

Ramallah, 5 February 2010

H.E. Roland Steininger
Head of Swiss Representation Office
al-Wataniah Bldg., 5th floor
Jerusalem Street
Ramallah, Palestine

Dear Mr. Steininger:

It is an honor for us representatives of civil society organizations in Palestine and other countries to address Your Excellency as representative of the depositary state of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (Fourth Geneva Convention). We address you also with a sense of grave concern over the long-standing violations of the above-mentioned convention in the Israeli-occupied Palestinian and other Arab territories by submitting the accompanying concept paper with recommendations for an eventual convening of the High Contracting Parties that meets current exigencies.

In light of the responsibility to host the Conference of High Contracting Parties (HCP) borne under the leadership of Switzerland, both as per GA resolution A/64/10 and as the depositary of the Convention, we look forward to supporting your efforts to ensure that the Conference upholds the integrity of the Fourth Geneva Convention, adopts effective measures and delivers the humanitarian outcomes required. For our part, we respectfully offer the attached concept paper with recommendations toward those common ends.

The elements mentioned in this paper form a general outline, requiring elaboration. We remain available for further consultation on the implementation of these recommendations and look forward to playing a positive role by contributing to the substance of the Conference itself. We provide below a list of organizations endorsing the attached concept paper. They remain available for further consultation toward this pivotal and historic Conference of HCP.

In the meantime, we hope that Your Excellency will transmit these recommendations to the concerned parties in the Federal Department of Foreign Affairs and the Government of Switzerland.

Your Excellency, we appreciate your cooperation in this important matter.

Please be assured of our highest consideration.

The Endorsers [listed below]:

Adalah – The Legal Center for Arab Minority Rights in Israel: fatmeh@adalah.org
Addameer Prisoner Support and Human Rights Association (Palestine): legal@addameer.ps
Al-Dameer Association for Human Rights-Gaza: aldameer@p-i-s.com
Arab Association for Human Rights –HRA (Israel): hra1@arabhra.org
BADIL Resource Center for Palestinian Residency and Refugee Rights (Palestine): legal@badil.org
The Centre for Refugee Rights/AIDOUN (Lebanon): jsleiman@inco.com.lb
Defence for Children International - Palestine Section: leigh@dcipal.org
Ensan Center for Human Rights (Palestine): shawqi@ensancenter.org
Fédération Internationale des Ligues des Droits de l'Homme—FIDH: sdavid@fidh.org
Habitat International Coalition—Housing and Land Rights Network: hic-mena@hic-mena.org
Al Haq (Palestine): shawan@alhaq.org
Jerusalem Legal Aid Center (Palestine): issam@mosaada.org
Al Mezan Center for Human Rights (Gaza, Palestine): mahmoud@mezan.org
Palestine Solidarity Committee - South Africa: naeem@shams.za.org
Palestine Subcommittee, National Lawyers Guild (USA): zaha@uswest.net
Palestinian Center for Human Rights (Gaza, Palestine): daragh@pchgaza.org
Women's Centre for Legal Aid and Counselling (Jerusalem, Palestine): maha@wclac.org
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Toward the Conference of High Contracting Parties of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) on measures to enforce the Convention in the occupied Palestinian territory

Geneva, April 2010

In light of Israel's conduct in the military operation codenamed "Operation Cast Lead," which took place from 27 December 2008 to 18 January 2009, and its context, the United Nations Fact Finding Mission on the Gaza Conflict has recommended that the General Assembly ask the Government of Switzerland to convene a Conference of the High Contracting Parties (HCP) to the Fourth Geneva Convention on measures to enforce the Convention in the occupied Palestinian territory (oPt) and to ensure its respect, in accordance with art. 1.²

In its resolution A/64/10 on the follow-up to the report of the United Nations Fact Finding Mission, the General Assembly has recommended that the Government of Switzerland

undertake the necessary steps as soon as possible to reconvene a Conference of High Contracting Parties in its capacity as depositary of the Geneva Convention relative to the Protection of Civilian Persons in Time of War. That High Contracting Parties Conference is to address "measures to enforce the Convention in the Occupied Palestinian Territory, (oPt) including East Jerusalem, and to ensure its respect in accordance with common article 1."³

Background

The first meeting of the HCP to address the Convention's application to the oPt took place in Geneva on 15 July 1999, after Switzerland conducted consultations with the other relevant parties. As recommended by UN GA Resolution ES-10/6 in its tenth Emergency Special Session, the Conference also was to address "measures to enforce the Convention in the oPt, including Jerusalem, and to ensure respect thereof in accordance with common article 1."⁴

² "Report of the United Nations Fact Finding Mission on the Gaza Conflict" [UN Fact-finding Report], A/HRC/12/48, 15 September 2009, p. 549, para. 1768.

³ "Follow-up to the report of the United Nations Fact-finding Mission on the Gaza Conflict," A/64/L.11, 2 November 2009, operative para. 5.

⁴ Operative Paragraph 6: "*Reiterates* its recommendation that the High Contracting Parties to the Fourth Geneva Convention convene a conference on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, and to ensure respect thereof in accordance with common article 1, and further recommends that the High Contracting Parties convene the said conference on 15 July 1999 at the United Nations Office at Geneva."

That Conference of HCP convened for some 15 minutes only, adjourning with a brief statement prepared for the participating HCP that reaffirmed the applicability of, and the need for full respect of the Fourth Geneva Convention to the oPt, including East Jerusalem. According to the statement, the conference adjourned “[t]aking into consideration the improved atmosphere in the Middle East as a whole” and referred to “the understanding that it will convene again in the light of consultations on the development of the humanitarian situation in the field.”⁵ That conference resulted in no practical action on the part of any party, neither depositary nor other HCP.

As Israeli occupying forces escalated attacks against Palestinian civilians in violation of the Convention in late 2000, the General Assembly again invited Switzerland to:

consult on the development of the humanitarian situation in the field, in accordance with the statement adopted on 15 July 1999 by the...Conference of High Contracting Parties to the Convention, with the aim of ensuring respect for the Convention in all circumstances in accordance with common article 1 of the four Conventions.⁶

The result of the corresponding closed session on 5 December 2001 was a declaration that did not reflect consideration of enforcement measures, as required. Rather, the declaration merely called upon third parties to fulfill their Article 1 obligation to ensure respect for the Convention, but failed to recommend or enact any such steps.

The only specific reference to possible involvement of third parties is in the Conference Declaration’s paragraph 11, which states:

The participating High Contracting Parties...encourage any arrangements and agreements supported by the parties to the conflict on the deployment of independent and impartial observers to monitor, *inter alia*, breaches of the Fourth Geneva Convention as a protection and confidence-building measure, with the aim to ensure effectiveness of humanitarian rules.⁷

However, a proposed third-party monitoring presence is not an enforcement measure, nor does it provide effective protection. The HCP also did not take any measures to install impartial observers or provide other forms of protection within the framework of the Fourth Geneva Convention. Nonetheless, the protection of civilians and the enforcement of humanitarian norms are high obligations of the Convention Parties under article 1, which cannot be deferred to other parties. The 2001 Conference did not serve its principal purpose as provided in the General Assembly resolution that called on the depositary to convene it.

⁵ Conference of High Contracting Parties to the Fourth Geneva Convention Statement, Geneva, 15 July 1999, at: [http://domino.un.org/unispal.nsf/3d14c9e5cdaa296d85256cbf005aa3eb/43b9f2b1643b4aee85256e37005946ea/\\$FILE/mg_990715_4cgstatemt_e.pdf](http://domino.un.org/unispal.nsf/3d14c9e5cdaa296d85256cbf005aa3eb/43b9f2b1643b4aee85256e37005946ea/$FILE/mg_990715_4cgstatemt_e.pdf).

⁶ A/RES/ES-10/7, para. 16 (20 October 2000).

⁷ Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, at: <http://www.muscanet.com/~ampal/Geneva.htm>.

Israel's occupation of the Gaza Strip and the West Bank, including East Jerusalem, is not taking place in a legal void. International humanitarian law (IHL) and, in particular, the Fourth Geneva Convention constitute the legal framework applicable to a situation of occupation. IHL instruments set out the obligations of all parties to the conflict, as well as those specifically binding upon an Occupying Power, but also upon states not party to the conflict.

Respect and ensuring respect of the Convention remain essential to human security and well-being in Palestine, regional peace and stability, and the integrity of the international system. Serial resolutions of the UN General Assembly⁸ and Security Council,⁹ as well as previous HCP conferences, the 9 July 2004 Advisory Opinion of the International Court of Justice¹⁰ and the UN Fact Finding Mission on the Gaza Conflict¹¹ have confirmed the *de jure* applicability of the Fourth Geneva Convention in the oPt, including East Jerusalem, which Israel nonetheless continues to contest.

On 20 July 2004, at the 27th meeting of its tenth Emergency Special Session, the General Assembly called upon all States parties to the Fourth Geneva Convention to ensure respect by Israel for the Convention and again invited Switzerland, in its capacity as depositary, “to conduct consultations and to report to the General Assembly on the matter, including with regard to the possibility of resuming the Conference of High Contracting Parties to the Fourth Geneva Convention.”¹²

Pursuant to its mandate, Switzerland held broad consultations with the parties to the conflict, the actors involved in the negotiation processes and other important actors in the region. Switzerland reportedly informed and consulted all the HCP to the Fourth Geneva Convention¹³ concerning broad application of the Convention, as well as the issues arising from Israel's Wall through the West Bank and Jerusalem in light of the International Court of Justice 9 July 2004 Advisory Opinion.¹⁴

With direct relevance to the obligations of the Fourth Geneva Convention's HCP, the opinion of the highest judicial body in the international system determined that:

⁸ “Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories,” A/RES/64/92, 13 November 2009.

⁹ E.g., Security Council resolution 681 (1990), adopted at its 2970th meeting, 20 December 1990.

¹⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, *I.C.J. Reports* 2004, paras. 89–101. The Advisory Opinion was in reply to the question put forth by the General Assembly in resolution ES-10/14, 8 December 2003: “What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

¹¹ UN Fact-finding Report, para. 28 and throughout.

¹² General Assembly resolution ES-10/15, 20 July 2004, paragraph 7.

¹³ “Letter dated 30 June 2005 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the General Assembly,” A/ES-10/304, 5 July 2005.

¹⁴ *Ibid.* Annex, para. 16.

- A. The construction of the wall and its associated regime, are contrary to international law;
- B. Israel is under an obligation to terminate its breaches of international law, to cease forthwith the construction of the wall, to dismantle forthwith the structure, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto;
- C. Israel is under an obligation to make reparation for all damage caused by the construction of the wall;
- D. All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; and,
- E. All States Parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have an additional obligation to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

In its consultations with the HCP, Switzerland found that the vast majority of States reaffirm the applicable legal framework and the obligations of the parties concerned as determined by the International Court of Justice in its Advisory Opinion of 9 July 2004, and concluded that those obligations cannot be called into question. However, the consultation did not involve deliberations, recommendations or specific commitments to implement the common HCP obligations.¹⁵

While the depositary echoed the position of the International Court of Justice, it also reported the conviction that “only a negotiated settlement of the Israeli-Palestinian conflict, based on international law, will ensure peace and security in the region.”¹⁶ Based on its consultations with HCP at the time, Switzerland concluded “that a conference of High Contracting Parties is not the course to be pursued at the moment.”¹⁷

Despite its ratification of the Fourth Geneva Convention, Israel, the Occupying Power, has refused to apply it *de jure* throughout the areas in which it maintains effective control, including the occupied Palestinian and other Arab territories. That is despite the UN Security Council’s unequivocal affirmation of the Fourth Geneva Convention’s applicability and that its provisions are declaratory of customary international law.¹⁸ Political talks have reached a dead end with the lack of implementation of the Quartet’s “road map” and the Sharm el-Sheikh Summit commitments, amid Israel’s ongoing

¹⁵ Ibid., para. 22.

¹⁶ Ibid., para. 61.

¹⁷ Ibid., para. 58.

¹⁸ UN Security Council resolution 827 (1993) on the International Criminal Tribunal for the Former Yugoslavia (ICTY), 25 May 1993, operative para. 1, approving Report of the Secretary-General on the Statute of the Tribunal, S/25704, 3 May 1993, para. 35.

colonization of the oPt. A continuum of impunity characterizes the violations, grave breaches and crimes attributed to the Occupying Power.

A corresponding lack of implementation of HCP's obligations to act in order to ensure respect for the Convention has coincided effectively to maintain the state of impunity and to weaken the value and meaning, objectives and purposes of the Fourth Geneva Convention. In order to restore integrity to the Convention, effective leadership of the depositary and other HCP is urgently required. In the spirit of that objective, we offer the following recommendations for the rationale, agenda and effective outcomes that we see as indispensable to the success of the forthcoming High Contracting Parties' Conference.

Rationale for the Conference

Convening the Conference of High Contracting Parties should rest on the normative values arising from the Fourth Geneva Convention itself, as well as the countervailing events and developments that the High Contracting Parties have omitted to address in the course of the Israel-Palestine conflict since the adoption of the Convention. Article 1 of the Fourth Geneva Convention, common to all Geneva Conventions, establishes the HCP' obligation to "ensure respect" for the Convention. Meanwhile, Israel consistently has refused to implement the Convention in the 1967-occupied territories, misinterpreting its provisions and dismissing particularly the central obligation to protect the civilian population. That situation creates a direct obligation on the part of the other HCP to uphold the Convention and its norms. In the absence of HCP implementing that obligation, the consequences for the civilians subject to the occupation include violations of the range of the Convention's provisions.

The General Assembly has acknowledged the commission of serious human rights violations and grave breaches of international humanitarian law during the Israeli military operations in the Gaza Strip, launched on 27 December 2008. That includes conduct reported in the findings of the UN Fact-Finding Mission on the Gaza Conflict and the Board of Inquiry convened by the Secretary-General.¹⁹ The GA again has expressed serious concern at the lack of implementation by the Occupying Power, Israel, of previously adopted resolutions and recommendations of the Council relating to the situation of human rights in the oPt, including East Jerusalem.²⁰ Moreover, the GA also has stressed the need to ensure accountability for all violations of international humanitarian law and international human rights law in order to prevent impunity, ensure justice, deter further violations and promote peace.²¹

¹⁹ "Follow-up to the report of the United Nations Fact-finding Mission on the Gaza Conflict, A/64/L.11, 2 November 2009, preamble.

²⁰ "Situation of human rights in the Occupied Palestinian Territory, including East Jerusalem," A/HRC/12/L.12, 25 September 2009, preamble.

²¹ *Supra*, note 18.

Both the normative dimensions and political criterion of these repeatedly stated intentions of states in the international system provide sufficient rationale to convene the High Contracting Parties, as well as to transform their stated concerns into effective measures. Thus, the rationale for the Conference of High Contracting Parties also informs the content of the agenda and the required outcomes.

Agenda

According to A/64/10, the forthcoming HCP Conference is to address “measures to enforce the Convention in the Occupied Palestinian Territory, (oPt) including East Jerusalem, and to ensure its respect in accordance with common article 1.” Logically, the Conference agenda is to be designed with that central objective. In turn, a serious assessment of implementation of the whole of the Fourth Geneva Convention is in order. Particular attention should focus on the implications for the Convention in light of the continuing violations and lack of accountability and enforcement on the part of the Occupying Power in the Palestinian Territory, as well as other HCP. A Conference of the HCP also should take advantage of the opportunity to evaluate HCP enforcement obligations under the Convention in the light of legal developments since the most-recent Conference of the HCP that provide greater specificity of the affected rights and obligations, and enhance options for enforcement.

Since the earlier meetings of the High Contracting Parties, the Rome Statute of the International Criminal Court, codifying certain grave breaches as subjects of international criminal law, has come into force.²² The ICJ Advisory Opinion on the wall in the West Bank also has profound implications for the Fourth Geneva Convention and its HCP. Related international norms, jurisprudence, legal specificity and practices have arisen since the previous Conferences of HCP also addressing remedy and reparations, refugee protection, universal jurisdiction, “state responsibility,” the right to water and “international liability in case of loss from transboundary harm arising out of hazardous activities.” Interim events in occupied Palestine since the previous HCP meetings, as well as Israeli jurisprudence, relating to the Convention, strongly suggest the need for an analysis of the developing legal context and understanding of the norms and options relevant to Fourth Geneva Convention enforcement obligations in the case of occupied Palestine. That understanding, enabled by way of a substantive agenda and sufficient preparation of related analytical papers, would be indispensable also in determining potential outcomes and effective measures.

In the particular light of the Goldstone recommendations, all Parties to the conflict, as well as the Palestinian and international sides, face an obligation now to investigate, prosecute and punish, as legally appropriate, grave breaches of the Convention and its principles. In addition to direct liability for grave breaches, the Advisory Opinion of the ICJ has clarified also the obligation of all States not to recognize the illegal situation

²² Rome Statute of the International Criminal Court U.N. Doc. 2187 *U.N.T.S.* 90, entered into force 1 July 2002.

resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by construction of the wall and its associated regime, including the settler colonies. Similar obligations arise also from the continuing illegal blockade of the Gaza Strip, which the UN Fact-finding Mission on the Gaza Conflict found to constitute the crime of persecution.²³

The formal call for Switzerland to convene the Conference of HCP now arises from Israel's conduct of "Operation Cast Lead." However, it must be kept in mind that the subject of the Conference would remain the Fourth Geneva Convention as such, especially the needed enforcement. The HCP Conference is not proposed to be the subject of an agenda that selectively would omit any of the Convention's parts, or omit certain geographical areas of its application in occupied Palestine. Thus, the agenda logically would address the Convention in its integrity, as opposed to addressing only those breaches conducted at a narrowly defined period, or in an arbitrarily limited locality (e.g., 27 December to 18 January in the Gaza Strip).

What is now required and overdue is a comprehensive assessment of breaches of the Fourth Geneva Convention and clarification of HCPs' corresponding obligations to "ensure respect" for the Fourth Geneva Convention in its integrity. Assessing the Fourth Geneva Convention's implementation in its integrity means also coverage of all nature of obligations, including those under its humanitarian, human rights and criminal provisions. Dissimilating the various types of provisions in order to stratify, subordinate or exclude any category of obligation would harm the integrity of the Fourth Geneva Convention and distort its purposes.

Since such an assessment of all obligations under the Fourth Geneva Convention should not be selective of the various types of prohibitions and obligations, or in limited geographical scope, a Conference of HCP would not only consider articles apparently breached in the recent Gaza conflict, but the Fourth Geneva Convention's nonenforcement elsewhere in Palestine since its entry into force as well. In the light of current events and HCP obligations under the Convention as a whole, a future Conference agenda would have to deal with Fourth Geneva Convention subjects such as population transfer, including the implantation of settlers and settlements. For example, a serious agenda for the Conference of HCP would cover article 49 of the Convention, which prohibits the implantation of settler colonies, population transfer and related grave breaches, as well as wanton destruction (e.g., house demolitions) in other occupied territories, including Jerusalem. Settler colonies are contrary to international law,²⁴ particularly constituting war crimes and crimes against humanity as adjudicated at

²³ UN Fact-finding Report, op cit., paras, 75, 293, 1326–27, 1534 and 1733.

²⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, [2004], International Court of Justice, rep. 136, para. 120; Security Council resolutions 904 (1994), 465 (1980), 452 (1979), 446 (1979) and General Assembly resolutions ES10/6, ES10/14, and 61/118 and the Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention,, Geneva, 5 December 2001.

the Nuremberg Trials (1945–49) and subsequently enshrined in the Rome Statute,²⁵ as well as contrary to general principles of international law and custom.

With an eye to complementary norms of The Hague Regulations, the Conference would have to consider also the obligations relating to the prohibition against an Occupying Power altering the legal system in an occupied territory (The Hague Regulations, Article 43). This prohibition holds broad implications for the High Contracting Parties *vis-à-vis* the Occupying Power in Palestine, which has established a multifarious legal system of differing rights and procedures in the West Bank and Jerusalem, as well as in Israel. The resulting institutionalised discrimination has caused the material deprivation of the indigenous people protected under the Fourth Geneva Convention, including those living as refugees.²⁶ The Hague prohibitions also have bearing on the legal system of the Occupying Power, as the Israeli High Court has recognized The Hague Regulations as customary international law and, thus, binding on Israel as part of domestic Israeli law.²⁷

The agenda, not being limited only to the Gaza Strip issues and events, nonetheless must consider also the continuing blockade of the Gaza Strip, an ongoing crime, and its humanitarian consequences. In practice, the blockade violates an array of customary norms and a bundle of civil, cultural, economic, political and social rights, as developed in international law.

The Conference of HCP would have to treat the urgent issues of Palestinian detainees and Israel's arbitrary military courts throughout the oPt and inside Israel. Actually, Israel has expanded the jurisdiction of those arbitrary military courts outside the oPt, and prosecutes normal activity. Israel's treatment of Palestinian prisoners and detainees before the military courts in the oPt violates the Fourth Geneva Convention rules under Article 78 on administrative detention. The HCPs need to address also the lack of safeguards for Palestinian suspects arrested and indicted under Israeli laws, and their incarceration conditions. A special item on the administration of justice, including

²⁵ Articles 7 and 8 of the Rome Statute on the Establishment of the International Criminal Court.

²⁶ In 1998, the Committee on Economic, Social and Cultural Rights observed "with grave concern that the Status Law of 1952 authorizes the World Zionist Organization/Jewish Agency and its subsidiaries, including the Jewish National Fund, to control most of the land in Israel, since these institutions are chartered to benefit Jews exclusively. [...] large-scale and systematic confiscation of Palestinian land and property by the State and the transfer of that property to these agencies constitute an institutionalized form of discrimination because these agencies by definition would deny the use of these properties to non-Jews. Thus, these practices constitute a breach of Israel's obligations under the Covenant." (E/C.12/1/Add.27, para. 11). In its 2003 review, the Committee on Economic, Social and Cultural Rights also observed with particular concern that "the status of 'Jewish nationality,' which is a ground for exclusive preferential treatment for persons of Jewish nationality under the Israeli Law of Return, granting them automatic citizenship and financial government benefits, thus resulting in practice in discriminatory treatment against non-Jews, in particular Palestinian refugees." (E/C.12/1/Add.90, para. 18). The Committee on the Elimination of Racial Discrimination (CERD) reached similar breaches in its Concluding Observations: Israel, CERD/C/ISR/CO/13, 14 June 2007, paras. 17–19.

²⁷ In the Beit El case (High Court of Justice 606, 610/78, *Suleiman Tawfiq Ayyub et al. v. Minister of Defence et al.*, Piskei Din 33 (2)), the High Court of Justice has ruled that The Hague Regulations (1907) are customary law and, therefore, automatically part of municipal law and judiciable in Israel, except when Israeli law clearly contradicts them, then the local law prevails.

conditions of incarceration and the lack of adequate safeguards, affecting civilians in the oPt is essential to a relevant agenda, as well as an effective outcome.

Certain violations of the Fourth Geneva Convention in the oPt form a long continuum of military practice. These include, but are not limited to attacking humanitarian relief personnel, facilities and vehicles; preventing humanitarian access for wounded and sick persons, including civilians; using human shields; extrajudicial and targeted killing of noncombatants; as well as consistently targeting and attacking homes, shelters and shelter seekers.²⁸ Some of these practices form Israeli military doctrine, including that explicit in written policy, but which the HCP have yet to address.

The Conference of the HCP would have to consider the “context” of the breaches catalogued in the Goldstone Report, including institutionalized discrimination under Israeli law and institutions operating in the oPt, as well as the ongoing and continuous illegal closure and blockade of the Gaza Strip, with its international humanitarian, human rights and criminal law implications.

Thus, at a minimum, the agenda of the Conference of HCP would cover the substance of the Convention’s implementation, including the following:

1. Analysis of the breaches and enforcement options under the Convention in light of legal developments, including international criminal law and other complementary humanitarian and human rights norms as developed;
2. The context and consequences of altering the legal system of the occupied territory, including the imposition of Israeli domestic law and institutions;
3. The legal dimensions and socioeconomic and other consequences of closure generally and, in particular, the blockade of the Gaza Strip, which amount to the crime of persecution, a crime against humanity, and/or collective punishment and inhuman treatment prohibited under the Fourth Geneva Convention;
4. The treatment of detainees and the administration of justice, including but not limited to arbitrary and administrative detention, practices amounting to torture and ill treatment, hostage taking,²⁹ transfer and deportation of detainees outside their territory,³⁰ and the imposition of military law on the civilian population;
5. Wanton destruction and confiscation of private, public and collective civilian property;³¹
6. Collective punishments and reprisals against civilian persons;³²

²⁸ Habitat International Coalition – Housing and Land Rights Network, *Targeting Homes, Shelters and Shelter Seekers during Operation Cast Lead in the Context of Israeli Military Practice* (submission to the UN Fact-finding Mission on the Gaza Conflict) (Cairo: HIC-HLRN, July 2009), at: <http://www.hic-mena.org/documents/Submission.pdf>.

²⁹ Fourth Geneva Convention, Articles, 3(1)(b), 34 and 147.

³⁰ Fourth Geneva Convention, Articles 70 and 147.

³¹ Fourth Geneva Convention, Article 33.

³² Ibid.

7. Targeted killing of civilians (crime of wilful killing);³³
8. Population transfer, including the implantation of settlers and settler colonies, and ongoing displacement also as a consequence of the wall and its associated regime;³⁴
9. Use of prohibited and restricted weapons and military practices;
10. Continuity of military doctrines, including but not limited to:
 - a. attacks on humanitarian relief personnel, facilities and vehicles;
 - b. preventing and impeding humanitarian access for wounded and sick persons, including civilians;
 - c. the use of human shields;
 - d. extrajudicial and targeted killing of noncombatants;³⁵
 - e. targeting and attacking homes, shelters and shelter seekers;
11. Effective measures of enforcement.

As with the rationale for the Conference of HCP, its agenda is organically linked with foreseeable outcomes of the Conference, as well as the humanitarian outcomes required under the present and continuing circumstances. In turn, the final agenda item in the foregoing list constitutes the principal subject of the intended outcomes.

Outcomes

The agenda of the Conference of HCP, if it were to uphold the integrity of the Fourth Geneva Convention, would lead to a noncontroversial reaffirmation of the *de jure* application of the Convention by Israel, as well as all other High Contracting Parties to enforce the Convention. However, it would have to consider and adopt the practical outcomes of prosecuting liable Israeli parties and other perpetrators of crimes and grave breaches defined in the Convention and its complementary norms, including international humanitarian and criminal law and the relevant human rights treaties.

It would be insufficient for HCP simply to recall that States not party to an armed conflict have responsibilities and a crucial role to play for the protection of civilians and those *hors de combat* and for the protection of their rights. Article 1 common to the Geneva Conventions of 1949 already establishes that the “High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” This provision entails obligations not only in relation to actors and conduct within the jurisdiction of each State, but also in relation to the international enforcement of the Conventions. States parties to the Geneva Conventions also have the obligation to

³³ Fourth Geneva Convention, Article 147.

³⁴ Displaced by the Wall; Forced Displacement as a Result of the West Bank Wall and Its Associated Regime (Bethlehem: Badil Resource Center for Palestinian Residency, and Refugee Rights—BADIL, the Norwegian Refugee Council, and the Internal Displacement Monitoring Center—IDMC, September 2006), at: <http://www.badil.org/en/documents/category/35-publications?download=96%3ADisplaced-by-the-wall>.

³⁵ Fourth Geneva Convention, Article 68.

facilitate the passage of humanitarian relief and have a role to play in the provision of such assistance for the protected population in case of need.³⁶

The question remains “how” HCP will implement their obligations. Answers to that question lie only partially in the text of the Fourth Geneva Convention and its enforcement provisions. Other practical measures are found in the complementary provisions of more-recent developments elsewhere in public international law. In light of the importance of the obligation in common Article 1 “to respect and ensure respect” of the Convention in the special circumstances of the oPt, deliberations among the HCP are indispensable to clarify how to implement this obligation through international cooperation.

Given the necessary consideration of legal and humanitarian issues involved and values at stake leading up to a Conference of HCP, a minimum of objectives and outcomes are expected from the Conference. As in all complex tasks, the purpose should determine the methodology, and both should be complementary in order to ensure integrity and success. The following recommendations consider this principle in pursuing effective outcomes of the Conference of HCP.

Norms and Mechanisms within the Fourth Geneva Convention:

The lack of the Convention’s enforcement by the HCP in light of historic and recent developments may undermine faith in the measures envisioned under the Fourth Geneva Convention. Nevertheless, for the purpose of an inventory of available options under the Fourth Geneva Convention, those include:

1. Engaging the enquiry procedure under the Convention (Article 149); and
2. Dispatching an International Humanitarian Fact-Finding Commission;
3. HCP domestic adjudication obligations, in particular, through the application of universal jurisdiction.

International cooperation in the adjudication of international humanitarian law (IHL) crimes and breaches is needed. IHL contains an obligation for HCP to investigate grave breaches of the Geneva Conventions. This obligation flows generally from common article 1, but more specifically from other provisions of the Fourth Geneva Convention.

Universal jurisdiction is also established under certain conventions as an obligation for their States parties. Such is the case of the Fourth Geneva Convention, whose article 146(2) requires each High Contracting Party “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches” and to bring such persons, regardless of their nationality, before its own courts.”³⁷

³⁶ Fourth Geneva Convention, Articles 23 and 59.

³⁷ “Report of the United Nations Fact-finding Mission on the Gaza Conflict” [UN Fact-finding Report], A/HRC/12/48, 15 September 2009, p. 514, para. 1648.

HCP should implement their common article 1 obligation based on the Convention's provisions for the Appointment of a "Protecting Power" in the oPt. This is especially called for in light of Israel's long-standing refusal to recognize the ICRC or any HCP in this role.

Norms and Mechanisms Complementary to the Fourth Geneva Convention:

Additionally, the Conference of HCP should consider practical measures of enforcement of the Fourth Geneva Convention. We foresee this prospect to include at least the following outcomes of the Conference to be pursued by the HCP individually and collectively:

- Resolving to establish, and implementing effective procedures for HCP to pursue criminal investigations of grave breaches in their national courts, using universal jurisdiction, where evidence of the commission warrants;³⁸
- The HCP must cooperate to put an end to the blockade on Gaza:³⁹
 - The HCP must deny recognition of the illegal blockade of the Gaza Strip and must not render aid or assistance in maintaining it;
 - The HCP must do all in their power to provide the civilian population in the Gaza Strip with goods and commodities needed to ensure conditions of life in peace and dignity;
- Demanding and taking consistent follow-up measures to ensure that Israel free Palestinians arbitrarily imprisoned and detained, including Palestinian human rights and IHL defenders;
- HCP recognising the recent Palestinian declaration of accession to the Rome Statute⁴⁰ and depositing a statement affirming applicability of the Fourth Geneva Convention in oPt regardless of Palestine statehood status;
- Calling on HCP and international aid providers to increase financial and technical assistance for organizations providing psychosocial, health, water and sanitation, housing and other vital development services to the occupied Palestinian population, especially in the Gaza Strip;
- Divestment and trade sanctions on Israel and other States abetting grave breaches;

³⁸ The UN Fact-finding Report's recommendation to the international community in para. 1772 of the Report.

³⁹ Particularly in light of the draft Articles on Responsibility of States for Internationally Wrongful Acts, annex to General Assembly resolution 56/83, 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4, in particular, articles 16, 40, 41, 46 and 48.

⁴⁰ On 21 January 2009, Government of Palestine Minister of Justice Ali al-Khashan signed a declaration under Article 12(3) of the Rome Statute, recognizing the jurisdiction of the International Criminal Court "for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002. The ICC Registrar acknowledged receipt of the declaration in 2009/404/SA/LASS, 23 January 2009. See "Al-Haq Position Paper on Issues Arising from the Palestinian Authority's Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute," (Al Haq, 14 December 2009), at: [http://www.alhaq.org/pdfs/position-paper-icc-\(14December2009\).pdf](http://www.alhaq.org/pdfs/position-paper-icc-(14December2009).pdf).

- Downgrading diplomatic relations with Israel and other States abetting grave breaches;
- Freezing the assets of legal and natural persons responsible for violations and grave breaches;
- Recognition of Israel's parastatal institutions (World Zionist Organization/Jewish Agency, Jewish National Fund, United Israel Appeal and affiliates) as organs of the State of Israel⁴¹ where they operate in the territory of a High Contracting Party, often claiming private, charitable and/or tax-exempt status, and engage in population transfer, including the implantation of settlers and settlements;⁴²
- Applying international and, as appropriate, domestic law to sanction Israel's parastatal institutions and other organizations where they are found to engage in grave breaches of IHL, including population transfer, and other humanitarian and criminal breaches of international law;
- Other material measures to uphold common Article 1 obligations as endorsed by the General Assembly also include measures to:
 - Refrain from supplying Israel with any weapons and related equipment and to suspend any military assistance that Israel receives from them;
 - Refrain from acquiring any weapons or military equipment from Israel;
 - Suspend economic, financial and technological assistance to and cooperation with Israel;
 - Downgrade or sever diplomatic, trade and cultural relations with Israel;⁴³
 - Ensure that the specialized agencies and other international organizations conform their relations with Israel to these remedial terms.⁴⁴

Conclusion

The well-being and survival of a significant part of the Palestinian people relies on the protection guaranteed under the Fourth Geneva Convention relative to Civilian Persons in Time of War. However, the Convention's depositary and High Contracting Parties repeatedly have declined to provide that protection.

Israel's occupation of Palestinian lands, particularly with its ten-year-old blockade of the Gaza Strip, have amounted to gross violations of the civilians' human rights and caused grave breaches of the Convention, culminating in "Operation Cast Lead" and its ongoing aftermath. Ample documentation of these gross violations and grave breaches has led

⁴¹ As established in Israel's World Zionist Organization-Jewish Agency (Status) Law (1952), Keren Kayemet Le-Israel Law (1953) and Covenant with the Zionist Executive (1954, amended 1971).

⁴² Prohibited under the Fourth Geneva Convention (article 49), a grave breach under Additional Protocol I (Article 85.4[a]), and codified in the Rome Statute on the International Criminal Court as a crime against humanity (Article 7) and war crime (Article 8).

⁴³ General Assembly resolution "The situation in the Middle East," A/37/123, 16 December 1982, para. 13.

⁴⁴ Ibid., para. 16.

to their legal analysis in such form as the ICJ Advisory Opinion on the construction of the wall and the report of the UN Fact finding Mission on the Gaza Conflict. Addressing the persistent absence of the rule of (international) law has become a matter of great urgency.

Certain parties, including High Contracting Parties, have insisted on the primacy of political talks at the expense of effective enforcement measures. That approach has caused tremendous damage to the lives and livelihoods of protected persons, enabled impunity for gross violations and grave breaches, and undermined the meaning and relevance of the Geneva Conventions.

With so much now at stake, we submit these recommendations to the depositary government as essential elements of an effective Conference of HCP that ensures respect for the Fourth Geneva Convention in its integrity. Achieving that objective now depends on the considerable efforts of the duty-bound depositary government and the HCP. If the depositary and the HCP of the Fourth Geneva Convention are to salvage the integrity of these humanitarian norms, effective measures are required now, and long overdue.