (7), at the International Criminal Court in the aggravated form of taking place in the context of a systematic attack against a civilian population, thereby falling within (4)).

3. Israel's violations of international law

3.a. The illegality of the war itself (legal areas (1) and (2))

5. Israel captured the Gaza Strip and West Bank from Egypt and Jordan in its 1967 war against these two states and Syria which ended in victory after six days. The war was illegal: even assuming as valid Israel's claim it feared attack, acting pre-emptively is legally impermissible. Even if pre-emptive action were lawful, the justification ended with Israel's victory. Either way, then, the continued use of force through the occupation had no legal basis. Israel's removal of settlements and redeployment of its military presence as part of the operation of a land, sea and air blockade of the Gaza Strip amounted, ultimately, to a reconfiguration, not an ending, of this use of force. Equally, its current action, supplementing the force-enabled siege with aerial bombardment and a land invasion, constitutes a further re-configuration of the use of force that began in 1967. As that use of force was illegal before the attacks on 7 October 2023, its continued use remains as such after the attacks, not becoming lawful as a means of responding to the attacks and/or the threat of future attacks emanating from the territory.

6. The use of force with respect to the Gaza Strip, then, is illegal—aggression ((2) above). It is not an illegal use of force that began after 7 October 2023, but a continued illegal use of force that pre-dates the attacks on that date and was reconfigured into a more extreme form in response to them. Given that the Palestinian people have a right to self-determination in international law, the use of force is also a violation of this right ((1) above).

3.b. Illegality of the conduct of the war since 7 October 2023 (legal areas (3)-(7))

7. A credible case is now being made by certain states, UN independent human rights experts (see e.g. here and here), and human rights NGOs (see here), that the way Israel has used force in Gaza since 7 October 2023 has constituted and is constituting genocide and crimes against humanity (legal areas (3) and (4)). The same actors and others are also making credible allegations that this use of force also involves violations of the core protections of the laws of war, thereby constituting war crimes (legal area (5)), the prohibition of apartheid, and racial discrimination more generally (legal areas (6) and (7)). Whereas many of these violations are specific to Israel's particular operation taking place since 7 October 2023, some of them constitute continuations of violations linked to Israel's pre-existing use of force, including through the blockade.

3.c. Violations are 'serious'

8. Israel's violations of *jus cogens* norms in international law fall into a special 'serious' category, which has special consequences for third states, addressed below. A serious breach of a *jus cogens* norm of international law is defined in Article 41, paragraph 2, of the United Nations International Law Commission's Articles on State Responsibility as

being "a gross or systematic failure by the responsible State to fulfil the obligation" concerned.[1] The commentary to the ILC's Articles on State Responsibility notes:

> To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations, and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.[2]

9. Violations of the following *jus cogens* norms are of their nature 'systematic', necessarily involving an intentional violation on a large scale. Their violation by Israel is, thus, by definition 'serious'.

   (1) Self-determination (legal area (1)).

   (2) Aggression (legal area (2)).

   (3) Genocide (legal area (3)).

   (4) Crimes against humanity (legal area (4)).

   (5) Apartheid (legal area (6)).

10. Violations of the core/basic protective rules of IHL (legal area (5)) are of their nature 'gross', necessarily being of a flagrant nature, amounting to a direct and outright assault on the values protected by the rules. Their violation by Israel is, thus, by definition 'serious'.

11. Israel's violations of the prohibition of racial discrimination generally (beyond what is covered by apartheid) (legal area (7)) have been both gross and systematic. These violations are, therefore, 'serious.'

3.d. Legal consequences for Israel

12. Israel is obliged to cease all its violations of international law. This means terminating its use of force immediately, withdrawing its military forces from the Gaza Strip entirely, ending its military blockade of the territory, and permitting full humanitarian access to the Strip.

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[1] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, U.N. Doc. A/56/10, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, (hereinafter 'ARSIWA'), Art. 41(2). See also International Law Commission, Draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries, adopted at its seventy-third session, A/77/10, 2022, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf (hereinafter 'ILC *jus cogens* Draft Conclusions & Commentaries'), Conclusion 19, para. 3, and ARSIWA, Part Two, Ch. III, Art. 41 Commentary; ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19 Commentary.

[2] ARSIWA, Part Two, Ch. III, Art. 40 Commentary, para. 8.

13. Israel is obliged to prosecute all individuals suspected of committing international crimes arising out of its illegal use of force in the Gaza Strip, or to extradite such individuals to another criminal jurisdiction, whether of another state, or the International Criminal Court, where such individuals can be prosecuted.

14. Israel is obliged to compensate the Palestinian people, and the State of Palestine, for all losses arising out of its illegal use of force in the Gaza Strip.

4. Consequences for third States

4.a. Non-recognition

15. Third States must not recognize as valid Israel's illegal use of force in the Palestinian Gaza Strip. This means they must not recognize that it has a legal right to use this force. To do otherwise would be to implicitly endorse illegality or to mistakenly treat as lawful something which is illegal. As Judge Higgins indicated in paragraph 38 of her Separate Opinion to the 2004 Advisory Opinion of the United Nations International Court of Justice (ICJ) on the legal consequences of Israel's construction of the Wall in the occupied Palestinian West Bank, "[t]hat an illegal situation is not to be recognized…by third parties is self-evident". This is a general principle of law in the sense that it is inherent in the concept of law and the rule of law itself.

16. An obligation of non-recognition also exists in international law because the particular rules being breached by Israel are, as indicated, of a fundamental nature. This has the effect of reinforcing, and concretizing as a specific obligation, the operation of this more general principle in the particular context of the breaches covered. It is addressed separately below.

17. Third States must not recognize the validity of Israel's presence in and exercise of control over the Palestinian Gaza Strip as a general matter, in and of itself. This includes not recognizing as valid Israel's justificatory claims for this presence/exercise of control, of whatever kind. Notably, any recognition that Israel has a right to defend itself through the use of force in the Strip is tantamount to recognizing that Israel has a valid basis to do this according to the international law on the use of force, when, as indicated above, it does not. In other words, it is recognition of an aggression and violation of self-determination or, put differently, it is a denial that something is an aggression and a violation of self-determination. This amounts to a fundamental repudiation of two of the core areas of international law, as a general matter, and as they apply in the present situation.

18. One concrete consequence of this obligation is that states should not permit their nationals to travel to Israel in order to serve in the Israeli armed forces in relation to the Gaza Strip, given that Israel's use of force there is, in and of itself, illegal, and, separately, is being conducted in a manner that involves further violations of international law. Where they provide advice to their nationals on travel to foreign countries that indicates whether or not such travel is advisable/permitted, this must include clear warnings that travel to Israel for the purposes of service in the Israeli armed forces is not advisable/permitted, for the specific reason of the illegal activities such forces are engaged in (so quite apart from any other considerations such as personal safety).

19. The general obligation not to recognize the validity of Israel's exercise of force-enabled authority in the Gaza Strip is reflected in determinations made by the United Nations International Court of Justice and Security Council concerning South Africa's illegal presence in Namibia. This presence was illegal on one of the two bases on which Israel's presence in the Gaza Strip is illegal—as a violation of self-determination. The determinations of it are directly transferrable on this basis, and by analogy to the second, use-of-force-illegality basis.

20. In a 1971 Advisory Opinion the ICJ held that that the consequence of the illegal nature of the presence was an obligation on the part of all States "to recognize the illegality and invalidity of South Africa's continued presence" in Namibia (para. 119). In Resolution 301 of 1971, the United Nations Security Council stated (para 6(1)) that

> States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia.

In an earlier resolution, 276 of 1970, the Council called upon all States (in para. 2)

> [p]articularly those which have economic and other interests in Namibia to refrain from any dealings with the Government of South Africa which are inconsistent with…

…the Council's determination that (in para. 5)

> …the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia…are illegal and invalid.

In its 1971 Advisory Opinion, the ICJ held that

> Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to…make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia (para. 123).

The Security Council called upon States maintaining diplomatic or consular relations with South Africa to take the following concrete steps:

> issue a formal declaration to the Government of South Africa to the effect that they do not recognize any authority of South Africa with regard to Namibia and that they consider South Africa's continued presence in Namibia illegal…[and] terminate existing diplomatic and consular representation as far as they extend to Namibia, and to withdraw any diplomatic or consular mission or representative residing in the Territory (Resolution 283 of 1970, para. 2).

And it called upon all States

> …to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration (Resolution 301 of 1971, para 6).

4.b. No aid or assistance

4.b.i. General principle

21. A further general principle of law arising out of the concept of illegality is that States must not provide aid or assistance to Israel's illegal behaviour. This was again indicated by Judge Higgins in her observation, made in conjunction with the earlier observation concerning non-recognition in her Separate Opinion to the ICJ's Advisory Opinion on the Wall (para. 38), "[t]hat an illegal situation is not to be…assisted by third parties is self-evident". As with non-recognition, this is a general principle of law in the sense that it is inherent in the concept of law and the rule of law itself.

22. As with the obligation of non-recognition, an obligation not to aid or assist illegality also exists in international law because the rules being breached by Israel are, as indicated, of a fundamental nature. This has the effect of reinforcing, and concretizing as a specific obligation, the operation of this more general principle in the particular context of the breaches covered. It is addressed separately below.

4.b.ii. As invoked in other contexts

23. The invocation of this principle in other contexts is transferrable to Israel's illegal presence in the Gaza Strip. In the context of South Africa's illegal presence in Namibia, the ICJ found in its Advisory Opinion (para. 119) that member States of the United Nations are "under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia". In the context of territories under Portuguese colonial control in 1965, the Security Council requested in Resolution 218 (para. 6) that:

> …all States…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.

4.b.iii. As invoked in the context of Israel's illegal occupation of the Palestinian Gaza Strip and the West Bank as a general matter

24. The principle has already been invoked in relation to Israel's presence in the Palestinian Gaza Strip, of which, as indicated above, the current use of force is a continued manifestation, as part of a more general determination concerning Israel's illegal presence there and in the Palestinian West Bank. In Resolution 3414 of 1975 (para. 3), the UN General Assembly

> Request[ed] all States to desist from supplying Israel with any military or economic aid as long as it continues to occupy Arab territories and deny the inalienable national rights of the Palestinian people.

In Resolution 36/27 of 1981 (para. 3), the General Assembly "[r]eiterates its call to all States to cease forthwith any provision to Israel of arms and related material of all types which enable it to commit acts of aggression against other States". In Resolution 36/226A, of 1981 (para. 13), the Assembly called on all States "to put an end to the flow to Israel of any military, economic, and financial resources that would encourage it to pursue its aggressive policies against the Arab countries and the Palestinian people". The Assembly also (in para. 12) considered that

> …the agreements on strategic co-operation between the United States of America and Israel signed on 30 November 1981…encourage Israel to pursue its aggressive and expansionist policies and practices in the Palestinian and other Arab territories occupied since 1967, including Jerusalem, would have adverse effects on efforts for the establishment of a comprehensive, just and lasting peace in the Middle East and would threaten the security of the region.

In Resolution 38/180A of 1983, the General Assembly (para. 9) deplored "any political, economic, financial, military and technological support to Israel that encourages Israel to commit acts of aggression and to consolidate and perpetuate its occupation and annexation of occupied Arab territories", and (para. 13) called "once more" upon all Member States:

> (a) To refrain from supplying Israel with any weapons and related equipment and to suspend any military assistance that Israel receives from them;
>
> (b) To refrain from acquiring any weapons or military equipment from Israel;
>
> (c) To suspend economic, financial and technological assistance to and co-operation with Israel;
>
> (d) To sever diplomatic trade and cultural relations with Israel.

The General Assembly further declared, in Part E of the same Resolution, "the international responsibility of any party or parties that supply Israel with arms or economic aid that augments its war potential" (para 1), and condemned "all steps which may result in augmenting the capability of Israel and contributing to its policy of aggression against countries in the region" (para. 2). In particular, it demanded that all States, and particularly the United States of America, "refrain from taking any step that would support Israel's war capabilities and consequently its aggressive acts" (para. 3), and called upon States to "review… any agreement, whether military, economic or otherwise, concluded with Israel" (para. 4).

4.c. General duty to ensure the realization of Israel's compliance with the law of self-determination, the core/basic protective rules of IHL, and the prohibition of genocide

4.c.i. Introduction

25. Three of the fundamental areas of international law violated by Israel have a special obligation attached to them, reflective of the underlying idea of a generalized interest that is the basis for the obligations having *erga omnes* status: all States bear a general obligation to ensure they are not violated by Israel. These areas of international law are, first, the right of self-determination, second, the core/basic protective obligations of IHL, and, third, the prohibition of genocide.

4.c.ii. Self-determination

26. According to the UN General Assembly Resolution on Friendly Relations and Co-operation (2625 of 1970),

> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples… and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . .
>
> […]
>
> Every State bas the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, *such peoples are entitled* to seek and *to receive support* [emphasis added].

4.c.iii. The core/basic protective rules of IHL

27. Article 1 common to the four Geneva Conventions of 1949 reads as follows: "[t]he High Contracting Parties undertake to respect *and to ensure respect* for the present Convention in all circumstances" (emphasis added). Common Article 1 was confirmed as customary international law in the 1986 *Nicaragua* decision of the ICJ (para 220). That Court held in the *Wall* Advisory Opinion that "[i]t follows from that provision [common Article 1] that every State party to that Convention, *whether or not it is a party to a specific conflict*, is under an *obligation to ensure* that the requirements of the instruments in question are complied with" (emphasis added) (para. 157).

4.c.iv. The prohibition of genocide

28. Under Article 1 of the Genocide Convention of 1948, States are obliged to 'prevent and to punish' genocide. As the International Court of Justice affirmed in the Preliminary Objections phase of the *Bosnia and Herzegovina v Serbia and Montenegro* case

concerning violations of the Convention, the treaty does not limit this territorially, thereby encompassing genocide anywhere in the world, not just genocide taking place within a State's own territory (an equivalent position on extraterritorial applicability has been taken to other human rights treaties that do not stipulate the territorial scope of their reach, such as the ICERD).[3]

4.c.v. Practical significance

29. This general duty takes on a practical significance in the form of three specific duties borne by States to suppress Israel's violations of the three areas of international law covered by it.

4.d. Three specific duties to suppress Israel's violations of international law

4.d.i. Introduction

30. States bear a tripartite set of specific suppression obligations (one positive, two, related (based on the overall concept of abstention), negative) relating to Israel's breaches of self-determination, the core rules of IHL, and genocide. These are:

    (1) To co-operate to bring them to an end.

    (2) Not to recognize the situation that gives rise to them.

    (3) Not to aid or assist in them.

    As indicated above, States are already required to follow (2) and (3) as a matter of legal principle concerning illegality as a general matter. Here, they are subject to the same requirement as a matter of a specific set of legal obligations tied to breaches of certain fundamental rules.

4.d.ii. Two different bases for these rules

31. These obligations arise on two separate bases in relation to two different types of violations of the relevant rules.

4.d.ii.α. Basis 1: For all violations, of rules that a) operate erga omnes, and b) in relation to which States bear the foregoing obligation to ensure implementation

32. In the case of violations of the right of self-determination (legal area (1)), and core/basic protective norms of IHL (legal area (5)), in particular, the ICJ indicated in the *Wall* Advisory Opinion that States bear the tripartite obligations in relation to these violations, given that the rules violated have the following two characteristics: first, they operate *erga omnes*, and second, as indicated above, linked to this status, primary obligations to

[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment of 11 July 1996, para 31 (page 616).

promote the realization of these obligations by all States exist in international law (in the case of self-determination, in the Friendly Relations and Co-operation Resolution of the General Assembly; in the case of the core/basic protective rules of IHL, in common Article 1 to the four Geneva Conventions).[4] The Court was not concerned with the prohibition of genocide (legal area (3)) in that case, but the logic of its position in relation to these other areas of law is transferrable to that prohibition, bearing in mind the general obligation states bear under Article 1 of the Genocide Convention.

33. It follows, then, following the ICJ's approach in the *Wall* Advisory Opinion, that for these three areas of international law (1), (3) and (5), Israel's violations engage the tripartite suppression obligations on the part of third States covered in the present section. This amounts to a fleshing out, through three particular, specific duties, the general duty to ensure the realization of Israel's implementation of these areas of international law as previously identified.

4.d.ii.β. Basis 2: For 'serious' violations, of rules that have jus cogens status

34. As indicated above, Israel's breaches of *jus cogens* rules of international law are, in legal terms, 'serious.' As matter of the international law of State responsibility as articulated in the International Law Commission's Articles on State Responsibility and its draft conclusions on *jus cogens* obligations, 'serious breaches' of *jus cogens* obligations, in the words of the Commentary on the State Responsibility Articles, "attract additional consequences, not only for the responsible State but [also] for all other States".[5] These additional consequences are the three suppression-related obligations being addressed presently, which all States bear in the case of a serious breach of a peremptory norm of general international law by any State. This is reflected in the following stipulation by the UN Human Rights Council in resolution 49/28 of 11 April 2022 (preamble, para 7):

> Calls upon all States to ensure their obligations of non-recognition, non-aid or assistance with regard to the serious breaches of peremptory norms of international law by Israel… and also calls upon them to cooperate further to bring, through lawful means, an end to these serious breaches and a reversal of Israel's illegal policies and practices.

4.d.ii.γ. Consolidating the treatment of these bases, and the violations by Israel covered by the three duties

35. The first basis for States bearing suppression obligations is limited to Israel's violations of the law of self-determination, the core/basic protective rules of IHL, and the prohibition of genocide – legal areas (1), (3) and (5). The second basis arises out of Israel's violations of a wider set of rules, including these three areas of law, based on the rules having *jus*

[4] The Court emphasises these two elements of each of the two areas of international law (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (hereinafter '*Wall* Advisory Opinion (2004)')), p. 199, para. 156 for self-determination; pp. 199-200, paras. 157-158 for IHL), follows this with "Given the character and…importance of the rights and obligations involved", and affirms the three obligations in relation to these two areas of international law (Ibid., p. 200, para. 159).

[5] ARSIWA, Part Two, Ch. III Commentary, para. 7. On this area of State responsibility, see ARSIWA, Arts. 40-41; ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19. See also ARSIWA, Part Two, Ch. III Commentary.

cogens status – so also covering legal areas (2), (4) and (6) and (7). This second basis, however, only covers 'serious' violations, whereas the first basis covers all violations. That said, given that Israel's violations of international law are, in all the categories of rules, 'serious' (as indicated above) they all fall into the category that would trigger States' tripartite suppression obligations on the second basis. For present purposes, then, there is no need to address the suppression obligations differently in terms of the two different bases on which they operate, since in this instance the difference has no material significance. Given that, the following coverage of the three obligations is based on a consolidation of the treatment of each as a matter of the particular bases for them.

36. What follows, then, relates to the violations by Israel of all the areas of law covered in the present opinion, based on the earlier characterization of these areas of law as having *jus cogens* status, the violations by Israel being 'serious' and, in the case of the right of self-determination, the core/basic protective rules of IHL, and the prohibition on genocide, the rules operating *erga omnes*, and States being subject to a general obligation to ensure their realization by Israel.

4.d.iii. Duty (1): Obligation to cooperate to bring to an end, through lawful means, the violations

37. In the *Wall* Advisory Opinion, the ICJ stated that:

> It is…for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[6]

38. For the sub-set of these violations and violations of other *jus cogens* norms that are 'serious', as a matter of the law of State responsibility States bear the duty to cooperate with one another—"a joint and coordinated effort by all States"—to bring the breaches to an end.[7]

39. No particular form of cooperation is prescribed by international law, given the multiplicity of possibilities that exist. Such possibilities include both institutionalized cooperation (for instance, through the United Nations) and non-institutionalized cooperation.[8]

40. On the United Nations, in the 2019 *Chagos* Advisory Opinion the ICJ held, in the context of self-determination and its status as an *erga omnes* right, 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

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[6] *Wall* Advisory Opinion (2004), p. 200, para. 159.
[7] ARSIWA, Art. 41(1); Quotation from ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 3. See also ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, para. 1; On this duty existing in customary international law, see ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, Commentary, para. 2.
[8] ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 2. and ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19 Commentary, para. 10.

to put those modalities into effect" (para 180) and also "that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius" (para. 182).

41. One aspect of international cooperation would be to seek to give effect to those resolutions of the General Assembly and Security Council which have on numerous occasions called for Israel's violations of international law to end, as outlined above. Some of these resolutions have expressly called upon third States to support the Palestinian people,[9] and to withhold military and economic aid to Israel.[10] Regardless of whether or not there are express stipulations addressed to member States of this kind, States can use the determinations as a part guide when determining what they must focus on in discharging their present obligation to bring Israel's breaches to an end.

42. States may also deploy a regime of sanctions aimed at curbing economic activity with Israel generally. These sanctions can also be deployed against key government officials involved in supporting and or promoting illegal activity. This may extend to freezing bank accounts and assets abroad, and restrictions on travel.

43. The aforementioned issue of States preventing their nationals from travelling to Israel to serve in the Israeli armed forces, addressed in connection with the obligation of non-recognition, is also a matter of the duty to prevent Israel's violations. States must, therefore, also prevent this travel, and include warnings on their travel advice, as outlined above, in order to prevent their nationals from contributing directly to Israel's violations of international law.

4.d.iv. Duty (2): Obligation of non-recognition

44. In the *Wall* Advisory Opinion, the ICJ, in the context of violations of the law of self-determination and IHL, stated that "…all States are under an obligation not to recognize the illegal situation" (para. 159).

45. For the sub-set of these violations and violations of other *jus cogens* norms that are 'serious', as a matter of the law of State responsibility States are obliged, in the words of the International Law Commission's Articles on State Responsibility, not to "recognize as lawful" the "situation created by" the breaches.[11] This is reflected in the dictum of the International Criminal Court in *The Prosecutor v. Bosco Ntaganda* that "as a general principle of law, there is a duty not to recognize situations created by certain serious

[9] GA Res. 3236, 5 November 1974, para. 6 ("*The General Assembly … Appeals* to all States and international organizations to extend their support to the Palestinian people in in its struggle to restore its rights, in accordance with the Charter").
[10] GA Res. 3414, 5 December 1975, para. 3 (*The General Assembly … Requests* all States to desist from supplying Israel with any military or economic aid as long as it continues to occupy Arab territories and deny the inalienable national rights of the Palestinian people"; GA Res. 36/226A, 17 December 1981, para. 13 (*The General Assembly … Calls upon* all States to put an end to the flow to Israel of any military, economic and financial resources that would encourage it to pursue it aggressive policies against the Arab countries and the Palestinian people").
[11] ARSIWA, Art. 41(2). See also ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, para. 2. See also ARSIWA, Part Two, Ch. III, Art. 41 Commentary, *passim*. On the status of this obligation in customary international law, see ARSIWA, Part Two, Ch. III, Art. 41 Commentary, paras 6 and 12 and sources cited therein and ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 13, para. 13 and sources cited therein.

breaches of international law".[12] According to the commentary to the Articles on State Responsibility,

> The obligation applies to "situations" created by these breaches…It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.[13]

46. However, as indicated earlier, Judge Higgins observed in relation to the aforementioned dictum from the *Wall* Advisory Opinion, "[t]hat an illegal situation is not to be recognized…is self-evident". Coverage of the specific duty of non-recognition as indicated in the present section has therefore been folded into the general position of non-recognition addressed above.

4.d.v. Duty (3): Obligation not to render aid or assistance in maintaining the illegal situation

47. In the *Wall* Advisory Opinion, the ICJ, in the context of a violation the law of self-determination and IHL, stated that "all States…are under an obligation not to render aid or assistance in maintaining the [illegal] situation" (para. 159). For the sub-set of these violations and violations of other *jus cogens* norms that are 'serious', as a matter of the law of State responsibility, States are obliged to refrain from rendering aid or assistance to Israel in maintaining the situation that constitutes these breaches.[14]

48. However, again, as indicated above, Judge Higgins observed in relation to the aforementioned dictum from the *Wall* Advisory Opinion, "[t]hat an illegal situation is not to be…assisted is self-evident". As with the related duty of non-recognition, then, coverage of the present specific duty not to aid or assist Israel's violations of certain norms has been folded into the general position concerning the requirement not to aid or assist Israel in relation to its illegality as a general matter above.

4.e. Entitlement to invoke a breach of obligations *erga omnes partes* and *erga omnes*

4.e.i. Introduction

49. All States have the legal right to invoke the responsibility of Israel for breaching obligations that are a) binding on a particular group of States including Israel (if they are in this group), established for the protection of a collective interest (an *erga omnes partes* obligation),[15] and/or b) exist generally (i.e. are applicable to all States) and are owed to the international community as a whole, i.e. obligations with *erga omnes* status.[16]

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[12] *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1707, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, of January 2017, Trial Chamber VI, International Criminal Court, para. 53.

[13] ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 5.

[14] ARSIWA, Art. 41(2). See also ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, para. 2; ARSIWA, Part Two, Ch. III, Art. 41 Commentary. On the status of this obligation in customary international law, see ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 12, and ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 13, para. 13 and sources cited therein.

[15] ARSIWA, Part Three, Ch. I, Art. 48 Commentary, para. 6.

[16] ARSIWA, Art. 48(b); ARSIWA, Part Three, Ch. I, Art. 48 Commentary, para. 8.

4.e.ii. Two bases

4.e.ii.α. (1) Erga omnes partes

50. Obligations *erga omnes partes* apply to a particular group of States and exist for the purpose of protecting a collective interest.[17] Usually, such obligations exist in a treaty, although they can also exist in customary international law.[18] Such obligations "are owed by any State party to all the other States"[19] such that when any given State breaches them, all other States within the group can invoke the breach even if they were not directly injured or they do not have some other special interest in it (e.g. it concerned harm to their nationals).[20]

51. Whether a treaty contains *erga omnes partes* obligations depends on its text. Interpreting the Treaty of Versailles in *S.S. Wimbledon*, the League of Nations Permanent Court of International Court of Justice identified a common legal interest in "the intention of the authors … to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind".[21] In the *Belgium v. Senegal* case, the International Court of Justice identified the *erga omnes partes* nature of obligations under the Convention Against Torture in the treaty's preambular call "to make more effective the struggle against torture…throughout the world".[22] Consequently, "the obligations in question are owed by any State party to all the other States Parties to the Convention"[23] and States have "a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, the authors do not enjoy impunity".[24]

52. This type of obligation exists in Genocide Convention. In the *Reservations to the Convention Against Genocide* Advisory Opinion, the International Court of Justice emphasised that States had a common interest in each other's compliance with the Convention, because its "object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality".[25] In the preliminary objections phase of the current *Gambia v. Myanmar* case also before that Court, it affirmed the "right of all other Contracting Parties to assert the common interest in compliance with the obligations *erga omnes partes* under the Convention".[26]

53. The areas of international law breached by Israel include treaty obligations that operate *erga omnes partes*. In addition to genocide under the Genocide Convention (legal area

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[17] ARSIWA, Art. 48.
[18] ARSIWA, Part Three, Ch. I, Art. 48 Commentary, para. 6.
[19] Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (hereinafter 'Belgium v Senegal Judgment (2012)'), p. 422 at p. 439, para. 68.
[20] *Belgium v. Senegal* Judgment (2012), p. 450, para. 69; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar), Preliminary Objections, I.C.J. Reports 2022 (hereinafter '*Gambia v. Myanmar* Preliminary Objections (2022)'), p. 36, para. 109.
[21] *Case of the S.S. "Wimbledon"*, Judgment of 17 August 1923, P.C.I.J., Series A, No. 1, 1923 (hereinafter '*S.S. "Wimbledon"* Judgment (1923)'), p. 23.
[22] *Belgium v. Senegal* Judgment (2012), para. 68.
[23] Ibid.
[24] Ibid.
[25] Reservations to the Genocide Convention Advisory Opinion (1951), p. 12.
[26] *Gambia v. Myanmar* Preliminary Objections (2022), para. 113.

(3)), the aforementioned approach taken by the ICJ and its predecessor would indicate that all Israel's obligations in human rights treaties that have been breached have this character. This therefore covers the right of self-determination (legal area (1)) since this right exists in common article 1 of the two global human rights Covenants of 1966, the ICCPR and the ICESCR to which Israel is a party as well as the prohibition of apartheid and racial discrimination more generally (legal areas (6) and (7)). The aforementioned approach of the ICJ also suggests that the core/basic protective norms of IHL (legal area (5)) also have this character.

4.e.ii.β. (2) Erga omnes obligations (and by association, jus cogens obligations)

54. All States can also invoke Israel's breach of *erga omnes* obligations as a matter of general international law.[27] Such obligations are owed to the international community as a whole and, therefore, as the ICJ held in the *Barcelona Traction* case, "by their very nature … are the concern of all States" and "[a]ll States can be held to have a legal interest in their protection...".[28] The ILC Draft conclusions on *jus cogens* norms (the Commentary of which observing that norms with *jus cogens* status also have *erga omnes* status) holds that "any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*)".[29]

4.e.iii. What States can do

4.e.iii.α. Call upon Israel—cessation, assurance of non-repetition, reparation

55. States are legally entitled to call on Israel to perform the three breach-consequence-related obligations outlined above: cessation, assurances of non-repetition, and reparation.

4.e.iii.β. Take measures to induce cessation and reparation

56. States are also entitled to take lawful measures against Israel to induce the aforementioned cessation and reparation.[30] (They are of course also obliged to take such measures under the separate obligation reviewed earlier, which, as it covers breaches of *jus cogens* obligations, necessarily covers obligations that also have *erga omnes* status).

57. In addition, countermeasures—acts that are ordinarily wrongful, but where wrongfulness is precluded by the fact that they are taken in response to another State's wrongful act—against Israel on the same grounds may also be legally permissible. The Commentary to the Articles on State Responsibility noted in 2001 that State practice on countermeasures by non-injured States "is limited and embryonic," mentioning the use of trade embargoes, asset freezes, travel bans, boycotts, and other unilateral and multilateral sanctions.[31] The conclusion then was that

[27] ARSIWA, Art. 48(b).
[28] *Barcelona Traction* Judgment (1970), p. 32, para. 33.
[29] ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 17, para. 2.
[30] ARSIWA, Art. 54.
[31] ARSIWA, Part Three, Ch. II, Art. 54 Commentary paras. 3 and 4 (quotation from para 3).

> the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 [concerning *erga omnes* obligations] to take countermeasures in the collective interest.[32]

58. Notably, the Commentary did not hold that such countermeasures would be unlawful—the position was left open. In the over-two-decade-period since the Commentary was completed, a right to take such measures may have crystallized.[33]

4.e.iii.γ. Bring a claim

59. States have potential standing to bring a claim before a court or tribunal against Israel for its breaches of obligations *erga omnes partes* and *erga omnes*. Examples of standing established on the basis of obligations in the former category are the League of Nations Permanent Court of International Justice in the aforementioned *S.S. Wimbledon* case, allowing Italy and Japan to bring a claim against Germany for refusing to grant access to the Kiel Canal, despite not being individually injured;[34] and the ICJ permitting Gambia to bring a claim against Myanmar under the Genocide Convention despite being uninjured by Myanmar's actions.[35]

60. The possibility of such a claim would depend *inter alia* on whether a court or tribunal would have jurisdiction to hear it. There are two main possibilities.

61. In the first place, the International Court of Justice: bringing a case alleging a violation of the Genocide Convention (legal area (3)). Under Article IX of the Convention:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III [concerning conspiracy, incitement, attempt and complicity], shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

This means any of the 153 parties to the Convention can bring the case, without Israel needing to consent to the Court's jurisdiction.[36] Israel has not made any reservations in connection with being a party to the Convention.[37]

62. In the second place, the Committee on the Elimination of Racial Discrimination (not a court but a body that makes what are in effect quasi-judicial determinations): bringing a (non-legally-binding) communication (effectively, a complaint) alleging a violation of the International Convention on the Elimination of Racial Discrimination in terms of the

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[32] ARSIWA, Part Three, Ch. II, Art. 54 Commentary paras 6.
[33] Martin Dawidowicz, 'Third-Party Countermeasures: A Progressive Development of International Law?', (2016) 29 QIL 3.
[34] *S.S. "Wimbledon"* Judgment (1923), pp. 20-23
[35] *Gambia v. Myanmar* Preliminary Objections (2022), p. 37, para. 113,
[36] For the parties to the Convention, see See United Nations Treaty Collection, Status of Treaties, Genocide Convention, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en
[37] Id.

prohibition of apartheid and racial discrimination more generally (legal areas (6) and (7)).[38] Article 11(1) of the ICERD reads,

> If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee.[39]

This mechanism does not require Israel's prior consent for the Committee to be seized, and no reservation has been made to Articles 11 and 13 by any Party to the Convention.[40] Indeed, in a decision in a 'communication' (as such complaints are termed) brought by the State of Palestine against Israel, the CERD has, in tandem with the jurisprudence and interpretations of the ECtHR, the IACtHR, and HRC, emphasised that human rights obligations are "non-synallagmatic".[41] They impose collective obligations, rather than a "web of inter-State exchanges of mutual obligations".[42] Consequently, "any State party may trigger the collective enforcement machinery created by the respective treaty, independently from the existence of correlative obligations between the concerned parties".[43] Such an approach advances the "object and purpose" of human rights treaties,[44] rooted as they are "in superior common values shared by the international community as a whole".[45] Therefore, under the ICERD, any of the 182 State Parties to the ICERD may bring a communication (complaint) against Israel for its violations of the ICERD.[46]

63. A case/complaint to either mechanism could be brought by one state acting alone, or by a group of states acting collectively. Also, serious consideration should be given to a case/complaint against not only Israel, but also against other third states for failing to discharge their obligations as outlined in the present opinion, linked to the violations of Israel that these obligations relate to (so the case/complaint would be against both Israel and one or more of these third states).

4.f. Criminal jurisdiction

64. As indicated, the areas of law violated by Israel covered in the present opinion, other than area (1), also give rise to individual criminal responsibility. This can be the basis for both the assertion of national criminal jurisdiction by any state (on the 'universal jurisdiction' basis) and prosecution before the International Criminal Court (in the case of area (2), there are impediments due to the special jurisdictional provisions concerning the crime of aggression, but these do not necessarily rule out the prosecution of individuals who have

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[38] On Israel being a party to the Convention, see United Nations Treaty Collection, Status of Treaties, ICERD, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.
[39] ICERD, Art. 11(1).
[40] See CERD, Inter-State communication submitted by the State of Palestine against Israel: decision on jurisdiction, U.N. Doc. CERD/C/100/5, 2021, para. 56 and UN Treaty Collection, Status of Treaties, ICERD, Declarations and Reservations, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.
[41] Ibid, para. 50.
[42] Ibid, para. 48.
[43] Ibid, para. 50.
[44] Ibid, para. 51 (cf. VCLT, Art. 31).
[45] Ibid, para. 51. CERD, Inter-State communication submitted by the State of Palestine against Israel: decision on jurisdiction, U.N. Doc. CERD/C/100/5, 16 June 2021, para. 51.
[46] See UN Treaty Collection, Status of Treaties, ICERD, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.

another nationality in addition to that of Israel, if the other state of nationality is a party to the Rome Statute).

65. As a general matter, all States bear an obligation in international law to prosecute or to extradite individuals suspected of committing these crimes. Moreover, enabling criminal prosecutions to happen, one way or another, is a key means through which States can discharge their legal obligations, as outlined above, to suppress the violations by Israel that give rise to individual criminal responsibility. Israel has to act (mostly) through human agents, and if those individuals are criminalized, the state policy and action they enable can be blocked. Moreover, the prospects of criminalization, including when investigations are commenced, can also have a deterrent effect on the human agents who would act as Israel and thus determine its compliance with international law.

66. In consequence, all third States must make every effort to enable investigations and prosecutions of the crimes in question. Their own national jurisdictions may be hampered by immunity, which gives a special significance to the support they can and should give to the International Criminal Court. The situation in Palestine has already been referred to the ICC, but the effectiveness of that body is acutely precarious, both politically and financially.[47] Thus the position taken on ICC jurisdiction by third states has the potential to be transformative. Given the exceptional significance of ICC jurisdiction in the light of immunity impediments to national jurisdiction, the role the Court can potentially play in criminal enforcement, thereby furthering the cause of suppressing Israel's violations of international law in the way outlined herein, is fundamental. In consequence, States should see support for the ICC as a key means through which they discharge the suppression obligations as set out above. Such support should be provided in two ways. In the first place, States who are parties to the Rome Statute should join the five third States that recently themselves joined the referral of the situation in Palestine originally made by the State of Palestine.[48] This is to be contrasted with the forty-three States parties to the Rome Statute who have referred the situation in Ukraine to the Court.[49] In the second place, third States, whether or not parties to the Rome Statute, should pledge financial support to the Office of the Prosecutor, explaining that the motivation for this is to support the Palestine investigation (even though the Office would use any funds provided across all its investigations). Notably, it is reported that such extra support has been given by third States for an equivalent motivation as far as the Ukraine investigation is concerned.[50] There are important, ongoing concerns about the ability and the willingness of the office of the Prosecutor at the ICC to address the situation in Palestine effectively, given the immense pressure he and the Court are under on that situation by those, such as the USA, who are opposed to the Court addressing it. Other states need to counter this through political and financial support if there is any hope that he and the ICC are able to withstand that pressure and deliver justice to the Palestinian people, a good in and of itself, and also a potentially vital means of enabling greater compliance with international law by Israel, an objective which, as the present opinion has indicated, States bear a legal obligation to secure.

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[47] https://www.icc-cpi.int/palestine
[48] https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine
[49] https://www.icc-cpi.int/situations/ukraine
[50] https://www.voanews.com/a/millions-in-extra-funding-pledged-for-icc-work-in-ukraine/7014220.html