



The Humanitarian - Development Divide: A False Dichotomy?

The International Law Framework for Humanitarian and Development Assistance in a Context of Protracted Occupation

Diakonia International Humanitarian Law Resource Centre
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List of abbreviations

- AP I 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
- ARSIWA Articles on the Responsibility of States for Internationally Wrongful Acts
- CESCR Committee on Economic, Social and Cultural Rights
- EU European Union
- GC IV 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War
- HR 1907 Hague Regulations concerning the Laws and Customs of War on Land annex to Convention (IV) respecting the Laws and Customs of War on Land
- HRC Human Rights Council
- HRCttee Human Rights Committee
- HRP Humanitarian Response Plan
- ICCPR International Covenant on Civil and Political Rights
- ICESCR International Covenant on Economic, Social and Cultural Rights
- ICJ International Court of Justice
- ICRC International Committee of the Red Cross
- IHL International Humanitarian Law
- IHRL International Human Rights Law
- ILC International Law Commission
- NGO Non-governmental organisation
- OP Occupying Power
- oPt occupied Palestinian territory
- UN United Nations
- UN OCHA UN Office for the Coordination of Humanitarian Affairs
- VCLT Vienna Convention on the Law of Treaties

Executive summary

Over the past five decades, Israel has established an occupation regime in the West Bank, including East Jerusalem, and the Gaza Strip characterised by a vast matrix of policies and practices that undermine the fundamental human rights and well-being of the protected Palestinian population. Palestinians in the occupied Palestinian territory (oPt) face a unique combination of protection crisis, economic de-development and the denial of autonomous development prospects.

Due to the chronic, protracted nature of the crisis, humanitarian and development actors operating in the oPt have increasingly recognised the need to move towards a response paradigm which combines emergency response with medium and long-term interventions. Such interventions are required to address the deep vulnerabilities of the Palestinian population brought about by protracted occupation. This has raised questions regarding the legal basis for undertaking longer term, development-type measures during occupation, and whether such measures are permitted and regulated under the same international law framework as that which governs humanitarian aid.

An analysis of the legal framework applicable to the delivery of assistance in situations of occupation should avoid reliance on the humanitarian/development dichotomy. These are policy, rather than legal terms and the differentiation between humanitarian and development aid has no bearing as a matter of international law. Rather, the inquiry should focus on what assistance the protected population is entitled to receive, and what duties the Occupying Power (OP) and third States bear, in a context of protracted occupation under international law.

To answer these questions, the legal framework traditionally applied to humanitarian assistance in situations of occupation should first be identified. On the basis of the relevant branches of international law that are applicable in the context - international humanitarian law (IHL), international human rights law (IHRL) and general public international law:

- an OP has a primary obligation to ensure the well-being of the population of the occupied territory and to respect, protect and fulfil their human rights; and
- whenever the OP fails to meet its primary obligation, it has a secondary duty to allow assistance to be delivered to the occupied population by others. It should realise the economic, social and cultural rights of the occupied population “to the maximum of its available resources”, which is deemed to include international cooperation and assistance.

Under IHL, an OP is obliged to allow humanitarian assistance to be delivered to the population in need. However, the OP can exercise a right of control over its delivery, and in exceptional cases is entitled to limit assistance for reasons of military necessity.

For their part, implementing agencies are entitled to offer assistance to the protected population in need but should comply with international law in the manner of its provision. Hence, they should ensure that they have the agreement of the OP when undertaking assistance activities. Such agreement may be implied if planned activities have been communicated to the OP through the United Nations (UN) and the OP has raised no valid objection to them. Moreover, implementing agencies and donors should not engage with unlawful practices dictated by the OP, such as the Israeli-imposed planning regime in the oPt, as this may be seen as an endorsement of such practices. They should allow the OP to exercise its right of control over the delivery of assistance only insofar as is required to verify that such assistance does not have any military aim and that it is not diverted from its legitimate purpose. Finally, they should remain aware that, in exceptional circumstances, the OP may limit their operations temporarily and/or geographically for reasons of military necessity.

In a protracted occupation such as the oPt, where emergency and longer-term needs overlap, or, at a minimum, intertwine, the international law framework set out above may be deemed to apply to both emergency and deep, longer-term measures. In fact, the OP obligations to ensure the well-being and fulfil the human rights of the protected population should translate into an entitlement for the latter to receive any support offered for the achievement of those goals whenever the OP fails to meet them.

At a bare minimum, on the basis of the OP duty of good governance under IHL, the de-development of the occupied territory should not be permitted to take place. Moreover, the OP obligation to provide for the well-being of the protected population requires the OP to strive to attain a higher level of well-being than mere preservation of the status quo. Indeed, it would appear that the protective scope of IHL can only be fully realised in a situation of protracted occupation by providing, and facilitating the provision of, assistance aimed at meeting the deeper, longer-term needs of the occupied population.

IHRL, which requires the OP to take positive action to ensure that the occupied population fully enjoys its human rights, indicates that an OP should allow third parties to undertake medium to long-term measures whenever such action strengthens compliance with its IHRL obligations. These obligations, as well as the OP's obligations under IHL, should be construed in accordance with the right of the occupied population to enjoy development in light of such emerging right.

Any suggestion that the international law framework regulating international assistance in an occupied territory should not apply to longer term development assistance in situations of protracted occupation would imply that, in such cases, international law allows for living conditions in the occupied territory to be frozen indefinitely at the level which existed at the start of the occupation.

The implementation of development projects in occupied territories is fraught with challenges. In light of the right to self-determination of the occupied population, an OP's prerogative over the development of the occupied territory should extend only as far as allowing and facilitating long-term measures. The responsibility and authority for identifying those measures rests with the occupied population and its legitimate representatives. Accordingly, full-scale development is, at best, an elusive objective without the full realisation of the right to self-determination, which only an end to occupation can bring about. Furthermore, development interventions in an occupied territory characterised by serious international law violations which appear to be aimed at the very de-development of the occupied population will hardly achieve their intended results unless such violations are brought to an end.

The proposition that international law allows and protects emergency and longer-term activities in support of an occupied population is not undermined by unlawful policies and practices enacted by an OP that hinder the implementation of such activities, as is the case in the oPt. Indeed, unlawful obstructions should not discourage third States from providing assistance to an occupied population in need. On the contrary, as dictated by international law, third States can and should respond to unlawful measures by working to put an end to such violations.

In light of the above considerations, we recommend that third States should:

- **Require the Occupying Power to halt any violations of international law perpetrated to the detriment of the occupied population** and facilitate in good faith the goal of promptly minimising and eventually eliminating oPt Palestinians' need for assistance altogether.

- **Require the Occupying Power to comply with its obligation to ensure the well-being of Palestinians in the oPt** in order to end dependence on, and normalisation of, international assistance as the primary means for satisfying the needs of the protected population.
- **Comply, and ensure that third parties comply, with applicable international law when undertaking assistance operations in the oPt**, including by:
 - not engaging with, and asking partners not to engage with, unlawful practices including the Israeli planning regimes for Area C and East Jerusalem;
 - adopting an effective planning coordination system in Area C and East Jerusalem that fully complies with international law for projects that involve construction.
- **Systematically protest against all obstacles to assistance created by the Occupying Power which violate international law** by, amongst other things, requesting reparations in the interest of any affected stakeholders.

We also recommend implementing agencies to:

- **Adopt operational guidelines for the implementation of humanitarian and development activities in the oPt** that comply fully with IHL and IHRL and that are specifically tailored to, and reflective of, the extraordinary context of protracted occupation in the oPt.

Introduction

More than fifty years after the June 1967 war, the West Bank, including East Jerusalem, and the Gaza Strip remain subject to Israeli military occupation. As the OP, Israel is responsible under IHL for ensuring the well-being of the protected population. However, over the past five decades, Israel has not only failed to comply with this obligation, but has established and entrenched an occupation regime that undermines the fundamental human rights and well-being of the protected population.¹ Flagrant examples of the policies and practices enacted by the OP include the unlawful appropriation of Palestinian land; the proliferation of settlements and settlers; the establishment in some parts of the oPt of an environment conducive to forcible transfer; and restrictions on Palestinian economic activity, including severely curtailed access to natural resources and restrictions on the free movement of people and goods.²

The UN describes the humanitarian situation in the oPt as one of “the world’s most long-standing protection crises.”³ Conditions are especially dire for Gaza Strip Palestinians, who have been living under Israeli military blockade for more than a decade, and for those living in Area C⁴ of the West Bank and East Jerusalem. As well as being largely responsible for the creation of a humanitarian crisis, Israel has established a system of economic control which has had the effect of de-developing the Palestinian economy and negating any possibility of autonomous Palestinian development.⁵

In this demanding scenario, the international community has been providing assistance⁶ to oPt Palestinians, in Israel’s stead, for decades. Such assistance has chiefly addressed emergency needs and the most acute vulnerabilities resulting from the Israeli occupation and attendant policies and practices. Due to the chronic, protracted nature of the crisis, the international community has increasingly been scrutinising its response paradigm in the oPt to address the need for more medium and long-term interventions. However, a general lack of clarity about the legal framework regulating such interventions has delayed their implementation.

This brief analyses the international law framework regulating assistance in situations of protracted occupation, and sets out the legal basis for such assistance in the oPt. It submits that, in situations of protracted occupation, the international law framework protecting and regulating emergency response also applies to medium and long-term interventions. This analysis should also be considered to apply to other situations of protracted belligerent occupation.

Section I analyses the reality on the ground in the oPt where humanitarian and development programmes often overlap or are complementary. It suggests that the humanitarian/development dichotomy widely used in the operational and policy discourse is not helpful when identifying the legal framework applicable to assistance interventions in situations of protracted occupation.

¹ See Human Rights Council (HRC), Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, Report of the Secretary-General, UN Doc. A/HRC/34/38, 13 April 2017, available at: <http://undocs.org/A/HRC/34/38>; and United Nations Conference on Trade and Development (UNCTAD), UNCTAD Assistance to the Palestinian People: Developments in the Economy of the Occupied Palestinian Territory, 2017, available at: http://unctad.org/en/PublicationsLibrary/tdb64d4_embargoed_en.pdf (all links last accessed in March 2018).

² See, for example, HRC, Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, Report of the Secretary-General, 2017, above note 1.

³ United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), Humanitarian Response Plan: January–December 2018, Occupied Palestinian Territory, December 2017, available at: https://www.ochaopt.org/sites/default/files/2017_hrp_draft5_20_12_2017_v2.pdf, p. 4.

⁴ The Interim Agreement on the West Bank and the Gaza Strip (Oslo II), signed by the Government of Israel and the Palestinian Liberation Organization in 1995, divided the West Bank (with the exception of East Jerusalem) into three administrative areas, pending resolution of the final status. Area A was placed under exclusive Palestinian administration and control, Area B under Palestinian civil control and joint Israeli-Palestinian security control, and Area C under full Israeli civil and military control. It was agreed that Area C, comprising over 60% of the West Bank, would be gradually transferred to Palestinian jurisdiction. However, due to the lack of a final agreement, the division is still in force.

⁵ UNCTAD Assistance to the Palestinian People, above note 1, p. 2.

⁶ In this brief, the term “assistance”, when not used alongside “development” or similar terms referring to deep, long-term measures, refers to all types of support for the benefit of the occupied population including short, medium and long-term interventions.

Section II provides an analysis of the international law framework traditionally applicable to humanitarian assistance operations in occupied territories. Section III submits that this international law framework also applies to the deep, longer-term interventions required in cases of protracted occupation. Section IV, while acknowledging that there are significant obstacles to the provision of assistance in the oPt, maintains that they do not result from a lack of protection under international law but from the OP's failure to comply with it. It asks third States to comply with their international law obligations by working to put an end to unlawful obstructions by the OP, rather than discontinuing assistance to those in need.

Finally, while recognising the critical importance of external assistance for Palestinians in the oPt, this brief is based on the fundamental premise that any assistance should be viewed as a temporary measure to compensate for the OP's failure – deliberate or otherwise – to comply with its obligations toward the protected population under international law.

I. Current assistance dynamics in the oPt

A. A common humanitarian-development approach to address vulnerabilities

Israel's military occupation of the oPt has led to what has been called an "unsustainable situation"⁷ for the Palestinian population, characterised by dire humanitarian conditions and a protection crisis on the ground. The UN has assessed that 2.5 million Palestinians, more than half of the oPt Palestinian population, will require humanitarian assistance in 2018.⁸ Due to the protracted and chronic nature of the occupation, the UN also has observed that every Palestinian who lives in the oPt "is vulnerable to some degree."⁹

Local and international humanitarian and development actors working to ensure a dignified life for oPt Palestinians have increasingly recognised the need to complement emergency response measures with interventions aimed at strengthening the resilience of vulnerable Palestinians, while also addressing the long-term structural drivers of those vulnerabilities.

As a result, the traditional dichotomy between humanitarian and development assistance has become increasingly blurred in the oPt. This is illustrated by the degree to which humanitarian activities have expanded and diversified from lifesaving emergency relief to the delivery of basic services, livelihood support and social protection. Furthermore, the need to strengthen coordination between humanitarian and development actors and interventions has been increasingly recognised.¹⁰ The UN has clarified, for example, that UN humanitarian and development interventions in the oPt operate complementarily and share the common focus of addressing vulnerability.¹¹

These developments, which reflect global trends,¹² are expressed clearly in the 2018 Humanitarian Response Plan (HRP)¹³ for the oPt which includes a multi-year approach for the first time and explicitly calls for enhanced coordination between humanitarian and development assistance.

B. The humanitarian-development divide as an obstacle to comprehensive assistance in the oPt

The expanding scope of assistance in the oPt, along with the increasingly blurred lines between emergency and longer-term development assistance, raise the question of whether all types of assistance should be regulated by the same legal framework. While there is general agreement on the international law regime applicable to humanitarian assistance in situations of occupation, questions have been raised about the legal framework applicable to development assistance in such situations. These include the question of whether the entitlement of the protected population to receive humanitarian assistance also extends to development interventions, and whether the

⁷ Association of International Development Agencies (AIDA), 50 Years of Occupation: Dispossession, Deprivation and De-development, October 2017, p. 35.

⁸ UN OCHA, Humanitarian Response Plan 2018, above note 3, p. 2.

⁹ United Nations Country Team, Occupied Palestinian Territory, Common Country Analysis 2016, Leave No One Behind: A Perspective on Vulnerability and Structural Disadvantage in Palestine, 2016, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/CCA_Report_En.pdf, p. 29.

¹⁰ See for example HRP 2018, above note 3, pp. 4 and 10.

¹¹ United Nations, United Nations Development Assistance Framework State of Palestine 2018-2022, available at: http://www.ps.undp.org/content/dam/papp/docs/Publications/UNDP-papp-research-undaf_2018-2022.pdf, p. 11.

¹² On the increasingly blurred nature of humanitarian and development assistance, especially in situations of protracted crisis, see the Humanitarian Advisory Group, What role do humanitarians play in the achievement of the Sustainable Development Goals?, <http://humanitarianadvisorygroup.org/what-role-do-humanitarians-play-in-the-achievement-of-the-sustainable-development-goals/>. On the importance of bridging humanitarian and development action, see the Report of the UN Secretary General, One humanity: shared responsibility, Report of the Secretary-General for the World Humanitarian Summit, UN Doc. A/70/709, 2 February 2016, p. 28; and at EU level, EU Foreign Affairs Council, Operationalising the Humanitarian-Development Nexus - Council conclusions, 19 May 2017, available at: <file:///C:/Users/maria/Downloads/Nexus%20sto9383.en17.pdf>

¹³ The HRP is a document produced by UN OCHA that presents the Humanitarian Country Team's understanding of the crisis including humanitarian needs and humanitarian response planning. It is jointly prepared by the Humanitarian Country Team and its partners.

carefully limited level of interference in the delivery of humanitarian assistance permitted an OP under international law should also apply to development programming (which may have unforeseen long-term implications).

There is no clear legal definition of either development or humanitarian assistance. In the policy and operational spheres, humanitarian assistance has traditionally been understood to refer to measures “targeted to meet immediate needs [...] underpinned by humanitarian principles in order to save lives and alleviate suffering”¹⁴ while development assistance refers to a type of engagement that focuses “on long-term systematic changes and is inherently political.”¹⁵ However, the contours of each concept vary according to policy and operational decisions made by humanitarian and development actors. As a result, definitions of humanitarian and development assistance are not universally shared. Moreover, the difference in meaning between the two kinds of aid has no bearing in international law.

As such, it is reasonable to question the value of conducting the analysis based on the humanitarian/development divide. This is all the more the case when many of the long-term interventions that donors and implementing agencies are willing to roll out for the benefit of a population living under occupation are aimed at promoting sustainable and inclusive economic and social development¹⁶ and may lack the political dimension that, in a situation of occupation, might otherwise complicate identification of the applicable legal framework.

For these reasons, an analysis of the international law framework applicable to the provision of assistance to a population living under protracted occupation should avoid reliance on the humanitarian/development dichotomy. Instead, a more accurate and practically useful approach would be to determine the type of support that the population is actually entitled to receive in a situation of protracted occupation according to international law. Specifically, this should include the question of whether only emergency assistance is allowed or if more profound, longer-term interventions are also permitted and regulated. To answer this question, the legal framework generally applicable to humanitarian assistance in situations of occupation should first be identified.

II. International law regulation of assistance in situations of occupation

The main bodies of international law governing situations of occupation are IHL,¹⁷ IHRL and general public international law. These legal frameworks regulate Israel’s actions in the oPt due to its 1967 occupation of the Gaza Strip and West Bank, including East Jerusalem.¹⁸ The laws regulating the provision of assistance to occupied territories, including the oPt, are therefore derived from these three bodies of international law.

¹⁴ Humanitarian Advisory Group, above note 12.

¹⁵ Ibid.

¹⁶ Activities, for example, focused on the promotion of economic independence, social protection, quality education and quality health-care for all.

¹⁷ IHL applies to cases of armed conflict, including to situations of occupation. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV), 75 UNTS 287 (entered into force 21 October 1950), Arts. 2 and 3.

¹⁸ The applicability of IHL and IHRL to Israel’s occupation has been recognised authoritatively, including by the International Court of Justice (ICJ). ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 9 July 2004, paras 90-113. The applicability of IHRL to the oPt was also repeatedly recognised by the UN Human Rights Committee (HRCtee) and the UN Committee on Economic Social and Cultural Rights (CESCR), most recently, in their latest concluding observations on the State of Israel. HRCtee, *Concluding observations on the fourth periodic report of Israel*, UN Doc. CCPR/C/ISR/CO/4, 21 November 2014, para. 5; and CESCR, *Considerations of the reports submitted by States Parties under articles 16 and 17 of the Covenant*, UN Doc. E/C.12/ISR/CO/3, 16 December 2011, para. 8.

A. The primary OP obligation to provide for the well-being of the occupied population

Under IHL, an OP is required to ensure the well-being of the population of the occupied territory. An OP has additional obligations under IHRL, which requires it to respect, protect and fulfil the human rights of all people under its control.

Although sovereignty is not transferred to the occupant by virtue of the occupation under IHL, the OP becomes administrator of the occupied territory. As a result, the OP assumes numerous obligations vis à vis the occupied population including, crucially, the duty to provide for that population's well-being. Article 43 of the Hague Regulations¹⁹ establishes that the OP should restore and ensure, as far as possible, "*ordre and vie public*"²⁰ (order and public life), where 'public life' is widely read as encompassing the well-being of the occupied population.²¹ This provision is widely interpreted as imposing a duty of good governance on the OP.²²

In addition to the general duty to provide for the well-being of the protected population, the OP has specific obligations relating to the fundamental needs of the occupied population. These include providing nourishment and medical care,²³ as well as education to children orphaned or separated from their parents due to the conflict.²⁴ An OP must fulfil these obligations "to the fullest extent of the means available to it."²⁵ In other words, it should exhaust "all available means to meet the essential needs of the population."²⁶

IHRL also imposes obligations on an OP in respect of the well-being of the population living under the occupation regime it has established and administers. An OP must respect, protect and fulfil²⁷ the human rights of the occupied population including the right to life and the right to liberty and security of person and, to the maximum of its available resources, the right to an adequate standard of living (including food, clothing, housing and the continuous improvement of living conditions), the right to health and the right to education, among others.²⁸ As stated by the International Court of Justice (ICJ), this also implies, in the case of the oPt, that the OP must not create any obstacles to the enjoyment of such rights where responsibility for their fulfilment has been transferred to the Palestinian Authority.²⁹

¹⁹ The Hague Regulations concerning the Laws and Customs of War on Land annex to Convention (IV) respecting the Laws and Customs of War on Land (HR IV), (entered into force 26 January 1910), Art. 43. Although Israel has not ratified the Hague Regulations, they are binding on Israel as a matter of customary law. The customary status of the Hague Regulations was recognised by the ICJ, in the Wall Advisory Opinion, above note 18, para. 89.

²⁰ French authoritative text of HR IV, Art. 43.

²¹ See M. Bothe, "The right to provide and receive humanitarian assistance in occupied territories", July 2015, available at: https://www.nrc.no/globalassets/pdf/legal-opinions/bothe_expert-opinion-on-humanitarian-assistance.pdf, p. 7; Thilo Marauhn and Ignaz Stegmiller, "The Obligation to Provide, and the Right to Receive, Development assistance in Occupied Territories, including in Situations of Prolonged Occupation", November 2016, available at: <https://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/expert-opinions/the-obligation-to-provide-and-the-right-to-receive-development-assistance-in-occupied-territories-including-in-situations-of-prolonged-occupation.pdf>, p. 24; and Philip Spoerri, "The law of occupation", in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2015, p. 194.

²² M. Bothe, above note 21, p. 7; T. Marauhn and I. Stegmiller, above note 21, p. 25. Bothe explains that not only can such duty be inferred from article 43 HR, but it also underlies the relevant provisions of GC IV and of the First Additional Protocol and it derives from basic human rights. Michael Bothe, "Expert Opinion relating to the Conduct of Prolonged Occupation in the Occupied Palestinian Territory", June 2017, available at <https://www.nrc.no/globalassets/pdf/legal-opinions/bothe.pdf>, p. 3.

²³ GC IV, Arts 55-56. According to the International Committee of the Red Cross (ICRC), in light of its obligation to ensure food and medical supplies for the population, the OP should provide any article necessary to support life. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol 4: Geneva Convention relative to the Protection of Civilian Persons in Times of War*, ICRC, Geneva, p. 310.

²⁴ GC IV, Art. 50.

²⁵ GC IV, Arts 55 and 56.

²⁶ Gilles Giacca, "Economic, Social, and Cultural Rights in Occupied Territories", in Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 1494-1495, para. 30.

²⁷ The obligation to respect is a negative one, meaning that a State should not interfere with the enjoyment of the human rights of the occupied population. The obligations to protect and fulfil are, instead, positive obligations. The former requires the State to protect the human rights of the occupied population from interferences stemming from third parties and the latter demands State action so that human rights are realised as comprehensively as possible. For an analysis of the division of human rights obligations in three categories, see Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, Oxford University Press, Oxford, 2011, pp. 96-97.

²⁸ International Covenant on Civil and Political Rights (ICCPR), United Nations Treaty Series vol. 999, p. 171 (entered into force 23 March 1976), Arts 6 and 9; International Covenant on Economic, Social and Cultural Rights (ICESCR), United Nations Treaty Series vol. 993, p.3 (entered into force 3 January 1976), Arts 2, and 11-14.

²⁹ ICJ, Advisory Opinion on the Wall, above note 18, para. 112.

IHL and IHRL, therefore, separately and jointly impose obligations on Israel, as OP, to provide for the well-being of oPt Palestinians. From this duty flow, in turn, the obligations to lift the blockade in the Gaza Strip,³⁰ to dismantle, as requested by the ICJ, the Wall,³¹ to halt the destruction of homes, farms, animal shelters and other structures that support Palestinian livelihoods and to put an end to all other measures that compromise the well-being of the protected Palestinian population and its enjoyment of fundamental rights.

B. The secondary OP obligation to allow and facilitate assistance

Where an OP fails to ensure the well-being of the occupied population, contrary to its primary obligation under IHL, and that population is inadequately supplied as a result, the OP bears a secondary duty to allow assistance to be delivered to the occupied population by others. This means that “either the occupying power fulfils its own primary duty [...] or it allows for “relief” by all means possible.”³² As with the primary obligation, the secondary obligation to allow and facilitate assistance by others is grounded in both IHL and IHRL.

IHL prescribes that the OP must allow and facilitate relief schemes undertaken by impartial humanitarian organisations if the population of the occupied territory is inadequately supplied.³³ Furthermore, the obligation to accept such relief does not exempt the OP from its primary obligation to provide for the well-being of the occupied population.³⁴ Consequently, accepting external assistance does not absolve the OP of its responsibility for breaching its duty to provide for the occupied population to the fullest extent of the means available to it.

An OP’s duty under IHL to allow the delivery of assistance is unconditional.³⁵ In other words, providing such consent is “intrinsicly linked to its [an OP’s] ability to fulfil its primary obligation to meet the needs of the population under its control”³⁶. It is therefore compulsory in case of its inability or unwillingness to fulfil its primary obligation.³⁷ In fact, IHL does not allow an OP to refuse to consent to the delivery of assistance to the protected population in need where the objective of such assistance is to safeguard the lives and dignity of affected people;³⁸ assistance that does not, in other words, have a military aim.³⁹

The secondary obligation requires the OP not only to allow but also to facilitate assistance. An OP should therefore not only consent to relief schemes but also “co-operate wholeheartedly in the rapid and scrupulous execution of these schemes.”⁴⁰ This would imply, for example, obligations to facilitate visa approvals for relief workers, resolve taxation issues in good faith and not create any obstacles to the delivery of aid to the protected population.

³⁰ This is due to the serious violations of human rights of the population in Gaza resulting from the closure, including violations of their freedom of movement and economic, social and cultural rights. See Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, 2017, above note 1, para. 31.

³¹ ICJ, Advisory Opinion on the Wall, above note 18, para. 151. In fact, the Wall severely interferes with the enjoyment of fundamental Palestinian rights in the West Bank (including the rights to health, education, and work).

³² T. Marauhn and I. Stegmüller, above note 21, p. 25.

³³ GC IV, Arts 23 and 59. See also Flavia Lattanzi, ‘Humanitarian Assistance’ in A. Clapham, P. Gaeta, M. Sassoli (eds.), *The 1949 Geneva Conventions*, above note 26, paras. 39-40; M. Bothe, above note 21, pp. 8-9; and T. Marauhn and I. Stegmüller, above note 21, pp. 24-25. This obligation has attained customary status. ICRC Customary Law Study, rule 55.

³⁴ GC IV, Art. 60.

³⁵ J. Pictet, above note 23, p. 320. See also Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 192, para. 454.

³⁶ ICRC, Q&A lexicon on humanitarian access, Q&A lexicon on humanitarian access, available at: <https://www.icrc.org/eng/assets/files/2014/icrc-q-and-a-lexicon-on-humanitarian-access-06-2014.pdf>, p. 10.

³⁷ J. Pictet, above note 23, p. 320; D. Fleck, *The Handbook of International Humanitarian Law*, Oxford University Press, 2008, second edition, p. 270, paras. 1 and 2.

³⁸ ICRC, Q&A lexicon on humanitarian access, above note 36, p. 10.

³⁹ The ICRC Commentary explains that the OP may refuse to allow the delivery of assistance if it is not to be used for humanitarian purposes, meaning that it consists of supplies containing weapons, munitions or other articles to be used for military ends. J. Pictet, above note 23, p. 322.

⁴⁰ J. Pictet, above note 23, p. 320.

However, IHL also recognises that an OP may have security concerns, and grants OPs certain limited rights over the delivery of such assistance. Importantly, those rights apply exclusively to the implementation of relief operations and not to the giving of consent for humanitarian organisations to operate in a certain territory.⁴¹ Indeed, as seen above, there is no exception to the obligation on an OP to agree to needed relief schemes. The entitlements granted to an OP in respect of its security concerns consist of the right of control over the provision of assistance and, in exceptional circumstances, the right to invoke military necessity to limit the delivery of assistance.

a. Right of control

IHL grants an OP a right of control over the delivery of assistance for two main purposes.⁴² Firstly, this permits the occupying authorities to ensure that goods that could be used for military purposes and may constitute a threat to the security of the OP, such as weapons, are not brought into the occupied territory.⁴³ Secondly, it permits the OP to ensure that assistance is not diverted from its intended purpose of benefiting the occupied population in need.⁴⁴ Exercise of the right of control, however, may never have the effect of “unduly delaying or rendering impossible the delivery of the humanitarian relief.”⁴⁵

b. Right to temporarily limit assistance for reasons of imperative military necessity

In exceptional circumstances, the OP may invoke imperative military necessity to restrict assistance operations in support of the occupied population.⁴⁶ However, the principle of military necessity only allows the OP to take action to weaken the military strength of the enemy,⁴⁷ and is therefore usually only applicable to situations of active hostilities.⁴⁸ Moreover, even in case of military necessity, the OP would only have the limited power to temporarily and/or geographically restrict assistance operations and not prohibit them altogether.⁴⁹

The OP obligation to allow and facilitate assistance for the occupied population’s well-being is complemented by additional obligations under IHL to respect and protect relief personnel⁵⁰ and to allow for their freedom of movement,⁵¹ as well as by the prohibition against destruction and confiscation of relief material.⁵² Exceptionally, restrictions on the freedom of movement of relief personnel and the destruction of property may be justified for reasons of military necessity, to be restrictively interpreted as set out above.

The OP obligation to allow humanitarian assistance and other measures to be undertaken by third parties is also grounded in IHRL. The International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes that a State should realise the rights of the covenant “to the maximum of its available resources.”⁵³ As stated by the UN Committee of independent experts monitoring States’ adherence to the ICESCR, this obligation should be interpreted to

⁴¹ ICRC, Q&A lexicon on humanitarian access, above note 36, pp. 10-11.

⁴² The right of control of the OP can be inferred from GC IV, Arts 23, 27 and 59 and ICRC Customary Law Study, rule 55.

⁴³ *Ibid.*

⁴⁴ GC IV, Art. 23.

⁴⁵ ICRC, Q&A lexicon on humanitarian access, above note 36, p. 15.

⁴⁶ ICRC, Q&A lexicon on humanitarian access, above note 36, p. 5 and 13.

⁴⁷ ICRC, ‘Military necessity’, available at: <https://casebook.icrc.org/glossary/military-necessity>.

⁴⁸ ICRC Customary Law Study, explanation of rule 56; Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds), *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, ICRC, Geneva, para. 2121.

⁴⁹ ICRC, Q&A lexicon on humanitarian access, above note 36, p. 5.

⁵⁰ Relief personnel should not be subjected to harassment, intimidation and arbitrary detention. ICRC Customary Law Study, rule 31.

⁵¹ ICRC Customary Law Study, rule 56.

⁵² As clarified by the ICRC when explaining the content of the customary obligation to protect humanitarian relief objects, destruction, misappropriation and looting of such objects are prohibited. ICRC Customary Law Study, rule 32. See also GC IV, Art. 53; HR IV Art. 46.

⁵³ ICESCR, Art. 2(1).

include “international cooperation and assistance.”⁵⁴ The Committee has further clarified, with reference to the right to food, that this right may be violated by “the prevention of access to humanitarian food in internal conflicts and other emergency situations.”⁵⁵ This suggests that the OP’s obligation to fulfil the human rights of the occupied population includes the duty to allow external cooperation and assistance.

Consequently, under both IHL and IHRL, the oPt Palestinian population is entitled to receive assistance when in need.⁵⁶ Hence, except for measures justified by the narrow exclusions set out above (right of control and right to temporarily limit assistance for reasons of military necessity), all measures taken by the OP which amount to the obstruction of needed assistance aimed at safeguarding the lives and dignity of the affected people, including destruction or confiscation of materials, restrictions on the freedom of movement of relief workers and denial of visas, are prohibited under international law.

C. Entitlements and obligations of donors and implementing agencies

Under international law, impartial humanitarian organisations⁵⁷ are entitled to offer assistance to the occupied population.⁵⁸ When undertaking their operations, implementing partners are required to operate in compliance with the legal framework presented above.

Therefore, while the OP is obliged to allow and facilitate assistance, agencies operating in an occupied territory should obtain the OP’s agreement to their engagement. Exceptionally, as suggested by Bothe, “there are situations where silence must be interpreted in good faith as consent” and this could be the case, in light of an OP’s obligation to cooperate with the UN, where the UN shares with the authorities a document presenting planned assistance activities and the OP does not object.⁵⁹ Furthermore, the law indicates that agreement should be obtained for “relief schemes” which could be read to also refer to broad plans of relief operations and not solely to individual assistance operations.⁶⁰ Indeed, if the law required implementing agencies to obtain an authorisation for each and every intervention this may undermine the protective aim underlying an OP’s duty to facilitate rapid access to assistance for the occupied population.⁶¹

With regard to programmes which involve any form of construction in Area C of the West Bank or East Jerusalem, Israel has established a planning regime whereby any person or entity seeking to build in those areas must obtain permission from the Israeli authorities.⁶² As analysed in detail

⁵⁴ CESCR, General Comment 3, ‘The Nature of States Parties’ Obligations’, UN Doc. E/1991/23, 14 December 1990, para. 13. See also ICESCR, Art. 2: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation [emphasis added], especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant [...]”.

⁵⁵ CESCR, General Comment 12: The right to adequate food (article 11), UN Doc. E/C.12/1999/5, 12 May 1999, para. 19.

⁵⁶ See ICRC Customary Law Study, rule 55. On the right of civilians in an occupied territory to receive humanitarian relief, see also Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, Leiden, Boston, 2009, pp. 356-357.

⁵⁷ On the broad nature of the wording “impartial humanitarian organisations” see ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, 2016, commentary on art. 9 GC I (same as art. 10 GC IV), para. 1157.

⁵⁸ GC IV, Arts 10, 59(2) and 63. On the right of impartial humanitarian organisations to offer assistance, see ICRC 2016 commentary on art. 9 GC I, paras 1122 and 1126.

⁵⁹ Charter of the United Nations, 1 UNTS XVI, 24 October 1945, Art. 1(5). See on the point, M. Bothe, above note 21, pp. 15-16.

⁶⁰ M. Bothe, above note 21, p. 15.

⁶¹ GC IV, Art. 61; ICRC Customary Law Study, rule 55. According to the ICRC, IHL distinguishes between “the requirement to obtain consent from a party to the armed conflict following an offer of services (i.e., the broad decision made by that party according to which an impartial humanitarian organization can be present and operate in its territory/territory under its control following a valid offer of services) on the one hand, and the obligation to allow and facilitate relief schemes, which aims at implementing the acceptance of the offer of services, on the other.” (ICRC, Q&A lexicon on humanitarian access, above note 36, p. 11). This seems to suggest that the request for consent should concern the general activity of an organisation in a given country.

⁶² For an analysis of the functioning and illegality of such regime under international law see Diakonia, *Planning to Fail, The Planning Regime in Area C of the West Bank: an International Law Perspective*, 2013, available at: <https://www.diakonia.se/globalassets/documents/ihl/ihl-in-opt/planning-to-fail.pdf>; and Marco Sassoli and Théo Boutrouche, “Expert Opinion On International Humanitarian Law Requiring of the Occupying Power to Transfer Back Planning Authority to Protected Persons Regarding Area C of the West Bank”, available at: <http://bit.ly/2z3y4lt>.

elsewhere, this Israeli-controlled planning regime contravenes international law both because of the way it was established and its effects, including the creation of unjustifiable impediments to assistance projects that involve construction activity.⁶³ Due to this planning regime's inherent violation of IHL and IHRL, donors and implementing agencies should not engage with it, in part to protect them from engaging with an institution that violates standards of international law.⁶⁴ In particular, from a pure legal perspective, to the extent that the planning regime appears to violate the right to self-determination of the Palestinian people,⁶⁵ a peremptory norm of international law,⁶⁶ third States are obliged to cooperate to ensure that the regime is repealed, not to recognise as lawful the situation resulting from its operation, and not to render aid or assistance in maintaining it.⁶⁷ Mitigating mechanisms, therefore, should be put in place to reduce the risk of confiscation and destruction of assistance on the grounds of lack of building permits, including the possible negotiation of an alternative coordination regime with the Israeli authorities that would comply fully with international law.

Finally, while relief organisations should allow the OP to exercise its right of control over the delivery of assistance, such control should never result in unduly delaying delivery or in creating unlawful impediments to it. It may be argued, as stated by the ICJ in the Advisory Opinion on Namibia, that “a party which disowns or does not fulfil its own obligations cannot be recognised as retaining the rights which it claims to derive from the relationship.”⁶⁸ Hence, where there is a well-founded fear that confiscation or destruction of external assistance would follow from the OP's exercise of the right of control based on a history of deliberate and persistent breaches, exceptionally, implementing agencies may bypass an OP's right of control. Although a sound legal basis can be found for such an approach, it unquestionably raises important “do no harm” questions that require cautious assessment.

Checklist for implementing agencies in the oPt

- Implementing agencies are entitled to offer to undertake projects in support of the occupied Palestinian population in need.
- Implementing agencies should ensure that the OP agrees to the undertaking of operations in the oPt; exceptionally, communicating planned activities to the OP through the UN and receiving no objection may meet this requirement.
- Implementing agencies should not engage with unlawful Israeli practices or systems when undertaking their operations.
- When requested by the OP, implementing agencies should allow it to control the delivery of assistance or the undertaking of other operations in support of the occupied population. Control may be exercised to verify that:
 - Assistance delivered or projects undertaken are directed for the benefit of the protected population and have no military aims; and
 - Assistance is not diverted from its legitimate purpose.Such control, however, should never result in unduly delaying or arbitrarily impeding assistance activities.
- Implementing agencies should remain aware that their operations may be exceptionally limited temporarily and/or geographically for reasons of military necessity.

⁶³ On the illegality of the planning regime in relation to the creation of unlawful impediments to the distribution of assistance, see Planning to Fail, above note 62, pp. 32-33.

⁶⁴ See Planning to Fail, above note 62, pp. 36-37.

⁶⁵ The planning regime deprives the local Palestinian population of any control over the land, natural resources, demography and development in Area C for an undefined period. Moreover, it is a major component in the determination of the future of Area C but the protected population has little or no involvement in the process. The regime appears therefore to impede the exercise by the Palestinian people of their right to self-determination. See Planning to Fail, above note 62, pp. 25-26.

⁶⁶ Peremptory norms of international law or jus cogens norms are fundamental principles of international law from which no derogation is permitted such as the right to self-determination and the acquisition of territory by force. On the jus cogens nature of the right to self-determination, see International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), November 2011, Supplement No. 10 (A/56/10), chapter IV.E.1, commentary on Art. 40, p. 113, para. 5.

⁶⁷ ARSIWA, Art. 41.

⁶⁸ ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, 21 June 1971, para. 91.

III. Assistance in a protracted occupation context

In a protracted occupation context such as the oPt where emergency and longer-term needs overlap, or, at a minimum, intertwine, addressing deep-rooted and structural needs is not only crucial to improving living conditions, but is also required under international law. The OP obligations to ensure the well-being and fulfil the human rights of the protected population and its duty to accept assistance whenever the population is inadequately supplied translates to an entitlement for the occupied population to receive any support offered for the achievement of those goals whenever the OP fails to satisfy its needs. Hence, the legal framework analysed above may be seen not only as allowing and governing the delivery of emergency assistance for the benefit of the occupied population, but also as applying to the undertaking of medium to long-term measures.

A. Legal grounds for longer term interventions in a protracted occupation context

International Humanitarian Law

The OP's obligations under IHL to provide, allow and facilitate assistance to the occupied population in need have been traditionally understood within the context of the provision of emergency assistance. However, given an OP's overall good governance role and responsibilities with regard to the well-being of a population under occupation, this narrow approach should be examined further with respect to cases of protracted crisis, including protracted occupation.

As analysed above, the OP obligation to allow and facilitate assistance flows directly from the OP's primary obligation of good governance and from its duty to provide for the well-being of the occupied population.⁶⁹ This duty amounts to a "definite obligation to maintain at a reasonable level the material conditions under which the population of the occupied territory lives."⁷⁰ Accordingly, whenever the occupied population's living conditions are dire, as is currently the case in significant parts of the oPt, the OP should be seen as having an obligation to provide, or allow and facilitate, the assistance required to ensure the welfare of the occupied population. This would include, whenever necessary for that purpose, the undertaking of medium to long-term development-type interventions.

Moreover, at a bare minimum, an OP should be seen as having the obligation to prevent de-development and to ensure the status quo well-being of the occupied population. Indeed, the duty of good governance of the OP and its obligations to ensure the provision of food and medical supplies and the functioning of the health system in the occupied territory, among others, suggest that an OP is obliged to prevent de-development as an integral component of its obligation to ensure the well-being of the population.⁷¹ Hence, where the evidence leads to the conclusion that Israel's conduct of its military occupation of the oPt is leading to Palestinian de-development,⁷² the OP must allow all development interventions necessary to avoid, at a very minimum, deterioration of the living conditions of oPt Palestinians.

The suggestion that the OP must allow and facilitate medium to long-term forms of assistance for the protected population in need can also find support in IHL provisions spelling out the obligation of the OP to allow and facilitate assistance for the occupied population. The relevant IHL norms contained in the Fourth Geneva Convention (GC IV) refer to a duty to allow and facilitate "relief."⁷³ The word "relief" is a product of its time which, when read in the context of the Geneva Conventions, appears to refer mainly to material assistance for the satisfaction of emergency needs of protected persons.⁷⁴ The term has evolved to encompass services in addition

⁶⁹ HR IV, Art. 43. Indeed, as explained by Professor Bothe, the general duty of the OP to provide for the well-being of the population is a basis for the duty to accept and facilitate relief. M. Bothe, above note 21, p. 8. See above sections II(A) and (B).

⁷⁰ J. Pictet, above note 23, p. 310.

⁷¹ T. Marauhn and I. Stegmüller, above note 21, p. 32.

⁷² UNCTAD Report, above note 1 and AIDA Report, above note 7.

⁷³ The IHL provisions refer to "relief schemes" or "relief consignments". GC IV, Arts 59, 60, 61, and 62.

⁷⁴ See on the point, ICRC, Q&A lexicon on humanitarian access, above note 36, p.8, fn 15. Article 59 GC IV clarifies that relief schemes "shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing".

to material assistance⁷⁵ and it can be understood today as “financial or practical assistance given to those in special need or difficulty.”⁷⁶

Although the term “relief” appears to have carried a restrictive meaning at the moment of adoption of the Geneva Conventions, this can be explained by the drafters’ assumption that only emergency needs would arise during times of occupation. This assumption was predicated on the historical development of the concept of military occupation and an understanding of it as an inherently temporary state of affairs taking place between active hostilities and the conclusion of a peace treaty.⁷⁷ It is submitted, however, that in a protracted occupation context, longer term measures also should be included under the term “relief” to interpret the provision in full compliance with the overall object and purpose of the relevant Convention,⁷⁸ namely the protection of civilians in times of war.⁷⁹ In fact, since emergency and medium to long-term needs increasingly overlap and intertwine the longer the duration of an occupation, deeper interventions are increasingly required to protect the occupied population as an occupation becomes increasingly protracted.⁸⁰ The suggestion that the drafters intended to allow for “relief” to be interpreted dynamically and that it should not correspond to a closed system also finds support in the provision’s negotiating history.⁸¹

International Human Rights Law

The argument that the OP is obliged to allow third parties to undertake medium to long-term measures for the benefit of the occupied population is further supported by the obligation of the OP to accept external assistance whenever doing so strengthens its compliance with its IHRL obligations vis à vis the occupied population.⁸²

⁷⁵ As explained by the ICRC, relief “must be interpreted to include both relief items/goods and humanitarian services/activities.” ICRC, Q&A lexicon on humanitarian access, above note 36, p. 14. The ICRC also specifies that “relief” encompasses “all activities, services, and delivery of goods, primarily in the field of health, water, habitat and economic security and which seeks to ensure that persons caught up in armed conflict can survive and live in dignity” (p. 14). According to Bothe, the conclusion that ‘relief’ also encompasses services is well-established and has been considered a customary norm. M. Bothe, above note 21, p. 13

⁷⁶ English Oxford Living Dictionary.

⁷⁷ In the preparatory work of GC IV, we can indeed read that, when an occupation continues after the general conclusion of military operations between the parties, “it appears normal that the Occupying Power should gradually hand over the various powers it exercises [...] to authorities consisting of nationals of the Occupied Power.” Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, Section A, p. 815. Moreover, the fact that concepts such as “development” did not make it into the texts of the Conventions should not surprise us in view of their emergence in earnest well after the adoption of the main IHL treaties. International law concerning development evolved only in the 1960s and 1970s, whereas the main IHL treaties were adopted between the end of the XIX century and the first half of the XX. See Alhagi Marong, “Development, Right to, International Protection”, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopaedia of Public International Law*, 2010, para. 5. See also T. Marauhn and I. #, above note 21, p. 18. #

⁷⁸ The Vienna Convention on the Law of Treaties (VCLT) provides that the object of a treaty must be taken into account in its interpretation. It further provides that treaties should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” UN VCLT, United Nations Treaty Series vol. 1155, p. 331 (entered into force 27 January 1980), Art. 31.

⁷⁹ The object and purpose of GC IV is clearly spelled out in its title and preamble. The latter reads: “The undersigned Plenipotentiaries [...], for the purpose of establishing a Convention for the Protection of Civilian Persons in Time of War [emphasis added], have agreed as follows”.

⁸⁰ Such interpretation should not be seen as upholding the argument put forward in the past by the Government of Israel that the protracted nature of its exercise of control over the oPt can increase the extent of its entitlements under IHL. To the contrary, as can be inferred from article 6 GC IV and its drafting history, IHL assumes that in a case of protracted occupation, the OP would hand over most of its powers to the sovereign authority and would therefore be bound only by the provisions intended to protect the occupied population. It is therefore contrary to the very essence of IHL to justify increasing exercise of power by the occupying authorities over the occupied territory on the basis of the protracted nature of the occupation. Art. 6(3) GC IV; Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, section A, p. 748. On the point, see also section III(C).

⁸¹ The travaux préparatoires of GC IV, report that, during the diplomatic conference, the Representative of the then Union of Soviet Socialist Republics (USSR) had suggested to make clear the wording of the provision imposing an obligation for the OP to allow and facilitate relief schemes by indicating that the obligation should have been triggered when the occupied population was inadequately supplied with “food stuffs and medical stores.” The British delegate responded that “where relief supplies were concerned it was wiser not to introduce any form of wording which might limit the scope of the text.” As a result, the amendment suggested by the USSR delegate was rejected by 18 votes to 8 and in a manner that suggests that the drafters ultimately agreed with the UK suggestion that the scope of the term “relief” in the treaty should not be limited. Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, section A, p. 748.

⁸² See above, section II(A) and (B).

Indeed, structural and lasting interventions may contribute to fulfilling the fundamental human rights of the occupied population, obligations that an OP is required to meet.⁸³ These core human rights include the right to work, the right to an adequate standard of living (including the right to adequate food, clothing and housing, and to the continuous improvement of living conditions), the right to the enjoyment of the highest attainable standard of physical and mental health and the right to education. Therefore, inasmuch as long-term assistance activities contribute to the promotion of the full enjoyment of the human rights of the population under occupation, including socio-economic rights, an OP is obliged to allow those measures. Such an obligation may be deemed as necessary for the OP to fulfil its duty to realise the fundamental rights of the occupied population to the maximum of the means available to it, including through international assistance.⁸⁴

Crucially, people living under occupation enjoy a right to self-determination, which is the right of all peoples to “freely determine their political status and freely pursue their economic, social and cultural development.”⁸⁵ Enjoyment by the Palestinian people of this right has been recognised by the ICJ.⁸⁶ On the basis of the right to self-determination, it may be argued that an OP has an obligation to transfer authority to legitimate representatives of the occupied population by ending the occupation.⁸⁷ This would enable the protected population to autonomously pursue its well-being and development. In the absence of such end to the occupation, the right to self-determination of the occupied people, which encompasses economic self-determination, should at a minimum protect their economic relations with other entities against unjustified interference by the OP.⁸⁸

Finally, the emerging right to development can be understood today as a system of several rights that translate into an entitlement for each individual “to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”⁸⁹ The UN Special Rapporteur on the situation of human rights in Palestinian territories occupied since 1967, Michael Lynk, emphasised the existence of a right to development for the Palestinian people in his first, 2016, report.⁹⁰ While acknowledging that the right to development as a binding right is currently in the process of being universally recognised, this right already provides normative guidance in shaping State behaviour and should inform the way human rights and humanitarian law are interpreted in situations of occupation.⁹¹ Hence, the obligations of an OP should be construed at all times in accordance with the right of the occupied population to enjoy development.

Comprehensive regulation of long-term assistance in the oPt under international law

As set out above, Israel, as OP, is required to ensure the well-being of oPt Palestinians and fulfil their human rights, including socio-economic rights, to the maximum of the resources available to it. This includes allowing assistance offered by third parties. At a bare minimum, the well-being of the occupied population should be ensured by preventing the de-development of the

⁸³ On the obligation of an OP to comply with IHRL in relation to the population of the occupied territory, see above note 18.

⁸⁴ ICESCR, Art. 2.

⁸⁵ ICCPR, Art. 1; ICESCR, Art. 1; UN Charter, Arts 1(2) and 55. The right to self-determination is considered a peremptory norm of international law. See above note 66.

⁸⁶ ICJ, Advisory Opinion on the Wall, above note 18, para. 118.

⁸⁷ Ralph Wilde, “Expert opinion on the applicability of human rights law to the Palestinian Territories with a specific focus on the respective responsibilities of Israel, as the extraterritorial state, and Palestine, as the territorial state”, February 2018, available at: <https://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl--expert-opinions/the-applicability-of-human-rights-law-to-the-palestinian-territories-with-a-specific-focus-on>, p. 13.

⁸⁸ T. Marauhn and I. Stegmiller, above note 21, p. 12.

⁸⁹ Declaration on the right to development: resolution, UN Doc. A/RES/41/128, 4 December 1986; and T. Marauhn and I. Stegmiller, above note 21, p. 3.

⁹⁰ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN Doc. A/71/554, 19 October 2016, paras 38 ff. The report, among others, considers the blockade of Gaza and its ensuing economic collapse and the cantonisation of the West Bank as violations of the right to development. *Ibid.* para. 44.

⁹¹ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied, 2016, above note 90, para. 39; and T. Marauhn and I. Stegmiller, above note 21, p. 5 referring to A. Marong, above note 77, para. 23.





occupied territory. However, both IHL and particularly IHRL, which requires the OP to take positive action to ensure that the occupied population fully enjoys its human rights, require the OP to strive to attain an even higher level of well-being for the occupied population than the mere preservation of the status quo. To argue otherwise would suggest that, in a situation of protracted occupation, international law allows for living conditions in the occupied territory to be frozen indefinitely at the level which existed at the start of the occupation and therefore, in the oPt case, at 1967 levels.

B. Risks, limitations and challenges of development assistance under protracted occupation

External actors engaged in the provision of development assistance under protracted occupation face numerous risks and constraints, even though such assistance is protected under international law.

Primarily, the OP obligation to allow long-term measures should not be seen as empowering occupying authorities to dominate or otherwise excessively control such activities. Indeed, in light of its close connection to the right to self-determination, the economic, social and cultural development of a people should be shaped by the people themselves and their legitimate representatives. The right to self-determination of the occupied people may also exclude control by an OP over development processes by implying that obligations of an OP should not be interpreted as requiring from it anything necessitating its retention of control over the occupied territory or delaying an end to the occupation.⁹² Interpreting development in a way that permits an OP control over the process would instead legitimise long-term planning authority and prospective control by an OP over the occupied territory and would flatly defy the cardinal IHL tenet that military occupation does not convey any sovereign rights to an OP.

Accordingly, an OP's prerogative over the development of the occupied population should extend only as far as allowing and facilitating long-term measures, with the responsibility and authority for identifying necessary measures resting with the occupied population and its legitimate representatives. However, because of the crucial role of the occupied people in the attainment of their development, its full-scale realisation is, at best, an elusive objective without the full attainment of the right to self-determination, which only an end to occupation can bring about.

Additional challenges exist for the realisation of full development in a protracted occupation context characterised by widespread and continuous violations of international law, as is the case in the oPt, particularly when these violations, in and of themselves, hinder the population's development. The closure of the Gaza Strip, the ongoing expansion of the vast Israeli settlement enterprise in the West Bank, including East Jerusalem, as well as the illegal Area C and Jerusalem planning regime together serve to severely stifle Palestinian development prospects whether viewed from a physical, economic, political, social or administrative perspective. Consequently, development interventions in the oPt will hardly achieve their intended results unless accompanied by robust action to ensure that Israel halts and reverses its international law violations, which in and of themselves fundamentally undermine Palestinian development.

⁹² R. Wilde, above note 87, p. 16.

IV. Obstructions to oPt assistance and recommended responses

A. Israeli practices in contrast to the international legal framework

Over the past five decades Israel has not only continuously violated its primary IHL obligation to provide for the needs of the occupied Palestinian population, but has created numerous obstacles to the provision of assistance by third parties, also in violation of international law.

In the Gaza Strip, third party operations to support the protected population face critical obstacles due to Israel's decade-long blockade including physical and administrative restrictions on the access and movement of aid workers and the delivery of goods and materials. This has prevented or severely limited humanitarian and development projects in Gaza, especially those that involve building, expanding or rehabilitating infrastructure.⁹³

In the West Bank, including East Jerusalem, some 400 structures funded by the EU and EU Member States and worth more than 1.2 million Euros were demolished or seized by Israel under the pretext of lacking building permits between 2009 and 2017.⁹⁴ Such building permits can only be obtained under the aforementioned illegal planning regime⁹⁵ and the approval rate for Palestinian applications for construction permits has stood at only 1% over the past years.⁹⁶

Although Israel's unlawful policies and practices present serious challenges to actors working in the oPt, this should not discourage third States and implementing partners from providing assistance to the Palestinian population.⁹⁷ As dictated by international law, third States can and should respond to unlawful obstructions to assistance by working to put an end to such breaches rather than discontinuing international support to those in need.

B. Legally appropriate responses to unlawful impediments to the provision of assistance

Entitlements and obligations to take action to put an end to unlawful obstructions

Israel's extensive restrictions on the movement of goods and materials, destruction and confiscation of assistance, suspension of relief worker visas and creation of taxation-related difficulties for NGOs operating in the oPt may result in violations of several international law provisions. These include some of an erga omnes nature, that is, obligations that are owed to the international community as a whole and in which all States have a legal interest.⁹⁸ Indeed, unlawful obstructions to assistance may result in infringement of the basic rights of the human person, including socio-economic rights, and IHL norms of fundamental importance to the human person, such as those aimed at ensuring the well-being of the occupied population. These categories of norms have been authoritatively recognised as having an erga omnes nature.⁹⁹

⁹³ UN OCHA, Occupied Palestinian Territory, Humanitarian Facts and Figures, 21 December 2017, available at: https://www.ochaopt.org/sites/default/files/factsheet_booklet_final_21_12_2017.pdf, p. 3.

⁹⁴ Office of the EU Representative (West Bank and Gaza Strip, UNRWA), Six-Month Report on Demolitions and Confiscations of EU funded structures in the West Bank including East Jerusalem, March 2017-August 2017, 4 October 2017, available at: https://eeas.europa.eu/sites/eeas/files/20171004_six-months_report_on_demolitions_of_eu_funded_structures_in_area_c_march-august_2017_o.pdf, p. 4.

⁹⁵ See above 62.

⁹⁶ Six-Month Report on Demolitions and Confiscations, above note 94, p. 1.

⁹⁷ It should be observed that, in some contexts, irrespective of the widespread impediments put in place by the OP, international assistance mostly reaches the population in need. The EU has for example reported that, in the West Bank, "the majority of assistance provided by the EU and its Member States still reaches its recipients despite the continued targeting of EU funded structures." Six-Month Report on Demolitions and Confiscations, above note 94, p. 1.

⁹⁸ ICJ, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase, Judgment, ICJ Reports 1970, 5 February 1970, para. 33.

⁹⁹ The International Law Commission, recalling the ICJ, has clarified that in the erga omnes category fall, among others, "the principles and rules concerning the basic rights of the human person" as well as the right to self-determination. ILC, Commentary to ARSIWA Art. 48, para. 9. Moreover, rules of IHL that are fundamental to the respect of the human person and of elementary considerations of humanity have been recognised as having an erga omnes nature by the ICJ, Advisory Opinion on the Wall, above note 18, para. 157. The erga omnes nature of IHL provisions, or a large part of those, was also recognised by the International Criminal Tribunal for the Former Yugoslavia, The Prosecutor v. Kupreškić et al., case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 519; ICRC 2016 commentary, on art. 1 GC I, para. 119; and Jean Pictet (ed.), Commentary on the Geneva Conventions of 12 August 1949, Vol. 1: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, ICRC, Geneva, p. 25.

Accordingly, it can be argued that all States have an interest and a legal entitlement to act to ensure respect for these rights and obligations, and therefore to guarantee that the occupied population receives the assistance to which it is entitled under international law.

Furthermore, States have an obligation to take action to ensure compliance with the law by putting an end to obstructions to assistance where such obstructions amount to IHL violations. This obligation for third States to take action may be derived from an increasingly accepted interpretation of Article 1 common to the four Geneva Conventions.¹⁰⁰ Since, as observed earlier, unlawful obstructions may also result in a breach of the OP duty to ensure the well-being of the occupied population, of the obligations to allow and facilitate relief schemes, to respect and protect relief personnel and to allow for their freedom of movement, as well as of the prohibition against destruction and confiscation of relief material, all States must do everything reasonably in their power to prevent such IHL violations and bring them to an end.

This duty can be discharged, *inter alia*, through political dialogue, public statements, non-public demarches, measures of conditionality relating to trade and assistance, invoking the responsibility of the OP through international dispute settlement mechanisms and through measures of international cooperation.¹⁰¹ States are left to decide how best to proceed depending on the particular circumstances, including “the means reasonably available to the State, and the degree of influence it exercises”¹⁰² over the OP. If measures already adopted by a State prove to be ineffective, each State is obliged to scale up its efforts within the limits of what it reasonably can do.¹⁰³

States are also obliged to take action to respond to unlawful obstructions to assistance whenever those breach the right to self-determination of the occupied population or other peremptory norms of international law, as is arguably the case with Israel’s planning regime in the oPt.¹⁰⁴ In such cases, States must cooperate to bring the violations to an end; not recognise the situation resulting therefrom as lawful; and not render aid or assistance in maintaining such violations.¹⁰⁵

Requesting reparations for unlawful OP acts

A significant prerogative granted to third States under international law is the entitlement to request full reparation for violations committed by an OP. Together with a demand to halt the violation and not to repeat it, reparation requests stand among the entitlements States possess to invoke the responsibility of a violating State under the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).

States may invoke an OP’s responsibility for the illegal obstruction of assistance, including requesting reparations, by way of diplomatic or legal action in competent fora. Despite the current absence of judicial bodies competent to adjudicate such cases with reference to Israel at the international level, third States continue to possess the capacity to act through diplomatic channels and demarches, whether public, confidential, bilateral or multilateral.¹⁰⁶

¹⁰⁰ ICRC, Commentary on Article 1 Common to the Four Geneva Conventions, 2016, paras 153-183. For a detailed analysis of such obligation see Diakonia, *Everyone’s Business: Third Party Responsibility and the Enforcement of International Law in the oPt*, October 2016, available at:

<https://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl---briefs/everyones-business-third-party-responsibility-and-the-enforcement-of-international-law-in-the-opt.pdf>, and M. Sassoli, T. Boutrouche, ‘Expert Opinion on Third States’ Obligations vis-à-vis IHL Violations under International Law, with a special focus on Common Article 1 to the 1949 Geneva Conventions’, November 2016, available at: <https://www.nrc.no/globalassets/pdf/legal-opinions/eo-common-article-1-ihl---boutrouche---sassoli---8-nov-2016.pdf>.

¹⁰¹ M. Bothe, above note 21, pp. 19-21. For a general overview of measures that can be adopted by States, see ICRC, 2016 Commentary on the First Geneva Convention, 2016, paras. 180-182.

¹⁰² ICRC 2016 commentary on article 1 GC I, para. 165.

¹⁰³ The obligation to ensure respect should indeed be carried out with due diligence. ICRC 2016 commentary on article 1 GC I, para. 165; and T. Boutrouche, M. Sassoli, above note 100, p. 17.

¹⁰⁴ On the violation by the Israeli planning regime of Palestinian self-determination see above note 62.

¹⁰⁵ ARSIWA, Art 41. See also ICJ, Advisory Opinion on the Wall, above note 18, para. 159.

¹⁰⁶ In the case of diplomatic protection exercised by a State in the interest of its nationals, or other cases where this may be required, available and effective local remedies must be first exhausted. ARSIWA, Art 44(b). The remedies that States should exhaust have to be effective (ARSIWA, commentary on Art. 44, para. 5, p. 121). This indicates that the duty to exhaust local remedies does not apply, *inter alia*, where the available remedy “offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal” (ARSIWA, commentary on Art. 44, para. 5, p. 121).

In case of unlawful obstructions to assistance in breach of international law obligations owed to the international community as a whole, all States can request that full reparation be made to Palestinians who have been negatively impacted by the illegal measures.¹⁰⁷ Moreover, some categories of States, for example those that have provided assistance which has been damaged or confiscated by an OP, or those whose citizen assistance providers have been mistreated or faced harassment, may also submit reparation requests in their own interest or that of their affected nationals.

Donor States that provide assistance that is subsequently unlawfully confiscated or demolished may invoke OP responsibility directly and in their own interest. Indeed, any State is entitled to invoke another State's responsibility as injured State when the obligation breached is owed to the international community as a whole and the invoking State is specially affected by the violation.¹⁰⁸ The "specially affected" status may derive from property rights that donor States retain over the assistance provided. However, property rights should not be viewed as the sole basis on which a State should seek reparations for its own account. In fact, it could be suggested that responsibility can also be invoked in light of the continuing vested interest that a donor State has in an OP assistance project¹⁰⁹ and on the basis of the State's accountability to its taxpaying citizens. Under some national legislative systems, a State additionally may be obliged to request reparations where public funds have been diverted from their intended purpose by virtue of the OP's illegal actions.

States may also intervene, through diplomatic channels, on behalf of implementing partner organisations domiciled in that State, or on behalf of relief personnel who are nationals of that State. Thus, States may request reparations on behalf of an implementing organisation whose operations have been unlawfully obstructed¹¹⁰ or on behalf of a relief staff member subjected to unlawful treatment.¹¹¹

Depending on the nature of the violation, States may ask the OP for restitution, that is, to re-establish the situation that existed before the violation.¹¹² This could consist, for example, of the return of unlawfully confiscated materials, the repeal of administrative or legal provisions that restrict the granting of visas to relief personnel, or the cessation of the illegal planning regime.¹¹³ If restitution is insufficient to provide full reparation, States also may seek *compensation*, namely the payment of a sum corresponding to the value of the financially assessable material or moral damage suffered. Finally,¹¹⁴ when full reparation is not made by way of restitution and compensation, States may request satisfaction for injuries that are not financially assessable.¹¹⁵ This could consist, for example, of an acknowledgement of the breach and a formal apology.¹¹⁶

¹⁰⁷ ARSIWA, Art. 48(1)(b).

¹⁰⁸ ARSIWA, Art. 42(b)(i). To establish whether a State is specially affected by an erga omnes obligation, an assessment must be done "on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case", so to prove that the State was simply "affected by the breach in a way which distinguishes it from the generality of other states to which the obligation is owed". ARSIWA, commentary on Art. 42, para. 12, p. 119.

¹⁰⁹ Such vested interests may arise since donor States generally retain control over projects they have funded. Implementing agencies must periodically submit financial and narrative reports to donors as well as requests for approval of any substantial changes to projects. Furthermore, a donor can generally request total or partial repayment of funds disbursed in case of failure to fulfil contractual obligations, fraud and other irregularities.

¹¹⁰ Indeed, States are entitled to ask for compensation for damages suffered by the State or by "nationals, whether persons or companies". It is suggested that "companies" should be interpreted to include implementing agencies. ARSIWA, commentary on Art. 36, para 5, p. 99.

¹¹¹ M. Bothe, above note 21, p. 18.

¹¹² ARSIWA, art. 35.

¹¹³ Restitution may be material (e.g. return of property or territory) or juridical, implying the reversal of some juridical act. See ARSIWA, commentary on Art. 35, p. 97, para. 5.

¹¹⁴ ARSIWA, Art. 36. States can, therefore, ask for compensation for material assistance destroyed or for the non-material injuries (moral damage) that may have been sustained by relief staff.

¹¹⁵ ARSIWA, Art. 37. Satisfaction is a rather exceptional form of reparation that States can rely on whenever there has been an affront to the State. ARSIWA, commentary on Art. 37, p. 106, para. 3.

¹¹⁶ ARSIWA, commentary on Art. 37, p. 106, para. 5.

Conclusions

Israel's military occupation of the oPt, now more than half a century in duration, is characterised by a broad catalogue of international law violations that adversely impact the lives of the protected Palestinian population. Working to remedy the OP's failure to ensure the well-being of the protected population, the international community has long been engaged in providing assistance to the Palestinian people in Israel's stead. Local and international actors operating in the oPt have become increasingly aware of the need to combine emergency aid with a broader commitment to address the more long-term, structural vulnerabilities of the Palestinian population brought about by a protracted occupation.

With regard to the legal questions raised by the operationalisation of combined short-term and deep, forward-looking assistance approaches in a protracted occupation context such as the oPt, we have argued that the artificial dichotomy between humanitarian and development assistance should be disregarded as a matter of international law. Instead, we have suggested that all kinds of assistance operations that aim to ensure a fully protected and dignified life for a population living under protracted occupation, whether characterised as emergency, humanitarian, development or any other category are permitted, regulated and protected under international law.

Thus, the legal framework traditionally applied to emergency response operations should be deemed to be equally applicable to medium and long-term measures for the benefit of the protected population in a situation of protracted occupation. Moreover, this principle extends to both the primary OP obligation to provide for the well-being of the population, and to its secondary obligation to allow and facilitate assistance for that population when in need, including by fully honouring the entitlement of local and international actors to offer such assistance. Certainly, the practical execution of the OP obligations vis à vis the protected population should differ depending on whether it concerns emergency or deeper interventions in light of the crucial obligation of an OP to give space to the occupied people and its legitimate representatives in the exercise of sovereign-like powers in the occupied territory.

The proposition that emergency and deep, long-term measures are permitted and safeguarded under international law results from the forgoing analysis concerning the scope, in a situation of protracted occupation, of the OP duty under IHL to provide for the well-being of the occupied population and of its obligation to fulfil that population's human rights under IHRL. In fact, while achieving full-scale development under protracted occupation may be arduous, if not impossible, due to contextual constraints, it would be misleading and deeply problematic to read IHL and IHRL, two branches of international law developed to protect human beings, as permitting regression in the living conditions of an occupied population due to the imposition of a protracted military occupation by a foreign power.

Finally, unlawful obstructions to the provision of assistance by an OP must not be allowed to discourage third parties from providing much needed assistance to a population in need under protracted occupation. Any such obstruction should prompt third States to exercise all powers granted them under international law, including the entitlement to request reparations in the interest of relevant stakeholders, in order to halt such obstruction and prevent its reoccurrence. Importantly, consistent engagement by third States may serve to announce, and clearly underline, broad international commitment to respect for the rule of law, under which a population under occupation is protected and enjoys unhindered access to all needed assistance.

For the above reasons, we recommend that third States should:

- Require the Occupying Power to halt any violations of international law perpetrated to the detriment of the occupied population and facilitate in good faith the goal of promptly minimising and eventually eliminating oPt Palestinians' need for assistance altogether.

- Require the Occupying Power to comply with its obligation to ensure the well-being of Palestinians in the oPt in order to end dependence on, and normalisation of, international assistance as the primary means for satisfying the needs of the protected population.
- Comply, and ensure that third parties comply, with applicable international law when undertaking assistance operations in the oPt, including by:
 - not engaging with, and asking partners not to engage with, unlawful practices including the Israeli planning regimes for Area C and East Jerusalem;
 - adopting an effective planning coordination system in Area C and East Jerusalem that fully complies with international law for projects that involve construction.
- Systematically protest against all obstacles to assistance created by the Occupying Power in violation of international law by, amongst other things, requesting reparations in the interest of any affected stakeholders.

We also recommend implementing agencies to:

- Adopt operational guidelines for the implementation of humanitarian and development activities in the oPt that comply fully with IHL and IHRL and that are specifically tailored to, and reflective of, the extraordinary context of protracted occupation in the oPt.

See other Diakonia IHL Resource Centre briefs:

Distinctions with Differences, Jerusalem as Corpus Separatum and its Legal Implications

Everyone's Business, Third Party Responsibility and the Enforcement of International Law in the oPt

Guilty by Association: Israel's Collective Punishment Policies in the oPt

Litigating Settlements: The Impact of Palestine's Accession to the Rome Statute on the Settlement Enterprise

Same Game, Different Rule: Practices and Policies of Racial Discrimination by the Occupying Power in the oPt

