

Ensuring Respect for the Fourth Geneva Convention:

Convening a Conference of High Contracting Parties



May 2010

1. Introduction

On 5 November 2009, the General Assembly of the United Nations adopted Resolution A/Res/64/10. Operative paragraph 5 recommended that:

“the Government of Switzerland, in its capacity as depositary of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, undertake as soon as possible the steps necessary to reconvene a Conference of High Contracting Parties to the Fourth Geneva Convention on measures to *enforce* the Convention in the Occupied Palestinian Territory, including East Jerusalem, and to *ensure its respect* in accordance with common article 1”¹

This recommendation was made in light of the Report of the UN Fact Finding Mission on the Gaza Conflict (the Goldstone Report),² and consequent to the deteriorating human rights and humanitarian situation in the occupied Palestinian territory; the recommendation was subsequently endorsed by the Human Rights Council.³ Within both resolutions there is an implicit call for specific, concrete measures, as is evident both through the wording of the resolution – ‘measures to enforce’, ‘ensure its respect’ – and the reference to the powers inherent in common Article 1.

The Palestinian Centre for Human Rights (PCHR) has prepared this memorandum in order to briefly illustrate the legal situation surrounding the convening of a Conference of the High Contracting Parties, and to make specific recommendations regarding the legal mechanisms available to High Contracting Parties as they fulfil their obligation to enforce, and ensure respect for, the Fourth Geneva Convention.

Throughout the course of its 42-year occupation, Israel has consistently and systematically violated international law. Despite the widespread perpetration of, *inter alia*, grave breaches of the Geneva Conventions and crimes against humanity, Israel has not been held to account; despite overwhelming and readily available evidence, not once has a senior Israeli official been investigated, tried, or prosecuted in accordance with the demands of international law. As noted by the Goldstone Report, the “prolonged situation of impunity has created a justice crisis in the Occupied Palestinian Territory that warrants action.”⁴

It is evident that if the rule of law is to be respected, it must be enforced. The history of the occupation has shown that as long as Israel continues to be allowed to act as a State above the law, it will continue to violate international law; it is innocent Palestinian civilians, the ‘protected persons’ of the Geneva Conventions, who will continue to suffer the horrific consequences.

¹ UN General Assembly Resolution, Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/Res/64/10, 5 November 2009, §5. Emphasis added.

² Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §1971(c).

³ UN Human Rights Council Resolution A/HRC/13/L.30, 22 March 2010, §7.

⁴ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, §1958.

The convening of a conference of the High Contracting Parties offers a rare opportunity to develop international humanitarian law, and to ensure that it remains capable of serving those it is mandated to protect.

It is imperative that the proposed conference be held, and that it results in practical measures intended to ensure Israel's compliance with international humanitarian law.

2. The Necessity of Convening a Conference of the High Contracting Parties

International humanitarian law – and the Fourth Geneva Convention in particular – extend specific and explicit protections to civilian populations. However, in order to prove capable of protecting civilians, the law must be respected and enforced. Over the course of the occupation, Israel has consistently and systematically violated international law, including international human rights and humanitarian law. Since the outbreak of the second *Intifada* in September 2000, at least 6,542 Palestinians have been killed by Israeli forces, 4,364 (67%) of whom were civilian. A further 20,257 have been injured, including 18,932 civilians (93%).⁵

PCHR has consistently highlighted the deterioration of the human rights and humanitarian situation in the oPt, and called for a convening of the conference of the High Contracting Parties to the Fourth Geneva Convention, in order to ensure Israel's compliance with international law.⁶ The impunity granted by the international community has resulted in Israel's continuing – and escalating – violations of international law.

⁵ Figures based on PCHR documentation, 29 September 2000 – 31 March 2010.

⁶ See the following Memoranda to the High Contracting Parties to the Fourth Geneva Convention submitted by the Palestinian Centre for Human Rights: 'Implementation not Impunity: International Humanitarian Law still not being applied to the Occupied Palestinian Territory', July 2005, (available at: http://www.pchrgaza.org/files/Reports/English/pdf_spec/PCHR%20Memorandum%20Implementation.pdf); 'Three Years of Israeli Violations of International Humanitarian Law in the Occupied Palestinian Territories: The Need for Accountability', September 2003 (available at: http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=2804:three-years-of-israeli-violations-of-international-humanitarian-law-in-the-occupied-palestinian-territories-the-need-for-accountability&catid=47:special-reports&Itemid=191); and 'The Obligation to ensure Respect', November 2001 (available at: http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=2792:the-obligation-to-ensure-respect&catid=47:special-reports&Itemid=191).

Such violations are often enacted consequent to publicly expressed governmental policy, as is the case, for example, with respect to the extrajudicial execution of suspected individuals or the construction of illegal settlements in the West Bank.⁷

The International Committee of the Red Cross (ICRC) has confirmed this reality:

“In the course of its activities in the territories occupied by Israel, the ICRC has repeatedly noted breaches of various provisions of international humanitarian law, such as the transfer by Israel of parts of its population into the occupied territories, the destruction of houses, failure to respect medical activities, and detention of protected persons outside the occupied territories. Certain practices which contravene the Fourth Geneva Convention have been incorporated into law and administrative guidelines and have been sanctioned by the highest judicial authorities.”⁸

Most recently, specific and extremely grave violations of international law perpetrated in the context of Israel’s offensive on the Gaza Strip (27 December 2008 – 18 January 2009) have been documented in the Goldstone Report,⁹ the Report of the Independent Fact Finding Committee of the Arab League,¹⁰ the Report of the UN Board of Inquiry,¹¹ and through the work of independent national and international organisations.¹²

PCHR emphasizes that documented violations include a significant number of grave breaches of the Geneva Conventions, such as wilful killing, the extensive destruction and appropriation of property not justified by military necessity, torture, and depriving a protected person of the right to a fair trial. These war crimes are universally abhorred by the international community, and give rise to individual criminal responsibility, if necessary through the exercise of universal jurisdiction.¹³

Israeli policies have resulted in the almost total suffocation of economic, political and social life in the oPt. The tragic effects of this illegal reality are particularly evident in the Gaza Strip. Since June 2007,

⁷ A violation of an individual’s right to due process, a fair trial, and an act of wilful killing, a grave breach of the Geneva Conventions. See, for example, Israel High Court of Justice, *The Public Committee against Torture in Israel et al, v. The Government of Israel et al*, HCJ 769/02, 14 December 2006; Uri Blau, *License to Kill*, Haaretz, 27 November 2008. Settlements are an explicit violation of Article 49 of the Fourth Geneva Convention, they also constitute a war crime, as codified in Article 8(2)(b)(viii) of the Statute of the International Criminal Court.

⁸ Statement by the International Committee of the Red Cross, Conference of the High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, §5.

⁹ Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009.

¹⁰ Report of the Independent Fact Finding Committee on Gaza: No Safe Place, Presented to the League of Arab States, 30 April 2009.

¹¹ Secretary-General’s Summary of the Report of the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009, Presented to the Security Council, 5 May 2009.

¹² See, for example, Palestinian Centre for Human Rights, *Targeted Civilians*, 2009; Amnesty International, *The conflict in Gaza: A briefing on applicable law, investigations, and accountability*, 2009; Human Rights Watch, *Rain of Fire: Israel’s Unlawful use of White Phosphorous in Gaza*, 2009.

¹³ See, Articles 146 and 147 Fourth Geneva Convention.

Israel has imposed a total closure of the Gaza Strip; this closure constitutes a form of collective punishment directed against the civilian population and is explicitly prohibited as such under international law. The effects have been nothing short of disastrous, and have resulted in the emergence of a man-made, and completely preventable, humanitarian crisis. PCHR note that this illegal closure continues to be enforced with disproportionate violence, exacerbating the suffering of the civilian population.

Such illegal practices have been consistently addressed at the highest levels, *inter alia*, via Resolutions of the UN Security Council¹⁴ and General Assembly,¹⁵ and an International Court of Justice Advisory Opinion.¹⁶ However, to-date, the international community has allowed Israel to exist as a State above the law; not once has the State, or suspect individuals, been held to account in accordance with the demands of international law. In light of such intransigence on the part of Israel, it is evident that specific measures must be taken to ensure – i.e. enforce – the State’s compliance with its international legal obligations. To-date, apart from empty official declarations, condemning in words such practices and calling upon Israel to stop them,¹⁷ Israel’s systematic violations of international human rights and humanitarian law have been committed under a veil of impunity granted by the international community, and the High Contracting parties to the Geneva Conventions.

2.1. Historical Background

The idea of convening a conference of the High Contracting Parties to discuss possible measures that might be taken by them “to ensure respect by Israel, the occupying Power, for its obligations under the Convention”¹⁸ first surfaced in the Security Council in 1990. In 1999, an Emergency Special Session of the General Assembly repeated this request, asking 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”.¹⁹

Consequently a conference was convened on 15 June 1999. PCHR was instrumental in convening this conference; in particular by means of the ‘International Campaign for the Implementation of [the Fourth

¹⁴ UN Security Council Resolution 242, 22 November 1967; UN Security Council Resolution 338, 22 October 1973; UN Security Council Resolution 681, 20 December 1990; UN Security Council Resolution 1860, 8 January 2009.

¹⁵ UN General Assembly Resolution A/Res/64/10, 5 November 2009; UN General Assembly Resolution 45/69, 6 December 1990; UN General Assembly Resolution 3091 (XXVIII), 7 December 1973.

¹⁶ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004.

¹⁷ See, *inter alia*, the declaration of the UN Secretary General, Ban Ki Moon, during his official visit to Gaza in March 2010, urging Israel to lift the blockade (BBC News 21 March 2010, available at: <http://news.bbc.co.uk/2/hi/8578611.stm>); see also the EU Foreign Minister’s, Catherine Ashton, condemn of the Israeli settlements and concerns over the Gaza blockade (The Guardian, 18 March 2010 at <http://www.guardian.co.uk/world/2010/mar/18/israel-pressure-lady-ashton-gaza>).

¹⁸ UN Security Council Resolution 681, 20 December 1990. §5 and §6.

¹⁹ UN General Assembly Resolution A/Res/ES-10/6, 24 February 1999, §6.

Geneva] Convention in the OPT'. However, at the time PCHR expressed its concern that political considerations were in danger of undermining the overall purpose of the Convention.²⁰ PCHR organized a preparatory meeting for the campaign and in association with other Palestinian human rights organizations presented a draft working paper discussing the available practical measures that could be used by the High Contracting Parties to ensure respect of the Fourth Geneva Convention in the oPt,²¹ including political, legal, diplomatic and economic measures. The draft proposal was an attempt to translate the legal obligations arising under Article 1 of the Geneva Conventions into practical actions that could be taken to ensure Israel's compliance with international law.

Regrettably, however, the process did fall victim to political interference and the conference adjourned after approximately 15 minutes. A short statement was issued:

"Taking into consideration the improved atmosphere in the Middle East as a whole, the Conference was adjourned on the understanding that it will convene again in the light of consultations on the development of the humanitarian situation in the field."²²

Following the outbreak of the Second *Intifada*, the General Assembly again requested a convening of a conference, "with the aim of ensuring respect for the Convention in all circumstances in accordance with common Article 1 of the four Conventions".²³ 114 High Contracting Parties attended the subsequent conference on 5 December 2001, joined by eight observers. Three States – the U.S., Israel, and Australia – boycotted the process.²⁴

Through a Declaration issued on 5 December, participating High Contracting Parties called "upon all parties, directly involved in the conflict or not, to respect and ensure respect for the Geneva Convention in all circumstances, to disseminate and take measures necessary for the prevention and suppression of breaches of the Convention. They reaffirm the obligations of the High Contracting Parties under articles 146, 147 and 148 of the Fourth Geneva Convention with regard to penal sanctions, grave breaches, and responsibilities of the High Contracting Parties."²⁵ Significantly, the Declaration also welcomed and encouraged "initiatives by States, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring the respect of the Convention".²⁶

²⁰ All the documents regarding the preparation of the 1999 HCP Conference, along with PCHR relevant communications, reports and papers, are collected in the volume edited by PCHR 'Politicization of the International Humanitarian Law. An analytical, critical study of the Conference of the High Contracting Parties to the Fourth Geneva Convention', December 1999

(at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=2924:politicization-of-international-humanitarian-law&catid=50:pchrstudies&Itemid=197).

²¹ See PCHR 'Politicization of the International Humanitarian Law', cit, p. 51 ss.

²² Conference of the High Contracting Parties to the Fourth Geneva Convention, Statement, Geneva, 15 July 1999.

²³ UN General Assembly Resolution A/Res/ES-10/7, 1 November 2000, §10.

²⁴ The majority of the remaining States not in attendance did not have permanent representatives in Geneva.

²⁵ Conference of the High Contracting Parties to the Fourth Geneva Convention, Declaration, Geneva, 5 December 2001, §4.

²⁶ Conference of the High Contracting Parties to the Fourth Geneva Convention, Declaration, Geneva, 5 December 2001, §17.

However, despite this landmark Declaration, no effective concrete measures were taken, and Israel continued to violate international law in general, and the provisions of the Fourth Geneva Convention in particular. In effect the Declaration was just that, a form of empty words which failed to take the necessary step of implementing practical enforcement measures.

Over nine years later it is imperative that this mistake not be repeated, and that all appropriate measure required to ensure respect for the Convention be taken. A conference of the High Contracting Parties must be convened in order to discuss such measures, and to provide mechanisms for their application.

2.2. Politics or Justice?

Political considerations, or the pursuit of an elusive 'peace process' have been proffered as reasons to prevent the convening of a conference of the High Contracting Parties,²⁷ or as an excuse for inaction in the event that a conference is convened.²⁸ These same arguments have also been used – most vociferously by the U.S. and Israel – as reasons for not implementing the recommendations of the Goldstone Report.

PCHR emphasize that such actions constitute violations of international law; the requirements of international law cannot be ignored, be it for political expediency or any other reason. International law must be respected at all times.

PCHR also emphasize that the requirements of international law are not inimical to peace, rather they are its essential prerequisites. As noted by the International Court of Justice in *The Wall* Advisory Opinion, the tragic situation in Israel and the oPt, "can be brought to an end only through implementation in good faith of all relevant Security Council resolutions"²⁹ and a negotiated settlement must be encouraged "on the basis of international law".³⁰ Equally, the Declaration of the 2001 Conference of High Contracting Parties stressed that "respect for the Fourth Geneva Convention and international humanitarian law in general is essential ... to achieve a just and lasting peace"³¹ and called upon all parties "to settle their disputes in accordance with applicable international law."³² This conclusion was most recently endorsed by the UN Fact Finding Mission on the Gaza Conflict which

²⁷ See paragraphs 58-59, Letter dated 30 June 2005 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the General Assembly, *Report By Switzerland, in its capacity as the depositary of the Geneva Conventions, pursuant to General Assembly resolution ES-10/15*, 5 July 2005, U.N. Doc. A/ES-10/304.

²⁸ See, Conference of the High Contracting Parties to the Fourth Geneva Convention, Statement, Geneva, 15 July 1999.

²⁹ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, §162.

³⁰ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, §162.

³¹ Conference of the High Contracting Parties to the Fourth Geneva Convention, Declaration, Geneva, 5 December 2001, §16.

³² Conference of the High Contracting Parties to the Fourth Geneva Convention, Declaration, Geneva, 5 December 2001, §16.

recommended that “States involved in peace negotiations between Israel and representatives of the Palestinian people, especially the Quartet, should ensure that respect for the rule of law, international law and human rights assumes a central role in internationally sponsored peace initiatives”.³³

2.3. Legal Basis for Convening a Conference of the High Contracting Parties

The convening of a conference of High Contracting Parties is not specifically provided for in the Fourth Geneva Convention, although it is a feature of Additional Protocol I.³⁴ This omission has been used by opponents – presumably on the basis of political motivations – to declare such conferences ‘illegal’. In 2001, Israel declared that: “There was no legal basis in the Convention for the holding of such a conference, which could have no positive effect and might undermine the situation in the region.”

However, from the wording of Article 1 of the Geneva Conventions, and the associated official *Commentary* it is evident that High Contracting Parties are obliged to take measures to ensure respect for the Convention, indeed, they must “do everything in their power”.³⁵ The convening of a conference is an appropriate mechanism to determine the modalities of such measures. Ambassador Maurer, Chair of the 2001 Conference, explained its basis in his opening statement:

“The legal basis for this Conference is provided by the first article of the Geneva Conventions: Common Article 1 of the Geneva Conventions states that all High Contracting Parties must not only undertake to *respect* their obligations but must also *ensure respect* for them *in all circumstances*. This is the reason why, and with the protection of civilian victims primarily in mind, we are here today.”³⁶

2.4. Switzerland’s Obligation to Convene the Conference

As the depositary of the four Geneva Conventions of 1949, the Swiss Federal Council (Switzerland) bears responsibility for the convening of a conference of the High Contracting Parties. Switzerland has fulfilled this role both with respect to previous conferences (in 1999 and 2001), and with respect to consultations regarding the possibility of convening further conferences, as was the case in 2004 following the International Court of Justice’s Advisory Opinion on *The Wall*.³⁷

Consequent to UN General Assembly Resolution A/Res/64/10, and UN Human Rights Council Resolution

³³ Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §1975(d).

³⁴ Article 7, Additional Protocol I to the Geneva Conventions of 12 August 1949, 8 June 1977.

³⁵ Jean Pictet, International Committee of the Red Cross, *Commentary on the Geneva Conventions* Vol. IV, p. 16.

³⁶ Conference of the High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Opening Statement by the Chair read by Ambassador Peter Maurer (emphasis and underlining in the original)

³⁷ In its capacity as depositary of the Geneva Conventions and their Additional Protocols, Switzerland has also previously convened the 1993 International Conference for the Protection of War Victims, and the 1995 Meeting of the Intergovernmental Group of Experts for the Protection of War Victims.

A/HRC/13/L.30, Switzerland is requested – on the basis of, *inter alia*, the authority vested in the General Assembly under Article 10 of the UN Charter – to undertake, as soon as possible, the steps necessary to convene a conference of the High Contracting Parties.

The convening of such a conference does not require the further assent of the UN Security Council, the UN Secretary-General, or any other body. PCHR emphasize that Switzerland is under a legal obligation to act impartially in the performance of its duties as a depositary.³⁸ During the preparatory stages necessary to convene a conference, it is imperative that Switzerland ignore all political pressures and fulfill its role as expeditiously as possible. In accordance with the principle of *pacta sunt servanda*, as manifest in article 26 of the *Vienna Convention on the Law of Treaties*,³⁹ PCHR argues that Switzerland's distinct status as the depositary of the Geneva Conventions entails a responsibility to set reputable standards of State practice that uphold and strengthen international humanitarian law.

PCHR also emphasize that this conference is intended to result in measures “to enforce the Convention in the Occupied Palestinian Territory, including East Jerusalem, and to ensure its respect in accordance with common article 1”.⁴⁰ As such, it is imperative that Switzerland always act with this goal in mind, and undertake all efforts to ensure that a repeat of the 1999 and 2001 conferences – which did not result in any practical measures – is avoided.

3. The Obligation to Respect and Ensure Respect

Common Article 1 to the four Geneva Conventions of 1949 is one of the most significant components of international humanitarian law. Its position at the head of each of the four Geneva Conventions signifies its importance and, significantly, there have been no reservations or declarations made with respect to this Article.⁴¹ The Article itself holds that:

“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”⁴²

The official ICRC *Commentary* notes that the inclusion of the phrase ‘to ensure respect for’ is deliberate, and is intended to emphasize the responsibility of the Contracting Parties. Therefore, “in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties

³⁸ Article 76, Vienna Convention on the Law of Treaties, 1969.

³⁹ Article 26, *Pacta Sunt Servanda*. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

⁴⁰ UN General Assembly Resolution, Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/Res/64/10, 5 November 2009, §5. Emphasis added.

⁴¹ See, International Committee of the Red Cross, State Parties/Signatories to the Geneva Conventions of 12 August 1949, available at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>.

⁴² Article 1, Fourth Geneva Convention, 12 August 1949.

should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.”⁴³

Importantly, ensuring respect for the Convention is not merely a right but also an obligation; Article 1 has been “deliberately invested with imperative force.”⁴⁴

The Geneva Conventions now form part of customary international law. In confirming this status in *Nicaragua*, the International Court of Justice stressed the obligation inherent in Article 1:

“The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.”⁴⁵

As confirmed by both the UN Security Council, and General Assembly, this obligation extends to third States, including those not directly involved in the conflict.⁴⁶ As made explicit in the *Commentary*, “no Contracting Party can offer any valid pretext, legal or otherwise, for not respecting the Convention in its entirety.”⁴⁷

4. Resort to Enforcement Measures

Resort to measures aimed at ensuring respect for the Fourth Geneva Convention is specifically envisioned in Article 1; “Contracting Parties ... should do everything in their power to ensure that the humanitarian principles in the Conventions are applied universally.”⁴⁸ However, the duty to resort to such measures also emerges more broadly from international law. The International Law Commission (ILC) has recognized that “some wrongful acts engage the responsibility of the State concerned ... towards the international community as a whole.”⁴⁹

This was confirmed by the International Court of Justice in *Barcelona Traction*, where the Court held that, with respect to *erga omnes* obligations, “all States can be held to have a legal interest in their

⁴³ Jean Pictet, International Committee of the Red Cross, *Commentary on the Geneva Conventions* Vol. IV, p. 16.

⁴⁴ Jean Pictet, International Committee of the Red Cross, *Commentary on the Geneva Conventions* Vol. IV, p. 17.

⁴⁵ International Court of Justice, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 27 June 1986, §220.

⁴⁶ See, for example, UN Security Council Resolution 681, 20 December 1990, §5; UN General Assembly Resolution 45/69, 6 December 1990, §3.

⁴⁷ Jean Pictet, International Committee of the Red Cross, *Commentary on the Geneva Conventions* Vol. IV, p. 16.

⁴⁸ Jean Pictet, International Committee of the Red Cross, *Commentary on the Geneva Conventions* Vol. IV, p. 16.

⁴⁹ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, 2008, p. 33.

protection.”⁵⁰ The *erga omnes* status of the Fourth Geneva Convention is evidenced *inter alia* by its universal ratification.⁵¹

Article 41(1) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts requires that:

“States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.”

Consequently, States are under a “positive duty to cooperate in order to bring to an end serious breaches”,⁵² such as violations of customary international law and the Fourth Geneva Convention. The ILC emphasize that “the obligation to cooperate applies to States whether or not they are individually affected by the serious breach.”⁵³

It is therefore evident, both from Article 1 of the Fourth Geneva Convention and international law more generally, that High Contracting Parties are under an obligation to take specific and effective measures aimed at ensuring respect for the Fourth Geneva Convention. The question remains as to what form these measures can take.

5. Recommendations: Legal Measures Which Can be Undertaken to Ensure Respect for the Fourth Geneva Convention

There are a number of legally permissible measures available to third Parties – States not party to the armed conflict – to ensure respect for international law in the event of a breach. These measures range from diplomatic pressure to coercive measures, either taken individually or jointly.⁵⁴

Previously taken measures to exert diplomatic pressure have included:

- Vigorous and continuous protests lodged by as many Parties as possible with the ambassadors representing the State in question in their respective countries and, conversely, by the representatives of those Parties accredited to the government of the aforementioned State.
- Public denunciation, by one or more Parties and/or by a particularly influential regional organization, of the violation of international humanitarian law

⁵⁰ International Court of Justice, *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, 5 February 1970, §33.

⁵¹ See also, International Court of Justice, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 27 June 1986, §220.

⁵² International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, 2008, p. 114.

⁵³ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, 2008, p. 114.

⁵⁴ See further, Umesh Palwankar, *Measures Available to States for Fulfilling their Obligation to ensure respect for international humanitarian law*, *International Review of the Red Cross*, no. 298, p. 9-25.

- Diplomatic pressure on the author of the violation, through intermediaries.⁵⁵

However, these measures have been tried, repeatedly, in the current context and have produced no discernible results. PCHR believe that resort must therefore be had to coercive measures. Such measures must be intended to oblige Israel to stop violating the law and to deter it from doing so in the future. In order to be lawful, such measures must:

- be preceded by a warning to Israel, asking it to stop its illegal activity, specifically violations of the Fourth Geneva Convention;
- be proportional; all measures out of proportion with the act which prompted them would be excessive, and hence unlawful;
- respect fundamental humanitarian principles, as provided for in public international law and International humanitarian law;
- be temporary and therefore cease as soon as the violation of the law by Israel ceases.⁵⁶

Appropriate coercive measures could thus include:

- the expulsion of diplomats;
- severance of diplomatic relations;
- non-renewal of trade privileges or agreements;
- reduction or suspension of public aid;
- restriction and/or ban on the trade of arms, military technology and scientific co-operation;
- restrictions on imports and/or exports with Israel;
- ban on investments;
- freezing of capital;
- suspension of air transport and other agreements.

These are the legal measures available to the High Contracting Parties in accordance with their legal obligation to ensure respect for the Fourth Geneva Convention. PCHR highlights that High Contracting Parties can recommend the suspension of public-aid or trade privileges and agreements, such as the EU-Israel Association Agreement.

5.1. Penal Sanctions

The practical measures to be taken by the High Contracting Parties to ensure respect and implement the Fourth Geneva Convention must be differentiated according to two basic categories of violations:

- 1) Grave breaches of the Convention
- 2) Other breaches of the Convention

⁵⁵ See further, Umesh Palwankar, *Measures Available to States for Fulfilling their Obligation to ensure respect for international humanitarian law*, International Review of the Red Cross, no. 298, p. 9-25.

⁵⁶ Umesh Palwankar, *Measures Available to States for Fulfilling their Obligation to ensure respect for international humanitarian law*, International Review of the Red Cross, no. 298, p. 8-9.

Grave breaches of the Geneva Conventions, such as wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer of protected persons, wilful deprivation of the right to a fair trial, taking of hostages, and the extensive destruction and appropriation of property, constitute war crimes according to Article 147, Fourth Geneva Convention; as such they give rise to individual criminal responsibility

Therefore, in the context of enforcing international law and ensuring respect for the Fourth Geneva Convention it is necessary to address the issue of penal sanctions. Paragraphs 1 and 2 of Article 146, Fourth Geneva Convention hold that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Article 146 thus places all High Contracting Parties under three specific obligations, regardless of whether or not they are a party to the conflict in question. All High Contracting Parties must: enact appropriate enabling legislation; “search for persons alleged to have committed grave breaches of the Convention”,⁵⁷ and; bring such persons before their own courts or, hand them over for trial to another concerned State. Naturally, this last obligation is subject to the caveat that such trials must occur in accordance with international legal standards and obligations, specifically they must be ‘genuine’.

The official ICRC *Commentary* further notes that the obligations incumbent on all High Contracting Parties to search for and prosecute all those suspected of committing grave breaches is “an active duty”.⁵⁸ Specifically, “[a]s soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed.”⁵⁹

Any future conference of High Contracting Parties must emphasise the need for accountability, in keeping with the obligations inherent in Articles 146 and 147 of the Fourth Geneva Convention. Concurrently, it is also essential that all States take concrete measures to fulfil their obligations in this regard, namely through the investigation and prosecution of suspected Israeli war criminals in accordance with the principle of universal jurisdiction.

⁵⁷ Jean Pictet, International Committee of the Red Cross, *Commentary on the Geneva Conventions* Vol. IV, p. 590.

⁵⁸ Jean Pictet, International Committee of the Red Cross, *Commentary on the Geneva Conventions* Vol. IV, p. 593.

⁵⁹ Jean Pictet, International Committee of the Red Cross, *Commentary on the Geneva Conventions* Vol. IV, p. 593.

6. Conclusion

PCHR emphasize that, to-date, the efforts of the international community to ensure Israel's respect for international law have failed. Innocent Palestinian civilians have paid the consequences with their lives, and their livelihoods. It is therefore essential that a future conference of the High Contracting Parties adopt concrete measures which have a reasonable chance of effecting Israel's compliance with the Fourth Geneva Convention. If such measures fail, after a pre-determined period of time, the High Contracting Parties must escalate their efforts.

The international community must assert the primacy of international law: Israel cannot continue to be granted impunity and allowed to act as a State above the law.