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B. AL-HAQ, "STATE RESPONSIBILITY IN CONNECTION WITH ISRAEL'S ILLEGAL SETTLEMENT ENTERPRISE IN THE OCCUPIED PALESTINIAN TERRITORY," RAMALLAH, 16 JULY 2012 (EXCERPTS).

Written by Ingrid Jaradat Gassner, former director of Badil Resource Center for Palestinian Residency and Refugee Rights, with input from al-Haq and international legal scholars, this memorandum lays out a legal framework for holding states accountable for condoning or actively supporting Israeli settlements in the occupied Palestinian territories. Drawing on the International Law Commission's 2001 "Draft Articles on State Responsibility for Intentionally Wrongful Acts," and the International Court of Justice (ICJ) 2004 Advisory Opinion on Israel's Separation Wall, it argues that states are obliged by customary international law and by treaty to actively oppose Israeli violations of international law and may be held liable for not doing so. Excerpted here are portions of the memorandum's executive summary. The complete memorandum is available from al-Haq at www.alhaq.org.

Executive Summary

States are responsible for their breaches of international law. This memorandum provides a legal framework for advocacy aimed at holding States accountable to their legal obligations vis-à-vis the illegal Israeli settlements in the 1967 Occupied Palestinian Territory (OPT). Given the current context in which efforts are undertaken by many actors to end this illegal Israeli enterprise while the settlements continue to expand, the purpose of this memorandum is to raise awareness of the important implications of the International Court of Justice (ICJ) Advisory Opinion of 2004 and the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles).

The ILC Articles lay out the customary legal rules for the conduct of State organs, public and even private entities and persons for which a State is responsible. This memorandum reviews the broad spectrum of Israeli actors

involved, since 1967, in the development and maintenance of the settlements, supportive infrastructure and services, and the associated regime of Israeli laws, policies and practices that compose the “settlement enterprise.” It concludes by finding that this settlement enterprise is institutionalised into the operations of all official organs, public and private entities and persons that make up the organisational fabric of the Israeli State and society. The memorandum illustrates how the conduct of these actors is attributable to the State under the rules of customary international law (ILC Articles 4, 5 and 7–9), and that the State of Israel is, therefore, in addition to the individual actors, responsible for the entire unlawful settlement enterprise in the OPT.

This memorandum also argues that the ICJ Advisory Opinion of 2004 is *the* most appropriate and authoritative legal framework for the analysis of the nature of the international breaches and the legal consequences resulting from Israel’s settlement enterprise. Many international and local actors continue to believe that the legal obligations of States vis-à-vis the illegal settlement enterprise, which has been pursued in the context of Israel’s prolonged occupation, are defined mainly by the humanitarian provisions of the Fourth Geneva Convention of 1949 (hereinafter Fourth Geneva Convention). This memorandum draws attention to the fact that the ICJ Advisory Opinion of 2004 has established a much broader legal foundation for Israel’s and other States’ obligations, based not only on the Fourth Geneva Convention, but also on a range of human rights treaties, as well as on customary international law.

The ICJ also recognised that Israel’s Wall and its associated legislative and regulatory regime are a *component* of the larger settlement enterprise in the OPT. The Court analysed the Israeli violations on this basis and found that, by constructing the Wall, Israel is in breach of:

- the prohibition on the acquisition of territory by force and the right to self-determination of the Palestinian people, which are *peremptory norms* of customary international law, i.e., norms which

are recognised to be binding on all States and from which no derogation is permitted, and,

- additional obligations under humanitarian and human rights law, including the prohibition on forced population transfer; the obligation to respect Palestinian private and public property; the obligation to refrain from introducing changes in government or institutions of the OPT that deprive the Palestinian population of the status and rights enshrined in the Fourth Geneva Convention; the obligation to respect Palestinian freedom of movement; and the obligation to protect the rights enshrined in the ICESCR and CRC, in particular the rights of Palestinians to work, health, education and an adequate standard of living. . . .

For Israel, the responsible State, the following legal obligations arise:

- to perform the obligations breached (ILC Article 29);
- to cease the settlement enterprise in the OPT and to offer appropriate assurances and guarantees of non-repetition, including the dismantlement of the settlements and related infrastructure (ILC Article 30); and,
- to make full reparation for all damage caused through restitution, compensation and satisfaction, including the return of displaced persons and property seized (ILC Articles 31–39). The ICJ Opinion reaffirms the principle that restitution is the primary form of reparation, particularly where breaches are of a *continuing and serious* character and violate *peremptory norms* under customary international law.

All other States, individually and when acting in groups, have the legal obligations set out in ILC Article 41. All States are to take action as required in order to perform these obligations. When States fail to perform their legal obligations vis-à-vis Israel’s settlement enterprise, these States become themselves responsible for internationally wrongful conduct. In this case, States incur the *additional obligations to cease*

their breach and to make reparation for damage caused.

The following legal obligations arise for all States under customary international law as codified in ILC Article 41:

- to perform their obligations under treaties;
- to cooperate to bring to an end Israel's serious breaches and to act, separately and jointly to counteract the effect of these breaches; and,
- not to recognise, *i.e.*, give legal sanction to, the illegal situation created by Israel, nor to render aid or assistance in maintaining that situation. . . .

The obligation not to render aid or assistance in maintaining that situation arises because of the *continuing* and *composite* character of Israel's serious breaches; it extends beyond aid and assistance in the commission of the breach itself to the maintenance of the situation created by the breach. . . .

The ILC Articles also codify the rules to be observed in the implementation of state responsibility, as well as some of the mechanisms which States can and should use in order to perform their legal obligations vis-à-vis Israel's serious breaches. Implementation of state responsibility begins with a formal notice of claim (ILC Article 43). Usually, the right to invoke claims against another State for a wrongful act is reserved for the *injured* State (ILC Article 42). However, in situations of a *serious breach of a peremptory norm*, such as the situation created by Israel's settlement enterprise in the OPT, all States are presumed injured or affected, and, are therefore, entitled to act individually or collectively on behalf of the injured State and/or the victims (ILC Article 48). Moreover, since Israel, the responsible State, has failed to comply with its obligation of cessation and reparation, it is lawful for any injured party, including any affected State, to take "countermeasures" (Article 54). Countermeasures (reprisals, sanctions) are defined as actions of a State that would be unlawful if they were not taken in response to an internationally wrongful act and in order to remedy the breach of an obligation (ILC Article 49). Countermeasures must comply with the rules for threat or

use of force in the UN Charter; respect fundamental human rights, humanitarian obligations and peremptory norms (ILC Article 50); and be proportional (ILC Article 51).

The final section of the memorandum reviews existing State practice vis-à-vis Israel's settlement enterprise in the OPT based on facts compiled by local and international actors. It is noted briefly that States have not ensured Israel's compliance with the provisions of the Fourth Geneva Convention as stipulated in the ICJ Advisory Opinion of 2004, and have failed to meet additional special obligations arising from other treaties. The memorandum also finds that:

- many States are, in fact, complicit through the provision of unlawful recognition, aid or assistance in the maintenance of the illegal situation created by Israel in the OPT. Such States are to cease and remedy their internationally wrongful conduct.
- All States have yet to adopt the measures they can and should take in order to perform their legal obligations under customary international law, as set out in the ILC Articles. No State has, for example, presented a formal claim to Israel for cessation of its serious breaches and for reparation for the Palestinian victims. No State, or group of States, has taken appropriate countermeasures (sanctions) under the terms of ILC Article 54. States have cooperated in the peace process and the delivery of aid to the Palestinian people in the OPT, but such cooperation has been guided by the terms of the Oslo Accords, which protect Israeli interests and sideline international law. Consequently, all States have ignored their obligation to cooperate to end Israel's serious breaches.

In light of the above, the memorandum concludes that all States have failed, in a number of critical ways, to perform their legal obligations under customary international law, as codified in ILC Article 41 and affirmed in the ICJ Advisory Opinion of 2004. States have, thus, failed to end Israel's illegal settlement enterprise, which undermines the human rights of the Palestinian people,

including the right to self-determination. States that fail to recognize and perform these obligations, or are complicit with Israel's *serious breaches*, incur the additional obligation to cease all unlawful recognition, aid or assistance, and to make reparation. However, when powerful States do not cease their wrongful conduct, other States lack the power and mechanisms to procure performance of this obligation from such States. Consequently, no State is held accountable for conducting "business as usual" with Israel. The resulting international climate of lawlessness and complicity is the environment that provides Israel with impunity and in which Israel's settlement enterprise thrives. . . .