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## Human Rights Council

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Agenda item 7

### Human rights situation in Palestine and other occupied Arab territories

## Written statement\* submitted by Norwegian Refugee Council, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[10 February 2019]

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\* Issued as received, in the language(s) of submission only.



## Third State Responsibility with Regards to Violations of International Law in Occupied Palestinian Territory

The Norwegian Refugee Council (NRC) is alarmed by the deteriorating humanitarian situation in Occupied Palestinian Territory (OPT), resulting from the prolongation of belligerent occupation, and the persistent violations of International Humanitarian Law (IHL) and human rights of the Palestinian people by Israel, the Occupying Power, including that arising from the forcible transfer of civilians; the violation of the fundamental right to adequate housing, which is a component of the right to an adequate standard of living; the destruction of property and infrastructure, *inter alia*, homes of Palestinians; the obstruction of humanitarian assistance and the destruction of, *inter alia*, structures provided as humanitarian aid, contributing to a coercive environment that leads to the forcible transfer of civilians; the siege imposed on the Gaza Strip, whose detrimental impact of continued impediments on the human rights situation and the socio-economic and humanitarian conditions of the Palestinian civilian population is of grave concern; and all other practices designed to permanently change the legal status, geographical character and demographic composition of OPT.

NRC recalls that State responsibility is a fundamental pillar of international law, stemming from the recognition that states are the principal bearers of international obligations. These standards of responsibility are codified and developed in the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ASR)<sup>1</sup>, adopted in 2001. According to customary international law embodied in ASR, States are obliged not to recognize as lawful a situation created by a serious breach of a peremptory norm<sup>2</sup>. Consequently, any State may invoke responsibility for breach of an obligation owed to the international community as a whole, as by definition, obligations *erga omnes*<sup>3</sup> are established for the protection of a collective interest.

Some of these issues were judicially assessed in the International Court of Justice (ICJ) Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.<sup>4</sup> There, the ICJ discussed the existence of obligations for third States as a result of the breaches by Israel of its obligations “to respect the right of the Palestinian people to self-determination and obligations under international humanitarian law and international human rights law.”

Concluding that the construction of the Wall involved serious breaches of international law, the ICJ held that “given the character and the importance of the rights and obligations involved, other States were under an obligation not to recognize the illegal situation resulting from the construction of the wall.” Furthermore, the ICJ was of the view that the “United Nations, and especially the UNGA and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall.”

ASR extended the material scope of non-recognition to include all serious breaches of the peremptory norms of international law, such as the flagrant denial of the right to self-determination of peoples, illegal use of force including territorial acquisition (or annexation), and the practice of systematic racial discrimination. The same obligation is expressly addressed to international organizations in Article 42(2) of Draft Articles on the Responsibility of International Organisations 2011<sup>5</sup>. It is generally recognized that the fundamental principles of the UN Charter, especially the prohibition of the use of force

<sup>1</sup> [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf)

<sup>2</sup> In the oPt context those would include the right of peoples to self-determination, as it evolved from the UN Charter, and rules of international humanitarian law applicable in armed conflict.

<sup>3</sup> These are obligations of a State towards the international community as a whole’ which are ‘the concern of all States’ and for whose protection all States have a ‘legal interest’. In line with State practice, it opens the possibility for States other than an injured State to take countermeasures (see page 8).

<sup>4</sup> <https://www.icj-cij.org/en/case/131>

<sup>5</sup> [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf)

(Art. 2 (4) UN Charter), have the character of a peremptory norm (*jus cogens*), from which derogation is never possible. It is also clear that fundamental human rights and IHL rules are of *jus cogens* character.

Peremptory norm violations most common to Israel's conduct of occupation of Palestinian territory include the prohibition of aggression, the denial of self-determination, and violations of the inviolable rules of IHL.<sup>6</sup> The consequences that follow from a breach of peremptory norms are that no State shall recognize as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation; and that all States must cooperate to bring to an end such a breach through lawful means.

The positive obligation to ensure respect for IHL, including by other States, principally found in Article 1 Common to the Geneva Conventions (CA1)<sup>7</sup> presupposes that some measures be taken and that the passivity of a State in the face of IHL violations would unquestionably amount to a breach of that duty.<sup>8</sup> CA1 also prevents third States from adopting measures which would limit or prohibit actions, including by its own population, that would frustrate the full implementation of the obligation to ensure respect, as long as the actions were proportionate, not in violation of other fundamental norms of international law, and that their aim was to ensure respect for IHL.

The continuous character of violations in the protracted occupation of Palestinian territory and the appropriateness of the measures taken in order to end such violations and include Israel, as the Occupying Power, to comply in full with the relevant normative rules are relevant to assess whether third States comply with their obligation to ensure respect.

Therefore, even if the measures to be considered by third States under their obligation to ensure respect must remain within the limits of what is proportionate to the violation it is aimed to stop, and reasonable given the specific circumstances and available resources, more measures can be expected if those taken remained ineffective in stopping IHL violations over time.

As the aggravated humanitarian situation in OPT would suggest, more effective measures must be taken until the violations end. This would mean that in the gradual scale of measures, ranging from diplomatic to countermeasures, an influential State has a duty under CA1 to consider other types of measures when the least disruptive ones have failed.

Accordingly, the measures which must be taken are to be determined in light of an ascending scale of severity whereby if a softer measure – such as public denunciations – does not attain the desired cessation, then a stronger measure must then be adopted. Further, the more leverage or influence a given State extends over the wrongdoing State, the higher the responsibility or onus on that State to ensure respect.

NRC reiterates that while the fulfillment of an international obligation can prove to be politically challenging – as has been the case with the Government of Israel – cannot serve as a ground to refuse to take any measure in the implementation of that obligation. This would run contrary to the very nature of a legal obligation, as opposed to mere political preference. This is even more so considering that the purpose of the obligation is to ensure respect for IHL.

Countermeasures, when required – such as arms embargoes, trade, and financial restrictions, and the reduction or suspension of aid and cooperation agreements – are intended to induce the wrongdoing State to comply with its obligations of cessation (if the wrongful act is continuing). They are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the

<sup>6</sup> <https://undocs.org/A/73/447>

<sup>7</sup> <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD>

<sup>8</sup> <https://www.nrc.no/resources/legal-opinions/third-states-obligations-vis-a-vis-ihl-violations-under-international-law/>

responsible State,<sup>9</sup> such as in the case of grave breaches of IHL. In view of the gravity of violations and the entrenched humanitarian vulnerability of Palestinians under occupation, NRC calls on Third States to ensure respect for international law, as they possess the legal entitlement and even the duty to take measures in order to induce Israel to comply with relevant obligations under international law; and urges all States to continue to support and assist the Palestinian people in the realization of their inalienable human rights.

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<sup>9</sup> <https://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>